No. 25-6716

# In the Supreme Court of the United States

IN RE: JOHN A. SHEPARDSON,

*Petitioner.*

**On Petition for an Extraordinary Writ of Mandamus Directed to the Superior Court of California, County of San Joaquin (J. Kronlund)**

## PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS

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## QUESTION PRESENTED

Should this Court grant certiorari to address California State Courts violating constitutional due process, free speech, and petitioning rights of a solo trial attorney with over 3,200 hours in the case, advanced over $380,000, by disqualifying him with arbitrary ex post facto rules and repeatedly violating an automatic stay to deny his right to represent the Plaintiff on 8/28/23 in his racial and sexual discrimination jury trial after 4.5 years of litigation and the sixth jury trial setting?

## PARTIES TO THE PROCEEDINGS

### Petitioner

- John A. Shepardson,
  Licensed California Attorney
  (Cal. SBN 129081)

### Respondent and Mandamus Court

- Judge Barbara A. Kronlund, Judge, Superior Court, in her capacity as a judicial officer; and/or the successor judge assigned to handle the *Johnson v. California Department of Transportation* case; and/or Judge George A. Abdullah, Jr.; and/or the Presiding Judge of the San Joaquin County Superior Court.

### Respondent and Defendant, Real Party In Interest

- California Department of Transportation

### Real Party In Interest Aligned with Petitioner, and Plaintiff-Appellant below

- Christian L. Johnson,
  Represented by Petitioner John A. Shepardson
  in the California Court proceedings

## LIST OF PROCEEDINGS

Supreme Court of California

No. S290366

Christian L. Johnson, Plaintiff and Appellant, v. Department of Transportation, *Defendant and Respondent*

Final Order Denying Review: June 25, 2025

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California Court of Appeal, Third Appellate District

No. C099319

Christian L. Johnson, *Plaintiff and Appellant*, v. Department of Transportation, *Defendant and Respondent*

Final Opinion: March 17, 2025

Rehearing Denial: April 4, 2025

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California Court of Appeal, Third Appellate District

No. C099501

Christian L. Johnson, *Plaintiff and Appellant*, v. Department of Transportation, *Defendant and Respondent*

Final Order: October 11, 2023

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Superior Court of California, County of San Joaquin

No. STK-CV-UCR-2019-281

Christian L. Johnson, et al., *Plaintiff* v. California Department of Transportation, *Defendants*

Final Order Denying Review: August 25, 2023

Final Order, Attorney Disqualification: Sept. 8, 2023

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## PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS

Petitioner and attorney John A. Shepardson, formerly attorney for Plaintiff and Appellant Christian L. Johnson, in the state court action, petitions this Court for an extraordinary writ of mandamus to the California Third District Court of Appeal.

## RULE 20 STATEMENT

### 1. Person to which Mandamus should be directed

Judge Barbara A. Kronlund, Judge, Superior Court, in her capacity as a judicial officer; and/or the successor judge assigned to handle the *Johnson v. California Department of Transportation* case; and/or Judge George A. Abdullah, Jr.; and/or the Presiding Judge of the San Joaquin County Superior Court.

### 2. Specific relief sought

Judicial Review of the disqualification of John Shepardson as the attorney of record for Christian L. Johnson, with a full report of findings; reinstatement of Shepardson as attorney of record for Johnson; vacating of the continuance of Johnson's case and remand for new trial with Shepardson as causes.

### 3. Reason for invoking this Court's jurisdiction

The Petitioner and his client Christian L. Johnson, pursued this relief in the California Court of Appeals and the California Supreme Court, but were denied. Those proceedings were under the caption "In Re

Christian L. Johnson" but directly involved with and with extensive briefing on the legal interests of the Petitioner. As an aggrieved person in this matter, and the damage done not only to his client, the case, but to his personal legal reputation and ability to represent Johnson, and having exhausted remedies in the highest court of a state, a petition for extraordinary writ of mandamus is properly filed under the jurisdiction of this Court. The petition aids in this Court's jurisdiction under the All Writs Act, as it involves the conduct of a judicial officer who has flaunted the First and Fourteenth amendment.

## OPINIONS BELOW

The trial court ruling, which was not published, was issued on August 25, 2023 in California Superior Court, San Joaquin County Case No. STK-CV-UCR-2019-281. (App.65a). On March 17, 2025, the California Court of Appeals issued its opinion, later published as *Johnson v. California Department of Transportation*, 109 Cal.App.5th 917 (2025). The Supreme Court of California denied review on June 25, 2025. (App.1a)

## JURISDICTION

Christian Johnson's petition for review, which squarely addressed the Petitioner's issues, to the California Supreme Court was denied en banc on June 25, 2025. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1651, and conforming to Sup. Ct. R. 20.

Federal questions were raised in the lower courts as referenced below.

## CONSTITUTIONAL PROVISIONS INVOLVED

**U.S. Const. amend. I**

> 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 grievances.

**U.S. Const. amend. XIV, § 1**

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

In addition the long standing application of common law client-attorney privilege applies, as articulated in *Upjohn Co. v. U.S.*, 449 U.S. 383, 1012 S.Ct. 677 (1981) (*Upjohn*) to the claim of an attorney-client privilege on email sent to a low-level noninvolved government employee who forwarded it to the Plaintiff and damaged him.

## INTRODUCTION

Law firms across the country face an unprecedented challenge by the federal executive branch of government to their constitutional rights to act as legal counsel for particular clients or causes.[1] Courts should be an impartial forum for protecting constitutional rights. Here, respectfully, the California trial court ("TC") authored violations of due process, free speech, and petition constitutional rights. Respectfully, the appellate court ("AC") erred in upholding the violations. The California Supreme Court denied review en banc.

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[1] *Perkins Coie LLP v. U.S. Department of Justice*, 783 F.Supp.3d. 105, 119 (D.C. Cir. 2025) "Eliminating lawyers as the guardians of the rule of law removes a major impediment to the path to more power. *See Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 371 n.24, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) (Stevens, J., dissenting) (explaining the import of the same Shakespearean statement to be "that disposing of lawyers is a step in the direction of a totalitarian form of government").

"If the founding history of this country is any guide, those who stood up in court to vindicate constitutional rights and, by so doing, served to promote the rule of law, will be the models lauded when this period of American history is written." (*Id.* at fn. 3).

