ORIGINAL

No. 23-86

In The

Supreme Court of the United States

CHRISTOPHER BAYRE CHAMBERLIN,

Petitioner,

vs.

HARTOG, BAER, & HAND, APC, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner, in pro per

QUESTIONS PRESENTED

In 2016, Christopher Chamberlin ("Petitioner") of New Jersey contacted Hartog, Baer & Hand, APC ("HBH"/"Defendants"/"Respondents") of California for legal representation in a Marin County probate case to remove the executor of his mother's estate (Michael J. Levin, "Levin") for fraud, waste, mismanagement, and bad faith. Petitioner conditioned the engagement upon no conflicts with Levin's influential and politically powerful cousins. (Pet. App., 120a, n.4). HBH falsely told Petitioner there were no conflicts. Once hired, HBH deliberately mishandled the case causing damage. (Pet. App., 86a). In 2018, Petitioner discovered HBH's conflict. In 2019, Petitioner, pro se, filed a diversity action[1] against HBH. The district court found HBH committed malpractice, but was not conflicted; and caused *no* damage beyond $2,831.91. (Pet. App., 74a-75a, 77a-81a, 126a-27a). The Ninth Circuit affirmed in a dismissive "***Oral Screening Memorandum***." (Pet. App., 2a-3a).

The questions presented are:

1. Whether HBH (concealing its family relationship with the adverse party in the underlying probate litigation) violated Petitioner's constitutional rights to freely associate and make contracts with conflict-free counsel, depriving Petitioner of due process and access to the courts?

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[1] Petitioner's Verified FAC (ECF-47) contains many of the undisputed facts repeated here, the rest were obtained in discovery and placed in the record.

QUESTIONS PRESENTED—Continued

2. Whether the Ninth Circuit's[2] pre-screening regime—vesting staff attorneys with exclusive authority to adjudicate "pro se" appeals—deprived Petitioner of his constitutional and federal statutory rights to appellate review by Article III judges, improperly favoring Respondents, requiring reversal?

3. Whether, due to egregious legal errors and due process violations, this case warrants summary reversal?

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[2] Detailed by Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, in a letter to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules (January 16, 2004) "Kozinski/Alito Letter" available at: https://www.uscourts.gov/sites/default/files/fr_import/03-AP-169.pdf

PARTIES TO THE PROCEEDING

Petitioner, Christopher Chamberlin, was a pro se Plaintiff in the District Court for the Northern District of California; and pro se Appellant in the United States Court of Appeals for the Ninth Circuit. Petitioner is an unrepresented "Cross-Claim" Defendant in the District Court for the Northern District of California.

Respondents, Hartog, Baer & Hand, APC; David W. Baer, Esq., John A. Hartog, Esq., and Margaret M. Hand, Esq., were represented Defendants in the District Court for the Northern District of California; and represented Respondents in the Court of Appeals, and are currently represented "Cross-Claimants" in the district court.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Northern District of California:

Chamberlin v. Hartog, Baer, Hand, et al., No. 19-CV-08243 (JCS), U.S. District Court for the Northern District of California, Order Granting Defendants' Motion to Dismiss Plaintiff's "Conflict of Interest" Counts I-IV (Sept. 1, 2020).

Chamberlin v. Hartog, Baer, Hand, et al., No. 19-CV-08243 (JCS), U.S. District Court for the Northern District of California, Order Denying Plaintiff's Motion to Enter Final Judgment or Certify Interlocutory Appeal on Plaintiff's "Conflict of Interest" Counts I-IV. (Oct. 9, 2020).

STATEMENT OF RELATED PROCEEDINGS—
Continued

Chamberlin v. Hartog, Baer, Hand, et al., No. 19-CV-08243 (JCS), U.S. District Court for the Northern District of California, Order Granting Chamberlin Partial Summary Judgment (finding malpractice for missing an appellate deadline, causing damages of $2,831.91); Striking HBH's Expert's Reports; and Dismissing HBH's "Account Stated" cross-claim; and Granting HBH Partial Summary Judgment on the Balance of Claims, including Conflict of Interest Counts Dismissed in 2020 (February 22, 2022).

Chamberlin v. Hartog, Baer, Hand, et al., No. 19-CV-08243 (JCS), U.S. District Court for the Northern District of California, Order Granting Petitioner's Motion for Leave to file a Motion for Reconsideration (March 7, 2022).

Chamberlin v. Hartog, Baer, Hand, et al., No. 19-CV-08243 (JCS), U.S. District Court for the Northern District of California, Order Denying Petitioner's Motion for Reconsideration (May 12, 2022).

Chamberlin v. Hartog, Baer, Hand, et al., No. 19-CV-08243 (JCS), U.S. District Court for the Northern District of California, Rule 54b Judgment (June 24, 2022).

Chamberlin v. Hartog, Baer, Hand, et al., No. 19-CV-08243 (JCS), U.S. District Court for the Northern District of California, Notice of Appeal (July 19, 2022).

STATEMENT OF RELATED PROCEEDINGS—
Continued

United States Court of Appeals for the Ninth Circuit:

Chamberlin v. Hartog, Baer, Hand, et al., No. 22-16049, U.S. Court of Appeals for the Ninth Circuit, "Oral Screening Memorandum." (Affirming, Feb. 24, 2023).

Chamberlin v. Hartog, Baer, Hand, et al., No. 22-16049, U.S. Court of Appeals for the Ninth Circuit, Order denying Chamberlin's Petition for Panel and En Banc Rehearing (May 11, 2023).

Chamberlin v. Hartog, Baer, Hand, et al., No. 22-16049, U.S. Court of Appeals for the Ninth Circuit, Order denying Petitioner's Motion to Stay Mandate pending filing of Petition for Writ of Certiorari (May 17, 2023).

Chamberlin v. Hartog, Baer, Hand, et al., No. 22-16049, U.S. Court of Appeals for the Ninth Circuit, Mandate with taxed costs ($1,974.60) awarded to HBH (May 25, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Chamberlin respectfully petitions for a writ of certiorari to review the "Oral Screening Memorandum" filed as a judgment for the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The district court's unpublished decisions (1 September 2020, 113a-131a; 22 February 2022, 32a-97a; and 12 May 2022, 9a-28a) are reproduced in Petitioner's Appendix and incorporated in the district court's Rule 54b Judgment reproduced in Petitioner's Appendix (5a-8a). The "Oral Screening Memorandum" of the Ninth Circuit is unpublished and reproduced in Petitioner's Appendix (1a-4a). The Ninth Circuit's order denying rehearing is reproduced in Petitioner's Appendix (133a-134a). The Ninth Circuit's order denying a stay pending Petition for Writ of Certiorari is reproduced in Petitioner's Appendix (132a). On 25 May 2023, the Ninth Circuit's Mandate awarded $1,974.60 taxed costs to respondent, HBH.

