

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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IN RE AMELIA ENG,  
*Petitioner,*

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**On Petition for Writ of Mandamus to the  
Supreme Court of California**

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**PETITION FOR WRIT OF MANDAMUS**

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## **QUESTIONS PRESENTED**

The question presented is:

1. Whether the California Supreme Court should be directed to order appellate review of Petitioner's appeal before a court of appeal having jurisdiction when:
  - (a) A disqualified judge's participation tainted the adjudicative process of the three-judge appellate panel in Petitioner's case?
  - (b) The California Supreme Court denied Petitioner's writ of mandate to vacate the decision by a two-judge appellate panel lacking state constitutional jurisdiction to adjudicate an appeal on the basis that the third required judge had been retroactively disqualified by California?

## **PARTIES TO THE PROCEEDINGS**

Petitioner is Amelia Eng.

Respondent is the California Supreme Court.

Real Parties in Interest are Margaret Eng, Susan Eng Madjar, Michael Eng, Jeffrey Eng, Taylor Unger, Jonathan Lum, Jr., Zhong Pei Wu, and Norman H. Green, Administrator CTA, Estate of Edward J. Eng.

## **CORPORATE DISCLOSURE STATEMENT**

Petitioner is not a publicly held corporation or other publicly held entity. Petitioner has no stock, so no publicly held corporation or entity owns any stock in Petitioner.

## **STATEMENT OF RELATED PROCEEDINGS**

California Supreme Court related proceedings *Johnson v. Commission on Judicial Performance*, California Supreme Court, Case Number S264179, review denied on January 27, 2021.

Petitioner is not aware of any other directly related cases in state or federal court.

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## PETITION FOR WRIT OF MANDAMUS

Petitioner Amelia Eng respectfully petitions the Court pursuant to Supreme Court Rule 20.3 for a writ of mandamus directing the California Supreme Court to order a review of her appeal by an appellate panel having jurisdiction to enter a final decision in her case.

To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

## OPINIONS BELOW

The California Court of Appeal, Second Appellate District, Division One's opinion in *Eng v. Eng*, B255829, consolidated with B258567, is unpublished but available at *Eng v. Eng*, B255829 (Cal. Ct. App. Jan. 29, 2016) (App., *infra*, 2a-22a). In light of the retroactive disqualification of a judge on the panel that rendered invalid the initial decision of the Court of Appeal, Petitioner sought a writ of mandate from the California Supreme Court ordering a review of petitioner's appeal by a panel of three qualified judges. (*Eng v. Court of Appeal, Second Appellate District, Division One*, No. S268803)

The California Supreme Court denied petitioner's request for a writ of mandate. The decision of the California Supreme Court (App., *infra*, 1a) denying Petitioner's petition for writ of mandate was given on June 30, 2021.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651 or, in the alternative, 28 U.S.C. § 1254(1). This is a case in equity. The jurisdiction of the California Supreme Court was invoked under *Cal. Const.* art. 6 § 10. The order of the California Supreme Court was entered on June 30, 2021. Were this Court to grant the Petition as a Petition for a Writ of Certiorari, Petitioner’s Petition for the June 30, 2021 order must be filed within 150 days from the date of the order, which is on or before November 27, 2021, pursuant to the Court’s March 19, 2020 order regarding filing deadlines due to the COVID-19 pandemic.

## CONSTITUTIONAL PROVISIONS

U. S. *Const. Amend.* V

U. S. *Const. Amend.* XIV, § 1

*Cal. Const.*, art. 1 § 7

*Cal. Const.*, art. 6 § 3

## STATEMENT OF THE CASE

On January 27, 2021, the California Supreme Court upheld the California Commission on Judicial Performance’s (hereinafter “Commission”) Decision and Order Removing Associate Justice Jeffrey W. Johnson (hereinafter “Justice Johnson”) From Office (hereinafter “Removal Order”). App., *infra*, 24a-170a.

Justice Johnson had engaged in 18 acts of prejudicial misconduct between 2009 and 2018. Among

other misconduct, Justice Johnson engaged in the unwanted touching of many women and in conduct that would reasonably be perceived as sexual harassment of seven women at his court, misused the prestige of his position and demeaned his judicial office by attempting to develop personal relationships with three young women, further demeaned his office by offensive conduct toward a fourth woman, and engaged in undignified conduct on multiple occasions while intoxicated. Justice Johnson's misconduct was aggravated by his refusal to admit his most serious sexual misconduct and to admit to intoxication at the courthouse, while holding himself out as an appellate justice at functions outside of court. App., *infra*, 25a-26a, 169a. The Commission determined that, during the formal proceedings, Justice Johnson engaged in a lack of candor, including making intentional misrepresentations and offering untruthful testimony under oath. Justice Johnson's misconduct was also aggravated because he undermined public esteem for the integrity of the judiciary and harmed numerous complaining female witnesses. App., *infra*, 27a-29a, 35a, 57a, 142-143a, 153a-156a.

The Removal Order states in pertinent part, "Justice Johnson's misconduct from 2009 (App., *infra*, 56a, 79a, 82a, 86a, 87a, 103a, 105a, 148a) "upon which our decision is based spanned nine years on the bench" (App., *infra*, 166a) and "we hereby remove Justice Jeffrey W. Johnson from office and disqualify him from acting as a judge." App., *infra*, 169a.

