

ORIGINAL

NO. 18-7191

IN THE SUPREME COURT  
OF THE UNITED STATES

Supreme Court, U.S.  
FILED

MAR 16 2019

OFFICE OF THE CLERK

SCOTT RICHARD PENDERGRAFT;  
DANIELLE PAULINE PENDERGRAFT,  
Petitioners,

v.

NETWORK OF NEIGHBORS, INCORPORATED,  
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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## **QUESTIONS PRESENTED**

American courts have agonized over the due process problems created in recent decades by the doctrine of judicial immunity. The Supreme Court, troubled by threats to judicial independence, has developed its own test that invests judges with immunity for any act performed in an official capacity. Under this approach, corrupt or malicious judges may easily shield even the most serious abuses behind a wall of immunity, and if the appellate courts fail to act, leave the victim unable to seek a remedy to protect his constitutional rights.

Yet a court's jurisdiction is limited by due process guarantees under the Fifth and Fourteenth Amendments to the Constitution, such as an opportunity for an impartial and complete hearing. Ignoring this fact, the Supreme Court has misconceived the problem by basing judicial immunity purely on statutory concerns and distorted readings of common law history. Immunity itself—a judge-made doctrine—must be limited by due process, which is of constitutional dimension. The supremacy clause unquestionably nullifies even the most ancient of common law principles and even the most popular of state statutes to the extent they are inconsistent with due process. No matter what the federal government or its courts might wish to do, it must stay within the boundaries of the Constitution.

Judicial immunity must be firmly rooted in due process guarantees. To achieve this result, the simplest approach is to create an irrebuttable presumption of immunity where a judge's acts did not deliberately terminate a citizen's rights without notice, hearing, and opportunity to appeal. Of these three requirements, the chance to appeal is the most important because it provides a means of curing defects in any other due process violation. A judge, whether trial or appellate, thus remains unquestionably immune as long as he does not take actions that intentionally and plainly prevent

further review. The duty imposed on a trial judge, then, is only to recognize that his own decisions may sometimes be in error and to ensure that orders affecting important Constitutional rights can be reviewed in another court. The duty imposed on the appellate or Supreme Court is to ensure this review actually does take place in accordance with the law. Therefore, the questions presented in this petition are:

*(1) Whether a pro se litigant's procedural or substantive due process rights are violated when a trial court decides a case with actual malice and reckless disregard for due process causing injury to the litigant, and appellate courts willfully refuse to fully and fairly review the decision.*

*(2) How the doctrine of judicial immunity should be balanced with a litigant's constitutionally protected right to due process if the understood route to remedy judicial misconduct is appeal, but the appellate system willfully refuses review of a viable appeal.*

**PARTIES TO THE PROCEEDING**

Scott Richard Pendergraft  
Danielle Pauline Pendergraft  
*Debtors/Defendants/Appellants/Petitioners*

Network of Neighbors, Inc.  
*Plaintiff/Appellee/Respondent*

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IN THE SUPREME COURT OF THE UNITED STATES

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**PETITION FOR REHEARING**

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Petitioners Scott Richard Pendergraft and Danielle Pauline Pendergraft respectfully move this Court for an order (1) vacating its order of February 19, 2019, which denied their petition for writ of certiorari filed on December 21, 2018, and (2) granting a petition for writ of certiorari. The grounds for rehearing are stated herein.

**OPINION BELOW**

The unpublished memorandum opinion of the United States Court of Appeals for the Fifth Circuit is included herein as Appendix 1.

**JURISDICTION**

This Court has jurisdiction of this petition for rehearing pursuant to Rule 44.2 of the Rules of the Supreme Court of the United States and to review the judgment of United States Court of Appeals for the Fifth Circuit pursuant to 28 USC §1254(1). The Fifth Circuit's memorandum opinion was filed on August 8, 2018. On October 31, 2018 Justice Alito extended the time for Petitioners to file their petition until December 21, 2018 via Application No. 18A453, and Petitioners filed timely. On February 19, 2019, this Court denied the petition. Petitioners now file this request for rehearing timely, in good faith, and not for delay pursuant to Rule 44.2.