JURISDICTION

On 11 May 2023, the Ninth Circuit Court of Appeals denied a timely Petition for Panel and En Banc Rehearing (Pet. App., 133a-134a), and issued its mandate on 25 May 2023. This case arises under the First, Fifth, and Fourteenth Amendments to—and Articles

III and IV, § 2 of—the United States Constitution; 28 U.S.C. §§ 1291; 1654; 2072, and Fed. R. App. P. 3(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **U.S. Constitution, Article III, § 1**, "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."

2. **U.S. Constitution, Article III, § 2**, Justiciability; Clause 1 Cases or Controversies, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . ;—to Controversies,—between Citizens of different States,"

3. **U.S. Constitution, Article IV, § 2**, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

4. **The First Amendment to the U.S. Constitution**, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance."

5. **The Fifth Amendment to the U.S. Constitution**, "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

6. **Fourteenth Amendment, § 1 to the U.S. Constitution**, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

7. **28 U.S. Code § 1291**, "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

8. **28 U.S. Code § 1654**, "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." (Judiciary Act of 1789, 1 Stat. 73, SEC. 35.)

9. **28 U.S.C. § 2072**

   (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

   (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

10. **28 U.S.C. App., Fed. R. App. P. 3(a)(1)**, "An appeal permitted by law *as of right* from a district

court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." (Emphasis supplied.)

RULE 29.4(b) STATEMENT

In this case, the constitutionality of an Act of Congress is drawn into question[3]—by the Ninth Circuit's denial of Petitioner's right to represent himself while obtaining Article III review of a district court judgment (28 U.S. Code § 1291; 28 U.S. Code § 1654 [Judiciary Act of 1789, 1 Stat. 73, SEC. 35]; and 28 USC App, Fed. R. App. P. 3(a)(1)).

As neither the United States nor any federal department, office, agency, officer, or employee is a party, 28 U.S.C. § 2403(a) may apply. This document is hereby served on the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

Petitioner did not discover the Ninth Circuit's unconstitutional "prescreening" regime until May 2023. The Court of Appeals did not certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. (Rule 14.1(e)(v).)

[3] See *Peruta v. Cnty. of San Diego*, 771 F.3d 570, 575 (9th Cir. 2014), reh'g granted, 824 F.3d 919 (9th Cir. 2016) (quoting *United States v. Lynch*, 137 U.S. 280, 285 (1890)).

INTRODUCTION

This case concerns cornerstone rights in the American adversarial system of justice: access to the courts (by conflict-free counsel); and right to Article III appellate review of an erroneous district court judgment in a diversity action filed by a self-represented litigant. First, despite an undisputed, yet concealed family relationship with the opposing party in the underlying Marin County probate action—the district court erroneously agreed with Respondents that "Levin" was too common a surname for a conflict check and that Defendant Hartog's Ambassador sister, married to Levin's "sibling-like" first cousin, Daniel Levin[4], did not warrant disclosure to Petitioner before retaining HBH to remove Levin for fraud, waste, mismanagement, and bad faith in the administration of Petitioner's mother's estate. (Pet. App., 127a-128a). Conflicted, HBH deprived Petitioner of due process[5] and access to the court[6].

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[4] Due to illness, Levin's father declined the federal judgeship that Rep. John Dingell, Sr. secured for him; suggesting that brother, Theodore Levin (Daniel's father, Levin's uncle), get the nomination instead. See, Theodore Levin U.S. Courthouse https://www.gsa.gov/about-us/regions/region-5-great-lakes/buildings-and-facilities/michigan/detroit-levin-ct.

[5] A Fourteenth Amendment procedural due process violation occurs when a person is denied the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[6] HBH: missed an appellate deadline, despite knowing it had "60 days" and if missed, it had to "call the carrier," causing an "extraordinarily bad ruling" to become final; failed to obtain discovery; failed to review its predecessor's file for evidence; and on

Second, exercising his constitutional rights[7] to represent himself, Petitioner filed[8] a malpractice action against his former lawyers, HBH, in the Northern District of California. Petitioner timely appealed a Rule 54b Judgment incorporating the district court's multiple erroneous legal rulings: dismissing Petitioner's conflict of interest counts under Rule 12(b)(6) and granting Rule 56 partial summary judgment to Petitioner on his appellate legal malpractice claim; but denying most damages, despite Petitioner's unopposed expert's opinion that HBH's failure to file a timely appeal of an "extraordinarily bad" demurrer order lost Petitioner a viable cause of action (to remove Levin as executor) causing damages. (Pet. App., 54a-56a).

A month after Petitioner filed his appellate reply brief, the Ninth Circuit filed an affirmance ("Oral Screening Memorandum") lacking analysis[9]. (Pet. App., 1a-5a). Petitioner recently discovered that his appeal was

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29 July 2016 (days after accepting Petitioner's $25,000 retainer), fabricated discovery deadlines to support HBH's position that it was too late to seek discovery from Levin. (ECF-105-1-pp.3-4.).

[7] 28 U.S. Code § 1654; Judiciary Act of 1789, 1 Stat. 73, SEC. 35; U.S. Constitution, Article III, § 2, U.S. Constitution, Article IV, § 2.

[8] Before mandatory retirement in April 2019, Petitioner was a senior Boeing 777 captain for United Airlines based in Newark, precluding self-representation in a Marin County, California probate case.

[9] It "read like [it was] written by someone a year out of law school with no adult supervision." Alex Kozinski, The Appearance of Propriety, LEGAL AFFAIRS, Jan.-Feb. 2005, at 20 ["Kozinski, LEGAL AFFAIRS"] http://alex.kozinski.com/articles/The_Appearance_of_Propriety.pdf.

decided by staff attorneys in a regime that Judge Kozinski described in a letter to *now* Associate Justice Alito:

> . . . these [unpublished] dispositions were drafted by our central staff and presented to a panel of three judges in camera, with an average of five or ten minutes devoted to each case. During a two- or three-day monthly session, a panel of three judges may issue 100 to 150 such rulings.