The Removal Order disclosed for the first time that Justice Johnson, who authored the appellate decision

in Petitioner’s appeal (hereinafter “Opinion”) by a purportedly qualified three-judge panel, had engaged in a pattern of pervasive sexual harassment of many women for nine years while on the bench and throughout his participation in Petitioner’s appeal. This misconduct had been concealed from the public for nearly a decade.

Though the California Supreme Court upheld the disqualification and removal of Justice Johnson, it refused to address the issues of: (a) the court of appeal’s lack of subject matter jurisdiction pursuant to the Commission’s *stated retroactive nine-year disqualification* of Justice Johnson which resulted in the absence of a required three-judge panel under California constitutional mandate, and (b) the federal constitutional bias involved in Justice Johnson’s participation in Petitioner’s appeal that deprived Petitioner of her liberty and property interests. Principles of due process under the Fourteenth Amendment to the United States Constitution require the states’ guarantee to individuals be heard by an impartial tribunal. The California Supreme Court therefore deprived Petitioner of the right to an impartial California constitutionally mandated three-judge appellate panel appropriately protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

**A. Panel Member Justice Johnson’s Removal From Office For Misconduct.**

On June 2, 2020, the Commission’s Removal Order (App., *infra*, 24a-170a) removed Justice Johnson of the Court of Appeal, Second Appellate District, Division

One from office. On January 27, 2021, the California Supreme Court denied Justice Johnson's petition for review -- upholding the Commission's Removal Order that removed him from office.

### **B. Prior Appellate Court Proceedings Resolving Petitioner's Appeals.**

In 2016, *Eng. v. Eng, et. al. (Estate of Eng)*, the consolidated appeals (App., *infra*, 2a-22a) under review by the California court of appeal, concerned Petitioner, as a beneficiary under her parents' wills, and her claims that her father's witnessed agreement not to revoke his 2003 will was enforceable, that her attorney-father and co-executor brother engaged in breaches of fiduciary duty and extrinsic fraud, and that attorneys' fees and costs were improperly awarded against Petitioner. Justice Victoria Chaney (hereinafter "Justice Chaney") and Justice Elwood Lui (hereinafter "Justice Lui") concurred in the Opinion.

In 2017, in *Estate of Eng*, Justices Johnson, Chaney and Lui, of the same court of appeal panel, summarily denied (App., *infra*, 23a) Petitioner's Motion to Recall the Remittitur that had asserted the Opinion was not yet final under the One Final Judgment Rule absent the court's disposition of all of Petitioner's causes of actions against all respondents and the Opinion should be modified to correct the court's errors in failing to follow controlling law.

### **C. California Supreme Court Proceedings.**

This Petition arises from the California Supreme Court's summary denial (App., *infra*, 1a) of Petitioner's petition for writ of mandate requesting the California



Supreme Court to retroactively vacate the Opinion. Petitioner argued that Justice Johnson's concealment of his on-going disqualification and the failure of the court of appeal to conduct itself as a three-judge court in violation of California constitutional mandate deprived her of due process and impartial appellate review.

### **FACTUAL BASIS FOR PETITION**

#### **A. Justice Johnson was constitutionally disqualified as a judge for misconduct.**

On June 2, 2020, the Commission ordered Justice Jeffrey W. Johnson of the Court of Appeal removed from the bench. The Removal Order is an extrajudicial source that constitutionally disqualified Justice Johnson from serving as a participant in Petitioner's appeal. *Liteky v. U. S.*, 510 U.S. 540, 555 (1994).

#### **B. The Commission adopted factual findings that Justice Johnson had engaged in a pattern of sexual harassment of many women from 2009 to 2018.**

The Commission concluded that Justice Johnson had engaged in 18 acts of prejudicial misconduct between 2009 and 2018. Among other acts of misconduct, Justice Johnson engaged in the unwanted touching of numerous women and in conduct that would reasonably be perceived as sexual harassment of seven women at his court, misused the prestige of his position and demeaned his judicial office by attempting to develop personal relationships with three young women, further demeaned his office by offensive conduct toward a fourth woman, and engaged in

undignified conduct on multiple occasions while intoxicated. Justice Johnson's misconduct was aggravated by his refusal to admit his most serious sexual misconduct and to admit to intoxication at the courthouse, while holding himself out as an appellate justice at functions outside of court. App., *infra*, 25a-26a, 169a-170a. The Commission determined that, during the formal proceedings, Justice Johnson engaged in a lack of candor, including making intentional misrepresentations and offering untruthful testimony under oath. Justice Johnson's misconduct was also aggravated because he undermined public esteem for the integrity of the judiciary and harmed numerous complaining female witnesses. App., *infra*, 27a-29a, 35a, 57a, 142-143a, 153a-156a.

More specifically, Justice Johnson did not meet the fundamental expectations of a judge. Justice Johnson lacked the temperament and judgment required of a Justice, was patently dishonest, untruthful and testified falsely about his own behavior and the behavior of others. Justice Johnson lacked integrity, failed to uphold high personal standards, and failed to treat everyone with dignity and respect. App., *infra*, 26a-29a, 102a, 116a, 139a, 141a-143a, 146a-148a, 162a, 169a.

