No. 21-507

In The

Supreme Court of the United States

LAWYERS UNITED INC., EVELYN AIMEE De JESUS, and ALLAN WAINWRIGHT,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

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

PETITIONERS' SUPPLEMENTAL MEMORANDUM

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ARGUMENT

I. THE WALL STREET JOURNAL'S REPORT THAT DISTRICT JUDGES ROUTINELY DECIDE CASES IN WHICH THEY HAVE A FINANCIAL INTEREST AND VIOLATE THE PRINCIPLE NO PERSON SHOULD BE A JUDGE IN THEIR OWN CASE

We the People respectfully request the Court to take notice that the *Wall Street Journal* published findings that more than 130 federal judges have violated U.S. law and judicial ethics by overseeing court cases involving companies in which they or their family own stock. This September 28, 2021 article was written by James V. Grimaldi, Coulter Jones, and Joe Palazzolo. 28 U.S.C. § 455(a) provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(c) provides: "A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." The recusal statute also categorically prohibits judges from hearing cases that involve a party where they or their spouses have a legal or equitable interest, however small. *See* 28 U.S.C. § 455(d)(4). It is also a core constitutional principle of due process that no judge should decide a case where they have personal or financial interest.

The *Wall Street Journal* found that federal judges in 685 court cases since 2010 improperly failed to

disqualify themselves, finding that nearly one out of five federal judges who disclosed their stock ownership, heard cases where they owned corporate stock in one of the parties. It discovered that when judges participated in such cases, about two-thirds of their rulings that were contested came down in favor of their or their family's financial interests. The *WSJ* also found 61 judges or their families owning stock in companies that were parties in their court were also trading that stock during the pending cases. The Journal's investigation "raises a more systemic problem of judges chronically neglecting their duty to disqualify in such cases," said Charles Geyh, a law professor at Indiana University, who specializes in judicial conduct, ethics and accountability. Members of Congress have written Chief Justice Robert that "the scope of the ethical violations is stunning" and have requested an investigation.

This lower court pattern of federal judges chronically neglecting to recuse themselves reported by the *WSJ* is at issue and ripe in this certiorari petition. Initially, petitioners aver *supervisory* review is warranted because the challenged federal facial licensing discrimination at issue presents a glaring conflict of interest that also contradicts the *Code of Conduct for United States Judges* Canon 5 and this Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Petitioners squarely argue *supervisory* review is necessary and proper because no person should be a party in their own case because the judges below are judge, jury, and defense counsel in their own case.

As will be shown below, the undisputed facts in this petition provide clear and convincing evidence that D.C. Court of Appeals Judge Janice Rogers Brown violated the recusal statute in writing the panel's decision in *National Ass'n of Multijurisdiction Practice v. Howell*, 851 F.3d 12 (D.C. Cir. 2017) and other D.C. judges on the panel below have violated the recusal statute and this Court's precedent. Denying review here is equivalent to licensing judges to nullify the recusal statute and the rule of law.

II. D.C. COURT OF APPEALS JUDGE JANICE ROGERS BROWN VIOLATED THE RECUSAL STATUTE AS A MATTER OF LAW IN *NATIONAL ASS'N OF MULTIJURISDICTION PRACTICE v. HOWELL*

D.C. Circuit Judge Janice Rogers Brown was previously a justice on the California Supreme Court. In that capacity, Judge Brown was a defendant in a lawsuit challenging the constitutionality of the 100% subjective California bar which has a *standard error of measurement* shoddier than .48 that is employed to fail two out of three experienced attorneys on the July bar exam. *See* Amended Complaint ¶ 82 ("*McKenzie v. George*, ND California docket #97-0403). Judge Brown was also the chair and authored the decision for the United States Court of Appeals for the District of Columbia in *NAAMJP v. Howell*, 851 F.3d 12 (D.C. Cir. 2017). On information and belief, Judge Brown was either collecting a pension from the California judiciary when she decided *Howell* or she is now collecting a

pension from them, as well as a second pension as a retired federal judge. Even if she was not collecting a state pension when she wrote the panel's decision in *Howell* she is now and her long personal and financial relationship with the California judiciary and being a defendant in prior litigation about the California licensing process for sister-state attorneys undermines her impartiality. It creates a stunning appearance of bias.