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### **STATEMENT OF THE CASE**

Petitioners recognize that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings, but this case reaches beyond that to the Courts' responsibilities and obligations to a litigant in preserving their Fifth and Fourteenth Amendment rights to due process, whether procedural or substantive.

This case arises from the United States Bankruptcy Court's denial of Applicants' Rule 9023 Motion for New Trial entered on July 11, 2017.

On October 22, 2012, Network of Neighbors, Inc. ("Respondent") filed a complaint to determine the dischargeability of an alleged debt owed by Petitioners.<sup>1</sup> Petitioners deny there is any debt owed Respondent. After four years of representation in the case and a mere six weeks prior to trial, the Court allowed Petitioners' counsel to withdraw for non-payment of fees.

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<sup>1</sup> *Network of Neighbors, Inc. v. Scott R. Pendergraft, et al*, No. 12-03445 in the U.S. Bankruptcy Court for the Southern District of Texas

Petitioners could not afford counsel and had no choice but to defend themselves pro se. Although the right to counsel in a civil case is not absolute, Petitioners were unaware they could have petitioned the Court for counsel under 28 U.S.C. 1915 § (e)(1).

Petitioners were well-prepared, professional, and respectful during a two-day bench trial which took place on October 6 and 7, 2016. However, during trial, Petitioners were treated in a hostile and impatient manner by the judge and two opposing attorneys, were prohibited by the judge from cross-examining Respondent or impeaching the credibility of a key witness, and the judge stated she did not have time to allow Petitioners to go through the line items of the invoices admitted into evidence which were the basis for Respondent's complaint. It is astounding and unacceptable that any judge would prevent a litigant, represented by counsel or pro se, from going through evidence in its defense, or from confronting the witnesses against him, especially evidence at the heart of the case. If it took longer than a two-day trial to accomplish this, then so be it, but it was crucial to Petitioners' defense and to the judge's understanding of the facts. Petitioners wonder whether the judge would have told a licensed attorney there "wasn't enough time" to hear his/her client's case. When Petitioners tried to make an objection on the record or ask a question, they were abruptly told to sit down or were threatened with the U.S. Marshal, to the point where Petitioners were intimidated and fearful of arrest as they simply tried to defend themselves.

The Bankruptcy Court entered its Opinion on May 11, 2017 (App.11a) determining Petitioners owed a debt to Respondent in the amount of \$43,486.30 and that such debt was non-dischargeable due to defalcation in a fiduciary capacity under 11 U.S.C. 523(a)(4). To support this conclusion, the Court's opinion attempted to dissect each and every line item on the subject invoices; however, it is very clear that because the Court did not allow Petitioners to go through those line items at trial, it did not understand what the majority of those line items were or

represented, and as a result its conclusions about those line items were in error. It is not appropriate to dispute specific findings of fact in this petition, but these were not findings subject to interpretation, but rather factual and mathematical errors. Additionally, the Bankruptcy Court ignored written evidence and testimony provided in defense of Petitioners and instead favored Respondent's key witness, who made three distinctly conflicting statements on the record about the subject matter of the complaint. The Bankruptcy Court's opinion made no sense given the evidence and was riddled with error. Petitioners were left no choice but to believe the Court was prejudiced against them for some reason and they had been denied a fair trial.

