No. _____

In the

Supreme Court of the United States

RAYMOND DE BOTTON,

Petitioner,

v.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, et al.,

Respondents.

On Petition for a Writ of *Certiorari* from
United States Court of Appeals for the Ninth Circuit
Case No. 23-35337

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under our legal system, courts determine the relevant facts of a case before applying the law. These functions have long been understood as crucial to the exercise of judicial power because the application of law hinges on the specific circumstances or facts surrounding a dispute.

The questions presented for review here are:

1. Whether Article III courts as institutions, through the judicial officials who operate them, are required to apply the law to the facts of a dispute the parties have brought before the court for adjudication?

2. Whether Article III courts as institutions, through the judicial officials who operate them, must apply the law to those facts found to exist with regards to judicial inquiries related to appellate courts' jurisdiction pursuant to the collateral order exceptions to the final judgments rule?

3. Whether a state court plaintiff, whose case has been removed to a federal court, can insist that his removed case be adjudicated by a judicial officer holding the office of Judge during good behavior?

PARTIES TO THE PROCEEDINGS

Petitioner here -- Plaintiff-Appellant below -- is Raymond DeBotton.

Respondents are Quality Loan Service Corporation of Washington, McCarthy & Holthus, LLP, Warren Lance, First Horizon Loan Corporation, Select Portfolio Servicing, Inc. and the State of Washington.

RULE 29.6 STATEMENT

Petitioner DeBotton is a natural person. DeBotton is a citizen of the United States who asserts that he has enforceable rights under Article III to have his case adjudicated by a judicial officer holding the office of judge during good behavior.

LIST OF RELATED PROCEEDINGS

Raymond de Botton v. Quality Loan Services Corporation; McCarthy Holthus, LLP, Warren Lance, First Horizon Loan Corporation, Select Portfolio Servicing, and State of Washington, Superior Court of Washington for Snohomish County, Case No. 23-2-00753-31[1].

Raymond de Botton v. Quality Loan Services Corporation; McCarthy Holthus, LLP, Warren Lance, First Horizon Loan Corporation, Select Portfolio Servicing, and State of Washington, United States District Court for Western Washington, case # 23-cv-00223 RSL.

Raymond de Botton v. Quality Loan Services Corporation; McCarthy Holthus, LLP, Warren Lance, First Horizon Loan Corporation, Select Portfolio Servicing, and State of Washington, United States Court of Appeals for the Ninth Circuit Court of Appeals, Case No. 23-35337.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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[1] This state court proceeding was removed to the United States District for Western Washington at Seattle pursuant 28 U.S.C. §1441, where it was assigned by that Court to a senior district court adjudicator over the objection of DeBotton.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Raymond DeBotton respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit refusing to accept jurisdiction of this appeal pursuant to the collateral order doctrine.

DECISIONS BELOW

The Order of the Court of Appeals for the Ninth Circuit dated August 18, 2023 denying jurisdiction under the collateral order doctrine is not published or reported. It is reproduced at Pet. App. 2a-3a.

The Order from the Clerk of the Ninth Circuit Court of Appeals directing that DeBotton demonstrate that the Court of Appeals has jurisdiction over this interlocutory appeal is not published or reported. It is reproduced at Pet. App. 4a-5a.

The Order of the District Court dated May 9, 2023 denying DeBotton's motion to reconsider the below referenced Order is not published or reported. It is reproduced at Pet. App. 6a.

The Order of the District Court dated April 24, 2023 denying DeBotton's motion to remand this case back to the state court if his case was not adjudicated by a judicial officer holding the office of judge during good behavior is not published or reported. However, that order is reproduced at Pet. App. 7a-8a.

JURISDICTION

The Order dismissing this case from the Ninth Circuit Court of Appeals for that Court's purported lack of jurisdiction was entered on August 18, 2023 by a panel composed of two senior adjudicators and one active duty judge of that Court.

On August 31, 2023, DeBotton filed a petition for a rehearing en banc of that Order pursuant to FRAP 35. To date, *i.e.* November 8, 2023, no "judge" appears to have called for a vote to have this Order reheard en banc. *See* FRAP 35(f). And DeBotton believes it likely that no judicial officers (including judges) of that Court of Appeals will do so because they benefit from the "senior judge" retirement system being challenged here as violative of the Good Behavior Clause set forth in the second sentence of Article III Section One.

Under these facts, DeBotton invokes the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted at Pet. App. 9a-22a.

STATEMENT OF THE CASE

A. The Underlying Case was originally filed in State Court and removed to the United States District Court

Like millions of other Americans struggling through everyday life in modern day America, Raymond DeBotton had his home sold out from under him by a statutory trustee pursuant to a state's Deed of Trust Act, *see* Chapter 61.24 Revised Code of Washington. And when monies in excess of what were claimed to be owed were received by the statutory trustee, that entity deposited them with the Superior Court of Snohomish County, which awarded those funds to other private parties and not to DeBotton. After his home and the monies in excess of his alleged debt were taken from him pursuant to Washington law, DeBotton sued the private parties that took his home and the excess funds, along with the State of Washington.

