No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN T. LAETTNER,
Petitioner,

v.

CALIFORNIA STATE COMMISSION ON JUDICIAL PERFORMANCE,
Respondent.

ON PETITION FOR REHEARING
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

DAVID J. BOWIE
Cal. State Bar No. 50167

PETER SILTEN,
Cal. State Bar No. 62784
Counsel of Record

Bowie and Schaffer
Attorneys at Law
2255 Contra Costa Blvd.,
Suite 305
Pleasant Hill, California
Phone (925) 939-5300
Dave@bowieschafferlaw.com
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. This Writ seeks review of a Decision by the California Commission on Judicial Performance to remove Judge John T. Laettner from service on the Contra Costa County Superior Court. Pursuant to that Decision, the charges detailed in the Notice of Formal Proceedings, as found, were insufficient to warrant a greater sanction than censure. Despite the absence of misconduct sufficient to warrant removal, the Commission imposed that most severe penalty. In so doing, it criticized the judge's defense during evidentiary hearing as "lacking in candor" in certain particulars. However, it did not find the judge to be untruthful or to have testified falsely. It also found that the judge failed to acknowledge the impropriety of his actions such that removal was necessary to protect the public from some future repeat of that misconduct. In short, the judge was removed based on the manner as well as the mere fact of his defense, even though the actual alleged misconduct on which the cause for discipline was based would not support the ultimate sanction of removal actually imposed. The issue presented is thus if it is constitutional under the 1st, 5th, 6th, and 14th Amendments to the United States Constitution for the Commission to (i) use the subjective determination that the defense "lacked candor" in its presentation as the sole justification for removal when that issue was never asserted as a basis for discipline; to (ii) refuse to consider

rebuttal evidence on that very issue when the details became apparent and relevant; and to (iii) justify removal of a sitting judge based on the conclusions that a defense against charges lacked candor and the defense itself was evidence of a failure to acknowledge wrongdoing; when (iv) the inescapable conclusion is that no removal was contemplated or would have occurred had no defense been presented and wrongdoing simply been admitted. Or, to state the issue a bit differently, can removal from office be sustained when the underlying alleged misconduct would not justify such a result, so that the penalty for assertion of a defense and exercise of the right to be heard can be removal if the alleged misconduct itself is deemed proven?

2. Is it Constitutional Under the 1st, 5th, 6th, and 14th Amendments to the United States Constitution for the Commission on Judicial Performance To Restrict a Judge's Speech on Interpersonal and Court Matters Under the Facts of This Case?

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Petitioner, John T. Laettner, respectfully petitions this Court to issue a Writ of Certiorari to review the California Supreme Court's denial of a Petition For Rehearing. The California Supreme Court action was taken on June 10, 2020. The underlying administrative action for which review and rehearing were sought is evidenced by the decision of the California Commission on Judicial Performance filed November 6, 2019.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are petitioner, John T. Laettner, and respondent, the California Commission on Judicial Performance.

OPINION BELOW

The California Commission on Judicial Performance issued its order of removal of Judge John T. Laettner on November 6, 2019. The California Supreme Court issued its order denying the petition for re-hearing in that case on June 10, 2020, reported as *Laettner v. Commission on Judicial Performance, S260482*, (Laettner). A photocopy of the Commission's Decision is attached hereto as Appendix C. The Special Masters Report is attached as Exhibit B. The California Supreme Court's order denying rehearing is attached as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a) as Petitioner asserts the deprivation of his rights secured by the Constitution of the United States. This petition has been timely filed as it is no more than 150 days

from the date of the order denying a timely petition for rehearing. [The rules for filing have been altered by the currently pending COVID 19 pandemic.]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law...abridging the freedom of speech..."

The Fifth Amendment provides in pertinent part: "No person shall be...deprived of life, liberty and property without due process of law..."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation."

The Fourteenth Amendment provides in pertinent part: "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."

The relevant statutes are attached as Appendix F., to include California Commission on Judicial Performance Rules 118(b)—notice, Rule 128(a)—amendments to notice, and Rule 133—Taking Additional Evidence.

STATEMENT OF THE CASE

California's Commission on Judicial Performance has violated Judge Laettner's procedural and substantive due process rights in that it has removed him from office without proper notice and for reasons unrelated to charged misconduct –

based entirely on the mere fact and manner of his assertion of his defense and the rights to be present at hearing and to be heard. In related fashion, the Commission deemed the judge's defense against misconduct charges to be evidence of his failure to acknowledge the impropriety of his actions and applied the penalty of removal to protect against future potential misconduct which it claimed might damage the public interest. In so acting, the Commission effectively punished Judge Laettner for his temerity in mounting a defense at hearing – in direct violation of this Court's well-established principles that the exercise of due process rights must be free from concerns that such exercise might result in retaliation. *Blackledge vs. Perry* (1974) 417 US 21, 94S.CT. 2098.

A. <u>Procedural History</u>

The Commission on Judicial Performance (Commission) filed its notice of investigation by letter on August 8, 2017. Approximately one year later, on September 14, 2018, the Commission filed its Notice of Formal Proceedings (Notice) alleging nine counts of misconduct. (Appendix A) No amendment to the Notice was ever filed. The Commission included five time-barred charges of misconduct, as these alleged offenses were more than six years prior to the start of the Judge's current term. (Article 6, section 18, California Constitution). Virtually all of the claimed instances of misconduct originated from the Contra Costa County Public Defender's Office.

It should be noted that Judge Laettner presided primarily within the criminal division of the Superior Court, as he handled its highest volume calendar

as well as the civil and criminal grand juries and wiretap matters. His experience prior to judicial appointment was as a Deputy District Attorney, an Assistant United States Attorney for some 17 years and the Chief of the United States Attorney's Office in Oakland, California. The source of dissatisfaction with him on the part of the Public Defender's Office was his stated positions on cash bail – something currently to be determined by the California Voters as they vote for or against Proposition 25 during this November 2020 election.