Petitioners filed a Motion for New Trial and Recusal of Judge, citing the hostility they encountered at trial, instances where the Court prevented them from presenting evidence, gross inconsistencies in the Court's application of evidence, misstatements of the evidence (that were not subject to interpretation), and errors in the Court's math calculations, among other things, which the Bankruptcy Court denied (App.10a). Petitioners timely appealed to the United States District Court.<sup>2</sup> They filed their brief enumerating the Bankruptcy Court's errors, and meticulously addressed the Court's misinterpretations or misunderstandings of each invoice line item and denial of due process. The District Court must not have thoroughly read Petitioners' brief, supporting evidence, or trial transcript. It stated in its ruling that managing a trial where there are pro se litigants can be "difficult" and "frustrating" for the judge and opposing counsel, as well as "pro se plaintiffs". Petitioners were pro se defendants, not plaintiffs. If the District Court read the trial transcript, it would not have seen any behavior from Petitioners whatsoever which would have produced a difficult or frustrating experience for the Court. Again, Petitioners were well-prepared,

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<sup>2</sup> *Scott Richard Pendergraft, et al v. Network of Neighbors, Inc.*, No. 4:17-CV-2297 in the U.S. District Court for the Southern District of Texas

rather versed on courtroom procedures and rules for pro se litigants, were professionally prepared with trial notebooks and exhibits for all parties (actually better assembled than opposing counsels' materials) and were respectful to all parties. The District Court also stated that Petitioners did not proffer relevant evidence that they were prevented from presenting their case, yet Petitioners' brief cited instances from the transcript where they requested to present certain items and the Court either refused or said it didn't have time to hear it. Most egregious perhaps, the District Court never addressed in its opinion any of the errors involving the invoices or miscalculations in the Bankruptcy Court's math, stating, "the remainder of appellants' claims are inconsequential in light of these holdings and will not be addressed." These claims were at the very heart of the Bankruptcy Court's erroneous ruling, and the District Court refused to review them, affirming the Bankruptcy Court's denial of Petitioners' Motion for New Trial (App.7a). Indeed, this review would have taken some time for the District Court to make, and probably would have been best facilitated through oral argument, which Petitioners requested for this reason. However, the claims which the District Court felt were "inconsequential" amount to deprivation of \$43,486.30 of Petitioners' potential or future property, a sum not at all inconsequential to Petitioners, especially since it is not based on accurate or factual data from the evidence and is also the result of a math error. Furthermore, Petitioners are left with published documents in the form of these holdings containing errors of fact which defame them, and if not addressed, will forever wrongfully label them as persons who committed fraud. This unto itself has deprived Petitioners of their careers and ability to support their family. In any other forum this would be actionable as libel because the writings were made with actual malice and reckless disregard for the truth; however, the doctrine of judicial immunity as currently held by the Supreme Court presents barriers to remedies such as this.

Petitioners were dumbfounded by the lack of care and reckless disregard for the truth by the District Court. They timely appealed to the Fifth Circuit<sup>3</sup>, who rubber-stamped the District Court's findings and produced an opinion equally as erroneous on August 8, 2018 (App.1a). Petitioners misunderstood the rules regarding the timing to file a request for panel rehearing, but filed an unopposed request in cooperation with opposing counsel, pointing out the factual errors (nothing subject to interpretation, but rather direct conflicts with the record). The Fifth Circuit nonetheless denied the request as untimely. Therefore, Petitioners have been unable to bring to the Fifth Circuit panel's attention the errors of fact contained in its opinion, albeit due to Petitioners' own filing error.

At this point, Petitioners realized that the miscarriage of justice in their case was a much bigger issue than just their particular case. Petitioners are not attorneys, but deep down expected that justice prevails in U.S. Courts and expected to be heard fairly and completely as provided by the Constitution's due process clauses. The truth is, the judicial system is greatly flawed in many ways and this particular case has been nothing short of going down the rabbit hole in *Alice in Wonderland*. A Bankruptcy Court judge has stated on the record *we don't have time to go through the thirteen invoices that are the subject of the litigation*, but then misstates what certain invoice line items mean resulting in an unjust ruling against a defendant defaming them and depriving them of monetary property present and future. Those errors are pointed out on appeal to the District Court, but that judge says *they aren't worth responding to*, and the Fifth Circuit essentially rubber-stamps the findings by saying *the District Court reviewed the evidence and dealing with pro se litigants can be a challenge...* but in reality the District Court by its own admission did not