[Kozinski/Alito Letter, *supra*, p.5]

Justice Alito responded, "If these comments are accurate, the described practices should be changed." Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 Wm. & Mary Bill Rts. J. 955, 968 (2009), quoting Samuel A. Alito, *How Did We Get Here? Where Are We Going?*, Keynote Address at the Washington and Lee University Law Review Symposium: *Have We Ceased to be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions* (Mar. 18, 2005).

The handling of Petitioner's appeal (prescreened and decided by court staff) presents several Constitutional violations including unequal treatment of similarly situated parties. Petitioner did not waive his right to Article III appellate review of an erroneous district court decision by exercising his right to self-representation. This prescreening regime violated

Petitioner's right to procedural and substantive due process, equal protection, and discriminated against him for appearing pro se. Civil appeals in which all parties are represented are not disposed of by Oral Screening Memoranda.

Judge Kozinski wrote that even if the prescreened appeal were decided by staff attorneys, they were careful to correct errors—not true in this case. Ninth Circuit staff attorneys affirmed an erroneous judgment based upon misreading a California statute and other enumerated legal errors[10]. Petitioner contends the Ninth Circuit prescreening regime is unconstitutional and this Court should, as Justice Alito stated, change it, starting with reversal here.

STATEMENT OF THE CASE

A. Probate Case in Marin County, California

This petition arises from an underlying Marin County probate case concerning the estate of Petitioner's mother, Jane, who died on 21 June 2015. Thereafter, Jane's executor, Levin, furtively schemed to sell Jane's houseboat—the estate's only valuable asset—to

[10] Misreading the California Court of Appeal, finding the demurrer order was appealable (Pet. App., 49a-50a)—*not* entitled to deference, let alone, "far more deferential review under an abuse-of-discretion standard" (Pet. App., 22a); and, astonishingly, relying upon [as "evidence" (Pet. App., 24a)] Levin's sham hearsay affidavit (subject to a pending a motion to strike), *that Levin wrote* to support his demurrer—which tests pleadings; not proofs.

the upstairs tenant, Laurel Braitman ("Laurel") for $360,000, despite a 2015 certified marine survey giving Jane's houseboat a $850,000[11] market value and $625,000 insurance value. (The surveyor gave Jane's houseboat a market value of $850,000, then deducted $25,000, for lacking a gas connection, which it had. The district court refers to the erroneous $825,000 figure.) (Pet. App., 38a). Levin arranged for the Marin Probate Referee, Andrew Rask ("Rask"), to prepare a $360,000[12] appraisal to match Laurel's purchase price and insulate Levin when Petitioner eventually discovered the below-market houseboat[13] sale. (*Id.*)

When, months later, Laurel backed out, Levin provided Petitioner with a copy of Rask's $360,000 probate appraisal. (Pet. App., 47a). Unable to resolve the $490,000 difference in values between the Rask appraisal ($360,000) and the certified marine survey

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[11] Jane's estate secretly ordered and paid for the 2015 certified marine survey to facilitate Laurel's Bank of Marin loan application. (Pet. App., 38a). Levin lied under oath, falsely stating that Rask, *appointed to the case in Jan. 2016*, requested the *2015* marine survey.

[12] Petitioner's discovery revealed that Levin secretly solicited a new "date of death" appraisal from Mr. Gary Starr, one of three investors who purchased Jane's houseboat in November 2016 for $484,250. Starr copied the 2015 certified marine survey ($625,000 insurance/$850,000 market value) and provided a *new* date of death value of $504,000. (Pet. App., 46a). An email obtained under federal subpoena revealed that as of *21 August 2015*, Jane's houseboat was worth "550-700" per a "second appraiser." (Pet. App., 36a).

[13] Under California law, a houseboat is personal property; a sale does not require court approval or advance notice to beneficiaries.

($850,000), Petitioner hired Marin County attorney, Lynn McCabe. Levin filed a preemptive petition for instructions, served late on McCabe. On 24 April 2016, Petitioner learned of the recently scuttled below market sale to Laurel. Unable to resolve the valuation issues, McCabe filed Petitioner's opposition and cross-petition to: prepare Jane's houseboat for sale (with Petitioner advancing funds); list with a neutral broker (not Levin's wife's colleague); and remove executor Levin under Cal. Prob. Code § 8502 for mismanagement, waste, fraud, and bad faith. Levin demurred.

The case was adjourned from May to August 2016 to accommodate the sick leave of Judge Roy O. Chernus, a civil judge selected[14] to hear Jane's probate case. By July 2016, McCabe agreed that Petitioner needed new counsel. Petitioner contacted HBH for a legal consultation to prosecute his case against Levin on the condition that HBH had no conflicts with Levin, or his influential sibling-like cousins (including the former employer of Valerie Jarett and President Obama's friend, Daniel Levin, and his wife, Ambassador Fay Levin).

After assuring Petitioner there were no conflicts, on 28 July 2016, Petitioner hired HBH. During argument on Levin's demurrer, Judge Chernus inexplicably threatened[15] Petitioner with sanctions were he to

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[14] In September 2015, Levin arranged for Judge Chernus to hear Jane's estate case. Petitioner discovered this in November 2016.

[15] After this demurrer ruling, Levin's lawyer wrote to HBH: "Judge Chernus, not the Executor, raised the question of Sanctions

persist with a challenge to Rask's $360,000 appraisal. Judge Chernus sustained Levin's demurrer *without leave to amend*[16], denying Petitioner's requested relief. Defendant Baer, not present, described this ruling as "extraordinarily bad." On 30 August 2016, Petitioner instructed HBH to appeal. In September 2016, HBH advised Petitioner to agree to list Jane's houseboat "as is" for $499,000[17]. HBH wrote that agreeing to list *did not waive* Petitioner's appellate rights. (Pet. App., 46a). From 2016 to April 2017, HBH issued written assurances that Petitioner's appeal was secure and would be filed at the end of the probate case. (Pet. App., 44a-45a). In May 2017, Levin moved before the Court of Appeal to dismiss Petitioner's appeal of the demurrer order (dated 6 September 2016) for being untimely. The Court of Appeal found that the demurrer order was appealable and granted Levin's motion to dismiss on 19 July 2017. (Pet. App., 49a).

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on [Petitioner's] Petition for a new Probate Appraisal. That question was raised sua sponte by the Judge, *as you would heard had you been there. You can check with Ms. Woods.*" (ECF-47-p.26, emphasis supplied.).