Judge Laettner timely responded to the allegations of the Complaint on October 4, 2018. A hearing was held before three special masters and began on February 25, 2019 and ended on March 8, 2019. The Commission made no motion to amend the Notice either prior to the hearing or to conform to proof at hearing or thereafter. Closing arguments took place before the special masters on April 26, 2019. On June 14, 2019, the masters filed their findings. (Appendix B). The findings contained two counts of willful misconduct and four counts of prejudicial misconduct. (Appendix B, p. 10—12.)

On July 8, 2019, Judge Laettner filed a request to re-open the proceedings. The basis for the request was that the decision included six findings in which appeared references to a "lack of credibility" to Judge Laettner's responses during testimony as a part of his defense. Judge Laettner felt such "lack of credibility" findings to be unwarranted and without evidentiary support. He felt that he had not been given notice of misconduct upon which such findings must have been based. He also felt that the concept of "lack of candor", in the ultimate conclusion,

was not a proper evidentiary standard, in that it was subjective, and had been impermissibly applied to his defense and the manner of its presentation. He included declarations in rebuttal of the vague lack of candor claims with which both he and his defense had been tarnished. The Commission Chairperson denied the motion to re-open, on August 28, 2019.

On September 9, 2019, Judge Laettner filed a motion to reconsider the denial of the motion to re-open to take additional evidence, and again included the declarations from four percipient witnesses. That motion was denied.

The Commission filed its Decision and Order Removing Judge John T. Laettner from office on November 6, 2019. A petition for rehearing with the California Supreme Court was filed in timely manner on February 3, 2020. The California Supreme Court denied that Petition on June 10, 2020. (Appendix D.)

B. Statement of Pertinent Facts:

The Commission case was commenced by its filing of a Notice of Formal Proceedings dated September 14, 2018. The Notice charged Judge John T. Laettner with willful misconduct in office, conduct prejudicial to the administration of justice that brought the judicial office into disrepute, and improper action within the meaning of the State Constitution, providing for removal, censure, or public or private admonishment of a judge. (Appendix A.)

The Notice made no mention of the fact that the nature and manner of Judge Laettner's defense during hearing against the stated charges might result in a greater penalty than the charges themselves, if sustained in their entirety, might

permit. In particular, there was no mention of the potential application of the rather subjective concept of "lack of candor" by which the very manner in which he might conduct his defense might cause his removal – in and of itself. Finally, the Notice made no mention of the fact that the judge's presentation of a vigorous defense might be found to constitute his refusal to acknowledge the impropriety of his misconduct, thus confirming the likelihood of repeat offense and compelling his removal from the bench. (Appendix A, Notice.) Such is the Orwellian nature of the process employed by the Commission in pursuit of its mission to protect the public from wayward judges.

Those who testified against Judge Laettner were virtually exclusively associated with the Public Defender's Office. Those who testified for him included many regarded as the best judges in California and a wide range of attorneys and others. Judge Laettner was denied the opportunity to present evidence of his honesty and integrity offered by some 100 additional subpoenaed witnesses, including many judges, on the grounds that California Evidence Code Section 352 permitted the exclusion of testimony deemed cumulative or to be outweighed by other considerations in the administration of justice. (Decision, p. 69. Appendix C.)

It is necessary to summarize briefly the 9 counts of misconduct asserted as grounds for discipline – but concededly insufficient to cause actual removal from the bench. These 9 counts were culled from the more than 100,000 cases over which the Judge presided. Some of the counts were simply barred by the statute of limitations – something of which the Commission surely should have been

cognizant. It is telling that counts 6, 7, 8 and 9 were all rejected as grounds for any discipline. Counts 2, 4, and 5 all related to purportedly undignified or unwelcome comments made to one particular public defender, to female attorneys in the public defender's office and to women in general. The special masters found neither sexual harassment nor workplace harassment by virtue of the aforesaid comments. (Appendix B. p. 108.) The Commission confirmed no sexual harassment, but did find workplace harassment. (Appendix C, Decision, p.41.) This is the "Me Too" era of politics and jurisprudence; nonetheless, can it truly be stated that it is constitutionally permissible to restrict a judge's speech on interpersonal and court matters under pain of removal from the bench? Counts 1 and 3 related to alleged ex parte communications, minor in nature, pertaining either to an incident involving bail and remand or an incident involving a probation revocation.

The following brief summary of the individual counts of misconduct upon which the administrative hearing was based may serve to illustrate the insubstantial nature of the charges and the reasons why even the Commission found that the behavior related thereto in the aggregate would simply not support removal: "There is substantial evidence that, during his 13 years as a judge, Judge Laettner has had an exemplary work ethic and has been a responsible conscientious judge, and an asset to the court. In light of this evidence if we were to consider only his acts of willful and prejudicial misconduct we would impose a censure." (Appendix C, p. 3.)

Count 8 – failure to recuse or to timely disclose that the Judge's son was employed with the District Attorney's office – was not sustained as a cause for discipline as any failures were held to be inadvertent and improper action.

Count 9 – ex parte communications with individual public defenders in an effort to dissuade them from peremptory challenges – was barred by the statute of limitations, having taken place in 2008. The time distance obviously challenged memories and the facts were disputed.

Count 7 – the institution of a new program to reduce the criminal case backlog – was not found to have sufficient evidentiary support for a misconduct finding.

Count 6 – a dependency hearing involving statements said to indicate prejudgment – was not supported by the evidence.

Counts 2, 4, and 5 all related to alleged undignified or unwelcome comments made to a particular Deputy Public Defender (DPD) Della Piana; female attorneys in the Public Defenders Office; and women in general. The Special Masters found no sexual harassment or workplace harassment. The Commission found no sexual harassment – but did find workplace harassment.

Counts 1 and 3 both related to alleged improper ex parte communications and remanding criminal defendants without notice and the opportunity to be heard. Count 1 involved a criminal defendant represented by DPD Della Piana who was found to be under the influence of narcotics at the time of hearing and who had violated conditions of

release. Count 3 involved a probation violator who was properly remanded – but the action was found to be in retribution for a 170.6 peremptory challenge.

