**United States Court of Appeals**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 21-5269** **September Term, 2022**
FILED ON: SEPTEMBER 9, 2022

LARRY ELLIOTT KLAYMAN,
APPELLANT

v.

NEOMI RAO, HON., ET AL.,
APPELLEES

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Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02473)

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Before: HIGGINSON* and ERICKSON**, *Circuit Judges*, and SACK***, *Senior Circuit Judge.*

**JUDGMENT**

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

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* Of the Fifth Circuit, sitting by designation.

** Of the Eighth Circuit, sitting by designation.

*** Of the Second Circuit, sitting by designation.

**ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: September 9, 2022

Opinion Per Curiam

App. 3

**United States Court of Appeals**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued August 10, 2022 Decided September 9, 2022

No. 21-5269

LARRY ELLIOTT KLAYMAN,
APPELLANT

v.

NEOMI RAO, HON., ET AL.,
APPELLEES

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Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02473)

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*Larry Klayman*, pro se, argued the cause and filed the briefs for appellant.

*Kevin B. Soter*, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *H. Thomas Byron III*, Attorney. *Abby C. Wright*, Assistant Director, entered an appearance.

Before: HIGGINSON* and ERICKSON**, Circuit Judges, and SACK***, *Senior Circuit Judge*.

Opinion for the Court filed PER CURIAM:

Larry E. Klayman appeals the sua sponte dismissal of his suit against Judges Colleen Kollar-Kotelly and Tanya S. Chutkan of the United States District Court for the District of Columbia and all members of the United States Court of Appeals for the District of Columbia Circuit. For the following reasons, we AFFIRM.

## I.

This case arises from an earlier suit between Klayman and Judicial Watch, the organization he founded in 1994 and left in 2003. That litigation has spawned a series of subsequent lawsuits over the course of nearly twenty years. In the initial lawsuit between Klayman and Judicial Watch (*Judicial Watch I*), Klayman sued the organization asserting a variety of claims. Judicial Watch counterclaimed. The Honorable Colleen Kollar-Kotelly of the United States District Court for the District of Columbia presided over the litigation for approximately sixteen years. The case eventually went to trial, and the jury returned a $2.3 million verdict against Klayman. Klayman appealed, and this court affirmed. *Klayman v. Judicial Watch, Inc.*, 6 F.4th 1301

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* Of the Fifth Circuit, sitting by designation.

** Of the Eighth Circuit, sitting by designation.

*** Of the Second Circuit, sitting by designation.

(D.C. Cir. 2021). Klayman petitioned for rehearing en banc, which was denied. He then petitioned for a writ of certiorari in the Supreme Court, which was also denied. *Klayman v. Judicial Watch, Inc.*, 142 S. Ct. 2731, *reh'g denied*, ___ S. Ct. ___, 2022 WL 3021506 (2022).

In 2019, following the jury verdict against him and the denial of his post-trial motions in *Judicial Watch I*, Klayman filed a separate complaint in the district court under Federal Rule of Civil Procedure 60 (*Judicial Watch II*), seeking vacatur of the judgment in *Judicial Watch I*. That case was assigned to Judge Tanya S. Chutkan. The district court dismissed Klayman's complaint, and this court affirmed. *Klayman v. Judicial Watch, Inc.*, 851 F. App'x 222 (D.C. Cir. 2021) (per curiam).

Following denial of rehearing en banc in *Judicial Watch I*, Klayman filed the pro se complaint at issue in this appeal. He named Judge Kollar-Kotelly, Judge Chutkan, and every member of this court as defendants. Klayman's complaint alleges that the defendants violated his First, Fifth, and Fourteenth Amendment rights based on the actions and inactions he alleges they took in the prior litigation. The district court dismissed the case sua sponte. Klayman timely appealed.

## II.

This court reviews a district court's dismissal of a complaint de novo, *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 339 (D.C. Cir. 2018), and the denial of a motion to transfer venue for

abuse of discretion. *McFarlane v. Esquire Mag.*, 74 F.3d 1296, 1301 (D.C. Cir. 1996).

III.

We have thoroughly reviewed the record, in particular the alleged evidentiary errors committed by the trial judge in *Judicial Watch I*. It seems clear to us that the instant suit is an attempt to relitigate prior decisions of the district court and of this court. Klayman attempts to present the allegations in his complaint as independent violations of his constitutional rights, but they are in fact accusations that the decisions of the district court and of this court are incorrect.[1] Such claims are only reviewable, and in this case have been reviewed, on appeal and on writ of certiorari to the Supreme Court.[2] *See Celotex Corp. v. Edwards*, 514 U.S.

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[1] For example, Klayman's complaint alleges that the following "highly prejudicial errors" in the original Judicial Watch litigation, presided over by Judge Kollar-Kotelly, were "clear cut violations of Mr. Klayman's sacrosanct due process rights": imposing "an overly broad, draconian sanctions order," granting partial summary judgment in favor of Judicial Watch, admitting "highly prejudicial, inflammatory statements," "reading jury instructions that were erroneous," and "entering judgment on the jury verdict." This court addressed each of these alleged errors in *Judicial Watch I*. 6 F.4th at 1311-1321. Klayman similarly claims, and pressed at oral argument, that the panel of this court that decided *Judicial Watch I* violated his right to due process by "failing to reverse the jury verdict with regard to Judicial Watch's trademark infringement and related claims" and that the full court did so again by denying his petition for rehearing en banc.

[2] *See Judicial Watch I*, 6 F.4th 1301; *see also Judicial Watch II*, 851 F. App'x 222.

300, 313 (1995) ("It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." (quoting *Walker v. Birmingham*, 388 U.S. 307, 314 (1967))). Klayman's requested relief—vacatur of the judgment against him and a new trial—further illustrates that the instant suit is an attempt to relitigate the original Judicial Watch litigation. As such, the district court correctly dismissed this case sua sponte because it had no jurisdiction to review the decisions of another federal district court judge or of this court; the claims are barred by res judicata; and Klayman was not entitled to injunctive relief because he had adequate, if unsuccessful, remedies at law.

First, the district court correctly dismissed this case because it lacked jurisdiction. "A federal district court lacks jurisdiction to review decisions of other federal courts." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006); *see also Partington v. Houck*, 2014 WL 5131658, at *1 (D.C. Cir. Oct. 3, 2014) ("The district court correctly held that it lacked authority to declare void a decision of this court."); *Mullis v. U.S. Bankr. Ct. for the Dist. of Nev.*, 828 F.2d 1385, 1392-93 (9th Cir. 1987) ("To allow a district court to grant injunctive relief against a bankruptcy court or the district court in the underlying bankruptcy case would be to permit, in effect, a 'horizontal appeal' from one district court to another or even a 'reverse review' of a ruling of the court of appeals by a district court. Such collateral

attacks on the judgments, orders, decrees or decisions of federal courts are improper."). As explained above, because the bases for the constitutional violations Klayman alleges are decisions made in separate legal proceedings by other district court judges, which have been affirmed by this court, adjudication of the instant case would necessarily involve review of the "decisions of other federal courts," *Smalls*, 471 F.3d at 192, and granting Klayman the relief he requests would "void a decision of this court," *Partington*, 2014 WL 5131658, at *1. Thus, the district court lacked jurisdiction over Klayman's claims.[3]

Second, for similar reasons, Klayman's claims would be barred by issue preclusion, a form of res judicata also known as collateral estoppel. *Allen v. McCurry*, 449 U.S. 90, 94 n.5 (1980). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* at 94. Moreover, "once an *issue* is raised and

[3] Klayman argues that Federal Rule of Civil Procedure 60(d)(1) grants the district court in the instant case the power to review and vacate the decisions of the district court and this court in *Judicial Watch I*. Rule 60(d)(1), however, merely makes clear that Rule 60 "*does not limit a court's power* to . . . entertain an independent action to relieve a party from a judgment, order or proceeding." Fed. R. Civ. P. 60(d)(1) (emphasis added). It does not affirmatively grant the courts any authority. Klayman cites no authority, nor are we aware of any, in which a litigant was allowed to collaterally attack another federal court's judgment under Rule 60(d)(1). As discussed above, such use of Rule 60(d)(1) is foreclosed by *Celotex* and related decisions of this court.

determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992). Klayman was a party to *Judicial Watch I* and *Judicial Watch II*, and he now seeks to relitigate issues that were raised and decided in that litigation. Therefore, his claims would be barred by res judicata.

Finally, this case was properly dismissed on the independent ground that Klayman had an adequate remedy at law and was therefore not entitled to injunctive or declaratory relief. It "is the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37 (1971); *see also Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.6 (D.C. Cir. 2006) ("The general rule is that injunctive relief will not issue when an adequate remedy at law exists."). Klayman's right to appeal in *Judicial Watch I* and *Judicial Watch II* and to petition for review in the Supreme Court provided a remedy at law adequate to address any errors in the district courts' judgments. *See Wilson v. Schnettler*, 365 U.S. 381, 385 (1961) (holding that the "petitioner ha[d] a plain and adequate remedy at law" by "an appeal to the Supreme Court of [his] State, and a right if need be to petition for 'review by [the Supreme Court]' "). Because he had an adequate remedy at law, Klayman was not entitled to the equitable relief he sought in this case. *Id.*; *see also Banks v. Office of Senate Sergeant-At-Arms & Doorkeeper of U.S.*

*Senate*, 471 F.3d 1341, 1344 (D.C. Cir. 2006) ("We do not grant mandamus relief for the same reason: the appellant has an adequate remedy at law and may appeal the contested decision following a final judgment.").

IV.

The district court properly denied Klayman's request for a change of venue. Because two of the named defendants sit as judges on the United States District Court for the District of Columbia, Klayman argues that all the judges of that court should have been recused or disqualified on the basis that their "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). He further argues that because every judge of the district court should have been recused or disqualified, his complaint should have been transferred to another judicial district. First, the mere fact that this case challenges rulings made by other judges of the same court would not "lead a reasonable, informed observer to question the District Judge's impartiality." *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001). Moreover, Klayman cites no authority for the proposition that recusal or disqualification of all judges in a judicial district is a basis for transfer of venue.

V.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

**United States Court of Appeals**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 21-5269** **September Term, 2022**

1:21-cv-02473-CRC

**Filed On: October 4, 2022**

Larry Elliott Klayman,

Appellant

v.

Neomi Rao, Hon., et al.,

Appellees

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**BEFORE**: Higginson*, Erickson**, and Sack***, Circuit Judges

**ORDER**

Upon consideration of the motion to set aside the order of October 11, 2022, dismissing appellant's petition for rehearing en banc, it is

**ORDERED** that the motion be denied. Appellant has cited no authority that would permit the court to

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* Of the Fifth Circuit, sitting by designation.

** Of the Eighth Circuit, sitting by designation.

*** Of the Second Circuit, sitting by designation.

transfer this appeal to another circuit for consideration of a petition for rehearing en banc.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **LARRY E. KLAYMAN**,<br>Plaintiff,<br>v.<br>**THE HONORABLE NEOMI RAO**, et al.,<br>Defendants. | Case No. 21-cv-02473 (CRC) |

**MEMORANDUM OPINION**

(Filed Oct. 25, 2021)

Larry E. Klayman, proceeding *pro se*, filed this action against the judges of the U.S. Court of Appeals for District of Columbia and two judges of the U.S. District Court for the District of Columbia, alleging violations of his rights under the Due Process Clause and the First Amendment. The claimed "unconstitutional and illegal actions" of the defendants occurred during the course of two prior related cases involving Klayman, Klayman et al. v. Judicial Watch, Inc., et al., No. 06-cv-670 (D.D.C.) ("Judicial Watch I") and Klayman et al. v. Judicial Watch, Inc., et al., No. 19-7105 (D.C. Cir.) ("Judicial Watch Appeal"). See Compl. ¶¶ 23-24. For the reasons explained below, this Court will dismiss this action *sua sponte*. Klayman's claims are barred in their entirety, either by absolute judicial immunity or by collateral estoppel, and this Court lacks jurisdiction to grant any of the relief Klayman seeks.

## I. Background

### A. Prior Litigation

This case arises from an earlier lawsuit between Klayman and the organization he founded in 1994, Judicial Watch. In short, Klayman left the helm of Judicial Watch in 2003. The relationship between Klayman and the organization then deteriorated further, leading to a series of lawsuits that have now spanned nearly 20 years.

#### *1. Judicial Watch I*

In 2003, after his resignation from Judicial Watch, Klayman sued the organization asserting breach of his severance agreement and violations of the Lanham Act. Judicial Watch responded with counterclaims of the same variety. See Klayman v. Jud. Watch, Inc., 6 F.4th 1301, 1307-09 (D.C. Cir. 2021). This litigation proceeded before The Honorable Colleen Kollar-Kotelly for approximately sixteen years. Compl. ¶ 24. During the proceedings, Klayman filed numerous discovery and pretrial motions, including five motions for Judge Kollar-Kotelly's recusal. See Judicial Watch I, 6-cv-670-CKK, ECF Nos. 298, 345, 414, 587, 606 (recusal motions); ECF Nos. 76, 126, 146, 156, 226, 275. (motions to quash subpoenas, discovery motions, and motion for partial summary judgment). Judge Kollar-Kotelly granted partial summary judgment to Judicial Watch. Id., ECF Nos. 318, 319. The remainder of Klayman's claims and Judicial Watch's counterclaims were presented to a jury, which returned a $2.3 million

dollar verdict against Klayman. Judicial Watch I, No. 6-cv-670-CKK, 2019 WL 1244079, at *31 (D.D.C. Mar. 18, 2019). Klayman filed several motions under Rules 50, 59, and 60 to alter the judgment, to grant a new trial, and for relief from judgment, all of which were unsuccessful. See Docket, No. 6-cv-670-CKK, ECF Nos. 571, 587, 603, 604, 608.

*2. Appeal of Judicial Watch I & Judicial Watch II*

In August 2019, after Judge Kollar-Kotelly denied Klayman's post-trial motions and his motion to reconsider those rulings, Klayman appealed to the D.C. Circuit. See No. 6-cv-670-CKK, ECF No. 613 (D.C. Cir. Case No. 19-7105). He also filed a motion in the district court to stay enforcement of the judgment pending appeal, which was denied. Id., ECF No. 609, 614.