[16] Julie R. Woods, the inexperienced HBH associate representing Petitioner before Judge Chernus testified that her response to his ruling was: " . . . are you kidding me. That's weird."

[17] HBH promised Petitioner that allowing Levin to sell Jane's houseboat for $484,250, despite an "as is" listing for $499,000, would not affect Petitioner's appeal. (Pet. App., 46a). Investor-buyers flipped Jane's houseboat for $875,000. (Pet. App., 47a).

B. Hartog, Baer, Hand Malpractice

HBH failed to conduct discovery[18] and failed to review McCabe's file containing copies of probate court pleadings (never served on Petitioner, nor in his possession) including Levin's admission of an estate debt to Petitioner, that Levin later refused to fully reimburse. (Pet. App., 38a). HBH failed to file a timely appeal of the 2016 demurrer order, causing its dismissal on 19 July 2017, foreclosing appellate review of Petitioner's viable cause of action to remove executor Levin for cause. Levin remained in charge of Jane's estate causing damages as outlined in Petitioner's expert's report, discovery, and verified pleadings.

C. Concealed Conflict of Interest & Federal Case

On 21 March 2018, Petitioner discovered HBH's deceit: the *concealed*[19], undisputed fact that Daniel Levin was Defendants Hartog's and Hand's brother-in-law, and that Ambassador Fay Levin was Defendant John Hartog's sister. In July 2018, Petitioner learned that Jane's probate case was discussed at Levin events

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[18] The appendix filed in the Ninth Circuit was nearly 7,000 pages, approximately a third was discovery that Petitioner obtained in the federal case. The Ninth Circuit awarded $1,974.60 taxed costs to HBH.

[19] Ambassador Fay Levin and her husband, "Dan" Levin, were identified as Levin's family members in an email to HBH that was pasted into Petitioner's Verified FAC. (ECF-47-pp.55-56.) In 2018, Petitioner discovered that Fay was Hartog's sister/ Hand's sister-in-law and Dan Levin was their brother-in-law. (ECF-47-pp.35-37.).

in 2016, with Hartog's and Hand's family members present.

On 18 December 2019, Petitioner filed a verified complaint against HBH in the Northern District of California. By January 2020, pursuant to 28 U.S.C. § 636(c)(1), both parties consented to magistrate judge jurisdiction. On 29 May 2020, Petitioner, pro se, filed a Verified First Amended Complaint ("FAC") with six counts. Petitioner sought a declaration that the engagement agreement with HBH was void for concealed conflicts of interest and sought damages caused by Respondents' malice and malpractice[20]. HBH filed fee collection "cross-claims" seeking $245,920.31 (Petitioner paid $170,286.34). Plaintiff was damaged by more than $300,000, excluding fees paid to Respondents.

In 2022, the district court struck[21] HBH's expert's reports and found that HBH committed malpractice by failing to timely appeal the demurrer order, causing its dismissal and awarded Petitioner damages (Levin's $2,831.91 "costs" to dismiss HBH's untimely appeal that Judge Chernus ordered Petitioner to pay). (Pet. App., 61a). Ignoring well-settled California authority[22] that a judge, *not a jury*, decides whether a failure to file a timely appeal caused damage, the district court

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[20] See *supra* note 6.

[21] Except for a minor point regarding how Petitioner's case might have differed from another demurer case.

[22] As "a purely legal issue," under *Pete v. Henderson* (1954) 124 Cal.App.2d 487, and its progeny, ***the judge***—not a jury—***decides causation*** in appellate malpractice cases, as if it were the Court of Appeal.

granted summary judgment to HBH, erroneously finding that *a jury* could not find in Petitioner's favor. (Pet. App., 13a, 15a, 20a, 25a).

The district court granted Petitioner's motion for judgment on HBH's "account stated" cross-claim, but denied judgment on the remaining three "fee collection" cross-claims. The district court entered a Rule 54b Judgment incorporating its prior rulings and staying the remaining cross-claims pending the Ninth Circuit appeal. HBH's cross-claims for fees allegedly owed are pending. Petitioner will request a stay should HBH pursue these cross-claims in a case where malpractice was found.

D. The Ninth Circuit's Unconstitutional Pro Se Prescreening Regime

Petitioner filed a timely opening brief, arguing ten points of legal error. HBH sought and received an extension to file its responsive brief by 28 December 2022. Petitioner's reply brief was timely filed in January 2023. Petitioner expected a decision from a panel of Article III judges within three months to a year[23]. In February 2023, Petitioner received a dismissive "Oral Screening Memorandum" affirming the district court. (Pet. App., 1a-4a). In May 2023, Petitioner learned that his "pro se" appeal was prescreened and decided by

[23] https://www.ca9.uscourts.gov/general/faq/.

staff attorneys in the unconstitutional regime described by Judge Kozinski[24] (and many others[25]).

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

A. Access to the Courts Requires Conflict-Free Counsel, Unrelated to the Opposing Party (Unless Disclosed and Waived)

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other

[24] Kozinski/Alito Letter https://www.uscourts.gov/sites/default/files/fr_import/03-AP-169.pdf; Kozinski/LEGAL AFFAIRS http://alex.kozinski.com/articles/The_Appearance_of_Propriety.pdf.

[25] William M. Richman and William L. Reynolds, *Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, Cornell Law Review, Vol. 81, p. 273 (1996); Richard B. Cappalli, Letter to Advisory Committee on Appellate Rules (Feb. 4, 2004); Washington and Lee Law Review Fall, 2005 *Symposium: Have We Ceased to Be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions*, 62 Wash. & Lee L. Rev. 1553 (2005); Bryan Wright, *But What Will They Do Without Unpublished Opinions?: Some Alternatives for Dealing with the Ninth Circuit's Massive Caseload Post F.R.A.P. 32.1*, 7 Nev. L.J. 239 (2006); Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 Wm. & Mary Bill Rts. J. 955, 968 (2009); Todd C. Peppers, Michael W. Giles, and Bridget Tainer-Parkins, *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage"*, 98 Marq. L. Rev. 313 (2014).

> rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship,

Chambers v. Baltimore & Ohio R. Co., 207 U.S. 142, 148 (1907).

Yet, Judge Learned Hand remarked, "[A]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985), citations omitted. When "dreaded" litigation is unavoidable, a citizen's access to the civil courts is, "an attribute of our system of justice in which we ought to take pride." *Zauderer*, *supra*, p. 643.

