No. _____

In The
Supreme Court of the United States

VALERIE JACKSON,

Petitioner,

v.

LUPE VALDEZ; MARIAN BROWN;
DALLAS COUNTY, TEXAS,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

SEAN R. COX
Counsel of Record
LAW OFFICES OF SEAN R. COX
400 N. Ervay St. #130864
Dallas, Texas 75313
Telephone: (214) 500-9280
Facsimile: (844) 501-8688
scox@coxappellate.com

SCOTT H. PALMER
JAMES P. ROBERTS
NILES ILLICH
SCOTT H. PALMER, P.C.
15455 Dallas Pkwy.,
Suite 540
Addison, Texas 75001
Telephone: (214) 987-4100
Facsimile: (214) 922-9900
scott@scottpalmerlaw.com

Counsel for Petitioner Valerie Jackson

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Whether a district court may disregard this Court's precedent and the plain language of 28 U.S.C. § 144, review and rebut the merits of an affidavit submitted in support of a motion to recuse, and refuse to recuse.

Whether, in a case addressing the violation of an individual's civil rights, a presiding judge's impartiality might reasonably be questioned under 28 U.S.C. § 455 when the judge has previously advocated against the civil rights of the entire class of citizens of which the individual is a member.

Whether a Circuit Court of Appeals may issue a Substituted Opinion in a case after the mandate should have issued in relation to its Original Opinion and after its jurisdiction has terminated.

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Valerie Jackson, Plaintiff and Petitioner
2. Lupe Valdez, Defendant and Respondent
3. Marian Brown, Defendant and Respondent
4. Dallas County, Texas, Defendant and Respondent

RELATED CASES

- *Valerie Jackson v. Lupe Valdez, Marian Brown, & Dallas County, Texas*, No. 20-10344, U.S. Court of Appeals for the Fifth Circuit. Judgment entered March 29, 2021. Judgment withdrawn and new judgment entered May 18, 2021. Order denying Rehearing En Banc entered June 15, 2021
- *Valerie Jackson v. Lupe Valdez, et al.*, No. 3:18-CV-02935-X-BH, U.S. District Court for the Northern District of Texas. Partial Judgment entered March 23, 2020
- *In re Valerie Jackson*, No. 19-11328, U.S. Court of Appeals for the Fifth Circuit. Order denying petition for writ of mandamus entered Dec. 19, 2019. Order denying Rehearing En Banc entered Jan. 28, 2020

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit issued the Original Opinion on March 29, 2021. Apx. 23. The Fifth Circuit affirmed in part and reversed in part a decision of the United States District Court for the Northern District of Texas issued on March 23, 2020, document number 48 in the District Court for cause number 3:18-CV-02935-X (N.D. Tex.) (Apx. 42), and a decision of the United States District Court for the Northern District of Texas issued on November 22, 2019, document number 41 in the District Court for cause number 3:18-CV-02935-X (N.D. Tex.). Apx. 76. The United States District Court adopted in its entirety the Final Report and Recommendation of the United States Magistrate Judge issued on February 27, 2020, document number 45 in the District Court's docket. Apx. 46.

The United States Court of Appeals for the Fifth Circuit issued a Substituted Opinion on May 18, 2021. Apx. 1. The Substituted Opinion affirmed the above decisions of the United States District Court for the Northern District of Texas. Justice Southwick dissented from the Substituted Opinion. Apx. 16.

The United States Court of Appeals for the Fifth Circuit denied a Petition for Rehearing En Banc on June 15, 2021. Apx. 92.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on May 18, 2021. Apx. 1-22. The court denied a timely petition for rehearing en banc on June 15, 20219. Apx. 92-93. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case involves the Section 1 of the Fourteenth Amendment to the United States Constitution:

> 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.

This case involves 28 U.S.C. § 144:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

This case involves 28 U.S.C. § 455(a) & (b):

(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.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal

> knowledge of disputed evidentiary facts concerning the proceeding;

This case involves 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This case involves the following regulations promulgated pursuant to the Prison Rape Elimination Act:

> 28 C.F.R. § 115.42 – Use of screening information.
>
> (a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being

sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal

> judgment for the purpose of protecting such inmates.

28 C.F.R. § 115.111 – Zero tolerance of sexual abuse and sexual harassment; PREA coordinator.

> (a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.
>
> (b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its lockups.

28 C.F.R. § 115.115 – Limits to cross-gender viewing and searches.

> (a) The lockup shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.
>
> (b) The lockup shall document all cross-gender strip searches and cross-gender visual body cavity searches.
>
> (c) The lockup shall implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or

genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an area where detainees are likely to be showering, performing bodily functions, or changing clothing.

(d) The lockup shall not search or physically examine a transgender or intersex detainee for the sole purpose of determining the detainee's genital status. If the detainee's genital status is unknown, it may be determined during conversations with the detainee, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner.

(e) The agency shall train law enforcement staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex detainees, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

28 C.F.R. § 115.6 – Definitions related to sexual abuse.

For purposes of this part, the term –

Sexual abuse includes –

(1) Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident; and

(2) Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer.

Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and

(4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation.

Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate, detainee, or resident:

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

(2) Contact between the mouth and the penis, vulva, or anus;

(3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

(6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1) through (5) of this definition;

(7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and

(8) Voyeurism by a staff member, contractor, or volunteer.

> Sexual harassment includes –
>
> (1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another; and
>
> (2) Repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.
>
> Voyeurism by a staff member, contractor, or volunteer means an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.