Count 1 cannot be viewed in isolation. That count involved a case with DPD Della Piana – who was the recipient of the unwelcome comments which formed the basis for action on Count 2. There were two ex parte communications: one with a Sheriff's deputy who administered a test to determine the ability of the criminal defendant to participate in court proceedings due to apparent narcotics influence. This ex parte communication was found by both Special Masters and the Commission to have been related to the administration of justice and permissible. The other ex parte communication was with a prosecutor, was less than one minute in duration, and related to the process to be employed in light of the absence of a particular waiver. Judge Laettner believed the communication to be related to the administration of justice; he said he did not see DPD Della Piana in the courtroom – or he would have included her. The particular defendant was also remanded with conflicted versions of whether there was proper notice or opportunity to be heard. The Commission found willful misconduct and prejudicial misconduct. Rather obviously, the entire incident was tied to the issues involving Judge Laettner and that same DPD who was the subject of the entirety of Count 2. The conduct related to Judge Laettner's administration of one case within the judicial system and personal issues between his role as judge and the particular Deputy Public Defender.

Count 3 also cannot be viewed in isolation. Again, it involved the public defender's office and a criminal defendant whose probation was properly rescinded. The ex parte communication was virtually identical to the other ex parte communication in terms of its purpose and duration. The conduct was found by the Commission to be in retribution for a peremptory challenge.

The conduct found improper in Counts 1 and 3 related to the found tendency for Judge Laettner to have used improper and undignified language in interacting with women in various capacities and to wish a closer and more personal relationship with attorneys than might have been proper. The conduct was indicative of a central issue involving Judge Laettner's behavior – "his desire to have certain attorneys [and others] like him and not be upset or 'mad at him' about his rulings, and action he has taken when he was angry or upset with them, has, at times, overridden his compliance with the canons of judicial ethics. The factual findings of the special masters suggest that Judge Laettner failed to maintain the necessary professional distance between himself and attorneys appearing before him or that he became embroiled. 'Once a judge becomes embroiled in a matter, fairness, impartiality, and the integrity of decisions leave the courtroom.' [Citation]" Decision and Order Removing Judge John T. Laettner From Office by the Commission (Appendix C, p.3).

The examples of claimed gender bias were for comments that included, in one on one conversations, "You're like a teenage daughter, you just talk until you get what you want" and "Your parents didn't spank you enough". (Appendix B, p. 40,

53.) To an attorney in dead time in the courtroom, he told her that she looked like someone on a PBS show and that she should watch the show. He did not describe what the actor on the show liked like, only that they looked like each other. (Appendix 6, p. 36.) To young men and women, who had driven while intoxicated and gotten into car crashes, he told them that they should not drink and drive, or else they might crash again, and told them the story of a disfigured young women who was crying in his courtroom many years before. He had told them that they were handsome or pretty and they didn't want to lose that. (Appendix B, p.104, Appendix E, Reed Declaration.) To a woman who was recovering from drug addiction, he told her that she was "pretty" and that he could ask the county if she wanted help with regard to tattoo removal services. (Appendix B, p.103.) To another public defender, he told her that his son was marrying an Asian woman, showed her a picture of his family with his future daughter-in-law, and asked her if he could ask her about her heritage and asked about any wedding customs that she knew. (Appendix E, Reed Declaration par. 35-41.) He made an undisputed attempt at a joke to a defendant who had just completed his probation that he understood his frustration with relationships by saying, "on a lighter note, I can take judicial notice that women can drive you crazy". He also said the same things to women, that "men can drive you crazy". A public defender was upset with him for his joke, which she acknowledged was a joke, and he apologized to her; it was the only complaint he had received in his eleven years on the bench until these proceedings. He also joked with the grand jury that a DA was from the DA's volleyball team

after they had just been discussing volleyball, and said that she was competent, lovely or beautiful, and that he had been honored to perform her wedding ceremony. It was of no moment to the woman, Ms. Bell, who did not remember it. (Appendix B, p. 89.) In a count excluded by the statute of limitations, he joked to his court reporter when she asked him in 2009 if he wanted only her in chambers or whether he wanted the parties. He said that she was "pretty hot, but let's do it the way we always do and bring in the parties". He also told her that she was "pretty" when she was crying in front of him in 2008 after her failed relationship with an unknown person, and he encouraged her that she would find someone else.

The foregoing comments – made over a period of many years, including times when they would have been routinely regarded as unobjectionable – might hardly be regarded as evidence of sexual or workplace harassment. More importantly, imposing the penalty of removal from the bench quite clearly must have the effect of chilling the exercise of free speech and association by any judge, in clear violation of 1st Amendment constitutional rights.

Prior to the masters' findings, Judge Laettner had no knowledge of any issues regarding the manner of presentation of his defense or the potential penalty the Commission might impose upon him in that context based on the elusive "standard" that it might be deemed "lacking in candor". There was certainly no notice that his defense might lead to the penalty of removal even though the actual alleged misconduct, as found, might not justify imposition of that sanction. In fact, the Masters actually commended Judge Laettner's evidence that he was a very good

judge with good character. Judge Hom noted the judge's abilities and character. RT: 2399, 6-21;[1] Justice Butz noted his character for honesty, dignity and, respect. RT 24-12, 1-9. Master Judge Hatchimonji stated that no further character evidence was necessary as they had "heard from some of the most well-respected judges in California" on these topics. RT: 2420,22- 2421;6. The Masters' then exercised California Evidence Code Section 352 to restrict such testimony as cumulative, since there were more than 100 additional subpoenaed witnesses available to testify on behalf of the Judge. (Judge Laettner's witness list filed in proceedings.)

When Findings of Fact were issued by the Special Masters in which comments were made that his testimony was, in part, "troubling", and issues regarding credibility were raised as to six events, Judge Laettner obtained affidavits in rebuttal to the voiced concerns. These were apparently the events which caused the Commission to deem him to lack candor. Two percipient witnesses for the commission, Deputy Reed and Deputy DA Fernandez, testified by declarations under penalty of perjury that the facts that the masters were assuming were just plain wrong. (Appendix E.) Two more percipient witnesses, swore under penalty of perjury in declarations, that the assumptions of the masters in support of comments regarding a lack of credibility were likewise incorrect. These were the supervising Superior Court Judge William Kolin, who worked with

[1] RT refers to reporter transcript at the hearing.