For the adversarial system to function, however, the citizen, if represented, must have loyal, conflict-free counsel who serves as his agent. See *Comm'r of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005) (describing the attorney-client relationship as "a quintessential principal-agent relationship"). The lawyer owes his client undivided loyalty. See Restatement (Third) of Agency § 8.01 (Am. Law Inst. 2006). The duty of loyalty is crucial to representation and is undermined when lawyers take a case to protect the adversary by ignoring basic client duties (getting discovery; making deadlines; reviewing the predecessor's file; making sure there's a trial)—none of which HBH did for Petitioner.

In this case, in one sentence, the "Oral Screening Memorandum" affirmed the district court's ruling that HBH's failure to disclose a family relation to the

opposing party was not a conflict of interest. (Pet. App., 3a). The memo failed to address the district court's rationale, e.g., that, as Respondents argued, "Levin" was too common a name for a conflict check; that the relationship (Ambassador sister married to Levin's sibling-like first cousin) did not require disclosure; and the district court's *erroneous* finding that HBH was unaware[26] of the conflict. (Pet. App., 104a-105a, 112a, 113a-131a, 127a, 137a).

Cuyler v. Sullivan, 446 U.S. 335 (1980) set the standard for conflict-free counsel in criminal matters. No one questions a criminal defendant's ability to secure the best unconflicted, loyal legal representation that his circumstances permit. See *Mickens v. Taylor*, 535 U.S. 162, 170-75 (2002). Parties to other civil litigation (e.g., arbitrations and bankruptcies) are protected by clear conflict of interest rules[27]. It follows that

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[26] The district court denied Petitioner discovery of contacts between HBH and the Levins. Petitioner appealed this ruling: "Issue III: Did the district court err when it prohibited Plaintiff from pursuing discovery concerning Defendants' conflicts of interest ("COI") with the Levin family, thus preventing Chamberlin from prosecuting his affirmative defenses against Defendants' cross-claims for allegedly owed legal fees and costs."

[27] Bankruptcy professionals must adhere to strict conflict standards under 11 U.S.C. § 327. Arbitrators must reveal conflicts to parties who hire them. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968). California authority requires lawyers (not their clients) to screen for conflicts. *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 86 Cal.Rptr.2d 20, 29. California clients may waive conflicts, but only after disclosure and a knowing and voluntary waiver. See Rule.3-310(B)1-3 and *Discussion*; Rule 3-500; Cal. Bus. & Prof.

an individual facing a civil dispute has a fundamental right to secure unconflicted counsel of his choice, within his price range. Procedural due process requires, at a minimum, that a person forced to litigate be given a meaningful opportunity to participate in the adversarial system, to protect his property or privacy, or whatever interest is at stake. That participation requires one's lawyer—an officer of the court, bound to the administration of justice, under color of law by State statute, regulation, and custom—be free from conflict, unless that conflict is disclosed and waived.

After hiring Respondents—with a concealed conflict—they were *the only means*[28] of Petitioner's access to California's probate court. "State action" is not required for judicial recognition and protection of a fundamental right—access to the courts, which is assured by the First Amendment. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). HBH's conflicted representation and misconduct deprived Petitioner of this essential American right.

Lawyers who take cases with undisclosed personal conflicts of interest violate the foundational tenets of agency law and ethics rules, warranting judicial censure and disgorgement of fees wrongly collected. Petitioner has not found one case condoning deceit (concealing a family relation to the adverse party) in response to a potential client's hiring condition that

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Code, § 6068(m); and Restatement (Third) Law Governing Lawyers, § 125, com. c, illus. 1 and 2 (Am. Law Inst. 2000).

[28] See *supra* note 8.

there be no conflicts with the adverse party and his powerful sibling-like cousins. HBH purposely gutted[29] Petitioner's case and caused damages. The federal malpractice/conflict of interest litigation would not have been filed but for HBH's wrongdoing and deception (Ambassador Fay Levin and her husband, Daniel were named as Levin's family members *in an email to HBH*[30]).

The district court and Ninth Circuit staff attorneys endorsed HBH's deceit, setting an appalling standard and depriving Petitioner of his constitutional rights to contract and associate with only those lawyers *not related* to Levin—the opposing party and faithless fiduciary in the underlying probate litigation. This Court can correct this error by setting a simple standard: no name is too common for a conflict check and any family relations with the adverse party must be disclosed.

B. Declare the Ninth Circuit's Pro Se Prescreening Regime Unconstitutional

Exercising the federal right of self-representation does not revoke one's right under 28 U.S.C § 1291 to appellate review by Article III judges, nominated by the President and confirmed by the Senate. "We have one set laws in this country and they apply to everyone[31]."

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[29] HBH "pulled its punches." *People v. Cox* (2003) 30 Cal.4th 916, 948-949.

[30] See note 19, *supra*.

[31] Statement of Special Counsel Jack Smith, 9 June 2023.

Application of this prescreening regime; however, unconstitutionally separates—and targets—those who exercise their rights not to hire counsel, from those who do. This prescreening regime relegates unrepresented litigants into a caste of "have-nots[32]," denying them constitutionally mandated Article III appellate review. (Contrary to Justice Harlan's dissent, "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).) Separated from appeals where all parties are represented, appeals in which one party is "pro se" become "untouchables" for Ninth Circuit Article III judges.

Judge Kozinski admitted the "pressure to give away essential pieces" of his [judges's] job and described how staff attorneys "process"—and decide—"small case" appeals in this prescreening regime:

> . . . the circuit shares approximately 70 staff attorneys, who process roughly 40 percent of the cases in which we issue a merits ruling. When I say process, I mean that they read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call "oral screening"-oral, because the judges don't see the briefs in advance, and because they generally rely on the staff attorney's oral description of the case in

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[32] Penelope Pether, *Constitutional Solipsism, supra*, p. 957 fn6, p.963, p.1033; Joan M. Shaughnessy, *Commentary: Unpublication and the Judicial Concept of Audience*, 62 Wash. & Lee L. Rev. 1597, 1604 (2005).

> deciding whether to sign on to the proposed disposition. After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible.

Kozinski/LEGAL AFFAIRS, pp.19-20

Judge Kozinski explained that these dispositions are, "the bare result as explicated by some law clerk or staff attorney" and to cite them as something more, "is a particularly subtle and insidious form of fraud." [Kozinski/Alito letter p. 7] Petitioner contends that this prescreening regime is an "insidious form of fraud" on Petitioner and other uncounseled litigants violating their right to a substantive review of a district court's judgment for faithfulness to the facts and the mandates of applicable statutes and constitutional principles.

