No. _____

In The
Supreme Court of the United States

JEFFREY B.C. MOORHEAD,

Petitioner,

v.

GLENDA LAKE, Clerk Of The District Court
Of The Virgin Islands, and
THE HONORABLE MICHAEL A. CHAGARES,
Chief Judge Of The Third Circuit,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court of the Virgin Islands entered a final order suspending petitioner from the practice of law. Petitioner filed a notice of appeal to the Third Circuit pursuant to F.R.App.P. 3. The district court ordered the clerk not to process the appeal, averring the order was not appealable. The clerk did not process the appeal.

Petitioner filed for mandamus relief in the Third Circuit, seeking an order directing the district court clerk to process the appeal. The Third Circuit, including a circuit judge who had sat as a district court judge in the case below, denied mandamus relief for the same reasons, holding the suspension order was not appealable.

The Questions Presented are:

1) Does 28 U.S.C. § 1291 grant lawyers the statutory right to appeal a final order of a district court suspending a lawyer from the practice of law?

2) Can a district court prevent appellate review of its own final decision by directing the clerk of the court not to process a timely notice of appeal filed pursuant to F.R.App.P. 3, which provides that "the clerk *must* promptly send a copy of the notice of appeal . . . to the clerk of the court of appeals"?

3) Did a circuit court judge violate 28 U.S.C. § 47 by determining an issue in a matter as an appellate judge that involved the same issue he had already determined below in the same case while sitting as a district court judge?

PARTIES TO THE PROCEEDING

There are two nominal parties below, the clerk of the District Court of the Virgin Islands, Glenda Lake, who has not processed either of the two notices of appeal filed pursuant to F.R.App.R. 3, and Chief Judge Michael A. Chagares, who entered the order (while sitting as a Judge of the District Court of the Virgin Islands) directing the clerk of the district court to not process the appeal.

RELATED PROCEEDINGS

On February 1, 2022, the Supreme Court of the U.S. Virgin Islands issued a show cause order for reciprocal discipline based solely on the district court's order; a response was filed. That proceeding remains pending at *In Re Jeffrey B.C. Moorhead*, S. Ct. Civ. No. 22-005. The Third Circuit Bar also issued a show cause order on January 27, 2022, based on the district court's order; a response was also filed. That proceeding remains pending at *In Re Jeffrey B.C. Moorhead*, C.A. Misc. No. 22-8005.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY AND RULE PROVISIONS 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION ... 10

A. A lawyer has the statutory right pursuant to 28 U.S.C. § 1291 to appeal a final Order of a District Court suspending the lawyer from the practice of law 10

B. A district court judge cannot prevent appellate review of a final order by directing the clerk not to process the appeal 15

C. 28 U.S.C. § 47 bars a judge from sitting on both the trial court and appellate panel when ruling on the same case (and issue) in each court 17

CONCLUSION 19

APPENDIX

United States Court of Appeals for the Third Circuit, Order Denying Petition for Rehearing, March 23, 2022 ..... App. 1

United States Court of Appeals for the Third Circuit, Order, March 4, 2022 ..... App. 2

TABLE OF CONTENTS—Continued

Page

District Court of the Virgin Islands, Docket, 1:21-mc-00035 ..... App. 5

District Court of the Virgin Islands, Order, January 25, 2022 ..... App. 10

Notice of Appeal, January 27, 2022 ..... App. 35

District Court of the Virgin Islands, Order, January 31, 2022 ..... App. 36

District Court of the Virgin Islands, Order, February 22, 2022 ..... App. 38

Notice of Appeal, February 28, 2022 ..... App. 40

Petition for a Writ of Mandamus, February 7, 2022 ..... App. 41

Response to Order, February 7, 2022 ..... App. 47

Petition for Panel Rehearing, March 11, 2022 .... App. 54

District Court of the Virgin Islands, Report and Recommendation, December 3, 2021 ..... App. 67

Objections to Report and Recommendations (and Exhibits), December 17, 2021 ..... App. 89

Relevant Statutes and Rules ..... App. 115

- United States Statutes ..... App. 115
- U.S. V.I. Local Rules ..... App. 119
- E.D. Pa. Rule 83.6 ..... App. 131