While it is difficult to comprehend that Justice Johnson would and did physically assault, intimidate, disparage, mistreat, and attempted to exploit so many women, the master's factual findings laid bare his substantial and egregious misconduct. App., *infra*, 138a-141a.

**1. Justice Johnson's physical assaults, intimidation, exploitation, and extreme misconduct harmed all of his female victims.**

Justice Chaney was on the verge of tears each time he repeatedly physically assaulted her (App., *infra*, 39a), she felt discomfort, she feared him, and she felt “shocked” and “upset.” App., *infra*, 154a, 156a. Justice Johnson had twice asked Justice Chaney to have an extramarital affair with him that made her feel “more than uncomfortable, frustrated, angry, and nervous, and she became concerned about how she was going to get out of it”. App., *infra*, 38a.

Butterick felt discomfort and told her colleagues she would not take a particular office that was close to Justice Johnson's chambers, and she avoided the South Tower because she did not want to encounter Justice Johnson. App., *infra*, 154a.

Blatchford said Justice Johnson's questions about her tattoos and her boyfriend made her “a little uncomfortable,” his comments about “pedestrian sex” and “arousal” made her “uncomfortable,” and his comment about “not going back” made her “really uncomfortable.” She said his references to personal topics caused her to be “on guard.” (*Ibid*).

Velez testified Justice Johnson's remark about never leaving her bed had a “big impact” on her and made her “very uncomfortable.” She also said she felt “panicked” when he called her and asked her to come to his chambers, which caused her to leave work early. She felt “embarrassed and horrified” by his discussing

her personal life with other justices. She would attempt to avoid interactions with him, pretending to be on a call, ducking behind her monitor, or leaving the courthouse.” App., *infra*, 154a-155a.

Wohn said Justice Johnson’s comments about her appearance and smell, and that he would have been in love with her in high school, made her feel uncomfortable. She was so uncomfortable about him looking at her that she brought in large flower arrangements to obscure his view of her at her desk. App., *infra*, 155a.

Currie testified Justice Johnson’s comments about her appearance and smell made her uncomfortable and embarrassed (App., *infra*, 155a), and she went to the bathroom and cried. App., *infra*, 87a.

CHP Officer Sauquillo said Justice Johnson’s comments about her appearance when she was at court made her uncomfortable. App., *infra*, 155a.

Justice Johnson’s attempts to use the prestige of his judicial office to form personal relationships had an adverse impact on women who did not work at the court, but who encountered him at various law-related functions that he attended by virtue of his position as an appellate justice. App., *infra*, 158a, 169a.

Palmer said Justice Johnson’s comments during her visit to the courthouse made her uncomfortable, and his subsequent sexually suggestive texts made her “feel gross.” App., *infra*, 155a-156a.

Schulman was “shocked” and “very upset” by his grabbing of her stomach and wrist, kissing her, and

commenting that she was going to be raped. App., *infra*, 156a.

Kent felt uncomfortable when he paid too much attention to her and was “shocked” and “very upset” when he ran his hand up her thigh under the table. (*Ibid.*)

Burnette was “quite upset” and “creeped out” by Justice Johnson’s vulgar comments related to her playing the viola and left the event immediately after he made them. (*Ibid.*)

Some of Justice Johnson’s misconduct occurred in his chambers alone with the women, in the courthouse hallways, at law-related public events, at private events and while Justice Johnson was working with others on judicial matters. App., *infra*, 31a, 33a, 38a, 39a, 60a, 67a-68a, 70a, 73a, 74a, 86a, 92a, 93a, 104a, 153a-156a.

Most, if not all of the women, did not report Justice Johnson’s substantial and egregious harassment fearing retaliation by him as an appellate justice. App., *infra*, 50a, 62a, 68a, 102a, 109a, 152a.

## **2. Justice Johnson disparaged his female victims and colleagues.**

Justice Johnson accused almost every witness of being a liar and blamed them for his misconduct. App., *infra*, 27a, 28a, 36a, 39a, 42a, 43a, 45a-47a, 52a, 53a, 60a, 69a, 74a, 77a, 80a, 84a, 86a, 93a, 99a, 105a, 109a-117a, 133a-136a, 144a-148a, 152a, 162a.

He “referred to Justices Chaney and Rothschild as ‘nasty ass bitches when speaking to certain CHP officers.’” App., *infra*, 133a-136a, 148a.

### **3. Justice Johnson’s egregious misconduct was purposeful.**

The record confirmed Justice Johnson’s knowledge that his conduct was wrongful toward the women. He nevertheless continued to sexually harass them, evidencing a purposeful intent. The Commission stated, “It is implausible that Justice Johnson did not know the appropriate standards of behavior for a person in his position. Indeed, this is evidenced by his proven comments to Justice Chaney: ‘It can’t be sexual harassment because we’re both on the same level’ and, ‘You would never report me [for sexual harassment], would you?’ Justice Johnson disregarded those standards for years, creating discomfort for multiple women.” App., *infra*, 45a, 150a-151a.