STATEMENT OF THE CASE

Petitioner filed suit in November 2018. The district clerk's office assigned the case to Judge Brantley Starr. Petitioner then learned that Judge Starr had advocated against the civil rights of the LGBTQ community prior to taking the bench, and in so doing

exhibited his patent bias/prejudice against LGBTQ individuals. Petitioner filed a proper motion to recuse Judge Starr, with the required affidavit, under 28 U.S.C. § 144.

On November 22, 2019, Judge Starr issued a lengthy opinion denying Petitioner's motion to recuse; Judge Starr attacked Petitioner's allegations and dismissed them as unmeritorious. *See* Apx. 76-91. Petitioner filed a Petition for Writ of Mandamus. The Fifth Circuit Court of Appeals denied the petition.

Respondents then filed a motion to dismiss under Rule 12(b)(6). The district court dismissed all of Petitioner's claims against Dallas County and Sheriffs Valdez and Brown in their official capacities. *See* Apx. 42-45. Petitioner appealed the recusal and dismissal orders to the Fifth Circuit Court of Appeals.

On March 29, 2021, a panel of the Fifth Circuit Court of Appeals issued an Opinion affirming in part and reversing in part. Apx. 23. No post-opinion motions or requests were filed by any party to the case. On May 18, 2021, the panel issued a Substituted Opinion reversing its earlier holding against dismissal and dismissed all of Petitioner's claims. Apx. 1. Justice Southwick issued a Dissenting Opinion to the Substituted Opinion. Apx. 16.

On May 31, 2021, Petitioner filed a request for en banc reconsideration, which was denied on June 15, 2021. *See* Apx. 92-93.

A. Factual Background

Ms. Jackson is a transgender woman. Ms. Jackson had her gender legally changed to female prior to the events giving rise to her claims in this case.

On or about November 4, 2016, Petitioner Valerie Jackson was a pre-trial detainee at the Dallas County Jail. The police had arrested Ms. Jackson for Possession of a Weapon in a Prohibited Place – essentially, she forgot to remove her firearm from her bag before going to the airport.

During intake at the jail, and after jail staff verified Ms. Jackson's name and female gender on her driver's license, the jailers required Ms. Jackson to lift her shirt and bra to expose her bare breasts, and then directed her to expose her genitalia to confirm her gender. Following the search and based on the fact Ms. Jackson has male genitalia, she was placed with the male detainee population. The search violated the Federal Prison Rape Elimination Act and Ms. Jackson's Constitutional rights.

Throughout the ordeal jail officials repeatedly declared that official policy required them to perform strip searches to confirm gender and determine whether an individual has had a sex change. Indeed, a detention officer explained, "We need to know if you've had a sex change or not. **We need to see if you have a penis or a vagina**." Ms. Jackson was also told that a strip search was the next step of "the process" and **"the process" could not move forward without**

her revealing her genitals, so that jailers could verify Ms. Jackson's genitalia.

Official policy, as explained by Dallas County detention personnel tasked with enforcing it, is "**we have to verify that you've had a sex change**. If you have a penis you're going with the men. If you have a vagina, you're going with the women." In fact, a Dallas County detention officer informed Ms. Jackson, **"that's our policy. You can talk to Lupe Valdez about it when you get out."** Lupe Valdez was the sheriff at the time and in charge of jail policy. Ms. Jackson complied with the compelled strip search, as she felt she had no other viable choice.

Following the compelled strip search, Ms. Jackson requested to be placed with her legally recognized gender and was told **"No, you're going with the men because that's what you are. You're a man."** She was told, "**[i]t's not uncommon** for men that look like women to be sitting in the men's section and vice versa. You'll probably see some like you over there. **You aren't the first and you won't be the last.**" Ultimately, detention center personnel placed a wristband on Ms. Jackson showing her gender as male and she was placed in the detention area for male detainees where she was taunted, ridiculed, and harassed by jail personnel and detainees. She was even laughed at by detention center personnel after seeing her torment.

After being released from custody, Ms. Jackson filed a formal complaint with the Dallas County Sheriff's Office regarding her treatment. On November 7,

2016, Captain Shelley Knight of the Dallas County Sheriff's Office received notice of Ms. Jackson's treatment. Captain Knight reviewed intake video from November 4, 2016 and acknowledged that she could see where some policies were misconstrued and others were not followed.

On April 19, 2017, Ms. Jackson was subsequently arrested and was subjected to similar mistreatment and violations of her constitutional rights at the Dallas County jail. When booked into the jail, she was again placed with the male inmates and endured similar mistreatment by both detention center personnel and other detainees. This time, however, Ms. Jackson was forced to shower with male detainees, where one of the male inmates masturbated while staring at her in the shower.

On June 15, 2018, Ms. Jackson was arrested for a third time and booked into the Dallas County jail. She was once again placed with the male inmates. And again, she had to shower with the men, where once again a male inmate masturbated while staring at her in the shower. Additionally, a male detention officer recorded video of her in the shower.

The experiences of Ms. Jackson were not isolated incidents, as shown by a similar incident involving a transgender female, C.W.,[1] at the Dallas County Jail in 2013. When C.W. was being booked into the Dallas County Jail, she was asked if she was a "real female"

[1] C.W. does not wish to be identified at this time; therefore, her initials have been used in place of her name.

and if she had a "working vagina." The officer laughed at C.W. and told other officers that they should have frisked her a little closer as the other officers laughed. Three male officers then took C.W. into a room to "change her out." They forced her to undress, spread her buttocks, show the bottom of her feet, and then put on male jail attire. The jail then began processing C.W. as a male, which caused her to remain in custody for another fourteen hours since they had to restart the booking process after she had already been processed as a female. C.W. was then taken to the male area of the jail where she was verbally harassed and embarrassed by inmates and guards in the same manner that Ms. Jackson was during her incarceration in the Dallas County Jail.

