No. 18-9047

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

UNITED STATES OF AMERICA

Respondent,

vs.

GREGORY SWECKER, also known as Gregory R. Swecker, also known as Greg Swecker, and BEVERLY SWECKER, also known as Beverly F. Swecker

Petitioners

Swecks, Inc.; Palisades Collection, LLC; State of Iowa, by serving Greene County Attorney and Attorney General for the State of Iowa; Grand Junction Municipal; Unifund CCR Partners; Midland Power Cooperative; State of Iowa, Green County Attorney

Defendants

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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8(i)

QUESTION(S) PRESENTED

(i) Whether the court of appeal's decision below contradicts existing legal principles when evaluating a Motion to Vacate under Fed.R.Civ.P. 60.

(ii) Whether the court of appeal's decision below adversely affects the public's perception of the unbiased nature of the judiciary when a substantial burden is placed on litigants to be granted recusal relief from a clearly biased judicial officer.

(iii) What impact will belie litigants where a biased judge, contrary to the independent functions of the judicial system, issues ruling(s) that should be set aside based upon an undisclosed financial interest or demonstrated Fraud Upon the Court?

LIST OF PARTIES

Petitioners submit that all parties appear in the caption of the case on the cover page, and are listed below for the Court's reference:

Petitioners: Gregory Swecker and Beverly Swecker

Respondent: United States of America (United States Department of Agriculture)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is found at *United States of America vs. Gregory Swecker, et al.,* No. 18-1007, Eighth Circuit COA, dated 11/20/2018. Unpublished Opinion.

JURISDICTION

The date on which the highest state court decided the merits of the case was November 20, 2018. A copy of that decision appears at Appendix A. A timely petition for rehearing was thereafter denied on February 1, 2019, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §455(a)

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(b)(1)

He shall also disqualify himself in the following circumstances:

Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

28 U.S.C. § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

15 U.S.C. §1691(a)

(a) Activities constituting discrimination. It shall be unlawful for any creditor to

discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

Title 7, United States Code § 1981a(b)(1)(A)-(B)

Subject to the other provisions of this subsection, effective beginning on the date of the enactment of this subsection, there shall be in effect a moratorium, with respect to farmer program loans made under subchapter I, II, or III, on all acceleration and foreclosure proceedings instituted by the Department of Agriculture against any farmer or rancher who—

(A) has pending against the Department a claim of program discrimination that is accepted by the Department as valid; or

(B) files a claim of program discrimination that is accepted by the Department as valid.

STATEMENT OF THE CASE

Respondent filed the instant foreclosure action against Petitioners and other interested parties on or about January 8, 2009. On January 22, 2009, District Court Judge Pratt's 2009 Financial Disclosure Report documents a "Buy" of between $15,000.00 and $50,000.00 of stock each in the National Rural Utilities and National Rural Utilities Coops, both of which intervened on behalf of Midland before FERC, as well as significant financial interest in other utility entities adverse to Petitioners' interest.

In response to the foreclosure complaint, Petitioners timely filed a Motion to Dismiss for failure to state a claim upon which relief can be granted. On April 2, 2009, the District Court entered an order denying said Motion to Dismiss.

A key point of contention which permeated this litigation is the undisputable fact that one "essential and unchanging" component of federal court jurisdiction is the "requirement that a litigant have standing to invoke the authority of a federal court." Until that threshold is crossed, "the court cannot proceed at all in any case." In direct violation of the Due Process Clause of the Fourteenth Amendment, Respondent, unlawfully and under "color of law," crossed that threshold in violation of Title 7, United States Code § 1981a(b)(1)(A)-(B), which provided for a moratorium on foreclosure proceedings against any farmer or rancher who files, or has pending against the United State Department of Agriculture ("USDA"), a claim of program discrimination. Congress specifically barred the exact action that has transpired in this case, thus preventing Petitioners from presenting their claims of discriminatory treatment and rightfully avoiding foreclosure.