In addition to challenging the foreclosure under Washington State law, DeBotton's complaint also set forth constitutional claims against these private defendants and potentially the State of Washington. For example, DeBotton asserted in his Complaint:

> 3.1 In the late 20th Century and the beginning of the 21st Century, investment banks created a securities scheme which was intended to make those banks vast sums of money by making it appear that consumers, like Plaintiff, had obtained loans to buy homes which were secured by mortgage instruments, which could be foreclosed upon by trusts composed of the

holders of certificates evidencing interests in the securities. This scheme constituted a fraud on both those who were sold the securities as investments and on those who purportedly borrowed monies pursuant to the non-existent loan.

3.2 The scheme referenced in paragraph 3.1 above resulted in other frauds being perpetrated by investment banks and their business allies on those who invested in such securities and those homeowners who were purported to have obtained purchase money pursuant to a loan. All of the frauds associated with or resulting from these practices are not presently known by Plaintiff but many are expected to become known through reasonable discovery and will be proved on a more-likely-than-not basis at trial.

3.3 One example of a separate fraud or misrepresentation that the Plaintiff complained occurred as a result of the fraud or misrepresentations described in paragraph 3.1, is that negotiable instruments signed by consumers (like Plaintiff) evidencing the non-existent loan transaction were frequently destroyed in favor of keeping an electronic copy of the original note.

* * *

3.5 At the time de Botton signed the promissory note in 2006, it was common practice for securities businesses that were creating pools of promissory notes for trust entities, to destroy the original

promissory notes signed by purported borrowers in favor of keeping electronic copies of such notes. On information and belief, both of the promissory notes signed by de Botton as security for the fraudulently described loans were destroyed pursuant to this then-common practice.

3.6 Plaintiff de Botton alleges that because the promissory note he signed had been destroyed, it could only be enforced pursuant to RCW 62A-3.309. On information and belief, the deed of trust trustee, … did not adjudicate that the purported beneficiary of the trustee sale of Plaintiff's home complied with this legal provision before purporting to sell Plaintiff's home.

3.7 Prior to 2008, the practices of securitization businesses, with regard to destroying copies of original instruments, became well known by persons holding positions with the federal government and the government of Washington State, because this business practice, *i.e.*, destroying the original note signed by the borrower, threatened to make the enforcement of loans owned by securitized trusts difficult to enforce under existing laws. And those governments, through office holders and other government workers, unconstitutionally took steps to protect the securities industry and a portion of its investors at the expense of homeowners and less-favored investors. Those

statutory actions taken by the political branches of the federal government and Washington State government to protect the economy and one group of interests at the expense of another were justified, if they were, as being in the public interest.

3.8 ***The political branches of the State of Washington, for example, enacted legislation to align the pecuniary interests of its judges with enforcing mortgages owned by purported securities certificate holders notwithstanding that they had no contractual or other right to do so. The intent of giving judges an interest in such mortgage-backed security investments was to unlawfully incentivize a judicial result favoring foreclosure of homes secured by loans purportedly owned by securitized trusts. This violated the Due Process Clause of the Fourteenth Amendment by compromising -- or appearing to compromise -- the neutrality of Washington's judicial officers with regards to deciding this enforceability of such mortgages because they had been given a pecuniary interest in how this judicial inquiry would be adjudicated.***

3.9 Additionally, since September 14, 2006, the date de Botton entered into the 2006 promissory note and deed of trust mortgage agreement referenced in paragraph 3.1 above, Washington's political

> branches have amended Washington's Deed of Trust Act on numerous occasions, including in 2008, 2009, 2011, 2012, 2013, 2014, 2018, and 2021. De Botton alleges that the political branches of Washington, and their debt collector and money lending allies, intended that these amendments would change the terms of his agreements so as to benefit money lenders, debt buyers, Washington's government officials, and Washington's Executive Branch of government at the expense of borrowers owning land secured by deed of trust security instruments purportedly owned by securitized trusts. De Botton also alleges that the political branches' enactment of such amendments for purposes of changing the law applicable to his 2006 agreements impaired his rights to freedom to contract pursuant to Wash. Const. art. 1, § 23 and U.S. Const. Art. 1, § 10 and has denied him due process of law.

DeBotton's case was not immediately assigned a judicial officer to adjudicate it. Several days after the removal was filed, Senior Adjudicator Lasnik[2] was

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[2] DeBotton does not refer to Judicial Officer Lasnik as *Senior Judge* Lasnik because use of the term "senior judge" suggests that Congress can constitutionally re-define a semi-retired judicial officer who is no longer serving as a judge during good Behaviour as an Article III judge. DeBotton's claim here is that the political branches of the federal government do not have the power to rewrite Article III by statute. *See* U.S. Const., Art. V. *See* also infra., at pp. 8-10, 12, 15

apparently tasked by the United States District Court for Western Washington with adjudicating DeBotton's case. *See* Pet. App. 24a-26a.

When DeBotton moved to remand his case back to the Washington State Court because Senior Adjudicator Lasnik did not serve in the office of judge during good behavior and therefore was not constitutionally competent to be an Article III judge of that Court, Senior Adjudicator Lasnik ruled that the District Court had jurisdiction over the underlying case pursuant to 28 U.S.C. §1331 because the issues therein involved federal law. But Senior Judge Lasnik failed to consider the judicial inquiry which DeBotton raised, which was *whether the District Court could act through a judicial officer who no longer held the office of judge during good behavior.*

It is DeBotton's position in this Petition that before Senior Adjudicator Lasnik could deny this motion, he was required to perform a judicial inquiry as to whether adjudicators who have assumed *senior status*[3] and therefore must be periodically designated and assigned to exercise the judicial power pursuant to 28 U.S.C. §294 comply with the Good Behavior Clause of Article III. Further, DeBotton asserts Senior Adjudicator Lasnik did not perform this judicial

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[3] "Senior Status" means a judge has decided to retire. *See* e.g. 28 U.S.C. 294(b) which states in pertinent part:
Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

inquiry because he simply ruled that the District Court of Western Washington had jurisdiction over DeBotton's removed case.

