IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

NORTH AMERICAN TITLE COMPANY, et al.,

Petitioners,

SUPERIOR COURT OF FRESNO COUNTY,

Respondent,

CAROLYN CORTINA, et al.

Real Party in Interest.

Case No. S280752

ANSWER TO PETITION FOR REVIEW

On review from the decision of the Court of Appeal of the State of California, Fifth Appellate District, Case No. F084913

Superior Court of California, County of Fresno, Case No. 07CECG01169

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I. INTRODUCTION

The court of appeal's thorough, well-reasoned decision holds that a judge accused of personal bias, which is by statute a non-waivable ground for disqualification, may not circumvent the legislative scheme for neutral examination of the bias allegations by striking the statement of disqualification as untimely. As the court of appeal correctly recognized, its result "aligns with the purpose of the [legislature's disqualification statute] amendments to assure that even the shadow of bias is kept out of California courts…[just as it] conforms with prior statutory language and judicial construction." (Op. 31).[1]

Rather than break new ground, this decision builds on and practically applies case law concerning judicial disqualification in accord with a statutory scheme that has evolved over time. Under the legislative scheme, two grounds for disqualification cannot be waived—the parties here do not dispute that general proposition. *See* Code of Civil Procedure Section 170.3(b)(2).[2] One such non-waivable ground is invoked here: "personal bias or prejudice concerning a party." Section 170.3(b)(2)(A). The decision reaches a common-sense conclusion,

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[1] The court of appeal's decision is cited to the slip opinion ("Op. __"). The petition is cited ("Pet. __").

[2] Citations are to the Code of Civil Procedure unless otherwise noted.

consistent with the statutory language and scheme, that a judge accused of personal bias should not be able to avoid the issue of bias by striking a statement of disqualification as untimely. Review should be denied for a number of reasons.

First, no prior case has substantively analyzed the issue of how Section 170.3(b)(2), which provides that certain grounds for disqualification are non-waivable, interacts with Sections 170.3(c)(1) [a statement of disqualification must be brought at the earliest practicable opportunity] and 170.4(b) [allowing an accused judge, in some circumstances, to strike a statement of disqualification as untimely]. Thus, there are no conflicting decisions concerning the relationship among these statutes. Indeed, the court of appeal meticulously examined, distinguished, and built upon prior case law, harmonizing it all with an evolving statutory scheme governing judicial disqualification.

Second, the court of appeal's decision does not interfere with the public policies animating the judicial disqualification statute. The legislature exercised its judgment in weighing policy concerns and concluded some grounds for disqualification—like personal bias or prejudice—cannot be waived. *See* Section 170.3(b)(2). This Court recognized such non-waivable bias scenarios more than 100 years ago, *see Lindsay-Strathmore Irrigation Dist. v. Superior Court* (1920) 182 Cal.

315, 331-32, and reiterated that recognition by distinguishing different grounds for disqualification that may be waived if not presented "at the 'earliest practicable opportunity.'" *See Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 22 Cal.2d 386, 390 (a case petitioners feature, e.g., Pet. 9, 17, 18). This makes sense. Judicial disqualification statutes aim to preserve the public's perception of a fair and impartial judiciary. The legislature logically concluded that some grounds for disqualification are so serious that they necessarily warrant neutral evaluation even if the accused judge thinks the accusation of bias is untimely. Such an interpretation of the statutory scheme adheres to this Court's jurisprudence, which has "invariably held the disqualification statute should be broadly construed" in furtherance of "an important purpose—to instill public confidence in the judiciary." (Op. 20 [citing cases]).

Third, petitioners ignore this venerable rule of "liberal" statutory construction, (Op. 20), sponsoring instead the idea that all accusations of personal bias can be waived unless the accused judge self-reports potential bias. Such a rule is counter-intuitive. It does not reflect a broad construction of the statutory language and it does not promote the important public policies of jealously protecting both the judiciary's impartiality and the public's respect for the courts. A neutral assessment of personal bias accusations is all the more necessary to

advance these important public policies when the accused judge tries to suppress independent review of his conduct by unilateral action.

Fourth, petitioners incorrectly argue the decision here will encourage dilatory and improper tactical use of disqualification remedies. Not so. As the court of appeal recognized, there are various means to discourage misuse of disqualification remedies and quickly dispatch truly meritless accusations. (Op. 32-33). This record shows how allowing an accused judge to block neutral review, by striking bias allegations as untimely, serves to delay expeditious resolution of disqualification issues.