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<sup>3</sup> *Scott Richard Pendergraft, et al v. Network of Neighbors, Inc.*, No. 18-20045 in the U.S. Court of Appeals for the Fifth Circuit

review the evidence, the interpretation is grossly factually inaccurate, and there is no evidence to support the notion that defendants were unruly during trial. This is insanity. The way this case has been managed has been the opposite of just or logical, and Petitioners cannot help but believe had they had the financial resources to employ proper counsel from its inception how differently they would have been viewed by the Court, even pre-trial.

Recently, a Justice on the United States Supreme Court asked to be completely and fairly heard and given due process, and he was afforded this opportunity, although it was not in a court of law. In reality, not everyone is able to have this opportunity in order to clear their name, despite the fact that the Constitution provides for the manner in which we are to treat one another, whether inside or outside of a courtroom, if we are to be a civilized people. Petitioners watched those proceedings on television and wept for that man. Sobbed. Petitioners know exactly what it is like to be attacked with false accusations, to be defamed and ridiculed, to have their family, children, and livelihoods harassed and attacked through horrific tactics and in the media, and even to have tickets sold to vicious stage shows produced about them, far worse than a five-minute Saturday Night Live parody, because this is precisely what Respondent has done to Petitioners for nearly seven years now in this litigation. To persevere through those events with the hope of being fairly and completely heard someday in court to clear their names, only to be either bullied, railroaded, or ignored, is disheartening to say the least. Petitioners cannot accept this is what was intended through the judiciary and due process clauses. Petitioners have come to realize in recent weeks that other litigants have had similar unfortunate experiences, especially those without resources to defend themselves. Citizens should not be intimidated or fearful as they navigate our judicial system, and should be afforded due process, *especially* those who are respectful and strive to follow the many rules and procedures in place, *and even* if they are representing themselves pro

se.

On appeal it seems that neither the District Court nor the Fifth Circuit have taken the necessary time to forensically dissect the evidence in the record as detailed in Petitioners' briefs; otherwise, they would surely see the errors. The errors are blatant. A thorough review and understanding of the evidence and testimony cannot yield two possible interpretations of Petitioners' conduct in this case, but the appellate courts charged with review of the lower courts must take the time and care to do this; otherwise, Petitioners are denied any remedy in this matter. When will someone look at the actual invoices and documentation to see the errors Petitioners pointed out in their briefs? There are math errors in the Bankruptcy Court's calculations! If an Appellate Court will not do this, or order the Bankruptcy Court to do so, then a wrongful, injurious judgment against Petitioner remains. That's not the justice the judiciary is employed and entrusted by citizens, Petitioners included, to ensure and protect. All that Petitioners have asked is to be fairly and completely heard as guaranteed by the Bill of Rights and that is what they respectfully request through continued proceedings.

#### **REASONS FOR GRANTING THE PETITION**

In the American judicial system, few more serious threats to individual liberty can be imagined than a corrupt judge. Clothed with the power and authority to pass judgment on the most basic aspects of everyday life, a judge can deprive citizens of liberty and property in complete disregard of the Constitution. The injuries inflicted may be severe and enduring. Yet expansions in recent decades of judge-made exceptions to the landmark Civil Rights Act of 1871, the chief vehicle for redress of civil rights violations, has rendered judges immune from suit or accountability even for the most bizarre, corrupt, or abusive of judicial acts. This "doctrine of judicial immunity" has led to a disturbing series of legal precedents that effectively deny citizens

any redress for injuries, embarrassment, and unjust imprisonment caused by errant judges.