Since 1997, Petitioners have filed numerous Civil Rights complaints including, marital status discrimination and the repeated delay in Petitioners' operating loan funding in direct violation of the Equal Credit Opportunity Act, codified at 15 U.S.C. §1691. The delay of Petitioners' loan funding in violation of ECOA is identical to the unlawful pattern and practice used by USDA creditors recognized in class actions lawsuits, including in the landmark case of *Pigford vs. Glickman.* Specifically, the complaints of Petitioner Beverly Swecker under the protected basis as a white female were never properly investigated. Petitioner Gregory Swecker's complaints with Rural Utilities Service ("RUS"), a division of the USDA, concerning unreasonable discrimination (as adjudicated) against Midland were not investigated. Based on the filing of the civil rights complaints, there was a stay on the underlying case imposed from late-2009 to 2015.

In early 2015, Respondent was ordered to provide a status report to the Court as to the pending stay of the action pursuant to Title 7, United States Code § 1981a(b)(1)(A)-(B), which provided for a moratorium on foreclosure proceedings against any farmer or rancher who files, or has pending against the United State Department of Agriculture ("USDA"), a claim of program discrimination that is accepted by the USDA, and as a result the Court extended the stay. The stay was further extended throughout 2010, 2011, 2012, 2013 and through 2014, with no record activity in the case at bar, with the exception of the Status Reports submitted to the Court by Respondent. As a "Fraud on the Court," the Status Reports clearly indicated that there was an alleged National Review of all open and previously closed civil rights complaints. During the pendency of the stay, Petitioners were never

contacted, let alone provided (1) discovery (2) the opportunity at any time to submit evidence, (3) examination and cross examination at a hearing (4) the opportunity to introduce exhibits (5) the chance to object to evidence at hearing, (6) and final findings of facts and conclusions of law. In fact, this Circuit (Gruender, Kelly, Erickson) called into question USDA's procedures for investigating Civil Rights complaints in *Curtis Johnson vs. USDA*, under Case No. 14-1796, calling them too "bare bones." It is thus clear to Petitioners that this Circuit is not maintaining consistency in its rulings based upon race and gender pursuant to the same violations of ECOA identified in *Johnson*. Not only were the *Johnson* litigants rightfully granted relief including debt forgiveness and awarded monetary compensation, it is unequivocal that Petitioners suffered damages as a result of the USDA creditors' pattern and practice of unlawfully delaying farm operating loan funding. It is indisputable that the evidence before this Court provided that the finding of facts, by the National Appeals Division, found that the USDA reason for delaying loan funding was not supported by the facts or by the regulations. For this reason, review by this Court is necessary.

Record activity resumed in mid-2015 with the filing of Respondent's Motion to Dismiss Petitioners' Counterclaims, filed on June 22, 2015. Petitioners further filed their Answer with Counterclaims to the complaint on July 10, 2015. After the appropriate resistance and responses were filed, the District Court entered an order on December 15, 2015 granting Respondent's Motion to Dismiss Petitioners' Counterclaims. After further motions and pre-trial matters, On June 7, 2016, Respondent filed its Motion for Summary Judgment. Petitioners jointly resisted the

motion on July 1, 2016. Respondent replied to resistance on July 12, 2016. The District Court entered its order on November 10, 2016 granting Respondent's Motion for Final Summary Judgment. The District Court then denied Petitioners' duly submitted Motion to Vacate Order of Summary Judgment based on Federal Rule of Civil Procedure 60(b). This appeal timely followed, with any and all equitable relief denied by the District Court and the Eighth Circuit Court of Appeals.

What can be considered as almost beyond comprehension is that it now appears that Respondent has used everything at its disposal to punish Petitioners, including transferring a companion case that had been filed in another circuit, back to a biased District Court Judge who has a direct financial interest in the case in order to subvert the administration of justice. Additionally, and most notably, genuine issues of material fact remained in dispute at the time the Court granted Respondent's motion for summary judgment. The District Court failed to apply the applicable legal standard on reviewing a motion for summary judgment. This issue, along with the substantive allegations of fraud, were properly and timely raised in Petitioners' Rule 60(b) motion to set aside order of summary judgment, the subject of this appeal. The District Court flippantly denied the motion without giving due consideration to the fraud allegations contained therein. The only thing the "stay" accomplished is that it allowed Midland to illegal convert over 400,000 KWH of renewable electric energy produced by Petitioners wind turbine without Due Process and without just compensation in violation of the 5th and 14th Amendments to the United States Constitution. For this and other reasons as set forth herein, Petitioners showed in the underlying action that they are entitled to relief. Accordingly, Petitioners request

that this Court grant the instant petition.