Fifth, although the court of appeal did not reach the issue, real party's statement of disqualification was filed "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." Section 170.3(c). This is not a case involving untoward delay and, therefore, not a good vehicle for considering how to resolve such a case of actual delay.

In sum, as to petitioners' first issue for review, there is no need for this Court to intervene: (1) the decision does not create conflict in California law; it addresses a heretofore undecided issue; (2) the decision is consistent with the public policies animating the disqualification statute; and (3) the statement of disqualification was in fact timely.

As to petitioner's second issue for review, there is, again, no conflict in decision and no important issue for review. Petitioners are complaining about case and fact-specific issues, which would in all circumstance not now be ripe for review. The court of appeal decided the statement of disqualification presented facially sufficient grounds. Assuming the judge does not consent to disqualification, a neutral judicial officer will determine whether disqualification is appropriate. The propriety of such a determination can be addressed after it is made on a developed record. That assessment can consider the relevance, if any, of Section 170.2(b), which provides that a judge may not be disqualified because he or she "[h]as in any capacity expressed a view on a legal or factual issue presented in the proceedings …."

As importantly, petitioners' second issue for review is based on a misinterpretation of the statute they invoke. Section 170.2(b) does not allow a judge to be disqualified based on prior rulings. Here, the personal bias allegations are sufficient to invoke disqualification because the trial judge predetermined issues that were never presented to him where the available evidence belies his view that the real party in interest and a former defendant orchestrated a scheme to dissipate the assets available to pay a judgment. On its face, Section 170.2(b) does not protect a judge who forms unilateral opinions on subjects never

presented to the court and then wields his misimpressions about never addressed issues against parties and counsel who come before him on unrelated issues.

For these reasons, and the others discussed here, review should be denied.

II. COUNTER-STATEMENT OF THE CASE

This is a wage and hour class-action case that has been pending for over fifteen years. The claims against defendant-real party in interest Lennar Title, Inc. ("Lennar Title") were tried to the court in 2015. After liability was determined, referee proceedings began to determine damages. (Op. 3). This case is long-lived and has a complex procedural history that petitioners exacerbated by attempting to add a new party after trial without serving process and without any proceedings or evidence to establish liability for the newly added defendant.

The events relevant to this proceeding began after the trial and before judgment. In 2018, Lennar Title entered into various business transactions unrelated to the wage and hour case: certain of Lennar Title's assets were sold in the ordinary course of business to a separate entity now called Doma. (Op. 4). At that time, Lennar Title was known as North American Title Company, Inc., but a series of name changes

culminated in its current name, "Lennar Title, Inc." Among the assets Doma acquired was Lennar Title's former name: "North American Title Company, Inc." Doma briefly operated under that name but was recognized at all times in California's state corporation records as a corporation separate from Lennar Title, with a separate state corporate ID number. (Op. 4). Both Lennar Title and Doma amended their respective articles of incorporation in 2019 to reflect the changes brought about by the asset sale transaction. (Op. 4).

Petitioners imagined and convinced Judge Hamilton, the judicial officer who tried the liability phase of this case, that there was a nefarious purpose behind these business decisions: to dissipate Lennar's Title's assets in the face of a judgment being entered against it in the wage and hour case. Petitioners sought to amend their complaint to add Doma as a defendant.[3] (Op. 5-6). At the hearing on the motion to amend, Judge Hamilton expressed his opinion that the defendants were "playing a shell game" and trying to avoid a big liability. He allowed

[3] Petitioners misrepresent what happened in discovery related to the Lennar Title/Doma transaction. (*See* Op. 5). Lennar Title produced the entire transaction agreement with all relevant schedules and the president of Lennar Title was produced for a Person Most Knowledgeable deposition. Lennar Title fully cooperated in this discovery. Petitioners just did not like the answers they got because they did not fit their narrative of the transaction as somehow nefarious and an effort to dissipate Lennar Title's assets.

petitioners' proposed amendment, despite having just issued a tentative ruling indicating that he would deny the motion to amend because the claims against Doma did not relate back so as to make them timely for limitations purposes. (Op. 5-8).

