

No. 22-269

In The
Supreme Court of the United States

DAWN MOORE,

Petitioner,

vs.

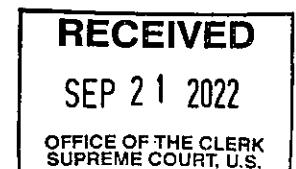
UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the application of Fed. R. App P. 2, by the United States Court of Appeals for the Fifth Circuit in the case at hand Unconstitutional and violates the appointment provision under Art. II, § 2, cl. 2 of the United States Constitution, by delegating appellate judicial decisions to a class of "mere employees" who are not appointed "Officers of the United States" pursuant to Art. II, § 2, cl. 2 of the United States Constitution.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

None of the parties are Corporate entities.

RELATED CASES

None.

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OPINIONS BELOW

The Fifth Circuit entered no opinion but instead entered an “Order Granting Summary Affirmance” dated January 10, 2022.

JURISDICTION

Petitioner on February 18, 2022 filed a timely request for En Banc Hearing. The Fifth Circuit on April 19, 2022 denied Petitioner request for En Banc Hearing treating it as a Motion for Reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

United States Constitution Article II, Section 2, Clause 2:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by

Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

STATEMENT OF THE CASE

Petitioner Moore on August 15, 2018 filed her Original Complaint¹ and Jury Demand against the United States of America. On May 30, 2020 the Respondent filed an Unopposed Motion to Stay the case, said motion was granted by the district court on June 3, 2019. On June 26, 2020 Respondent filed an Unopposed Motion to Lift Stay; said motion was granted by the district court on July 2, 2020. On September 25, 2020 the Petitioner moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Respondent filed an Original Answer to Petitioner's Complaint on October 21, 2020; Respondent did not file an Answer to Petitioner's Motion for Summary Judgment. On November 23, 2020 Respondent filed a Cross Motion for Summary Judgment. Petitioner on December 8, 2020 filed an Answer to Respondent's Cross Motion for Summary Judgment. On July 21, 2021, the district court entered an Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Cross

¹ Petitioner Complaint sought benefits under the Service members' Group Life Insurance Traumatic Injury Protection Program – known as "TSGLI" created by Congress in 2005, to provide monetary assistance for service members who suffer serious traumatic injuries. See Pub. L. 109-13, § 1032, codified at 38 U.S.C. § 1980A.

Motion for Summary Judgment. The district court on July 21, 2021 also entered and Order/Judgment stating “. . . . Final Judgment. Accordingly, it is ORDERED that the above-captioned case is DISMISSED WITH PREJUDICE. All motions by either party not previously ruled on are hereby DENIED-AS-MOOT.”

On September 1, 2021, Petitioner timely filed Notice of Appeal to the Federal Fifth Circuit Court of Appeals. Petitioner in keeping with the briefing schedule by the Fifth Circuit on December 4, 2022 timely filed a brief. Respondent on December 22, 2021 filed with the Fifth Circuit a motion seeking “Summary Affirmance in Lieu of Filing a Brief” or in the alternative and extension of time to prepare and file Respondent’s Brief. Petitioner on December 29, 2021 filed a motion in opposition to Respondent’s Motion for Summary Affirmance in Lieu of Filing a Brief. The Fifth Circuit on January 10, 2022 entered an Order stating : IT IS ORDERED that Appellee’s opposed motion for summary affirmance is GRANTED. IT IS FURTHER ORDERED that Appellee’s alternative motion for an extension of thirty (30) days to file its brief is DEEMED MOOT. (See App. 1)

Petitioner on February 18, 2022 filed a timely Motion for En Banc Hearing presenting the issue below in motion:

The application of Fed. R. App. P. 2, in the case at hand violates the appointment provision under United States Constitution Article II, Section 2, Clause 2 by delegating appellate judicial decision to a class of “mere employees” who are not appointed “Officers of

the United” pursuant to Art. II, § 2, cl. 2 of the United States Constitution.

On April 19, 2022 Petitioner Motion for En Banc Hearing was denied with the Fifth Circuit stating:

Treating the petition for rehearing en banc as a motion for reconsideration (5th Cir. R. 35 I.O.P.), the motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED. (See App. 27)

REASONS FOR GRANTING THE PETITION

Fed. R. App. Rule 2 states:

“On its own or a party’s motion, a court of appeals may-to expedite its decision or for other good cause-suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).”

Petitioner submits as the reasoning for granting this petition is because there is a critical question as to who is the “Gate Keeper” with the power to sort out the appellate cases to divert from the “normal appellate path”, to wit those Appellate cases under the parameters of Fed. R. App. P. 2. Is the “Gate Keeper” “mere employees” who are not appointed “Officers of the United States” pursuant to Art. II, § 2, cl. 2 of the United States Constitution?

The answer to this question is critical in light of the factors set out by the Fifth Circuit in *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) wherein the Fifth Circuit stated the following as to the use/application of Fed. R. App. P. 2, to wit:

We can think of at least two circumstances under which summary disposition is necessary and proper. Both of them appear in this case. The **First** (*emphasis added*) comprises those cases where time is truly of the essence. This includes situations where important public policy issues are involved or those where rights delayed are rights denied. **Second** (*emphasis added*) are those in which the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous. (*Groendyke* at 1162)

In the case at hand at no point has Petitioner tendered any position as to being governed by the **First** grouping referenced in *Groendyke*. Concerning the **Second** grouping however Petitioner tenders the position that this Petition should be granted because it is clear that “Second Grouping” requires a review by an Individual or Individuals with a legal acuity based on the magnitude of their review which is tantamount to rendering a “Judicial Decision” without an opinion; said review entailing determining:

1. . . . If the position of one of the parties is clearly right as a matter of law so that there

can be no substantial question as to the outcome of the case, or

2. . . . If the appeal is frivolous. (*Groendyke at 1162*)

Who are these Individuals are they “mere employees” vs. appointed “Officers of the United States”; a question addressed by this Supreme Court in *Raymond J. Lucia, et al. v. Securities and Exchange Commission*, 138 S.Ct. 2044 (Supreme Court of United States 2018) and a question raised in the recent Fifth Circuit case *George R. Jarkey, et al. v. Securities and Exchange Commission*, [No. 20-61007] (Fifth Circuit May 18, 2022). Again who are these Individuals “Mere Employees” who lack the Constitutional ability to make a decision to divert Petitioner’s Appeal under Fed. R. App. P. 2 or are they appointed “Officers of the United States” who are vested with that authority pursuant to Art. II, § 2, cl. 2 of the United States Constitution? The answer to this question is necessary for the future application of Fed. R. App. P. 2 in the Fifth Circuit and other Federal Appeals Circuits.

CONCLUSION

Petitioner tenders to this Honorable United States Supreme Court that Petitioner's petition for a writ of certiorari should be granted and the Question/Issue that is presented herein should be answered.

Respectfully submitted,

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