Simultaneously, Klayman filed a separate action seeking relief from the judgment against him under Rule 60. Klayman v. Judicial Watch, Inc., No. 19-cv-02604, 2021 WL 602900 at *2 (D.D.C) ("Judicial Watch II"). Klayman sought vacatur of the Judicial Watch I judgment. Id. at *5. The case was assigned to The Honorable Tanya S. Chutkan, whom Klayman also names as a defendant in the present lawsuit. Judge Chutkan initially stayed the matter pending the outcome of Klayman's appeal, but then dismissed the action *sua sponte* in February 2021, finding that he had failed to state a claim for relief under Rule 60(b) or (d), and failed to plead facts supporting his allegation of fraud

on the court. Id. at *7-10. Klayman appealed that decision, and the D.C. Circuit affirmed without argument in June 2021. See Docket, No. 19-cv-02604 (TSC) (D.D.C), ECF No. 14; Docket, No. 21-5076 (D.C. Cir.), Document # 1904268 (June 29, 2021) (unpublished disposition).

On July 30, 2021, the D.C. Circuit issued its opinion in the original Judicial Watch Appeal. See Klayman, 6 F.4th at 1301. Klayman raised a host of issues before the Court of Appeals, including challenges to Judge Kollar-Kotelly's pretrial and evidentiary rulings, her sanctions order, her grant of partial summary judgment to Judicial Watch, the jury instructions she used, and her entry of judgment against him. Id. The Court of Appeals affirmed in full, finding no error in Judge Kollar-Kotelly's handling of the case. Id. at 1321. Klayman filed a petition for rehearing en banc, which was denied on September 15, 2021.

*3. Judicial Watch III*

Not a week later, Klayman filed the present action against the sixteen judges of the D.C. Circuit and Judges Kollar-Kotelly and Chutkan. Klayman alleges Judge Kollar-Kotelly "committed numerous highly prejudicial, intentional, and/or reckless manifest errors which resulted in a highly flawed and outrageous jury verdict against Mr. Klayman." Compl. ¶ 24. He claims that Judge Chutkan "collude[d]" with Judge Kollar-Kotelly to deny him "his constitutional and other legal rights." Compl. ¶ 44. And he asserts that

the D.C. Circuit "mistakenly, intentionally, and/or recklessly failed to reverse clear errors by Judge Kotelly, . . . [and] made new highly prejudicial errors of its own." Id. ¶ 27. He submits that these errors were "clear cut violations of [his] sacrosanct due process rights, as guaranteed to him under the Fifth and Fourteenth Amendments." Id. ¶ 35. Klayman also contends these alleged errors violated his First Amendment rights. Id. ¶ 63-65. As redress for these claimed injuries, Klayman seeks "judgment against each of the Defendants, jointly and severally, for declaratory and preliminarily and permanent injunctive relief." Compl. VI. He also prays that the judgment against him in Judicial Watch I be vacated, "and this matter be reheard and retried before an unbiased and neutral judge." Id. ¶ 67.

## II. Legal Standards

The Court "may *sua sponte* dismiss a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) without notice where it is patently obvious that the plaintiff cannot possibly prevail based on the facts alleged in the complaint." Rollins v. Wackenhut Servs., Inc., 703 F.3d 122, 127 (D.C. Cir. 2012) (internal quotation marks omitted); see also Baker v. Dir., U.S. Parole Comm'n, 916 F.2d 725, 726 (D.C. Cir. 1990) (to do otherwise would "lead to a waste of judicial resources . . . in cases where the plaintiff has not advanced a shred of a valid claim"); Best v. Kelly, 39 F.3d 328, 330-31 (D.C. Cir. 1994) (a court may *sua sponte* dismiss a complaint under Rule 12(b)(6) when a complaint is "legally frivolous").

A complaint fails to state a claim upon which relief may be granted if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). When considering dismissal under Rule 12(b)(6), the Court "assume[s] the truth of all material factual allegations in the complaint and construe[s] the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged." Am. Nat'l Ins. Co. v. F.D.I.C., 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks omitted). Additionally, a court may take judicial notice of other court proceedings and the records from those proceedings. See Luke v. United States, No. 13-cv-5169, 2014 WL 211305, at *1 (D.C. Cir. Jan. 13, 2014) (citing Dupree v. Jefferson, 666 F.2d 606, 608 n.1 (D.C. Cir. 1981)). Further, "when jurisdictional questions arise in a suit, courts are obligated to consider [those issues] sua sponte." Worley v. Islamic Republic of Iran, 75 F. Supp. 3d 311, 323 (D.D.C. 2014).

Although *pro se* complaints are "held to less stringent standards than formal pleadings drafted by lawyers," they must still "plead factual matter that permits the court to infer more than the mere possibility of misconduct." Abdelfattah v. U.S. Dep't of Homeland Sec., 787 F.3d 524, 533 (D.C. Cir. 2015) (citations omitted).[1] "Likewise, although a pro se complaint must

[1] The D.C. Circuit has not yet decided whether the more liberal reading applies to a complaint "when the *pro se* plaintiff is a practicing lawyer like Klayman." Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014). The Court need not reach that question here because it would dismiss the case even under the

be construed liberally, the complaint must still present a claim on which the Court can grant relief." Smith v. Scalia, 44 F. Supp. 3d 28, 36 (D.D.C. 2014) (internal quotation marks omitted).

## III. Analysis

### A. Judicial Immunity

"Judges enjoy absolute judicial immunity from suits for money damages for all actions taken in the judge's judicial capacity, unless these actions are taken in the complete absence of all jurisdiction." Sindram v. Suda, 986 F.2d 1459, 1460 (D.C. Cir. 1993). Judicial immunity "extends even to actions that are allegedly malicious or corrupt." Sibley v. Roberts, 224 F. Supp. 3d 29, 37 (D.D.C. 2016); see also Mireles v. Waco, 502 U.S. 9, 11 (1991) ("Judicial immunity is not overcome by allegations of bad faith or malice."). Put simply, the only remedy for a judge's alleged past mishandlings of a case is "an appeal . . . not a lawsuit against the judge[]." Smith, 44 F. Supp. 3d at 42.[2]

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most generous reading of the complaint. Id.; see also Richards v. Duke Univ., 480 F. Supp. 2d 222, 235 (D.D.C. 2007).

[2] See, also, e.g., Moore v. Burger, 655 F.2d 1265, 1266 (D.C. Cir. 1981) (affirming *sua sponte* dismissal of complaint against the justices of the Supreme Court); Jafari v. United States, 83 F. Supp. 3d 277, 278 (D.D.C. 2015) (dismissing *sua sponte* a claim against the judges of the Fourth Circuit under the Federal Tort Claims Act as barred by judicial immunity); Yi Tai Shao v. Roberts, No. CV 18-1233 (RC), 2019 WL 249855, at *11 (D.D.C. Jan. 17, 2019), aff'd sub nom. Shao v. Roberts, No. 19-5014, 2019 WL 3955710 (D.C. Cir. July 31, 2019) (*sua sponte* dismissing claims

Klayman does not seek money damages in his complaint. See Compl. IV. However, each of the acts that Klayman claims violated his rights are *past* judicial decisions of the defendants. For example, he claims Judge Kollar-Kotelly violated his Due Process rights during Judicial Watch I by, among other things, "[a]llowing highly prejudicial, inflammatory statements and an irrelevant court order into evidence, in contradiction of . . . the Federal Rules of Evidence," "grant[ing] partial summary judgment to Judicial Watch with regard to Mr. Klayman's (1) Lanham Act claims, (2) rescission claim, and (3) defamation claims," failing to provide certain jury instructions, failing to remit the award against him, and "[e]ntering judgment on the jury verdict" against him. Compl. ¶ 24(a)-(i). He further contends that the judges of the D.C. Circuit compounded these errors by affirming the jury verdict and denying his petition for rehearing en banc. Compl. ¶¶ 27, 33, 36.

A lawsuit challenging the past decisions of judges taken in their judicial capacities is barred by judicial immunity. See Smith, 44 F. Supp. 3d at 40 ("[J]udges are absolutely immune from lawsuits predicated on acts taken in their judicial capacity.") (citing Forrester v. White, 484 U.S. 219, 225 (1988)); see also Caldwell v. Kagan, 777 F. Supp. 2d 177, 179 (D.D.C.), aff'd, 455 F. App'x 1 (D.C. Cir. 2011) ("Plaintiff's claims against the district and court of appeals judges are patently frivolous because federal judges are absolutely immune

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for money damages against two California judges as barred by judicial immunity).

from lawsuits predicated, as here, for their official acts."). The rationale that dictates judicial immunity from damages also "dictate[s] that immunity be conferred in suits . . . in which a party seeks an injunction compelling a judge to alter an earlier decision." Lewis v. Green, 629 F. Supp. 546, 553 (D.D.C. 1986). "While courts do distinguish between equitable and monetary relief in this context, it is well established that judicial immunity bars claims . . . for retrospective declaratory relief of a violation of federal law." Jenkins v. Kerry, 928 F. Supp. 2d 122, 135 (D.D.C. 2013) (citing Green v. Mansour, 474 U.S. 64, 73 (1985)).

Klayman's claims are therefore barred by absolute judicial immunity, and he "thus fails to state a claim upon which relief may be granted." Caldwell, 455 F. App'x 1.

B. Declaratory and Injunctive Relief.

Even if judicial immunity did not apply, this Court does not have the power to grant the type of relief Klayman seeks. The Court therefore lacks subject matter jurisdiction over his claims.

This Court lacks subject matter jurisdiction when a matter does not present a "case or controversy" within the meaning of Article III. Medelius Rodriguez v. U.S. Citizenship & Immigr. Serv., 605 F. Supp. 2d 142, 145 (D.D.C. 2009); see Cherry v. F.C.C., 641 F.3d 494, 497 (D.C. Cir. 2011) ("Article III standing is a jurisdictional requirement that cannot be waived by the parties."). To demonstrate a redressable injury for the

purpose of Article III standing, a plaintiff "must show in the first instance that the court is capable of granting the relief they seek." McNeil v. Harvey, No. CV 17-1720 (RC), 2018 WL 4623571, at *5 (D.D.C. Sept. 26, 2018); see also Swan v. Clinton, 100 F.3d 973, 976 (D.C. Cir. 1996) ("redressability" includes the question of "whether a federal court has the power to grant [the plaintiff's requested] relief").

As noted above, Klayman seeks a declaratory judgment as well as preliminary and permanent injunctive relief against the defendants, who are sitting federal judges of the D.C. Circuit Court of Appeals and District Court for the District of Columbia. A request for injunctive and declaratory relief may not be barred by judicial immunity in all instances. See Pulliam v. Allen, 466 U.S. 522, 540 (1984). Here, however, Klayman seeks a judgment declaring the past judicial decisions of the defendants illegal and an order vacating the prior judgment against him. Even if Klayman could establish his entitlement to such relief, neither this Court nor any other federal district court would have the power to grant it.

It is "axiomatic that a lower court may not order the judges or officers of a higher court to take an action." In re Marin, 956 F.2d 339, 340 (D.C. Cir. 1992). "[I]t is also well established that federal district courts do not have jurisdiction to reconsider decisions of other federal courts." Yi Tai Shao, 2019 WL 249855, at *14. This Court "is a trial level court in the federal judicial system," and therefore "generally lacks appellate jurisdiction over other judicial bodies, and cannot exercise

appellate mandamus over other courts." United States v. Choi, 818 F.Supp.2d 79, 85 (D.D.C. 2011). Accordingly, "[t]his Court cannot compel . . . other Article III judges in this or other districts or circuits to act." Sibley v. U.S. Supreme Ct., 786 F. Supp. 2d 338, 345 (D.D.C. 2011); see also Sanders v. United States, 184 F. App'x 13, 14 (D.C. Cir. 2006); Lewis, 629 F. Supp. at 553 (district court lacks the authority to compel another district court to vacate an earlier decision).

As a federal district court, this Court lacks the power to void other federal courts' orders through a collateral attack. "[It] is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995). The relief Klayman seeks—vacatur of the prior award against him and an injunction against the judges of the D.C. Circuit—is simply not relief this Court has the power to grant.

Klayman's request for a declaratory judgment fares no better. "Declaratory relief against a judge for final actions taken within his or her judicial capacity is . . . available by way of direct appeal of the judge's order." Jenkins, 928 F. Supp. 2d at 135; see also Lewis, 629 F. Supp. at 553 ("Challenges to rulings made during the course of judicial proceedings should be made by appeal in those cases."). Because "declaratory relief against a judge for final actions taken within his or her judicial capacity is . . . available by way of a direct appeal of the judge's order," parties cannot seek "a

declaratory judgment challenging a ruling in a separate action." Sibley, 224 F. Supp. 3d at 38.[3] Such suits are "improper collateral attacks." Id.; see also McNeil, 2018 WL 4623571, at *5 ("Federal district courts lack the power to void other federal courts' orders through a collateral attack."). To obtain the declaratory judgment Klayman seeks, his path was an appeal to the D.C. Circuit, and following that, a petition for writ of certiorari to the Supreme Court.[4] This Court is not on that path, so there is nothing this Court can do that would redress Klayman's claimed injuries.

Klayman was certainly aware of this Court's inability to grant him the equitable relief he seeks when he filed this complaint, because the D.C. Circuit has informed him of this principle not once, but twice. In 2012, Klayman sued Judge Kollar-Kotelly while the Judicial Watch I litigation was still in progress. The Honorable Richard J. Leon dismissed the complaint, and the D.C. Circuit affirmed, stating "this court has

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[3] Klayman's request for a declaratory judgment would fail on the merits anyway. "A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act." Klayman v. Blackburne-Rigsby, No. CV 21-0409 (ABJ), 2021 WL 2652335, at *3 (D.D.C. June 28, 2021). Here, Klayman seeks a declaratory judgment about the past acts of the defendants; he identifies no ongoing or future violation of his rights, so his request for a declaratory judgment must therefore fail. And "the Declaratory Judgment Act neither expands a court's jurisdiction nor creates new substantive rights." Thomas v. Wilkins, 61 F. Supp. 3d 13, 21 (D.D.C. 2014).

[4] The complaint indicates Klayman has not yet filed a certiorari petition, but that he intends do so in the future. Compl. ¶ 36.

concluded that one district court does not have jurisdiction to review the decisions of another district court or federal appellate court." Klayman v. Kollar-Kotelly, No. 12-5340, 2013 WL 2395909, at *1 (D.C. Cir. May 20, 2013). And, in its affirmance of Judge Chutkan's decision dismissing his complaint in Judicial Watch II, the D.C. Circuit explained once again that a "district court . . . lacks jurisdiction to vacate prior orders of another district court." Klayman v. Jud. Watch, Inc., 851 F. App'x 222 (D.C. Cir. 2021).