Further, Petitioners claim that Judge Robert W. Pratt should have recused himself on two legal bases: (1) under 28 U.S.C. §455(a) based upon an alleged appearance of partiality; and (2) under 28 U.S.C. §455(b)(1) because Judge Pratt has personal knowledge of disputed material facts. In addition, there is a legal question if Judge Pratt exceeded his authority and retained subject matter jurisdiction to initiate the foreclosure litigation when it directly violated an Act of Congress and the mandate that all civil rights matters were to have been properly investigated and resolved before any acceleration or foreclosure could begin. It is well established that jurisdiction must be established on the date the action was filed- January 8, 2009- and not based upon subsequent events. Judge Pratt failed to render fair and impartial rulings in the underlying case and Petitioners were damaged as a result of his refusal to recuse himself and assign the underlying case to an impartial judicial officer.

A manifest or grave injustice, such as the one perpetrated here upon Petitioners, is described as something that is obviously unfair, or which is shocking to the conscience that is direct, obvious and observable. In fact, the 7th Circuit Court of Appeals in *Kenner vs. C.I.R.*, 387 F3d 689 (1968), adjudicated that a "decision produced by fraud upon the court is not in essence a decision at all and never becomes final. "Fraud Upon the Court" makes void the orders and judgments of that court and vitiates the entire proceedings, thus no appeal would lie within the Eighth Circuit in this case wherein the underlying judgment wherein in essence it was never a decision at all and never became final.

Petitioners filed their Motion to Vacate Order of Summary Judgment based upon Fraud Upon the Court with the District Court. Said motion was denied by the District Court on April 9, 2019.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DRASTICALLY DECREASES THE PUBLIC'S CONFIDENCE IN AN UNBIASED JUDICIARY AS IT ENABLES BIASED JUDGES TO MAKE ARBITRARY ADVERSE RULINGS.

Litigants must have confidence that their claims will be heard by an unbiased judicial officer. When a judicial officer has a financial interest in the outcome of a case, it creates a bias on his part in favor or against one party, and not based on the merits of the case. Thus, recusal is sometimes necessary.

28 U.S.C. §455(a) requires a judge to disqualify himself if a reasonable person would have factual grounds to doubt the impartiality of the court. *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979). The determination for the district judge to make is whether "his impartiality might reasonably be questioned." 28 U.S.C. §455(a). Section 455(b) lists specific circumstances in which recusal is required, including when a judge has "personal bias or prejudice concerning a party." In fact, "By enacting section 455(a), Congress sought to eradicate not only actual, but also the appearance of impropriety in the federal judiciary." *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir.2002). An "objective standard of reasonableness" applies in deciding a motion to disqualify. *Pope v. Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992). "This objective standard is not a test of whether the judge, or a party,

might believe that a bias existed, but whether the `average person on the street' would question the impartiality of the judge, under the circumstances." *Id.*

"The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality." *Hall v. Small Business Administration*, 695 F. 2d 175, 179 (5th Cir. 1983). Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." 796 F. 2d, at 802.

The words of the Senate Judiciary Committee, in recommending what became § 455(a) under the 1974 amendments to §455, provide guidance for judges who must decide whether to disqualify themselves under §455(a): [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in [§ 455(a)] should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants

ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice. See S.Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973) (quoted in 13A Wright, Miller & Cooper, Federal Practice and Procedure: Juris 2d § 3549, at 623-24).

A reasonable person on the street who knows all relevant facts would indeed question District Court Judge Pratt's impartiality. Courts have consistently recast the issue as "whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case." *In re KPERS*, 85 F.3d at 1358.

Judge Pratt was the presiding judge. A review of the record shows that at every turn, Petitioners were denied the opportunity to fully prosecute their claims and/or put forth factual showings in support of their defenses. Most notably, Judge Pratt denied and dismissed Petitioners' counterclaims and affirmative defenses, which called into question the validity and authority of the Respondent to foreclose on their property. Supplementation of the record below shows that Respondent, upon their professional status withheld and suppressed evidence of a Settlement Agreement executed by U.S. Attorney Inga Bumbary Langston (the "Agreement"). The Agreement is central to Petitioners' claims. Further, Judge Pratt refused to allow Petitioners' Expert Fact Witness to submit his report or to testify on Petitioners' behalf. Judge Pratt further refused to allow Petitioners any accounting of their loans as required by ECOA 15 U.S.C. §1691. Also notable is the fact that most (if not all) of Judge Pratt's rulings were simply a resuscitation of Respondent's arguments, demonstrating his impartiality and refusal to give all parties an equitable

determination on the merits.