Following the amendment, petitioners chose not to serve Doma. Doma moved to quash the complaint because it had never been served. (Op. 8-9). At the time of the motion to quash hearing, in June 2021, Lennar Title was operating under its current name, and Judge Hamilton, apparently annoyed by the name change, battered Lennar Title's counsel asking him if he "was sure about all those names"; the court disputed counsel's statements, saying "Well you're not sure though; right? You just believe you do or are you 100 percent?" (Op. 9-10). Then, addressing Doma's counsel, Judge Hamilton asserted his belief that there was a "name game shell game that we are playing." He berated Doma's counsel about an obvious typo in a filed document where the word "Title" was instead spelled "Titel," asking if this was "more trickery." (Op. 10). Judge Hamilton expressly embraced petitioners' view that there was "scheming to prevent collection of the forthcoming judgment through a corporate game of three-card monte." (Op. 10).

There is no basis in the record for these views. As the court of appeal correctly noted, at the time of these statements "issues of

fraudulent transfer, alter ego, or successor liability were never properly presented to the [superior] court."[4] (Op. 2). That remained true even at the time of the court of appeal's writing.

Judge Hamilton denied the motion to quash for lack of service of process on Doma based on his mistaken insistence that Doma and Lennar Title were the same entity despite California state corporation records showing them to be separate entities. (Op. 11). Consequently, Doma secured from the court of appeal a writ of mandate requiring that Doma be served with process. (Op. 12).

Eventually, Doma was properly served. It promptly exercised its right to file a peremptory challenge under Section 170.6. Judge Hamilton denied that challenge and Doma filed another petition for a writ of mandate. (Op. 13).

Doma also filed a statement of disqualification for cause pursuant to Section 170.1 based on Judge Hamilton's statements accusing Doma of participating in a sham transaction with Lennar Title. (Op. 13). Judge Hamilton answered on November 10, 2021 with a verified

[4] Although petitioners' third amended complaint included alter ego and joint enterprise allegations, there was no motion presented by any party through which it would have been proper to adjudicate those issues. No version of petitioner's complaints alleges fraudulent transfer. The parties had no opportunity to submit evidence or legal arguments.

statement that he was not biased against Doma, because, in making his statements about such things as a "shell game" and "three-card monte" the court "was CLEARLY referring to [Lennar Title] attempting to avoid payment of the judgment award, not some nascent corporation." (Op. 14). Judge Hamilton maintained his errant belief that Lennar Title was transferring assets to "avoid what everyone now knew would be a judgment in the tens of millions of dollars when judgment finally entered." (Op. 13). This accusation was at all times without any basis, a fact underscored and confirmed when Lennar Title bonded the judgment in full for purposes of its appeal of the judgment entered in the wage and hour case.[5] (Op. 49 fn.9 [commenting after noting the judgment had been bonded that "[c]oncerns whether Lennar Title is attempting to evade payment of the judgment appear unwarranted, and raise questions whether such concerns were ever warranted"]).

After the court of appeal issued an alternative writ in connection with Doma's Section 170.6 writ petition (on January 6, 2022), petitioners facilitated, with Judge Hamilton's cooperation, their voluntary dismissal of Doma as a defendant in hopes that would moot the disqualification efforts. (Op. 14-16).

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[5] That judgment is currently under appeal at the Fifth Appellate District. No briefs have yet been filed.

Shortly thereafter, in early February 2022, the court of appeal issued an order to show cause and stayed trial court proceedings. (Op. 16). That stay remained in place until July 28, 2022. An independent, neutral judge was assigned to evaluate Doma's Section 170.1 disqualification statement. The neutral judge believed the court of appeal's stay prevented him from resolving the issue of Judge Hamilton's disqualification. (Op. 16-17).

Doma's Section 170.6 writ was eventually denied on the ground it was not timely: Doma's belated addition to the case did not create another peremptory challenge opportunity. In so holding, the court of appeal was careful to state that "[n]othing in this opinion should be read as implying that these entities are, or are not, alter egos or that Doma Title is, or is not, a successor in interest liable for the debts of Former NATC/Lennar Title." (Op. 16). Once the mandate issued and the stay lifted, the neutral judge evaluating Doma's Section 170.1 challenge found it was moot as a result of petitioners voluntarily dismissing Doma as a defendant in the wage and hour case. (Op. 17).

Less than three weeks later, based on Judge Hamilton's verified statement that his comments indicating bias were directed towards Lennar Title and not Doma, Lennar Title filed its own Section 170.1 disqualification statement. (Op. 17). Judge Hamilton struck that

statement as untimely. In doing so, he reiterated his belief that Lennar Title and Doma are "inextricably intertwined" despite the court of appeal's repeated caution that there was no basis in the record for this belief—no such issue has ever been presented for decision in any court. (Op. 17).