Accordingly, DeBotton, through his counsel, appealed Senior Adjudicator Lasnik's Order to the Court of Appeals for the Ninth Circuit pursuant to the collateral order exception to the final judgment rule set forth in 28 U.S.C. §1291.

By way of further factual information pertinent to this Petition, DeBotton would observe that recently DeBotton learned that Senior Adjudicator Lasnik had a Washington judicial retirement account of the type that was complained of in paragraph 3.8 of DeBotton's complaint, i.e. a judicial retirement account that was alleged to have been created by the political branches of Washington with "the intent of giving judges an interest in mortgage backed securities [which would] unlawfully incentivise a judicial result favoring foreclosure of homes secured by loans purportedly owned by securitized trusts." *See* supra, pp. 5-7.

This information is relevant here to the extent it suggests another reason why Senior Adjudicator Lasnik may not be constitutionally competent to adjudicate the merits of this case over DeBotton's objection. In this regard, DeBotton recently notified the District Court that he questions whether Senior Adjudicator Lasnik appears to be a neutral adjudicator within the meaning of the Fifth and Fourteenth Amendments principle that "no man can be a judge in his own case." *See e.g.*, *Rippo v. Baker*, 137 S. Ct. 905 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *Bracy v. Gramley*, 520 U.S. 899

(1997); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986); *Ward v. Monroeville*, 409 U.S. 57, (1972); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133, 3 L. Ed. 162, 177 (1810).[4] Further, DeBotton also questions whether under these circumstances, Senior Adjudicator Lasnik has also violated 28 U.S.C. §455(b). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). And he wonders why the senior adjudicator didn't simply disclose that he had a Washington judicial retirement account of the type being challenged by DeBotton's complaint.

The Collateral Order Exception to the Final Judgment Rule as it relates to this Petition for Relief.

28 U.S.C. §1291 gives courts of appeals jurisdiction over a small class of rulings, not concluding

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[4] DeBotton contends that Senior Adjudicator Lasnik should be disqualified on this ground because his financial disclosures indicate he has a Washington judicial retirement account of the type challenged in paragraph 3.8 of the above quoted complaint. The Washington Court of Appeals has ruled this type of bias claim should be asserted to the trial court, as was recently done here. U.S. Bank Nat'l Ass'n v. Peterson, 2020 Wash. App. LEXIS 1692, *9-10 (2020). In *Larson v. Snohomish County*, 20 Wash. App. 2d 243 (2021) that same court of appeals ruled its judges could consider whether they as judges were biased under the rule of necessity and held that under the allegation of the complaint in that case the Larsons had not demonstrated the trial court judges had violated Washington's Code of Judicial Conduct. *Id.* at 288-89.

The Rule of Necessity does not permit senior adjudicator *Lasnik* to adjudicate this matter. And the allegations of the complaint make clear that his judicial retirement account is likely to be a disputed aspect of this litigation.

the litigation, but conclusively resolving claims of right separable from, and collateral to, rights asserted in the action. See *e.g. Axon Enter. v. FTC*, 143 S. Ct. 890 (2023); *Mitchell v. Forsyth*, 472 U. S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

The reason this Court requires courts of appeal to assume appellate jurisdiction over these types of interlocutory orders is because they are "too important to be denied review and too independent of the cause to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

Immediate appeals are permitted under this doctrine because these cases involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). Thus, this Court has authorized immediate appeals from orders denying claims of immunity under the Double Jeopardy Clause, see *Abney v. United States*, 431 U.S. 651, 660-662 (1977); orders denying immunity under the Speech or Debate Clause, *see Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); orders denying absolute immunity, see *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); orders denying qualified immunity, see *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), orders denying Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145, 147 (1993); orders requiring administrative adjudication be performed by officials asserted not to have the constitutional authority to do. *See Axon Enter. v. FTC*, 143 S. Ct. 890 (2023).

Senior Adjudicator Lasnik's Order holding he is qualified to adjudicate this case for the District Court -- without any factual or legal explanation as to why -- fits squarely within those requirements necessary to have brought this appeal pursuant to the collateral order doctrine. *See supra*. And existing Ninth Circuit precedent clearly acknowledges this with regard to judicial recusal orders based on 28 U.S.C. §455. *See In re Cement Antitrust Litigation*, 673 F.2d 1020 (1982) ("[W]e cannot disagree that an order granting recusal conclusively determines a disputed question, completely separate from the merits of the action, which, if not reviewed immediately, will be effectively unreviewable on appeal from final judgment. *Id.* at 1023).

DeBotton asserts that senior "judges," i.e. judicial officials, have no license to violate the Good Behavior Clause of Article III simply because they like the posh retirement program the branches of the federal government have agreed upon for them, in violation of Article V, the Tenth Amendment and the federal structure of our Constitution.