## STATEMENT OF FACTS

SUMMARY TIMELINE:

**2021**—Christian is evaluated by Retained Expert Psychologist Dr. Bennet Williamson ("Dr. Williamson"). They discuss Christian's emotional distress and work conditions. Respondent California Department of Transportation ("CalTrans") *CalTrans takes Williamson's deposition and learn of his evaluation protocol.*

**1/10/22**—Trial has already been set for 4/18/22.

**1/10/22 at 10:13 a.m.**— Petitioner emails CalTrans attorney W. Christoper Sims ("Sims") and informs him Christian will be re-tested by Williamson on 1/28/22. *Sims and the four other attorneys of record* are on notice Christian will disclose to Williamson his current work conditions and emotional distress on 1/28/22. At 4:01 p.m. CalTrans attorney Paul Brown emails ("E-mail") Christian's boss, Nicholas Duncan ("Duncan") with derogatory and misleading information about Christian. About 27 minutes later Duncan sends a copy of the E-mail to Christian (suggesting Duncan was not advised or considered E-mail privileged). Christian is upset by the E-mail contents. at 4:28 p.m., Christian sends Petitioner a copy.

**1/11/22 at 10:51 a.m.**—Petitioner emails Sims the E-mail. Petitioner asserts intentional disclosure and waiver of any privilege. At 2:27 p.m., Sims claims the E-mail is privileged, demands destruction, and claims Duncan lacked authority to waive the privilege.

**1/12/22**—Petitioner refuses to destroy the E-mail in a *9-page* letter rebutting the privilege claims.

**1/13/22-1/27/22**—CalTrans refuses to respond. Sims never explains why.

**1/28/22**—Christian attends his follow up psychological evaluation with Dr. Williamson, he shows him the E-mail and discusses its emotional harm. Dr. Williamson calls Petitioner for a copy for his chart. Petitioner complies. *Thereafter,* that day, Petitioner advises Sims the E-mail is being disclosed to Christian's experts. Sims fails to respond.

**2/3/22**—Sims claims the E-mail is privileged, be destroyed, and not used. The most reasonable inference is CalTrans' legal department intentionally refuses to respond for *23-day days* because they *want* the E-mail to be used by Christian's attorney and experts to disqualify them. Sims fails to explain the 23-day delay.

**In February, 2022**—Petitioner engages in meet and confer efforts with CalTrans and then *CalTrans stops* participating. Petitioner seeks judicial resolution. The discovery referee and trial judge refuse to rule on the matter.

**1/11/22 to 8/17/23**—CalTrans fails to file any motions.

**7/1/22**—Petitioner informs CalTrans their delay waived any privilege.

**8/18/22**—CalTrans files a motion against "Plaintiff" only—for a protective order.

**1/3/23**—The TC finds the email "*not clearly privileged,*" (emphasis added). Petitioner's only duty under the *McDermott/State Fund* lower standard of care is to disclose the E-mail to CalTrans, which he did, and then CalTrans had the burden to take steps to protect the privilege. The TC finds the E-mail itself

is privileged and expressly refuses to order experts return their copies nor bar use of the E-mail contents and effects for trial.

**8/25/23**—The TC grants CalTrans' motion to disqualify Petitioner. The TC violates its 1/3/23, order by applying the *McDermott / State Fund* higher standard of care, applicable to documents "clearly privileged," which the TC never factually found. There is no factual foundation for the higher standard. TC arbitrarily and in ex post facto fashion applied the this wrong standard back to January, 2022, to manufacture grounds for attorney and expert disqualification. There is no factual support for the TC finding Petitioner continued to disseminate the E-mail. The TC incorrectly found Petitioner should have secured the experts' E-mails, when the 1/3/23, order allowed them to keep their copies. The TC erred in finding Petitioner continued to discuss the E-mail specific contents, when he did not, and the 1/3/23, order expressly refused to bar discussing the E-mail's contents and effects.

**8/28/23**—Petitioner serves and files a notice of appeal that automatically stays the attorney disqualification. The TC defies the stay, refuses to allow Petitioner to speak or try the case, and over Christian's objections, wrongfully continues the trial, and Sims and CalTrans readily support the egregious judicial error. The TC allows CalTrans's legal trial team to lounge in the courtroom while Petitioner and the public are locked out, which gives the appearance of impropriety.

**9/8/23**—The TC violates the automatic stay a second time by rejecting Petitioner's seventh motion for judicial disqualification based in part on lack of standing due to the disqualification order.

**In October, 2023**—The appellate court rejects Petitioner's writ without prejudice to filing another *if the TC continues not follow the automatic stay law.* The TC reverses, honors the stay, and places a stay on the entire case.

**4/1/25**—In a published decision, the appellate court upholds the TC order for attorney and expert disqualification.

**6/25/25**—The California Supreme Court en banc denies review.

**8/8/24**—Notice is received that the trial judge is retiring effective 11/1/25.

## STATEMENT OF THE CASE

One, Petitioner files a civil rights suit on behalf of Plaintiff and former Appellant Black Male Christian L. Johnson against his employer, Real Party in Interest California Department of Transportation for sexual and racial harassment by co-worker White Male, Mark Taylor.

Two, respectfully, the trial judge, the Hon. Barbara A. Kronlund systemically rules contrary to case law, statutes, and rules, and makes derogatory and humiliating comments, including:

1) On 2/17/22, CalTrans' attorney W. Christopher Sims sends an email to the trial court and states in part:

> Further, Mr. Shepardson currently has an objection regarding the *Referee and alleged*

> *conflicts* pending with the Court. If you could please confirm whether this matter should be heard by the Discovery Referee or by the Court. (emphasis added) (Vol. 8: p. 1966);

2) That day TC sua sponte imposes a stay and sets a hearing to determine if Petitioner should be disqualified for representing Christian and his mother. The TC denies disqualification. The TC errs by finding a sham relationship based on two cases where either the client or attorney claim there was no relationship. (Vol. 9: pp. 2120-2122) Ms. Johnson and Petitioner declare there is an attorney-client relationship. (Vol. 6: p. 1352: ls. 9-21; Vol. 17: p. 3916: ls. 13-18) The TC overlooks CalTrans' attorneys' conflict in representing a former employee. (Vol. 17: p. 3917: ls. 8-13);

3) Requiring Petitioner to pay *$8,000* for referee services cancelled by him and ordered and received by Sims. As a government lawyer, Sims violates his duty to justice, not harass, and just seek wins. *County of Santa Clara v. Superior Court,* 50 Cal.4th 35, 57 (2011) The referee is notified of his billing error, fails to respond, and improperly disburses the $8K retainer. (Vol. 5: pp. 937-938; Vol. 17: p. 3916: ls. 20-25; Vol. 4: pp. 721-723—copies of emails showing Sims agreed to pay for the referee fees—"Caltrans will of course pay your fee.");