C. Summary Disposition

Given the clarity of the record and the sloppy, simplistic Oral Screening Memorandum, summary reversal will restore the lawful administration of justice in this case.

II. THE CONSTITUTION REQUIRES FAIR ACCESS TO CIVIL COURTS

A. Right to Independent, Conflict-Free Counsel, a Condition Precedent for Access to the Courts

The core issue is a civil litigant's right to hire conflict-free counsel for meaningful access to the courts. The privilege of paying for unconflicted private counsel seems self-evident[33]. The "right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client," *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948). Plus, "the right to conflict-free counsel is just as firmly protected by the Constitution as the defendant's right of self-representation recognized in *Faretta v. California*, 422 U.S. 806 (1975)." *Mickens v. Taylor*, 535 U.S. 162, 183 n.6, 184 n. 7 (2002).

HBH's conflicting obligations, i.e., ostensibly to Petitioner, on the one hand; and to opposing party Levin (as a family favor to a sister and brother-in-law), on the other, required disclosure to Petitioner, providing him with the right to decline hiring HBH. (Pet. App., 119a-120a). Consider Justice Story's comment in 1824:

> . . . When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive

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[33] A criminal defendant has the right to secure the best assistance that his "circumstances permit." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 155 (2006) (J. ALITO, dissenting).

> devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.

Williams v. Reed, 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me. 1824).

In this case, the "engagement" is the personal relationship with a sister married into the Levin family and reaping the rewards: Ambassadorship, power, influence. This Court has long recognized that the duty of loyalty is "perhaps the most basic of counsel's duties" and encompasses "a duty to avoid conflicts of interest." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). It is well settled that the *Cuyler/Strickland* analysis applies in criminal cases where the asserted conflict is between the interests of the client and those of his attorney. Under the Due Process clauses of the 5th and 14th Amendments, the same rule should be established for clients in civil litigation in state or federal courts.

B. Access to the Courts

The right of access to the courts is part of the constitutional right to petition. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Justice Souter wrote that "judicial access" is "grounded" in the Constitution through the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Christopher v. Harbury*, 536 U.S. 403,

415 n. 12, (2002) (collecting cases). HBH failed to conduct discovery; failed to read the file for evidence; failed to secure a trial; and caused the dismissal of the demurrer appeal costing Petitioner a viable cause of action to remove executor Levin, for fraud, waste, mismanagement, and bad faith. Twenty months after hiring HBH, Petitioner discovered that Defendants Hartog and Hand were Levin's relatives. Petitioner contends that HBH's deceit and Levin-loyalty, unconstitutionally impeded Petitioner's access to the courts, warranting reversal.

C. Right to Association and Contract

Just as a criminal defendant with resources should be afforded a fair opportunity to secure counsel of his own choice (*Powell v. Alabama*, 287 U.S. 45, 53 (1932)), Petitioner claims a fundamental right to privately contract and associate with unconflicted counsel in a civil matter. HBH denied Petitioner meaningful access to the California probate court by concealing its Levin family relations (a sister and brother-in law; and a niece and nephew raised in a Levin home from 1995, until their adulthood) and failing to provide professional services one would expect from a law firm specializing in trusts and estates.

D. Ninth Circuit now Split with other Circuits

The Ninth Circuit's summary affirmance of the district court's judgment (that there was no conflict of

interest, despite HBH's concealed family relation to the opposing party), creates a split with California conflicts cases[34] and other circuits following U.S. Supreme Court rulings requiring conflict disclosure in criminal and bankruptcy cases and arbitrations.

E. Preserving the Integrity of the System

"[O]ur adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest," and this unfettered advocacy is a "fundamental principle." *In re Lee G.*, 1 Cal.App.4th 17, 26 (1991). Affirming the district court's judgment—that no conflict of interest existed despite the unrefuted fact of kinship between Defendants Hand and Hartog and opposing party Levin—makes a mockery of the concept of loyal, independent counsel. In this case, HBH stood by as kin, executor Levin, defrauded Petitioner and his mother's estate. Declaring a simple disclosure rule would prevent future similar miscarriages of justice.

F. A Simple Rule: Disclosure

Failing to reveal a family relation to an adverse party creates an impermissible conflict that infects the

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[34] See *Knutson v. Foster* (2018) 25 Cal.App.5th 1075; *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59; and *La Serena Properties, LLC v. Weisbach* (2010) 186 Cal.App.4th 893 (arbitrator failed to disclose conflict of interest—a romantic relationship with the sibling of an attorney representing the party opposing plaintiffs—award was vacated, but immunity upheld).

entire process. Constructive knowledge of a conflict is sufficient to require disclosure. *Schmitz v. Zilveti*, 20 F.3d 1043, 1044, 1048-50 (9th Cir. 1994) quoting *In re Siegal*, 153 N.Y.S.2d 673 (Sup.Ct.1956). The opposing party's surname "LEVIN"—the same as sister Fay's—was enough for "constructive," if not actual, knowledge of a potential conflict warranting disclosure to Petitioner. Rule 3-310 of the California Rules of Professional Conduct[35] and discussion require disclosure of potential and actual conflicts (including personal interests) affording the litigant an opportunity to waive them with informed consent. HBH failed to disclose its Levin relationship. The conflicted representation caused Petitioner damages and subsequent litigation. "Levin" is not too common a name for a conflict check. To protect the integrity of the courts, the parties, and the process, Petitioner urges the Court to set a disclosure standard, including all family relations to the adverse party in a civil action.

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[35] See CRPC 1-100(A); See also *People v. Donaldson* (2001) 93 Cal.App.4th 916, 928; accord, *Doe v. Yim* (2020) 55 Cal.App.5th 573, 582, fn. 3; *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1210.

III. THE NINTH CIRCUIT'S PRO SE PRESCREENING REGIME IS UNCONSTITUTIONAL

A. The Ninth Circuit's Prescreening Regime Wrongfully Targets Pro Se Litigants and is Ultra Vires

Both represented and unrepresented litigants have rights to judicial review. Yet, this case reveals that Ninth Circuit staff attorneys—not judges—determine pro se[36] outcomes. Crucially, Petitioner consented to magistrate judge jurisdiction premised upon the availability of Article III appellate review. As Justice Thomas stated, "when private rights[37] are at stake, full Article III adjudication is likely required." *Axon Enterprise Inc. v. FTC*, 143 S. Ct. 890, 906 (2023), J. Thomas concurrence. Petitioner, unrepresented, was wrongfully denied that right to review.