On November 2, 2018, Ms. Jackson filed a lawsuit alleging her treatment at the Dallas County Jail clearly violated federal law and her constitutional rights.

The district court originally assigned Ms. Jackson's lawsuit to Judge Karen Gren Scholer. However, the case was transferred to Judge Brantley Starr on August 27, 2019. Soon thereafter, Ms. Jackson became aware of Judge Starr having advocated against the civil rights of members of the LGBTQ community while employed by the Texas Office of the Attorney General. This caused Ms. Jackson to believe (reasonably) that Judge Starr has a bias/prejudice against her because she belongs to the LGBTQ community. On September 19, 2019, Ms. Jackson filed a motion to recuse Judge Starr.

B. The District Court's Erroneous Refusal to Recuse.

Petitioner sought recusal under both 28 U.S.C. §§ 144 & 455, to which there was no objection or opposition filed by any party. Petitioner supported her motion with an affidavit setting forth the grounds for Judge Starr's bias/prejudice, as provided for under 28 U.S.C. § 144, including his history of advocacy against the civil rights of the LGBTQ community.

In contravention of 28 U.S.C. § 144, Judge Starr issued a lengthy opinion denying Ms. Jackson's motion to recuse, in which he attacked the allegations of bias/prejudice, weighs the evidence supporting the allegations, and determined they were without merit. Apx. 76-91. Judge Starr also denied the motion to recuse based on the alleged lack of impartiality under 28 U.S.C. § 455. Apx. 89-91. On mandamus and a subsequent appeal, the Fifth Circuit allowed the district court's ruling on recusal to stand.

C. The District Court's Erroneous Granting of a 12(b)(6) Motion to Dismiss and the Fifth Circuit's Reversal of that Order.

On March 23, 2020, the Judge Starr granted a motion to dismiss Ms. Jackson's suit for failure to state a claim under Rule 12(b)(6), dismissing Ms. Jackson's claims against Dallas County and Sheriff Valdez and Sheriff Brown in their official capacities. In response to the 12(b)(6) motion to dismiss, Ms. Jackson had identified a policy, custom, or practice of permitting

detention personnel to conduct unconstitutional and illegal strip searches of transgender individuals solely for the purpose of determining gender. Specifically, Ms. Jackson alleged that Dallas County agents, representatives and employees informed Ms. Jackson that it was the policy to conduct strip searches of transgender individuals to determine their biological gender and to place transgender individuals with the detainee population matching their biological gender. Ms. Jackson was told **"our policy is we have to verify that you've had a sex change. If you have a penis you're going with the men. If you have a vagina, you're going with the women"** and **"that's our policy. You can talk to Lupe Valdez about it when you get out"** and **"you aren't the first and you won't be the last."** These violations resulted in a deprivation of Ms. Jackson's civil rights and caused considerable trauma. Rather than viewing the above allegations in a light most favorable to Ms. Jackson, the district court ignored them.

Ms. Jackson has also alleged a failure to train and supervise detention personnel and that such was done with deliberate indifference to the rights of transgender individuals like herself. **Ms. Jackson specifically alleged that Dallas County maintained policies, customs and practices of**:

> [O]bserving and searching a person's genitals when that person is believed or known to be transgender for the sole purpose of making a placement decision and ostensibly "determining" the person's gender.

* * *

> [C]lassifying transgender inmates based exclusively on genital characteristics rather than their gender identity without any individualized determination of what would be safest. . . .

Ms. Jackson also expressly alleged that "Defendants failed to properly train and supervise jail staff to follow policy and practice prohibiting the classification of transgender inmates based solely on genital characteristics rather than gender identity."

Even though Ms. Jackson alleged clear violations of written policies, the Prison Rape Elimination Act, and the U.S. Constitution, as well as identified admissions from Sheriff's Department supervisory personnel that the deprivation of Ms. Jackson's civil rights was contrary to written policy, the district court found that these specific allegations did not survive under Rule 12(b)(6). Specifically, the district court found Ms. Jackson, "failed to allege even the existence of an allegedly inadequate training policy or procedure," and therefore "failed to sufficiently plead the first element that 'a training policy or procedure was inadequate.'" The district court also found Ms. Jackson failed to allege facts showing deliberate indifference. These findings conflict with the allegations in this case and applicable law.

Ms. Jackson appealed the dismissal of her suit to the Fifth Circuit Court of Appeals, which issued an Opinion and Judgment on March 29, 2021, affirming

the district court's order denying recusal and reversing the district court's dismissal order under Rule 12(b)(6).

D. The Fifth Circuit's Erroneous Issuance of a Substituted Opinion Beyond its Jurisdiction to Act.

Following the issuance of its Opinion and Judgment on March 29, 2021, the Fifth Circuit did not direct that a formal mandate issue, thus, the Fifth Circuit's jurisdiction terminated upon the effective date of the informal mandate – April 20, 2021. The Fifth Circuit, however, issued a Substituted Opinion on May 18, 2021, reversing its previous ruling holding that the dismissal of Ms. Jackson's case was in error, and denying Petitioner all relief. The Fifth Circuit provided no explanation as to why the Substituted Opinion was issued or why its previous holding on dismissal was reversed. Justice Southwick dissented from the Substituted Opinion. Apx. 16-22.