Petitioners alleged in their Amended Complaint and also preserved that argument on appeal, that Judge Brown, the former Chairwoman on the panel deciding *NAAMJP v. Howell*, 851 F.3d 12 (D.C. Cir. 2017), should have recused herself in that appeal as a matter of law and thus the *Howell* panel's decision warrants *de novo* review.

This Judge Brown recusal statute violation was not presented in the certiorari petition because of word count limits and because judges routinely reject claims of their judicial colleague's misconduct as absurd and frivolous. However, petitioners would disserve their professional responsibility of truth and candor if they did not bring to this Court's attention similar chronic financial conflict of interest violations in this case that have been reported in the *WSJ* that undermine public respect for the Article III Courts that are capable of repetition but evading review.

In *NAAMJP v. Howell*, the appellants in that appeal, who were different from appellants in this case, presented evidence that proves that the California bar

has a *standard error of measurement* shoddier than .48 and this putative bar exam fails to meet national testing *Standards*. Judge Brown conveniently ignored this evidence in *Howell* that has also been presented in this petition for certiorari. *See* App. 45-82 (Exhibit A.) Petitioners below argued, in both the trial and appellate court, that Judge Brown should have disqualified herself from the Appellate Court panel in *Howell* in light of her previously being a named defendant as a justice of the California Supreme Court and the submission to her of Exhibit A concerning the California bar exam in *Howell*.

28 U.S.C. 455(b) provides:

> a judge "shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

She should have recused herself because she has personal knowledge of facts in evidence and the parties. She had a personal interest in the outcome. She did not want anyone to know the California bar exam for experienced attorneys is neither a valid nor reliable test.

Petitioners also argued below she should have also disqualified herself under 455(b)(3):

> "Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion

> concerning the merits of the particular case in controversy."

Petitioners aver she should have also disqualified herself under Section 455(a) as her appearance as judge might reasonably be questioned in view of her prior experience as a defendant justice on the California Supreme Court concerning the California bar exam for experienced attorneys that has a *standard error of measurement* shoddier than .48.

This Court has made clear that "[b]ias is easy to attribute to others and difficult to discern in oneself." *Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899 (2016). "No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id*. at 1905. In *Williams*, this Court stated,

> . . . a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." [internal cites omitted] In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court. *Ibid*.

The goal of Section 455(a) is to avoid even the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 860 (1988). The purpose to "promote public confidence in the integrity of the judicial process . . . does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Ibid*. The Court in *Liljeberg* vacated the prior Court's judgment long after it was final.

Petitioners submit, not that the *Howell* decision should be vacated, but merely that the prior decision in *Howell* should be re-examined *de novo* as a matter of law because it reasonably appears she was not neutral. The law requires neutrality. A single biased member of a panel can affect the decision of all members. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1731 (2018) ("Factors relevant to the assessment of governmental neutrality" include "the historical background of the decision under challenge.")

In *Nguyen v. United States*, 539 U.S. 69 (2003), the Court considered the question whether a panel consisting of two Article III judges and one Article IV judge had jurisdiction. The Article IV judge did not have life tenure and Article III Court protections. This Court reversed. The same result should apply here when an appellate panel includes a judge who is not neutral.

III. THE D.C. COURT OF APPEALS BELOW VIOLATED THE RECUSAL STATUTE

The Senior District Judge below rejected petitioners' claims that the Circuit's prior opinion in *Howell* should be reexamined in light of Judge Brown's bias and conflicts of interest in *Howell*. His Honor held:

> Furthermore, even if the Court did believe the D.C. Circuit was biased when it made its decision in *Howell*, that would not be valid basis for ignoring precedent. This argument is clearly a desperate attempt to convince this Court to ignore a binding precedent legitimately issue by the D.C. Circuit. (App.20)
>
> . . . .
>
> If the plaintiffs want to challenge *Howell*, they must do so in the D.C. Circuit or the U.S. Supreme Court, as this Court plainly lacks authority to overturn binding precedent. . . ." (App.20)