Accordingly, Klayman has failed to demonstrate a redressable injury for the purpose of Article III standing because this Court lacks the power to grant the relief he seeks.

C. Res Judicata

Even if Klayman was able overcome the jurisdictional bars described above, his claims would be barred by *res judicata*.

"The doctrine of res judicata prevents repetitious litigation involving the same causes of action or the same issues." I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co., 723 F.2d 944, 946 (D.C. Cir. 1983). A final judgment on the merits of an action "precludes the parties or their privies from relitigating claims that were or could have been raised in that action." Barroca v. Hurwitz, 342 F. Supp. 3d 178, 195 (D.D.C. 2018) (internal quotation marks omitted).

"Res judicata has two distinct aspects—claim preclusion and issue preclusion (commonly known as collateral estoppel)—that apply in different circumstances and with different consequences to the litigants." Sheppard v. District of Columbia, 791 F. Supp. 2d 1, 4 (D.D.C. 2011). "Under issue preclusion or collateral estoppel, 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" Id. at 5 (quoting Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992)). Therefore, "issue preclusion prevents the relitigation of any issue that was raised and decided in a prior action," even if one party to the original action is not a party to the present suit. Ficken v. Golden, 696 F. Supp. 2d 21, 32 (D.D.C. 2010); see also Novak v. World Bank, 703 F.2d 1305, 1309 (D.C. Cir. 1983) (noting that the Supreme Court has "virtually eliminated the mutuality requirement for collateral estoppel").

The D.C. Circuit has held that *res judicata* may be raised by a district court *sua sponte* "because of the policy interest in avoiding unnecessary judicial waste." Jenson v. Huerta, 828 F. Supp. 2d 174, 179 (D.D.C. 2011); see also Stanton v. D.C. Ct. of Appeals, 127 F.3d 72, 77 (D.C. Cir. 1997) ("As res judicata belongs to courts as well as to litigants, even a party's forfeiture of the right to assert it . . . does not destroy a court's ability to consider the issue sua sponte.").

There can be no doubt that the issues Klayman raises in this complaint have already been raised and

decided in Judicial Watch I. Although Klayman styles his suit as one to vindicate a deprivation of his due process rights, his specific allegations of wrongdoing all stem from previously adjudicated judicial decisions of either the district or appellate court. For example, he challenges Judge Kollar-Kotelly's evidentiary rulings and jury instructions in Judicial Watch I, Compl. ¶¶ 24-26, and the D.C. Circuit's affirmance of those rulings on appeal, Compl. ¶¶ 27-29. Klayman alleges that he set forth all these errors "in detail" in his opening and reply brief before the D.C. Circuit in the Judicial Watch Appeal. Compl. ¶¶ 24-25. He attaches those briefs as exhibits to his complaint, along with his petition for rehearing. Id., Ex. 1, 2.

These issues have been fully litigated to a final judgment on the merits. In the Judicial Watch I appeal the D.C. Circuit considered, and rejected, each of the issues Klayman now raises in his complaint. For example:

- Klayman alleges Judge Kollar-Kotelly erred by "[e]ntering an overly broad, draconian sanctions order" against him. Compl. ¶ 24(b). The D.C. Circuit held Judge Kollar-Kotelly "did not abuse [her] discretion when [she] sanctioned Klayman." Klayman, 6 F.4th at 1311; see also id. at 1313 ("[T]he district court did not abuse its discretion when it sanctioned Klayman for his inadequate pretrial statement.").
- Klayman claims Judge Kollar-Kotelly violated the Constitution when she granted

partial summary judgment to Judicial Watch. Compl. ¶¶ 24(c), (d). The D.C. Circuit considered this issue *de novo*, 6 F.4th at 1314, and affirmed the grant of partial summary judgment on each of the relevant claims and Judicial Watch's counterclaim. Id. at 1314-17.

- Klayman asserts Judge Kollar-Kotelly instructed the jury erroneously. Compl. ¶¶ 24(e), (g). The D.C. Circuit found no error in the instructions provided, and that the district court correctly refused to give the "outlandish" instructions Klayman sought. 6 F.4th at 1318-20.

- Klayman additionally challenges the verdict against him and Judge Kollar-Kotelly's failure to remit the damages award. Compl. ¶¶ 24(h)-(i). The D.C. Circuit affirmed the judgment in all respects. 6 F.4th at 1320-21.

Klayman also claims Judge Chutkan "acted in concert to deny Mr. Klayman his constitutional and other legal rights" based on her decision to dismiss his complaint in Judicial Watch II. Compl. ¶ 44. This decision has also been affirmed by the D.C. Circuit on appeal. See Klayman, 851 F. App'x 222.

It is clear, then, that the issues outlined in Klayman's complaint have already been "raised and decided in a prior action," Ficken, 696 F. Supp. 2d at 32, and Klayman is therefore precluded from relitigating them here, Sheppard, 791 F. Supp. 2d at 5. Given this Court's interest in "conserve[ing] judicial resources, avoid[ing] inconsistent results, engender[ing] respect

for judgments of predictable and certain effect, and prevent[ing] serial forum-shopping and piecemeal litigation," id., the Court sees it fit to invoke issue preclusion *sua sponte* in this instance.

D. Failure to State a Claim

Klayman's complaint must also be dismissed for the independent reason that it fails to state a claim for relief. As described above, a court may *sua sponte* dismiss a complaint under Rule 12(b)(6) when a complaint is "legally frivolous," or as factually frivolous when the allegations are "fanciful." Best, 39 F.3d at 330-31. Litigants must "plead factual matter that permits the court to infer more than the mere possibility of misconduct." Abdelfattah v. U.S. Dep't of Homeland Sec., 787 F.3d 524, 533 (D.C. Cir. 2015).

Klayman brings three counts. He alleges the defendants denied him "meaningful and actual access to the courts to litigate his claims" in violation of his right to Due Process under the Fifth and Fourteenth Amendments. Compl. ¶¶ 35, 50-55, 56-61 (Counts I & II). He also avers that the decisions against him were designed to bankrupt him and thereby shield the defendants from his criticism, in violation of the First Amendment. Compl. ¶¶ 62-67 (Count III).

Aside from recounting the tortuous history of this litigation, Klayman provides astonishingly few factual allegations in support of these causes of action. He alleges that the three judges presiding over the Judicial Watch I appeal, Judges Rao, Wilkins, and Silberman,

colluded with Judge Kollar-Kotelly and that the opinion issued by the panel "was an attempt [by Judge Rao] to protect a fellow female jurist." Compl. ¶ 27. He also claims the en banc court "simply rubber-stamped" the opinion because his petition for rehearing was denied in eleven days. Compl. ¶¶ 38-41. Finally, Klayman maintains that these decisions were motivated by "personal animus and dislike for Mr. Klayman," which he claims is a result of his highly critical book about the D.C. Circuit. Compl. ¶ 45.

The Court "does not have to accept asserted inferences or conclusory allegations that are unsupported by facts set forth in plaintiff's complaint." Richards, 480 F. Supp. 2d at 235. Allegations "need only be accepted to the extent that 'they plausibly give rise to an entitlement to relief.'" Baker v. Gurfein, 744 F. Supp. 2d 311, 315 (D.D.C. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)). Klayman's allegations of collusion and judicial bias are "so attenuated and unsubstantial as to be absolutely devoid of merit." Hagans v. Lavine, 415 U.S. 528, 536 (1974). Thus, even assuming the truth of these allegations, it is "patently obvious" that Klayman has not stated a claim under either the Due Process Clause or the First Amendment. Baker, 916 F.2d at 727.

E. Motion to Transfer Venue

Finally, Klayman has moved to transfer this case to an "unbiased and impartial venue," Mot. to Transfer

at 1, ECF No. 4.[5] He proposes either the U.S. District Court for the Northern District of Texas or the U.S. District Court for the Southern District of Florida, both locations where Klayman is admitted to practice. Id. The Court will deny the motion.

Although "the interest[s] of justice generally require transferring a case to the appropriate judicial district in lieu of dismissal," Abraham v. Burwell, 110 F. Supp. 3d 25, 30 (D.D.C. 2015), dismissal "is often appropriate when the outcome is foreordained . . . or the complaint has serious substantive problems," Fam v. Bank of Am. NA (USA), 236 F. Supp. 3d 397, 409 (D.D.C. 2017) (internal quotation marks omitted). Examples of cases where dismissal is appropriate include "cases where the plaintiff's claims would be procedurally barred by res judicata . . . or [if] transfer would be futile." Id. at 410; see also Lemon v. Kramer, 270 F. Supp. 3d 125, 140 (D.D.C. 2017) (dismissing rather than granting transfer where the complaint failed to state a claim). Because of the "obvious substantive problems" with Klayman's complaint, outlined above, the Court finds that transfer is not warranted. Id.

Furthermore, Klayman has not established that transfer to the venues he suggests would be proper. Under 28 U.S.C. § 1404(a), a district court "may transfer any civil action to any other district or division

[5] Klayman requested similar relief in this complaint. See Compl. ¶ 49; see also Docket, No. 21-cv-02473 (D.D.C), ECF No. 2 ("Mr. Klayman . . . respectfully requests that this case be transferred to a neutral jurisdiction, as set forth in his Pro Se Complaint.").

*where it might have been brought*." (emphasis added). This action likely could *not* have been brought in either the Southern District of Florida or the Northern District of Texas, because nothing in the complaint or in Klayman's transfer motion suggests that those courts would have personal jurisdiction over the defendants, whom Klayman alleges are all citizens of the District of Columbia. See Compl. ¶¶ 4-21. None of the events alleged in the complaint occurred anywhere besides the District of Columbia. See 28 U.S.C. § 1391(b), (e)(1). Accordingly, venue would not be proper in the districts Klayman proposes, and this Court cannot transfer the case to an improper venue. See Hoffman v. Blaski, 363 U.S. 335, 343 (1960); Lamont v. Haig, 590 F.2d 1124, 1132 (D.C. Cir. 1978) (a prerequisite to transfer under § 1404(a) is proper venue "in the transferee district with respect to every defendant and each claim for relief"); Pinson v. U.S. Dep't of Just., 74 F. Supp. 3d 283, 295 (D.D.C. 2014) (declining to transfer case "because the transferee district might assert that it lacks personal jurisdiction" over federal defendants sued in their individual capacities).

Klayman additionally requests transfer under 28 U.S.C. § 455, which provides for the disqualification of a judge under certain circumstances. Mot. for Transfer at 3. Klayman alleges partiality on account of the fact that the undersigned is a member of the Court where two of the named defendants also sit as judges. This allegation is not enough to lead a "reasonable, informed observer" to question the impartiality of the

undersigned. United States v. Microsoft Corp., 253 F.3d 34, 115 (D.C. Cir. 2001).

"Judicial impartiality is presumed." First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir. 2000). Recusal is warranted only if a "reasonable and informed observer would question the judge's impartiality." United States v. Cordova, 806 F.3d 1085, 1092 (D.C. Cir. 2015). Said reasonable observer "must assume that judges are ordinarily capable of setting aside their own interests and adhering to their sworn duties to faithfully and impartially discharge and perform all duties incumbent upon them." Armenian Assembly of Am., Inc. v. Cafesjian, 783 F. Supp. 2d 78, 91 (D.D.C. 2011) (internal quotation marks omitted). Therefore, "conclusory, unsupported or tenuous allegations" are insufficient for recusal. In re Kaminski, 960 F.2d 1062, 1065 n.3 (D.C. Cir. 1992).

Klayman has not provided anything beyond "conclusory, unsupported or tenuous allegations" of bias. Id. He has not provided evidence of "an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute," Osei v. Standard Chartered Bank, No. CV 18-1530 (RC), 2019 WL 917998, at *4 (D.D.C. Feb. 25, 2019), aff'd sub nom. Akwasi Boakye Osei v. Standard Chartered Bank, No. 19-7018, 2019 WL 2563460 (D.C. Cir. June 4, 2019), or, as would be necessary under 28 U.S.C. § 455(b)(1), actual "evidence of the judge's extra-judicial conduct or statements that are plainly inconsistent with his responsibilities as an impartial decisionmaker." Jenkins

v. Sterlacci, 849 F.2d 627, 634 (D.C. Cir. 1988). In fact, Klayman points to nothing besides the undersigned's status as a judge of this Court. This is plainly not enough. Accordingly, the Court will deny his motion for transfer of venue.

## IV. Conclusion

As the voluminous record of court proceedings shows, Mr. Klayman has had ample opportunity to litigate his dispute with Judicial Watch. And he has done so vigorously. His lack of success does not work a violation of his constitutional rights, however. Nor does it offer a ticket back to this Court. "Regardless of how the plaintiff seeks to characterize his challenge, he is asking this Court to do nothing other than second-guess an order issued by another judge on this Court, which this Court cannot do." Sibley, 224 F. Supp. 3d at 38.

For the foregoing reasons, the Court will dismiss Klayman's suit, in its entirety, with prejudice. A separate Order will follow.

[SEAL]

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: October 25, 2021

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **LARRY E. KLAYMAN**, Plaintiff, v. **THE HONORABLE NEOMI RAO**, et al., Defendants. | Case No. 21-cv-02473 (CRC) |

**ORDER**

(Filed Oct. 25, 2021)

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

**ORDERED** that [4] Plaintiff's Motion to Transfer Case and for Issuance of Summons is DENIED. It is further

**ORDERED** that this case is DISMISSED WITH PREJUDICE for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

This is a final appealable order.

**SO ORDERED.**

[SEAL]

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: October 25, 2021

**United States Court of Appeals**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 21-5269** **September Term, 2022**

1:21-cv-02473-CRC

**Filed On**: October 11, 2022

Larry Elliott Klayman,

Appellant

v.

Neomi Rao, Hon., et al.,

Appellees

**ORDER**

Appellant's complaint filed on September 21, 2021, in the United States District Court for the District of Columbia named as defendants all the judges sitting on this court at that time. Accordingly this appeal was assigned to three judges from the United States Court of Appeals for the Fifth, Eighth, and Second Circuits, sitting by designation. By opinion and judgment filed September 9, 2022, the panel sitting by designation affirmed the district court's order filed October 25, 2021. Appellant filed a petition for rehearing en banc. Upon consideration of appellant's petition for rehearing en banc, and there being no judges of this court available to constitute an en banc court, it is

**ORDERED** that the petition for rehearing en banc be dismissed.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

LARRY KLAYMAN
7050 W. Palmetto Park Rd
Boca Raton FL 33433

Plaintiff,

v.