4) Improperly ordering Christian to pay one-half of the referee fees when he cannot afford them. (Vol. 17: p. 3917: ls. 4-5);

5) Ordering payment of fees without due process of law. (Vol. 17: p. 3917: ls. 12-13);

6) Telling Christian in a conference that government workers are not as good as those in the private sector. (Vol. 17: p. 3917: ls. 1-2);

7) Referring to Petitioner as a "mouthpiece," a term used to refer to criminal lawyers that do the mob's bidding without ethics. (Vol. 17: p. 3915: ls. 18-24; Vol. 6: p. 1353 ls. 9-20; Vol. 5: p. 1032);

8) Referring to Christian's mother as "mom." (Vol. 17: p. 3917: ls. 6-7);

9) Saying Christian and Petitioner sit in a separate room during a settlement conference while a "paralegal" settles the case. (Vol. 17: p. 3917: ls. 17-19; Vol. 6: p. 1352: ls. 9-21);

10) The AC issues a *Palma notice* indicating the judge engaged in an improper ex parte communications and should refer a judicial disqualification motion to another judge. The TC reverses her ruling, refers out the motion, and the outside judge finds the trial judge more likely than not engaged in ex parte communications in violation of the CALIFORNIA CODE OF JUDICIAL ETHICS. (Vol. 5: pp. 895-6 & 996-999);

11) On 8/28/23, the judge states in a minute order that Christian gave notice that he filed an appeal of the disqualification order. (Vol. 16, p. 3886). The oral transcript confirms the judge was notified of the appeal (Vol. 16, p. 3706: ls. 16-2). The judge is provided a copy of the notice of the appeal before the hearing and it references the legal authority that the filing stayed the order for attorney disqualification (Vol. 16: p. 3706: ls. 1-7). The judge's minute order falsely states Christian is not ready to proceed, when the reporter's transcript shows otherwise (Vol. 16: p. 3706: ls. 1-28). Another writ is filed. The AC states:

> This denial, however, is without prejudice to petitioner filing a petition for a writ of supersedeas *should the trial court continue to fail to enforce the stay order.* (*URS Corp. v. Atkinson Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 887 (emphasis added) (Vol. 17: p. 3921); and

12) At the scheduled 8/28/23, jury trial the judge should have allowed Petitioner to try the case given the automatic stay triggered by the appeal. The TC violated the stay by prohibiting Petitioner from speaking, demanding to speak directly to Christian, and continuing the jury trial. (Vol. 17: p. 3918: ls. 4-5; p 3921)

Three, Petitioner is forced to file 11 writs to the AC and 11 petitions to the California Supreme Court.

Four, backing up, in *2021,* Christian is seen by retained Expert Psychologist Bennett Williamson ("Dr. Williamson"). He interviews Christian about his work conditions and emotional state. CalTrans takes Williamson's deposition and learns of the interview and protocol.

Five, a jury trial is set for *April, 2022.* On *1/10/22,* CalTrans' counsel are advised Williamson will evaluate Christian on *1/28/22.* CalTrans attorney Paul Brown sends an email to Christian's boss, Nicholas Duncan ("Duncan"). Duncan has no involvement in Christian's lawsuit. The E-mail contains false, misleading, and derogatory information about Christian. Duncan immediately sends the E-mail to Christian. Christian is upset by it. He forwards it to Petitioner. Petitioner forwards it to Sims on 1/11/22. Petitioner claims the E-mail is not privileged. Sims claims it is and demands

it be destroyed. On 1/12/23, Petitioner sends a nine-page letter claiming not privileged.

Six, Sims stops communicating until 2/3/22.

Seven, on 1/28/22, Christian discloses the E-mail contents to Dr. Williamson. He calls Petitioner and asks for a copy. A copy is sent. That day Petitioner emails Sims and informs him the E-mail is being provided to experts.

Eight, on 8/18/22, CalTrans files a motion for protective order. The notice of motion only identifies the "Plaintiff" as subject to the motion.

Nine, on 1/3/23, the TC errs by including Petitioner in the protective order. The TC finds the E-mail is "not clearly privileged" and pursuant to *McDermott/State Fund's* lower standard, Petitioner's *only duty* is to disclose its existence to CalTrans (timely done) and the *burden* shifts to CalTrans to take steps protect any claimed privilege. The TC finds the E-mail itself subject to the attorney-client privilege, but refuses to so order on its contents and effects. The TC provides an ambiguous hybrid privilege/nonprivileged ruling.

## REASONS FOR GRANTING THE EXTRAORDINARY WRIT OF MANDAMUS

### I. California Courts Violated Petitioner's Due Process, Free Speech and Petitioning Rights by Allowing the TC to Twice Violate the Automatic Stay and Arbitrarily Violate the 1/3/23, Order by Ex Post Facto Raising the Standard for E-Mail Handling to Create False Grounds for Disqualification.

One, the Fourteenth Amendment's Due Process Clause provides that no state may deprive any person of life, liberty, or property, without due process of law. (U.S. Const. Amend. XIV) The Supreme Court applied the Clause in two main contexts. The Court construed the Clause to provide protections similar to the Fifth Amendment's Due Process Clause except that, while the Fifth Amendment applies to federal government actions, the Fourteenth Amendment binds the states. (U.S. Const. Amendments, V & XIV) The Fourteenth Amendment's Due Process Clause guarantees procedural due process, mandating that government actors follow certain procedures before depriving a person of a protected life, liberty, or property interest. The Court construed the Clause to protect substantive due process, holding that there are certain fundamental rights that the government may not infringe even if it provides procedural protections.

Two, the Due Process Clause of the Fourteenth Amendment formed the basis for high-profile Supreme Court cases. *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178 (1943); *Gideon v. Wainwright,*

372 U.S. 335, 83 S.Ct. 792 (1963); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678 (1965); *McDonald v. Chicago,* 561 U.S. 742, 130 S.Ct. 3020 (2010).

Three, due process requirements depend on the interest at stake and the weight of that interest balanced against the opposing government interests. The Supreme Court articulated the current standard for determining what process was required before the government may impair a protected interest in the 1976 case *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893 (1976). The *Mathews* Court explained at page 335:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Four, violation of Petitioner's due process rights was raised on pages 58-59 of the AC opening brief.