TABLE OF AUTHORITIES

Page

CASES

Adams v. Ford Motor Co., 653 F.3d 299 (3rd Cir. 2011) 14

Gelboim v. Bank of Am. Corp., 574 U.S. 405 (2015) 10, 11

Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) 15, 16

Hall v. Hall, 138 S. Ct. 1118 (2018).....10

Hollingsworth v. Perry, 558 U.S. 183 (2010) 12

In re Doherty, No. 21-1258, 2021 WL 5190865 (3rd Cir. Nov. 9, 2021).....13

In re Tutu Wells Contamination Litig., 120 F.3d 368 (3rd Cir. 1997).....14

In re Surrick, 338 F.3d 224 (3rd Cir. 2003) 12, 13

Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020) 10, 11

Saldana v. Kmart Corp., 260 F.3d 228 (3rd Cir. 2001) 13

STATUTES

28 U.S.C. § 47 .....*passim*

28 U.S.C. § 1291 .....*passim*

F.R.App.R. 3 .....6, 16

F.R.App.R. 4 8

F.R.App.R. 21 1

TABLE OF AUTHORITIES—Continued

Page

S. Ct. R. 10(a) 2, 10

S. Ct. R. 10(c).....10, 18

Eastern District of Pennsylvania's Local Rule 83.6 .....2, 13

Virgin Islands District Court LRCi 7.3 .....2, 7

Virgin Islands District Court LRCi 83.2.....*passim*

OPINIONS BELOW

The District Court of the Virgin Islands entered an order on January 25, 2022, suspending petitioner Jeffrey Moorhead from the practice of law for two years. App. 10. The district court entered an order directing the clerk of court not to process petitioner's notice of appeal on January 31, 2022. App. 36. The district court entered an order on February 22, 2022, finding its suspension order was not an appealable order. App. 38.

The Third Circuit denied petitioner's petition for a writ of mandamus on March 4, 2022. App. 2. The Third Circuit denied petitioner's motion for rehearing on March 23, 2022. App. 1.

JURISDICTION

On March 4, 2022, the Third Circuit denied petitioner's petition for a writ of mandamus that was filed pursuant to F.R.App.R. 21. App. 2. On March 23, 2022, the Third Circuit denied petitioner's motion for rehearing. App. 1.

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND RULE PROVISIONS

The relevant statutes (28 U.S.C. § 47 and § 1291) and court rules (F.R.App.P. 3, F.R.App.P. 4, Virgin

Islands District Court Local Rules 7.3 and 83.2(b), and Eastern District of Pennsylvania's Local Rule 83.6 appear in the appendix. App. 115-152.

INTRODUCTION

This is the rare instance that calls for this Court to exercise its supervisory authority over a circuit court. *See* S. Ct. R. 10(a). This case arises out of an attorney discipline proceeding in the U.S. District Court for the Virgin Islands that took multiple inexplicable turns. First, a magistrate judge issued a report that recommended the imposition of serious sanctions on petitioner without first providing petitioner any opportunity to be heard or to contest the charges against him—which were based, in part, on the secret testimony of anonymous witnesses. That report and recommendation plainly violated the local rule requiring the magistrate judge to "afford the attorney the opportunity to be heard." LRCi 83.2(b). Then, the judges of the Third Circuit, sitting en banc, acted as the district court and adopted the report and recommendation—an action that constitutes a "final determination" under the relevant local rule. *Id*.

Petitioner filed a timely notice of appeal from that decision, appealing as of right from the district court's "final decision" as permitted by 28 U.S.C. § 1291. But the Chief Judge of the Third Circuit, sitting as a district court judge, directed the clerk of the district court not to process the appeal, reasoning that because the

local rule describes the district court's disciplinary order as a "final determination," the rule prohibits appeals.

Petitioner sought mandamus relief from the refusal to process his appeal, arguing that finality and appealability aren't mutually exclusive (indeed, finality in the district court is ordinarily a prerequisite to appeal), and pointing to many cases in which the Third Circuit has previously reviewed disciplinary orders from the Virgin Islands under this same rule. Finally, the petition was denied by a panel that included one of the very judges that had ruled against him on the same issue in the district court.

The lower court's actions in this case violate several federal statutes, as well as basic norms of due process. Specifically, they violate 28 U.S.C. § 1291, which vests jurisdiction in the appellate courts over all final decisions of district courts. They violate 28 U.S.C. § 47, which provides that no judge may preside over an appeal from an issue he decided. They also violate basic principles of fairness that provide attorneys accused of misconduct with a fair opportunity to respond to the charges before discipline is imposed—and then to obtain unbiased appellate review.

This Court should summarily reverse the decisions below and direct the Third Circuit to direct the district court clerk to process petitioner's appeal from the suspension order, which should then be docketed in the Third Circuit and processed like any appeal.