In denying review the Ninth Circuit Panel (composed of two senior adjudicators and only one judge serving in office during good behavior) held that motions to remand and for the recusal of judges are not appealable under the collateral order doctrine under any circumstances. Astonishingly, the Panel did so without any consideration of the undisputed factual and historical evidence before the district court, which included, among other things.

1. The language of 28 U.S.C. §294(b) which states in pertinent part that "[a]ny judge of the

United States who has retired from regular active service under section 371 (b) … of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, ***when designated and assigned as provided in subsections (c) and (d).***

2. The language of 28 U.S.C. §294(e) which states: ***[n]o retired justice or judge shall perform judicial duties except when designated and assigned***."
3. The Federal Judicial Council states on its government website that senior judges essentially provide volunteer services for those cases which they ***agree*** to adjudicate.[5]
4. Evidence from the government website "CONSTITUTION ANNOTATED Analysis and Interpretation of the U.S. Constitution" entitled "Historical Background on Good Behavior Clause," which states, among other things, "***If judges*** could be removed at will or ***were appointed for specific periods, judges would be tempted to consider popular opinion in their rulings to the***

[5] Last accessed on November 6, 2023 at: https://www.uscourts.gov/faqs-federal-judges#:~:text=Senior%20judges%2C%20who%20essentially%20provide,the%20

detriment of the Constitution and the rights of political minorities."[6]

5. Evidence from the Federal Judicial Center's government website entitled "The Evolution of Judicial Retirement," which states, among other things, that our founders considered, but chose not to give judges a retirement option because good behavior tenure was considered to be the better option. "Alexander Hamilton, for example argued, in Federalist No. 79 for life tenure and against mandatory retirement by noting 'how few outlive the season of intellectual vigor.'"[7]

6. None of DeBotton's adversaries objected to -- or disputed -- any of these facts.

It is also DeBotton's position that the Ninth Circuit Court of Appeals Panel's decision fails to set forth any meaningful factual or legal analysis of this important constitutional issue for millions of other homeowner litigants across the Nation; the Panel suggesting that motions to disqualify a judge are never appealable under the collateral order doctrine. *See* Pet. App. 2a-3a. But this cryptic analysis suggests that the Panel composed of senior judges either didn't

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[6] Last accessed on November 6, 2023 at: https://constitution.congress.gov/browse/essay/artIII-S1-10-2-2/ALDE_00000685/

[7] Last accessed on November 6, 2023 at: https://www.fjc.gov/history/spotlight-judicial-history/judicial-retirement

understand the issue DeBotton was raising or wanted to ignore it. This is because DeBotton's judicial inquiry asserted that Senior Adjudicator Lasnik was not a judge within the meaning of Article III and that the United States District Court of Western Washington could not force DeBotton to adjudicate his removed case before a judicial official who was not constitutionally qualified to perform this task.

DeBotton and his counsel sincerely believe that the senior adjudicators of the United States District Court for Western Washington and the Ninth Circuit Court of Appeals are biased against homeowners to the point where attempting to obtain justice from them is futile. And they, DeBotton and his counsel, do not want to appear before that District Court's senior adjudicators. And it is their position that DeBotton has a right to have his case adjudicated by a judicial official who holds the office of judge during good behavior if he is required to have his case removed to the federal courts. *See* Pet. App. 26a-35a.

REASONS FOR GRANTING THE PETITION

A. A court is not a judge, nor a judge a court.

It doesn't require a law school education to know the difference between a court and a judge. Indeed, Justice Story said it simply in *United States v. Clark*, 1 Gallison, 497.

> A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in

> which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.

Todd v. United States, 158 U.S. 278, 284 (1895).

Under the language of Article III, Section One the judicial power of the United States must be exercised by courts through judicial officials holding the office of judge during good behavior. But under 28 U.S.C. §294 legitimately appointed judges who accept senior status become judicial officials who must be periodically designated and assigned by other judicial officials to exercise the judicial power of the United States and receive compensation for doing so. Accordingly, such officials no longer hold the office of judge during good behavior in the manner our Constitution requires.

We know this because history demonstrates that the term *good behavior* refers to a type of tenure judges were afforded in England before this Nation's Revolution. *United States v. Will*, 449 U.S. 200, 218-219 (1980) (referencing the Act of Settlement enacted in 1701). And this Nation's framers intended that this same tenure, i.e., good behavior, and salary protection for judges should be included in this Nation's organic law to protect the People. *See also United States v. Hatter,* 532 U.S. 557, 567-569 (2001); *Evans v. Gore*, 253 U.S. 245 (1920).

History demonstrates that by the time Baron de Montesquieu wrote *The Spirit of Laws* in 1750 (which inspired our Framers' adoption of the Separation of Powers as part of the structure of our government), English courts had established as a principle

of justice that judges exercising judicial power in individual cases must be neutral as between the parties to justiciable disputes. Ultimately, this led to the requirement that federal judges must be independent adjudicators who are neutral as between the parties with regard to the issues in the disputes they are adjudicating. *See e.g., Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59-60 (1982); *Nguyen v. United States*, 539 U.S. 69 (2003); *United States v. Will*, 449 U.S. 200, 219 (1980); Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary*, 1606-1787 (Oxford Univ. Press 2011); Fabien Gelinas, *The Dual Rationale of Judicial Independence* 1, 9-10 (2011) (discussing ancient roots of the concept of adjudicatory justice, which trace back to Egypt's First Intermediate Period and also appear in Babylonian inscriptions about this same period of time.) *See also* Smith, Joseph, *An Independent Judiciary: The Colonial Background*, 124 University of Pennsylvania Law Review 1104 (1976).