Moreover, Justice Johnson had received ethics training, training in avoiding sexual harassment for years and was personally cautioned about some of his inappropriate conduct. App., *infra*, 27a, 149a-150a. The Commission found, “[Justice Johnson] failed to heed these warnings and to comport himself in a professional manner befitting his position.” “The evidence had established that Justice Johnson was on notice about the impropriety of his behavior, yet continued to engage in such behavior for years. Even without the warnings, he should have known his behavior was improper.” Justice Johnson confessed to taking classes on gender in the workplace since the

investigation, an admission that he was aware of his harassment of women. App., *infra*, 150a-152a.

Justice Johnson's sexual harassment of the women was a form of sex discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*). See e.g., *Meritor Savings Bank, Fsb v. Vinson*, 477 U.S. 57, 63-69 (1986).

**C. Justice Johnson harbored subjective discriminatory intent against Petitioner and other women.**

The negative bias or prejudice from which the law of recusal or disqualification protects a party must be grounded in some personal animus or malice that the judge harbors against him (or her), of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes. *U.S. v. Balistrieri*, 779 F.2d 1191, 1201 (7th Cir. 1985), citing *Berger v. United States*, 255 U.S. 22, 28 (1921).

In *Berger*, Judge Landis' statements was sufficient to show that Landis had a personal bias and prejudice against certain of the defendants who were German-Americans and showed "the objectionable inclination or disposition of the judge." As the Court stated, it is an essential condition and "[the judge's] duty to 'proceed no further' in the case." *Berger*, 255 U.S. at 28-29 & 34-35.

In *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868, 877 (2009), the Court mandated recusal under circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally

tolerable,” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) as applied through an “objective inquiry” into relevant circumstances whether or not actual bias exists or can be proved. In *Caperton*, a CEO whose company had had a \$50 million judgment entered against it, proceeded to contribute about \$3 million to replace a judge on the West Virginia Supreme Court of Appeals. The contribution was found a “significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case, ‘offered a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.’” *Caperton*, 556 U.S. at 886.

*Williams v. Pennsylvania*, 579 U.S. 1, 136 S. Ct. 1899, 1905 (2016) concerned a judge who, as a district attorney, had personally authorized his subordinates to seek the death sentence the petitioner was challenging. The Court found, “that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.” *Williams*, at 1905 (citing *In re Murchison*, 349 U.S. 133, 136-37 (1955)). This objective risk of bias is reflected in the due process maxim that “no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” (*Ibid.*)

In *Rippo v. Baker*, 137 S. Ct. 905, 906 (2017), the Court stated that “a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him.”

Here, the Removal Order averred facts that clearly showed Justice Johnson’s pattern toward his female victims and was purposeful, predatory, aggressive,



uncontrollable, offensive, opportunistic, flagrant, repulsive, hostile, exploitative, disrespectful, demeaning, degrading, intimidating, contemptuous and disparaging that all appeared of no concern to him during nine years. He possessed a personal animus against women as demonstrated by his pattern of complete disregard for their physical and emotional well-being, comfort, welfare, happiness and personal interests. But rather, he treated and regarded *all* of his female victims with contemptuous behavior without any thought or regard of harm to them by his misconduct. *Berger*, 255 U.S. at 28-29. Objectively, Justice Johnson could not set aside his personal animus of hostility and contempt for women when judging Petitioner, a woman. *Balistrieri*, 779 F.2d at 1201.

**D. Justice Johnson's behavior pattern was a motivating factor in his gender bias against Petitioner.**

Lacking any legal discretion under his Opinion, Justice Johnson, *inter alia*, refused to follow controlling law and thereby denied her claims. App., *infra*, 2a-22a. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962) ("Acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction").

He cited controlling law but refused to follow it in bad faith. App., *infra*, 7a, 9a-13a. *See e.g., Broadman v.*

*Commission on Judicial Performance*, 18 Cal.4th 1079, 1092, 1096-97 (1998).

He denied Petitioner equal protection based upon his arbitrary and capricious selective enforcement of controlling law by his refusal to apply the applicable statutory canons of contract interpretation to interpret de novo Petitioner's father's witnessed agreement not to revoke his 2003 will (App., *infra*, 9a-13a), and failure to interpret contracts and written instruments with extrajudicial bias (*Liteky*, 510 U.S. at 555). As a result, the Opinion heavily favored Petitioner's father and brother to the detriment of Petitioner.

Demonstrating his "objectionable inclination and disposition" against women and commensurate with his pattern of blaming his female victims found by the Commission, he had Petitioner's *gender in mind* when he prejudged her by stereotyping her and *blamed* her for her father's misconduct, stating, "*As a lawyer herself*, [Petitioner] would have been aware of Edward's duties and *would immediately have been aware of any breach*." (Italics added.) App., *infra*, 14a.

He awarded substantial attorneys' fees and costs against Petitioner by materially misstating controlling law (App., *infra*, 17a-21a), a characteristic of his dishonesty found by the Commission.

He unlawfully *judged his own misconduct* and issued an order denying Petitioner's Motion to Recall the Remittitur that had identified, *inter alia*, his Opinion's failure to follow controlling law, in breach of his ethical and legal duty to recuse himself in the first instance. App., *infra*, 23a. See *Caperton*, 556 U.S. at

880-81 citing *In re Murchison*, 349 U.S. at 136 (“no man can be a judge in his own case.”).