STATEMENT OF THE CASE

Petitioner has been a member of the bar of the District Court of the Virgin Islands since 1986. The mother of a criminal defendant represented by petitioner filed a complaint based on the petitioner's alleged mishandling of her son's case with the sentencing judge, who referred the matter to the Chief Judge of the District Court for the Virgin Islands, as required by Local Rule (LRCi) 83.2(b). Because petitioner is related to the Chief Judge, the matter was referred to the then-Chief Judge of the Third Circuit, Judge D. Brooks Smith.[1] On October 4, 2021, Judge Smith appointed retired Magistrate Judge Maureen Kelly from the Western District of Pennsylvania to submit a Report and Recommendation pursuant to LRCi 83.2(b). App. 6.

The next day, Magistrate Judge Kelly ordered records of all disciplinary matters involving petitioner over the past five years from the clerk's office. App. 6-7. She then issued her Report on December 3, 2021. App. 67-88. As the Report reflects, she held no hearings on the allegations against petitioner, never even attempting to contact Attorney Moorhead before she issued her Report. Neither did she try to contact the complainant or her son, petitioner's client, or make any attempt to investigate the allegations made in the mother's complaint. Instead, her Report relied upon (1) several unrelated prior sanction orders involving petitioner which had already been resolved, such as

[1] Judge Smith was succeeded as Chief Judge by Judge Michael Chagares on December 4, 2021.

fines for being late to court, and (2) interviews with six unidentified "persons with knowledge," who allegedly opined that petitioner had not "been himself" lately. Her Report contained no citations, nor did it list any rule that petitioner had supposedly violated. She then recommended that petitioner be suspended for 2 years. App. 67-88.

Petitioner filed multiple objections to the Report on December 17, 2021, primarily based on several due process issues, including the failure to comply with LRCi 83.2(b)'s requirement that an accused attorney be given an "opportunity to be heard" *by the presiding magistrate*. App. 89, 91-95, 104, 108. The petitioner also answered the allegations made by the mother, explaining why he believed he had handled her son's case properly, as well as discussing the difficulties often encountered when dealing with the parents of criminal defendants due to the attorney-client privilege. App. 89-91, 95-98. In short, while such complaints are a real concern, they were not unusual, which Magistrate Judge Kelly apparently found so insignificant here that she did not even investigate them, as reflected in her report. App. 67-89, 95, 105.

Petitioner asked that his filing be made in a sealed envelope since unnamed court personnel had been interviewed by the magistrate. Even though it exceeded her scope of authority since she was only charged with issuing a Report, Magistrate Judge Kelly denied the motion, noting that the objections "would be heard by the entire Third Circuit Court of Appeals" (App. 8, 47-50), which was a surprise to counsel, as nothing in the

record reflected that such treatment would be applied. In fact, why would she even know this would be heard by the entire Third Circuit?

The Third Circuit, sitting *en banc* as district court judges, rejected all of petitioner's objections on January 25, 2022, finding that (1) petitioner's written response objecting to the Report was sufficient to satisfy the hearing requirement of LRCi 83.2(b), (2) that the hearsay statements of the unidentified "persons with knowledge" were properly considered, as the rules of evidence did not apply to this proceeding and (3) the failure to investigate the mother's initiating complaint was of no consequence. The *en banc* district court panel then adopted the findings and recommendations of the magistrate, entering a final order suspending petitioner from the practice of law for 2 years. App. 10-34.

On January 27, 2022, petitioner filed a notice of appeal to the Third Circuit pursuant to F.R.App.R.3. App. 35. On January 31st Chief Judge Chagares, sitting as a district court judge, directed the clerk of district court not to process the appeal, stating in part (App. 36-37):

> [Petitioner] has now filed a notice of appeal captioned for the Court of Appeals for the Third Circuit, purporting to seek appellate review of the final determination entered in this administrative proceeding. Rule 83.2 does not set forth procedures for such an appeal. Indeed, Rule 83.2 does not contemplate any availability of further review after a Court has entered a final determination.

> Accordingly, the purported notice of appeal shall be considered as a motion for reconsideration. . . . **In light of this decision, the Clerk of the District Court of the Virgin Islands is directed to refrain from transmitting the purported notice of appeal to the Court of Appeals for the Third Circuit.** (Emphasis added).