Five, the TC 1/3/23, order was vague and lacked notice for what was improper conduct. *Grayed v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294 (1972), dealing with vague statutes provides compelling reasoning regarding compliance with vague court orders, like the 1/3/23, TC order:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Vague laws offend several important values.* First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, *if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.* Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.' (emphasis added, internal footnotes omitted)

Six, CalTrans brought a motion for protective order and argued the E-mail was privileged, the higher-level *State Fund* standard (and duties) applied, which required Petitioner to stop looking at a "clearly privileged" document, disclose its existence to opposing counsel, meet and confer, and seek judicial relief for guidance. (Vol. 1, pp. 16-17, ls. 22-23)

Seven, *McDermott,* states on pages 1108-1109 there are two *State Fund* standards:

> Finally, a reasonable way to reconcile the issue is to interpret *State Fund* as *establishing two standards,* with each one applying to slightly different situations. The language Defendants quote applies when an attorney receives materials that *obviously or clearly appear* to be privileged and it is reasonably apparent the materials were inadvertently disclosed. In that situation, the attorney receiving the materials must refrain from examining them any more than is necessary to determine their privileged nature, immediately notify the privilege holder the attorney has received materials that appear to be privileged, attempt to reach an agreement with the privilege holder about the materials' privileged nature and their appropriate use, and resort to the court for guidance if an agreement cannot be reached. The attorney must not further review or use the materials for any purpose while the issue remains in dispute. (emphases added)
>
> The language Dick quotes applies when an attorney ascertains that he or she received materials that are *not obviously or clearly privileged,* but nonetheless may be privileged materials that were inadvertently disclosed. This plainly is a *lower standard,* and it triggers a more *limited response.* In this situation, the attorney's duty is simply to *notify the privilege holder* that the attorney may have privileged documents that were inad-

> vertently disclosed, the *onus shifts* to the privilege holder to take appropriate steps to protect the materials if the holder believes the materials are privileged and were inadvertently disclosed. (emphases added)

Eight, on 1/3/23, the TC found the E-mail was not clearly privileged and the lower *McDermott/State Fund* standard applied to Petitioner's handling of the E-mail. As a matter of clear law, Petitioner's *only duty* was to notify opposing counsel of the E-mail, which he did, and the "onus" shifted entirely to CalTrans to take steps to protect any privilege. (Vol. 12: pp. 2799-2800, ls. 15-10) From the TC 1/3/23, order:

> Specifically, "when an attorney ascertains that he or she received materials that are not obviously or clearly privileged, but nonetheless may be privileged that were inadvertently disclosed . . . *the attorney's duty is simply to notify the privilege holder that the attorney may have privileged documents that were inadvertently disclosed. At that point, the onus shifts* to the privilege holder to take appropriate steps to protect the materials if the holder believes the materials are privileged and were not inadvertently disclosed." *McDermott* at 1108-1109. Because Duncan was a lower-level Caltrans manager whose communications with Caltrans lawyers were *not obviously privileged, the Referee concludes the standard applies.* (emphases added) (Vol. 11, within pp. 2636-2637, ls. 15-6)
>
> Whatever Mr. Shepardson concluded about the potentially privileged nature of the Brown e-mail, he responded to his recognition of the

> issue by *immediately informing Mr. Sims of the disclosure, as required by McDermott. At that point the burden shifted to defense counsel to "take appropriate steps to protect the materials." Ibid.* (emphases added) (Vol. 11, within pp. 2636-2337, ls. 15-6)

Nine, the AC overlooked the "simply" part of the order. CalTrans filed a motion to disqualify Petitioner and argued against the *McDermott/State Fund's* lower standard and for the higher one. (Vol. 7, pp. 1652-1669 (pp. 1659-1666))

Ten, Petitioner opposed the motion:

> Christian's attorney met the Court-approved *McDermott* standard by disclosing the email. At that point, the *onus* was on Defendant to protect the Email. Defendant failed to act. (emphases added) (Vol. 8: p. 1811: 6-8)

> 14. Burden Shifted to Defendant's Lawyers. It is undisputed that pursuant to this Court's 1/3/23 Court order, with my disclosure of the Email to opposing counsel, I had fully met my McDermott obligation to disclose it and the burden shifted entirely to Defendant's attorneys to take appropriate action to protect it. (Vol. 8: p. 1823: ls. 20-24)

Eleven, Exhibit N was a copy of the TC's 1/3/23, order and it highlighted the E-mail was already found "not clearly privileged." Petitioner's only duty was to disclose the E-mail and the burden shifted to CalTrans' counsel to protect the communication. (Vol. 11: pp. 2636, ls. 21-10)

Twelve, the TC stated in its 8/25/23, order that it was bound to follow *McDermott,* refused to follow it, cited to the dissent, and applied the higher *McDermott/State Fund* standard, without changing the finding the E-mail was "not clearly privileged," which resulted in trumped up ethical violations to justify disqualification. (Vol. 12: pp. 2987.10-2987.19). The TC stated:

> *This Court is bound to follow McDermott, supra.* As previously noted, the McDermott Court concluded and directed the "State Fund rule requires the attorney . . . refrain from using documents until the parties resolve or the court resolves any dispute about their privileged nature. (Vol. 12: pp. 2987.16)

Thirteen, the TC irrationally rejected its prior adoption of the *McDermott/State Fund* lower standard, and arbitrarily applied *State Funds'* higher standard. The TC's order to disqualify Petitioner failed to undo the finding that the E-mail was "clearly privileged." Thus, it was logically impossible for the 8/25/23, order to have the necessary factual predicate to justify the higher standard used to disqualify Petitioner.

Fourteen, to apply the higher *McDermott/State Fund* higher standard, required a factual finding that the E-mail was "clearly privileged," which never occurred. (Vol. 12: pp. 2987.10-.19)

Fifteen, at page 948 the AC overlooked the TC's failure to make a "reasoned" decision and erred in assuming the TC correctly applied the law:

Sixteen, the AC overlooked the TC's failure to follow the law, its own 1/3/23, order, and ex post facto increased Petitioner's duties in handling the E-mail.

Seventeen, on *pages 20-21 of his AC petition for rehearing, Petitioner stated the AC committed constitutional violations by arbitrarily and ex post facto raising the standard for handling the E-email.*

Eighteen:

> Disqualification motions implicate several important interests, among them are the clients' right to counsel of their choice, the *attorney's interest in representing a client,* the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion. *(Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 218-219 (emphasis added)

Nineteen, the TC and AC violated Petitioner's due process, free speech, and petitioning rights by arbitrarily disqualifying him by retroactively imposing improper additional duties: to not read or use the E-mail, reach an agreement with the opposing counsel, or have the court resolve the matter. From Jon B. Eisenberg, et. al., *Cal. Prac. Guide: Civil Appeals and Writs* (12/2024 Update):

> [8:94.1] Attorney disqualification motions:
>
> In exercising its discretion, however, the trial court must make a *"reasoned judgment"* that complies with the applicable legal standard. An order disqualifying an attorney that is not supported by "sufficient reason" constitutes "an abuse of discretion that must

> be reversed on appeal." *[McPhearson v. Michaels Co.* (2002) 96 C.A.4th 843, 851, 117 C.R.2d 489, 496 (emphasis added)

Twenty, the TC ignored its 1/3/23, order and ex post facto applied the wrong *McDermontt/State Fund* standard. The TC's 8/25/23, order fails the "reasoned" test.