In *Stump v. Sparkman*<sup>4</sup>, the Supreme Court recognized that a judge had violated the most elementary principles of due process, but the Supreme Court majority nonetheless found him immune from suit, holding that even grave procedural errors do not deprive a judge of immunity because immunity attaches to any act performed in a judicial capacity.<sup>5</sup> In this way, the Supreme Court excused a gross departure from due process that would have subjected virtually any other party or state official to suit. The effect is plain: under this current doctrine of judicial immunity, a victim is forced to bear the full burden of a serious, irreparable injury inflicted by a judge in blatant violation of the Constitution. In no other area of American life are public officials granted such license to engage in abuse of power and intentional disregard of the very Constitution and laws they are sworn to defend. Those who are harmed, no matter how extensive and irreparable the injury, are deprived of any method to obtain remedy.

The *Stump* test for immunity affords no impediment to a corrupt judge. At best, it cloaks a judge with immunity if he merely indicates his official status while performing any act not expressly prohibited by law. At worst, it offers a road map for corruption with total impunity. Those subject to a corrupt judge's power may find little comfort in the Supreme Court's pronouncements that judicial immunity in effect is a necessary evil, the price to be paid for a fearless, independent judiciary.<sup>6</sup> With power to abridge liberty, damage reputation, and seize property, judges are the masters of everyday life in America. They are capable of causing enormous and irremediable harm to citizens like Petitioners who are simply not given a chance to protect their own interests before the judge irreparably abridges them. Yet the Supreme Court

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<sup>4</sup> 435 U.S. 349 (1978).

<sup>5</sup> Id.

<sup>6</sup> See *Fern v. Ackerman*, 444 U.S. 193 (1979).

insists in the strongest of language that a sweeping immunity shield is necessary for an impartial judiciary. Permitting dissatisfied litigants to sue judges, argues the Court, “would contribute not to principled and fearless decision-making but to intimidation.”<sup>7</sup> Under this viewpoint, immunity is not for the benefit of the malicious and corrupt, but for the benefit of the public, whose best interests are protected by an independent judiciary.<sup>8</sup> If errors are committed, the proper remedy is appeal.<sup>9</sup> (*emphasis added*)

Few would question the worthiness of such abstract principles as impartiality and fearlessness; however, highflying abstractions often serve only to hide the underlying issue, which in Petitioners’ case is the injury a corrupt judge or apathetic appellate courts can inflict on innocent people. Congress and the courts must seriously question any device that affords greater protection to the unscrupulous than to the principled. By resort to the current immunity doctrine, an unscrupulous judge can escape liability even for acts of revenge, gross favoritism, improper seizure of property, unjust incarceration, or serious injuries inflicted in a judicial capacity. Most disturbing are those instances in which a judge ensures that an appeal cannot remedy the wrong inflicted. In *Stump*, for instance, the judge’s actions allowed no appeal prior to court-ordered surgery that would prevent a woman from ever having a family. If appeal indeed is the proper method of challenge, the judiciary cannot justify granting immunity to judges who have prevented an appeal from occurring. In Petitioners’ case, even though the trial court is clearly on record as having denied Petitioners due process, subsequent appellate courts have willfully and maliciously refused to review their case, thus stripping Petitioners from any remedy. The appellate court must be held accountable by this Court, or this Court must give Petitioners another method of redress with the

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<sup>7</sup> *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

<sup>8</sup> *Id.*

<sup>9</sup> See *Pulliam v. Allen*, 466 U.S. 522 (1984).

judges involved.

The history of judicial immunity makes the doctrine even more suspect, since Congress clearly believed it was imposing liability on judges under the 1871 Act.<sup>10</sup> By judicial fiat, the doctrine was conjured out of certain old English cases, such as *Floyd v. Barker*<sup>11</sup>, frequently cited as the foundation of the American judicial immunity doctrine, that were not themselves concerned with judicial immunity from suit, but with judicial independence from the Crown.