Judge Pratt's 2009 and 2010 Financial Disclosure Reports document a "Buy" of between $15,000.00 and $50,000.00 of stock in the National Rural Utilities and National Rural Utilities Coops, both affiliates of Midland Power Cooperative, a known competitor of Petitioners. Jude Pratt did not act in an impartial manner in rendering its rulings surrounding the issues between the parties, regardless of the rulings rendered. As indicated in the appellate record, Judge Pratt has significant financial interests in the National Rural Utilities Coop., an organization that has repeatedly intervened before the Federal Energy Regulatory Commission ("FERC") on behalf of Petitioners' adversary, Midland. The National Rural Utilities Coop and its members seek to destroy competition from renewable energy sources, such as Petitioners, through the use of a biased Judge who had a financial interest in this case.

This case warrants a granting of certiorari because it calls into question the appropriate application of 28 U.S.C. §455(a), which again provides that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Further, "Under § 455(a), disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *United States v. Wisecarver*, 644 F.3d 764, 771 (8th Cir.2011).

The independent nature of the judicial system is seriously put into jeopardy when judicial officers decide for themselves whether or not they are "biased." The

public needs to have confidence in the independent and impartial nature of the judiciary. The decisions below fly in the face of building public confidence.

It is of great public importance that citizens have faith and confidence in the judicial branch of government. Attaining confidence does not and will not happen when there are biased judicial officers, such as Judge Pratt, sitting in judgment of a litigant's claims. Petitioners herein were denied any opportunity to have their case heard and decided on the merits. Instead, Judge Pratt acquiesced to Respondent (as fellow government officials) and granted dismissal and denied recusal.

Accordingly, the petition for Writ of Certiorari should be granted.

II. THE DECISION BELOW IS IN CONTRAST WITH EXISTING PRINCIPLES AND ESTABLISHED RULE OF LAW WHICH GOVERN THE COURT'S REVIEW OF A MOTION TO VACATE UNDER RULE 60, WHICH SEVERELY INHIBTS A LITIGANT'S RIGHT TO AN EQUITABLE RESULT ON THE MERITS.

The Eighth Circuit panel reasoned in affirming the District Court's decision that Petitioners "did not show with clear and convincing evidence that the government had engaged in fraud or misrepresentation preventing them from fully and fairly presenting their case and did not show exceptional circumstances warranting relief." Petitioners respectfully submit that this was an erroneous finding and certainly had Petitioners' Expert Witness testified, such clear and convincing evidence would have been beyond dispute. Respondent engaged in a deliberate "cover up" by intentionally withholding evidence from the Court and not disclosing the

Agreement and failed to give Petitioners an accurate accounting. Respondent further committed "perjury" by way of affidavit that the file was complete, and that Petitioners had not made payments, all untrue statements of material fact by Respondent.

Petitioners were required to go to extreme measures to obtain the authentic version of the 1997 Settlement Agreement from the Court archives. As background for the Court, in 1997, a Settlement Agreement was entered into between the Petitioners and the Farm Service Agency, a division under the control of Respondent USDA, as a result of an out of court settlement to resolve pending litigation against the Secretary of the Department of Agriculture. The Settlement Agreement provided for only one mortgage and note which Petitioners were responsible for. The terms of the Settlement Agreement, as confirmed by Ag Credit Manager Robert Anderson (by letter to Petitioners dated January 6, 1997 in response to their inquiry on December 31, 1996) and U.S. Attorney Inga Bumbry-Langston, included: (1) Annual payments of $10,645.00; (2) Loan would run for 26 years; (3) Last payment would be in January 2023; (4) First payment would be due on January 1, 1997; and (5) That the Settlement Agreement would in effect write off all of the original loans, leaving the $152,997.19 total debt owed against the real estate. However, when Respondent filed this foreclosure case on January 8, 2009, it claimed relief for multiple mortgage instruments, and that no payments had been made by Petitioners, a clear false statement and fraud upon the court. As a material fact overlooked by the Court, Respondent and Petitioners entered into a Settlement Agreement in which only one contract existed. The Contract entered into bound the United States, by and through