B. The Ninth Circuit's prescreening regime violates the Equal Protection and Due Process Clauses of the Fifth Amendment and the Privileges and Immunities Clause of the U.S. Constitution.

"No person shall . . . be deprived of life, liberty, or property, without due process of law" which includes a

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[36] Judges, lawyers, and court staff treat pro se litigants negatively, regardless of case merit. See Victor D. Quintanilla, *Doing Unrepresented Status: The Social Construction and Production of Pro Se Persons*, 69 Depaul L. Rev. 543, 544-45 (2020).

[37] Private rights encompass "the three 'absolute' rights,' life, liberty, and property". *Axon Enterprise Inc.*, *supra*, p. 906.

right to "equal protection." See *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). The ideal of equality before the law characterizes our institutions. See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199. June 29, 2023, citations omitted.

A civil litigant in the federal courts must be treated as an individual—not the unreasonable and arbitrary basis of his pro se status. Petitioner's appeal (against HBH represented by a state-certified malpractice specialist) was decided by staff attorneys; yet, a recent diversity appeal involving a "routine contract dispute" with represented parties received proper Article III appellate review[38]. At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a class, like "pro se" litigants. No constitutional basis exists for disparate treatment of individuals based upon a "pro se" classification. "[T]he Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping" pro se prescreening regime. *Marshall v. Marshall*, 547 U.S. 293, 299-300 (2006).

Similarly, the Privileges and Immunities Clause, Art. IV, § 2, protects Petitioner's fundamental right[39] to

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[38] *Silk v. Bond*, 65 F.4th 445 (9th Cir. 2023).

[39] "The right of a citizen of one state; to institute and maintain actions of any kind in the courts of the state; . . . These, and many others which might be mentioned, are, strictly speaking, privileges and immunities." *Corfield v. Coryell*, 6 F. Cas. 546, 551-552 (No. 3,230) (CC ED Pa. 1823).

sue, which has, at all times, been enjoyed by the citizens of the several states. Depriving Petitioner of his fundamental right to review by Article III judges—instead, allowing staff attorneys to affirm an erroneous judgment—was wrong and unduly favored the represented Respondents, beneficiaries of the "faux" appeal. Judgment in this case should be reversed and the ultra vires prescreening regime terminated.

C. The Ninth Circuit's Prescreening Regime Turns an Appeal of Right into an Unconstitutional Petition for Certiorari

Unrepresented parties no longer have a right to review in the Ninth Circuit[40]. Instead, they are unknowing participants in a lottery for a discretionary petition for writ of certiorari—decided by staff attorneys. Unlike the Supreme Court, which has statutory authority to decide which cases it wishes to hear and decide, the U.S. Courts of Appeal *must* review judgments of the district courts.

Courts are faithful agents. They do not limit constitutional rights. Yet, they do strike laws (and ultra vires regimes) when they violate the U.S. Constitution or federal statutes. "It is emphatically the province and duty of the judicial department to say what the law is."

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[40] In 2023, the Ninth Circuit—the nation's largest—exercised Article III "judicial power" over territory with a population of 61.7 million, plus "out-of-state" litigants (like Petitioner) with cases against defendants domiciled in Ninth Circuit states and territories.

Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 177 (1803). The judicial power of the United States described in Article III of the Constitution does not permit the substitution of judges for para-judicial staff in the appellate process. While staff may assist, they may not decide.

No federal laws, rules, or statutes[41] warned Petitioner that the Ninth Circuit would deprive him of the fundamental right to judicial review of the district court judgment rendered in his case. The Rules Enabling Act, 28 U.S.C. § 2072, authorizes the Court to "prescribe general rules of practice and procedure and rules of evidence for cases" in federal courts; but they may not "abridge, enlarge or modify any substantive right." In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), this Court observed that federal courts, in adopting rules, were not free to extend or restrict the jurisdiction conferred by a statute. *Id.* at 10. In *Stern v. Marshall*, 564 U.S. 462 (2011), this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication. See also *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992). Analogously, here, the Ninth Circuit's

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[41] Constitutionally legitimate prescreening procedures exist. Under the Prison Litigation Reform Act (PLRA), before filing an action against the government or granting in forma pauperis (IFP) status, the district court must prescreen a prisoner's pleading and dismiss it if frivolous, malicious, or fails to state a claim. 28 U.S.C. § 1915A and § 28 U.S.C. § 1915(e)(2)(B)(i-iii). No such law provides for the Ninth Circuit's ultra vires prescreening regime.

prescreening regime is ultra vires, impermissibly eliminating unrepresented litigants' Article III review as of right.

Just as the PLRA[42] serves a salutary purpose, providing district courts with a lawful screening protocol to reduce the burdens posed by prisoners' filings; the Ninth Circuit could implement a system—perhaps similar to magistrate judge jurisdiction under 28 U.S.C. § 636(c)(1), whereby litigants waive Article III review and consent to staff attorneys deciding their appeals. Such a system would constitutionally winnow the wheat from the chaff, while protecting the fundamental rights of litigants entitled to, and expecting, lawful review by Article III judges.

IV. SUMMARY DISPOSITION

A. Error Correction

Appellate courts serve "two basic functions: (1) correction of error (or declaration that no correction is required) in the particular litigation; and (2) declaration of legal principle, by creation, clarification, extension or overruling." See J. Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 Law & Contemp. Probs. 1, 2 (Spring 1984). The staff attorneys who wrote and filed the oral screening memorandum here, failed to apply settled law to undisputed facts. While generally "not a court of error correction," the summary-reversal docket allows this Court to do just that

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[42] See *supra* note 41.

while supervising the administration of justice in the federal courts. Michael R. Dreeben, *Case Selection and Review at the Supreme Court*, June 25, 2021.