This sweeping immunity doctrine is at odds both with American legal history and the Constitution. Congress never intended to exempt judges from accountability when it passed the 1871 Civil Rights Act. Moreover, the judiciary is wrong when it asserts that immunity was a settled doctrine, incorporated into the 1871 Act by implication. To the contrary, the doctrine in its present form did not exist in the United States or England when the civil rights legislation was passed in 1871. Moreover, the immunity doctrine is inconsistent with the due process clauses of the Fifth and Fourteenth Amendments. Even if the doctrine had existed in common law, constitutional supremacy dictates that it must bow before the American idea of procedural justice embodied in the guarantee of due process.

The current American immunity doctrine not only was a serious departure from its common law antecedents, but also broke with early American case law. As early as 1806, the Supreme Court in *Wise v. Withers*<sup>12</sup> recognized a right to sue a judge for exercising authority beyond the jurisdiction authorized by statute. In 1869, one year after passage of the Fourteenth Amendment and long before due process had assumed its modern contours, the Supreme Court made its first

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<sup>10</sup> *Pierson v. Ray*, 386 U.S. 547, 562 (Douglas, J., dissenting) (“every member of Congress who spoke on the issue assumed. . . that judges would be liable”).

<sup>11</sup> 777 Eng. Rep. 1305 (Star Chamber 1608).

<sup>12</sup> 7 U.S. (3 Cranch) 331 (1806).

effort to define limits imposed on state judges. The Court held that state judges possessing general powers were not liable “unless perhaps when the acts … are done maliciously or corruptly.”<sup>13</sup> Then in 1872, one year after the civil rights laws were passed, the Supreme Court overruled its earlier dictum and announced that judges would not be liable even for malicious or corrupt acts.<sup>14</sup> This 1872 expansion of the immunity doctrine was an abrupt departure even from the common law recognized by a majority of the states in the Civil War era. By the time civil rights legislation passed in 1871, only 13 states had granted their judges a broad form of judicial immunity, while six states had found judges unquestionably liable for malicious acts in excess of jurisdiction.<sup>15</sup> Eighteen other states had not addressed the issue at all,<sup>16</sup> although many recognized English common law as binding precedent. Thus, from 1869 to 1872 the Supreme Court extended a sweeping form of immunity to state-court judges that a majority of the states themselves would not have recognized under their own law.

The Supreme Court, citing dicta in these cases, invented a completely new immunity doctrine far more expansive than these Civil War-era precedents would warrant. Most troubling of all are the strong due process interests that necessarily are involved in any judicial immunity controversy. By wielding its expansive doctrine, the Supreme Court in effect has declared that every organ of government except courts must observe the dictates of the Fifth and Fourteenth Amendments. The irony is unmistakable: those who are the guardians of the Constitution are themselves privileged to violate it with corrupt impunity. Any damage inflicted on innocent citizens must be borne by the injured, not by the government. Due process, one of the most

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13 *Randall v. Brigham*, 74 U.S. (13 Wall.) 523, 535-36 (1869).

14 *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872).

15 “Liability of Judicial Officers”, 79 Yale L.J. (1969), pp. 326-27 and nn, 29-30).

16 *Id.* at 327 nn. 31, 32 and accompanying text.

hallowed and ancient of rights, apparently has no place in the law when a citizen attempts to seek recompense or other remedy from a judge who has wrongfully caused an injury. Nor has the Supreme Court made any effort to reconcile its judge-made rule of judicial immunity with constitutional rights, thus turning the idea of constitutional supremacy on its head. When a judge chooses to act corruptly, the logical result of any sweeping immunity doctrine is the destruction of due process rights. Instead of fearless impartiality, the doctrine thus protects only malice and arbitrary administration of the laws.

If judicial immunity truly is to serve as a bulwark of justice, some more clearly defined limit must be placed on it. Logically, this limit must arise from the due process clause itself. Clothing a judge with immunity simply because he has performed a judicial act overlooks the real-world probability that even judicial acts can be utterly inconsistent with due process. Important personal rights can be destroyed by the mere nod of a judge's head. Judges should not be privileged to violate the rights of citizens unfortunate enough to find themselves in a biased, corrupt, or irresponsible courts as Petitioners have.