Judge Laettner in 2007 and 2008, and a second law enforcement officer, Deputy Lisa Berry. (Appendix E.)

In his defense in rebuttal, Judge Laettner attached the aforesaid declarations to his motion to take additional testimony to correct misperceptions and assumptions pursuant to Commission on Judicial Performance Rule 133 - timely filed on July 9, 2019. The Commission denied the motion, thus precluding the masters from hearing evidence in rebuttal of their observations regarding a "lack of candor" on the part of the defense presentation. (It is undisputed by the Commission that no motion to re-open has ever been granted since the rule (Rule 133) was enacted some 25 years before.) (Commission Answer to Petition, see also *Inquiry concerning Hyde*, 48 Cal. 4th CJP Supp. 329 (2003)). A motion to reconsider the motion was also filed. The Commission denied that motion, finding no grounds permitting reconsideration and also determining it to be untimely.

It is without question that neither the Special Masters nor the Commission made any express finding that Judge Laettner was untruthful or had knowingly made false statements during the presentation of his defense.[2] Such a finding

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[2]The Masters were "troubled" by some of his lengthy testimony and expressed "concerns" as to credibility. (See pps. 34, 35, 44, 46, 64 and 135 of Appendix B.) Rather inconsistently, the Masters also characterized the Judge as forthright in that same testimony. (Appendix B, p. 142) In net effect, the terminology "lacking in candor" seems purposefully vague given the conflicted characterization of the defense testimony and evidence made by the Masters and Commission. While "lack of candor" may have suited the conflicted feelings of the Masters and Commission regarding testimony, it can hardly be regarded as the standard to be applied in weighing alleged misconduct. (In any case, the evidentiary declarations for which Judge Laettner unsuccessfully sought admission both clarified and rebutted the only instances concerning which comments about "concerns" and being "troubled" arose. [Appendix E; Appendix C pps. 70-72.])

would have required clear and convincing evidence under the standards applicable to Commission evidentiary hearings. *Kennick vs. Commission on Judicial Performances*, 50 Cal. 3d 229 (1990). Despite this lack of evidence of knowingly false testimony measured against the required burden of proof and the fact that the charged behavior might be deemed misconduct, but would warrant only censure, the Commission voted 8-3 for removal. The reported justification for that penalty was that the defense itself "lacked candor" and that the refusal to simply acknowledge wrong doing and impropriety at the outset of the case were indications that Judge Laettner might repeat his misconduct at some time in the future. (Appendix C, p.3.) In other words, Judge Laettner would never have been removed from office had he simply declined a defense to charges and admitted their truthfulness for all purposes. In Orwellian fashion, a refusal to defend and admission of wrong-doing might avoid the penalty of removal; an actual vigorous defense might compel removal regardless of the seriousness of the underlying charges.

A Petition For Rehearing was timely filed with the California Supreme Court. In past years, the appeal from rulings of the Commission was direct. It is now merely discretionary. None of the 13 cases appealed over the past 25 years since review became discretionary has been granted hearing. (See Answer to Petition, P. 13.) The petition for review was denied. (Appendix D.)

The special masters found no sexual harassment of any kind, either to any individual or within the workplace. The commission found workplace sexual

harassment, though it confirmed that no sexual harassment as to any individual had ever occurred. The Commission faulted Judge Laettner for certain of the alleged misconduct as it found that these were actions taken by the judge due to his desire to please and to be friendly with the attorneys who appeared before him. There was absolutely no reference to any case wherein the judge's decisions were made to please the public defenders or anyone else.

The six allegations of lack of candor in terms of the defense presentation were all refuted in the declarations and evidence which Judge Laettner offered by motion but which were never considered by the Commission due to denial of that motion.

California Commission on Judicial Performance Rule 118(b)[3] sets forth requirements which mandate that notice of all actionable charges be given. Notice regarding charges related to an alleged lack of candor/lack of credibility was not given in this case. Rule 128(a)[4] provides that Notice could have been amended to conform to proof – which did not happen. The Commission could have granted Judge Laettner's motion to submit additional evidence in clarification of the lack of

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[3] Rule 118(b) of the California Commission on Judicial Performance provides: "The notice shall specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based..."

[4] Rule 128(a) provides: "The commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to its answer. During the evidentiary hearing, the special masters may allow amendments to the notice to conform to proof. In a motion to amend the notice to set forth additional facts not presented at the hearing is made during the evidentiary hearing, the chairperson of the commission, or the chairperson's designee, shall determine whether the motion shall be determined by the full commission or the special masters. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his or her defense against the matters charged thereby."

candor issues for which notice was never given. It did not do so. Simply put, there were "troubling" concerns expressed by the special masters in their report based on the manner of the defense presentation characterized as "lacking candor" concerning which no notice was ever given and no right of rebuttal or clarification ever granted.

The Commission filed a Notice in which it defined all of the instances of misconduct upon which it proposed discipline. Those instances concededly did not warrant removal as a penalty. Had Judge Laettner simply acknowledged impropriety and dropped any defense against the pending charges, the Commission would have made no inference that misbehavior would repeat and there would have been no asserted need to protect the public from future events by removal. Because Judge Laettner wished to exercise his constitutional rights to assert a defense and be heard on the alleged counts of misconduct, the manner and choices he made in defense were made subject to review under the "made up" standard of "lack of candor". He was given no notice of this potential ground for discipline.

Findings of knowingly false or untruthful testimony would have required clear and convincing evidence to satisfy the Commission burden of proof. By contrast, the amorphous concept of "lack of candor" – a "standard" lacking in clarity and subjective in nature - became the actual cause for removal. In short, the Notice of charges made no reference to the actual basis of ultimate action. The belated opportunity to refute the charge of "lack of candor" was denied. Had Judge

Laettner prostrated himself before the Commission and presented no defense, he would have merely been censured.

For presenting a defense to charges, Judge Laettner was removed on a finding which was not charged, which was not a proper standard for discipline, and which was deemed to be proof that his refusal to acknowledge wrong doing might require removal due to the potential repeat of the misconduct against which he wished to defend himself.