HON. NEOMI RAO
c/o 333 Constitution Ave
Washington DC 20001

and

HON. ROBERT L. WIKLINS
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON.
LAURENCE H. SILBERMAN
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON.
COLLEEN KOLLAR-KOTELLY
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. TANYA S. CHUTKAN
c/o 333 Constitution Ave NW
Washington DC 20001

and

**COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF**

(Filed Sep. 21, 2021)

HON. SRI SRINIVASAN
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON.
KAREN LECRAFT HENDERSON
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. JUDITH W. ROGERS
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. DAVID S. TATEL
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. PATRICIA A. MILLETT
c/o 333 Constitution Ave NW
Washington DC 20001

And

HON. CORNELIA T.L. PILLARD
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. GREGORY G. KATSAS
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. JUSTIN R. WALKER
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON.
KETANJI BROWN JACKSON
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. HARRY T. EDWARDS
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. DOUGLAS H. GINSBURG
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. DAVID B. SENTELLE
c/o 333 Constitution Ave NW
Washington DC 20001

and

HON. A. RAYMOND RANDOLPH
c/o 333 Constitution Ave NW
Washington DC 20001

Defendants.

## I. INTRODUCTION

Plaintiff LARRY KLAYMAN ("Mr. Klayman") brings this action against HON. NEOMI RAO, HON. ROBERT L. WIKLINS, HON. LAURENCE H.

SILBERMAN, HON. COLLEEN KOLLAR-KOTELLY, HON. TANYA S. CHUTKAN, HON. SRI SRINIVASAN, HON. KAREN LECRAFT HENDERSON, HON. JUDITH W. ROGERS, HON. DAVID S. TATEL, HON. PATRICIA A. MILLETT, HON. CORNELIA T.L. PILLARD, HON. GREGORY G. KATSAS, HON. JUSTIN R. WALKER, HON. KETANJI BROWN JACKSON, HON. HARRY T. EDWARDS, HON. DOUGLAS H. GINSBURG, HON. DAVID B. SENTELLE, and HON. A. RAYMOND RANDOLPH for injunctive and other equitable relief for egregious and blatant violations of his constitutional and other legal rights.

## II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction).

2. Venue is proper pursuant to 18 U.S.C. § 1965 and 28 U.S.C. § 1391(b)(2), (3) a substantial part of the events or omissions giving rise to the claims occurred in this judicial district and Defendants are subject to personal jurisdiction in this District.

## III. PARTIES

**Plaintiff**

3. LARRY KLAYMAN is an individual, natural person, who at all material times was and is a citizen of Florida.

**Defendants**

4. HON. NEOMI RAO ("Judge Rao") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

5. HON. ROBERT L. WILKINS ("Judge Wilkins") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

6. HON. LAURENCE SILBERMAN ("Judge Silberman") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

7. HON. COLLEEN KOLLAR-KOTELLY ("Judge Kotelly") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the U.S. District Court for the District of Columbia.

8. HON. TANYA S. CHUTKAN ("Judge Chutkan") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the U.S. District Court for the District of Columbia.

9. HON. SRI SRINIVASAN ("Judge Srinivasan") is on information and belief an individual and a citizen of the District of Columbia. He is the Chief Judge of the D.C. Circuit).

10. HON. KAREN LECRAFT HENDERSON ("Judge Henderson") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the D.C. Circuit.

11. HON. JUDITH W. ROGERS ("Judge Rogers") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the D.C. Circuit.

12. HON. DAVID S. TATEL ("Judge Tatel") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

13. HON. PATRICIA A. MILLET ("Judge Millet") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the D.C. Circuit.

14. HON. CORNELIA T.L. PILLARD ("Judge Pillard") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the D.C. Circuit.

15. HON. GREGORY G. KATSAS ("Judge Katsas") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

16. HON. JUSTIN R. WALKER ("Judge Walker") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

17. HON. KETANJI BROWN JACKSON ("Judge Jackson") is on information and belief an individual and a citizen of the District of Columbia. She is a judge at the D.C. Circuit.

18. HON. HARRY T. EDWARDS ("Judge Edwards") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

19. HON. DOUGLAS H. GINSBURG ("Judge Ginsburg") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

20. HON. DAVID B. SENTELLE ("Judge Sentelle") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit.

21. HON. A. RAYMOND RANDOLPH ("Judge Randolph") is on information and belief an individual and a citizen of the District of Columbia. He is a judge at the D.C. Circuit

## IV. STANDING

22. Mr. Klayman has standing to bring this action because he has been directly affected, harmed, and victimized by the unlawful conduct complained herein. His injuries are proximately related to the conduct of Defendants, each and every one of them, jointly and severally.

## V. FACTS

23. This case centers around the unconstitutional and other illegal actions of Defendants, each and every one of them, acting in concert, in not just violating their oath of office as federal judges but worse violating Mr. Klayman's rights and discriminating against him in *Klayman v. Judicial Watch, Inc., et al*, 19-7105 (D.C. Cir.) (the "Appellate Proceeding"). This case was an appeal from a case before Judge Kotelly in this Court styled *Klayman v. Judicial Watch, Inc., et al*, 06-cv-670 (D.D.C.)(the "Lower Court Proceeding").

24. During the Lower Court Proceeding, which lasted about sixteen (16) years, Judge Kotelly committed numerous highly prejudicial, intentional, and/or reckless manifest errors which resulted in a highly flawed and outrageous jury verdict against Mr. Klayman in the sum of $2.8 million dollars. This was subsequently appealed to the D.C. Circuit. These highly prejudicial and manifest errors are set forth in detail in Appellant's Initial Brief and Appellant's Reply Brief which are incorporated herein by reference. Exhibit 1. These highly prejudicial manifest errors include, but are not limited to:

a. Allowing highly prejudicial, inflammatory statements and an irrelevant court order into evidence, in contradiction of both the Federal Rules of Evidence as well as the parol evidence rule.

b. Entering an overly broad, draconian sanctions order preventing Mr. Klayman from

introducing evidence or calling witnesses at trial.

c. Usurping and extinguishing the fact-finding role of the jury, as provided for in the Seventh Amendment to the Constitution, by weighing competing affidavits to grant partial summary judgment to Judicial Watch with regard to Mr. Klayman's (1) Lanham Act claims, (2) rescission claim, and (3) defamation claims.

d. Usurping and extinguishing as provided for in the Constitution the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch.

e. Orally reading jury instructions that were erroneous, confusing, and highly prejudicial to Mr. Klayman, refusing to provide other jury instructions that would have stated the correct law and prevented the confusion, and then failing to disclose any written instructions that were provided to the jury, if any.

f. Failing to require authentication of documents submitted by Judicial Watch that purported to show "confusion" with regard to Judicial Watch's trademark infringement and related claims.

g. Failing to provide a jury instruction that a few instances of alleged confusion, notwithstanding that there were no authenticated and

admissible documentary evidence to show such confusion, do not constitute trademark infringement, in contravention of well-established case law.

h. Failing to remit the damage award based on the actions of non-parties and the false representations to the jury by witnesses and counsel for Judicial Watch.

i. Entering judgment on the jury verdict where Judicial Watch clearly failed to prove that Mr. Klayman took and used donor information owned solely by Judicial Watch, but rather was owned by American Target Advertising.

25. These highly prejudicial manifest errors are fully set forth in detail in Appellant's Initial Brief and Appellant's Reply Brief, which are attached hereto as Exhibit 1 and incorporated herein by reference.

26. Among these highly prejudicial errors were clear cut violations of Mr. Klayman's sacrosanct due process rights, as guaranteed to him under the Fifth and Fourteenth Amendments. These highly prejudicial manifest errors deprived Mr. Klayman of meaningful and actual access to the courts to litigate his claims. These highly prejudicial errors enabled Judge Kotelly to determine the outcome of Mr. Klayman's case alone, taking it out of the hands of the jury, and causing Mr. Klayman's case to be decided not on the facts and the law, but on Judge Kotelly's personal dislike for and extrajudicial bias and prejudice toward Mr. Klayman. These due process violations include, but are not limited to:

(a) Spending approximately one hour orally reading jury instructions to the jury, many of which instructions contained misstated law, and then refusing to provide documentation of any written instructions that were provided to the jury, if any. This is a due process violation on two fronts: (1) if no written jury instructions were provided to the jury, it is impossible to expect a jury of laypersons to remember and accurately apply over one hour's worth of oral instructions, which would have led to a clearly flawed jury verdict and (2) if written jury instructions were provided, Judge Kotelly's refusal to file or even provide a final copy to Mr. Klayman strongly suggests that she had something to hide in the form of inaccurate written jury instructions having been provided.

(b) Usurping and extinguishing the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch. This is a violation of Mr. Klayman's due process rights because it denied him his right to have a jury of his peers serve as the finder of fact on his claims.

(c) Entering an overly broad, draconian sanctions order preventing Mr. Klayman from introducing evidence or calling witnesses at trial, and subsequently refusing to give the jury an instruction informing them of this

> sanction, leaving the jury with the false impression that Mr. Klayman simply had no evidence or witnesses to support his claims.

27. At the D.C. Circuit, a three judge panel consisting of Judge Rao, Judge Wilkins, and Judge Silberman further compounded the highly prejudicial manifest errors of the Lower Court in fully affirming the jury verdict from the Lower Court Proceeding. In doing so, the three judge panel not only mistakenly, intentionally, and/or recklessly failed to reverse clear errors by Judge Kotelly, but it also made new highly prejudicial errors of its own. It appears that the three-judge panel's opinion, penned by Judge Rao, was an attempt to protect a fellow female jurist in Judge Kotelly of which she and the others felt a kinship.

28. It is apparent from the three judge panel's opinion that was it intended to protect Judge Kotelly, and it is likely that they were colluding with her. An egregious example is that the three judge panel, unprompted and gratuitously wrote that Judge Kotelly had done a "commendable" job in administering the case. This flies in the face of the cold, hard fact that this case took sixteen (16) years to try. This is not commendable in any way.

29. Importantly, the three judge panel clearly did not take the time in good faith to actually conduct a bona fide review of the voluminous record, as it simply ignored Mr. Klayman's well documented arguments, and completely failed to address others that showed prima facie incontrovertible error by Judge Kotelly,

such as her and their failure to account for the parol evidence rule, or her decision to grant partial summary judgment on the issue of alleged personal expenses owed to Judicial Watch, despite Mr. Klayman having provided a sworn affidavit countering each and every claimed expense, to name just a few by way of example.

30. Mr. Klayman therefore had no choice but to seek Petition for Rehearing En Banc to try to set the record straight and correct the numerous highly prejudicial manifest errors that had occurred.

31. Given the extremely voluminous record at the Lower Court level, which was unsurprising given the fact that it took sixteen (16) years to reach trial, and the fact that there were numerous highly prejudicial errors that needed to be remedied, Mr. Klayman moved for leave to file a 25-page Petition for Rehearing En Banc—a mere ten excess pages. This motion was filed on August 18, 2021.

32. This was an eminently reasonable request, given again the voluminous record and the number of issues involved, and Mr. Klayman had a good faith basis to operate under the premise that such a basic and reasonable request would be granted. However, nine days elapsed from the filing of his motion, and only on August 27, 2021 at 12:23 p.m.—the day before Mr. Klayman's Petition was due to be filed—did the D.C. Circuit rule that no additional pages would be allowed. This malicious abuse of discretion was intended to "sandbag" Mr. Klayman, compromise his rights to be

fully heard, and thus caught him off-guard and he had to scramble to prepare a 15-page Petition.

33. Mr. Klayman subsequently timely filed two versions of his Petition for Rehearing En Banc—a fully compliant 15-page version, as well as a 25-page version accompanied by a Motion for En Banc Panel to Consider 25-Page Petition for Rehearing En Banc and Motion for Reconsideration by the Full Court. These encapsulate and set forth the numerous prejudicial and manifest errors made by the three judge panel, and are attached hereto as Exhibit 2 and are incorporated herein by reference. The highly prejudicial and manifest errors by the three-judge panel include *inter alia*, but are hardly limited to:

a. Failing to reverse the Lower Court's error of letting in highly inflammatory, and completely irrelevant testimony, and completely disregarding the fact that the Lower Court ignored the parol evidence rule.

b. Failing to reverse the jury verdict with regard to Judicial Watch's trademark infringement claims, which were the result of unauthenticated inadmissible hearsay being admitted into evidence to prove likelihood of confusion, and the application of the incorrect standard necessary to show likelihood of confusion and any trademark or related infringement. In doing so, the three-judge panel admitted that there have been unreversed and precedential decisions by courts within the D.C. Circuit which have held that likelihood of confusion requires an "appreciable number of

consumers," *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980), but then still applying a much lower standard in contravention of this case law.

c. Failing to reverse the Lower Court's grant of summary judgment with regard to misuse of Mr. Klayman's likeness and being.

d. Failing to set aside the jury verdict and judgment with regard to alleged access to Judicial Watch's donor list.

j. Failing to reverse the Lower Court's usurping of and thus extinguishing the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch.

34. These highly prejudicial and manifest errors are again set forth fully in Mr. Klayman's petitions for rehearing en banc, which are attached hereto as Exhibit 2 and incorporated herein by reference.

35. Among these highly prejudicial errors were clear cut violations of Mr. Klayman's sacrosanct due process rights, as guaranteed to him under the Fifth and Fourteenth Amendments. These highly prejudicial errors deprived Mr. Klayman of meaningful and actual access to the courts to litigate his claims and extinguished his constitutional and other legal rights. These highly prejudicial errors show that the three judge

panel did not actually consider the appellate record and apply the relevant law, and make their ruling based on the facts and the law, but instead based on their personal feelings towards Mr. Klayman and their desire to protect one of their own, Judge Kotelly, as well as to harm Mr. Klayman financially with a $2.8 million dollar flawed verdict. These due process violations include, but are not limited to:

(a) Failing to reverse the jury verdict with regard to Judicial Watch's trademark infringement and related claims, which were the result of unauthenticated inadmissible hearsay being admitted into evidence to prove likelihood of confusion, and the application of the incorrect standard necessary to show likelihood of confusion. In doing so, the three judge panel admitted that there have been unreversed precedential decisions by courts in this Circuit and elsewhere which have held that likelihood of confusion requires an "appreciable number of consumers," *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980), but then still applying a much lower standard in contravention of this case law. This is a due process violation because it denies Mr. Klayman meaningful access to the appellate courts, as he presented clear, unreversed case law in his favor, which the three judge panel simply ignored.