Accordingly, under this Court's precedent those judicial officials not serving in the office of judge during good behavior cannot act as judges exercising the national government's judicial powers unless the litigants to cases and controversies waive their right to insist upon judges serving in office during good behavior. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015); *Nguyen v. United States*, 539 U.S. 69, (2003); *Gomez v. United States*, 490 U.S. 858 (1989); *Commodity Futures Trading Com v. Schor*, 478 U.S. 833, 106 S. Ct. 3245 (1986).

Nobody has ever argued that DeBotton waived his right to have his case adjudicated by a judicial official holding the office of judge during good behavior.

B. It is time for this Court to resolve this too long lingering constitutional issue.

The issue as to whether *senior judges*, i.e. retired judges no longer serving in the office of judge during good behavior, are constitutional has been percolating around, about, and to some extent within this Nation's courts for some time. *See e.g.* David R. Stras and Ryan W. Scott, "*Are Senior Judges Unconstitutional*?" Cornell Law Review 92 (2007)[8]; Betty Binns Fletcher, *A Response to Stras & (and) Scott's Are Senior Judges Unconstitutional*, 92 Cornell L. Rev. 523 (2007).[9]

How one views this issue likely depends on his or her status. Certainly, senior adjudicators may view the issue differently than do litigants like DeBotton and his attorney who may be required to have their cases adjudicated in federal court before Article III judges.

And today (most likely because of this Court's reliance on history to provide meaning for women's rights to abortion) the issue as to the meaning of the Good Behavior Clause resounds even here as "legal experts" urge that the political branches have the authority to impose term limits on the justices of this Court based on the senior judge statutes being challenged here. *See e.g.* Presidential Commission of the Supreme Court of the United States, Final Report

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[8] Available at:
https://scholarship.law.cornell.edu/clr/vol92/iss3/2/

[9] Available at:
https://scholarship.law.cornell.edu/clr/vol92/iss3/3

(December 2021) (hereafter referred to as Final Report); American Academy of Arts & Sciences, The Case for Supreme Court Term Limits, A Paper by the U.S. Supreme Court Working Group (2023) (hereafter referred to as Working Paper).

These "experts" concede that the question as to whether Congress can impose term limits on judges pursuant to the language and history of Article III remains an open and hotly debated one. Final Report, at pp. 132-136; Working Paper, 7-9.

The primary arguments that proponents of term limits use to argue that Congress can enact a statute to limit this Court's Justices to a fixed term for performing some type of judicial tasks notwithstanding Article III's mandate that they shall serve in the office of judge during good behavior are: (1) that Congress may and did something similar to this without objection when the political branches enacted statutes providing for judicial retirements. Final Report at 133; Working Paper, at 7-9; (2) that this Court held this retirement statute was constitutional in *Booth v. United States*, 291 U.S. 339 (1934). Report Final Report at 134, Working Paper, p. 8-9(2); and (3) that this Court reaffirmed *Booth*'s reasoning and conclusions in *Nguyen v. United States*, 539 U.S. 69 (2003). Final Report, at 134; Working Paper, at 8.

With all due respect to the "experts", their reasoning is likely wrong because every litigant has a personal right under the Good Behavior Clause of Article III to have a judicial officer serving in the office of judge during good behavior adjudicate his or her case unless he or she waives that personal right. *See Wellness Int'l Network, Ltd. v. Sharif*, *supra*, at 674-78; *Cf. Nguyen v. United States*, supra at 79-81

(refusing to find waiver of appellant right to have three judges serving during good behavior adjudicate his appeal.)

The experts' arguments are also clearly flawed because: First, the clear language of Article III, Section One states that only judicial officers holding the office of judge during good behavior can exercise the federal judicial power. Article III, section One states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ***The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour***, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Emphasis Supplied.

The first sentence vests the judicial power of the United States in courts Congress creates. But the second sentence mandates that the judges of those courts exercising the United States judicial power must hold *their* offices as *judges* during good behavior. Thus, this language clearly provides that in order for a judicial officer of an Article III court to exercise the national judicial power he or she must hold the office of judge during good behavior. No matter what you call them, senior adjudicators, like Lasnik, do not

meet this requirement under 28 U.S.C. §§294 (b) and (e).

Indeed, 28 U.S.C. §294(e) clearly states: "No retired justice or judge shall perform judicial duties ***except when designated and assigned***." This "except when designated and assigned" limitation on senior judges, i.e. retired judges, ability to exercise the judicial power of the United States means that they do not serve in the office of judge during good behavior, but at the discretion of others.

Second, some experts argue that Congress' passage of judges' *senior status* retirement program demonstrates such adjudicators comply with the requirements of Article III. Working Paper, at 8. But this assertion flies in the face of historical facts,[10] which include without limitation (1) evidence that the second sentence of Article III, section One was intended to mirror the Act of Settlement enacted by the English Parliament in 1701; (2) the framers considered retirement as a way to achieve judicial independence but decided in favor of good behavior tenure; and (3) the framers considered but rejected the notion that the United State sovereign should be allowed to appoint Article III judges for specific periods of time in favor of good behavior tenure.