Motions for reconsideration are permitted in the Virgin Islands District Court pursuant to LRCi 7.3, but only for limited reasons.[2]

Petitioner then filed a petition for a writ of mandamus in the Third Circuit on February 7, 2022, seeking an order directing the clerk of the district court to process the appeal, as required by F.R.App.P. 3. Petitioner also filed a motion to recuse all Third Circuit judges who sat on the case below pursuant to 28 U.S.C. § 47. App. 41-46.

On that same date, petitioner filed a pleading in the district court in response to the January 31, 2022 order, pointing out that (1) his notice of appeal had divested the district court of jurisdiction and (2) explaining why filing a motion for reconsideration had been contemplated, but then rejected, since it involved raising questions about certain conduct of the *en banc*

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[2] LRCi 7.3(a) allows *a party* to seek reconsideration due to:

(1) an intervening change in controlling law;

(2) the availability of new evidence, or;

(3) the need to correct clear error or prevent manifest injustice.

panel that would be better addressed in the appellate process. App. 47-53.

The same *en banc* panel of district court judges then summarily held on February 22, 2022, that the disciplinary proceeding was "administrative" in nature so that the final order suspending petitioner from the practice of law was not appealable for the same reasons set forth in the January 31st order. App. 38-39.

On February 28th, petitioner then filed a second notice of appeal from this February 22nd order pursuant to F.R.App.P. 3.[3] App. 40.

The Third Circuit, *including Judge Theodore McKee who had sat on the en banc panel at the district court level*, denied the mandamus petition on March 4, 2022, summarily holding (without briefing) that the final order was not appealable, as there was no appeals process provided for in LRCi 83.2(b), stating in part (App. 2-4):

> Here, petitioner asks this Court to direct the Clerk of the District Court of the Virgin Islands to transmit a Notice of Appeal to the Court of Appeals. Petitioner seeks to pursue an appeal of an order of attorney discipline issued on January 25, 2022 by the active Circuit Judges of the Court of Appeals, sitting as the

[3] The second notice of appeal was filed as a precaution in case the district court's January 31st order could be construed as ordering a post-trial motion that could then render the first notice of appeal as a nullity pursuant to F.R.App.R. 4, even though a motion for reconsideration is not one of the specific post-trial motions list in F.R.App.R. 4.

> District Court, in accordance with Rule 83.2 of the Local Rules of Civil Procedure of the District Court of the Virgin Islands. See In re: Jeffrey B.C. Moorhead, D.V.I. No. 1:21-mc-00035. Rule 83.2, however, does not authorize appellate review. Rule 83.2 provides that, after notice and opportunity to be heard, a disciplinary matter is "submitted to the Court for final determination." Rule 83.2(b) (emphasis added). A final determination was rendered pursuant to Rule 83.2 and the matter is therefore concluded.

A motion for rehearing was filed on March 11, 2022, pointing out that (1) the final order raised Constitutional due process issues, (2) the Third Circuit had heard similar due process appeals regarding disciplinary actions taken against other Virgin Islands attorneys pursuant to LRCi 83.2(b), and (3) that Judge McKee had improperly ruled on the mandamus petition, as he had ruled below on the same issue in the same case in the district court, which is prohibited by 28 U.S.C. § 47. App. 54-56.

The Third Circuit denied the rehearing without comment on March 23, 2022. App. 1.

To date, the clerk of the district court has yet to process either notice of appeal, nor has either appeal been docketed in the Third Circuit.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari pursuant to Supreme Court Rule 10(a) and 10(c), as the Third Circuit has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," and has also decided important federal questions in ways that conflict with relevant decisions of this Court and the federal court system in general. For the reasons set forth herein, it is respectfully requested that the Supreme Court accept certiorari, vacate the Third Circuit's mandamus orders, and remand this matter with instructions to the clerks of the district court and the Third Circuit to process this appeal.

A. A lawyer has the statutory right pursuant to 28 U.S.C. § 1291 to appeal a final Order of a District Court suspending the lawyer from the practice of law.

This Court's precedents hold that "a party may appeal to a court of appeals as of right from 'final decisions of the district courts.'" *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020) (quoting 28 U.S.C. § 1291); *see also Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) ("The normal rule is that a 'final decision' confers upon the losing party the immediate right to appeal."); *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 407 (2015) ("An unsuccessful litigant in a federal district court may take an appeal, as a matter of right, from a final decision of the district court.") (cleaned up). "A 'final decision' within the meaning of § 1291 is

normally limited to an order that resolves the entire case." *Ritzen Grp.*, 140 S. Ct. at 586; *see also Gelboim*, 574 U.S. at 409 (explaining that "decisions of this Court have accorded § 1291 a practical rather than a technical construction," and that "the statute's core application is to rulings that terminate an action") (quotation marks omitted).