REASONS FOR GRANTING THE PETITION

The Court should hear this case because the Fifth Circuit's Substituted Opinion (*sua sponte reversing its previous decision*) involves questions of exceptional importance, and conflicts with decisions of this Court and the Fifth Circuit itself regarding judicial recusal and the standard of review for motions to dismiss under Rule 12(b)(6). Importantly, in a disturbing precedent, the Fifth Circuit acted without jurisdiction by issuing

a Substituted Opinion 51 days after the Original Opinion when no party had sought relief that would have delayed finality or extended the Fifth Circuit's time to act. These reasons, and others, are further discussed below.

I. This Court should hear this case because questions regarding the total disregard of this Court's precedent and plain statutory language regarding judicial recusal threatens to nullify the only avenue to address bias and prejudice in the Federal lifetime appointment judiciary.

Petitioner's reasonable belief that the judge presiding over her case was biased/prejudiced against her because she belongs to the LGBTQ community led her to seek recusal under 28 U.S.C. §§ 144 & 455. No objection or opposition was filed by any party. And although Petitioner satisfied all statutory prerequisites, the presiding judge refused to recuse himself. Apx. 76-91.

Petitioner based her motion to recuse the presiding judge, in part, on 28 U.S.C. § 144. Under 28 U.S.C. § 144, "[w]henever a party . . . makes and files a timely and sufficient affidavit that the judge . . . has a personal bias . . . against him . . . such judge shall proceed no further therein." 28 U.S.C. § 144; *see also Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003).[2]

[2] "The purpose of section 21 is clear from Representative Cullop of Indiana's answer to a question of whether the statute allowed judges discretion to determine the sufficiency of affidavits:

Yet Judge Starr disregarded the provisions of 28 U.S.C. § 144 and considered the merits of Petitioner's motion to recuse. Apx. 76-91. The Fifth Circuit erred in allowing the district court's ruling to stand on recusal. This approach is contrary to binding precedent of this Court and the language of Section 144.

"When a motion is filed under Section 144, the district court 'must pass on the legal sufficiency of the affidavit' **without passing on the truth of the matter asserted**." *Netsphere, Inc. v. Baron*, 703 F.3d 296, 315 (5th Cir. 2012) (emphasis added) (quoting *Davis v. Bd. of Sch. Com'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975)). Nearly a century ago, this Court explained the reasoning behind the requirement that a district judge not weigh the facts in relation to a motion to recuse:

> To commit to the judge a decision upon the truth of the facts **gives chance for the evil**

> Mr. Cullop: . . . no, it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of jurisdiction in the case.
>
> Mr. Cox: . . . Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, does it not leave it to the discretion of the judge?
>
> Mr. Cullop: No; it expressly provides that the judge shall proceed no further."

State of Idaho v. Freeman, 507 F. Supp. 706, 715 (D. Idaho 1981) (citing 46 Cong.Rec. 2627 (1911), quoted in Note, *Caesar's Wife Revisited Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L.REV. 1201, 1216 n.102 (1977)).

> **against which the section is directed**. The remedy by appeal is inadequate. **It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious.** It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

Berger v. U.S., 255 U.S. 22, 35-36, 41 S.Ct. 230, 234 (1921) (applying Section 21 of the Judicial Code (Comp. St. § 988) (codified at 28 U.S.C. § 144 (1970))).

"A legally sufficient affidavit must: (1) state material facts with particularity; (2) state facts that, if true, would convince a reasonable person that a bias exists; and (3) state facts that show the bias is personal, as opposed to judicial, in nature." *Patterson*, 335 F.3d at 483. As the Supreme Court has held, a party seeking recusal must merely show "a bent of mind that may prevent or impede impartiality of judgment." *Berger*, 255 U.S. at 33-34.

Regardless of whether the presiding judge disagreed with the allegations, he was bound to accept them and allow another judicial officer to evaluate the merits of the claims. *In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997); *Tezak v. U.S.*, 256 F.3d 702, 717 (7th Cir. 2001); *U.S. v. Rankin*, 870 F.2d 109, 110 (3d Cir. 1989).

Here, the affidavit set out facts demonstrating that the District Court Judge had a personal bias/prejudice

against Petitioner. For instance, Judge Starr was a signatory to a Complaint filed in federal court arguing against Title IX protections for transgender individuals, claiming such was a "massive social experiment", that "Defendants cannot foist these radical changes on the nation", and that "[t]he text employed by Congress does not support the term 'sex' as anything other than one's immutable, biological sex as determined at birth." *State of Texas, et al. v. U.S., et al*., 7:16-cv-00054-O, ECF No. 1 (May 25, 2016). This Court recently held against the position advocated by Judge Starr in that Complaint. *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1734, 207 L.Ed.2d 218 (2020).

The affidavit also noted that in an October 2015 panel discussion entitled "Gay Rights, States' Rights," Judge Starr defended the right of county clerks to refuse to issue marriage licenses to same-sex couples following this Court's opinion in *Obergefell v. Hodges*. Judge Starr participated in a June 2015 Attorney General opinion making similar points written in the wake of the *Obergefell* decision, referring with apparent skepticism to "[t]his newly minted federal constitutional right to same-sex marriage." Judge Starr also testified before the Texas legislature supporting legislation to protect adoption agencies refusing to place children with same-sex couples.