In direct contrast to his boast, the Opinion penned by Justice Johnson in Petitioner’s appeal was disparately unlawful, in bad faith, dishonest, arbitrary, capricious, familiarly disparaging, disrespectful and hostile toward Petitioner.

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. *Washington v. Davis*, 426 U.S. 229, 242 (1976). This Court reiterated in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977) that an invidiously discriminatory purpose determination does not require proof that the challenged action rested solely on a discriminatory purpose but rather, whether it was *a motivating factor* that demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

Discriminatory purpose “implies more than intent as volition or intent as awareness of consequences.” *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). “It implies that the decisionmaker . . . selected . . . a particular course of action *at least in part* ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (*Ibid.*, emphasis added.)

Here, the record is satisfactory evidence of Justice Johnson’s personal animus against women exemplified by his pattern of hostility, physical assaults, intimidation, exploitation and contempt for women that

harmed all of his female victims. *Berger*, 255 U.S. at 28. Justice Johnson’s objectionable inclination and disposition was manifested by his behavior pattern of sexual harassment and gender bias against many women (*People v. Spector*, 194 Cal.App.4th 1335, 1391 (Cal. Ct App. (2011)) that motivated his attack against Petitioner in his Opinion (*Arlington Heights*, 429 U.S. at 265-66), as another of his female victims and further exemplified by his disparate treatment of Petitioner. *See Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1739-1740 (2020).) Justice Johnson’s gender bias was of a kind that a fair-minded person could not entirely set aside. His hostility and contempt for women was a motivating factor for his behavior pattern and disparate treatment of Petitioner when he judged her. *Balistreri*, 779 F.2d at 1201.

**E. Justice Johnson’s retroactive disqualification during the pendency of Petitioner’s appeal.**

Under the totality of the extreme facts in the instant case, objectively, Justice Johnson’s bias was patent and posed an unconstitutional risk of actual bias against Petitioner as follows:

- The Commission’s clear and convincing factual findings and legal conclusions established that Justice Johnson had engaged in a pattern of substantial and egregious sexual harassment and gender bias against numerous women for nine years. This, coupled with the temporal relationship to Petitioner’s appeal (*Caperton*, 556 U.S. at 886), was relevant to a “realistic appraisal of [the] psychological tendencies” of an average judge in Justice Johnson’s position, established he could not

hold the balance nice, clear, and true between his personal animus toward women, as a class, and Petitioner, a woman. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

- The Removal Order documented Justice Johnson’s pattern of words and conduct that proved his personal animus against women, as a class, on the basis of his hostility, physical assaults, disrespect, intimidation, mistreatment and contempt for women, combined with his attempts to exploit women. Justice Johnson’s “pattern” of “prior acts” against women generally manifested as a motivating factor, against Petitioner, a woman.
- Justice Johnson was permanently removed under the Commission’s determination that “the extent of Justice Johnson’s lack of recognition of his misconduct creates a significant risk that he will reoffend.” Justice Johnson’s significant risk of “reoffending” under his nine-year pattern of sexually harassing and mistreating women occurred during the pendency of Petitioner’s appeal. As such, the risk of his discrimination against Petitioner because she was a woman “was too high to be constitutionally tolerable.” *Caperton*, 556 U.S. at 886.
- Commensurate with his pattern of blaming his female victims, as found by the Commission, Justice Johnson had Petitioner’s *gender in mind* when he prejudged her by stereotyping her and *blamed* her for her father’s misconduct, stating, “*As a lawyer herself*, [Petitioner] would have been aware of

Edward's duties and *would immediately have been aware of any breach.*" (Italics added.)

- Justice Johnson's presumption of impartiality, integrity and honesty was irrefutably rebutted by the Removal Order, which confirmed his dishonesty, bad faith, unlawful behavior, pattern of intentional fabrication and misrepresentation of the facts under oath in his own disciplinary proceeding.
- Justice Johnson unlawfully *judged his own misconduct* by issuing an order denying Petitioner's Motion to Recall the Remittitur that had asserted, *inter alia*, his failure to follow controlling law, in breach of his ethical and legal duty to recuse himself in the first instance. *Caperton*, 556 U.S. at 880-81 citing *Murchison*, 349 U.S. at 136 ["no man can be a judge in his own case."]

## ARGUMENT IN FAVOR OF WRIT RELIEF

### **A. Justice Johnson's Participation In Petitioner's Appeal Tainted The Decision-Making Process Of The Entire Appellate Panel.**

Justice Johnson's authoring and participation in Petitioner's appeal compels reversal of the Opinion regardless of whether he cast the deciding vote. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986). Due process cannot be satisfied by a rule that requires only some appellate panel members to be unbiased or that allows all but one member of an appellate panel to be free from bias. An unconstitutional risk of bias presents a structural error, and a showing of prejudice is not required. *See*

*Williams*, 136 S. Ct. at 1909. Justice Johnson's participation tainted the entire process in a manner due process should never tolerate and denied Petitioner the impartial decisionmakers required by the Due Process Clause of the 14th Amendment.