The district court's order suspending petitioner undeniably meets the definition of a final decision: it was the order that concluded the disciplinary proceedings by adjudicating finally and fully, the legal claims at issue. Indeed, the district court repeatedly described its order suspending petitioner as a "final" order, as did the Third Circuit. App. 2-4, 36-38. Moreover, the local rule under which the order was rendered, LRCi 83.2(b), likewise described it as a "final determination."

Nevertheless, the lower courts held that the suspension order was not an appealable final order because LRCi 83.2(b) does not expressly provide for an appeal. That is a facially backwards reading of the rule: the fact that the rule describes the district court's order as a "final determination" indicates that it intended to *facilitate* appeals—not bar them.

Assuming *arguendo* that the lower court correctly interpreted the rule, this Court should summarily reverse because a lower court cannot adopt a procedural rule that is at odds with the text of § 1291.[4] This Court

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[4] Section 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have

explained that it "may use its supervisory authority to invalidate local rules that were promulgated in violation of an Act of Congress," *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010), and it emphasized that "[t]he Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Id*. In *Hollingsworth*, the Court thus invalidated a rule relating to the broadcasting of trials; here, the lower courts interpreted the local rules of the District of the Virgin Islands *to prohibit appeals of a final order*—a far more significant infringement on litigants' rights. This Court should accordingly either hold that the local rule must be construed to permit appeals, or in the alternative hold that the rule is invalid insofar as it prohibits them.

In short, appellate jurisdiction in the federal court is set by statute pursuant to 28 U.S.C. § 1291, not local district court rules. In fact, the Third Circuit has previously held that § 1291 applies to disciplinary matters, holding in *In re Surrick*, 338 F.3d 224, 229 (3rd Cir. 2003):

> The District Court has the inherent authority to set requirements for admission to its bar and to **discipline** attorneys who appear

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jurisdiction of appeals **from all final decisions** of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, **and the District Court of the Virgin Islands**, except where a direct review may be had in the Supreme Court. (Emphasis added.)

> before it. We have jurisdiction to review the final order of the District Court pursuant to 28 U.S.C. § 1291. (Citations omitted).

Surrick involved a lawyer disciplined pursuant to that Eastern District of Pennsylvania's Local Rule 83.6 that is almost identical to LRCi 83.2(b).[5] The *Surrick* holding was cited just last year by another Third Circuit panel, holding in *In re Doherty*, No. 21-1258, 2021 WL 5190865, at *2 (3rd Cir. Nov. 9, 2021):

> A federal district court "has the inherent authority to set requirements for admission to its bar and to discipline attorneys who appear before it." *In re Surrick*, 338 F.3d 224, 229 (3rd Cir. 2003). **We have appellate jurisdiction under 28 U.S.C. § 1291**. . . . (Emphasis added).

Doherty involved the disbarment of a lawyer under the same E.D. Pa. Local Rule, 83.6.

Counsel could not locate a single case in the federal court system that has held to the contrary. In fact, in a series of cases cited in the proceedings below, the Third Circuit has heard and reversed several prior disciplinary orders of the District Court of the Virgin Islands where sanctions were imposed by that court pursuant to LRCi 83.2. For example, in *Saldana v. Kmart Corp.*, 260 F.3d 228, 236 (3rd Cir. 2001), the Third Circuit vacated an order for sanctions against an attorney entered pursuant to LRCi 83.2, first noting:

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[5] Both local rules are in the appendix. Neither states whether final disciplinary orders are or are not appealable, while §1291 allows appeals of all final orders of a district court.

> That [sanctions] opinion issued more than two years after the hearing when the Court invoked Local Rule 83.2 and, in very strong language, sanctioned [the attorney]. . . .

In short, the Third Circuit addressed the merits of the case and then reversed the sanctions for having been issued in violation of the lawyer's due process rights, **a finding it could not have made if the district court's Rule 83.2 order was not appealable**. *See also Adams v. Ford Motor Co.*, 653 F.3d 299, 302 (3rd Cir. 2011) ("We further find that the judge denied Colianni's due process rights by not following the disciplinary procedures outlined in Local Rule 83.2(b) of the District Court of the Virgin Islands and by failing to give Colianni *sufficient notice and an opportunity to be heard* prior to finding misconduct and imposing sanctions."); *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 379 (3rd Cir. 1997) (noting that D.V.I. R. 83.2 requires "notice and an opportunity to be heard" which the District Court failed to provide to the counsel disciplined in this case).