The affidavit also addressed written responses to questions during the confirmation process for the bench Judge Starr now holds. In those written responses Judge Starr refused to answer whether the Fourteenth Amendment requires that states treat

transgender people the same as those who are not transgender. Judge Starr also refused to answer a question as to whether history and tradition should not limit the rights afforded to LGBT individuals, other than to say he would apply binding precedent. Judge Starr also refused to answer whether he believes that the government has a compelling interest in eradicating discrimination against LGBT people, other than to reference an irrelevant answer to another question.

Thus, the affidavit is legally sufficient under 28 U.S.C. § 144. Instead of following the procedure in Section 144, the District Court Judge authored a lengthy refutation of the facts alleged in Ms. Jackson's affidavit and weighed the truthfulness of each allegation. *See* Apx. 76-91. The District Court Judge expressly questioned the views of Petitioner and others regarding the positions he has espoused in the past, and refused to give them "any deference." Apx. 89. Indeed, the District Court Judge required Petitioner to present "**authoritative evidence** that demonstrates personal bias" and that "would convince a reasonable person of personal bias." Apx. 89 (emphasis added). Such requirements conflict with 28 U.S.C. § 144. The Fifth Circuit should have reversed the District Court Judge's refusal to recuse, rather than perform its own post hac error analysis, because, according to this Court, the prejudice had already "worked its evil" and tainted the proceedings. *Berger*, 255 U.S. at 35-36.

Permitting the District Court Judge to review and determine the merits of the allegations supporting

recusal reduces Section 144 to a mere Maginot line against judicial bias/prejudice – although ostensibly a barrier, easily circumvented and offering no meaningful protection. In failing to reverse, the Fifth Circuit reviewed decisions already tainted by prejudice. The Fifth Circuit should have followed precedent, ordered Judge Starr's recusal, and remanded the case to the district court for assignment of another judge.

This Court has not addressed recusal under 28 U.S.C. § 144 for decades, and as shown here, the standards have severely eroded during that time. This case should be heard to clarify that this Court's precedent and that of the Circuit courts[3] does not permit a district judge to circumvent the plain language of 28 U.S.C. § 144.

Consideration by this Court is also necessary to decide a question of exceptional importance as to whether a presiding judge's public statements and advocacy during prior employment against the civil and human rights of an entire class of individuals may be considered in determining whether their impartiality might reasonably be questioned under 28 U.S.C. § 455. The Fifth Circuit assumed such were only the positions of the employer, not the presiding judge, and held that

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[3] The district court's refusal to recuse and the Fifth Circuit's affirmance also conflicts with the precedent of other courts of appeals. *See In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997); *Tezak v. U.S.*, 256 F.3d 702, 717 (7th Cir. 2001); *U.S. v. Rankin*, 870 F.2d 109, 110 (3d Cir. 1989); *Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976); *Tynan v. U.S.*, 376 F.2d 761, 764 (D.C. Cir. 1967).

they would not be properly considered in evaluating whether an appearance of bias/prejudice existed.

As previously held by the Fifth Circuit, but not followed here, "[i]n order to determine whether a court's impartiality is reasonably in question, the objective inquiry is whether a well-informed, thoughtful and objective observer would question the court's impartiality." *Republic of Panama v. Am. Tobacco Co.*, 217 F.3d 343, 346 (5th Cir. 2000) (quoting *Trust Co. v. N.N.P.*, 104 F.3d 1478, 1491 (5th Cir. 1997)).

In deciding whether a probability of bias exists, courts ask "not whether the judge is actually, subjectively biased, but whether the average judge in [the same] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009) (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 91 S.Ct. 499 (1971)).

"Since the goal of section 455(a) is to avoid even the appearance of impropriety, recusal may well be required even where no actual partiality exists." *U.S. v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999). "Thus, if a reasonable man, cognizant of the relevant circumstances surrounding a judge's failure to recuse, would harbor legitimate doubts about that judge's impartiality, then the judge should find that section 455(a) requires his recusal." *Id.* at 226; *see also Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999).

> As recently explained by the Fifth Circuit:
>
> > A litigant has the fundamental right to fairness in every proceeding. Fairness is upheld by avoiding even the appearance of partiality. See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980). When a judge's actions stand at odds with these basic notions, we must act or suffer the loss of public confidence in our judicial system. "[J]ustice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954).

Miller v. Sam Houston State Univ., 986 F.3d 880, 883 (5th Cir. 2021).

Given the positions advocated by Judge Starr as a lawyer, an apparent bias/prejudice exists against LGBTQ individuals, such as Petitioner. Thus, Judge Starr's recusal was required.

The Fifth Circuit erred in disregarding the evidence calling into reasonable question the impartiality of Judge Starr and finding – without any evidence – that the positions previously advocated by Judge Starr were "solely the legal positions of his client, not his personal views." Apx. 8. There is absolutely nothing in the record to show the positions Judge Starr advocated were not his personal views. Indeed, **Judge Starr has never disavowed his ardent advocacy against the civil rights of the LGBTQ community as not being in line with his own personal views**. It was merely assumed by the Fifth Circuit that such did not reflect his personal views. Assuming Judge Starr's

personal views were not in line with those which he spent years promoting was error that should not be allowed to stand.