Twenty-one, from *Sanchez Ritchie v. Energy,* 2014 WL 12637956 (2014) at page 2:

> Moreover, with regard to the ethical boundaries of an attorney's conduct, a *bright line test is essential . . . an attorney must be able to determine beforehand whether particular conduct is permissible;* otherwise, an attorney would be uncertain whether the rules had been violated until . . . he or she is disqualified. *Unclear rules risk blunting an advocate's zealous representation of a client. (Snider v. Superior Court,* 113 Cal.App.4th 1187, 1197-98 (Cal.Ct.App.2003)) (emphases added)

Twenty-two, from Michael Paul Thomas, California Civil Courtroom Handbook and Desktop Reference, section 28:23 (4/23 Update):

> *such a motion should be made as soon as the basis for the motion becomes apparent—motions first made at the time of trial are strongly disfavored. (See Maruman Integrated Circuits, Inc. v. Consortium Co.*, 166 Cal. App.3d 443, 451, 212 Cal.Rptr.497 (6th Dist. 1985); *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.*, 194 Cal.App.4th 839, 847, 123 Cal.Rptr.3d 498 (2d Dist. 2011) [proper for trial court to deny motion brought

as a *tactical* device to delay the litigation] (emphases added)

Twenty-three, the TC and AC failed to consider the eve of trial motion was strongly disfavored.

Twenty-four, the TC violated Petitioner's due process, free speech, and petition rights by disqualifying him from presenting at the 8/28/23, jury trial, despite knowing there was a stay of the disqualification order. The TC again violated his rights on 9/8/23, by denying him standing for his seventh motion for judicial disqualification—again knowingly defying the automatic stay. *Constitutional due process was argued violated in the trial court motion to disqualify the judge and a copy is attached as appendix.* App.271a. Petitioner filed a writ and the AC stated that if the TC *continued to not follow the law* another writ could be filed. The TC then reversed, enforced the stay, and stayed the entire case.

## II. Caltrans' Motion to Disqualify Petitioner and His Experts Violated CCP 1008. The TC Lacked Jurisdiction to Grant the Motion, and So There Was a Violation of Constitutional Due Process.

One, "Section 1008 expressly applies to all renewed applications for orders the court has previously refused." *Evan Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC,* 61 Cal.4th 830, 840 (2015) and "Section 1008's purpose is '"to conserve judicial resources by constraining litigants who would endlessly bring the same *motions over and over, or move for reconsideration of every adverse order* and then appeal the denial of the motion to reconsider."' (emphases added) (*Id.* at p. 839) CalTrans brought a motion for protective

order and remedies. (Vol. 1, pp. 1-18, ls. 22-23), and argued the *State Fund* higher standard applied to Christian's attorney's handling of the E-mail. (Vol. 1, pp. 16-17, ls. 22-23)

Two, the TC's 1/3/23, order rejected CalTrans' argument and found the E-mail was subject to the *McDermott / State Fund* low-level "not clearly privileged," standard, which "simply" required notifying opposing counsel of the E-mail, (done), and the "onus" shifted to CalTrans to take steps to protect any privileges. (Vol. 12: pp. 2799-2800, ls. 15-10)

Three, CalTrans's motion for disqualification of Petitioner was not brought pursuant to CCP 1008. Cal-Trans argued against he the *McDermott / State Fund* lower standard. (Vol. 7, pp. 1652-1669 (pp. 1659-1666)

Four, Robert I. Weil (Ret.), et. al., *Cal. Prac. Guide: Civil Procedure Before Trial* (June 2024 Update) states CCP 1008 applies when the same matter or issue is subsequently ruled on:

[9:324.1] What constitutes "motion for reconsideration":

> *The name of the motion is not controlling.* The above requirements (¶ 9:324) apply to any motion that asks the judge to *decide the same matter previously ruled on. (See R & B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 C.A.4th 327, 373, 44 C.R.3d 426, 463 (citing text); (emphases added)

Five, in *Lennar Homes of Calif., Inc. v. Stephens* 232 Cal.App.4th 673, 681 (2014), the court held CCP 1008 applied if the same matter or issue was being addressed and the motion name was *not* controlling.

Six, CalTrans failed to comply with CCP 1008, the TC lacked jurisdiction grant disqualification, so Petitioner's constitutional rights were violated by the disqualification.

## III. There Was a Violation of *Upjohn.* the E-Mail Was Not Privileged.

One, *Upjohn was discussed on pages 65 and 66 in the AC opening brief and in the AC decision.*

Two, *Upjohn,* 449 U.S., at page 391 stated that the privilege extends to lower-level employees that embroil the corporation in legal difficulties.

Three, Duncan did *not* embroil CalTrans in legal difficulties (Vol. 8, p. 1687, ls. 16-22; Vol 1: p. 165, ls. 18-19). There was no substantial evidence Brown contacted Duncan to secure information to provide legal advice to CalTrans. (Vol 1: pp. 19-20, ls 22-13)

Four, from Robert H. Fairbank, et. al., *Cal. Prac. Guide: Civil Trials and Evidence* (10/24 Update):

> [8:2008] Comment: *Chadbourne* sets forth detailed guidelines ("basic principles") for determining whether a communication in the corporate setting is privileged and, if so, whether waiver of the privilege has occurred. [*See D.I. Chadbourne, Inc. v. Sup.Ct. (Smith), supra,* 60 C2d at 736-738, 36 CR at 477-478]
>
> The *Chadbourne* guidelines are crucial in dealing with attorney-client privilege/waiver issues in the corporate or entity context. *[Cf. D.I. Chadbourne, Inc. v. Sup.Ct. (Smith), supra,* 60 C2d at 735, 739, 36 CR at 476, 479—privilege lost; *Insurance Co. of North*

*America v. Sup.Ct. (GAF Corp.)* (1980) 108 C.A.3d 758, 761, 765, 166 CR 880, 882, 884

Five, Failure to Strictly Construe. The TC and AC failed to strictly construe the attorney-client privilege. *Chadbourne* at page 739 stated the privilege must be strictly construed. (Vol. 3: 411-412, ls. 7-15)

Six, evidentiary privileges should be narrowly construed. *(McKesson HBOC, Inc. v. Superior Court,* (2004); *People v. Sinohui,* 28 Cal.4th 205, 212 (2002).) The TC and AC failed to strictly construe the privilege. The courts erred in finding a privilege.