The Constitution does not permit the government or any of its agencies to deny to anyone the right to present a defense to charges and to be heard. It requires proper notice. It does not permit sanctions and punishment simply because the rights of defense and to be heard are exercised. *Blackledge vs. Perry* 417 U.S. 21 (1974).

The California Commission process effectively denies judges the right to defend against misconduct charges on the ground that the defense itself may be deemed unacceptable in manner as it might also constitute evidence of the potential for future wrongdoing. Under penalty of removal as the ultimate sanction, the California process inhibits the exercise of both freedom of speech and the exercise of constitutional due process.

REASONS FOR GRANTING THE WRIT

JUDGE LAETTNER WAS REMOVED FROM OFFICE FOR REASONS UNRELATED TO NOTICED MISCONDUCT AFTER HEARING DURING WHICH THE COMMISSION ON JUDICIAL PERFORMANCE APPLIED A VAGUE AND SUBJECTIVE EVIDENTIARY STANDARD TO BOTH THE FACT AND THE MANNER OF HIS DEFENSE. SAID REMOVAL WAS

JUSTIFIED BY THE COMMISSION AS NECESSARY BECAUSE THE DEFENSE PRESENTED AT HEARING FAILED TO REFLECT AN ACKNOWLEDGMENT REGARDING THE IMPROPRIETY OF THE CHARGED MISCONDUCT. JUDGE LAETTNER WAS NOT AFFORDED ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO DEFEND AGAINST CHARGES; HE WAS PENALIZED FOR CONDUCTING A VIGOROUS DEFENSE; AND THE PENALTY IMPOSED ON HIM WAS GREATER THAN WOULD HAVE BEEN THE CASE HAD NO DEFENSE WHATEVER BEEN PRESENTED, INDICATIVE OF A RETALIATORY MOTIVE ON THE PART OF COMMISSION. THESE ACTIONS OF THE COMMISSION VIOLATED JUDGE LAETTNER'S CONSTITUTIONAL RIGHTS AND REPRESENT THE DEPARTURE OF CALIFORNIA PROCEDURES INVOLVING THE DISCIPLINE OF JUDGES FROM THOSE APPLICABLE ELSEWHERE THROUGHOUT THE COUNTRY.

A. Petitioner's 5th, 6 th and 14th Amendment Rights Require That He Be Given Adequate Notice and a Meaningful Opportunity to Defend

1. The Commission Did Not Follow this Court's Mandate in In Re Ruffalo, 390 U.S. 544, 550 (1967).

This Court applied a fair notice and hearing test relative to procedural due process requirements applicable to professional discipline proceedings in *In re Ruffalo,* 390 U.S. 544, 550 (1967). It concluded that the respondent in that case had been deprived of fair notice and an opportunity to be heard because the charge, as amended, was not known before the proceedings began and no new evidence was taken to determine its validity. This Court emphasized that charges must be made known before disciplinary proceedings commence. "They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused. He can then be given no opportunity to expunge the earlier statement and start afresh." Id. At 551. This Court reversed a disbarment decision on the ground

that '[t]his absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process'. Id. At 552.

In this case, Judge Laettner was never given notice that the manner in which he might present his defense against misconduct charges might itself be viewed as cause for discipline when evaluated under an ill-defined, subjective and vague concept that his defense might "lack candor"—regardless of any determination as to whether or not it was truthful or knowingly false.

This lack of notice was especially damaging under the circumstances. Since the charged misconduct by itself was concededly insufficient to support removal from office as a proper penalty, it was the fact and manner of the defense against such charges that had the effect of removal by Commission action. To that effect, the Commission found that Judge Laettner's defense against charges was somehow "lacking in candor". That finding prompted removal from office and was used as confirmation that the Judge failed to acknowledge the impropriety of his behavior so that only removal from office might somehow protect against the future repetition of similar misconduct. It is noteworthy that the Commission made no findings that the Judge was untruthful in his defense or knowingly offered false evidence. (see FN 1) (Appendix B, pp. 9, 22,48, 50, 57) (lack of credibility only) One might well observe that the Commission reasoning and actions taken were circular in nature as they also lacked both common sense and any consistency with the principles of constitutional due process.

Since there was no notice to Judge Laettner that the very nature and manner of his defense might itself be grounds for discipline when evaluated under the vague standard that it "lacked candor", there was no opportunity afforded him to restructure or even abandon the right to defense and no opportunity for a meaningful hearing. There was no opportunity given for him to respond to what was not disclosed. Had notice that his defense might itself be deemed "lacking in candor" regardless of truth or falsity, he might well have simply accepted the charges against him as the more certain course in avoidance of the ultimate punishment of removal from office. In effect, the lack of notice was and is directly related to the chilling effect on the right to defend and appear, which application of the Commission's "lack of candor" concept actually discourages.

The circumstances in the *Ruffalo* case held to be constitutionally insufficient were similar to the Gordian Knot faced by Judge Laettner in this case. In *Ruffalo*, the charges for discipline were amended to include the very subject matter of his testimony in defense. In this case, the Commission did not bother to amend charges; it simply imposed discipline based on the manner in which Judge Laettner presented his defense. When Judge Laettner became aware that his defense would be viewed through a lens which might conclude that it "lacked candor" even while failing to find it to be untruthful or knowingly false, he requested the opportunity to respond to the specific cited instances which the Commission or Special Masters found "troubling". He was not only denied notice of the circumstance; he was also denied any opportunity to present evidence in clarification. It is well established in

professional discipline proceedings, that charges must be known before proceedings commence. There is otherwise a clear violation of due process. Id., *Attorney Grievance Committee v. Costanzo*, 432 Md. 233 (2013).

This Court has described the "most basic ingredients of due process of law as follows: A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, at a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *Washington v. Texas*, 388 U.S. 14, 18 (1967) (quoting *In re Oliver*, 383 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 2d 682(1948). *In Re Oliver* involved a case where a judge did not believe a defendant, believed another witness, and incarcerated the defendant. The Court found that there was a violation of notice and a right to be heard as to a charge of false and evasive swearing. Id. The right to due process is longstanding, and can even be found in the Bible, John 7:51: "Does our law judge a man without first giving him a hearing and learning what he does?"