The Opinion involving a disqualified Justice is void at issuance regardless of a showing of prejudice. *Tumey*, 273 U.S. at 535 ("No matter what the evidence was against him, he had the right to have an impartial judge.").

Failure to void the Opinion will result in manifest injustice to Petitioner who is entitled to a decisionmaker who both appears and is impartial. See *Offutt v. United States*, 348 U.S. 11, 14 (1954).

The independence and integrity of the judiciary are paramount to public trust and the courts' ability to deliver impartial justice. To enforce appellate review by an impartial and independent tribunal empowers the courts' legitimacy. If Justice Johnson is unfit today based on the misconduct he engaged in during the pendency of Petitioner's appeal, he was unfit at the time he authored his Opinion against Petitioner. Removal from the bench does not remedy the appearance of bias created by Justice Johnson in Petitioner's appeal.

The core of due process is notice and a hearing before an impartial tribunal. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). "A fair . . . tribunal is a basic requirement of due process." *Murchison*, 349 U.S. at 136. An impartial decisionmaker is an essential right in civil proceedings. *Tumey*, 273 U.S. at 535.

This Court has explained that “[d]ue process guarantees ‘an absence of actual bias on the part of a judge.’ *Williams*, 136 S.Ct. at 1905. Almost a century ago, the Supreme Court explained that “[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter of due process of law.” *Tumey*, 273 U.S. at 532

**B. The right to issuance of a writ of mandamus is clear and indisputable.**

The traditional use of mandamus has been “to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction.” *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). A court may grant mandamus upon a showing that (1) the petitioner’s “right to issuance of the writ is ‘clear and indisputable’”; (2) “no other adequate means [exist] to attain the relief he desires” and (3) “the writ is appropriate under the circumstances.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney*, 542 U.S. at 380-81).

This petition is permitted by Supreme Court Rule 20.3 and is warranted both because of the identity of legal issues and because the state’s highest court lacked discretion to pass on a lower court’s action without subject matter jurisdiction. The United States Constitution guarantees an impartial tribunal. U. S. *Const. Amend. XIV*, § 1.



The writ of a mandamus is appropriately issued, when there is usurpation of judicial power or a clear abuse of discretion. *Bankers Life Casualty Co v. Holland*, 346 U.S. 379, 382-83 (1953). In *United States Alkali Export Ass v. United States California Alkali Export Ass v. Same*, 325 U.S. 196, 204 (1945), this Court granted mandamus where a higher court had acted in “excess of their authority, by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal.”

The extraordinary relief of a mandamus is warranted by the extraordinary nature of this case.

**1. Mandamus is proper because the California Supreme Court refused Petitioner’s Writ of Mandate to vacate the Opinion after the retroactive disqualification of Justice Johnson.**

The California Supreme Court’s lack of discretion to refuse Petitioner’s writ of mandate is a clear and indisputable legal error. In California, a three-judge court of appeal is a jurisdictional requirement for appellate review. *Cal. Const.* Art VI, Sec. 3.

The Commission had specifically retroactively disqualified Justice Johnson for nine years during his term on the court of appeal from 2009 to 2018. App., *infra*, 166a, 169a. The record supports Justice Johnson’s disqualification for nine continuous years from 2009 to 2018 under his pattern of misconduct toward the women (App., *infra*, 26a-29a, 138a-141a, 166a) as follows:

From 2010 to 2018 toward Justice Chaney. App., *infra*, 32a-56a, 86a.

From 2013 to 2016 toward Officer Sauquillo. App., *infra*, 59a-61a.

From 2015 to 2018 toward Butterick. App., *infra*, 66a-69a.

Multiple times in 2018 toward Blatchford. App., *infra*, 70a-75a.

From 2013 to 2018 toward Velez. App., *infra*, 76a-79a.

From 2009 to 2012 toward Wohn. App., *infra*, 79a-82a.

From 2009 to 2011 toward Currie. App., *infra*, 82a-84a.

In 2013 toward Palmer. App., *infra*, 91a-95a.

In 2015 toward Schulman. App., *infra*, 96a-103a.

In 2009 or 2010 toward Kent. App., *infra*, 103a-108a.

In 2015 toward Burnette. App., *infra*, 108a-116a.

From 2013-2015 toward Wagniere. App., *infra*, 117a-118a.

The Removal Order's plain and unequivocal statement that -- "Justice Johnson's misconduct [from 2009] upon which our decision is based spanned nine years on the bench" (App., *infra*, 166a), and "we hereby remove Justice Jeffrey W. Johnson from office and disqualify him from acting as a judge" (App., *infra*, 169a) -- could not have been more clear. Justice Johnson was disqualified for misconduct that *spanned nine years on the bench* which necessarily entailed his *entire* nine years on the court of appeal as detailed under the Commission's one hundred and eleven page Removal Order. The Removal Order stated, "The

number of acts of misconduct is relevant to determining appropriate discipline to the extent that it shows whether the conduct [of Justice Johnson] consisted of isolated incidents or a pattern that demonstrates a lack of judicial temperament . . . . Justice Johnson committed 18 acts of prejudicial misconduct (based on 42 separate instances of proven misconduct). This is a substantial amount of misconduct, and some of it is quite egregious. The masters found the ‘particularly flagrant’ nature of some of the misconduct and the ‘large number of victims’ to be factors in aggravation” (App., *infra*, 138a-141a) that was found under his repeated “pattern” of misconduct over and over again from 2009 to 2018. App., *infra*, 26a, 32a, 69a, 74a, 79a, 91a, 138a, 139a, 166a.