Furthermore, here, a reasonable person would harbor legitimate doubts as to Judge Starr's impartiality. Indeed, civil rights organizations including the Alliance for Justice[4] and the Leadership Conference on Civil and Human Rights, voiced such concerns during Judge Starr's confirmation process. Apx. 79.[5]

Importantly, the discriminatory policies pushed by Judge Starr while at the Texas Office of the Attorney General were not only argued in court proceedings, but also in pushing proposed legislation and participating in public speaking engagements. Apx. 79-80. His troubling positions are also evidenced by his cagey and

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[4] The Alliance for Justice expressed the following views:

> Starr has been at the forefront of Texas's efforts to undermine LGBTQ equality. He led Texas's efforts to block federal guidance that protected transgender students under Title IX. Following *Obergefell v. Hodges*, Starr signed an opinion letter claiming that despite the Supreme Court establishing what he referred to as a "new constitutional right," civil servants, including clerks, judges, and justices of the peace, could refuse to issue marriage licenses to same-sex couples. Starr also supported a Texas House bill that advocates explained would allow groups "to discriminate," allowing them to "refuse to place foster children with gay couples or families with different religious backgrounds."

[5] The Leadership Conference on Civil and Human Rights is a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States.

evasive responses to questions during his confirmation process. Apx. 80-81. Evidence was presented showing Judge Starr's impartiality might reasonably be questioned, yet Judge Starr disregarded all such evidence and ruled that his own impartiality could not reasonably be questioned. Apx. 76-91.

The Fifth Circuit's primary basis for affirming Judge Starr's refusal to recuse was that the conduct evidencing a bias/prejudice occurred during the judge's "past legal advocacy in the course and scope of his employment for the State of Texas, during which the judge made statements reflecting solely the legal positions of his client, not his personal views." The Fifth Circuit went on to explain that "[a] lawyer often takes legal positions on behalf of his client that he may or may not personally agree with, and the statements made by the district judge when he was a Deputy Attorney General only involved pertinent legal issues; that is, they were interpretations of statutes, caselaw, and administrative rules and reflected no personal animus against LGBTQ people." Apx. 8-9, 30.

This conclusion finds absolutely no support in the record. At no time has Judge Starr renounced the positions for which he advocated so strongly. And there is also nothing in the record that the views he espoused were "solely the legal positions of his client, not his personal views." Apx. 8, 30. These are purely unsupported factual conclusions drawn by the unidentified author of the Fifth Circuit's Substituted Opinion.

The other central basis upon which the Fifth Circuit based its recusal holding was that Judge Starr stated during his judicial confirmation hearing, "that he would set aside his personal beliefs and apply binding precedent when asked about the legal treatment of LGBTQ individuals. His answers support the conclusion that he is committed to applying the law accordingly." Apx. 9-10, 31. Judges, however, are no more capable of leaving their biases and prejudices at the courthouse door as any witness, attorney, or juror. Such necessarily color and influence a judge's rulings. And "trust me" is a phrase as easily employed by the upstanding as the disreputable. It is no more trustworthy or comforting simply because it is uttered in the context of a Senate confirmation hearing. And it is notable that Judge Starr demonstrated the weakness of his affirmation when he deliberately disregarded the plain language of 28 U.S.C. § 144 and this Court's precedent shortly after ascending to the bench.

The impartiality of a presiding judge is essential to due process,[6] and a presiding judge's prior advocacy against the civil rights of an entire class[7] of individuals is of obvious significance in evaluating impartiality. The rulings in this case by the district court and the Fifth Circuit in relation to recusal threaten one of the

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[6] Trial before an unbiased judge "is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780 (1971).

[7] *See Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 141 S.Ct. 2878 (2021) (recognizing "transgender people constitute at least a quasi-suspect class.").

only safeguards in place to ensure the impartiality of a lifetime appointment judiciary. This Court is the last line of defense to protect against unbridled partiality and politicization in judicial proceedings, to which Judge Starr and the Fifth Circuit have thrown open the door. This Court should consider this case to prevent unrestricted judicial activism and disregard for precedent.

II. This Court should hear this case because the Fifth Circuit's action in issuing a Substituted Opinion threatens the limitations on the Circuit Courts of Appeals' jurisdiction to act.

This Court should also hear this case to address the extra-jurisdictional action in issuing a substituted opinion after the court's jurisdiction had expired. The Fifth Circuit's sua sponte issuing of the Substituted Opinion was without jurisdiction as it occurred long after the period for issuing the appellate mandate.

According to Federal Rule of Appellate Procedure 41(b), "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order."[8] The

[8] "Absent a motion for stay or a stay by operation of an order, rule, or procedure, mandates will issue promptly on the 8th day

Original Opinion in this case was issued on March 29, 2021. No rehearing or stay of mandate was sought in this case, and no order was issued extending the time to issue the mandate.

The deadline to seek rehearing was fourteen days after entry of judgment. Thus, the very latest a formal mandate should have issued would have been no later than April 20, 2021. **Of critical importance, the Fifth Circuit docket for the appeal actually states, "Mandate issue date is 04/20/2021."** The Fifth Circuit's jurisdiction terminated upon the effective date of the mandate – April 20, 2021.[9]

Considering the Fifth Circuit did not direct the issuance of a formal mandate, and Rule 41(b)'s mandatory language that the mandate must issue 7 days after the time to file a petition for rehearing expires, the mandate became effective approximately one month before the Fifth Circuit issued its Substituted Opinion.