Petitioners' claims about the Judge Brown conflicts of interest were white-washed. On appeal, the one-paragraph decision rubber stamps and provides another coat of white-wash. D.C. Circuit Judge Pillard served on the panels both in *Howell* and on the appeal below. Thus, once again, the same federal judges are deciding their own case. 28 U.S.C. § 455(b)(3):

> "Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or *expressed an opinion*

> concerning the merits of the particular case in controversy." (Emphasis added)

Judge Pillard expressed an opinion and participated in the decision in *Howell* and in the decision below. The panel below denied a recusal motion. Judge Pillard refused to recuse herself knowing she served on both panels. This is the same systemic "judge club" pattern of federal judges' refusing to adhere to the recusal statute and constitutional prohibition against judges wearing a robe and deciding their own cases.

Petitioners further allege Judge Brown's decision repeatedly omits facts submitted and misstates the law. Her appearance of bias rings loud and clear. For example, and there are many similar examples, in *Frazier v. Heebe, Chief Judge for the District of Louisiana*, 482 U.S. 641 (1987): "The question for decision is whether a United States District Court may require that applicants for general admission to its bar either reside or maintain an office in the State where that court sits." *Id*. at 642-43. This Court said No. Judge Brown said the opposite in *Howell*. *Frazier* holds, "[s]imilarly, we find the in-state office requirement *unnecessary* and *irrational*. First, the requirement is not imposed on in-state attorneys." *Id*. at 649. The *Frazier* Court applied its supervisory power over Local Rules and a heightened scrutiny rational and necessary standard. *Id*. at 645. Janice Brown in *Howell* says the opposite. Judge Brown says D.C. Local Rule office requirements are *rational* – the direct opposite.

In *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) squarely holds that *bar admission on motion* without taking another bar exam for out-of-state licensed attorneys is a constitutionally protected Privilege and Immunity. Judge Brown holds the direct opposite in *Howell*, that bar admission on motion for out-of-state attorneys is not constitutionally protected. Judge Brown holds that licensed attorneys have the same 19th Century rights as *Myra Bradwell* and *Belva Lockwood*. None!

The one paragraph decision conceals the petitioners' argument that Judge Brown should have recused herself in *Howell*. This omission warrants this Court exercising its s*upervisory* authority and exercising *de novo* review.

IV. THE DECISIONS BELOW RESURRECT 19TH CENTURY LICENSING CASE LAW AND DO NOT ADHERE TO THIS COURT'S PRECEDENT

In *Bradwell v. The State*, 16 Wall. 130 (1873), the Supreme Court held that the right to practise (sic) law in the state courts was not a *privilege or immunity* of a citizen of the United States. The Supreme Court thus rejected Myra Bradwell's application to practice law in Illinois holding that the opportunity to practice law is not a fundamental right entitled to constitutional protection. Justice BRADLEY in an infamous concurring opinion about the fitness of female lawyers concluded:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. *Id*. at 141.

Likewise, *In re Lockwood*, 154 U.S. 116 (1894), Belva A. Lockwood was admitted to practise (sic) law in the Supreme Court of the District of Columbia and the bars of several States of the Union. The Virginia Supreme Court rejected her application for admission. The Supreme Court citing *Bradwell* affirmed. Simply stated, the Court in the 19th Century held an attorney's opportunity to practice law is not a fundamental right that merits constitutional protection, women are delicate, timid, and unfit to leave the domestic sphere and practice law. The incorporation of the Bill of Rights into the Fourteenth Amendment did not begin until 1925.

The Court has reversed this 19th Century precedent. In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Supreme Court overruled the 19th Century holdings that an attorney's opportunity to practice law is not a fundamental right and is not constitutionally protected privilege and immunity, the Court held:

> The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause.[fn11] Out-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. *Id*. at 281-82.

V. CONCLUSION

JUSTICES THOMAS, BREYER, ALITO, and COMEY recently publicly commented on the need for the public to believe in the fairness and integrity of this Supreme Court.

In view of the foregoing, this Court should exercise its supervisory review and summarily abrogate this Local Rule facial licensing discrimination or grant certiorari in order to preserve the integrity of the rule of law. Sixteen thousand lawyers every year are provided

reciprocal licensing privileges in another state that they are denied by the federal licensing categorical disqualification rules.

Respectfully submitted,

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