In *Christie v. City of El Centro*, 135 Cal.App.4th 767, 776-77 (Cal. Ct. App. (2006)), the court stated, “disqualification occurs when the facts creating disqualification arise, not when disqualification is established... The acts of a judge subject to disqualification are void. . . . Although a party has an obligation to act diligently, he or she is not required to launch a search to discover information that a judicial officer should have disclosed.” *Ibid.* at 776. Under *Christie*, the disqualification of Justice Johnson occurred during his nine years on the court of appeal when the facts creating his disqualification arose and not when disqualification was established by the Commission in 2020.

Moreover, in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988), this Court stated that in proper cases, disqualification may be applied

retroactively. In *Liljeberg*, the trial judge was a member of the board of trustees of a university that had a financial interest in the litigation, but the judge was unaware of his financial interest when he conducted a bench trial and ruled in the case. (*Ibid.*) In *Liljeberg*, this Court held that disqualification, based on an appearance of partiality, may be applied retroactively. (*Ibid.*)

The retroactive disqualification of Justice Johnson is more compelling than in *Liljeberg* where, the judge was unaware of his financial interest.

In this case, the Removal Order stated that, “it is implausible that Justice Johnson did not know the appropriate standards of behavior for a person in his position” based upon his years of training in avoiding sexual harassment and his comments to Justice Chaney. App., *infra*, 150a-151a. Thus, Justice Johnson had demonstrated his awareness of his disqualification but had concealed his knowledge for nine years. His disqualification was revealed when the Commission’s 2020 Removal Order became public, was upheld by the California Supreme Court in 2021, all years after Justice Johnson had authored the 2016 Opinion.

In *Liljeberg*, this Court stated that the judge’s failure to disclose a potential basis for disqualification “further compels the conclusion that vacatur was an appropriate remedy” because it prevented the parties from raising the issue in a timely fashion (*Liljeberg*, 486 U.S. at 867) and likewise, vacatur is an appropriate remedy here because Justice Johnson had demonstrated his awareness of his disqualification but had concealed his knowledge for nine years, and

Petitioner was not required to launch a search to discover information that Justice Johnson “should have disclosed.” *Christie* at 776-777.

The record of Justice Johnson’s misconduct from 2009 continuously until 2018 supports the Commission’s factual findings and conclusions of law that clearly and unequivocally stated that Justice Johnson was retroactively disqualified for misconduct during his term on the court of appeal that “spanned nine years on the bench” and in so finding, negated his power to act in Petitioner’s appeal (*Christie*, at 776) leaving a two-judge panel in conflict with California’s constitution. *Liljeberg*, at 861.

Without subject matter jurisdiction in Petitioner’s appeal, the two-judge court of appeal was therefore without power to issue any appellate decision. *Cal. Const.* Art VI, Sec. 3. The two-judge panel was without jurisdiction to hear and determine Petitioner’s appeal that is now left indeterminate and “hanging in limbo.”

In *Ex parte Metropolitan Water Co. of West Virginia*, 220 U. S. 539, 545-46 (1911), this Court granted mandamus where a single judge had acted without jurisdiction in deciding a matter that should have been considered and determined by a tribunal consisting of three judges under statutory mandate. In *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922), this Court granted mandamus to void an order by a single judge court who lacked jurisdiction absent the statutory minimum participation by a three judge court.

Here, the California Supreme Court exceeded its authority when it passed upon the court of appeal's void Opinion by foreclosing Petitioner's appellate right to a three-judge court of appeal upon California's retroactive disqualification of Justice Johnson (*Cal. Const.* Art VI, Sec. 3) and the two-judge court of appeal not so constituted, lacked subject matter jurisdiction (*Metropolitan*, at 546; *Cumberland*, at 219), a clear and indisputable legal error. It necessarily follows that mandamus is the only proper remedy, since there is no provision for an appeal from a decision made by two judges in California, and a right of appeal is not otherwise given by statute.

Thus, the California Supreme Court had no discretion to deny Petitioner's writ of mandate to vacate the Opinion by the two judge court of appeal and its denial of Petitioner's writ of mandate was a clear and indisputable legal error. *Bankers Life*, at 382-383; *Alkali Export*, at 204.

The Opinion should be set aside as void. (*Metropolitan*, at 546; *Cumberland*, at 219.)