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[10] Those facts which were before the District Court included, among others, that "Alexander Hamilton argued that federal judges must 'guard the constitution and the rights of individuals' against the possibility of laws that oppress political minorities. If judges could be removed at will ***or were appointed for specified periods***, judges would be tempted to consider popular opinion in their rulings to the detriment of the Constitution and the rights of political minorities."

Third, the experts argue *Booth* upheld the constitutionality of the judges' senior status retirement program. But this is not true for several reasons, which include without limitation (1) *Booth* was brought by retired judges who complained that Congress had reduced their pay in violation of the Compensation Clause of Article III; (2) *Booth* only holds that when judges voluntarily take senior status, but continue to hear cases, Congress may not reduce their compensation under the Compensation Clause; and (3) the statutory scheme relating to judges now is vastly different from that which existed when *Booth* was decided. Fourth, the experts argue *Nguyen v. United States*, supra, reaffirmed *Booth*'s reasoning in 2003. But this is not true because the judicial inquiries before this Court in *Nguyen* were (1) whether a territorial judge -- a judge who did not have good Behaviour tenure -- could exercise Article III judicial Power on behalf of this Court in violation of 28 U.S.C. §292(a) (This Court held he could not) and (2) whether the decision of the unanimous three judge panel should be reversed on this ground because both the active and senior judge on the panel also concurred in the conviction.

Notwithstanding this Court acknowledged the two federal judicial officers concurred in Nyguen's conviction, this Court held that conviction had to be reversed. In so doing, Justice Stevens (writing for the majority" observed: "The panel convened to hear … [the appeal] included the Chief Judge and a Senior Circuit Judge of the Ninth Circuit, both of whom are, of course, life-tenured Article III judges who serve during 'good Behavior' for compensation that may not be diminished while in office." But there is nothing in

that decision which suggests the judicial inquiry in *Nyguen* included considering whether the senior judge on that panel continued to hold the office of judge during good behavior. Nor does it appear that this issue was ever argued to this Court.

And it is worth noting this Court's *obiter dictum* in *Nyguen* cuts two ways because it suggests that if the senior judge did not hold the office of judge during good behavior, the holding in *Nyguen* with regard to the territorial judge should be applied to senior judges who do not hold the office of judge during good behavior.

C. The District Court should have made a factual finding with regard to whether its senior adjudicator served in the office of judge during good behavior

DeBotton's motion for remand was supported by his declaration, *see* Pet. App. 33a-35a and the declaration of his attorney. Pet. App. 23a-32a. DeBotton testified:

> 2. When I was in school, I learned from my teachers and the textbooks that the Constitution of the United States requires that judges exercising Article III judicial power be appointed for life. I was taught that the reason for this was not to benefit those judges, but to benefit the People, like me, because this helped to make sure that federal judges would be neutral and independent when resolving those cases that were brought before them.

* * *

> 5. My attorney and I discussed whether I should object to a senior judge adjudicating my case. In doing so, we discussed the fact that by law, these "*senior judges*" must be periodically designated and assigned by judges actually having life tenure to adjudicate cases. My counsel asked me if I wanted to object to a judge not having life tenure adjudicating my case.
>
> 6. I told my counsel as clearly as possible that I did object to any adjudicator who did not have life tenure adjudicating my case in this federal court. I do so not only because my attorney believes this is the best way for me to find justice in these courts, but even more so because that is what our written Constitution mandates. I trust those who wrote the Constitution much more than those who appear to me to be abusing its language to promote their own personal interests.

Pet. App. 33a-35a.

Among other things, DeBotton's attorney's declaration stated:

> 11. After much reflection, my client and I have decided to move to remand these proceedings back to state court for the reasons stated in the accompanying motion to remand.
>
> 12. At the outset, I want to acknowledge that I have previously

sought to have judicial inquiries similar to the one being made in Mr. de Botton's Motion to Remand adjudicated by this Court. *See e.g.*, *Bank of NY Mellon v. Scott Stafne*, No. 2:16-cv-77TSZ; *Stafne v. Burnside*, No. 2-16-cv-753JCC; *Stafne v. Zilly*, No. 2:17-cv-01692HHS; and *Hoang v. Bank* of America, *N.A.*, No. 2:17-cv874JLR. But none of these previous cases have involved a removal situation, *i.e.*, the involuntary removal of a case filed in state court to a United States District Court.

13. I also want to point out to this Court that Senior Judge Coughenouer of this Court appears to have threatened me with sanctions if I make any similar challenges about senior judges or semi-retired judges on senior status adjudicating cases without the consent of litigants, like Mr. De Botton, in any future cases. *See Stafne v. Burnside*, No. C16-0753-JCC, 2022 U.S. Dist. LEXIS 103433 (W.D. Wash. June 9, 2022) purportedly putting me on notice that judicial inquiries challenging the appropriateness of senior judges will no longer be considered by this Court as "nonfrivolous argument." Id., at *3.

14. After carefully considering Senior Judge Coughenour's personal threat against me, I have nonetheless concluded that I have an obligation to Mr. de Botton, my client, under those circumstances which exist here to Move for Remand

based on the fact that Senior Judge Lasnik does not hold the "office of judge during good Behaviour" as that term is defined by Article III. And also, because Mr. de Botton (based on my advice) does not and will not agree to any senior judge, *i.e.*, an adjudicator who does not hold the office of judge during good behavior, adjudicating this case which has been removed from the state court in which it was filed to this United States District Court pursuant to the federalism structure established by the Nation's written constitution.