36. Then, finally, on September 15, 2021, Mr. Klayman' s Petition for Rehearing En Banc was denied via a *per curiam* order by all of the Defendants, excluding Judge Edwards, Judge Ginsburg, Judge Sentelle,

and Judge Randolph, along with his Motion to Consider 25-Page Petition for Rehearing En Banc. This *per curiam* order contained no legal reasoning or analysis, rendering it impossible for Mr. Klayman to know what issues to address when he takes this matter up to the Supreme Court on Petition for Writ of Mandamus and/or Certiorari. By including all of the members of the three judge panel, but excluding other judges on the D.C. Circuit, in the review of Mr. Klayman's Petition for Rehearing En Banc, and the resulting per curiam order, this was intended to prejudice Mr. Klayman's right to an en Banc review of the prejudicial manifest errors and opinion of the three judge panel.

37. Pursuant to the Internal Operating Procedures of the D.C. Circuit, a vote sheet is transmitted to "all other active judges of this Court" which necessarily would have included Judge Edwards, Judge Ginsburg, Judge Sentelle, and Judge Randolph. These four Defendants are not part of the panel that denied Mr. Klayman's Petition, and therefore have abdicated their responsibility, contrary to their oath of office, to review the Petition for Rehearing En Banc and cast a vote, and thus they are also included in this complaint as defendants.

38. The fact that it only took Defendants eleven (11) business days to deny Mr. Klayman's Petition for Rehearing En Banc, despite the extremely voluminous record, clearly shows that Defendants simply "rubber stamped" the three judge panel and did not take any time to even read, review, digest, or consider Mr. Klayman's detailed and compelling arguments.

39. Indeed, it would have been impossible for the Defendants to render a decision in just eleven (11) business days if they had actually reviewed the record and considered Mr. Klayman's arguments, even assuming that they had no other cases to work on (which is obviously not the case), simply given the extremely voluminous record.

40. This is especially evident considering the fact that it took Defendants nine (9) days including weekends just to simply deny Mr. Klayman's motion for excess pages.

41. Thus, from the timing alone, it is incontrovertible that Defendants in bad faith and in severe and blatant violation of constitutional and other legal rights gave Mr. Klayman's Petition for Rehearing zero (0) consideration. This is a clear violation of Mr. Klayman's due process rights because it denies him fair, meaningful, and non-discriminatory access to the appellate system, as it is clear that the en banc panel did not actually consider his arguments, and instead simply "rubber stamped" the three judge panel's prejudicial and manifestly fatally flawed opinion.

42. Furthermore, Mr. Klayman had filed an independent action in this Court relief under Fed. R. Civ. P. 60 and asking that the Lower Court judgment be set aside. *Klayman v. Judicial Watch, Inc., 1:19-cv-2604* (D.D.C.) based on fraud and other misconduct. This matter was assigned to Judge Chutkan.

43. On September 22, 2019, Judge Chutkan stayed this matter pending resolution of the Appellate

Proceeding. However, on February 16, 2021, Judge Chutkan reversed course and precipitously and inexplicably dismissed this action, well before the resolution of the Appellate Proceeding.

44. Mr. Klayman respectfully asked Judge Chutkan via a motion if she had any "*ex parte*" communications with Judge Kotelly, which most likely explained her precipitous and contradictory decision to dismiss the action without even giving Mr. Klayman an opportunity to submit any type of brief, much more allow a collateral appeal of the judgment to proceed pursuant to a conclusion as per her earlier stay order. Judge Chutkan has refused to give any substantive answer, giving rise to the strong inference that Judges Chutkan and Kotelly did, in fact, collude and act in concert to deny Mr. Klayman his constitutional and other legal rights.

45. On information and belief, each and every one of the Defendants have communicated and worked together in collaboration to create and cause the manifest and grave injustice that has occurred. This has resulted from their personal animus towards and dislike for Mr. Klayman, as he has been very openly critical of federal judges in the Lower Court and its D.C. Circuit, particularly in the highly politized and toxic environment of the District of Columbia, as he wrote in his book "It Takes A Revolution: Forget the Scandal Industry!," which was dedicated to Thomas Jefferson. This greatest of Founding Fathers and presidents opposed Article III federal judges, as unelected, life tenured and thus unaccountable to We the People,

predicting that they would in effect become despots and tyrants. This book was published on October 27, 2020, before the three-judge panel and en Banc panel ruled, and it was widely advertised nationally and internationally months in advance of that by Post Hill Press and other publishers and distributors.

46. The Defendants' dislike if not animus for Mr. Klayman is no secret. At a hearing in an unrelated matter where Mr. Klayman served as counsel, *Arpaio v. Zucker et al*, 18-cv-2894 (D.D.C.), the Honorable Royce Lamberth of the Lower Court and a judge in this D.C. Circuit revealed to Mr. Klayman and those who were in the audience, "I haven't had you here in a long time. It's a pleasure to have you again. I know some judges don't say that to you, but I will say it." Exhibit 3. This shows that even Judge Lamberth knew of the dislike if not animus that many of his colleagues on the lower and higher courts in the D.C. Circuit had and continue to have for Mr. Klayman.

47. However, respectfully, it is not Defendants' job to simply brush off and dismiss their duties as federal judges that for whatever reason they do not want to do, whether it be due to personal dislike of and animus toward the Appellant, Mr. Klayman, or for other reasons. Defendants were appointed to perform their duties of applying the law to the facts, regardless of any personal biases. This is required by the oath of office for federal judges:

> I do solemnly swear that I will administer justice **without regard to persons**, and do

> equal right to the poor and to the rich, and that I will impartially discharge and perform all the duties incumbent upon me as judge under the Constitution and laws of the United States. So help me God. 28 U.S.C. § 453 (emphasis added).

48. Mr. Klayman has thus been severely harmed by the Defendants, as his due process rights pursuant to the Fourteenth Amendment of the Constitution and the Fifth Amendment to the Constitution have been severely violated, all with the intent to harm him by effectively attempting to bankrupt him and his family with a fatally flawed and manifestly wrong $2.8 million dollar verdict. On information and belief, Defendants believe that this will effectively put Mr. Klayman and his public interest advocacy, writings and other professional activities out of business, shielding them from more harsh criticism and potential litigation.

49. Mr. Klayman therefore respectfully requests that this matter be transferred to another District Court where he is admitted, either the U.S. District Courts for the Southern or Middle Districts of Florida or the U.S. District Court for the Northern District of Texas, as this case will necessarily hinge upon members of this Court ruling on their own misconduct and violation of Plaintiffs constitutional and other legal rights, which creates a strong conflict of interest. Transfer to an impartial venue is therefore necessary in the interest of Mr. Klayman's due process and other rights, as well as the interests of justice in general.

**FIRST CAUSE OF ACTION**
***Civil Action for Deprivation of Rights***
***Against All Named Defendants***
**Fourteenth Amendment Due Process**

50. Mr. Klayman repeats and re-alleges all of the previous allegations of the entirety of this Complaint with the same force and effect, as if fully set forth herein again at length.

51. Defendants' actions and omissions, each and every one of them acting in concert as joint tortfeasors, constituted a violation to Mr. Klayman constitutional rights secured by the Due Process clause of the Fourteenth Amendment.

52. Defendants denied Mr. Klayman due process by failing to review the record, failing in good faith to even consider Mr. Klayman's arguments, and simply "rubber stamping" each other's' highly flawed and prejudicial orders.

53. Defendants denied Mr. Klayman due process by taking away meaningful access to the legal system, taking away his ability to meaningfully seek appeal, and taking away his right to have his cases actually heard and considered by the judicial system.

54. Defendants' actions were intentional, malicious, willful, wanton, and in gross and reckless disregard of Mr. Klayman's constitutional rights.

55. Mr. Klayman prays that the $2.8 million dollar judgment rendered at the Lower Court Proceeding, and it's affirmance by the D.C. Circuit be vacated and

this matter be reheard and re-tried before an unbiased and neutral judge, as well as such other equitable relief as is deemed just and proper.

**SECOND CAUSE OF ACTION**
***Civil Action for Deprivation of Rights***
***Against All Named Defendants***
**Fifth Amendment Due Process**

56. Mr. Klayman repeats and re-alleges all of the previous allegations of the entirety of this Complaint with the same force and effect, as if fully set forth herein again at length.

57. Defendants' actions and omissions constituted a violation to Mr. Klayman constitutional rights secured by the Due Process clause of the Fifth Amendment.

58. Defendants denied Mr. Klayman due process by failing to review the record, failing to consider in good faith Mr. Klayman's arguments, and simply "rubber stamping" each other's highly flawed and prejudicial orders.

59. Defendants denied Mr. Klayman due process by taking away meaningful access to the legal system, taking away his ability to meaningfully seek appeal, and taking away his right to have his cases actually heard and considered by the judicial system.

60. Defendants' actions were intentional, malicious, willful, wanton, and in gross and reckless disregard of Mr. Klayman's constitutional rights.

61. Mr. Klayman prays that the $2.8 million dollar judgment rendered at the Lower Court Proceeding and affirmed by the D.C. Circuit be vacated and this matter be reheard and retried before an unbiased and neutral judge, as well as such other equitable relief as is deemed just and proper.

**THIRD CAUSE OF ACTION**
***Civil Action for Deprivation of Rights***
***Against All Named Defendants***
***First Amendment Violation***

62. Mr. Klayman repeats and re-alleges all of the previous allegations of the entirety of this Complaint with the same force and effect, as if fully set forth herein again at length.

63. Defendants' actions and omissions, each and every one of them acting in concert as joint tortfeasors, constituted a violation to Mr. Klayman constitutional rights secured by the First Amendment.

64. Defendants believed that their misconduct and violation of Mr. Klayman's constitutional and other legal rights, as set forth above, will effectively put Mr. Klayman and his public interest advocacy, writings and other professional activities out of business, shielding them from more harsh criticism and potential litigation.

65. Defendants' attempted to silence Mr. Klayman is a violation of his rights of free speech under the First Amendment.

66. Defendants' actions were intentional, malicious, willful, wanton, and in gross and reckless disregard of Mr. Klayman's constitutional rights.

67. Mr. Klayman prays that the $2.8 million dollar judgment rendered at the Lower Court Proceeding and affirmed by the D.C. Circuit be vacated and this matter be reheard and retried before an unbiased and neutral judge, as well as such other equitable relief as is deemed just and proper.

## VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment against each of the Defendants, jointly and severally, for declaratory and preliminarily and permanent injunctive relief, and any other further relief the Court deems just and proper, for the prejudicial, intentional, reckless, illegal, unconstitutional and malicious acts of the Defendants, each and every one of them, jointly and severally, against Mr. Klayman, which are and continue to be designed to severely harm him and his family, and subject him to potential bankruptcy, therefore eliminating him as a public interest advocate who has been and continues to be critical of many in the federal judiciary, particularly in and on the highly politicized, toxic, vindictive, and compromised D.C. Circuit.

Dated: September 21, 2021

Respectfully submitted,

*/s/ Larry Klayman*

Larry Klayman
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*Plaintiff Pro Se*

**ORAL ARGUMENT REQUESTED**

**CASE NO. 21-5269**

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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LARRY KLAYMAN

Plaintiff-Appellant,

v.

HON. NEOMI RAO, et. al

Defendants-Appellees.

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APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# APPELLANT'S INITIAL BRIEF

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*Plaintiff-Appellant Pro Se*

**Dated:** February 18, 2022

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties

Larry Klayman is an individual and a Plaintiff/Appellant. Hon. Neomi Rao is an individual and a Defendant/Appellee. Hon. Robert L. Wilkins is an individual and a Defendant/Appellee. Hon. Laurence H. Silberman is an individual and a Defendant/Appellee. Hon. Colleen Kollar-Kotelly is an individual and a Defendant/Appellee. Hon. Tanya S. Chutkan is an individual and a Defendant/Appellee. Hon. Sri Srinivasan is an individual and a Defendant/Appellee. Hon. Karen LeCraft Henderson is an individual and a Defendant/Appellee. Hon. Judith W. Rogers is an individual and a Defendant/Appellee. Hon. David S. Tatel is an individual and a Defendant/Appellee. Hon. Patricia A. Millett is an individual and a Defendant/Appellee. Hon. Cornelia T.L. Pillard is an individual and a Defendant/Appellee. Hon. Gregory G. Katsas is an individual and a Defendant/Appellee. Hon. Justin R. Walker is an individual and a Defendant/Appellee. Hon. Ketanji Brown Jackson is an individual and a Defendant/Appellee. Hon. Harry T. Edwards is an individual and a Defendant/Appellee. Hon. Douglas H. Ginsburg is an individual and a Defendant/Appellee. Hon. David B. Sentelle is an individual and a Defendant/Appellee. Hon. A. Raymond Randolph is an individual and a Defendant/Appellee.

There were no amici in the district court.

**B. Rulings**

Appellants appeal from the U.S. District Court for the District of Columbia's October 25, 2021 *sua sponte* order dismissing this case with prejudice. App. 313.

**C. Related Cases**

There were no related cases.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 26.1, Appellants are not officers, directors, or majority shareholders of any publicly traded corporation.

**TABLE OF CONTENTS**

## Table of Authorities

*CASES*

*STATUTES*

*SECONDARY SOURCES*



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## [1] **JURISDICTIONAL STATEMENT**

The basis for the U.S. District Court for the District of Columbia's ("District Court") subject-matter jurisdiction is pursuant to 28 U.S.C. § 1331 under Federal Question Jurisdiction. The basis for the U.S. Court of Appeals for the District of Columbia Circuit's jurisdiction is pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims. Plaintiff/Appellant Larry Klayman ("Mr. Klayman") has filed a motion for extension of time to set to due date for this brief to February 18, 2022, which has been granted.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err by *sua sponte* dismissing Appellant's entire claim? App. 313.

2. Did the District Court err by failing to transfer this case to an impartial and unbiased venue? App. 313.

## STATEMENT OF THE CASE

This case centers around the unconstitutional and other illegal actions of Defendants-Appellees, each and every one of them, acting in concert, in not just violating their oath of office as federal judges but worse violating Appellant Larry Klayman's rights and discriminating against him in *Klayman v. Judicial Watch, Inc., et al*, 19-7105 (D.C. Cir.) (the "Appellate Proceeding"). This is now on appeal to the U.S. Supreme Court—with the Supreme Court having set a deadline of [2] March 14, 2022 to resubmit a Petition for Writ of Certiorari. This case was an appeal from a case before the Hon. Colleen Kollar-Kotelly ("Judge Kotelly") in the Lower Court styled *Klayman v. Judicial Watch, Inc., et al*, 06-cv-670 (D.D.C.) (the "Lower Court Proceeding").