When unjust injuries are inflicted by improper judicial acts, the courts, not the individual, should be forced to either remedy the situation or bear the cost of the wrongful acts. Indeed, the history of the 1871 Act reveals that Congress intended to provide just such a remedy. Instead of the abstract and ambiguous factors used in *Stump* to determine the existence of immunity, the courts should use a simpler inquiry founded on the fundamental principles embodied in the due process clause. To preserve the integrity of the judicial process, the courts always should presume that a trial court properly exercised its jurisdiction, but they should permit a litigant to overcome this presumption by showing that the judge acted with actual malice, consisting of a knowing or reckless disregard of due process. Petitioners have done this. Specifically, if the court is to enjoy

immunity, it must afford three things—notice, a chance to be heard, and a method of appeal. Then, and only then, would an irrebuttable presumption of immunity exist.

Of these three requirements, the opportunity to appeal should be the most crucial based on the policy that appeal, not a suit against the government for damages, is the preferred method of challenging a judge's improper actions. Deprivation of an opportunity to appeal or denial of actual, diligent review on a lawful appeal, effectively renders this policy meaningless and makes some other remedy necessary for proper redress. Moreover, the right to appeal usually can correct due process violations. Even errors in notice or opportunity to be heard should not of themselves subject a judge to liability as long as the opportunity to appeal is present. In effect, the appeal itself will afford a new opportunity for a proper hearing. Nor should routine *ex parte* orders create any liability for the judiciary. In emergency hearings for the seizure of property, the court could preserve the irrebuttable presumption of immunity by affording as soon as possible the required notice, a hearing, and the right to appeal. In summary incarcerations, as for contempt of court, the judge could preserve his immunity by affording the defendant an immediate opportunity for further review, such as in a *habeas corpus* hearing. Mere failure of the litigant to exercise these rights should never subject the judge to liability. Nor should a judge be liable for errors of judgment, even those plainly forbidden by law or precedent, as long as his acts did not deliberately preclude the possibility of appeal before constitutionally protected rights were completely foreclosed. The test proposed above also addresses the question of subject matter jurisdiction. Although the Supreme Court suggested in *Stump* that a clear lack of subject-matter jurisdiction will subject a judge to liability, it was plainly troubled by the possibility that a judge might be subjected to suit

for an honest and harmless mistake.<sup>17</sup> A test based on the ability to appeal will shield good-faith errors. As long as the judge does not take actions that prevent appeal, he will be protected by an irrebuttable presumption of immunity.

But when the litigant is denied review under the appellate process as in the case of Petitioners, then what? For a litigant who timely appeals and brings to the appellate court's attention blatant errors documented in the record, especially those caused by the trial court's willful and malicious failure to hear evidence and denial of due process, the Supreme Court must compel the appellate court's review, otherwise the litigant is left injured with no remedy.

### CONCLUSION

The foregoing concepts of fundamental fairness are rooted in the traditions and consciences of our nation. As will be fully briefed if this Court calls for a response, the actions of the trial and appellate courts so significantly departed from accepted and usual judicial proceedings which are supposed to respect procedural or substantive due process rights protected by the Fifth and Fourteenth Amendments, that it is necessary for this Court to exercise its supervisory power. The issues raised by Petitioners are of considerable national importance if integrity and confidence in the judiciary is to be preserved, as well as fairness to all litigants, including pro se litigants. Conflicts between judicial immunity and the constitutional right to due process must be reconciled by the Supreme Court in cases where the appellate courts fail.

For the above and foregoing reasons, Petitioners request the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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<sup>17</sup> *Stump v. Sparkman*, 435 U.S. 349, 356 (1978).

DATED: April 4, 2019

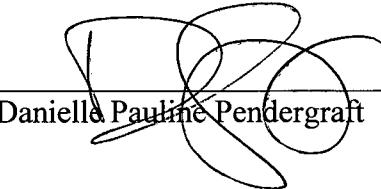
Respectfully submitted,

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