Seven, *Chadbourne* guidelines showed the E-mail was not privileged: 1) Duncan not a co-defendant. 2) Not natural person to speak for CalTrans. 3) He was an independent witness:

> 3. When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney *does not alter his status or make his statement subject to the attorney-client privilege; (D.I. Chadbourne, Inc.* at p. 737) (emphases added)

4-7: A report was not required in the ordinary course of business. 11: No more liberality in finding privilege for corporate entities over individuals. 9: E-mail intended to mislead and damage Christian. (Vol. 1: p. 166, ls. 2-7)

## IV. State Courts Failure to Find Waiver Further Shows Violation of Constitutional Rights.

One, AC admitted at page 93 that the privilege is waived if a party revealed *specific content* concerning the communication. Here, its undisputed CalTrans' lawyers intentionally disclosed in court filings *specific content*—the confidentiality notice footer—63 verbatim words-to support the privilege claim. (at p. 940) CalTrans treated the 63 verbatim words as "significant." Yet, to avoid finding waiver, the AC illogically found CalTrans did not disclose *specific content* (at p. 940)

Two, *U.S. v. de la Jara,* 973 F.2d 746, 749-750 (1992), stated all reasonable steps must be taken to protect a privilege and held a six month delay waived the privilege. CalTrans took over seven months to file a motion.

## V. Crime-Fraud Exception Applied to E-Mail.

One, the crime/fraud exception has a low bar. Christian only needed to make a prima facie case that has foundation in fact. *Nahama & Weagan Energy Co.,* 199 Cal.App.3d 1240, 1262-1263 (1988). The TC erred in overlooking the facts and opinions about the E-mail provided by Christian, his attorney, and Williamson. (Vol. 3: pp. 452-452, ls. 1-13)

Two, Christian provided evidence that that E-mail failed to mention the DCIU report confirming wrongdoing (Vol. 2: p. 203); was false, misleading, subject to the crime-fraud exception (Vol. 2: p. 206); Brown should cease and desist making false and misleading statement to Duncan and others; he should send a clarifying statement that provided a balanced and accurate depiction of Christian's history at Caltrans

(Vol. 2: p. 207): Brown provided a misleading history that was unnecessary and harmful; the email was defamatory and failed to reference the DCIU substantiated wrongdoing (Vol. 2: p. 209); Brown provided false and misleading facts and concealed material facts and only asked for negative information (Vol. 2: p. 213); Brown did not provide legal advice (Vol. 2: p. 222); dominant purpose was not to obtain objective information: it was to create in Duncan's mind that Christian was an employee that made wild and unsubstantiated complaints; he was trying to get Christian's supervisor to act against Christian's interests; the E-mail was a malicious effort to damage Christian's career (Vol. 2: p. 230); dominant purpose was to damage Christian; false statements about Christian; his work in Rio Vista was not part of the complaint; Brown engaged in multiple violations of the *Penal Code sections 131 & 133,* by misrepresenting information in connection with an investigation conducted by the head of a department of the State of California; and by making a false statement to a witness upon any trial, proceeding, inquiry, or investigation with the intent to affect the testimony. (Vol. 2: pp. 275-278)

## REASONS FOR ISSUING THE WRIT OF MANDAMUS

One, government officials may not "subject[] individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Hous. Cmty. Coll. Sys.,* 595 U.S. 468, 474, 142 S.Ct. 1253 (2021) (quoting *Nieves v. Barlett,* 587 U.S. 391, 398, 139 S.Ct. 1715 (2019)); *Crawford-El v. Britton,* 523 U.S. 574, 592, 118 S.Ct.

1584, 140 L.Ed.2d 759 (1998) ("[T]he First Amendment bars retaliation for protected speech."). Such "'[o]fficial reprisal for protected speec . . . 'threatens to inhibit exercise of the protected right.'" *Hartman v. Moore,* 547 U.S. 250, 256, 126 S.Ct. 1695 (2006) (quoting *Crawford-El,* 523 U.S. at 588 n.10, 118 S.Ct. 1584). *Borough of Duryea v. Guarnieri,* 564 U.S. 379, 387, 131 S.Ct. 2488 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."). Retaliation based on the exercise of the right to petition the government violates that right, and the associated liberty interest, just as retaliation based on protected speech violates the First Amendment.

Two, evaluating procedural due process claims requires determining whether a protected interest in life, liberty, or property was deprived and, if the process provided adequate. *Reed v. Goertz,* 598 U.S. 230, 236, 143 S.Ct. 955, 215 L.Ed.2d 218 (2023).

Three, an attorney's right to petition the government, is protected under the First Amendment. The Supreme Court has recognized that "[t]he very idea of government, republican in form, implies a right on the part of its citizens to . . . petition for a redress of grievances," *De Jonge v. State of Oregon,* 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937) (quoting *United States v. Cruikshank,* 92 U.S. 542, 552, 23 L.Ed. 588 (1875)), and this right "is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," *id.* (citations omitted). *BE & K Constr. Co. v. NLRB,* 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) ("We have recognized [the]

right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights." (quoting *United Mine Workers of America, District 12 v. Illinois State Bar Association,* 389 U.S. 217, 222, 88 S.Ct. 353 (1967)). This liberty interest in petitioning is protected under the due process clauses of the Fifth and Fourteenth Amendments. *De Jonge,* 299 U.S. at 364, 57 S.Ct. 255. The right to petition government "extends to all departments of the Government" and, includes "[t]he right of access to the courts." *BE & K Constr. Co.,* 536 U.S. at 525, 122 S.Ct. 2390 (quoting *California Motor Transportation Co. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972)).

Four, the government is not constitutionally permitted to interfere directly with the right of counsel. *U.S. v. Gonzalez-Lopez,* 548 U.S. 140, 148, 126 S.Ct. 2557 (2006) ("Deprivation of the right [to counsel of choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.").

Five, "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.,* 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). *Boutilier v. INS,* 387 U.S. 118, 123, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967) ("It is true that this Court has held the 'void for vagueness' doctrine applicable to civil as well as criminal actions."); *Gentile v. State Bar of Nev.,* 501 U.S. 1030, 1048-51, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (finding a state Supreme Court rule governing attorney conduct void for vagueness); *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603-04, 87 S.Ct. 675, 17

L.Ed.2d 629 (1967) (finding a restriction on government employee speech "wholly lacking in terms susceptible of objective measurement" (internal quotation marks, citation omitted)). In the civil context, an enactment is only void if it is "so vague and indefinite as really to be no rule or standard at all."

Six, "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673 (1976)); *Roman Catholic. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting *Elrod*, 427 U.S. at 373, 96 S.Ct. 2673); *Karem v. Trump*, 960 F.3d 656, 668 (D.C. Cir. 2020)

Seven, the primary focus of the due process clause is to check arbitrary government decision making. *Codd v. Velger*, 426 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 9d2 (1977).

Eight, Petitioner's Constitutional Due Process, Free Speech, and Petitioning Rights to represent his former client Plaintiff and Appellant Christian L. Johnson ("Christian"), have experts, earn contingent fees and recover costs advanced, were violated when Petitioner was arbitrarily disqualified with ex post facto standards by a TC so embroiled in the litigation they arbitrarily with ex posto facto rules disqualified Petitioner and engaged in series of objectionable and harassing acts. The TC twice knowingly violated the automatic stay on disqualification triggered by an appeal. The TC actively thwarted and denied Petition-

er's his ability to speadk and advocate for Christian in the scheduled 8/28/23 jury trial. *Arizona v. Fulminante,* 499 U.S. 279, 309, 111 S.Ct. 1246 (1991) [trial by judge who is not fair or impartial constitutes "structural defect in the constitution of the trial mechanism" and resulting judgment is reversible per se]; *Gomez v. United States,* 490 U.S. 858, 876, 109 S.Ct. 2237 (1989); *Gray v. Mississippi,* 481 U.S. 648, 668, 996, 107 S.Ct. 2045 (1987) ["impartiality of the adjudicator goes to the very integrity of the legal system"]

*Based on the attorney-client privilege only, Caltrans' motion is granted. However, this hardly spells the end of the matter.* Plaintiff received the Brown e-mail through no fault of his own, and claims it caused him emotional distress. Is such distress, arguably caused by the litigation process, a recoverable component of damage? *If so, to what extent will he be allowed to testify to the privileged e-mail's content and effect on him. The message is now part of Dr. Williamson's chart. Will he give it up?* To what extent will he be allowed to rely upon it? He has testified "[i]t would be difficult, perhaps impossible, to give testimony about Christian's psychological harm caused by Defendant Christian (sic) without consideration of the damaging email." Williamson Dec., paragraph 31. Has he talked himself out of a job? *What use will plaintiff's "HR experts' be allowed to make of the Brown e-mail given that Brown is not a CalTrans HR officer or employee? These and related questions are unresolved. The Referee does not rule or imply that by finding the Brown e-mail privileged and recommending that the motion be granted that these issues must be resolved in Caltrans' favor.* (Vol. 12: pp. 2811-2812: ls. 16-2) (emphases added)

1. Defendant Caltrans' motion for protective order is GRANTED. The Brown e-mail is a protected attorney-client communication which shall not be introduced at trial over Caltrans' objection.

2. Plaintiff and his counsel are prohibited from any further *dissemination* of the Brown e-mail. (emphasis added)

3. Within 20 days following mailing notice of entry of the court's order on this motion, *plaintiff and his attorney,* John A. Shepardson, shall doo (sic) all of the following: (emphasis added)

   A. Return or destroy all copies of the Brown e-mail and prepare, serve, and file a declaration under penalty of perjury that this has been done, or explaining the reasons(s) it cannot be done.

   B. Include in the declaration identifications of all persons to whom the *Brown e-mail is known to have been disclosed,* and the date of each disclosure. (emphasis added)

4. The issue to what extent *plaintiff and his witnesses called by plaintiff, including his retained experts, may testify, regarding the Brown e-mail and its effect on plaintiff is not addressed or ruled on.* (emphasis added) (Vol. 11, pp. 2648-2649, ls. 15-5)

Nine, the 1/3/23, order refuses to order return of the experts' E-mail copies.

Ten, Petitioner *over-complies* with the TC's 1/3/23, *McDermott / State Fund* lower standard, includ-

ing by 1) multiple meet and confer writings; 2) disclosing experts were being provided the E-mail; 2) requesting judicial officer involvement. (Vol. 8: p. 1823-1834: ls. 20-15; p. 1848: ls. 23-24) The officers *refuse* to address the matter in February, 2022.

Eleven, on 8/25/23, the TC grants CalTrans' motion to disqualify Petitioner and his experts. The TC ignores its 1/3/23, order that determined the *McDermott/State Fund* lower standard, made a "not clearly privileged" finding, stated Petitioner's sole obligation to disclose, and thereafter it was CalTrans' burden to take steps to protect any privilege. Instead, the TC arbitrarily applies the *McDermott/State Fund* higher standard with no factual support for it. The unjustified elevated duties are ex post facto applied back 17 months to fomant ethical violations to disqualify Petitioner and his experts. The AC overlooks the TC's unlawful, arbitrary, and ex post facto change in the E-mail handling standards.

Twelve, the TC fails to consider Christian's or his attorney's interests reflecting bias and lack of a reasoned decision. The AC errs in overlooking these TC errs.

Thirteen, the 8/25/23, disqualification order, *without evidence,* states the E-mail itself had been improperly disseminated by Petitioner. (Vol. 12: 2987.15-.16,-.18)

Fourteen, Petitioner's declaration shows that after the 1/3/23, order is issued, the E-mail is not disseminated. (Vols. 11: pp. 2674-2675; 12: pp. 2829-2832).

Fifteen, the AC errs at page 934 by narrowly construing Code of Civil Procedure section ("CCP") 1008 in defiance of a broad construction required by

*Evan Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC,* 61 Cal.4th 830, 839-840 (2015).

Sixteen, at page 936 the AC errs by failing to apply the required *strict* construction to the privilege and overlooks the TC's failure to strictly construe.

Seventeen, at page 936 the AC finds important:

The email bore a confidentiality notice.

Eighteen, at page 937 the AC discusses the E-mail's dominant purpose. The AC incorrectly states there is no evidence the E-mail is to impugn Christian. Christian's upset at the E-mail and Duncan's promptly providing it to him is powerful circumstantial evidence the dominant purpose is to damage Christian's credibility and reputation. The TC and AC err in *liberally* construing the privilege.

Nineteen, at page 937, the AC applies a broad construction to *Upjohn* ruling by essentially finding when a government attorney claims a communication with a low-level employee is privileged, that it is, even if that employee has zero involvement in the underlying wrongful conduct and fails to confirm the communication is privileged.

Twenty, the AC errs at pages 937-938, by discussing *D.I. Chadbourne v. Superior Court of City and County of San Franciso,* 60 Cal.2d 723 (1964), without adhering to its requirement that the privilege be strictly construed.

Twenty-one, the E-mail contains specific content. (Vol. 1: p. 20, ls. 1-5) CalTrans discloses the content in a declaration and memorandum. At page 940 the AC errs by stating CalTrans did not disclose "specific content":

> *Neither disclosed the "specific content"* or "substantive information" of the communication. (*Ibid.*) (emphasis added)

Twenty-two, the AC errs on page 941 by concluding CalTrans was *not* on notice that Christian and Petitioner intended to show to others the E-mail until 1/28/2022. CalTrans is aware on 1/10/22, that Johnson has an expert psychological evaluation on 1/28/22 and that in a prior evaluation he disclosed his work place conditions and emotional distress. On 1/11/22, CalTrans is aware Petitioner claims the E-mail is not privileged. CalTrans is aware on 1/12/22, that the E-mail would be disclosed by Christian on 1/28/22.

Twenty-three, at pages 941-942 the AC irrationally gives CalTrans' attorney's demands for destruction of the experts' copies of E-mail *greater weight* than the TC 1/3/23, order which expressly refused to order return of the experts' E-mail.

Twenty-four, the AC states at page 942:

> The trial court found that Johnson had "failed to adduce facts" supporting any of his accusations of criminal or fraudulent behavior.

Twenty-five, Petitioner's AC opening brief provides a plethora of facts, including, lay opinion evidence and multiple sworn detailed statements about the E-mail contents:

> The E-mail made false and/or misleading statements about Christian's complaints. Attorney Brown violated the statute. (Vol. 1: p. 167, ls. 8-12)

> Four, deceitful statements were made to affect testimony, which violated the statute. (Vol. 1: p. 167, ls. 18)
>
> Eight, the crime/fraud exception has a low bar. Christian only needed to make a prima facie case that has a foundation in fact. *(Nahama & Weagan Energy Co.)* (1988) 199 Cal.App.3d 1240, 1262-1263.) Trial court erred in finding the opinions held by Christian, his attorney, and Dr. Williamson's opinion were not admissible—they were in evidence. (Vol. 3: pp. 452-452, ls. 1-13)

Twenty-six, at page 944, the AC finds *State Fund's* higher standard obligations for handling the E-mail are not satisfied and disqualification of Petitioner and his experts justified. Again, the AC ignored the TC's 1//3/23, order that the E-mail was already determined to be "not clearly privileged," and the lower-level *McDermott/State Fund* applied. The TC without notice arbitrarily raised and retroactively applied the wrong standard for E-mailing handling back 17 months to January, 2022, and the AC supported this unlawful and illogical action.

Twenty-seven, at pages 944-945 the AC erred in conflating dissemination of the E-mail with discussing its contents and effects, which was allowed by the 1/2/23, order.

Twenty-eight, the AC errs because the 1/3/23, order expressly refused to bar Petitioner from referring to, disclosing, or discussing the E-mail's contents or effects.

Twenty-nine, the AC misconstrues the 1/3/23, order by stating there is "silence" on the issue of witness tes-

timony. The TC 1/3/23, order expressly refused to prohibit Petitioner or his experts from presenting evidence at trial on the E-mail contents and effects. Thus, the E-mail contents and effects could be discussed, disclosed, and referred to, short of actually sharing the E-mail itself.

Thirty, the AC states at page 945:

> Third, the record supports the conclusion that there was a reasonable probability that Shepardson and the experts would continue to use the Brown email, or the information it contained, to *unfair advantage against Caltrans . . . he also declared his intention to solicit testimony about it at trial.* (emphases added)

Thirty-one, since the 1/3/23, order expressly left open the option to Petitioner and his experts for presenting trial testimony on the E-mail contents and effects, it there was no "unfair advantage" to discuss, refer to, or rely upon the contents or effects of the E-mail. Since the 1/3/23, order refused to order the experts to return their copies, it was logically impossible to find a violation for their failure to return their copies.

Thirty-two, at page 944, the AC finds Petitioner violated the higher *McDermott/State Fund* duties applicable to "clearly privileged" documents, when the TC on 1/3/23, found the E-mail was "not clearly privileged."

Thirty-three, at page 946 the AC states:

> But even if the email was only potentially privileged, we disagree with Johnson that

> *McDermott* permitted him to use or disclose the email.

Thirty-four, the TC's 1/3/23, order expressly refused to bar Petitioner from using or disclosing the E-mail *contents or effects.*

Thirty-five, the AC errs at 946 by identifying the wrong *McDermott/State Fund* standard. The TC's 1/3/23, order found the lower-level standard applied. The TC had already ruled Petitioner's only duty was to disclose the E-mail, and then it was CalTrans' burden to take steps to protect the privilege. CalTrans failed to protect the privilege before 1/28/22; stopped meeting and conferring; objected to using the discovery referee; in February, 2022, *the trial court refused to hear the matter,* and CalTrans delayed for 17 months to file a motion for disqualification. The AC acknowledged the *McDermott/State Fund* lower standard, which only required disclosure, and then arbitrarily refused to follow the law and the TC's 1/3/23, order to impose higher standard duties. This fallacious reasoning was essentially what the TC did to justify disqualification.

Thirty-six, the AC states on page 947:

> After receiving the compliance declarations and meeting and conferring with Shepardson, it became clear that Shepardson had disseminated the Brown email and its contents and still intended to use the email to his client's advantage at trial.

Thirty-seven, there is no evidence that Petitioner *disseminated* the E-mail itself after the 1/3/23, order was issued, and the order refused to bar use of the E-mail contents and effects.

Thirty-eight, at page 948, the AC references Petitioner's argument that the TC failed to consider the prejudice to Petitioner for disqualification, finds no error, incorrectly *presumes* the TC correctly applied the law, when it failed to comply with the *McDermott/ State Fund* lower standard of care, its own 1/3/23, order, and the AC sternly rebuked the TC for repeatedly violating the automatic stay law. Respectfully, the AC overlooked the TC clear violations of law. They were simply too eager to uphold her errant rulings and judicial misconduct.

Thirty-nine, Christian files a petition for review with the California Supreme Court, raises a plethora of issues, and on pages 47-48 discusses violation of constitutional due process rights.

## CONCLUSION

For the reasons stated, Petitioner respectfully asks the Court to grant the petition. *Whatever the status of the E-mail*, the evidence is overwhelming that Petitioner was denied his constitutional rights, including on 8/28/23 and 9/8/23, when its undisputed the TC twice knowingly violated the automatic stay law to intentionally bar Petitioner from trying the scheduled 8/28/23, jury trial.

Respectfully submitted,

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