CALIFORNIA ACADEMY OF APPELLATE LAWYERS

President
Joseph P. Mascovich
Schroeder, Schaff & Low, Inc.
2205 Plaza Drive, Suite 225
Rocklin, CA 95765

Vice President
Sean M. SeLegue
Arnold & Porter
Three Embarcadero Ctr., 10th Fl.
San Francisco, CA 94111-4024

Treasurer
Benjamin G. Shatz
Manatt, Phelps & Phillips, LLP
2049 Century Park East, Suite 1700
Los Angeles, CA 90067-3119

Secretary
Judith E. Posner
Benedon & Serlin, LLP
22708 Mariano Street
Woodland Hills, CA 91367

EXECUTIVE COMMITTEE
Susan Brandt-Hawley
Raymond A. Cardozo
Michael G. Colantuono
Jon B. Eisenberg
Margaret A. Grignon
Laurie J. Hepler
Kirk C. Jenkins
Wendy C. Lascher
James C. Martin
Joseph P. Mascovich
Steven L. Mayer
Robin Meadow
Judith E. Posner
Sean M. SeLegue
Benjamin G. Shatz
John A. Taylor, Jr.

WWW.CALAPPELLATE.ORG

May 7, 2024

Hon. Buffy Wicks, Chair
Assembly Appropriations Committee

Hon. Robert Rivas
Assembly Speaker

Hon. Tom Umberg, Chair
Senate Judiciary Committee

Hon. Mike McGuire
Senate President Pro Tempore

Re: Assembly Bill 2125 (Garcia), as amended April 10, 2024—Oppose

Honorable Members:

The California Academy of Appellate Lawyers, one of the nation's first bar organizations devoted to appellate practice, opposes Assembly Bill 2125. The bill presumes that appellate justices become biased against a party who obtains a reversal of their decision by the California Supreme Court. But the bill's proponents offer no evidence that such bias after reversal exists. The bill is an unnecessary and counterproductive solution to a non-existent problem.

AB 2125 presumes that appellate justices are biased after a reversal.

The premise underlying Assembly Bill 2125 is that "appellate justices are demonstrating bias against litigants involved in cases in which the justice's decision was overturned by the California Supreme Court." Assembly Committee on the Judiciary, Analysis of AB 2125, as amended March 6, 2024 (hereafter, "Report"), at 1. According to the bill's author, the bill "closes a loophole to ensure that voting rights, immigration rights, and environmental rights are not negatively impacted by an appellate judge." *Id.* at 5. The bill's proponents argue that "appellate justices are making biased decisions after being overturned on appeal to punish litigants." *Id.* at 7.

According to the Report, the bias at issue arises when a "justice has been reversed by the California Supreme Court." *Id.* at 1. The proponents' theory is that an appellate justice will resent the party who obtained a reversal in the California Supreme Court and become "bitter" and "harbor resentment" toward that party. *Id.* at 1, 5. Thus, the stated reason for the proposed legislation is that a reversal from the California Supreme Court is likely to transform an unbiased justice into a biased or prejudiced justice.

The Assembly Committee's Report identifies no evidence to support its presumption.

The Assembly Committee's Report claims that public trust in the judiciary is low and that much of the public's distrust "can likely be traced to the numerous scandals involving United States Supreme Court justices and their acceptance of gifts and trips from parties with matters before the court." Report at 1. The Report does not contend that *California* justices accept gifts from parties. In any event, the proposition that improper gifts compromise impartiality has no connection to the unsupported proposition that reversal by the California Supreme Court compromises impartiality. A judge's acceptance of gifts from parties with interests before the court creates an "obvious appearance of impropriety." *Adams v. Comm'n on Jud. Performance*, 8 Cal. 4th 630, 663 (1994) (quotation marks omitted). Ruling on a case on remand does not.

The Assembly Committee's Report states that the accusations of bias made by Assembly Bill 2125's proponents are "symptomatic" of the distrust that the United States Supreme Court has engendered. Report at 1. But the unease that proponents of this bill may feel as a result of recent disclosures concerning federal judges who sit in Washington D.C. is not a reason to leap to the conclusion that California justices should be presumed biased after a reversal by the California Supreme Court. California's judicial appointment system, politics, and history are quite different from those that led to the appointment of the justices who currently sit

on the U.S. Supreme Court. Similarly, the Report's two examples involving state judges in West Virginia and Montana related to improper use of judicial resources, not bias. Report at 5.

If the proponents of the bill are dissatisfied with the reasoning on remand in a single case, as reported in the press, then they fail to identify a systemic or pervasive problem and instead are asking the Legislature to tinker with ongoing litigation in that single case—*Pico Neighborhood Association v. City of Santa Monica*. Even as to that single case, the Assembly Committee has not argued that the Court of Appeal misapplied California Supreme Court precedent on remand, much less that any errors are attributable to bias caused by the reversal.

All judicial officers take an oath to uphold and defend the California Constitution and the United States Constitution. Cal. Const., Art. XX, § 3. In our experience, appellate justices understand that their oath requires them to apply the law faithfully, including the decisions of the California Supreme Court. Even in the face of great controversy and criticism, the oath to support and defend the Constitution "requires a public official to act within the constraints of our constitutional system," as opposed to following their own personal views. *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1100 (2004). In the absence of evidence to the contrary, we suggest that the ordinary presumption that government officials uphold their oath of office should guide public policy.

This legislation would harm public trust in the appellate courts, and thereby harm the judiciary and the public.

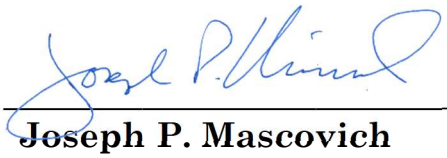
Others including the Judicial Council have explained the damaging practical consequences of this bill for timely delivery of appellate justice, and the Academy agrees. We wish to add further systemic concerns about this bill.

First, if the legislature tells the public that appellate justices are pervasively and presumptively biased after reversal by the California Supreme Court, many members of the public will believe these accusations to be true. If this comes to pass, the legislature itself would seriously injure the judiciary and all Californians. The link between public confidence in the judiciary and the effectiveness of judicial decisions is well known. "The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445 (2015). As Alexander Hamilton explained in Federalist No. 78, the judiciary possesses "'neither force nor will but merely judgment.'" *Ibid.* (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961)). "The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions." *Id.* at 445-46.

Second, AB 2125 encourages litigants to accuse appellate justices of bias. The bill provides that a litigant may unilaterally obtain different justices after reversal by the California Supreme Court, if the litigant swears under penalty of perjury that the justice or justices whom the litigant wishes to replace are "prejudiced" against a party or attorney. AB 2125, § 1 (proposed section 170.6(a)(2), (a)(2)(B), (a)(6)). If a party asks for removal of a justice after reversal by the California Supreme Court and provides the required affidavit accusing the justice of bias, no "further act or proof" may be required of the moving party and the accusation of bias may not be adjudicated. *Ibid.* (proposed section 170.6(a)(4)). The rule forbids any scrutiny or consideration of whether a justice has actual or even reasonably-perceived bias. Under this bill, litigants could irrebuttably accuse any justice of bias after a reversal, bolstered by the Assembly Committee's own fundamental premise that justices are bitter, angry, and biased after reversal. This would be corrosive to public trust.

For all these reasons, the Academy opposes AB 2125.

Respectfully submitted,



Joseph P. Mascovich
Academy President

Brian A. Sutherland
Chair, Rules Commentary &
Legislative Suggestions Committee