U.S. Attorney Inga Bumbary Langston, to the terms of a court Settlement Agreement, filed in Civil Action 04-96-80430 on January 2, 1997 before the Honorable Charles Wolle. Pursuant to the terms of said Settlement Agreement, the parol evidence provides that all of Petitioners' Mortgages and notes were written off into a single Mortgage Loan, under number 41-14, in the amount of $152,997.19. As a condition thereof only one contract existed between the parties on or after January 2, 1997.

Three mortgages remain as outstanding encumbrances on Petitioners' property, as recorded in the public records of Greene County, Iowa, which violates the terms of the out of court settlement. Upon information and belief, Respondent's failure to record satisfactions of the mortgages written off by the Settlement Agreement constitutes Mortgage Fraud. It is well settled in this jurisdiction that any attempt to commit fraud in a mortgage voids the mortgage *void ab anito*, both at law and in equity. Respondent has benefitted from the execution of the Settlement Agreement, but yet Petitioners received no material benefit of the bargain from the executed Settlement Agreement in Civil Action 04-96-80430, rather Respondent engaged in a well calculated scheme to defraud, Petitioners' debt was not written off (Mortgage Fraud), nor did they receive the benefit of the proceeds upon the execution of Loan 41-14 in the amount of $152,997.00. The only thing the out of court settlement accomplished was that Petitioners were tricked into dismissing their statutory rights and claims in Civil Action 04-96-80430 based upon the government's false pretense of a mutually beneficial settlement offer. In furtherance of Respondent's scheme to defraud, Petitioners' debt was not written off to a debt of $152,997.19 against the real estate, but rather Petitioners' debt was increased with

the intent to defraud them of their property through an illegal foreclosure. Such tricks, scheme and devices were perpetrated by Respondent in retaliation for pursing Petitioners' statutory rights in filing suit in Civil Action 04-cv-96-80430.

Additionally, FSA knowingly and purposely breached the terms of the contract by declaring Petitioners delinquent by raising their interest rate, contrary to the terms of the out of court settlement. It is undisputed that Petitioners were making payments consistent with the court settlement when the Respondent unlawfully accelerated the note and mortgage. As such, triable claims against Respondent and its agents should have been allowed to proceed based on its misrepresentations and clear breach of the 1997 Settlement Agreement. Petitioners designated Expert Witness should have been allowed to testify and file a report into the court record. These remained as triable issues of fact which clearly precluded the entry of summary judgment in Respondent's favor and were exactly the type of false representations which were raised in Petitioners' Rule 60 motion(s) to set aside and vacate order of summary judgment.

Title 7, United States Code § 1981a(b)(1)(A)-(B) provided for a moratorium on foreclosure proceedings against any farmer or rancher who files or has pending against the United State Department of Agriculture, a claim of program discrimination. Based upon the plain language of the USDA's Office of Civil Rights policy, "under no circumstance could FSA accelerate or foreclose a loan before the discrimination complaints could be closed." See Paragraph 41G of FSA Handbook 1-FLP (Rev. 1, Amend. It states: "Under no circumstances could FSA: accelerate or foreclose a loan before a discrimination complaint is closed." See FSA Handbook 1-

FLP, Para. 41G (emphasis added). Respondents acted under "color of law."

The lower courts erroneously did not give proper weight to the pending discrimination complaints duly filed by Petitioners. The pending claims alleging discrimination precluded Respondent from initiating this foreclosure action. A moratorium was in place on January 8, 2009 when Respondent filed this foreclosure action. Petitioners submit that this triable claim clearly precluded the entry of summary judgment in favor of Respondent and sounds in the type of fraud necessary to prevail on a Rule 60(d)(3) motion to set aside for "Fraud Upon the Court" at any time and the equitable powers given to this Court to prevent injustice.

A writ of certiorari for further review is thus warranted in the public interest.

CONCLUSION

For the reasons herein, the petition for writ of certiorari should be granted.

Dated: April 26, 2019.

Respectfully submitted,

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