Judge Laettner's federal constitutional due process claim depends on his having a property right in continued employment. See *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487 (1985). If the government gives a public employee assurances of continued employment or conditions dismissal only for specific reasons, the public employee has a property interest in continued employment. *Loudermill*, at 538. Judge Laettner had a property interest in his employment as a judge. *Loudermill* further holds that an employee has a right to

present his side of the story. At 541. Due process protects against erroneous decisions. *Mathews v. Eldrige* 424 U.S. 319 (1976).

In *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed. 2d 224 (1963) this Court held that an attorney applicant had to be apprised of what the government proposes and be heard on its proposals before it issues its final command. Cf. *Morgan v. United States*, 304 U.S. 1, 18-19, 58 S.Ct. 773, 776 L.Ed. 1129. In the concurring opinion in *Willner*, Justice Goldberg, with Justices Brennan and Stewart joining, stated that the applicant must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut the evidence. That did not happen in this case. In fact, there is no apparent charge related to judicial misconduct by which one might be removed from office due to a "lack of candor" since all misconduct must actually be proven by clear and convincing evidence.

From the explanation set forth in its own opinion, the Commission can only be deemed to have removed Judge Laettner from his office because he had the temerity to actually mount a defense to charges with which he generally disagreed. Had he presented no defense and simply acknowledged the impropriety of his actions, he would not have been removed from office. This lack of notice regarding the risks associated with his vigorous defense was exacerbated by the fair conclusion that the penalty imposed by the Commission was in retaliation for that very defense. This itself is constitutionally improper. See *Blackledge vs. Perry* 417

U.S. 21, 94 S.Ct.. 2098 (1974); *North Carolina vs. Pearce* 395 U.S. 711, 85 S.Ct. 2072 (1969).

2. California Has Not Followed Procedural Due Process In Judicial Discipline Proceedings and Its Procedures are Inconsistent With This Court's Rulings As Well As The Applicable Holdings of Other State Supreme Courts

Other states have dealt with the issue of procedural due process in professional discipline. They have typically required notice and an opportunity to be heard before taking action against judges based on their testimony and/or the manner and conduct of their defense. By contrast and as noted, California is perfectly prepared to impose discipline based solely on the defense mounted against the noticed misconduct, without notice that the defense itself may become the vehicle for the imposition of punishment regardless of the nature and/or sustaining of the underlying charges. These states holding contrary to California include, at least: Florida, Kansas, Maryland, Arizona, New York, Delaware, Illinois, Oregon, Ohio, and Michigan.

In *In re Henderson*, 306 Kan. 62 (2017), the Kansas Supreme Court found that no charge could be made against a judge (*Henderson*) in a prior case where there were allegations of dishonesty in his testimony, as he was not given notice and an opportunity to be heard on that issue. A new case was required due to the judge's procedural due process rights.

To similar effect, the Arizona Supreme Court held in *In re Tocco*, 194 Ariz. 453, 457-58, 98 P.2d 539 (1999), that charges of misconduct arising out of a judge's

testimony presented at a misconduct hearing may not be included as ethical violations of the original complaint because of lack of notice or the opportunity to be heard.

The state of Maryland reached the same conclusion as did the states of Kansas and Arizona in the case, *Attorney Grievance Commission of Maryland v. Mooney*, 359 Md. 56, 81-82, 753 A.2d 17 (2000). The holding of that case was that charges of untruthfulness before the tribunal investigating the unethical conduct "might serve as a basis for subsequent formal charges, if adequate notice is provided."

Florida has long held that lack of candor had to be formally charged and supported by particularized findings before it could be used a basis for the reprimand and removal of a judge. See In re *Davey*, 645 So. 2d 398 (Fla. 1994). The Florida Supreme Court relied on *Davey*, when it disapproved of the commission's use of Judge McAllister's lack of veracity as a basis for discipline. *Inquiry Concerning a Judge (McAllister)*, 646 So. 1d 173 (1994). See also *Inquiry Concerning A Judge (Hawkins)* 151 So. 3d 1200 (Fla. Sup. Ct., 2014).

Ohio is yet another state that requires fair notice of charges based on the defense against one set of charges before disciplinary proceedings can commence based on problems posed by the defense. See *Disciplinary Counsel v. Reinheimer*, 2020-Ohio-3941 (August, 6, 2020, (Per Curiam)). Similarly, in *Absaf v. Nyquist*, 37 N.Y. 2d 182 (1975) the Supreme Court of New York annulled the penalty in a nurse discipline case because lack of candor during hearing was not charged and, thus, no

reasonable opportunity to defend was afforded. Delaware also requires that a "lack of candor" be actually charged followed by a reasonable opportunity to defend. See *In re Lankenau*, 158 A.3d 451, (Del. Supreme Ct., 2017).

In Illinois, the Supreme Court, citing *Ruffalo*, supra, held that an attorney cannot be disciplined for uncharged conduct as it would violate due process. *In re Chandler*, 161 Ill. 2d 459 (1994). In Oregon, in *Inquiry Concerning a Judge (Day)* 362 Ore 547 (2018), a judge could not be disciplined for that for which he was not charged, and as with the present case, there was no attempt to amend the charges at any time. (Two allegations were for false allegations in testimony, punishment for those acts was not allowed as they were not charged).

It takes no great imagination to see that the California procedure which resulted in Judge Laettner's removal from office represents a major – and constitutionally deficient – departure from the practices and procedures employed in professional discipline by all of the other states in the case cited above. California and the Commission applied the vague concept of a "lack of candor" to cause removal from office over misconduct which by itself would not warrant that result. If "lack of candor" might indeed be cause for discipline, then it should have been separately charged, with notice and the opportunity to defend. It was certainly not noticed as a basis for discipline. There was most certainly no meaningful opportunity to defend – since the claim was both without notice and the motion to respond in evidentiary fashion was expressly denied. In any of the other states cited, there would have been hearings on the noticed charges and then

separate notice on "lack of candor" as applied to the defense of the noticed charges. Or, proper notice and the evidentiary opportunity to respond to the charge of "lack of candor" might have avoided successive hearings. The California procedure represented a clear-cut denial of Judge Laettner's due process rights.