### I. Facts Pertaining to the Lower Court Proceeding

During the Lower Court Proceeding, which has lasted over sixteen (16) years, Judge Kotelly

committed numerous highly prejudicial, intentional, and/or reckless manifest errors which resulted in a highly flawed and outrageous jury verdict against Mr. Klayman in the sum of $2.8 million dollars, plus a requested pending award of attorneys fees for this fiasco over nearly $2 million dollars more. This was subsequently appealed to the D.C. Circuit. These highly prejudicial and manifest errors are set forth in detail in Appellant's Initial Brief and Appellant's Reply Brief which are incorporated herein by reference, which Mr. Klayman implores the Court to read and digest thoroughly. App. 022–175.

Chief among these highly prejudicial errors was Judge Kotelly allowing highly prejudicial, inflammatory statements and an irrelevant court order into evidence, in contradiction of both the Federal Rules of Evidence as well as the parol evidence rule. App. 069. These false, inflammatory, prejudicial, and irrelevant statements included (1) an alleged effort to pursue an improper relationship with a JW employee, (2) claiming he effectively sexually harassed her, [3] (3) Mr. Klayman's alleged admission that he was in love with the employee, had purchased gifts for her and had kissed her, and (4) Mr. Klayman's alleged acknowledgment of an incident with his wife that provided the basis for his wife's allegation that he physically assaulted her in front of their children. App. 071. Indeed, this highly prejudicial, inflammatory, and false testimony was introduced, with the Lower Court's consent, by Judicial Watch to perpetuate the falsity that Mr. Klayman did not voluntarily leave to run for the Senate;

rather, they forced him out due to this alleged misconduct. However, this ignores the plain fact that the Severance Agreement between the parties, which was undeniably signed and agreed to by all the parties, unequivocally stated that Mr. Klayman left JW voluntarily to pursue other endeavors:

> Judicial Watch announced today that Larry Klayman has stepped down as Chairman and General Counsel of Judicial Watch, [sic] to pursue other endeavors. App. 070.

Thus, this purported "evidence" should never have been admitted because it was a violation of the parol evidence rule, and Mr. Klayman's departure from Judicial Watch should never have been allowed to become at issue during the trial. Furthermore, even if this evidence was relevant, which it clearly was not, it should have been excluded under the balancing test of Fed. R. Evid 403:

> **Some types of extrinsic acts are particularly "likely to incite a jury to an irrational decision," few would doubt that violent spousal abuse falls into this category.** *United States v. Hands*, 184 F.3d 1322, 1328 (11th Cir. 1999).
>
> [4] **Moreover, we believe the public stigma attached to a husband who beats his wife is significant. The inflammatory nature of such a characterization is arguably more substantial than the purchase of marijuana discussed in *State v. Hockings, supra.* It is probable that**

> **portrayal of defendant as a "wife-beater" so blackened his character in the mind of the jury, that it was natural to infer that he was readily capable of rape, sodomy and sexual abuse. In short, we find that the slight probative value of the evidence was outweighed by its inflammatory and prejudicial impact.** *State v. Zamudio*, 57 Or. App. 545, 551 (1982).
>
> **In this case, the risk of unfair prejudice, given the nature of the proffered evidence, was high. The evidence the State sought to introduce was extremely inflammatory: that Defendant physically abused Mother, that Defendant used cocaine, that Defendant looked at pornography, and that Defendant had been involved in "emotional" affairs. Many jurors would likely not look kindly on individuals who engage in these activities. There can be no question that this sort of evidence has the potential to cause unfair prejudice. . . . Such evidence . . . should have been excluded here.** *State v. Miranda*, 407 P.3d 1033, 1042-43.

These cases all stand for the same undeniable, bedrock, irrefutable legal principle—testimony that an individual engaged in domestic violence, that is beat his wife, is highly prejudicial and inflammatory, and its admission—even in criminal cases where violence is at issue—is still in error. Here, this type of testimony was allowed in a civil case, and where it was entirely irrelevant. It cannot be overstated how egregious, glaring

and clear of an error the admission of this testimony was. This testimony clearly poisoned the jury to Mr. Klayman, and in conjunction with the other errors set forth below and in full in his briefs, App. 022–175, gave Mr. Klayman no chance at a fair trial. Appellant respectfully implores the panel in this appeal to read the appellate briefs for an even greater [5] understanding of the injustice meted upon Mr. Klayman. App. 022–175. Other egregious errors include, but are not limited to:

a. Entering an overly broad, draconian sanctions order preventing Mr. Klayman from introducing evidence or calling witnesses at trial.

b. Usurping and extinguishing the fact-finding role of the jury, as provided for in the Seventh Amendment to the Constitution, by weighing competing affidavits to grant partial summary judgment to Judicial Watch with regard to Mr. Klayman's (1) Lanham Act claims, (2) rescission claim, and (3) defamation claims.

c. Usurping and extinguishing as provided for in the Constitution the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch.

d. Orally reading jury instructions that were erroneous, confusing, and highly prejudicial to Mr. Klayman, refusing to provide other jury

instructions that would have stated the correct law and prevented the confusion, and then failing to disclose any written instructions that were provided to the jury, if any.

e. Failing to require authentication of documents submitted by Judicial Watch that purported to show "confusion" with regard to Judicial Watch's trademark infringement and related claims.

f. Failing to provide a jury instruction that a few instances of alleged confusion, notwithstanding that there were no authenticated and admissible documentary evidence to show such confusion, do not constitute trademark infringement, in contravention of well-established case law.

g. Failing to remit the damage award based on the actions of non-parties and the false representations to the jury by witnesses and counsel for Judicial Watch.

[6] h. Entering judgment on the jury verdict where Judicial Watch clearly failed to prove that Mr. Klayman took and used donor information owned solely by Judicial Watch, but rather was owned by American Target Advertising. App. 022–175.

Among these highly prejudicial errors were clear cut violations of Mr. Klayman's sacrosanct due process rights, as guaranteed to him under the Fifth and Fourteenth Amendments. These highly prejudicial manifest errors deprived Mr. Klayman of meaningful and actual access to the courts to litigate his claims. These

highly prejudicial errors enabled Judge Kotelly to determine the outcome of Mr. Klayman's case alone, effectively taking it out of the hands of the jury, and causing Mr. Klayman's case to be decided not on the facts and the law, but on Judge Kotelly's personal dislike for and extrajudicial bias and prejudice toward Mr. Klayman. These due process violations, among other gross prejudicial errors, include, but are not limited to:

(a) Spending approximately one hour orally reading jury instructions to the jury, many of which instructions contained misstated law, and then refusing to provide documentation of any written instructions that were provided to the jury, if any. This is a due process violation on two fronts: (1) if no written jury instructions were provided to the jury, it is impossible to expect a jury of laypersons to remember and accurately apply over one hour's worth of oral instructions, which would have led to a clearly flawed jury verdict and (2) if written jury instructions were provided, Judge Kotelly's refusal to file or even provide a final copy to Mr. Klayman strongly suggests that she had something to hide in the form of inaccurate written jury instructions having been provided.

[7] (b) Usurping and extinguishing the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch. This

is a violation of Mr. Klayman's due process rights because it denied him his right to have a jury of his peers serve as the finder of fact on his claims.

(c) Entering an overly broad, draconian sanctions order preventing Mr. Klayman from introducing evidence or calling witnesses at trial, and subsequently refusing to give the jury an instruction informing them of this sanction, leaving the jury with the false impression that Mr. Klayman simply had no evidence or witnesses to support his claims. App. 022–175.

## II. Facts Pertaining to the Appellate Proceedings

At the D.C. Circuit, a three judge panel consisting of the Honorable Neomi Rao ("Judge Rao"), the Honorable Claudia Wilkins ("Judge Wilkins"), and the Honorable Laurence Silberman ("Judge Silberman") further compounded the highly prejudicial manifest errors of the Lower Court in fully affirming the jury verdict from the Lower Court Proceeding, apparently with little to no apparent review of the deep record over sixteen (16) years of litigation and still counting. In doing so, the three judge panel not only mistakenly, intentionally, and/or recklessly failed to reverse clear errors by Judge Kotelly, but it also made new highly prejudicial errors of its own. It appears that the three judge panel's opinion, penned by Judge Rao, appeared on its face to be an attempt to protect a fellow jurist in

Judge Kotelly of which she and the others felt a kinship.

[8] Thus, it was apparent from the three judge panel's opinion that was it intended to protect Judge Kotelly, and it is likely that they were unfairly, without factual or legal bases, siding with her. An egregious example is that the three-judge panel, unprompted and gratuitously incredibly wrote that Judge Kotelly had done a "commendable" job in administering the case. This flies in the face of the cold, hard fact that this case took over sixteen (16) years to administer, an unprecedented delay in the history of litigation. This is not commendable in any way.

Importantly, the three judge panel clearly did not take the time in good faith to actually conduct a bona fide review of the voluminous record, as it simply ignored Mr. Klayman's well documented arguments, and completely failed to address others that showed prima facie incontrovertible error by Judge Kotelly, such as her and their failure to account for the parol evidence rule, or her decision to grant partial summary judgment on the issue of alleged personal expenses owed to Judicial Watch, despite Mr. Klayman having provided a sworn affidavit countering each and every claimed expense, to name just a few by way of example. Mr. Klayman therefore had no choice but to seek Petition for Rehearing En Banc to try to set the record straight and correct the numerous highly prejudicial manifest errors in pursuit of justice that had occurred. Given the extremely voluminous record at the Lower Court level, which was unsurprising given the fact [9] that it took

sixteen (16) years and counting and now on top of the huge damage award there is a multi-million dollar request for an attorneys fees award pending, and the fact that there were numerous highly prejudicial errors that needed to be remedied, Mr. Klayman moved for leave to file a 25-page Petition for Rehearing En Banc—a mere ten excess pages. This motion was filed on August 18, 2021.

This was an eminently reasonable request, given again the voluminous record and the number of issues involved, and Mr. Klayman had a good faith basis to operate under the premise that such a basic and reasonable request would be granted. However, nine days elapsed from the filing of his motion, and only on August 27, 2021 at 12:23 p.m.—the day before Mr. Klayman's Petition was due to be filed—did the D.C. Circuit rule that no additional pages would be allowed. This malicious abuse of discretion was intended to "sandbag" Mr. Klayman, compromise his rights to be fully heard, and thus caught him off-guard and he had to scramble to prepare a 15-page Petition. Mr. Klayman subsequently timely filed two versions of his Petition for Rehearing En Banc—a fully compliant 15-page version, as well as a 25-page version accompanied by a Motion for En Banc Panel to Consider 25-Page Petition for Rehearing En Banc and Motion for Reconsideration by the Full Court. These encapsulate and set forth the numerous prejudicial and manifest errors made by the three judge panel, and are incorporated herein by reference. App. 176–208.

[10] Chief among the errors by the D.C. Circuit was failing to reverse the jury verdict with regard to Judicial Watch's trademark infringement claims, which were the result of unauthenticated inadmissible hearsay being admitted into evidence to prove likelihood of confusion, and the application of the incorrect standard necessary to show likelihood of confusion and any trademark or related infringement. In doing so, the three judge panel admitted that there have been unreversed and precedential decisions by courts within the D.C. Circuit which have held that likelihood of confusion requires an "appreciable number of consumers," *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980), but then still applying a much lower standard in contravention of this case law:

> **Klayman also argues that the district court failed to properly instruct the jury on an element of trademark infringement. Judicial Watch asserted that Klayman infringed on its trademarks "Judicial Watch" and "Because No One is Above the Law." To establish trademark infringement, Judicial Watch needed to prove, among other elements, that Klayman's use of its trademarks created a "likelihood of confusion" among consumers. *See Am. Soc'y for Testing and Materials v. Public.Resource.Org, Inc.*, 896 F. 3d 437, 456 (D.C. 2018). Klayman argues that the court erred by failing to instruct the jury that likelihood of confusion requires confusion by an "appreciable**

> **number" of consumers. But his only support for this proposition comes from two unpublished decisions of our district court, which are of course not precedential. *See In re Exec. Office of President*, 215 F.3' 20, 24 (D.C. Cir. 2000).**
>
> . . . .
>
> **This circuit "has yet to opine on the precise factors courts should consider when assessing likelihood of confusion**. . . . App. 252.

[11] Thus, Panel admitted that (1) this Circuit "has yet to opine on the precise factors . . . when assessing likelihood of confusion, and (2) there are courts in this Circuit who have held that likelihood of confusion requires an "appreciable number of consumers. Furthermore, as set forth below, authority from other circuits also requires an "appreciable number of consumers" to show likelihood of confusion, and thus trademark infringement. *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980).

Further highly prejudicial and manifest errors by the three judge panel include *inter alia*, but are hardly limited to:

a. Failing to reverse the Lower Court's error of letting in highly inflammatory, and completely irrelevant testimony, and completely disregarding the fact that the Lower Court ignored the parol evidence rule.

b. Failing to reverse the Lower Court's grant of summary judgment with regard to misuse of Mr. Klayman's likeness and being.

c. Failing to set aside the jury verdict and judgment with regard to alleged access to Judicial Watch's donor list.

i. Failing to reverse the Lower Court's usurping of and thus extinguishing the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch.

Among these highly prejudicial errors were clear cut violations of Mr. Klayman's sacrosanct due process rights, as guaranteed to him under the Fifth and [12] Fourteenth Amendments. These highly prejudicial errors deprived Mr. Klayman of meaningful and actual access to the courts to litigate his claims and extinguished his constitutional and other legal rights. These highly prejudicial errors show that the three judge panel did not actually consider the appellate record and apply the relevant law, and make their ruling based on the facts and the law, but instead based on their personal feelings towards Mr. Klayman and their desire to protect one of their own, Judge Kotelly, as well as to harm Mr. Klayman financially with a $2.8 million dollar flawed verdict, plus a requested multi-million dollar attorneys fees award of nearly $2 million dollars

more. These due process violations include, but are not limited to:

> (a) Failing to reverse the jury verdict with regard to Judicial Watch's trademark infringement and related claims, which were the result of unauthenticated inadmissible hearsay being admitted into evidence to prove likelihood of confusion, and the application of the incorrect standard necessary to show likelihood of confusion. In doing so, the three judge panel admitted that there have been unreversed precedential decisions by courts in this Circuit and elsewhere which have held that likelihood of confusion requires an "appreciable number of consumers," *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980), but then still applying a much lower standard in contravention of this case law. This is a due process violation because it denies Mr. Klayman meaningful access to the appellate courts, as he presented clear, unreversed case law in his favor, which the three judge panel simply ignored.