Lennar Title petitioned for a writ of mandate. The parties fully briefed the issues, including with rounds of supplemental briefing and oral argument. (Op. 18).

The court of appeal issued a thorough and well-reasoned opinion concluding that, under the statutory scheme, the grounds on which Lennar Title moved to disqualify Judge Hamilton are not waivable such that implied waiver, by delay in seeking disqualification, is not a basis for the accused judge to strike the statement of disqualification and prevent substantive resolution of the disqualification accusations of personal bias by a neutral judge. In reaching this conclusion, the court surveyed 130 years of case law addressing the various iterations of the judicial disqualification statutory scheme. It also considered this Court's command that "the disqualification statute should be broadly construed" in order to "instill public confidence in the judiciary." (Op. 20). Based on that review, the court concluded that, when the legislature enacted the 1990 statutory amendments that prohibit waiver of two forms of judicial

bias in Section 170.3(b)(2), including personal bias, it was well aware of case law concerning implied waiver of bias claims based on their untimely presentation. The legislature nevertheless wrote broadly and unconditionally, preventing waiver as to the types of judicial bias it specified. (Op. 29-32). That prohibition on waiver extends to implied waiver associated with the time when the disqualification statement is filed. Concluding that Lennar Title had stated a "facially sufficient" case of bias that should be considered by a neutral judge (Op. 38-47), the court of appeal directed that a writ issue vacating the order striking Lennar Title's disqualification statement. (Op. 47).

III. REASONS TO DENY REVIEW

A. The court of appeal's well-reasoned decision addresses for the first time the interaction among different parts of California's judicial disqualification statute in a manner that creates no decisional conflicts, conforms to statutory language, and advances the public policies underlying the statutory disqualification scheme.

The court of appeal's decision addresses for the first time this issue: how do Sections 170.3(c)(1) and 170.4(b), which require a party file a statement for disqualification at the earliest practicable opportunity and allow a judge to strike a statement for disqualification as untimely, interact with Section 170.3(b)(2), which specifies two grounds for disqualification that cannot be waived by the parties to the

case? After a thorough review of the relevant statutes, case law, and legislative history, the court of appeal concluded the legislature meant what it said when it wrote in Section 170.3(b)(2) that the ground of "personal bias or prejudice" is not waivable. Therefore, here, the accused judge could not suppress an independent review of accusations of his personal bias or prejudice by finding Lennar Title impliedly waived its disqualification challenge because it did not present it sooner.

Petitioners cite no other case that has examined the interaction among these statutes. Real Party is not aware of any. To the extent petitioners conjure claims of confusion in California law as a result of the decision here, their efforts are wholly unconvincing.

1. The court of appeal decision fits comfortably within the existing body of California law.

Petitioners contend the court of appeal decision departs from California law allowing implied waiver of grounds for judicial disqualification. (Pet. 17-21.) Quite the contrary: the court meticulously surveyed California law, including cases where disqualification statements were deemed untimely. (Op. 29-33.) After this survey, the court concluded that: (1) the legislature did not intend to restrict its prohibition on waiver, in Section 170.3(b)(2), to express, written waiver (Op. 29-30); and (2) by enacting Section 170.3(b)(2)'s

waiver prohibition, with knowledge of California's then-existing case law, the legislature was, to some extent, clarifying the law's trajectory to underscore waiver is not available in some circumstances. (Op. 30-31.) The clarification of that trajectory returns to the result of earlier precedents and statutes that prohibited waiver of certain specified actions. See *Lindsay-Strathmore Irrigation Dist.*, 182 Cal. at 331-32. That rule was preserved and distinguished even as subsequent cases enforced waiver of some claims of disqualification that were not presented "at the earliest practicable opportunity." See *Caminetti*, 22 Cal.2d at 390.

As for the propriety of review by this Court, no cognizable conflict exists. Petitioners' citations do not show otherwise. A claim of decisional conflict cannot rest on: statements in cases predating the 1990 adoption of Section 170.3(b)(2); statements in cases where disqualification requests were deemed timely—such that the implications for "untimely" submissions were not even relevant; or statements in cases where courts were not invited to and did not consider the interaction among Sections 170.3(b)(2), 170.3(c)(1), and 170.4(b).