3. Lack of Candor is Simply No Standard at All and Cannot Be Used as a Basis for the Imposition of Discipline.

Neither the Special Masters nor the Commission defined what was meant by their conclusions that Judge Laettner's defense mounted against misconduct charges "lacked candor". This is a serious deficiency when it is clear that removal from office was based on that concept and the evaluation of the defense and not on the instances of misconduct for which notice was given and charges actually were brought.

It turns out that "lack of candor" may be found as a conclusion in a great many cases – but it is ambiguous, difficult to define and apply to the particular context, and used in inconsistent fashion. In *Fargnoli v. Department of Commerce*, 123 M.S.P.B. 330, 338, 2016 M.S.P.B. 19 (2016)(where lack of candor was charged) the requirement for lack of candor is that the person "knowingly" gave incomplete or incorrect information. "Intent to deceive" was found to be an essential element of a misrepresentation or a lack of candor showing. *Swan Creek Communications v. FCC*, 39 F.3d 1217 (1994). Lack of candor has also been found to be where a person "could not reasonably have believed" the circumstances surrounding his resignation that were unfavorable. *Freedland v. Dept. of Homeland Security*, 2020 U.S. App. LEXIS

24997, (lack of candor charged). In *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002)(where lack of candor is stated to be a distinct charge and was charged) two requirements were stated: 1) that the employee gave incorrect or incomplete information, and 2) that he did so "knowingly". Lack of candor may also be where there was a failure to disclose something that should have been disclosed in order to make the given statement accurate and complete. It necessarily involves an element of deception. Id. In *Hoskins v. Nicholson*, 900 F. Supp. 2d 712 (Miss., 2012)(lack of candor charged) the court held that to prove lack of candor, "no intent to deceive is required", but failure to disclose something that should have been disclosed is required.

"Minor discrepancies" in testimony which may result from an honest difference in recollection, do not support a lack of candor charge. In re *Kiley*, 74 N.Y. 2d 364 (1989)(lack of candor charged). Objective proof of "lying" would be needed to support such a charge. Id. at 370-371. In In re *Davey*, 645 So.2d 398 (Fla. 1994), the Florida Supreme Court held that to sustain a lack of candor charge, it first had to be formally charged, and second, had to be supported by particularized findings before it could be used to reprimand or remove a judge. Simply showing that a judge made an inaccurate or false statement under oath would not suffice. What is required is that a judge "made a false statement that he did not believe to be true". Id., at 407.

The Federal Circuit took a similar approach in *Parkinson v. Department of Justice*, 815 F.3d 757, 766 (Fed. Cir. 2016) (lack of candor charged) where 1) lack of candor was based on an allegation of "failure to be fully forthright" in his statements

to an agency investigation. The court reversed the Board finding and required that such a failure had to be "knowingly done".

In re Kroger, 167 Vt. 1, (1997) held that a judge could be disciplined for making false, deceptive and misleading statements in her testimony. The court found, however, that "absent a psychic connection" it was hard pressed to find that respondent lied when she explained what she meant to say in an article. The court was "not privy to her inner thoughts". Id. at 11. A false statement must be "knowing and false". Id. In New York, in In re *Richter*, 409 N.Y.S. 2d 1013, 1016-1017 (Ct. Jud. 1977) a charge that a judge gave false testimony to a judicial conduct commission was not proven where statements were not "intentionally or willfully false"; mistakes in testimony did not constitute false swearing. In Alaska, in *In Re Nash*, 257 P.3d 130 (Alaska, 2011) lack of candor allegation reversed as candor allegation was based on an event 18 years prior and failure to remember found not to constitute lack of candor. Similarly, in *In re Baker*, 579 A.2d 676 (D.C. 1990) momentary lapses of memory during an examination by five questioners do not make a reasonable basis for a finding of evasiveness, and therefore, lack of candor was not proven and finding reversed.

In *Inquiry v. McBrien*, 49 CJP Supp. 315 (2010), in California, the masters did not make a finding that Judge McBrien gave intentionally false testimony, finding only that his testimony was not credible. Because they could not make such a finding, censure, rather than removal was the proper punishment

As of November 1, 2019, a lawyer in California may not knowingly make a false statement of fact or law to a tribunal. Rule 3.3. Knowledge and belief are of course very different mental states. *United States v. Galomb*, 811 F.2d 787, 792-93 (2d. Cir. 1987).

"The legal profession frequently refers to lawyers' duty of candor, but the term has no fixed meaning". Bruce A. Green, Candor in Criminal Advocacy, 44 Hostra L. Rev. 1105 (2016). Judge Richard Posner quoted Kant, and said there is the difference between a duty of truthfulness and a duty of candor, or between a lie and reticence. To Kant, a truthful declaration is one that the speaker believes to be true. But being truthful is different from being candid. One might speak truthfully, believing everything one says is true, but not saying everything that matters. To make a false statement is to lie, but to withhold relevant information—to be candid—is to be reticent. *City of Livonia Emps. Ret. System v. Boeing Co.,* 711 Fed. 3d 754, 758-59 (7th Cir. 2013).

In re Simpson, 500 Mich. 533 (2017), the Court wrote:

> "At the outset, we could locate no finding in the special masters report that respondent lied under oath as the partial panel dissent suggests...But it is far from clear that a "misleading statement" is equivalent to lie under oath". We have not yet addressed whether materiality or an intent to deceive are necessary to prove that a judge testified falsely under oath. Before being removed from office, a respondent judge is certainly entitled to an opportunity to provide input to these critical questions." At p.570.

In re Receiver-Bascombe, 892 A.2d 396 (2006) the court remanded the case for more exact findings on dishonesty or whether the conduct was reckless or negligent.

Similarly, credibility or lack thereof, is not the same as lack of candor. In *Altamirano v. Chem. Safety and Hazard Investigation Bd.,* 2014 U.S. Dist. LEXIS 114329, At 38, (Dist. Ct. of Colo.), a lack of candor charge was not sustained, as the explanation given went to credibility only.