Then, finally, on September 15, 2021, Mr. Klayman' s Petition for Rehearing En Banc was denied via a *per curiam* order by all of the Defendants-[13]Appellees, excluding Judge Edwards, Judge Ginsburg, Judge Sentelle, and Judge Randolph, along with his Motion to Consider 25-Page Petition for Rehearing En Banc. This *per curiam* order contained no legal reasoning or analysis, rendering it impossible for Mr. Klayman to know what issues to address when he takes this

matter up to the Supreme Court on Petition for Writ of Mandamus and/or Certiorari. By including all of the members of the three judge panel, but excluding other judges on the D.C. Circuit, in the review of Mr. Klayman's Petition for Rehearing En Banc, and the resulting per curiam order, this was intended to prejudice Mr. Klayman's right to an en banc review of the prejudicial manifest errors and opinion of the three judge panel.

Pursuant to the Internal Operating Procedures of the D.C. Circuit, a vote sheet is transmitted to "all other active judges of this Court" which necessarily would have included Judge Edwards, Judge Ginsburg, Judge Sentelle, and Judge Randolph. These four Defendants-Appellees are not part of the panel that denied Mr. Klayman's Petition, and therefore have abdicated their responsibility, contrary to their oath of office, to review the Petition for Rehearing En Banc and cast a vote, and thus they were also included in the Lower Court action.

The fact that it only took Defendants-Appellees eleven (11) business days to deny Mr. Klayman's Petition for Rehearing En Banc, despite the extremely voluminous multi-decade record, clearly shows that Defendants-Appellees simply [14] "rubber stamped" the three judge panel and did not take any time to even read, review, digest, or consider Mr. Klayman's detailed and compelling arguments. Indeed, it would have been impossible for the Defendants-Appellees to render a decision in just eleven (11) business days if they had actually reviewed the record and considered Mr.

Klayman's arguments, even assuming that they had no other cases to work on (which is obviously not the case), simply given the extremely voluminous record. This is especially evident considering the fact that it took Defendants-Appellees nine (9) days including weekends just to simply deny Mr. Klayman's motion for excess pages.

Thus, from the timing alone, it is incontrovertible that Defendants-Appellees in bad faith and in severe and blatant violation of constitutional and other legal rights gave Mr. Klayman's Petition for Rehearing zero (0) consideration. This is a clear violation of Mr. Klayman's due process rights because it denies him fair, meaningful, and non-discriminatory access to the appellate system, as it is clear that the en banc panel did not actually consider his arguments, and instead simply "rubber stamped" the three judge panel's prejudicial and manifestly fatally flawed opinion,

## III. Facts Pertaining to the Independent Fed. R. Civ. P. 60 Action

Furthermore, Mr. Klayman had filed an independent action in this Court relief under Fed. R. Civ. P. 60 and asking that the Lower Court judgment be set [15] aside. *Klayman v. Judicial Watch, Inc., 1:19-cv-2604* (D.D.C.) based on fraud and other misconduct. This matter was assigned to the Honorable Tanya S. Chutkan ("Judge Chutkan").

On September 22, 2019, Judge Chutkan stayed this matter pending resolution of the Appellate

Proceeding. However, on February 16, 2021, Judge Chutkan reversed course and precipitously and inexplicably dismissed this action, well before the resolution of the Appellate Proceeding. Mr. Klayman respectfully asked Judge Chutkan via a motion if she had any "*ex parte*" communications with Judge Kotelly, which most likely explained her precipitous and contradictory decision to dismiss the action without even giving Mr. Klayman an opportunity to submit any type of brief, much more allow a collateral appeal of the judgment to proceed pursuant to a conclusion as per her earlier stay order. Judge Chutkan has refused to give any substantive answer, giving rise to the strong inference that Judges Chutkan and Kotelly did, in fact, collaborate and act in concert to deny Mr. Klayman his constitutional and other legal rights.

## IV. Facts Pertaining to Transfer

Mr. Klayman respectfully requested that the Lower Court matter be transferred to another District Court where he is admitted, either the U.S. District Courts for the Southern or Middle Districts of Florida or the U.S. District Court for the Northern District of Texas, as this case necessarily hinged upon members of [16] the Lower Court ruling on their own conduct and violation of Mr. Klayman's constitutional and other legal rights, which clearly creates a strong conflict of interest.

On information and belief, each and every one of the Defendants-Appellees have communicated and

worked together in collaboration to create and cause the manifest and grave injustice that has occurred. This has resulted from their personal animus towards and dislike for Mr. Klayman, as he has been, as the founder of both Judicial Watch and now Freedom Watch, been very openly critical of federal judges in the Lower Court and its D.C. Circuit, particularly in the highly politized and toxic environment of the District of Columbia, as he wrote in his book "It Takes A Revolution: Forget the Scandal Industry!," which was dedicated to Thomas Jefferson. This greatest of Founding Fathers and presidents opposed Article III federal judges, as unelected, life tenured and thus unaccountable to We the People, predicting that many would in effect become despots and tyrants. This book was published on October 27, 2020, before the three judge panel and en banc panel ruled, and it was widely advertised nationally and internationally months in advance of that by Post Hill Press and other publishers and distributors.

However, respectfully, it is not Defendants-Appellees job to simply brush off and dismiss their duties as federal judges that for whatever reason they do not [17] want to do, whether it be due to apparent personal dislike of and animus toward the Appellant, Mr. Klayman, or for other reasons. Defendants-Appellees were appointed to perform their duties of applying the law to the facts, regardless of any personal biases. This is required by the oath of office for federal judges:

> I do solemnly swear that I will administer justice **without regard to persons**, and do

> equal right to the poor and to the rich, and that I will impartially discharge and perform all the duties incumbent upon me as judge under the Constitution and laws of the United States. So help me God. 28 U.S.C. § 453 (emphasis added).

Mr. Klayman has thus been severely harmed by the Defendants-Appellees, as his due process rights pursuant to the Fourteenth Amendment of the Constitution and the Fifth Amendment to the Constitution have been severely violated, all with the intent to harm him by effectively attempting to bankrupt him and his family with a fatally flawed and manifestly wrong $2.8 million dollar verdict, as well as pending multi-million dollar award of attorneys fees for this sixteen (16) year old "ordeal." On information and belief, Defendants-Appellees believe that this will effectively put Mr. Klayman and his public interest advocacy, writings and other professional activities out of business, shielding them from more harsh criticism and potential litigation.

Thus, Mr. Klayman strongly believed that a transfer was necessary in the interests of fundamental fairness and justice. The Lower Court rejected this request, and then unsurprisingly, *sua sponte* dismissed Mr. Klayman's complaint [18] without even giving him a chance to respond. This was exactly the type of conduct that Mr. Klayman was afraid of, and why he had requested a transfer in the first place. This is clearly not allowed under the Code of Conduct for United States Judges. *See* Code of Conduct for United States

Judges 3(C)(1)(a), which states that a judge may not preside over a case where "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" and 3(C)(1)(d)(i) "the judge. . . . is a party to the proceeding. . . ."

## SUMMARY OF THE ARGUMENT

The Lower Court fundamentally erred by *sua sponte* dismissing Mr. Klayman's Complaint, without granting any discovery, or even much less, any chance to respond. This was a grave violation of Mr. Klayman's due process rights, and a furtherance of the other constitutional violations set forth in Mr. Klayman's Complaint.

Perhaps most egregiously, the Lower Court erred by failing to transfer this case to a truly independent and impartial venue. A fair litigation was never possible in the Lower Court, given the fact that Judge Kotelly and Judge Chutkan are both jurists at the Lower Court.

## [19] STANDARD OF REVIEW

A dismissal by the Lower Court is reviewed *de novo*, and all of the factual allegation of the Complaint must be taken a true. *Sierra Club & Valley Watch, Inc. v. Jackson*, 648 F.3d 848, 854 (2011).

## ARGUMENT

### I. THERE IS NO JUDICIAL IMMUNITY FOR INJUNCTIVE RELIEF

*First and foremost*, Mr. Klayman has not conceded that Defendants-Appellees were acting in their judicial capacities. Mr. Klayman has indisputably alleged that Defendants-Appellees have violated his constitutional rights under the Fifth, Fourteenth and Fifth Amendments. It is undisputable that violating a litigant's constitutional rights cannot be deemed to part of a jurist's judicial duties, and therefore, no judicial immunity can apply.

It is important to recognize that the entire concept of judicial immunity was created and adopted by none other than the Courts themselves—which essentially means that the Court decided that it would be immune from liability from their judicial acts.[1] However, this flies on the fact of well-established case law that clearly states that a court's role is to interpret the laws, not to legislate and manufacture an immunity for itself. "The courts declare and enforce the law, but [20] they do not make the law." *United States v. First National Bank of Detroit*, 234 U.S. 245, 34 S.Ct. 846, 58 L.Ed. 1298; *United States v. Consolidated Elevator Co.*, 8 Cir., 141 F.2d 791 . . . This is for the reason that courts do not have the function of legislating or the power to legislate." *In re Shear, 139 F. Supp.* 217, 220

[1] *See generally;* J. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke Law Journal 879-925 (1980

(N.D. Cal. 1956) (cites in original). Any grant of immunity should have been legislated, and not created by judges themselves.

Given this, it is especially important that judicial immunity not be used in order to serve as a license for judges to act according to their own biases or politics and engage in unconstitutional conduct. It flies in the face of common sense and logic that courts should be able to simply grant themselves immunity in this manner. Thus, Mr. Klayman has argued that Defendants-Appellees were not acting pursuant in their judicial capacities, and the District Court egregiously erred in finding that they were.

### A. *Pulliam v. Allen*, 466 U.S. 522 (1984) is Controlling

In any event, Mr. Klayman's action only seeks injunctive and declaratory relief against Defendants, not monetary damages. Thus, based on well-settled and established case law, judicial immunity does not preclude his case.

In the landmark case of *Pulliam v. Allen*, 466 U.S. 522 (1984), the United States Supreme Court expressly held that "[w]e conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her [21] *judicial capacity*." *Id.* at 541-42. In *Pulliam*, the Petition, Gladys Pulliam was a Magistrate judge. She had a practice of imposing bail on persons arrested for nonjailable offenses and then incarcerating those persons if they could not meet

bail. *Id.* at 524. Respondents challenged this practice under 42 U.S.C. § 1983. The District Court found that this was a violation of due process and equal protection and enjoined Pulliam. *Id.* at 526. The Supreme Court affirmed. In doing so, it provided sound landmark legal reasoning that resonates and applies to this day:

> If the Court were to employ principles of judicial immunity to enhance further the limitations already imposed by principles of comity and federalism on the availability of injunctive relief against a state judge, it would foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm. Absent some basis for determining that such a result is compelled, either by the principles of judicial immunity, derived from the common law and not explicitly abrogated by Congress, or by Congress' own intent to limit the relief available under § 1983, we are unwilling to impose those limits ourselves on the remedy Congress provided. *Id.* at 539-40.
>
> We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review. *Id.* at 541.

This Supreme Court precedent has been followed and adhered to by the U.S. Court of Appeals for the District

of Columbia Circuit in *Wagshal v. Foster*, 307 U.S. App. D.C. 382, 28 F.3d 1249, 1251 (1994) (finding that the Appellant's claim for injunctive relief was not barred by judicial immunity). As recently as 2014, the [22] Honorable Ketanji Brown Jackson ("Judge Jackson") of this Court, and now President Biden reported top pick to fill the seat left by Justice Stephen Breyer on the U.S. Supreme Court, cited both *Pulliam* and *Wagshal* in finding that "The Supreme Court has held that 'judicial immunity is not a bar to prospective [injunctive] relief against a judicial officer acting in her judicial capacity . . . " *Smith v. Scalia*, 44 F. Supp. 3d 28, 43 (D.D.C. 2014).[2]

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[2] Mr. Klayman directs the Court's attention to analogous legal authority that shows that there is simply no "absolute immunity," whether judicial or otherwise, when government officials or judges violate an individual's constitutional rights.

In *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001), a landmark case that Plaintiff served as counsel, filed, and argued before the U.S. Court of Appeals for the Fourth Circuit, plaintiffs, an ex-intelligence official in the Department of Energy and his assistant, sought review of an order of the U.S. District Court for the Eastern District of Virginia, which dismissed their action against defendants, FBI Director Louis Freeh, his agents, and his supervisors, alleging an unconstitutional seizure and search of their home and computer in retaliation for the official's published criticism of the FBI. *Id.* at 397-98. The U.S. Court of Appeals for the Fourth Circuit held that plaintiffs First Amendment claim could proceed and that the officials, including FBI Director Freeh, were not entitled to qualified immunity because "a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right. *Id.* at 405. Additionally, the court ordered the case to proceed to discovery. *Id.*

Furthermore, the Honorable Ellen Segal Huvelle of this Court has allowed for a First Amendment retaliation *Bivens*

[23] Thus, under the firm and convincing precedent set by *Pulliam, Wagshal*, and *Smith*, the Court must find that Mr. Klayman's claims here for injunctive relief are also not barred by judicial immunity.

There are also numerous law review articles and other authority on judicial immunity which have discussed and confirmed this fundamental principle. *See Absolute Judicial Immunity Makes Absolute No Sense: An Argument for an Exception to Judicial Immunity*, 84 Temp. L. Rev. 1071.; *see also Note: Pulliam v. Allen: Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity* 34 Am. U. L. Rev. 523.

> Judicial immunity, unlike other forms of official immunity in the United States, is almost entirely a creation of the men and women it immunizes. . . . Such analysis shows that the wall of judicial immunity, which uses its purposes as mortar, is not without cracks and under certain pressures should crumble. 84 Temp. L. Rev. 1071.
>
> In Pulliam v. Allen, the Court considered whether judicial immunity bars injunctive and declaratory relief, as well as legal fees associated with gaining that relief. In Pulliam, a county magistrate judge allegedly incarcerated persons for "nonjailable offenses. . . . Similarly, American courts "never have had a

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*claim* to proceed past the motion to dismiss stage in *Navab-Safavi v. Broadcasting Board of Governors*, 08-cv-1125 (D.D.C).

These cases show that there is no absolute immunity for judges or government officials for violating an individual's constitutional rights, especially when equitable relief is sought.