Petitioners rely on *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332. (Pet. 19-20). But the asserted ground for

disqualification in that case was that the judge conducted an independent factual investigation of an issue he decided by citing in his order a judicially noticeable document. That is not an accusation of personal bias or prejudice and therefore does not fall into the category of non-waivable bias under Section 170.3(b)(2). Not surprisingly, therefore, *Tri-Counties* does not discuss the non-waiver statute at all. And, in any event, *Tri-Counties* was a decision of the Fifth Appellate District, the same Court that ruled here. A later panel of a unified District may distinguish or even overrule its own prior precedent without creating a multi-court conflict subject to review by this Court. See *Estate of Sapp* (2019) 36 Cal.App.5th 86, 109 fn.9.

Petitioners rely on other, distinguishable cases. (Op. 18-19). Petitioners cite *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, but neglect to mention they never referred to this case in the court of appeal: before decision or in their rehearing petition. More importantly, *Alhusainy* did not discuss the statutory provisions addressing non-waivable bias. Moreover, although the court found the disqualification statement in that case untimely, *Alhusainy* nevertheless decided that the untimely allegations of bias necessitated the assignment of a new judge on remand. *Id*. at 395. That result underscores the public policies served by having bias claims considered regardless of strict timing

niceties and not squelched by the unilateral action of the accused judicial officer.

Similarly, in *People v. Seaton* (2001) 26 Cal.4th 598, 698, even though the litigant did not raise the issue of bias until direct appeal (making it technically unreviewable since it was not presented through the exclusive avenue of statutory writ review), this Court stated it still reviewed the record and decided the judge was not biased. In *People v. Hines* (1997) 15 Cal.4th 997, 1041 and *People v. Scott* (1997) 15 Cal.4th 1188, 1207, the issue of disqualification was not preserved on appeal because there was no objection or statement of disqualification filed at the trial court level.

The issue of whether a party may wait until appeal to raise a question of bias is an entirely different issue given the statutory writ mechanism provided for appellate review and Section 170.3(c) laying out the process for neutral evaluation of facially sufficient bias allegations. See *People v. Bryant* (1987) 190 Cal.App.3d 1569, 1572.

There is no conflict for this Court to resolve in this case.

2. Petitioners urge an illogical, restrictive interpretation of the judicial disqualification statute contrary to the rule of broad statutory interpretation, as necessary to promote public respect for the judiciary.

Petitioners claim the court of appeal misread the legislative history of the disqualification statute and failed to recognize a difference between judicial-self-disqualification based on bias and cases where a party raises personal bias through a written statement of disqualification. (Pet. 21-23). But petitioners provide no authority or sound reason for this distinction. It is the judge who tries to suppress independent examination of his impartiality who should receive the greater scrutiny.

Here, again, there is no basis for review. The court of appeal carefully considered the context of the statutory language added through Section 170.3(b)(2) and the whole of the disqualification statutory scheme, concluding the legislature put no restrictions or conditions on the waiver prohibition it contains. (Op. 31 ["The Legislature's determination to place no limiting language on the prohibition of waiver in section 170.3, subdivision (b)(2) despite well-established caselaw developing the doctrine of implied waiver, shall be interpreted to indicate its intent to prohibit all forms of waiver, including implied waiver due to untimeliness."]).

There is, similarly, no sound reason to prohibit waiver only when the judge self-identifies potential bias. Such a rule would lead to perverse outcomes. A judge could refuse to bring to the parties' attention a potential ground for disqualification and then strike a subsequent disqualification statement as untimely. A more forthcoming judge, who raised her bias concern, would have no choice but to step aside from the case. The risks of bias, and the implications for the public's perception of judicial fairness, are not more acute in the latter scenario as compared with the former. If anything, the opposite is true.

Nor is there any reason why potential personal bias or prejudice should not be evaluated by a neutral judicial official in *all* circumstances. *People v. Berrara* (1999) 70 Cal.App.4th 541, merely notes the legislature was concerned with judges who pressure parties to waive disqualification issues after the judge identifies a potential ground for disqualification. That one concern does not exclude the existence of other concerns. The legislature did not include any limiting language in Section 170.3(b)(2), which it could have done if waiver prohibitions were to be conditional or limited. And petitioners' proposed statutory interpretation is contrary to this Court's long-standing recognition that disqualification statutes must be broadly construed to advance the cause of promoting respect for the judiciary. (Op. 20).