The foregoing discussion of the concept of "lack of candor" as applied to the circumstances of a variety of cases is useful in the review of Commission action taken in Judge Laettner's case. Here, there was no finding of knowingly false or untrue statements. That finding would have required proof by clear and convincing evidence. Instead, a "lack of candor" was used to characterize the defense of the case and was noted to be "troubling". Neither term nor concept was defined and obviously neither could be measured in terms of the clear and convincing proof required for discipline to be imposed. The observations had nothing to do with the charged misconduct, because all were specific incidents and none was sufficient to justify removal from office. Therefore, the Commission removed Judge Laettner from office based on an undefined concept without application of the proper evidentiary standard, without notice and the opportunity to be heard, and as punishment for the defense against misconduct charges rather than on a standalone basis.

The California Commission cannot be deemed to have satisfied due process requirements as applied to these circumstances.

B. The First and 14th Amendments Prohibit The Restraints On Judicial Speech in This "Me Too" Era Case

Judge Laettner was initially charged with sexual harassment through the use of allegedly improper language. That charge was not sustained by either the Commission or the masters. The same language was charged as creating a hostile work environment. The masters did not sustain the charge, although the Commission did.

The comments upon which charges of workplace harassment were based have been summarized in the Statement of the Case at Part B pgs 5-12 of this Brief. (Such statements may also be found in the Commission Decision at Appendix C. pg. 41.) The allegedly hostile work environment essentially had reference to Judge Laettner's long-time court reporter. Obviously, the comments themselves were made over a very long period of time during which attitudes of acceptable commentary amongst genders and others have significantly changed. An objective review of representative comments indicates that most were made as a part of the discharge of judicial duties, without contemporary complaint. Unobjectionable at the time, some of them would be ill-advised in this present era of high tension and a willingness to take offense where none was intended.

While judges do not enjoy the high levels of speech available in the general marketplace, once the actual protection moves from the functional interests to the aspirational interest of the profession, the First Amendment comes to bear with greater force. What is possible, then, is arbitrary enforcement of rules designed to protect against sexual harassment or gender bias, and this also implicates the 5th, 6th and 14th amendment due process provisions.

Judge Laettner was the judge. Drunk drivers were his responsibility. Saying the word "pretty" or "handsome" in this context was only to get them to understand that they had something to lose and had to change their behavior, if not for others, for themselves. Similarly, reciting as a human-interest story that he enjoyed doing weddings and adoptions and had performed Ms. Bell's wedding, and introducing her as "lovely" in front of the court reporter, can hardly be deemed objectively offensive.

Judges simply must have the First Amendment right to speak with the people that appear in front of him. The potential for infringement of protected free speech by the Commission looms large when it seeks discipline based on the catch-all "gender bias". In *Inquiry v. Johnson*, 9 Cal. 5th CJP Supp. 1 (2020) the commission found that the use of the words "beautiful" or being his favorite was not actionable as the person to whom the statement were made did not feel uncomfortable or were related to their work. In Judge Laettner's case, the person whom he described as "lovely or beautiful", or a favorite for example, was not made to feel uncomfortable, did not actually remember the incident, and was not offended after being told of it. RT: 2251-2252. What was found not to be misconduct in the *Johnson* case was so found in this case.

A judge has a right to his private opinions outside of a campaign contest or on his belief in any particular area. These are core First Amendment values. *Morial v. Commission on Judicial Performance v. Boland*, 975 So. 2d 882 (Sup. Ct. Miss. 2008). The First Amendment to the Constitution provides in part: "Congress

shall make no law abridging the freedom of speech". "Language that is likely to offend some listeners is fairly commonplace in many social gatherings. See *Eaton v. City of Tulsa*, 415 U.S. 697, 700(Powell, J., concurring). Requiring lawyers outside of courts and court pleadings to use language that no judge could possibly find offensive is irreconcilable with the "prized American privilege to speak one's mind although not always with perfect good taste...". *Bridges v. California*, 314 U.S. 252 (1941). It is submitted that the judge should easily have been allowed to say what he said and that he should not have been sanctioned for it.

CONCLUSION

A reported instance of judicial discipline sheds light on the actions of the Commission to remove Judge Laettner. In *Inquiry concerning Symons*, 7 Cal.5th CJP Supp. 1 (2019), a judge with a reprehensible history and series of misconduct violations was censured – but not removed. The apparent reason for the exercise of mercy in that case was the observation that the respondent judge offered no defense and the Commission saved the money and time that a due process hearing would have required. Id. 11, 19.

The misconduct of Judge Laettner cited for purposes of discipline did not support his removal - by the Commission's own lights. Judge Laettner was unwilling, however, to simply admit wrong doing and accept the administrative equivalent of a slap on the wrist. He elected to exercise his constitutional rights to present a defense and to be heard on the charges. The Commission obviously penalized the judge for that decision – and not for any misconduct in which he was

found to have engaged. It effectively applied no standard in concluding that the defense "lacked candor" as it nonetheless used that finding to justify removal. It also stated that the fact of the defense coupled with a "lack of candor" evidenced the failure to acknowledge impropriety, thus compelling removal so as preclude a repetition of misconduct at some future, unknowable time. No notice was provided regarding the peril in which the decision to mount a defense placed the Judge. When the direction of the Commission and masters regarding the application of the "lack of candor" standard became apparent, no opportunity to present evidence on the issue was afforded.

It is very difficult to avoid the conclusion that the only reason for meting out removal as punishment was simply the fact and manner of defense.

The California Commission has acted in wayward fashion with respect to its denial to Judge Laettner of the fundamental procedural and substantive rights of due process. The Commission and State have failed to follow the procedures for discipline of judges employed by other states in a constitutionally sanctioned

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fashion. This Court's Writ of Certiorari must issue to review the State action and redress the wrongs it caused Judge John T. Laettner.

Respectfully Submitted,

David J. Bowie

/s/ Peter R. Silten

PETER R. SILTEN
Counsel of Record

Bowie and Schaffer
Attorneys at Law
2255 Contra Costa Blvd.,
Suite 305
Pleasant Hill, California
Phone (925) 939-5300
Dave@bowieschafferlaw.com
Counsel for Petitioner