Like the appellants in these other cases, petitioner raised constitutional due process issues as well as statutory construction issues in his objections to Magistrate Judge Kelly's report. For example, LRCi 83.2(b) expressly requires that "[t]he magistrate judge or the Disciplinary Committee shall afford the attorney the opportunity to be heard." That requirement is distinct from the separate requirement that the attorney be permitted to "submit objections to the report and recommendation" once issued. *Id*.

In summary, if the suspension procedure followed by the district court is deemed appropriate, every federal court in the country could adopt LRCi 83.2(b) and suspend lawyers who appear before them without any appellate review. Such suspensions would then have a ripple effect on the lawyer's other bar admissions, as occurred in this case. While the judges of the district courts mean well, they do make errors, and very occasionally appear to make biased rulings, which is why the federal appellate system was created. Thus, it is a matter of utmost importance to the entire federal bar to make sure such suspensions can be challenged on appeal, as provided in 28 U.S.C. § 1291, rather than risk one's entire career on an unfavorable decision of a district court judge that is not reviewable on appeal.

B. A district court judge cannot prevent appellate review of a final order by directing the clerk not to process the appeal.

In a case cited to the district court in these proceedings, this Court held in *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L. Ed. 2d 225 (1982):

> The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

This Court further noted in *Griggs, id.* at 59:

> In 1979, the Rules were amended to clarify both the litigants' timetable and the courts' respective jurisdictions. The new requirement that a district court "transmit forthwith" any valid notice of appeal to the court of appeals advanced the time when that court could begin processing an appeal. Fed.Rule App.Proc. 3(d).

Thus, once petitioner filed a notice of appeal on January 27, 2022, the district court was divested of jurisdiction. As such, the January 31st order by a "district court judge" directing the clerk of court not to process the appeal improperly interfered with the appellate process required by F.R.App.R. 3.

In this regard, while it may be understandable why a clerk of court may not want to process an appeal once ordered not to do so by a district court judge, Rule 3 of the Federal Rules of Appellate Procedure states as follows:

> (a)(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).
>
> . . .
>
> (d)(1) . . . The clerk **must** promptly send a copy of the notice of appeal and of the docket

> entries—and any later docket entries—to the clerk of the court of appeals named in the notice. . . . (Emphasis added).

Thus, there is no legal mechanism that allows a district court judge to interfere with or stop this appellate process.

Indeed, it would create havoc in the federal appellate system if district court judges were allowed to stop review of their final orders simply by directing their clerks not to process a notice of appeal. To the contrary, whether an order or judgment is appealable is an issue to be determined by the appellate courts, which they are **required** to do.

Thus, it is respectfully submitted that the Supreme Court should make it clear that clerks of district courts must process a notice of appeal as required by F.R.App.P. 3, without regard to any orders to the contrary by a district court judge. Likewise, district court judges should be admonished not to interfere with the clerk's mandatory obligations under Rule 3.

C. 28 U.S.C. § 47 bars a judge from sitting on both the trial court and appellate panel when ruling on the same case (and issue) in each court.

Judge McKee sat as one of the district court judges who made this key jurisdictional ruling on February 22, 2022 (App. 38-39):

> Rule 83.2 does not set forth procedures for such an appeal. Indeed, Rule 83.2 does not contemplate any availability of further review after a Court has entered a final determination.

Judge McKee then sat on the Third Circuit panel that denied the mandamus petition on March 3rd, again deciding the same key issue as follows: "Rule 83.2, however, does not authorize appellate review." App. 2-4. However, 28 U.S.C. § 47 bars such participation on appeal, stating:

> No judge shall hear or determine an appeal from the decision of a case **or issue** tried by him. (Emphasis added)

Thus, Judge McKee violated § 47 by making this ruling on this same issue, as he had done below.[6]

Again, this violation, which as a practical matter can only be raised in a certiorari petition, also supports granting certiorari pursuant to Rule 10(c), with a summary order vacating the decision below and instructing him from participating further in this matter at the appellate level.

[6] Judge McKee acknowledged the motion to recuse him, but denied it, finding that ruling on the same issue in the same case in denying a mandamus petition did not violate § 47 since it was not technically an appeal. App. 2-4.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Court should grant certiorari, summarily reverse the decision below, and order the Third Circuit to instruct the district court to process petitioner's timely appeal from the order suspending him, and then to decide that appeal using a panel that does not include judges who have previously ruled against petitioner on the merits.

Respectfully submitted,

Dated: April 8, 2022

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