15. I have advised my client not to consent to a senior judge adjudicating this case for many reasons, but the primary one is because I believe such adjudicators tend to unfairly favor money lenders and debt buyers when adjudicating foreclosure related cases. For example, it is my experience with this Court that since the 2008 bailout, the senior judges of this Court have consistently taken the stance that homeowners should not be allowed to demand to see the original notes which they signed. I believe that these rulings were disingenuous because under Washington law if such notes did not exist they could only be enforced pursuant to RCW 62A.3-309. And it was well known at the time the judges of this Court were making these rulings that it was a common business practice for those who sold and

> created mortgage-backed securities to destroy the notes signed by makers in favor of keeping an electronic copy of the original. …

Pet App. 26a-30a.

With regard to the cases cited in paragraph 12 of the attorney's above quoted declaration, in *Stafne v. Zilly,* 337 F. Supp. 3d 1079 (2018) the specially appointed active duty judge who adjudicated that case after being designated and assigned to do so by the Chief Judge of Ninth Circuit ruled that Stafne (DeBotton's attorney) had no standing to sue senior judges directly pursuant to the Appointments Clause. The judge did not consider Stafne's Article III claims, but observed after briefing and argument that:

> At some point, the constitutionality of § 371[11] may need to be resolved. That may even occur in the appeal of either *BNYM* or *Burnside*. For the reasons already discussed, however, this separate action brought against the Federal Judge Defendants presents neither the proper place nor the proper time to do so.

Stafne v. Zilly, 337 F. Supp. 3d at 1098 (2018).

The Ninth Circuit affirmed, also without considering the language, history, and precedent

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[11] It will be recalled that 28 U.S.C.§294 (b) states:

> Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

applicable to Article III's Good Behavior Clause. *See Stafne v. Zilly*, 820 Fed. Appx. (2020).

More recently in response to DeBotton's assertion that none of the federal courts had previously considered the Article III issue being raised, Senior Adjudicator John C. Coughenouer stated in an Order dismissing the senior judge issue in *Stafne v. Burnside*:

> Plaintiff merely repeats arguments that have been rejected at least four times, two of which have been affirmed on appeal. (*See* Dkt. No. 37 (denying motion to recuse), *aff'd* Dkt. No. 38); *Hoang v. Bank of Am., N.A.*, 2021 WL 615299, 2021 U.S. Dist. LEXIS 29696 (W.D. Wash. 2021) (citing prior instances where Plaintiff's argument failed and rejecting it yet again).) ***Nonetheless, he argues that a manifest error has occurred because every court that he has presented with this argument has dodged it.*** (Dkt. No. 43 at 7.) He is wrong. Several courts have considered his theory on the merits, even if they apparently felt that dismantling it point by point was not worth the added wordcount. ***This Court agrees with that assessment but will devote the wordcount anyway, if only to put Plaintiff on notice that what may once have been "a nonfrivolous argument for extending, modifying, or reversing existing law" can no longer be considered one from this point forward. See Fed. R. Civ. P. 11(b)(2).***

Stafne v. Burnside, 2022 U.S. Dist. LEXIS 103433, *2-3 (2022).

And after devoting the time to do the word-count, this is what Senior Adjudicator Coughenouer concluded:

> … Section 294(b) provides that a senior judge may continue to perform such judicial duties "as he is willing and able to undertake, when designated and assigned." *The "willing and able" qualifier imposes an objective constraint on any designation and assignment decisions, and nothing in the statute authorizes a chief judge making such decisions to indefinitely block a senior judge from judicial duties. Nor does the statute prohibit that, but the lack of express authorization makes the threat of constructive removal so hypothetical as to not raise serious Article III concerns.* Properly construed, the assignment and designation provisions of § 294 describe a largely ministerial act rather than an exercise of broad discretion or a grant of authority to a judge that relinquished it upon electing senior status. *See Two Guys from Harrison-Allentown, Inc. v. McGinley*, 266 F.2d 427, 432 n.1 (3d Cir. 1959).

Emphasis added.

Stafne v. Burnside, supra., at 5-6.

As can be seen the district court holds that the statutory limitations which Congress has imposed on senior judges, like himself, are "so hypothetical *as to not raise serious Article III concerns.*" *Id.* But there are no facts in this decision or in any of the district

court's decisions regarding this issue -- or in the historical record generally -- which support this conclusion; which runs counter to the clear language of the statute, s*ee* 28 U.S.C. 28 §294 (b) and (e), and the historical interpretation of those statutes. *See* David R. Stras & Ryan W. Scott, Are Senior Judges Constitutional?" *supra*., at 483-4[12] and note 221 at 283. *See also* Clark L. Hildabrand, The Curiously Nonrandom Assignment of Sixth Circuit Senior Judges, 108 Ky. L. J.O. 1 (2019-2020).[13] *See also Steckel v. Lurie*, 185 F.2d 921 (6th Cir. 1950) ("According to its plain and unambiguous language, the section of the statute provides and means that no retired district judge shall perform judicial duties except when designated and assigned." *Id.* at 923.

If the district court's senior adjudicator's conclusion is based on facts within his own experience, he should say so.