B. Diversity, California law, and District Court Errors

Article III, § 2 Clause 1, extends federal court jurisdiction to diversity cases. (See also 28 U.S.C. § 1332.) After Petitioner's bad experience with Judge Chernus in Marin County, he feared more prejudice against a nonresident suing local lawyers in a county court; thus, Petitioner filed in federal court. Petitioner consented to magistrate jurisdiction because his case was uncomplicated—a missed appellate deadline; no discovery, no trial; damages; a conflicted law firm—and 28 U.S.C. § 636(c)(3) assured Article III review by a federal judge if an appeal were necessary. Petitioner would not have consented to giving a magistrate judge the final word in his case. As happened here, Petitioner, appearing pro se in the Ninth Circuit, had "only the right to a meaningless ritual, while the [represented] man has a meaningful appeal." *Douglas v. California*, 372 U.S. 353, 358 (1963); see also *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). This Court should declare the Ninth Circuit's ultra vires prescreening regime an unconstitutional "meaningless ritual" and reverse this case.

i. Facts Pleaded Should Have Survived Motion to Dismiss

Dismissing Petitioner's conflict counts on a Rule 12(b)6 motion under the *Twiqbal*[43] was erroneous and should be reversed. (Pet. App., 113a-131a). As a matter of law, Petitioner is entitled to a declaration that the contract between him and HBH is void for undisputed, concealed conflicts of interest with Levin, the opposing party.

ii. Pro Se Prejudice and Ignoring California Law

After Petitioner consented to magistrate jurisdiction, he learned from comments during case management conferences that Judge Spero had been a legal malpractice defense attorney[44]. Judge Spero warned[45] Petitioner that he would not succeed as a pro se.

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[43] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[44] "I was a malpractice lawyer for many years."

[45] " . . . there is the issue of just it's—you know, the number of cases that any pro se has won in this case—in this District by themselves without a lawyer, in my 20 years of experience, you can count on one hand. And none of them are as complicated as this one." " . . . you know, I read your missives about your conversations with the third parties . . . So I can tell that you're, you know, going down avenues that you think are fruitful, but I might just slam the door on them if you come into court with them." "[Y]ou need to have a lawyer represent you. You can't do it on your own," ***"In some ways the case is easier if you don't have a lawyer because you will make a mistake, and someone will dismiss the case."*** (Emphasis added.).

For Petitioner to prevail on his professional negligence claim under California law he had to establish, by a preponderance of the evidence, that had HBH timely filed his appeal [in the underlying probate action], that the "extraordinarily bad" demurrer order would have been reversed. Petitioner met that burden[46]. In a California appellate malpractice case, *the judge* (deciding as matter of law if the order would have been reversed on appeal), *also decides causation.*

> If [plaintiff] can prove that the judgment in that case was erroneous and would have been reversed, he should be permitted to do so. ***In that event he has proved damage proximately caused by the negligence.***

Pete v. Henderson (1954) 124 Cal.App.2d 487, 489-90 emphasis added; see also *Kidwell ex rel. Penfold v. Meikle*, 597 F.2d 1273, 1294 (9th Cir. 1979).

Disregarding decades-old California case law, Judge Spero erroneously ruled against Petitioner, finding that even if the demurrer order were reversed, that *a jury* could not rule in Petitioner's favor on causation and damages. (Pet. App., 15a-16a, 24a-27a, 81-83a). Ninth Circuit Staff attorneys affirmed what would

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[46] In California, a reviewing court *must reverse* a demurrer sustained without leave to amend if it finds an amendment would cure the defect (or that the complaint/petition stated a cause of action). *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081. Petitioner's cross-petition stated multiple causes of action against Levin for fraud, waste, mismanagement, and bad faith. (Pet. App., 15a).

have been corrected upon proper de novo review by an Article III judge. (Pet. App., 2a-3a).

iii. Evidence for the Case within a Case

While most victims of attorney malpractice would be left speculating what the evidence would have been (had their attorneys obtained discovery); here, Petitioner's discovery detailed Levin's fraud against him and Jane's estate, proving that "but for" HBH's malpractice in the underlying action, it was "more likely than not" that Petitioner would have removed Levin and obtained a more favorable result after reversal[47] of the erroneous demurrer order. (Pet. App., 79a-80a). *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244. Additionally, California case law makes Respondents responsible for all damages flowing from their conduct, i.e., losing Petitioner's viable cause of action to remove Levin for waste, mismanagement, fraud, and bad faith.

> To hold otherwise would be to rule that where an attorney's negligence has caused a court to make an erroneous adjudication of an issue, the fact that the court had made that adjudication absolves the attorney of all

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[47] The District Court misread Cal. Code Civil Pro. § 170.6(a)(2) stating that reversal *is grounds for automatic disqualification of a judge. Hendershot v. Superior Court* (1993) 20 Cal.App.4th 860, 865 (confirming that reversal of demurrer warrants automatic disqualification under § 170.6(a)(2)). Compare: "[Petitioner's] assertion that the probate judge would have been removed for bias is entirely speculative and cites no legal authority beyond the general statute prohibiting judicial prejudice." (Pet. App., 25a).

> accountability and responsibility for his negligence. That cannot be and is not the rule.

Ruffalo v. Patterson (1991) 234 Cal.App.3d 341, 344.

Under California law, "[w]here the fact of damages is certain, the amount of damages need not be calculated with absolute certainty." *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396-397. Here, HBH's failure to file a timely appeal of the demurrer order caused Petitioner's damages calculated to the penny; leaving only the lost bad faith award to judgment.

iv. Misapplying Summary Judgment Law

In deciding the merits of a party's motion for summary judgment, the court's role is not "to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The non-moving party's evidence "is to be believed and all justifiable inferences are to be drawn in his favor." *Anderson*, *supra*, p. 255. If the nonmoving party can point to concrete evidence in the record that supports each essential element of its case, he must prevail. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Here, Petitioner more than met his burden to survive HBH's summary judgment motion.

The staff attorney memo affirmed the district court's erroneous reliance on *Estate of Sapp* (2019) 36 Cal.App.5th 86, to support its ruling that the Marin County demurrer order was entitled to special

deference. (Pet. App., 24a). *Sapp* was not a demurrer case. Rather, the California Court of Appeal affirmed an executor's removal under Prob. Code § 8502 ***after a trial with evidence***. *Sapp*, *supra*, pp.95-98, 102-03. Petitioner's record detailed how Levin mismanaged the estate; acted in bad faith; and was not an impartial fiduciary; thus, providing a basis for Levin's removal as a matter of law. *Sapp*, *supra*, p.107-110. The "Oral Screening Memorandum" affirming the erroneous district court judgment is "as inexplicable as it is unexplained"[48] warranting "the bitter medicine of summary reversal."[49]

CONCLUSION

This Court should grant the petition and summarily reverse the Ninth Circuit's oral screening memorandum.

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Respectfully submitted,

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Petitioner, in pro per

[48] *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam).

[49] *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting).