Case No. _____
CJP No. 204

IN THE SUPREME COURT OF CALIFORNIA

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JUSTICE JEFFREY W. JOHNSON,

Petitioner,

v.

COMMISSION ON JUDICIAL PERFORMANCE,

Respondent.

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**PETITION FOR REVIEW**
**FROM THE DECISION OF THE**
**COMMISSION ON JUDICIAL PERFORMANCE**

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## INTRODUCTION

Justice Jeffrey W. Johnson seeks review and a reversal of the decision of the Commission on Judicial Performance removing him from office after ten years of distinguished service as a justice of the Second District Appellate Court of California during which time his judicial opinions have been praised as scholarly and distinguished, his work on other judicial matters, such as the Court Facilities Advisory Committee and Courthouse Cost Reduction subcommittee (for which he received the 2017 Judicial Council's Distinguished Service Award), has been exemplary, his mentoring and encouragement to young men and women has had a positive impact on the lives of many, and he has never received any prior discipline for conduct of any sort.

The order removing Justice Johnson was the first time a sitting appellate judge has *ever* been removed, and the first time that a judge at any level has *ever* been removed in a case involving neither willful misconduct nor prior discipline. In response to Justice Johnson's argument that the remedy was disproportionate, the commission did not adequately explain why its choice of remedy here was significantly more severe. Instead, the commission observed that it need not show willful misconduct, prior discipline, or a failure to take steps to reform to remove a jurist from the bench. (Decision and Order Removing Justice Jeffrey Johnson from Office, p 107.) But the question is not whether the commission has the *power* to remove a jurist without these elements; the question is whether removal as a remedy is "required to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and impartiality of the judiciary." *Id.* at p. 86, citing *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112. And as to that, the commission's reasoning and outcome cannot withstand scrutiny.

The commission acknowledged that Justice Johnson "has had a positive impact on many lives and devoted time and effort to giving back to the community," and that he "served as an important mentor to young men and women, many of whom attribute their success in the legal field and their personal lives to Justice Johnson's encouragement and guidance." (Decision and Order, p. 102.) But the commission nevertheless ordered him removed from office. If not reviewed by this Court, the decision will leave lingering doubts about the fairness and impartiality of the California judiciary inevitably undermining public confidence in its operations.

Review is also warranted because the findings against Justice Johnson as to the most egregious charges do not meet the clear and convincing evidence standard. The special masters' findings, which were adopted by the commission, fault Justice Johnson for entering Justice Chaney's room uninvited, inviting her to have an affair with him, using coarse language, and engaging in unwanted touching. The special masters specifically rejected portions of Justice Chaney's sworn testimony observing that "some of Justice Chaney's testimony was not fully substantiated and/or conflicted with written records." (Special Masters' Findings of Fact and Conclusions of Law, p. 41.) They declined "to fully credit" her accusation that Justice Johnson propositioned her. (*Id.* at p. 43.)

The special masters likewise found "doubtful that Justice Chaney would have written such a glowing letter [of recommendation of Justice Johnson for a position on the California Supreme Court] if Justice Johnson had been grabbing her breasts with 'significant pressure' once or twice a month during the years before she signed the letter." (*Id.* at p. 83.) They were unable to reconcile her accusations with her enthusiastic endorsement of his potential appointment to the California Supreme Court. But this same inability to reconcile Chaney's conduct with her glowing recommendation or to make sense of her accusations of severe harassment despite her

extremely friendly communications and behavior toward Justice Johnson undermines its veracity entirely.

The commission, after its independent review of the evidence, also discerned serious problems with Justice Chaney's testimony, observing that her conduct "seems odd and hard to explain." (Decision and Order, p. 24.) Under normal circumstances, these are key factors used to identify falsehood. But the commission offered no explanation of how a witness whose conduct "seems odd and hard to explain," and whose testimony was discredited by multiple eye witness observers (who did not see what she claimed visibly occurred in their presence), could satisfy the clear and convincing evidence standard of proof. Rather than grapple with the severe and lingering problems with Justice Chaney's story, the commission adopted the special masters' factual findings relating to Justice Chaney despite its expressed unease about her veracity. It did so in part on the strength of hearsay accounts of Justice Chaney's descriptions of incidents to others, including that of Eric George, who gave ostensibly factual testimony during the hearing supporting Justice Chaney while simultaneously acting as her advocate in the judicial inquiry and proceedings. Eric George was also representing Chaney's law clerk – all of which is disconcerting and leaves a blemish on the proceedings and outcome given the normal rule that witnesses should not discuss their testimony with other witnesses and the troubling question of whether George was acting as an advocate for Chaney or a truthful witness.

Chaney repeatedly made friendly overtures to Johnson for years after she was supposedly shaken and upset by his behavior in Reno. Her more outrageous accusations cannot be reconciled with her own conduct in repeatedly seeking out his company – or with the large number of witnesses who said they often saw Chaney with Johnson and she never appeared

uncomfortable or ill at ease but seemed to have a warm friendship characterized by friendly banter.

The special masters and commission also did not reconcile Justice Chaney's accusations claiming that Justice Johnson used coarse sexually explicit language and engaged in unwanted sexual touching with the salacious sexually explicit cartoon Justice Chaney sent him years after the Reno trip or the numerous emails in which she expressed the desire to travel with him on judicial trips or her repeated characterization of herself as his "conjoined twin" or her invitations to contact her about personal matters, signing off with "love," telling him in writing how much she appreciated him as a colleague, or her glowing letter of recommendation and testimony that she had no problem with his potential elevation to the California Supreme Court. (RT 617, 2157; Documents Produced Pursuant to SDT re Gov. Emails, Exhibit 630, JJ 0507-0903.) The commission's findings insofar as they are predicated on Justice Chaney's testimony require review and a reversal because they do not meet the high standard required for clear and convincing evidence.

The commission's reliance on testimony of two other witnesses to find facts supporting two other instances of claimed misconduct does not satisfy the clear and convincing evidence standard. Both Ms. Burnette and Ms. Kent had motives to retaliate against Justice Johnson, gave testimony that is on-its-face incredulous and fantastic, and had their accounts seriously undermined by others present at the time. To shore up their testimony, the examiner offered "corroborating witnesses" who failed to corroborate their core claims. Even more troubling, the examiner failed to call purportedly friendly witnesses, presumably because that testimony would not have supported the outrageous stories Burnette and Kent presented and yet the absence of these witnesses was ignored when crediting Kent and Burnette's testimony.

One aspect of the special masters' consideration that was also evident in the commission's decision is the notion that women who make accusations of outrageous conduct have no motive to lie while those charged with misconduct are to be disbelieved or suspected because they have a motive to lie to avoid the charges.[1] This mindset is troubling, particularly when judging credibility in a dispute involving claimed sexual misconduct. The clear and convincing evidence standard demands evenhanded consideration and the burden of proof requires those judging to start with the scales of justice balanced. The record here reflects unfavorably on that evenhanded and impartial consideration of these key charges.[2]

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[1] History is replete with examples where justice went awry because individuals made false accusations because of their desire to avoid consequences for their conduct, or to retaliate, or to harm the person they accuse. See e.g., Diane Bernard, *'They Were Treated Like Animals': The Murder and Hoax That Made Boston's Black Community A Target 30 Years Ago*, THE WASHINGTON POST, Jan. 4, 2020, Marisa Lati, *She Captivated the Nation by Saying A Black Man Kidnapped Her Sons. Police Knew She Killed Them*, THE WASHINGTON POST, Oct. 25, 2019, Don Terry, *A Woman's False Accusation Pains Many Blacks*, THE NEW YORK TIMES, Nov. 6, 1994, Thomas Fuller, *He Spent 36 Years Behind Bars. A Fingerprint Database Cleared Him in Hours*, THE NEW YORK TIMES, March 21, 2019; see also, ALAN M. DERSHOWITZ, GUILT BY ACCUSATION: THE CHALLENGE OF PROVING INNOCENCE IN THE AGE OF #METOO (2019) (describing problems with ignoring procedural protections for those accused of sexual misconduct or harassment). And this history is even more problematic when considering the accusations of white women against black men. See e.g., MAMIE TILL-MOBLEY AND CHRISTOPHER BENSON, DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA (2003).

[2] This Court recently reiterated its intention of confronting injustices to assure that the justice system works for everyone. Placing a thumb on the scales of justice in favor of claimants and against those accused of sexual harassment by assuming that claimants have no reason to lie is not consistent with this Court's goal and policy or with the longstanding rules,

Once these findings of fact as to Chaney, Burnette, and Kent are rejected because the proofs are inadequate, the foundation for the commission's conclusions of law and its chosen remedy fall like the house of cards they are. What remains are instances of prejudicial misconduct that occurred largely in social situations, none of which rose to the level of sexual harassment. In those instances, Justice Johnson made personal comments about women and their appearance or hugged or kissed them in ways that made them feel uncomfortable. Not one of them told him they were uncomfortable at the time, and one went on to have him serve as godparent to two of her children and to ask him to officiate at her wedding.

Justice Johnson takes these instances seriously. He has taken the feelings of these individuals to heart, apologizing, remaining out of the judicial chambers during the pendency of proceedings but for when he was on the bench to spare their feelings, and voluntarily seeking and attending multiple sessions with a counselor to better understand appropriate limits to speech and behavior in interacting with others. His statement before the commission and his testimony before the special masters reveals his deep desire to reform his conduct, with new sensitivity learned through the counseling and deeper understanding gained by listening to the accounts of witnesses. Although Justice Johnson denies a drinking problem, he has explained that he no longer engages even in social drinking. He also pointed out that some of those claiming he had too much to drink had not actually seen him drinking alcohol, but were observing symptoms associated with his severe diabetes, which can cause slurring of words and an unsteady gate due to dizziness. (Justice Jeffrey W. Johnson's Opening Brief to the Commission on Judicial Performance, pp. 95-96.) The special

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which place the burden on the examiner to prove the charges and require proof by clear and convincing evidence.

masters accepted the medical veracity of this phenomenon.

Doubling down on their reliance on Justice Chaney's "perplexing" and "hard to understand" story, the special masters bootstrapped the basis for selecting the harshest remedy by calling Justice Johnson's denial of Chaney's accusations untruthful, asserting that his effort to defend himself against her false accusations, the most serious of which was rejected by the special masters and commission, and his denial of charges of some others, amounted to blaming the victim. (Decision and Order, p. 90.)[3] Giving the benefit of the doubt to Justice Chaney by suggesting that she inaccurately reported facts because of "faded memories" and an "appeasement strategy," the commission simultaneously concluded that Justice Johnson's "intentional fabrication and misrepresentation of facts during the evidentiary hearing, while is he under oath" was "exceptionally egregious" and warrants the most severe remedy of removal. (*Id.* at p. 91.) This is an unprecedented and improper use of the canon regarding honesty.

It may be tempting in a petition involving a record this large, and with testimony of so many witnesses, for this Court to simply defer to the commission and special masters. Such an outcome here will leave pervasive and unanswered questions about whether the commission's most important findings are supported by clear and convincing evidence and

[3] Arguing that a judge or justice's effort to defend himself from serious and some false accusations amounts to "blaming the victim" and warrants removal as opposed to a lesser remedy raises serious due process problems. See California Constitution, article I, § 7; *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390. A lack of candor previously resulted in removal only in significantly different circumstances, such as when a judge altered evidence, *Public Reproval of Judge Kamansky* (1992), or falsely denied contacting another judicial officer or the prosecutor about charges brought against the judge's son, *Public Reproval of Judge Schatz* (1989), p. 2. It has not been used when a judge's account of a long-ago off-the-bench interaction diverges from that of another witness.

whether the commission imposed a disproportionate remedy – one that was entirely unnecessary to protect the public.

The California Code of Judicial Ethics provides as the foundational principle that "[t]he basic function of an independent, impartial, and honorable judiciary is to maintain the utmost integrity in decision making." Canon I, California Code of Judicial Ethics. Justice Johnson has always done so – and no finding or conclusion of law of the special masters or the commission suggests to the contrary. Yet, the commission has imposed the most severe remedy available in circumstances in which it has never done so before. The result of its decision is to permanently deprive litigants appearing before California courts of a jurist whose past opinions have been widely praised, whose integrity as a justice in deciding cases is and has been impeccable, and who has served it well in every decision and every legal action he has presided over at a time when there is a dire need of a diverse judiciary. One of only ten African-American jurists on the California appellate courts will be removed based on findings that are not supported by clear and convincing evidence and in circumstances in which no California jurist on any state court has ever been removed before.[4]

Review is warranted, as is a reversal.

[4] Demographic Data Provided by Judges and Justices as of December 19, 2019. See also, cjp.gov/decisions_by_type_of_discipline/ (listing past instances of removal by the commission and this Court).

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I.

REVIEW AND REVERSAL ARE REQUIRED BECAUSE THE KEY FACTUAL FINDINGS WERE UNSUPPORTED BY CLEAR AND CONVINCING EVIDENCE, PARTICULARLY WHERE THE SPECIAL MASTERS AND COMMISSION EXPLICITLY CHARACTERIZED RELIED-ON TESTIMONY AS "PERPLEXING" AND "HARD TO EXPLAIN"

II.

REVIEW AND REVERSAL ARE REQUIRED BECAUSE THE COMMISSION'S UNPRECEDENTED DECISION TO REMOVE JUSTICE JOHNSON IS DISPROPORTIONATE TO ANY PRIOR DECISION, MORE SEVERE THAN IS CONSISTENT WITH THE COMMISSION'S OBLIGATION TO PROTECT THE PUBLIC, AND THREATENS TO DAMAGE THE COURT'S INSTITUTIONAL CREDIBILITY WITH THE PUBLIC

## JURISDICTION

This Court has jurisdiction over this petition pursuant to article VI, § 18, subdivision (d) of the California Constitution and Cal. Rules of Court, rule 9.60. The commission's decision removing Justice Johnson was issued on June 2, 2020.

## TIMELINESS OF PETITION

Pursuant to Rule 136 of the Commission on Judicial Performance, the Commission's Decision and Order Removing Justice Jeffrey W. Johnson from Office became final on July 2, 2020. This petition is therefore timely because it was filed within 60 days of the date of finality of the Commission's Decision and Order. Cal. Rules of Court, rule 9.60(a)(2).

## PROCEDURAL HISTORY

In 2018, the Commission on Judicial Performance ordered a preliminary investigation of Justice Jeffrey W. Johnson setting forth twelve possible charges. (Letter of Preliminary Investigation, 7/27/18, Exhibit 1, CJP 194-203.) The commission advised of two additional possible charges in a second letter. (Supplemental Notice of Preliminary Investigation, 8/3/18, Exhibit 2, CJP 204-205.) The commission advised on one further possible charge in a third letter. (*Id.* at CJP 206-207.)

Justice Johnson provided a detailed response. (Response Letter of Justice Johnson, 9/24/18, Exhibit 4, CJP 212-312.) He denied the truth of allegations made by Justice Victoria Chaney and Officer Tatiana Sauquillo, each of whom asserted that he had employed sexually explicit language. (Examples claimed by Chaney included "squeeze your titties" and Sauquillo claimed "bend her over," "take her clothes off," "fuck her from behind.") (*Id.*) Justice Johnson also denied the truth of Justice Chaney's assertion that he went into her hotel room uninvited. And while

acknowledging mutual hugs, Justice Johnson denied ever squeezing or touching Justice Chaney's breast.

Justice Johnson's attorney also obtained sworn declarations by multiple individuals in support of his response, many of whom were present when Chaney's allegations of misconduct purportedly occurred and did not witness the purported conduct. And he supplied multiple email and text exchanges from Justice Chaney to him showing her expressions of affection (unlike anything he received from any other colleague), her repeated invitations to him to get together, and her glowing recommendation of his consideration for a position on the California Supreme Court.

Justice Johnson also responded to the other allegations included in the letters of possible charges. He explained that some involved social interactions in which Justice Johnson made the statements as alleged. Some were taken out of context, or involved appropriate informal communications and pleasantries being recast as something sinister. Many of those to whom he made the complained-of comments indicated that they did not believe that Justice Johnson intended to be sexually suggestive and did not believe that he was sexually harassing them, although they felt uncomfortable or felt that others might feel uncomfortable. This Court knows well that such "uncomfortableness" is not the essence of harassment.[5]

[5] This Court has made clear that "use of sexually course and vulgar language in the workplace is not actionable per se." *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 273. To be actionable, especially as here in the absence of any loss of tangible job benefits, the plaintiff must show sexually harassing conduct that was pervasive and destructive of the working environment, that is, "one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive it to be*." Id.* at 284. The commission did not conclude that Justice Johnson's conduct approached this level. Given the absence of proof sufficient to show sexual harassment, the commission concluded that

Equally important, Justice Johnson acknowledged from the outset that he had failed to "maintain appropriate boundaries at times between the professional and the personal and it is not acceptable behavior for a judge." (Response Letter of Justice Johnson, 9/24/18, p. 4, Exhibit 4, CJP 215.) Justice Johnson also reported from the outset that he was working wholeheartedly to change his behavior. Those efforts included his voluntary steps to ensure no discomfort to those who made allegations against him during the investigation and hearing process by largely working from home except for at argument and avoiding interactions with anyone involved in the proceedings. In addition, Justice Johnson "entered and continue[s] an intensive course of professional counseling and education." (*Id.*) He has also discussed these issues with his wife and his pastor, seeking their guidance on how to improve.

The commission sent another letter advising of possible additional charges. (Preliminary Investigation Letter, 10/26/18, Exhibit 5, CJP 572-574.) Justice Johnson's counsel responded to that letter explaining that his former law clerk and Johnson had a strong and trusting working relationship, had exchanged hundreds of friendly emails over the years in which the law clerk had sent photos of her children (to both of whom Justice Johnson was a godfather), and visited him long after she left her employment as a law clerk. Johnson's counsel also responded to allegations of a former staff attorney who left his chambers because Justice Johnson would not allow her to telecommute as many days as she wanted. He admitted to making complimentary comments though he did not recall the specifics. As to the allegations that he engaged in drinking and

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the conduct could reasonably be perceived as sexually harassment – a standard it employed in so broad a manner that it encompassed isolated mild overly-familiar comments or inquisitive behavior about family, a boyfriend, and off-duty activities.

inappropriate conduct at the Spring Street Bar, he responded that he had been to that bar and met people on occasion to watch sporting events or get together. He included a statement by a former law student and extern who had never seen Justice Johnson to be intoxicated and had never seen or heard of Justice Johnson handing out his card and putting his arm around females that he did not know. (Response Letter of Justice Johnson, 12/3/18, Exhibit 6, CJP 583-586.)

The Commission on Judicial Performance charged Justice Johnson with ten counts of misconduct under article VI, § 18 of the California Constitution. The Chief Justice of this Court appointed a panel of special masters to hear and take evidence in this matter. (Special Masters' Findings.) The hearing extended over multiple days with the examiner and Justice Johnson each calling numerous witnesses and admitting numerous exhibits. To avoid unnecessary repetition, detailed discussion of the testimony and documents included in that evidentiary hearing will be included as part of the argument rather than here.

In summary, over the decades-long period examined, the special masters found that no willful misconduct occurred, but that fifteen instances of prejudicial misconduct had taken place. See Appendix of Special Masters' Findings of Fact and Conclusions of Law, p. 315. The special masters also found five instances of improper action. (*Id.* at pp. 315-316.) The special masters published their findings and conclusions of law. (Special Masters' Findings.)

They filed their report to the commission, and thereafter, the commission heard one hour of oral argument and issued its decision. The commission concluded that the special masters' findings of fact were supported by clear and convincing evidence, including its conclusion that Justice Johnson was "at times, intentionally dishonest in his testimony." (*Id.* at p. 2.) The commission found that Justice Johnson engaged in 18

instances of prejudicial misconduct. (*Id.*) The commission ordered the removal of Justice Johnson concluding that he had engaged in sexual misconduct, displayed poor demeanor to coworkers, and had become intoxicated and used the courthouse to socialize late at night.

Justice Johnson's testimony at the evidentiary hearing was unequivocal: he acknowledged transgressing professional boundaries with multiple women, occasionally raising his voice in over-heated discussions about work product and engaging in social drinking that he has now completely stopped. No evidence was offered to refute or challenge any of this testimony. The commission nevertheless rejected Justice Johnson's expressions of remorse and efforts to change. (Special Masters' Findings at p. 4.)

From that decision and order, Justice Johnson petitions this Court for review and seeks a reversal and, at a minimum, a decision from the Court that he ought not be removed from office. Notably, the commission had at its disposal numerous tools short of removal to ensure the public is protected, which is the goal of these procedures.

## THE COMMISSION'S DISPOSITION OF CHARGES AND ITS DECISION TO REMOVE JUSTICE JOHNSON

Justice Jeffrey W. Johnson of the California Court of Appeal, Second Appellate District, Division One was ordered removed as a judicial officer by the Commission on Judicial Performance (the "Commission") on June 2, 2020 after almost eleven years on the appellate bench, ten years as a federal magistrate judge, and ten years as an Assistant United States Attorney, all with no prior history of discipline or admonishment from the commission or any other regulatory body. The commission, in removing Justice Johnson, specifically found no willful misconduct underlying any of Justice Johnson's actions.

The allegations against Justice Johnson, confirmed in the factual

statements of the commission, involved primarily social interactions found to constitute sexual misconduct, not involving any criminal conduct and not rising to the level of sexual harassment. Other findings included sporadic alcohol intemperance not related to any conduct on the bench, and never occurring during any daily working time periods. A few findings included demeanor allegations which were likewise not while Justice Johnson was on the bench, nor toward any litigant or counsel appearing before the Court. In none of the allegations, was Justice Johnson found to have altered or attempted to alter the course of the administration of justice.

After its review of the evidentiary record and Special Masters' Findings of Fact and Conclusions of Law, the commission found:

> Count 1 – Justice Chaney's allegations were partly substantiated and partly unsubstantiated. She accused Justice Johnson of making sexually harassing statements and acts over a period of nine years, from 2009 to 2018. A number, but not the majority, of the allegations were found to be unsubstantiated. Counts 1A and Count 1L were dismissed by the commission. The commission also noted that in 2014, *after* many of Chaney's allegations had purportedly already occurred, she helped to draft, and signed, a letter recommending Justice Johnson to the California Supreme Court in glowing terms. The commission found that Chaney had never made a complaint or sought the intervention of the administration or any supervising judicial officer, although some of her accusations – if true – were reportable under the Canons of Judicial Ethics. Although the special masters found her actions were "perplexing" in light of her accusations and noted numerous problems with her testimony, the commission credited the accusing justice's recitation of the one-on-one allegations. It did so even though it described her claims as "odd and hard to explain" in light of her friendly behavior and letter of recommendation (Decision and Order, pp. 23-24.)
>
> Count 2 – Counts 2A, 2C, and 2D – gross allegations of sexual propositioning by a member of the California Highway Patrol, Officer Sauquillo, were unsubstantiated. The

commission dismissed these counts. A less serious claim that Justice Johnson complimented Sauquillo on her appearance (Count 2B) was substantiated. A claim by another member of the California Highway Patrol (Count 2E - an offer to use a bathroom facility after a long drive), was found not to be misconduct. The commission dismissed Count 2E.

Counts 3, 4, and 5 – social comments to several female staff at the Court of Appeal from 2009, 2012, 2013, 2015, and 2018 were found to be generally substantiated, although not entirely so. The commission dismissed Count 4E. An allegation involving another justice (Count 5D) consisting of an offhand complimentary comment in 2010 was not found to constitute willful or prejudicial misconduct, but improper.[6]

Count 6 involving allegations of demeanor violations, toward a fellow justice in 2009, a judicial secretary on three occasions during the almost twenty years that she worked for Justice Johnson, and two staff attorneys, involved displays of irritation or anger. No allegation involved improper demeanor from the bench, nor toward any litigant or counsel involved in a case.

Count 7 – social comments to female attorneys outside of the court - were found to include comments which the recipients described as making them feel uncomfortable. The allegations described social comments and gestures in private from 2009, 2013 and 2015. In one allegation, the comments and gestures were not found to constitute improper conduct (Count 7C), and the commission dismissed the count.

Count 8 – intoxication allegations did not involve any judicial action, nor conduct during performance of any duty. The commission dismissed Counts 8A and 8F. Nor did the commission, or the masters, find that Justice Johnson had ever exhibited an appearance of intoxication during any action involving any judicial duty. The allegations involved sporadic after hours or off-duty weekend conduct including

[6] Notably, that justice denied any recollection of the comment ever being made; overriding her recollection, the commission based its decision solely on Justice Chaney's word.

instances in 2011, 2015, 2016, and 2017.

> Count 9 – social comments from 15-25 years earlier to two females while he was serving as a federal magistrate judge and Assistant U.S. Attorney [1989 -1999] were time barred by the statute of limitations.
>
> Count 10 involving a 2015 or 2016 off-hand comment out of the presence of the comment's subjects, made alone in private to another male, was found to be prejudicial misconduct.

The commission then analyzed aggravating and mitigating factors and concluded that "Justice Johnson's refusal to admit to serious misconduct, and his intoxication, coupled with his failure to be truthful during the proceedings, compels us to conclude that he cannot meet the fundamental expectations of his position as a judge." (Decision and Order, p. 111.) Therefor and without any consideration of alternative remedies that might serve to uphold the commission's mandate, such as censure or ordering service with re-evaluation after a time or other options, the commission decided that its mission could "only be achieved by removing him from the bench." (*Id.*)

## STANDARD OF REVIEW

The California Constitution empowers this Court, in its discretion to "grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify … a judge or former judge." California Constitution, article VI, § 18(d). The Constitution further empowers this Court to "make an independent review of the record." *Id.* An independent review of the record mandates that this Court examine "in full detail the record of proceedings below," and "determine whether each of the charges has been proved by 'clear and convincing evidence' sufficient to sustain them to a reasonable certainty." (*Spruance v. Commission on Judicial*

*Qualifications* (1975) 13 Cal.3d 778, 784-785; see also *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 190-191.) In reviewing a proceeding, this Court has historically made "an independent evaluation of the evidence before the Commission to determine whether the charges against Petitioner are supported by clear and convincing evidence." *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, 554.

If judges have been removed, the Court has exercised a heightened standard of record review, "explor[ing] in detail the extensive factual matrix underlying each of the commission's findings." *Fitch v. Commission on Judicial Performance*, *supra*, 9 Cal.4th at 556. This Court then determines, as a matter of law, what if any constitutional grounds for judicial discipline are established and whether those grounds support the commission's recommendation of removal. *Geiler v. Commission on Judicial Performance* (1973) 10 Cal.3d 270, 276. *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.

Clear and convincing evidence is required to support each factual finding to a reasonable certainty. *Spruance v. Commission on Judicial Performance* (1975) 13 Cal.3d 778, 784-785; *Geiler v. Commission on Judicial Performance* (1973) 10 Cal.3d 270, 275. This Court must find "a high probability that the charge is true." *Inquiry Concerning McBrien* (2009) 49 Cal.4th CJP Supp. 315, 320, quoting *Broadman v. Commission on Judicial Performance* (1988) Cal.4th 1079, 1090. In other words, the evidence "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Matter of Jobes* (1987) 108 N.J. 394, 407-408; 529 A.2d 434, 441 (quotation omitted). The standard requires proof so strong that every reasonable person would accept it as true without

hesitation:

> The phrase "clear and convincing evidence" has been defined as "clear, explicit, and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to demand the unhesitating assent of every reasonable mind."

*People v. Martin* (1970) 2 Cal.3d 822, 887.

## ARGUMENT

The central principle that undergirds the canons and ethical requirements for judges is that the judge's conduct will "ensure the honesty and integrity of the process of judicial decisionmaking and of the decisions of judges." DAVID M. ROTHMAN ET AL., CALIFORNIA JUDICIAL CONDUCT HANDBOOK 4 (4th ed. 2017). This single foundational idea unifies all the elements of the California Constitution, "statutes, precedents, the rules on procedure, and the California Code of Judicial Ethics governing the conduct of judges in court and in private life." *Id.* "Restraints on the conduct of a judge are justifiable where there is a rational nexus between the restraint, either in the courthouse or in private life, and the integrity of decisions and the decisionmaking process." *Id.* at p. 7. "Absent this connection, the conduct is permissible." *Id.* A review of the California Judicial Conduct Handbook, and this Court's prior decisions makes clear that judicial discipline is not intended to punish judges but is properly focused on protecting "the judicial system and those subject to the awesome power that judges wield." *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1320 quoted in Rothman, p. 842.

Review and a reversal are warranted in this case for three major reasons. First, Justice Johnson has served as a distinguished jurist on the California Court of Appeal for more than a decade during which time he authored approximately 119 opinions, very few of which were reversed when reviewed by this Court, and the rest of which, this Court upheld or

denied review. One of his opinions, *In Re M.C.* (2011) 195 Cal.App.4th 197, was later adopted by the California Legislature, and all demonstrate scholarly even-handed legal analysis. After an intensive judicial inquiry in which the examiner searched out witnesses of every sort going back decades and shined a light on every aspect of Justice Johnson's life, the special masters acknowledged and the commission adopted findings showing no willful misconduct -- including no misconduct that occurred while Justice Johnson was sitting on the bench or dealing with the parties or lawyers appearing before him in judicial proceedings or dealing with court staff in the courtroom.

Justice Johnson did not engage in private or off-the-bench conduct that involved use of his judicial title or the prestige of judicial office to secure private or personal advantage for the judge or the judge's friends or family. Nor did he engage in conduct while off the bench that would cast reasonable doubt on his ability to act impartially, or interfere with the performance of his judicial duties, or lead to frequent disqualification, or violate confidentiality strictures of the court, or engage in business relationships with persons likely to appear before the court, or wear his judicial robe outside the courthouse. He performed as a distinguished jurist, engaged in recognized and important work on committees focused on courthouse building and cost reduction, and served as a mentor to young people in the community in ways that made important contributions to their lives. He served as a mentor to many lawyers, helping them with their careers, offering them advice and guidance, and introducing them to others in the legal community who could be helpful to them.

Second, key factual findings undergirding the most serious instances of prejudicial misconduct found by the special masters and confirmed by the commission do not satisfy the clear and convincing evidence standard of proof. Adherence to that standard is crucial to the maintenance of public

acceptance of and confidence in the impartiality and integrity of the system. Given the repeatedly acknowledged credibility problems with Justice Chaney's testimony, the decision, if left to stand, threatens to undermine that public confidence in the impartiality and integrity of the system. Two other witnesses, Ms. Burnette and Ms. Kent, made extreme and outrageous accusations against Justice Johnson, each claiming an isolated interaction with him, one in 2009 and one in 2015. But their testimony was also problematic and should have been rejected as the basis for findings of fact accepting their stories because they do not satisfy the clear and convincing evidence standard of proof. Both had strong motives to retaliate against Justice Johnson; neither refuted testimony of eye witnesses whose testimony was inconsistent with their accounts; and both called friendly witnesses who failed to substantiate the central accusations or failed to call other friendly witnesses at all suggesting that testimony would not have supported Burnette and Kent's accusations. In addition, the special masters and commission repeatedly relied on what was essentially character evidence or prior instances to buttress the weak proofs as to the central claims, although the nature of the prior instances employed to support these three claims was so significantly different that this evidence did not have any tendency to show that Justice Johnson engaged in the behavior he was accused of by these individuals.

Third, the remedy imposed by the commission (even if the Court accepts the most egregious accusations) is disproportionate and unnecessary to protect the public or ensure confidence in the integrity of the courts. The commission did not even attempt to explain why a remedy so disproportionate to past cases involving off-the-bench prejudicial misconduct involving sexual misconduct claims was necessary here. Justice Johnson has cooperated fully with this process, which is a testament to his willingness to change his behavior. He has engaged in countless hours of

counseling and education and has deepened his understanding of and ability to respect the boundaries between personal and professional life. He has stopped social drinking per his unrefuted statements during the hearings. And the public ought not be deprived of the service of a brilliant diverse jurist especially now when protestors are scrutinizing law enforcement and the judiciary to demand an even-handed and impartial justice system.

Therefore, Justice Johnson petitions this Court for review and a reversal.

## I. Review and reversal are required because key factual findings were unsupported by clear and convincing evidence, particularly where the special masters and commission explicitly characterized relied-on testimony as "perplexing" and "hard to explain"

### *A. The commission erroneously accepted the special masters' factual findings that Justice Johnson engaged in sexual misconduct with Justice Chaney without clear and convincing proof*

The commission's decision to remove Justice Johnson is squarely predicated on accusations brought by Justice Chaney despite her "lack of memory" and inconsistent and incredible assertions, many of which were not corroborated by witnesses in a position to verify their truth if they had been true, or were controverted by other testimony and documentary evidence. Once a witness has demonstrated a lack of credibility, as with Justice Chaney in key portions of her most serious accusations such as her claim that Justice Johnson urged her to have an affair with him and pushed himself uninvited into her hotel room, the remainder of her testimony cannot meet the clear and convincing evidence standard.[7] The special

[7] California Jury Instructions make clear that a "witness, who is materially false in one material part of his or her testimony, is to be distrusted in others…." Cal J I 2.21.2. BA JI 2.22. See also *Nelson v. Black*, (1954) 43 Cal.2d 612. Although this presumption can be overcome with strong other

masters nonetheless accepted Chaney's account as a basis for findings that fall at the heart of the commission's decision.

The flaws the special masters found were undeniable, as they themselves stated:

- "We find the truth of what actually happened is somewhere in between each party's versions." (Special Masters' Findings, p. 39.)

- "We agree that some of Justice Chaney's testimony was not fully substantiated and/or conflicted with the written records." (Special Masters' Findings, p. 41.)

- "After carefully reviewing all of the evidence, we decline to fully credit either version regarding sexual propositioning." (Special Masters' Findings, p. 43.)

- "We recognize Justice Chaney's failure to report and her many supportive actions toward Justice Johnson create reservations." (Special Masters' Findings, p. 78.)

- "We decline to distrust Justice Chaney because she omitted Officer Sauquillo and Officer Barnachia from her list of persons knowledgeable about Justice Johnson's conduct and do not believe 'she was intentionally seeking to conceal relevant information.'" (Special Masters' Findings, p. 80.)[8]

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proofs, no such other proofs were offered here or identified by the commission. See also, California Civil Jury Instruction 107.

[8] Justice Chaney lawyered up before submitting the list – and the omission of these individuals after she consulted with an attorney was certainly intentional. She hired Eric George to represent her in these proceedings after she had breached the commission's strict confidentiality rule and Justice Lui's specific request by sending the inadvertently-circulated email to George, who immediately leaked it to the press and later lied about it until he was forced to recant his sworn account after his emails were discovered and revealed the truth. See RT 3848-3852; George's 9/10/19 Letter to the Special Masters (Tab 2-6 to Justice Jeffrey W. Johnson's Opening Brief to the Commission on Judicial Performance.) Chaney and George's conduct regarding the leaked email, George's initial untruthful assertion that he did not get the leaked email from Chaney, and his

- "We find perplexing Justice Chaney's decision to author the 2014 letter recommending Justice Johnson for appointment to the California Supreme Court. Her representation about his fitness, character, and collegial nature stand in stark contrast to her testimony at the hearing." (Special Masters' Findings, p. 80.)

- "Justice Chaney's statements regarding the frequency of the hugs is difficult to reconcile with the glowing Supreme Court recommendation letter on Justice Johnson's behalf. It is doubtful Justice Chaney would have supported Justice Johnson's position on the court if he had been grabbing her breasts with 'significant pressure' once or twice a month during the years before she signed the letter." (Special Masters' Findings, p. 83.)

- "[W]e find the Examiner did not prove that these hugs occurred with anywhere near the regularity testified to by Justice Chaney." (Special Masters' Findings, p. 83.)

- "[W]e do not find that Justice Johnson squeezed her breast or buttocks or rubbed her body or made a vulgar comment about her body." (Special Masters' Findings, p. 86.)

- "We are not convinced that Justice Johnson would have engaged in the breast and buttocks touching in view of others or made a 'raunchy' sexual comment about Justice Chaney in front of others." (Special Masters' Findings, p. 86.)

- "We cannot reconcile Justice Chaney's signing the [Governor] letter if two months earlier he had grabbed and squeezed her breast in full view of others and made a 'raunchy' comment about her body." (Special Masters' Findings, p. 86.)

The overwhelmingly negative conclusions the special masters

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immediate leak to the press and obfuscation about whether he participated in editing the article, all raise serious and unanswered questions about both George's and Chaney's veracity.

reached would doom any other witness below the clear and convincing bar. Most of their findings that Chaney was not credible were not "memory" problems, but rather Chaney's direct statements which the special masters found to be false.[9] Her credibility is further weakened by the fact that each and every accusation she made about conduct in the presence of others was refuted by their testimony.

The special masters recognized that Justice Chaney's credibility was impacted by her decision to deliberately withheld information from the commission and her supervisors; nevertheless, they explicitly chose to ignore it, stating:

> We agree Justice Chaney knew of her ethical obligations to report Justice Johnson's conduct, and her failure to report raises legitimate questions. But her decision not to report and the implications arising from that conduct are not before us in this proceeding, *except as it impacts her credibility*. We find only that despite her awareness of this duty, she made the deliberate decision to address the situation by working cooperatively with Justice Johnson, an appeasement strategy commonly used by sexual harassment victims." (Special Masters' Findings, p. 80) (emphasis added).[10]

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[9] The commission also sought to avoid problems with Chaney's story by concluding that her allegation that Justice Johnson had propositioned her was "not charged" and "neither party's version was found to be true" so it "decline[d] to go into detail about the alleged sexual proposition." (Decision and Order, p. 11.) But rather than look to California Civil Jury Instruction 107 and discrediting the rest of her story, the commission simply accepted many of her other specific accusations. The commission then approved the special masters' finding that Johnson failed to tell the truth when he denied asking Chaney to have an affair and denied entering her hotel room uninvited. Chaney's unsubstantiated accusation should have raised serious doubts about her veracity on other points and answered the question of whether she had a motive to lie. The commission's decision faulting Justice Johnson for his vehement denials of a charge that was never substantiated is reversible error.

[10] The special masters acknowledged a "legitimate question" about whether Chaney violated her ethical obligations. But having conceded this, the special masters nonetheless credit her testimony, depict her as a vulnerable

Despite the multiple credibility problems with Chaney's story, the commission accepted the special masters' factual findings and legal conclusions. They did so although they too recognized that Justice Chaney's accusations were "odd and hard to explain" in light of her glowing letter of recommendation to the Governor, and her "ongoing friendly behavior, and referring to herself as his 'conjoined twin.' (Decision and Order, p. 24.)

Justice Chaney and Justice Mallano both signed a letter to Governor Brown's judicial appointment secretary recommending Justice Johnson for appointment to this Court. (Documents Produced Pursuant to SDT re Gov. Emails, Exhibit 630, JJ 727-728; RT 617, 2157.) The letter states:

> We are writing to recommend Justice Jeffrey W. Johnson for appointment to the California Supreme Court. He has been an associate of ours on Division One of the Court of Appeal, Second Appellate District since August 2009. We have collaborated on hundreds of cases; accordingly, we have a deep appreciation of his judicial skills and abilities.
>
> Justice Johnson is highly intelligent, hardworking and brings

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fearful victim, and fault Justice Johnson for defending himself against her accusations. Then, after acknowledging Chaney's potential problem with her ethical obligations, the special masters inexplicably concluded that she had no motive to lie. Not so. Given her own failure to report and her own behavior and comments to Justice Johnson, Chaney had every reason to lie to protect herself from the truth coming out in these proceedings and harming her reputation. Moreover, to the extent that she sought an intimate relationship with Justice Johnson or was upset that he was surprised about her age when he learned it, she may have sought to retaliate out of anger or disappointment. Finally, while the special masters acknowledged her failure to report what she now claims she knew about Justice Johnson, they ignored her further breach of the confidentiality obligation she was under when she shared Justice Lui's email with Eric George, who speedily leaked it to the press, scattering false accusations by Sauquillo to the press and public, all gravely harming both Justice Johnson's reputation in the community and the public's confidence in the courts.

> a keen sense of fairness to his cases. He has common sense and is collegial in dealing with the justices on his panel.
>
> His academic background is excellent, having graduated from Duke University with honors and Yale Law School.
>
> As an attorney, he practiced with one of Los Angeles's leading firms, Manatt Phelps, and thereafter as an Assistant U.S. Attorney in the Central District of California, where he earned the 1995 Attorney General's Award for Distinguished Service, among many other awards and commendations. In 1999, he was selected to serve as a United States Magistrate Judge. He has been active in a number of bar activities.
>
> As a Justice of the Court of Appeal, he has held important Judicial Council Committee appointments, including to the Court's Facilities Advisory Committee.
>
> One thing that stands out about Justice Johnson which speaks to the kind of person he is would be his willingness to help others. Around Christmastime, his chambers are loaded with gifts for the poor, which he personally delivers. He goes to grammar schools and talks to the students about the importance of education. He sits on several governing boards in the community, including the Bright Star Schools, comprised of three middle schools and one high school, primarily located in impoverished areas of Los Angeles. The schools' objective is to bring students who are performing below grade level up to grade level or college readiness. Justice Johnson's activities in this regard are obviously based on his genuine care for young people and not for padding his resume. And he is a family man who has four remarkable children.
>
> We believe that Justice Johnson is eminently qualified to sit on the California Supreme Court and is the kind of person that would make a great contribution to our state."

(Documents Produced Pursuant to SDT re Gov. Emails, Exhibit 630, JJ 727-278.) When reviewing Justice Mallano's draft, Justice Chaney added the information about Justice Johnson's charitable work and added the

phrase, "And he is a family man who has four remarkable children." (RT 749, 2158-2159; Letter from Justice Jeffrey W. Johnson to CJP, 9/24/18, Exhibit 832, CJP 235.) She acknowledged that she agreed to recommend Justice Johnson for the high court, specifically told the governor's appointment secretary that Justice Johnson was a good family man, and that she believed he was qualified to sit on the California Supreme Court. This glowing recommendation cannot be reconciled with her accusations that he had been sexually harassing her for years. (RT 747-754.)[11]

Despite Chaney's obligation to report conduct of the nature she claimed occurred here, she did not do so. Chaney was forced to concede that not only did she fail to report this claimed misconduct – a failure that would raise legitimate questions as the special masters explicitly determined – but she lied about those she had spoken with regarding Justice Johnson's claimed sexual harassment of her and others. She said variously:

- "I did not report misconduct toward me to the Commission on Judicial Performance before the July 2, 2018 email of Justice Lui because I believed I was the only one." (RT 629.)

- "I did not report misconduct to the CJP even though I had learned from Officer Sauquillo in February of 2018 about Justice Johnson's harassment, because I promised Officer Sauquillo that I would keep her claims confidential." (RT 664-665.)

- "I did not remember the claims when I spoke to the CJP in interviews." (RT 770-771.)

- "I did not report the claims because I did not know them, and if I had known them, I would have reported them."

[11] In fact, judges have been removed for making deceitful statements to the appointing authorities. See e.g., *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205 (removing judge for misrepresenting his educational background and military service to appointing authorities).

(RT 772.)

- "I did not disclose my knowledge of misconduct to the CJP in interviews because I had promised Officer Sauquillo that I would keep her statements confidential." (RT 666-667.)
- "When asked, I did not provide an accurate list to the CJP of the people I had spoken to about Justice Johnson's abuse of me by omitting the names of Officer Barnachia and Officer Sauquillo. Instead, I told the CJP that all I knew was that Officer Sauquillo did not like Justice Johnson." (RT 770.)

Instead of concluding that Chaney's inconsistent accounts and her intentional withholding of evidence (by deliberately omitting the names of two material witnesses) undermined her credibility, the commission accepted that Justice Chaney had "conflicting feelings" about Justice Johnson including being afraid of him.

Chaney's purported rationale is entirely inconsistent with her longstanding and repeated invitations to him to join her on other trips after his purported serious misbehavior in Reno or to join her for lunch or dinner. It is also completely inconsistent with Chaney's own assertion and that of other witnesses that she is and was a strong person. And it is inconsistent with her position as an equal colleague on the California Court of Appeal and *not* someone who could be professionally harmed by Johnson. Indeed, Chaney was a colleague who would be particularly familiar with the commission's work, having herself served as a special master for the commission on occasion. Yet, if her story is to be believed, she failed to report serious accusations, including that Justice Johnson came into her hotel room uninvited and propositioned her using graphic sexually explicit language, to the appropriate authority as required by the judicial canons.

Nor is there any way to justify a finding of credibility given the strong evidence that Chaney repeatedly reached out to Johnson inviting him

to spend time together (at conferences and elsewhere) and expressed affection calling herself his "conjoined twin."

> You are most welcome my conjoined twin brother! Oh, and I am so glad that you will be going to San Diego on June 9-11.

(Text Message from Justice Chaney, 5/29/14 Exhibit 833, CJP 343.) On another occasion, she wrote in highly affectionate language:

> Jeffrey: Thank you for signing the blue back of Concerned Residents]] It is really great to have a good working relationship as we do. Love, Your conjoined twin.

(Email from Justice Chaney, 2/12/15, Exhibit 833, CJP 350.) Signing a work-related email with "love" is incredibly familiar and affectionate as is the descriptor "your conjoined twin." (*Id.*) She also sent him a salacious cartoon showing President Trump's hand up under a woman's skirt. (Email from Justice Chaney, 1/18/17, Exhibit 552, JJ 0113.) These emails cannot be squared with Chaney's story of fear or her claimed strategy of maintaining a professional relationship; they reflect a desire for and participation in a much closer personal friendship.

Equally important, during all these years when Chaney claims Johnson was pursuing her, he never sent an inappropriate or unduly affectionate text or email to Chaney. It was all the other way around.

The commission accepted Chaney's conduct was part of an "appeasement strategy, born of her desire to get along with her colleagues and maintain conviviality at the court." (*Id.*) Not so. A failure to report misconduct and business-like politeness with a colleague might sometimes be reconciled with accusations of harassing behavior but not here.

The repeated instances in which Chaney reached out to Johnson in overly friendly – indeed intimate language – after he had purportedly engaged in egregious unwanted touching and supposedly used coarse language to proposition her is inexplicable as the commission's own

language concedes. Neither the testimony of the examiner's expert witness nor any other evidence or common knowledge supports the notion that a victim of unwanted severe sexual overtures, inappropriate touching, and harassing conduct would continually reach out for more contact with the claimed harasser, particularly in the manner that Chaney did. It defies logic, experience, and the testimony.

The commission's willingness to accept her as a credible witness requires review and reversal because her testimony fails to satisfy the clear and convincing evidence standard. The commission has not, and cannot, reconcile her accusations with her ongoing friendly behavior, repeated invitations to Justice Johnson to join her on out-of-town travel, continued exchange of emails expressing affection for him, her ongoing conduct in reaching out to encourage time together with him, and the consistent testimony of other justices and others that she never appeared uncomfortable with Justice Johnson. (*Id.*)[12]

The commission nonetheless gave credence to Chaney's accusations; its decision does not satisfy the clear and convincing evidence standard and requires reversal.

[12] Officer Barnachia, Justice Mallano, Justice Rothschild, and all witnesses who had seen Justice Chaney and Justice Johnson together agreed that Justice Chaney never appeared uncomfortable around Justice Johnson. They appeared to be relaxed and friendly. (RT, Lui, 1387; Rothschild, 1165-1166; Mallano, 2154, 2168, 2176; Smith, 2122; Willhite, 1254-1255; Barnachia, 1853; Velez, 335; Alexander, 950-951; Young, 2507; Bendix, 3068.) Officer Barnachia said that if Justice Chaney's descriptions of Johnson's conduct toward her had occurred, he would have reported it. (RT 1891.)

### *B. The commission erroneously accepted the special masters' factual findings that Justice Johnson used coarse sexually explicit language with Ms. Burnette and Ms. Kent and inappropriately touched Kent without clear and convincing proof*

The commission reversibly erred in sustaining charges based on the testimony of two other witnesses that was inherently incredible and inconsistent with testimony of other credible witnesses. The evidence in support of these charges also fails to satisfy the clear and convincing evidence standard. Roberta Burnette accused Justice Johnson of employing sexually explicit language. According to Burnette, Justice Johnson sat alone with her at a table while attending an event put on by the Association of Business Trial Lawyers (ABTL). She said that he called her voluptuous and then, when she brought up her participation in the Los Angeles Lawyers Philharmonic with Justice Bendix, accused Johnson of purportedly saying that she should "put your viola mouth on my big black dick." Burnette claimed that she told him that you don't play viola with the mouth because it's a string instrument. She then claimed he asked if that meant you stroke it and said, "you need to stroke my big black dick with your viola hand." Given that Justice Bendix was a colleague of Justice Johnson's and that Burnette's story is predicated on the speaker being unfamiliar with orchestral instruments, the accusation is suspect at the outset. (RT 3214-3217; RT 3399-3400.) Justice Johnson denied ever having met her, was never alone with a woman at the event and did not even recognize Burnette. (RT 3214.)

During dinner, Johnson was seated at a table with Judge Brazile and others, including Eric Swanholt. (*Id.*) Swanholt explained that Justice Johnson was to his right and Ms. Brazile was on Johnson's other side. (Swanholt Declaration, Exhibit 680, JJ 2150-2152.) He recalled that Judge Brazile and his wife, both African-Americans, engaged in an "extended and

highly interesting discussion about judges of color and the challenges they faced and about all aspects of the justice system." (*Id.*)

Burnette was not seated with Justice Johnson and did not remain at the table alone with him when others left.

After dinner, Swanholt and Johnson went to the bar and had a drink, and from there, walked over to another table where "perhaps two people were seated." (*Id.*) One of those at the table was Robin Crowther. (*Id.*) They were talking and Burnette was not there. Swanholt did not recall Justice Johnson sitting alone at a table with anyone. (*Id.*) Swanholt had "the distinct recollection of walking out with Jeff Johnson…." (*Id.*) Johnson did not appear intoxicated to Swanholt, although they had been drinking. (*Id.*)

Burnette's veracity was severely undermined by witnesses who denied that she was ever seated alone at a table with Justice Johnson. Justice Johnson and Eric Swanholt both said that Johnson was never alone at a table with Burnette (indeed Johnson said he never met her and did not recognize her). But the commission entirely discounted this testimony because the special masters concluded that "it is not realistic to assume two friends would be physically together for an entire night at a professional event at which socializing and networking is expected." (Decision and Order, p. 67.) Far from satisfying the clear and convincing evidence standard, the special masters adopted this "finding" on the basis their unsupported speculation that it was "not realistic" for Swanholt and Johnson to have remained together, although both recalled that they did so. Judge Brazile also did not see Justice Johnson alone at a table with any woman who was not a member of the Association of Business Trial Lawyers.

The examiner called Burnette's then-boyfriend in an effort to corroborate her story. The commission announced that he "corroborated substantially all of Burnette's testimony." (Decision and Order, p. 65.) But

Elliott did not corroborate the central allegation; he recalled that Burnette told him she wanted to leave, and that she had said Justice Johnson made remarks that were upsetting – but he could not recall the remarks.

Given the nature of these remarks, the special masters called Elliott's inability to recall them "surprising." But they nonetheless credited them as corroborating evidence. They did so because they concluded that he could easily have lied about the words since Burnette told him her story after she met with investigators. An equally plausible interpretation of Elliott's lack of recall is that his memory of the evening differed from Burnette's and he did not want to be at odds with his now-wife, but also did not want to perjure himself. His account was far from corroboration.

Nor did the examiner call any of the multiple other individuals that Burnette claimed she told about the event. The absence of such testimony is particularly bothersome. given Burnette's claim that she complained to her law firm and was denied a position on the ABTL board as a result. Surely, if Burnette's story were true, those individuals could have readily confirmed it. They did not. The absence of such testimony undermines the believability of Burnette's accusation.

The commission papered over this problem with the proofs reasoning that if Justice Johnson had never met her, Burnette would have had no motive to invent a complaint about him before. But the only evidence of Burnette's complaint to other lawyers in her firm was Burnette's testimony. The examiner had the opportunity to present witnesses from the firm – but did not do so. Consequently, it is entirely unclear whether she complained to the firm at all or simply made up this part of her story as well. And if in fact she complained about Justice Johnson and was then denied a spot on the ABTL because of it, it may well be because her allegations were so fantastic that they could not be credited, and the law firm concluded that she was untrustworthy or confused. With

no one from the law firm corroborating Burnette's account, the story remains incredible.

Equally troubling, the examiner did not present testimony of anyone else at that table or elsewhere to say that Johnson was alone at a table with Burnette. Given the examiner's exhaustive investigation, this omission is highly revealing. Once more the commission accepted a story because it concluded that the complainant, here Burnette, had "no reason to make up this story," gave weight to the weakly corroborating hearsay testimony of Elliott, and rejected the accounts of eye witnesses who never saw Justice Johnson seated at a table alone with a woman.

Given the conflicting accounts by others at the event who did not see Justice Johnson alone with Burnette, the examiner's failure to present what would have been easily-obtainable testimony of witnesses from Burnette's law firm, who could have given strong confirming testimony if her story was true, the lack of true corroboration, the "surprising" nature of Burnette's husband not recalling such unusual language, and the unlikelihood of Justice Johnson making such statements to a woman he had purportedly met only seconds earlier and who he knew would regularly see his colleague, Burnette's testimony cannot satisfy the clear and convincing evidence standard.

Likewise, Ms. Kent's accusations should have been rejected as failing to satisfy the clear and convincing evidence standard. Her own accounts of what she claimed occurred in 2009, more than a decade ago, have changed over time. At the evidentiary hearing in 2019, Ms. Kent claimed that Justice Johnson put his hand on her thigh during the dinner and before dessert was served. (RT 120.) This differed from her account in 2009 when she claimed there was an issue with Justice Johnson walking her to her car and trying to kiss her. Her 2009 version was not credible because

Kent was forced to concede that Johnson did not walk her to her car; she left with Ms. Jones. (RT 124, 141.)

Her 2019 version was directly refuted by Mr. Lambirth, a name partner in the firm that Kent worked for at the time. Lambirth said that in 2009, Kent told him Johnson tried kiss her while walking her to her car. (Special Masters' Findings, p. 222; RT 2432.) But of course, since Johnson did not walk her to the car, this could not be true. At the evidentiary hearing in 2019, Kent was forced to concede that Justice Johnson did not walk her to her car because she left with Kristi Jones. Ms. Spurley, who was there that evening, agreed that Kristi Jones, not Johnson, walked Kent to her car. (RT 141; RT 1597.) Thus, the record plainly shows that Kent complained to her law firm in 2009 about something that did not happen, i.e., that Justice Johnson tried to kiss her while walking her to her car. This weakens her story and undermines her veracity at the outset.

When her 2009 story was disproved, Kent offered a new story. She accused Justice Johnson of placing his hand on her thigh during dinner. This story was directly refuted by Mr. Lambirth, who remained at the table through dinner and did not observe this purported behavior. Equally important, Kent never made this accusation to the firm in 2009. (RT 2432.) And Justice Johnson vehemently denied it.

Both Lambirth and Baillio, a former associate of Kent's, testified that she has a dramatic personality, and tends to inaccurately perceive and recount facts. (RT 2994.) Given Kent's own conflicting reports, the clear evidence that her initial report to her firm was untrue (since Justice Johnson did not walk her to her car and thus could not have tried to kiss her while walking her to her car), her credibility is nowhere near sufficient to amount to clear and convincing evidence. When her conflicting testimony is viewed in light of the testimony of her associates explaining that she tends to inaccurately perceive and recount facts, it should have been rejected.

Once again, in the absence of clear and convincing evidence, the special masters and commission sought to buttress Kent's implausible account by asserting lots of women complained. They did the same as a means of downplaying the serious credibility problems with Chaney and Burnette. This logically unsustainable error permeates the special masters and commission's factual findings and reasoning. Because the examiner brought multiple charges based on testimony of multiple women, weak proofs about Chaney, Burnette, and Kent's accusations were supported by pointing to other purportedly similar instances.

This Court has warned that evidence involving other conduct than that for which the defendant is being tried has a "'highly inflammatory and prejudicial effect' on the trier of fact." *People v. Thompson* (1980) 27 Cal.3d 303, 314 (citations omitted). In recognition of this serious problem with use of such proofs, the admission of character evidence "including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion" is prohibited. Cal. Evidence Code, section 1101(a). *People v. Ewoldt* (1994) 7 Cal.4th 380, 393. Such acts are only admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident," none of which were at issue here. Cal. Evidence Code, section 1101(b). When such evidence is admissible at all, this Court has warned that it must be subjected to "extremely careful analysis." *People v. Smallwood* (1986) 42 Cal.3d 415, 428.

Yet time and again, when the proofs were so weak as to fall far below the clear and convincing evidence standard, the special masters and commission erroneously concluded that Justice Johnson has a propensity to act inappropriately toward women and then used that to support charges, which plainly lacked sufficient proof when viewed alone. This is exactly

the kind of reasoning that the rule is intended to guard against.[13] Moreover, the use of Justice Johnson giving a t-shirt with BAMF on it, or his complimenting someone who looked "hot," or his hugging a staff person or attorney on occasion, or asking someone if her boyfriend gave her a necklace or where her other tattoos were located, or even his use of words like, doing it "doggy-style" with a male colleague, are not indicative of a pattern of propositioning women in crude graphic sexual and racial language such as urging someone to suck his "black dick" or pushing into a hotel room uninvited. The other charges are so dissimilar that they do not show a "pattern" or propensity here and are not probative as to Chaney, Burnette, and Kent's claims. This propensity-evidence error further underscores the need for review and reversal of the commission's decision and order.

## II. Review and reversal are required because the commission's unprecedented decision to remove Justice Johnson is disproportionate to any prior decision, more severe than is consistent with the commission's obligation to protect the public, and threatens to damage the court's institutional credibility with the public

### *A. The touchstone for discipline is whether the complained of conduct harms the integrity of the judicial decisionmaking process and rule of law or undermines public confidence in the judiciary*

While it announced the correct standard for determining the remedy, the commission failed to properly apply it to the record here and consequently reached a reversibly erroneous result. The California Code of

[13] Research shows that such extraneous arguments and proofs can and do affect how judges assess cases. See e.g., JUDGE ANDREW J. WISTRICH AND JEFFREY J. RACHLINSKI, *Implicit Bias in Decision Making*, *in* ENHANCING JUSTICE REDUCING BIAS 93-96 (Sarah E. Redfield ed.) ("irrelevant anchors influence how judges assess cases" as does "irrelevant evidence").

Judicial Ethics is "aimed at ensuring justice; i.e., ensuring the integrity and honesty of decisions." Rothman, *supra*. The pillars of judicial conduct are intended to assure that judges make decisions honestly and with integrity. To the extent that they cover private social conduct, they do so to assure that judges do not engage in private conduct likely to undermine the integrity of judicial proceedings and the decisionmaking process or to create a public perception that calls their integrity and fairness into question. In other words, the pillars are focused on securing public confidence in the judge's integrity and his or her honesty in the decisionmaking process. Rothman, *supra*, pp. 23-27.

The appearance of impropriety arises when a judge engages in behavior that can be perceived as undermining his "integrity, impartiality, and competence." *Id.* at 62. Thus, a judge who "favored a particular legislative action, made a ruling in a case, then used that ruling to advance the legislative effort," and a judge who "engaged in a personal cash transaction with a member of the court's staff … and later made a ruling favorable to the lawyer" were both disciplined. Rothman, *supra*, pp. 62-63. Similarly, proper judicial demeanor is focused on assuring that the judge's behavior does not affect the fairness of the proceedings or respect for the judicial institution. *Id.* at p. 116.

### *B. Justice Johnson's conduct was not related to any judicial proceedings or the decisionmaking process*

Justice Johnson's conduct was not related to any judicial proceedings or the decisionmaking process. None of the instances of prejudicial misconduct, including the most serious as to which Justice Johnson seeks reversal, involved his conduct with litigants or attorneys who appeared before him in the courtroom or with anyone involved in those proceedings outside of the courtroom. The commission gave this point short shrift when it considered the appropriate level of discipline. Instead of

exploring whether removal was necessary to protect that central goal, the commission offered a litany of findings in highly general terms, observing that "Justice Johnson committed 18 acts of prejudicial misconduct (based on 42 separate instances of proven misconduct)." (Decision and Order, p. 87.) The commission characterized this as a "substantial amount of misconduct and some of it is quite egregious." (*Id.*)

The commission's litany of lists blurred critically important distinctions between qualitatively-different conduct. The commission did not discuss the difference between the nature of the claims at issue here – and those that have resulted in removal in other cases. Instead, the commission criticized Justice Johnson's argument regarding the nature of the complained-of conduct, asserting that he "appears to believe that prejudicial misconduct is, by definition, less serious than willful misconduct." (Decision and Order, p. 88.)

This Court employed that exact language in the very decision that the commission quoted – albeit omitting the critical prelude phrase. This Court stated, "[L]ess grave than willful misconduct, prejudicial conduct may nevertheless, by itself, warrant removal." *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191. In omitting that key phrase, the commission misstated the point that this Court was making, which is that removal *may* be necessary if the nature of the misconduct and its impact on the integrity of the decisionmaking process and public confidence in the judiciary's adherence to the rule of law requires it. *Id.* This Court's statement invited careful consideration of the nature of the prejudicial misconduct.

This Court has also cautioned that these inquiries are fact-dependent so that comparison of cases may not be helpful and proportionality review is not required. *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112. Importantly, while acknowledging that "choosing

the proper sanction is an art, not a science, and turns on the facts of the case at bar," this Court has never held that like cases should not be treated alike. *Id.*, quoting *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1318. That principle is so fundamental to the rule of law that it cannot be ignored here.

### *C. Removal of Justice Johnson is disproportionate and unnecessary to protect the judicial process and decisionmaking or to maintain public confidence in it*

Justice Johnson's removal is entirely unnecessary to protect the public or to assure public confidence in the integrity of the courts. First, none of Justice Johnson's misconduct occurred while he was on the bench or while he was interacting with the parties or lawyers who appeared before him. No one has suggested, nor could they, that his decisions were ever issued on the basis of some extraneous consideration that is an improper basis for a fair and impartial decision. This Court can review his written decisions to see for itself that they are well-reasoned and sound. He participated in a total of 978 decisions at the California Court of Appeal level – 859 unpublished and 119 published cases. Westlaw's report shows that he was rarely reversed, only .5%. [14] The strength of his legal reasoning can also be seen when this Court quoted Justice Johnson's dissent with approval in its decision overturning the court of appeal majority in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 768, 776.

Second, Justice Johnson's conduct while off the bench – inside the court building or engaged in social activities outside the court building–

[14] This count is based on a Westlaw search, and the Westlaw search and profile information are somewhat imprecise. Regardless of the precise number, Justice Johnson clearly was a productive jurist issuing scholarly decisions with only a tiny number of reversals.

does not so endanger the integrity of the decisionmaking process or undermine confidence in the integrity of the judiciary as to require removal. The stinging rebuke of public censure is more than enough to assure the public that the courts are enforcing high standards of behavior and that Justice Johnson does not engage in any misconduct in the future.

Third, the commission failed to credit Justice Johnson's unrefuted testimony that he had engaged in lengthy education and counseling to alter objectionable behavior. No evidence suggests that he was not and is not sincere in his efforts No evidence suggests that he would continue to make inappropriate comments to women or engage in social drinking (to excess or otherwise). His uncontroverted testimony makes clear that he will not do so.

The commission acknowledged that "Justice Johnson has made significant contributions to the judiciary as well as to his community." (Decision and Order, p. 103.) But rather than credit this irrefutable conclusion as a mitigating factor, the commission downplayed Justice Johnson's contributions after a glancing recognition of his accomplishments and contributions. The commission then offered an ipse dixit conclusion that "even a good reputation for legal knowledge and administrative skills does not mitigate prejudicial misconduct." (*Id.*) Far from reading like a dispassionate analysis of the facts, the commission's analysis of the appropriate discipline reads more like an adversarial brief from the examiner. This does nothing to vindicate the public's confidence in the judiciary; it raises serious questions about the decision and order.

Consideration of this Court's teachings compels the conclusion that the commission's decision to remove Justice Johnson is both

disproportionate to past decisions and unnecessary here[15]. Never before has a judicial officer been removed from office in the absence of willful misconduct or a failure to heed prior discipline. The examiner conceded this point throughout the case but argued that a departure from past precedent is warranted here. Neither the commission nor this Court has ever imposed removal based on prejudicial misconduct in the absence of clear and convincing evidence that the jurist's behavior threatens the integrity of judicial decisionmaking and the public's confidence in the courts. The absence of those reasons ignites concerns about a failure to treat like cases alike which are especially salient in these circumstances and in this time.

### *D. In the past, removal has been reserved for prejudicial misconduct that directly threatens the integrity of the judicial process and decisionmaking or instances in which lesser discipline has failed to prompt change*

*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 illustrates why a failure to differentiate between categorically-distinct conduct is likely to lead to error. In *Fletcher,* a judge altered minute orders to mislead the commission about his involvement in a case, a serious act going to the heart of his judicial integrity. He also advocated against a criminal defendant because of the judge's political rivalry with the prosecutor. The judge had ex parte contacts with the litigants in a case, including with the defendants, their relatives, and witnesses. The judge also used court staff for campaign purposes, abused his contempt powers, reacted inappropriately to disqualification attempts, prejudged cases, and

[15] The examiner's strategy of using a multiplicity of claims, many involving isolated comments or questions that were not taken as sexual overtures at the time or after, is itself problematic given evidence that judges make mistaken judgments when they excessively rely on numeric reference points, such as the examiner employed here See JUDGE ANDREW J. WISTRICH AND JEFFREY J. RACHLINSKI, *Implicit Bias in Decision Making, in* ENHANCING JUSTICE REDUCING BIAS 93-96 (Sarah E. Redfield ed.)

publicly criticized public officers. *Id.* The judge failed to recognize the limits of his judicial powers or to appreciate the need to adhere to the rule of law.

In contrast, Justice Johnson's misconduct (even if no findings are reversed by this Court) did not involve the abuse of judicial power that has heretofore been the hallmark for removal. Justice Johnson's conduct arose when he was off-the-bench in social situations and was trying (albeit in a misguided fashion on occasion) to mentor young and older lawyers, to demonstrate accessibility to the public by participating in social outings with externs, young lawyers, and others, to develop warm friendships with those with whom he worked, and to make everyday people know that he worked for them. Although several instances of misconduct occurred in the court building or involved court staff, none of these instances occurred during judicial proceedings or related to litigants or their attorneys or the decisionmaking process. Justice Johnson's complained-of conduct qualitatively differs from conduct at issue in *Fletcher* – a point that the commission entirely overlooked in its analysis.

The commission's litany of incidents obscures the proper analysis, which is founded on the fundamental goal of assuring the integrity of judicial decisionmaking and maintaining public confidence in the judicial institutions of the state. That goal forms the basis for the Constitutional provisions, the canons, rules of ethics, and procedures governing the judiciary, and should have been the touchstone for the commission's consideration of the appropriate discipline to employ in this case. See generally, Rothman, *supra*, pp. 21-31. The commission emphasized its power to remove a judge for a single act of prejudicial misconduct. But the question is whether the conduct at issue in Justice Johnson's case is of an order of magnitude or nature that the failure to remove him would imperil

the integrity of the decisionmaking process and rule of law or the public's perception of this.

This Court's decisions offer a framework to evaluate appropriate discipline. But the commission failed to grapple with the foundational question or to explain why such a severe sanction should be imposed here, unlike in past decisions. In *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, for example, this Court concluded that the judge in question had deliberately tricked a criminal defendant's lawyer into agreeing to more time before the sentencing by failing to explain that he intended to use it to research whether he could order prison officials to refuse to provide medical treatment for the criminal defendant who was HIV-positive. The judge also intervened in a civil suit being tried before another judge to speak with the opposing party about the case, to provide special access to court files, and to even appear in the courtroom during the trial, all in an effort to retaliate against the civil defendant, who was an old rival and adversary of the judge's. Some complained-of conduct occurred when the judge was off the bench, but his tricking the lawyers in a case pending before him to obtain a waiver and his efforts to influence a civil trial in which his enemy was the defendant fell at the heart of his exercise of judicial responsibility. Like the charges addressed in *Fletcher*, this prejudicial misconduct reflected grave transgressions against the integrity of the process and undoubtedly undermined public confidence in the judiciary's evenhandedness. See Rothman, *supra*, p. 27. It is not surprising, therefore, that this Court held that the California Constitution (article VI, § 18, subdivision (d)(2)) empowered the commission to remove a judge for prejudicial misconduct. And it is not surprising that this Court concluded that severe discipline was warranted in that case.

Serious discipline has been imposed to protect the integrity of judicial decisionmaking and the process – and not when violations were

removed from the judicial function and unnecessary to assure public confidence in the judiciary.[16] In *McCullough v. Commission on Judicial Performance* (1989) 189 Cal.3d 186, for example, this Court upheld the recommendation that a judge be removed because he (1) abridged a defendant's right to a jury trial when he directed the jurors to find the defendant guilty; (2) used his judicial office to advance the interests of a personal friend when he continued a criminal case against his friend for over two years and then dismissed it without explanation and in violation of the state's penal code; (3) violated two defendants' rights to be represented by counsel in criminal proceedings by holding trials in the absence of their attorneys; (4) failed to advise those convicted of misdemeanors of their right to appeal; and (5) failed to dispose of a matter that had been pending before him for more than six years. *McCullough,* 49 Cal.3d at 190. This judge had been publicly censured in the past for failing to decide a case for almost four years and for executing salary affidavits even though cases remained pending in his courtroom for more than 90 days. And this judge had been privately admonished to act more promptly three times before. *Id.*at 189.

### *E. Past sexual misconduct cases have also not resulted in removal in similar or more severe circumstances*

A comparison of the treatment of sexual misconduct cases similarly supports the argument that removal is unnecessary and disproportionate

[16] Charges against Justice Johnson were based on his comments on women's appearances, inappropriately personal questions, or use of colloquial language that is viewed as a violation of decorum, such as giving t-shirts to externs with "BAMF" on them, or calling colleagues "nasty ass bitches". Some charges were based on inappropriate touching of women – placing a hand on their arm or leg or kissing or hugging them in ways that made them uncomfortable. Even if this Court accepts the most egregious accusations, Justice Johnson's conduct does not rise to the level that would require removal to assure the integrity of the decisionmaking process.

here. In the past, even multiple acts of prejudicial misconduct involving circumstances both in and out of the courtroom have not resulted in removal. In one instance, a judge engaged in twenty-nine acts of judicial misconduct (one willful misconduct, seventeen prejudicial conduct, and eleven improper actions). He made gross sexual comments, statements reflecting racial bias, and used inappropriate humor in the courtroom in a manner demeaning to the dignity of the court. Some of his misconduct occurred in the courtroom during performance of his judicial duties where he showed poor demeanor and bias. He used crude language and swore in the courtroom during proceedings. Despite the number of instances of misconduct, which was deemed a pervasive pattern showing a lack of sensitivity to its impact on others and on public esteem for the judiciary, this Court concluded that censure, not removal, was the appropriate level of discipline. *Inquiry Concerning Kreep* (2017) 3 Cal.5th CJP Supp. 1. According to the commission, removal was unnecessary because the judge was generally fair to litigants and had a sincere desire to help people and showed a desire and willingness to change once the problems were brought to his attention. *Id.*

Similarly, the commission did not remove Judge Fitch but chose to censure him although he had engaged in a pattern of inappropriate and offensive comments to court staff, attorneys, and others. *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552. Judge Fitch's transgressions included nonconsensual touching of women working under his supervision, and a pattern of offensive behavior. His comments included gross comments about appearance ("your butt looks good in that dress,"), comments about intimate relations of staff and their spouses ("I hope you're not that frigid at home with your husband."), and mention of gross acts with other staff ("the only thing he's ever done to me is go down on me a couple of times."). Judge Fitch's conduct included slapping or patting

court staff females on the buttocks. Despite this, and unlike with Justice Johnson, the commission did not remove him from office; it imposed a public censure.

On another occasion when addressing more severe sexual misconduct, the commission again concluded that public censure was the appropriate sanction. That judge made sexually suggestive remarks to female staff members, referred to a staff member using crude and demeaning names and descriptions and an ethnic slur, referred to fellow jurist's physical attributes in a demeaning manner, and mailed a sexually suggestive postcard to a staff member. *In re Gordon* (1996) 13 Cal.4th 472, 473-474. In agreeing that censure, not removal was appropriate, this Court observed that "[w]hile the actions were taken in an ostensibly joking manner and there was no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame, the result was an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary." *Id.* at 474. The Court's language suggests that, unlike Justice Johnson's comments, this judge's comments were in the courtroom environment, which is more directly connected to the public's perception of the integrity of the process than is the case with Justice Johnson's misconduct. And yet, public censure was again deemed the appropriate level of discipline.

Similarly, the commission ordered censure for both Judge Steiner and Judge Woodward for misconduct involving blatant acts of sexual intercourse in the courthouse and elsewhere with persons involved in the administration of justice. In each case, the commission concluded that no willful misconduct had taken place, no prior discipline had been imposed, and the judges' actions did not influence matters before the court. Although the conduct was undoubtedly disruptive to personnel issues involving those people within the court system, the commission determined that censure,

not removal, was appropriate. *Judge Woodward 2014 and Judge Steiner 2014 CJP Decisions*. [17]

The commission also refrained from removing Judge Gibson but ordered public admonishment for multiple inappropriate gestures and comments to court staff, much of which was sexually suggestive *Inquiry Concerning Gibson* (2000) 48 Cal.4th CJP Supp. 112. And despite this earlier public admonishment, when Judge Gibson again came before the commission for conduct that included insensitive comments and gestures, he was not removed from the bench. *Id.* See also *Inquiry Regarding Harris* (2005) 49 Cal.4th CJP Supp. 61 (unwanted touching of division chief's face while saying "you're so cute" and making inappropriate comments about appearance during a court proceeding and holding an improper ex parte meeting resulted in public admonishment, not removal).

### *F. The commission reversibly erred in its application of this Court's teachings on evaluation of appropriate discipline*

Justice Johnson likewise should not be removed. The public humiliation and stinging rebuke of a public censure is more than enough to ensure that no further misconduct takes place and that the public will continue to have confidence in the courts' ability to address problems and ensure appropriate conduct.

#### *1. The commission's conclusion that Justice Johnson lacks honesty and integrity is not supported by the record*

The commission predicated its order of removal in part on its conclusion that Justice Johnson intentionally fabricated and misrepresented the facts during the hearing. But this conclusion rests on Justice Johnson's

[17] Contrast this with the allegation, which was that Justice Johnson brought a young woman back after drinks to show her the courthouse, with no suggestion that he engaged in any sexual conduct.

testimony and on his memory of disputed incidents. Four of the examples that the commission listed were based on Justice Johnson's denial of Justice Chaney's outrageous claims that he entered her hotel room in Reno uninvited, his denial that he asked Chaney to have an affair, and his assertion that he did not use the graphic sexually explicit language she claimed. (Decision and Order, p. 90.) Justice Johnson took and passed a polygraph examination regarding the most egregious claims of Justice Chaney and Officer Sauquillo. (Polygraph Testing, CJP 248-249.)[18] And the special masters and the commission found Justice Chaney's accusations about Reno to be untruthful in part. The commission's should not have concluded that Justice Johnson's denial of these false charges meant that he was dishonest.

Likewise, the commission pointed to differences in the accounts of Justice Johnson and Velez, Palmer, and Denow. But the commission has not, in the past, concluded that differing accounts of incidents that occurred years before the parties' testified about them means that witnesses are deliberately lying.[19]

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[18] The examiner hired its own polygraph expert and moved to bar use of Johnson's favorable results, but that expert's report would never pass the test for reliable testimony. He announced that he had never seen the breathing pattern in the results and then offered an ipse dixit conclusion that it was therefore unreliable and might even reflect an effort to hide deceit. His other conclusions were flatly inconsistent with the proofs as eventually presented during the hearing since he questioned the veracity of Johnson's denial of Sauquillo's fantastic and entirely-discredited accusations. The Special Masters granted the examiner's motion to exclude the evidence but made clear that the respondent could argue that his participation in a polygraph examination should be considered as a mitigating factor. Justice Johnson's denial of Chaney and Sauquillo's accusations should not be a basis for removing him rather than imposing a lesser sanction. (Decision and Order, pp. 7-10-19.)

[19] The commission had to stretch to find instances of purported dishonesty by reaching back to include a count barred by the statute of limitations.

The commission faulted Justice Johnson for accurately pointing out that his severe diabetes causes symptoms that mimic intoxication and disputing several witnesses' conclusions that he had too much to drink on specific occasions. Notably, multiple witnesses conceded that they did not smell alcohol and did not know how many drinks Justice Johnson had imbibed or over how long a period when asked about his drinking. Moreover, Justice Johnson never denied drinking on occasions. His testimony regarding occasions when his severe diabetes caused symptoms that mimic intoxication does not demonstrate a lack of honesty or integrity.

The commission also asserted that Justice Johnson's claim that he did not use sexually explicit language was "not credible." (Decision and Order, p. 91.) This assertion is problematic for two reasons. First, the commission's assertion – like the special masters' findings – is articulated at such a high level of generality that it misstates Justice Johnson's testimony. He did not deny ever using sexually inappropriate language. He conceded that he gave t-shirts with "BAMF" on them to externs. He conceded that he spoke about doing it "doggy style" on one occasion before he became an appellate justice. He denied sexually propositioning Justice Chaney, Officer Sauquillo, or Miss Burnette, using the sexually graphic and racially charged language that they claimed.

Heretofore, when the commission has concluded that a lack of honesty or integrity is an aggravating factor, it has been when a judge has admitted to lying, or when the circumstances disclosed irrefutable evidence

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(Decision and Order, p. 90, citing Policy Declarations of Commission on Judicial Performance, Policy 7.1(2)(b).) That policy specifically precludes use of the instances beyond the statute of limitations for purposes of evaluating the level of discipline. But the commission nevertheless asserts that it can consider the incident for purposes of determining Justice Johnson's truthfulness. It did so specifically for purposes of evaluating the level of discipline. This use plainly violates the policy.

that the judge intentionally lied in a manner in which his dishonesty threatens the integrity of the judicial process. In *Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, for example, the complainant's account was corroborated by numerous documents, including text messages, the testimony of another court employee, and notes and letters written by the judge. The judge's testimony was inconsistent with documents and texts and with his own prior statements. The judge admitted that he had lied in his communications with the investigators and that he had told others to lie about his conduct. His testimony was also inconsistent with the large money gifts he made, his payment for a trip to Disneyland, and his gift of a car, all of which confirmed an inappropriate relationship with the court employee and are inexplicable otherwise. This is a far cry from the record in this case.

Likewise, in *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, a judge was removed after she had perjured herself repeatedly in campaign finance filings that failed to disclose a $20,000 contribution to her campaign from her romantic partner in a relationship she sought to hide from the public. The judge admitted that she failed to disclose the contribution. *Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289 similarly involved a judge whose dishonest responses were documented in emails and texts, and who eventually admitted that they were "misleading" and tried to excuse them on that basis. In addition, the judge's lies were intended to obtain reimbursement for travel for a seminar although she did not attend classes on the days she claimed. The other decisions cited by the commission in support of its conclusion that Justice Johnson's honesty and integrity were aggravating factors were also based on far different records. *Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 86-87, 102, 141-143 (judge created after-the-fact document to corroborate his account of an incident while misrepresenting to the

commission that it was his contemporaneous notes, gave conflicting and inconsistent accounts that were discredited by other testimony and records, and gave highly implausible explanations when questioned); *Inquiry Concerning Murphy* (2001) 48 Cal.4th CJP 179 (judge repeatedly lied about absences from court falsely claiming medical disability on days when he was teaching classes and taking other classes that were prerequisites for the medical school in the West Indies in order to obtain his court salary while doing so).

### *2. The commission's conclusion that Justice Johnson fails to appreciate his own misconduct and that he is likely to repeat it is not supported by the record*

The commission wrongly concluded that Justice Johnson fails to appreciate his own misconduct and thus asserts that removal is necessary because he is likely to repeat it. The commission relied on three decisions, none of which are even close to the circumstances in this case. *Inquiry Concerning Platt* (2002) 48 Cal.4th CJP 227, 248 (previously admonished judge removed from office after fixing four tickets for friends and then telling commission he did not realize it was wrong); *Inquiry Concerning Ross*, *supra*, 49 Cal.4th CJP Supp. at 143 (previously admonished judge backdated affidavits, lied about handling events in matters coming before him as evidenced by clear documentary records, and continued to engage in serious misconduct even after prior admonishments and after receiving a letter about the inquiry and investigation); *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257 (previously admonished judge engaged in repeated acts of misconduct similar to those for which he had been admonished belittling attorneys who appeared before him in front of the jury, flinging a file at an attorney during a trial, and declining to take anger management or other classes after he was cautioned about his conduct).

Contrary to those examples, Justice Johnson admitted that he had transgressed professional boundaries on multiple occasions causing discomfort to those with whom he was interacting. He cooperated with the special masters' investigation and with the commission. He arranged a way to avoid further discomfort to his accusers by working from home throughout the lengthy investigation and hearing process. He participated in extensive counseling and educational sessions so that his future conduct would never again be deemed misconduct of any sort. And he has stopped even social drinking to avoid any future questions regarding his drinking.

Despite his unrefuted testimony, the commission erroneously concluded that Justice Johnson did not appreciate his misconduct and that it was likely to continue. Its conclusion rests on several questionable assumptions. First, the commission faulted Justice Johnson for denying some of the claimed misconduct and asserting that he blamed others for the more serious incidents. (Decision and Order, pp. 92-93.) Second, the commission faulted him for accusing several of the witnesses of lying and asserting that their testimony reflected longstanding stereotypes about African-American men. Third, the commission focused on his testimony that he was now "more aware of changing mores within our society…." (*Id.*, p. 95.) Finally, the commission entirely discounted his efforts at therapy and classes to ensure that no future misconduct would occur, noting that his conduct over the past two years did not reflect a change because he had "been away from the court and its female employees…." (*Id.* at p. 98.)

This reasoning is problematic on multiple grounds. First, while Justice Johnson asserted that several witnesses' outrageous accusations were lies, except for those clearly false accusations, he readily admitted most of the specific instances charged by the commission and expressed regret that his past conduct caused anyone discomfort. In some of these instances, his testimony differed in details from those of the witnesses, but

the differences are readily explained by their differing memories as Justice Johnson readily conceded. And in the matter of Officer Sauquillo's allegations, the findings of the masters support the irrefutable conclusion that she lied.

Second, the commission refused to even consider Justice Johnson's conduct over the past two years because he voluntarily chose to be absent from the courthouse except during times when he was on the bench or needed to be there and gave notice. The commission's refusal to lend any weight to this factor, given two years without incident, itself requires a reversal. Justice Johnson chose not to come to the courthouse to spare anyone who would be testifying from any discomfort by his presence. That is positive evidence of his sincere desire to reform. In addition, since the commission repeatedly considered charges against Justice Johnson that occurred outside the courthouse at social events, at area restaurants and bars, or at professional bar events, the commission's reasoning lacks logic. That is, the absence of any misconduct in the past two years is strong evidence that Justice Johnson is capable of reform and that future misconduct is extremely unlikely. Since most of his prior misconduct took place outside the courthouse, the fact that he was largely working remotely does not undercut the strong evidence that he has reformed his conduct, as evidenced by the complete absence of any additional incidents, comments, or problems.

Third, Justice Johnson's reference to racial stereotypes is not a basis to impose harsher discipline. This Court itself has said in no uncertain terms that "the legacy of past injustices inflicted on African-American persons persists powerfully and tragically to this day." Supreme Court of California Public Announcement, June 11, 2020. The commission's blithe rejection of Justice Johnson's concerns about the testimony of several witnesses whose testimony is implausible and was discredited and refuted

by other strong witnesses, even if that testimony is ultimately accepted and those findings are not reversed, is unfortunate and troubling. Despite mountains of research and well-accepted notions of implicit bias and the ways in which racial stereotypes can interfere with judicial decisionmaking, the commission entirely rejected any possibility of bias. That conclusion is inconsistent with this Court's own recent statement that it intends to find and root out such implicit bias anywhere it can be found. Likewise, the commission rejected out of hand the possibility of confirmation bias from the publicity generated by Justice Chaney's improper release of Justice Lui's email to hundreds of people including Eric George, who immediately released it to the press. Despite expert testimony during the hearing and the long-known potential impact of confirmation bias on memory, the commission concluded there was "no evidence to support this highly speculative theory…." (Decision and Order, p. 106.) [20]

Worse still, the commission not only rejected the potential that racial bias or stereotypes could be in play as a result of implicit bias, it criticized Justice Johnson for making the assertion, announcing that his concerns "compound the injury these witnesses have suffered…." (*Id.*, p. 94.) If the commission or this Court uses an individual's assertion that racist stereotypes may be in play as a basis for a harsher outcome, as it did here, it is hard to see how African-American litigants or any litigants can have

[20] See e.g., Jerry Kang, et al, *Implicit Bias in the Courtroom*, 59 U.C.L.A. 1124, 1126-1130, 1145-1146, 1173 (2012) (reviewing extensive research showing "convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects," that jurors and judges are not immune from such implicit biases. The article also found that when judges view themselves as objective, that belief "licenses him to act on his biases."). See also, HOWARD J. ROSS, EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES (2020); MAHZARIN R. BANAJI AND ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013).

confidence in the judiciary's understanding of its own implicit biases or empathy and mutual respect in its efforts to overcome them. Surely, if this Court's recent policy statement is to have any impact, neither the commission nor any court should use a litigant's assertion that implicit bias may have formed the foundation for a decision against that litigant in determining the outcome or remedy. Yet, that is precisely what the commission did here.

### *3. The commission reversibly erred in evaluating the impact of Justice Johnson's conduct on the judicial system*

The touchstone for discipline is whether it is necessary to protect the public and maintain respect for the integrity of judicial decisionmaking and the process. To be sure, the commission's policies permit consideration of whether the misconduct has been injurious to others. Policy Declarations of Commission on Judicial Performance, Policy 7.1(1)(f). But the central point of the discipline is to ensure that the decisionmaking process has integrity and that the public's confidence in that integrity is not undermined. And as to that, the commission offers not a single example in which Justice Johnson's conduct is an aggravating factor. The commission concedes that "none of Justice Johnson's prejudicial misconduct occurred while he was on the bench." (Decision and Order, p. 99.) This concession is glossed over although it should be a strong factor in favor of lesser discipline.

Instead of discussing Justice Johnson's impact or lack thereof on the judicial system and decisionmaking process, the commission analyzed statements by complainants about their feelings. To point out this error is not to minimize or downplay the impact on these individuals. But making critical distinctions is a hallmark of rigorous legal analysis under this Court's framework for determining the appropriate discipline. The commission's failure to do so mars its conclusions.

The commission also suggested that Justice Johnson fails to appreciate the negative impact of his conduct on various women by pulling a statement in his opening brief entirely out of context. The commission quoted Justice Johnson's assertion that "[n]o person was harmed in their position or treated unfairly by Justice Johnson." (Decision and Order, p. 99.) The commission then concluded that Justice Johnson's "statement reflects a remarkable lack of recognition of the impact of his behavior on others." (*Id.*) This conclusion cannot be drawn from Justice Johnson's actual discussion in his brief or from his testimony before the special masters or his argument to the commission.

Justice Johnson's statement was made in the context of evaluating his behavior in his job as a justice and in the courtroom and in his role as a supervisor of employees. He asserted:

> No person was disadvantaged in any legal matter or any matter before the court. No person was harmed in their position or treated unfairly by Justice Johnson.

(Justice Jeffrey W. Johnson's Opening Brief, p. 83.) The entire paragraph plainly dealt with his conduct in the courtroom and his behavior toward his employees, indicating that none were retaliated against or harmed or given poor reviews or suffered other employment-related consequences or lost tangible job benefits from his decisions regarding their employment.

Also, Justice Johnson repeatedly acknowledged that he failed to maintain appropriate boundaries between the professional and personal and engaged in "not acceptable behavior for an appellate justice." (Justice Johnson's Response to CJP, 9/24/18, Exhibit 4, CJP 212-312.) He accepted his need to change his behavior and took his errors to heart. (*Id.*) He stated without equivocation that he was working to change:

> I nevertheless accept wholeheartedly that I need to change some of my behavior. I am working conscientiously to recognize and correct that mindset that contributed in any

> way to many issues raised by the commission. Specifically, I have entered and continue an intensive course of professional counseling and education. I have also openly discussed and worked to understand all aspects of the allegations with my wife, and pastor, who have both helped me see and correct blind spots.

(*Id.*) Justice Johnson emphasized that he "understood and accepted this problem with maintaining appropriate boundaries" and that he "apologize[d] to the commission and to those who were aggrieved by my inappropriate statements and conduct. (Justice Johnson's Response to CJP, 9/24/18, Exhibit 4, CJP 212-312.)

Justice Johnson's unequivocal statements and active steps to ensure his own change were not given any weight by the commission. Instead, the commission focused on statements made by some of those aggrieved that Justice Johnson's conduct made them uncomfortable or embarrassed them or in a few cases "shocked" them. And then in conclusory fashion the commission announced "the adverse effects of Justice Johnson's misconduct on the individuals who were subjected to his actions and the negative impact of his misconduct on public perception of the judiciary, to be a substantial aggravating factor." (Decision and Order, pp. 101-102.) The commission cited no decision that has evaluated the effect of misconduct on the judicial system in this manner and its analysis is reversible error.

#### *4. The commission erroneously gave limited weight to Justice Johnson's ability to reform*

The commission dismissed Justice Johnson's ability to reform, despite his unrefuted testimony that he has undertaken multiple steps for doing so, and the absence of any further misconduct in the years since the inquiry and these proceedings began. In support of its analysis regarding

this factor, the Commission looked to two prior decisions and commentary in Rothman's book. Neither support the outcome here.

The commission cited the 1999 edition of Rothman's book for the proposition that judges have a responsibility to "know what constitutes sexual harassment in the work place" and to deal with it. Rothman did not assert that the conduct that constituted sexual harassment in 1999 is the same as the conduct that would be deemed sexual harassment today. The reasonable person standard embodied in sexual harassment law necessarily means that what is "reasonable" modifies over time with societal changes.

Equally important, neither the commission nor the special masters found that Justice Johnson sexually harassed his employees or anyone else; it found that relatively isolated remarks or comments or questions or touching could reasonably be perceived as sexual harassment. (Decision and Order, pp. 25, 29, 36, 40,43, 45, 46.) Thus, Rothman provides no support for the conclusion that removal is required or warranted here.

The two decisions that the commission cited do not support removal here. *Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289 and *Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1. In *MacEachern*, an appellate judge was removed from her judicial office because she falsified travel requests for a trip to a seminar for multiple days on which she was not registered for any classes and lied to the commission falsely testifying under oath that she arrived not knowing she had not been admitted to various classes when clear testimony and documents showed that she had been advised of this before she took the trip. In *Saucedo*, the judge engaged in multiple serious violations of the canons pursuing his courtroom clerk by giving large money gifts, buying her a car, and attempting to pressure her into a "special friend" relationship by showing her a crude anonymous letter. The judge urged her to lie about the letter, not report it, and to keep their conversations and the letter secret. The judge

gave her approximately $26,000 in gifts including a BMW automobile and a Disneyland package for her family. His effort to manipulate the clerk into a close personal relationship was clear from letters and texts he had sent. The judge said very specifically in one text:

> If you want me to be an ordinary friend … I will provide only moral support. If you want me for a special friend, everything is on the line with full financial and moral support going forward. Special friend means you want to take time and effort to share thoughts and experiences with me.

*Saucedo*, *supra*, at 28. This is a clear and direct quid pro quid offer of financial gifts in exchange for a close personal relationship, which the judge repeatedly denied under oath, but which was plainly present and evidenced by his own texts to her. The judge's conduct was far more egregious and directly connected with and problematic in terms of court administration and truthfulness.

### *G. Justice Johnson's removal threatens public confidence in the California courts because it is harsher than any comparable case and because it deprives the public of a brilliant diverse jurist at the very time his services are most needed*

Finally, imposing the most severe penalty against Justice Johnson in circumstances that have never resulted in removal in the past threatens to undermine public confidence in the judiciary's even-handedness. The first removal of an appellate judge and the first removal ever of a judge who has not engaged in willful misconduct or been admonished in the past is imposed against one of a small minority of African-American jurists on the bench in California.

As this Court recently announced, the country is at an inflection point in our history, with the potential to confront and overcome the legacy from past racial injustices. Supreme Court of California Public Announcement, June 11, 2020. This Court stated "clearly and without

equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing." *Id.* This Court embraced its obligation to "uphold our fundamental constitutional values" and work to make the "promise of equal justice under law" for everyone "a living truth." *Id.* This petition presents an opportunity to do so. Presumably this court by its manifesto also abhors the punishment of someone for pointing out racism or perceived racism in good faith, when the witness has rational basis to do so.[21]

Conceding that its mandate is "not to punish, but rather is to protect the public," the commission nevertheless ordered removal of Justice Johnson although that remedy is unnecessary to protect the public. (Decision and Order, p. 86.) In attempting to justify this decision, the commission pointed to the number of acts and the seriousness of the misconduct, accepted the special masters' assertion that Justice Johnson was not honest in several respects, and concluded that Justice Johnson's denial of some allegations meant that he lacked capacity to avoid repeating his misconduct.

The commission was forced to acknowledge that "none of Justice Johnson's prejudicial misconduct occurred while he was on the bench," but it refused to consider this a mitigating factor. The commission discounted the fact that Justice Johnson has had no prior discipline or admonishments (public or private) and none of his conduct called into question the integrity

[21] History is replete with decisions issued under the societal imperatives of the time, imperatives that are later seen to be deeply flawed by bias or racism, explicit or implicit. Cf. *Korematsu v. United States* (1944) 323 U.S. 214; *Plessy v. Ferguson* (1896) 163 U.S. 537; but see *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483. Assuring that such decisions are relegated to the past requires this Court to make clear that a litigant in a judicial inquiry or any other proceeding who questions whether some form of bias underlies the testimony is not penalized for raising the question.

of court proceedings and judicial decisionmaking.

The commission was also forced to recognize Justice Johnson's contributions to the community and to the judiciary, but then gave them no weight in its analysis, announcing that "even a good reputation for legal knowledge and administrative skills does not mitigate prejudicial behavior." (Decision and Order, p. 103.) The commission entirely dismissed the serious problems with pretrial publicity created by Justice Lui's release of an email recounting Officer Sauquillo's untrue allegations that Justice Johnson had propositioned her in crude graphic sexual language, a confidential email that Justice Chaney, deliberately and in violation of court confidentiality requirements, provided to Eric George who in turn released it to the Daily Journal.[22]

The commission rejected Justice Johnson's assertion that removal was disproportionately harsh in comparison with its past decisions. (Decision and Order, pp. 107-110.) In addressing that question, the commission did not point to comparable cases that resulted in removal. Instead, it asserted that willful conduct is not required for removal nor is prior discipline. (*Id.*, p. 107.) The commission also took the position that even if a judge takes immediate steps to modify behavior after he or she learns that they are inappropriate, and even when his misconduct did not impact the judicial decisionmaking process or judicial decisions in any way

[22] This breach of the confidentiality of the process – a breach that was not inadvertent on Chaney or George's part – undoubtedly created enormous harm to the public perception of the courts – and unjustly also gravely harmed Justice Johnson's reputation. George's lie under oath about his role in it – corrected only after his incriminating emails were produced – provides yet another reason to discount the testimony of both Chaney and George. Now, the commission's decision threatens to do even more damage to the public's perception of the judiciary's ability to provide evenhanded and consistent justice.

and did not rise to the level of sexual harassment or criminal conduct, this need not be given weight in deciding whether to impose a lesser sanction. (*Id.*)

The commission entirely rejected the notion that its prior precedent suggested that the outcome was disproportionate, essentially taking the position that since each case is individual and evaluation is fact-intensive, a disproportionate penalty simply cannot be recognized and thus, concluded it need not consider the question. (Decision and Order, pp. 108-109.) This bold position cannot be squared with any proper notion of the rule of law, which demands that like cases be treated alike. Countless areas of law are highly fact-dependent and yet courts struggle to ensure that decisions are consistent. Yet here, the refusal to even grapple with this important rule-of-law question threatens to diminish the public's perception of the fairness in the California justice system. If the public believes that the commission has no need to select a disciplinary sanction – ranging between a private admonishment, public censure, a short-term suspension, or removal - in a consistent and evenhanded manner how can it have confidence in the integrity of the decision or be sure that it has not been negatively affected by extraneous considerations? This problem is likely to be intensified here because the jurist whose discipline is so visibly disproportionate is one of only a handful of African-American jurists on the state's appellate courts, at the very time when the justice system and courts are under intense scrutiny.

Full participation of all racial and ethnic groups in the legal profession, including on the judiciary, is a vital state interest. *Regents of Univ. of Cal. v. Bakke* (1978) 483 U.S. 265. As Judge Eric Clay wrote in his concurrence in *Grutter v. Bollinger* (6th Cir. 2002) 288 F.3d, 764-765 (en banc)(Clay, J, concurring), individuals can only experience racial or ethnic discrimination based on their race or ethnicity. As a result, trying to be sure that such individuals are included is an important interest for law

schools and the legal profession. That same principle may be even more important to the need for diversity in the judiciary, especially at these pivotal times when the evenhanded treatment of African-Americans by the law enforcement and justice system is under such intense scrutiny.

Lawyers, judges, and public officials who share a common membership in a minority group typically share a body of experience that is not shared or fully understood by those who are not members of that group. But when our democratic institutions, and particularly the judiciary, are made up of those reflecting this diversity, then they are better-able to resist the implicit biases that we all suffer from – and then members of the public observing their operations will have more confidence in and respect for their decisions. Sandra Day O'Connor explained this well when speaking about former justice Thurgood Marshall's participation on the United States Supreme Court:

> Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective…. Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Hon. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992). Judge Leon Higgonbotham, Jr. likewise recognized the importance of judicial diversity, observing that it "creates a milieu in which the entire judicial system benefits from multi-faceted experiences with individuals who came from different backgrounds." A. Leon Higginbotham, *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028, 1037 (1993).

Without effective participation by all segments of society, the legitimacy of our legal system will be imperiled. This essential requirement

was recognized by our Founders who recognized that a legitimate government depends on this inclusion of everyone, and not a favored class or group. THE FEDERALIST No. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961). The judiciary's ability to discharge its constitutional responsibilities rests on "public confidence in it." *United States v. Johnson* (1944) 323 U.S. 273, 276.

All of this is not to say that an African-American jurist who engaged in the kinds of persistent and serious misconduct that has previously resulted in removal should be given better treatment. Nor is it an argument to suggest that no minority or diverse jurist can ever be removed. But here, the discipline imposed is disproportionate – strikingly so – and entirely unnecessary to protect the courts and the public. And that poses a serious threat to the public perception of the decision and to its faith in an evenhanded justice system.

Careful scrutiny of the record and the decision confirm that review and reversal are required under the law of California.

**RELIEF**

Petitioner Justice Johnson respectfully requests that this Court review and reverse the Commission on Judicial Performance's decision and

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order removing Justice Jeffrey W. Johnson from office and grant him such other relief as is warranted in law and equity.

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Dated: August 28, 2020

## CERTIFICATE OF WORD COUNT

The undersigned attorney for Petitioner Justice Jeffrey W. Johnson, hereby certifies that the Petition for Review from the Decision of the Commission on Judicial Performance consists of 22,340 words as counted by the Microsoft word processing program used to prepare this brief.

*/s/ Paul S. Meyer*
Paul S. Meyer

## CERTIFICATE OF SERVICE

Re: Case No.:_____
Case Title: Justice Jeffrey W. Johnson v.
Commission on Judicial Performance

I hereby declare I am a citizen of the United States, am over the age of eighteen years, and am not a party in the above-entitled action. I am employed in the County of Orange, and my business address is 695 Town Center Drive, Suite 875, Costa Mesa, California 92626.

On August 28, 2020, I served a true copy of the foregoing document described as:

**PETITION FOR REVIEW FROM THE DECISION OF THE COMMISSION ON JUDICIAL PERFORMANCE**

on all parties in this matter by electronic transmittal, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and would so testify in court. Executed this 28th day of August, 2020, at Costa Mesa, California.

*/s/ Shenna Laderman*
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