But to his credit, Senior Adjudicator Coughenouer recognized the long-established premise

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[12] Judge Stras and Professor Stras observe that in the past senior judges have been refused designation and assignment for reasons unrelated to disability. "For example, Chief Justice Earl Warren refused to designate and assign Justice Charles Evans Whittaker to perform work on the lower courts, despite Justice Whittaker's willingness to undertake those duties. . . . Chief Justice Warren reportedly told a colleague, "Tell [Justice Whittaker] that I never could get him to make up his mind, and I'll be damned if I will let him do that to me again trying cases. So the answer is no."

[13] Accessible at:
https://www.kentuckylawjournal.org/online-originals/index.php/2019/06/20/the-curiously-nonrandom-assignment-of-sixth-circuit-senior-judges

of civilizations throughout history that the exercise of judicial power must be based on factual findings and legal conclusions related to those findings. Senior Adjudicator Lasnik has refused to perform this same judicial inquiry by conflating himself with the United States District Court for Western Washington; notwithstanding he is only a human judicial officer serving in that court presently as a result of his being designated and assigned to do so pursuant to 28 U.S.C §294.

Throughout this Nation's history, aggrieved parties have asserted their views as to the important political (and moral) issues of their time[14] by posing ***judicial inquiries*** to federal courts by seeking an adjudication as to how our Constitution applies to the facts of their specific cases. *See* e.g. *In re Summers*, 325 U.S. 561, 566-567 (1945) citing *Osborn v. President, Dirs. & Co. of Bank*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824). *See also Scott v. Sandford*, 60 U.S. (19 How.) 393, 402-03, 15 L.Ed. 691, 699-700 (1857). *Cf. Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *also Korematsu v. United States,* 584 F. Supp. 1406 (ND Cal. 1984).

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[14] DeBotton asserts the merits of his case, which assert, among other things, that both the state and federal governments have engaged in unconstitutional conduct intended to benefit the wealthy at the expense of those who are not, involve such issues. *See* James Madison, "The Union as a Safeguard Against Domestic Faction and Insurrection", Federalist Paper No. 10 (November 23, 1787. (Arguing that "Justice ought to hold the balance" between factions, including creditors and debtors.)
Accessible at:
https://avalon.law.yale.edu/18th_century/fed10.asp

Are judges' retirement accounts so important to the present judicial officers of Article III courts that they are not capable of performing the traditional judicial inquiries past generations have demanded for the legitimate exercise of judicial power?

Article III judicial power should be exercised pursuant to judicial inquiries.

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908). *See also D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476-79 (1983); *Roudebush v. Hartke*, 405 U.S. 15 (1972).

DeBotton asked the United States District Court to conduct a judicial inquiry with regard to whether his case should be remanded back to the state court because the senior adjudicator who had been assigned to adjudicate his case was a judicial officer *not holding the office of judge during his good behavior*. But Senior Adjudicator Lasnik and the senior adjudicators on the Ninth Circuit panel, unlike Senior Judge Coughenouer, have refused to make any factual findings and legal conclusions with regards to the meaning of the Good Behavior Clause, 28 U.S.C. §294 and whether they are inconsistent. Why?

It is DeBotton's position that reasonable people would conclude that these retired "senior status" judicial officials have not performed the judicial inquiries before their courts because they understand that fairly doing so may adversely affect their authority to

continue acting as if they hold the office of judge during good behavior.

And DeBotton also asserts most reasonable people would also conclude that is why the appeal in *Stafne v. Burnside* has not been scheduled for argument notwithstanding more than a year has passed since that appeal was filed.

DeBotton requests this Court order his Adversaries to respond to this Petition.

Because the issues in this Petition go to the core of this nation's exercise of judicial power through federal courts and their judicial officers, DeBotton urges this Court to order his adversaries to respond to this Petition.

POSTSCRIPT:

Just as this petition for a writ of certiorari was being finalized for delivery to the printer in the format required by this Court's rules, Senior Adjudicator Lasnik issued an order awarding sanctions against DeBotton's attorney and a non-existent law firm (Stafne Trumbull) for challenging the authority of "senior judges." A copy of that Order appears at the end of the Appendix, at Pet. App. 36a-46a. In that Order, Senior Adjudicator Lasnik appears to adopt Senior Adjudicator Coughenour's analysis that 28 U.S.C. §294 does not mean what its provisions so clearly state.

DeBotton asserts that this Petition anticipates and refutes the premises of Senior Adjudicator Lasnik's latest Order. DeBotton also contends this

latest Order provides another reason as to why this Court should grant review of DeBotton's Petition regarding the District Court's exercise of judicial power.

Conclusion.

After this Court's review of DeBotton's adversaries' responses to this Petition, the petition for a writ of certiorari should be granted. Alternatively, the decisions below should be summarily reversed and remanded back to the Court of Appeals with instructions to perform a traditional judicial inquiry with regard to whether judges who retire from the office of judge during good behavior and continue to serve as judicial officials pursuant to 28 U.S.C. § 294 comply with the Good Behavior Clause of Article III.

DATED this 8th day of November 2023.

Respectfully Submitted,

s/ Scott E. Stafne

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CERTIFICATION OF COUNSEL

I hereby certify that this petition for rehearing is restricted to the grounds as specified in Sup. Ct. R. 44.2 and has been presented in good faith and not for delay.

DATED this 8th day of November, 2023.

s/ Scott E. Stafne
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this petition for rehearing contains 7,587 words, excluding the parts that are exempted by the Rules.

DATED this 8th day of November, 2023.

s/ Scott E. Stafne
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