**2. Mandamus is proper when Justice Johnson was not impartial and constitutionally disqualified.**

Judicial disqualification warrants the exercise of mandamus jurisdiction. 28 U.S.C. § 1651(a) provides, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Commission adopted the master's factual findings in its entirety under independent review that was supported by clear and convincing evidence that Justice Johnson had engaged in a pattern that spanned nine years of substantial and egregious sexual harassment and gender-bias of many women. App., *infra*, 25a-29a. The Removal Order exposed Justice Johnson's mistreatment, disparagement, intimidation and exploitation of his female victims that revealed an undeniable personal animus and contempt for women as a motivating factor during his nine-year *pattern* of sexual harassment and gender bias of many women. App., *infra*, 32a-118a. Under the totality of the circumstances, Justice Johnson's personal animus and contempt for women during the pendency of Petitioner's appeal, his blaming Petitioner for another's misconduct (App., *infra*, 14a) displaying his continuing pattern of gender bias as found under the Removal Order, his disparate treatment of Petitioner under his unlawful Opinion and significantly, his lack of recognition of his misconduct that created a significant risk that he will reoffend (App., *infra*, 153a), objectively, created a constitutionally intolerable risk of Justice Johnson's gender bias against Petitioner, a woman. *Caperton*, 556 U.S. at 877; *Murchison*, 349 U.S. at 136.

The Due Process Clause of the 14th Amendment requires an objective inquiry, at the very least, into whether Justice Johnson was constitutionally disqualified from participating in Petitioner's appeal. The 14th amendment of the U.S. Constitution provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." (U. S.

*Const. Amend. XIV*, §1; see also, *Cal. Const.*, art. 1 § 7.) The concealment of Justice Johnson’s disqualification for nearly a decade denied Petitioner the right to an independent and impartial tribunal; the court’s duty to disclose was clear and indisputable. See, *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899) (holding “the writ of mandamus will not ordinarily be granted ... unless the duty sought to be enforced is clear and indisputable.”). Petitioner necessarily has a clear and indisputable right to relief. See, *Cheney* at 380-81 (citation omitted).

**C. Petitioner has no other adequate means to attain relief.**

California’s removal of Justice Johnson as disqualified during the pendency of her appeal deprived Petitioner of fundamental rights without due process of law by a court of appeal lacking subject matter jurisdiction in the first instance. This is amplified by the California Supreme Court’s summary denial of the Petitioner’s right to address the constitutional disqualification of Justice Johnson or obtain review of its denial. Mandamus is appropriate only when no other adequate means of obtaining the desired relief exists. *Cheney*, at 380.

California’s retroactive disqualification of Justice Johnson proscribed: (a) his power to act to render any decision in Petitioner’s appeal (*Christie*, at 776-78) and (b) the court of appeal’s power to act as a three-judge tribunal (*Cal Const. Art VI, Sec 3*). Therefore, the Opinion is void. *Metropolitan*, at 546; *Cumberland*, at 219. In so doing, California has left Petitioner’s appeal in an indeterminate state.



The California Supreme Court has refused to act when it had no power to refuse. *Bracey v. Gray*, 71 Cal.App.2d 206, 209 (Cal. Ct. App. (1945)) (If for any reason the judgment of the District Court of Appeal is deemed to be void, it is the province of the Supreme Court to so determine.).

The failure to review the issue of the lack of jurisdiction of the court of appeal deprived Petitioner of any adequate remedy at law. Petitioner's right to petition for writ of mandate arose after the California Supreme Court in 2021 denied Justice Johnson's petition for review. Petitioner sought to compel the California Supreme Court to take action that it lacked power to withhold.

#### **D. Mandamus Relief Is Appropriate Under The Circumstances.**

In extraordinary cases, mandamus petitions "serve as useful 'safety valve[s]' for promptly correcting serious errors." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). The California Supreme Court found Justice Johnson's misconduct egregious enough to uphold his disqualification and removal from office. Yet, the California Supreme Court summarily denied Petitioner's Writ to address the issue of the court of appeal's action without jurisdiction. As such, Petitioner was deprived of the right to an independent and impartial tribunal, a fundamental interest appropriately protected by the Due Process Clause of the United States Constitution.

The Commission found that Justice Johnson's misconduct had retroactively disqualified him from

office as an appellate judge and that disqualification had occurred during the pendency of Petitioner's appeal.

The California Supreme Court should have determined that the court of appeal acted without California constitutional jurisdiction absent a three-judge panel rendering the Opinion void (*Metropolitan Water Co*, at 546) that has left Petitioner's appeal indeterminate.

The guarantee to an independent and impartial tribunal lays the foundations for the rule of law. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Matthews v. Eldrige*, 424 U.S. 319, 332 (1976). Thus, knowing that due process applies here, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Therefore, the California Supreme Court should be directed to exercise its authority to vacate or void the Opinion by the court of appeal as lacking jurisdiction in the first instance and to remand Petitioner's appeal to an impartial tribunal when "it is an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so." *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943). A writ of mandamus is clearly warranted. *Cheney at 380-381*.

## CONCLUSION

To preserve and uphold Petitioner's right to an impartial tribunal under the Fourteenth Amendment to the federal constitution that was denied by the California Supreme Court pursuant to Justice Johnson's Opinion, Petitioner urges this Court to issue a writ of mandamus to remand Petitioner's appeal for decision before an impartial tribunal by:

1. Directing the California Supreme Court to void the Opinion by the two-judge court of appeal acting without subject matter jurisdiction.
2. Alternatively, Petitioner urges this Court to consider Justice Johnson's retroactive disqualification under *Caperton*, at 872, and treat this petition as a petition for a writ of certiorari, grant the petition, vacate the Opinion and remand Petitioner's appeal for decision before an impartial tribunal. Sup. Ct. R. 10.

Dated: November 24, 2021

Respectfully submitted,

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