Moreover, the speediness issues raised by petitioners are vastly overstated. (Op. 24-26). Here, for example, if Judge Hamilton had simply answered the disqualification statement instead of striking it as untimely, issues concerning disqualification would almost certainly have been resolved long ago. It adds time to the process if parties must first secure by writ review confirmation of their timely action in seeking disqualification.

3. Lennar Title's statement of disqualification was timely.

Although not addressed by the court of appeal, real party in interest also demonstrated it raised its bias concerns and filed its disqualification statement at the earliest practicable opportunity. *See* Section 170.3(c)(1). As noted in the case background, *ante*, this case was stayed from the beginning of February 2022 until July 28, 2022. Judge Hamilton filed a verified statement in November 2021, wherein he stated any bias he might have was directed towards Lennar Title. (Op. 13-14). In January 2018, despite the court of appeal issuing an alternative writ indicating that he lacked any jurisdiction to act in this matter as result of Doma's 170.6 challenge, Judge Hamilton helped facilitate Doma's dismissal thereby ensuring that Doma's bias challenges were moot and not evaluated on the merits. Given the late stage of this

case, Lennar Title was extremely reluctant to seek disqualification but it was increasingly concerned about Judge Hamilton's escalating comments. Remaining as the lone defendant, Lennar Title could face Judge Hamilton's ire if he ruled on post-trial and attorneys' fee and cost motions.[6] The need for Lennar Title to file the disqualification statement was proven when, in striking the disqualification statement, Judge Hamilton persisted in his views that there was an improper relationship between Lennar Title and Doma, despite the court of appeal cautioning in denying Doma's 170.6 writ that no such relationship had been adjudicated.

This is a cumulative effects case where the grounds of Judge Hamilton's bias are based on a series of statements and actions over time. See *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1025, 1052 (in identifying the earliest practicable time for a challenge, the fact that some events occurred months or years before will not prevent a challenge from being timely as "the cumulative effect of potentially disqualifying events sometimes will matter").

[6] Petitioners filed a motion requesting more than $14 million in attorneys' fees and nearly $1 million in non-statutory costs and expenses.

Because the result of the court of appeal decision is supported by the independent ground that the statement of disqualification was timely, that is yet another reason against this Court's review.

4. Public policy concerns favor the court of appeal decision.

Review should also be denied because the court of appeal decision promotes and protects the integrity of the judiciary and the impartiality of decision making. By contrast, petitioners fail to show detrimental consequences to the administration of justice resulting from the court of appeal's non-waivable bias rule.

First, the rule only applies to two grounds for disqualification: "personal bias or prejudice" and where the judge served as a witness or advocate. Section 170.3(b)(2). Other grounds for disqualification are still subject to being stricken as untimely.

Second, as the court of appeal recognized, there is no reason to necessarily believe that litigants will not take the first opportunity to disqualify a biased judge—before adverse, tainted rulings occur. (Op. 32).

Third, even if there were to be a significant uptick in disqualification statements as a result of the decision here, the legislature crafted the policy trade-off when it made certain grounds of

bias non-waivable. The legislature can always revisit or modify its rule to the extent it thinks necessary.

Fourth, in the event a statement of disqualification is truly filed on the eve of trial or a hearing, the legislature has provided that a judge can continue to oversee the case simultaneous to a neutral judge evaluating the merits of the disqualification. Section 170.4(c)(1)-(2). As the court of appeal noted, these provisions are "further safeguards" to prevent potential abuse by parties using statements of disqualification for dilatory gamesmanship. (Op. 32-33).

B. Petitioners' second issue for review: does not satisfy the Rule 8.500(b) criteria; is plainly insubstantial; rests on an obvious misinterpretation of Section 170.2(b); and is not ripe for consideration.

Section 170.2(b) functions in certain circumstances not implicated here as a safe harbor for jurists and provides that "[i]t shall not be grounds for disqualification that the judge … [h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding." Petitioners have invoked this provision as a reason why Judge Hamilton's statements and actions should not be regarded as grounds for disqualification. There is no basis for review of this issue.