An appellate court "retains jurisdiction over an appeal until it has issued a mandate to implement its disposition." *U.S. v. Cook*, 592 F.2d 877, 880 (5th Cir. 1979); *Newball v. Offshore Logistics Intern.*, 803 F.2d 821, 826 (5th Cir. 1986); *U.S. v. DiLapi*, 651 F.2d 140, 144 (2d Cir. 1981); *U.S. v. Dozier*, 707 F.2d 862, 864 n.2 (5th Cir.

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after the time for filing a petition for rehearing expires; or after entry of an order denying the petition." 5th Cir. IOP 41.

[9] *See* https://www.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/civil_case/issuance_of_mandate.html (last viewed November 4, 2021) ("The issuance of the mandate terminates the Court of Appeals' jurisdiction over a case and transfers jurisdiction back to the district court.").

1983). The mandate in this case should be considered to have issued and been effective as of April 20, 2021, terminating the Fifth Circuit's jurisdiction.

The Fifth Circuit's disregard of the limitations on its jurisdiction and the issuance of a Substitute Opinion after its jurisdiction expired is a dangerous overreach that intrudes upon the jurisdiction of this Court and the district court as well. The Fifth Circuit's aberrant extra-jurisdictional action represents a disquieting detour from its jurisdictional boundaries that should not go unaddressed.

III. This Court should hear this case because the Fifth Circuit's Substituted Opinion is contrary to principles for ruling on motions to dismiss under Rule 12(b)(6).

The Court should also hear this case to correct the Fifth Circuit's favoring of the movant in ruling on a 12(b)(6) motion to dismiss. Apx. 13. The Fifth Circuit favoring the movant is contrary to established principles related to 12(b)(6) motions to dismiss.

In moving to dismiss under Rule 12(b)(6), Respondents alleged that there was no evidence of a policy or pattern of conduct supporting a policy that could support a *Monell* claim. The district court agreed, even though there are allegations that jail personnel expressly declared to Petitioner that there is policy of compelled strip searches to determine gender. The Fifth Circuit initially held that Petitioner sufficiently alleged the existence of a policy sufficient to pursue a

Monell claim. Apx. 37. However, the Fifth Circuit, for unknown reasons, reversed this holding in a Substituted Opinion. Apx. 13.

As explained by Justice Southwick's Dissenting Opinion, the majority erred in reversing the prior per curiam holding in the Original Opinion as to whether Petitioner had sufficiently alleged a *Monell* claim in order to prevail against a 12(b)(6) motion to dismiss. The Original Opinion held (correctly) as follows:

> Thus, construing Jackson's allegations in a manner required for Rule 12(b)(6) motions, this is a close call that, at this stage of the proceeding, should have gone in Jackson's favor.

Apx. 37 (emphasis added). The Fifth Circuit's Original Opinion also recognized:

> **Because we must accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff, we conclude that sufficiently pleaded a policy of strip searching transgender detainees for the sole purpose of determining their gender and classifying them solely on their biological sex.** Specifically, her complaint alleged that she and another transgender female detainee were forced to endure two strip searches for determining their physical sex characteristics and four instances of being classified based on their anatomy. **Further, alleged statements made by county employees support the reasonable inference that other transgender detainees have been treated similarly; for**

> **instance, officers told Jackson that it was their "policy" to classify detainees solely based on biological sex and that "[y]ou aren't the first and you won't be the last" transgender person to be placed with detainees of the same biological sex. In other words, the statements suggest that the way Jackson was treated is the norm rather than the exception.**

Apx. 35-36 (emphasis added).

As noted by the Fifth Circuit in the Original Opinion, when reviewing a Rule 12(b)(6) dismissal, the Fifth Circuit was to accept well-pleaded facts as true and consider them, and the inferences to be drawn therefrom, in the light most favorable to Petitioner. Apx. 35, 40; *Leal v. McHugh*, 731 F.3d 405, 413 (5th Cir. 2013); *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 570, 127 S.Ct. 1955 (2007). Instead, although recognizing "Jackson is without the benefit of discovery, and that we have no rigid rule regarding numerosity to prove a widespread pattern of unconstitutional acts" and that "it is a close call," the Fifth Circuit viewed the well-pleaded facts and drew inferences **in a light most favorable to the movants**. Apx. 13. In the Substituted Opinion, the Fifth Circuit resolved this "close call" in the polar opposite manner, while ignoring the well-pleaded facts that show "the way Jackson was treated is the norm rather than the exception." Apx. 13, 35-37.

The Fifth Circuit also ignored the fact that a custom or practice may be shown by a pattern of conduct,

or "that a final policymaker took a single unconstitutional action." *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010). Contrary to precedent, the Fifth Circuit ignored the allegations that a final policymaker, the sheriff, took an unconstitutional action in establishing the unconstitutional strip search policy.

Importantly, Justice Southwick, although previously joining in the Original Opinion, dissented to the Substituted Opinion. Justice Southwick noted "a complaint's assertion of a customary policy can take the form of claiming a pattern of unconstitutional conduct by municipal actors or claiming a policymaker's single unconstitutional action." Apx. 19. Justice Southwick concluded that Petitioner "sufficiently pled a policy that may ultimately be proven under either theory." Apx. 19. In fact, after detailing allegations omitted from the Substituted Opinion, Justice Southwick succinctly stated, "Dallas County employees told Jackson that they had a policy. She must plead facts that plausibly allege that the policy existed. Jackson did." Apx. 21. "In other words, the quoted statement supports that the way Jackson was treated was the norm rather than the exception." Apx. 21.

As noted by Justice Southwick's Dissenting Opinion, matching the Fifth Circuit's original holding, "It is too early at this stage to conclude that she cannot show a policy simply because she has not yet discovered enough incidents." Apx. 21.