Notably, the court of appeal did not evaluate the merits of the disqualification request, only whether Lennar Title had "facially

sufficient" grounds for relief even considering Section 170.3(b)(2). (Op. 41-42.) The court acknowledged it was "possible to argue the comments were merely expressing a view in a legal proceeding" but likewise "it is similarly possible to construe the comments as violative of section 170.1, subdivision (a)(6)(A)(iii) and Canon 3 of the Code of Judicial Ethics." (Op. 43.) For this reason, the court of appeal decided "it is not tenable to hold that on its face [the disqualification statement] discloses no legal grounds for disqualification" and that for this reason "the issue of disqualification should have been reviewed on the merits by another judge." (Op. 44.)

Thus, petitioners' second issue for review is not ripe or actually presented. There has not yet been a merits determination. Once there is, issues concerning the application of Section 170.2(b), if any, can be resolved on an appropriate, developed record.

Moreover, petitioners misinterpret Section 170.2(b). That statute exempts prior judicial rulings as grounds for disqualification not judicial predetermination of issues never before the court. Government Code section 11425.40(b)(2), which pertains to disqualification of administrative law judges, contains a similarly worded provision: without further evidence of bias, prejudice, or interest, the fact an administrative law judge "has in any capacity expressed a view on, a

legal, factual, or policy issue presented in the proceeding" is not alone grounds for disqualification. Government Code Section 11425.40(b)(2). Cases interpret this provision to mean if an ALJ previously issued a ruling in administrative proceedings, the ALJ need not voluntarily disqualify himself from subsequent proceedings. See, e.g., *Cnty. of San Diego v. Alcoholic Beverage Control Appeals Bd.* (2010) 184 Cal.App.4th 396, 406-07. Similarly, here, Section 170.2(b) prevents a party that obtains an unfavorable ruling on a properly considered and presented issue from using that as evidence of judicial bias.

None of that has anything to do with the situation here: Judge Hamilton formed a persistently expressed, incorrect belief about the relationship between Doma and Lennar Title before being "presented" with a motion, evidence or argument addressing whether any such relationship exists.

Moreover, a recurring theme of the petition is that Judge Hamilton's array of provocative, erroneous and prejudicial comments ("shell games," "three-card monte," "trickery," "scheming,") (*see* Op. 42), were all just Judge Hamilton commenting on the credibility of the parties. (*See, e.g.*, Pet. 29-30). That assertion is obviously untenable. The comment about "trickery" was directed to Lennar Title's counsel over a typo. As the court of appeal observed, some of the comments

"were made while ruling on a motion to quash due to lack of service of process and were not relevant to the determination of the motion." (Op. 41-43). Likewise, when in the verified answer to Doma's Section 170.1 challenge, Judge Hamilton stated his comments—and therefore his bias—were "CLEARLY" directed towards Lennar Title, that was an admission as to his state of mind and not a comment on the parties' credibility or reference to any proper, previously issued ruling. As the court of appeal aptly explained, a reasonable observer could conclude that when considering the context, the statements evidenced improper bias creating a concern Judge Hamilton may have prejudged issues. (Op. 43-44).

IV. CONCLUSION

Review should be denied.

Dated: July 18, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d)(1), I certify that this Answer to Petition for Review is proportionately spaced, using Microsoft Word 2016, is set in Century Schoolbook font, has a typeface of 13 points or more, and contains 5,353 words.

By: */s/ Thomas M. Peterson*
Thomas M. Peterson

CERTIFICATE OF SERVICE

I, Thomas M. Peterson, hereby declare I am a resident of the State of California. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On July 18, 2023, I served on the interested parties in this action the within document entitled:

ANSWER TO PETITION FOR REVIEW

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and via U.S. Postal Service. By placing the above mentioned document in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

Hon. Jeffrey Y. Hamilton, Jr.
Superior Court of California
County of Fresno
1100 Van Ness Avenue
Fresno, CA 93724

Office of the California Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

Office of the District Attorney
Fresno County
2100 Tulare Street
Fresno, CA 93721

Appellate Coordinator
Office of the Attorney General
Consumer Protection Section
300 S. Spring Street
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 18, 2023, at San Francisco, California.

By: */s/ Thomas M. Peterson*
Thomas M. Peterson

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NORTH AMERICAN TITLE COMPANY v. S.C. (CORTINA)**
Case Number: **S280752**
Lower Court Case Number: **F084913**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **tmpeterson@morganlewis.com**

3. I served by email a copy of the following document(s) indicated below:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/18/2023

Date

/s/Thomas Peterson

Signature

Peterson, Thomas (96011)

Last Name, First Name (PNum)

Morgan, Lewis & Bockius LLP

Law Firm