It is gravely concerning that **the Fifth Circuit deleted facts from the Original Opinion that**

supported the inference of a pattern showing an unconstitutional policy, viewed the remaining allegations in a light most favorable to the movant, and reversed its previous "close call" in favor of the nonmovant. This is obviously contrary to precedent, as pointed out by Justice Southwick in his Dissenting Opinion.

Serendipitously, a per curiam opinion issued one year ago, involving Justices Barksdale and Graves from the same panel as here, acknowledged that close calls in the 12(b)(6) context should be decided in favor of the nonmovant. *Covington v. City of Madisonville, Tex.*, 812 Fed. Appx. 219, 228 (5th Cir. 2020) ("In short, construing Laura's allegations in the manner required for Rule 12(b)(6) motions, this close call is one that, at this stage of the proceeding, should have gone in Laura's favor."). But Petitioner's case was treated differently in the Supplemental Opinion.

The Fifth Circuit also ignored precedent that a single instance can be sufficient if the decision (policy) was that of an individual with final policy making authority and was made with "deliberate indifference to the risk that a violation of a particular constitutional or statutory right with follow." *Gelin v. Houston Auth. of New Orleans*, 456 F.3d 525, 527 (5th Cir. 2006); *Brown v. Bryan Cnty, Okla.*, 219 F.3d 450, 460-61 (5th Cir. 2000) (citing *Bd. of Cnty. Comm'rs, Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 404-05 (1997)).[10]

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[10] It should be recognized that "[m]any courts, including the Seventh and Eleventh Circuits, have held that various forms of

The opacity of the Fifth Circuit's reversal of its holdings in the Original Opinion, combined with the abandonment of precedent and previously applied procedural rules, threatens to undermine confidence in the judiciary. This Court should review the Fifth Circuit's radical reversal of its holdings in the Original Opinion so that the standards of review are applied uniformly and justly. The Court should also review the decisions in this case of the district court and the Fifth Circuit that hold an unconstitutional policy based on a pattern of misconduct is not sufficiently alleged without including numerous historical examples of the same constitutional violations. The arbitrary nature of the conclusion that Petitioner did not sufficiently allege a pattern of constitutional violations establishing a policy, particularly when that policy was declared by personnel responsible for its enforcement, is intolerable and erects an insurmountable wall to the presentation of *Monell* claims.

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discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender nonconformity, thereby relying on sex stereotypes." *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 141 S.Ct. 2878 (2021); *see Adams v. Sch. Bd. of St. Johns County, Florida*, 3 F.4th 1299, 1311 (11th Cir. 2021), reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (school's refusal to recognize a student's legally established gender implicated the student's Fourteenth Amendment rights); *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1734, 207 L.Ed.2d 218 (2020) (recognizing discriminatory treatment of a homosexual or transgender employee violates the law).

CONCLUSION

This Honorable Court must grant the writ of certiorari in this case to prevent the utter and complete erosion of judicial recusal standards and procedures. The Fifth Circuit has in this case erroneously affirmed a district court's refusal to recuse, although recognizing that the district court's conduct was in error. The Fifth Circuit's disregard of this Court's precedent and the plain language of 28 U.S.C. §§ 144 & 455 throws easily intelligible standards and procedures into a gray area wherein recusal will never be necessary, and indeed, allegedly biased or prejudiced judges can always preside over their own recusal.

The Fifth Circuit's actions in this case leave lower courts uncertain as to whether there is any requirement to recuse under any circumstances and injects confusion into the procedures for recusal that essentially eliminates the entire concept of recusal as a check on a lifetime appointment judiciary.

This confusion is not only a threat to ensuring the consistency and predictability required for the rule of law, but it is also eviscerating this Court's precedent on recusal. Other lower courts are now uncertain whether they are bound by this Court's previous precedents, as the Northern District of Texas and the Fifth Circuit believe they are not.

Transgender individuals in this country urgently need this Court's answer to whether a judge's apparent prejudice against transgender people will prevent the

judge from presiding over litigation to protect the civil rights the judge has fervently sought to deny them.

Additionally, the Fifth Circuit's reversal of its own holdings by issuing a Substituted Opinion long after the mandate should have issued, casts doubt as to the limits of the Circuit Courts' jurisdiction.

Furthermore, the Fifth Circuit favoring the movant when considering a motion to dismiss under Rule 12(b)(6), and omitting facts favorable to the non-movant when reversing its earlier rulings, are dangerous departures from settled law that should not be allowed to stand.

This Court must finally determine whether and to what extent transgender individuals are entitled to the civil rights enjoyed by other citizens of this country. The Northern District of Texas and the Fifth Circuit have failed to protect the civil rights of an entire class of people. Such failure should not be perpetuated, but rather reversed.

Respectfully submitted,

SEAN R. COX
Counsel of Record
LAW OFFICES OF SEAN R. COX

400 N. Ervay St. #130864
Dallas, Texas 75313
Telephone: (214) 500-9280
Facsimile: (844) 501-8688
Email: scox@coxappellate.com

SCOTT H. PALMER
JAMES P. ROBERTS
NILES ILLICH
SCOTT H. PALMER, P.C.
15455 Dallas Pkwy., Suite 540
Addison, Texas 75001
Telephone: (214) 987-4100
Facsimile: (214) 922-9900
Email: scott@scottpalmerlaw.com

Counsel for Petitioner
Valerie Jackson