> rule of absolute judicial immunity from prospective relief." The Court noted that the concerns with granting injunctive relief against a judge were distinct from those alleviated by protecting judges from damages. Further, the Court noted that the hurdles for obtaining equitable relief are sufficiently high to guard against harassment of judges and the chance of compromising judicial independence is lower in the case of injunctions. 84 Temp. L. Rev. 1071
>
> In Pulliam v. Allen the Supreme Court took a major step in removing one of the last vestiges of sovereign immunity for members of the judiciary. In Pulliam the Court upheld the award of injunctive and declaratory relief under section 1983 and attorney's fees under section [24] 1988 against a state magistrate who, although acting within a magistrate's proper jurisdiction, had violated a litigant's civil rights. Pulliam was the first Supreme Court case to reject judicial immunity by holding a judge civilly accountable for her conduct. 34 Am. U. L. Rev. 523.

## II. THE COURT HAS AUTHORITY TO GRANT THE RELIEF SOUGHT BY MR. KLAYMAN

The Lower Court fundamentally erred by misunderstanding the relief sought by Mr. Klayman. Mr. Klayman never asked the Lower Court to reverse the jury verdict and judgment in the Judge Kotelly Lower Court Proceeding, the Judicial Watch Appellate Proceeding, or the Judge Chutkan Rule 60 Proceeding.

Instead, what Mr. Klayman sought was an order of *vacatur* and remand to another unbiased jurist for retrial. App. 020.

This right to relief is expressly written into Fed. R. Civ. P. 60(d), which states that this rule does not limit a court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding." This is exactly the type of relief that Mr. Klayman is seeking, and therefore, the Lower Court does have authority to grant the relief sought by Mr. Klayman.

## III. *RES JUDICATA* DOES NOT APPLY

In the same vein as the preceding section, the Lower Court fundamentally misconstrued the relief sought by Mr. Klayman. In no way was he seeking to "re-litigate" jury verdict and judgment in the Judge Kotelly Lower Court Proceeding, [25] the Judicial Watch Appellate Proceeding, or the Judge Chutkan Rule 60 Proceeding. This instant action was brought due to the violation of Mr. Klayman's constitutional rights that occurred during these cases. This issue has never been litigated before. These constitutional violations are separate and apart from the ultimate results of these cases, and were properly brought as individual causes of action in this instant case.

## IV. MR. KLAYMAN HAS STATED PROPER CLAIMS FOR RELIEF

The District Court *sua sponte* made the findings that Mr. Klayman's complaint was both legally frivolous and factually frivolous, without even giving Mr. Klayman a chance to respond. In doing so, the District Court improperly ignored the applicable pleading standard set forth under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009), which states that a Complaint only needs to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* To make matters even worse, the District Court then usurped the fact-finding role of the jury and *sua sponte* made weighed factual determinations to dismiss the Complaint.

It is indisputable that the Complaint meticulously set forth very specific facts which clearly showed that Mr. Klayman's constitutional rights were violated by the Defendants-Appellees. *See supra* "Statement of the Case." At a bare minimum, [26] the extremely fact-specific Complaint should have survived dismissal and Mr. Klayman been given a chance to conduct discovery

Regrettably, the District Court's conduct in this regard actually underscores exactly why Mr. Klayman moved the Lower Court for a transfer, since he knew that he would not receive a fair ruling where the Lower Court was being asked to rule on the misconduct of its colleagues and fellow jurists in the same Court. This was the highly-predictable, but still incredibly flawed outcome, as set forth below.

## V. THIS MATTER SHOULD HAVE BEEN TRANSFERRED AT THE LOWER COURT LEVEL

At the Lower Court, Mr. Klayman moved the Court for an order transferring the case to an unbiased and impartial venue and suggested either the U.S. District Court for the Northern District of Texas or the U.S. District Court for the Southern District of Florida, where he is admitted to practice. App. 292–295.

As the Defendants-Appellees in this case are all of the judges at the U.S. Court of Appeals for the District of Columbia Circuit, as well as the Honorable Tanya Chutkan and Colleen Kollar-Kotelly of the Lower Court, it was clear that there would be an inherent bias against Mr. Klayman by every single member of this Court, and this was borne out with the Lower Court's *sua sponte* dismissal. Mr. Klayman never intended to cast any aspersions on the Honorable Christopher Cooper or any other member of this Court personally, but just to point out that, as a matter of human nature, it will be incredibly difficult for any member of this Court [27] to be completely unbiased in a lawsuit against their colleagues that they see, work with, and mingle with every single day.

In this regard, under 28 U.S.C. § 455, a judge " . . . shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). In order to preserve the integrity of the judiciary, and to ensure that justice is carried out in each individual case, judges must adhere

to high standards of conduct. *York v. United States*, 785 A.2d 651, 655 (D.C. 2001). "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . " ABA Code of Judicial Conduct Canon 3(C)(1); *See also Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) *(en banc).* Disqualification or recusal is required when there is even the appearance that the court's impartiality may be called into question, and "could suggest, to an outside observer, such a 'high degree of favoritism or antagonism to defendants' position that 'fair judgment is impossible.' " *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *See also Jackson v. Microsoft Corp.*, 135 F. Supp. 2d 38, 40 (D.D.C. 2001) (recusal was proper because the judge "ha[d] created an appearance of personal bias or prejudice").

Indeed, an impartial judiciary is a fundamental component of the system of justice in the United States. The right to a "neutral and detached judge" in any proceeding is protected by the U.S. Constitution and is an integral part of [28] maintaining the public's confidence in the judicial system. *Ward v. City of Monroeville*, 409 U.S. 57, 61-62 (1972); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (The U.S. Constitution guarantees a party an impartial and disinterested tribunal in civil cases). To ensure that this right is protected, Congress has sought to secure the impartiality of judges by requiring them to step aside, or in some circumstances, disqualify themselves, in various circumstances.

Here, it is clear that Lower Court fell within the conditions set forth by 28 U.S.C. § 455 as well as 28 U.S.C. § 144. Furthermore, because every single judge in the Lower Court would also have the same conflict of interest where recusal is mandated, the only solution was to transfer this matter to another truly independent jurisdiction.

There is precedent for this type of transfer in the Federal Rules of Criminal Procedure, Rule 21(a), which states, "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." This same principle should apply here, as Mr. Klayman stands no chance at a fair and impartial trial here. Buttressing this argument is the fact that the the underlying proceeding, the bar disciplinary proceeding against him, is quasi-criminal. "These are adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, [29] 551, 88 S. Ct. 1222, 1226 (1968). Thus, it is even more crucial that Mr. Klayman's rights are protected.

It is clear under any lens that this is not the recipe for a fair and unbiased proceeding. This is why the Code of Conduct for United States Judges expressly prohibits this situation. *See* Code of Conduct for United States Judges 3(C)(1)(a), which states that a judge may not preside over a case where "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts

concerning the proceeding" and 3(C)(1)(d)(i) "the judge. . . . .is a party to the proceeding. . . ." Every single judge in the Lower Court clearly has a personal bias against Mr. Klayman, as their colleagues, Judge Kotelly and Judge Chutkan were being sued. Thus, this case should have been transferred to another Court for litigation.

## CONCLUSION

For the foregoing reasons, if the Court does not summarily find the District Court's decision should be reversed, this case must be remanded and ordered transferred to another impartial Court. A simple and thorough review of the underlying record will bear this out. App. 022–175.

Dated: February 18, 2022

Respectfully Submitted,

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[Certificates Omitted]

**ORAL ARGUMENT REQUESTED**

**CASE NO. 21-5269**

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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LARRY KLAYMAN

Plaintiff-Appellant,

v.

HON. NEOMI RAO, et. al

Defendants-Appellees.

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APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# APPELLANT'S CORRECTED REPLY BRIEF

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**Dated**: May 17, 2022

## TABLE OF CONTENTS



## Table of Authorities

*CASES*

*STATUTES*



*SECONDARY SOURCES*

## [1] SUMMARY OF THE ARGUMENT

Nothing set forth by the Appellees changes the fact that absolute judicial immunity—even if it were a valid concept, which it is not—does not preclude claims for injunctive relief, which is precisely what Appellant Larry Klayman ("Mr. Klayman") has asserted here. This applies equally to judges sitting in state court or in federal court, as set forth below. Thus, the District Court fundamentally erred by dismissing Mr. Klayman's claims on the basis of purported absolute judicial immunity, as well as on all of the other grounds set forth below. Appellant was denied due process and equal protection under the Constitution and he seeks only injunctive relief as redress for the failure of the subject federal judges adhere to their oath of office as set forth below and in this appeal generally.

## ARGUMENT

### I. NOTHING SET FORTH BY THE APPELLEES CHANGES THE FACT THAT THERE IS NO JUDICIAL IMMUNITY FOR INJUNCTIVE RELIEF

*First and foremost*, Appellant Larry Klayman ("Mr. Klayman") has not conceded that Defendants-Appellees were acting in their judicial capacities. Mr. Klayman has indisputably alleged that Defendants-Appellees have violated his constitutional rights under the Fifth, Fourteenth and Fifth Amendments. It is without any doubt that violating a litigant's constitutional rights cannot be deemed to part of a jurist's judicial duties, and therefore, no judicial immunity can apply.

[2] It is important to recognize that the entire concept of judicial immunity was created and adopted by none other than the Courts themselves – which essentially means that the Court decided that it would be immune from liability from their judicial acts.[1] However, this flies on the fact of well-established case law that clearly states that a court's role is to interpret the laws, not to legislate and manufacture an immunity for itself. "The courts declare and enforce the law, but they do not make the law." *United States v. First National Bank of Detroit*, 234 U.S. 245, 34 S.Ct. 846, 58 L.Ed. 1298; *United States v. Consolidated Elevator Co.*, 8 Cir.,

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[1] *See generally;* J. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke Law Journal 879-925 (1980

141 F.2d 791 . . . This is for the reason that courts do not have the function of legislating or the power to legislate." *In re Shear, 139 F. Supp.* 217, 220 (N.D. Cal. 1956) (cites in original). Any grant of immunity should have been legislated, and not created by judges themselves.

Indeed, while hardly defensible, there are now currently people and groups threatening to harm even the justices of the Supreme Court over the leaked draft opinion which threatens to overturn *Roe v. Wade*.[2] This is at least in part due to the "absolute judicial immunity" that the justices, as well as judges over the country, have conferred upon themselves. The concept that judges are above the law is a [3] very dangerous one, not just for themselves but the citizenry at large. Accordingly, judges must be subject to the same legal system of justice that applies to ordinary Americans.

Given this, it is especially important that judicial immunity not be improperly applied in order to serve as a license for judges to act according to their own biases or politics and engage in unconstitutional conduct. It flies in the face of common sense and logic that courts should be able to simply grant themselves immunity in this manner. Thus, Mr. Klayman has argued that Defendants-Appellees were not acting pursuant in their judicial capacities, and the District Court egregiously erred in finding that they were.

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[2] https://www.nbcnews.com/news/us-news/blog/roe-v-wade-live-updates-protests-rage-leaked-abortion-ruling-rcna27427

### A. *Pulliam v. Allen*, 466 U.S. 522 (1984) is Controlling

In any event, Mr. Klayman's action only seeks injunctive and declaratory relief against Defendants, not monetary damages. Thus, based on well-settled and established case law, judicial immunity does not preclude his case.

In the landmark case of *Pulliam v. Allen*, 466 U.S. 522 (1984), the Supreme Court expressly held that "[w]e conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id.* at 541-42. In *Pulliam*, the Petition, Gladys Pulliam was a Magistrate judge. She had a practice of imposing bail on persons arrested for non-jailable offenses and then incarcerating those persons if they could not meet *bail. Id*. at [4] 524. Respondents challenged this practice under 42 U.S.C. § 1983. The District Court found that this was a violation of due process and equal protection and enjoined Pulliam. *Id.* at 526. The Supreme Court affirmed. In doing so, it provided sound landmark legal reasoning that resonates and applies to this day:

> If the Court were to employ principles of judicial immunity to enhance further the limitations already imposed by principles of comity and federalism on the availability of injunctive relief against a state judge, it would foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm. Absent some basis for

> determining that such a result is compelled, either by the principles of judicial immunity, derived from the common law and not explicitly abrogated by Congress, or by Congress' own intent to limit the relief available under § 1983, we are unwilling to impose those limits ourselves on the remedy Congress provided. *Id.* at 539-40.
>
> We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review. *Id.* at 541.

This Supreme Court precedent has been followed and adhered to by the U.S. Court of Appeals for the District of Columbia Circuit in *Wagshal v. Foster*, 307 U.S. App. D.C. 382, 28 F .3d 1249, 1251 (1994) (finding that the Appellant's claim for injunctive relief was not barred by judicial immunity). As recently as 2014, the Honorable Ketanji Brown Jackson ("Judge Jackson"), now soon to be sworn in as a justice of the Supreme Court, cited both *Pulliam* and *Wagshal* in finding that "The Supreme Court has held that 'judicial immunity is not a bar to prospective [5] [injunctive] relief against a judicial officer acting in her judicial capacity . . . " *Smith v. Scalia*, 44 F. Supp. 3d 28, 43 (D.D.C. 2014).[3]

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[3] Mr. Klayman directs the Court's attention to analogous legal authority that shows that there is simply no "absolute

The Defendants-Appellees assert that the *Pulliam* case does not apply to federal judges. This is simply not true. Nowhere in the holding of *Pulliam* does the Supreme Court limit its finding to state court judges. "We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id.* at 541-42. There is no distinction between the type of immunity enjoyed by federal judges and state judges. It is simply judicial [6] immunity. And, since Pulliam does not make any distinction, the Defendants-Appellees are putting their own

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immunity," whether judicial or otherwise, when government officials or judges violate an individual's constitutional rights.

In *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001), a landmark case that Plaintiff served as counsel, filed, and argued before the U.S. Court of Appeals for the Fourth Circuit, plaintiffs, an ex-intelligence official in the Department of Energy and his assistant, sought review of an order of the U.S. District Court for the Eastern District of Virginia, which dismissed their action against defendants, FBI Director Louis Freeh, his agents, and his supervisors, alleging an unconstitutional seizure and search of their home and computer in retaliation for the official's published criticism of the FBI. *Id.* at 397-98. The U.S. Court of Appeals for the Fourth Circuit held that plaintiffs First Amendment claim could proceed and that the officials, including FBI Director Freeh, were not entitled to qualified immunity because "a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right. *Id.* at 405. Additionally, the court ordered the case to proceed to discovery. *Id.*

Furthermore, the Honorable Ellen Segal Huvelle of this Court has allowed for a First Amendment retaliation *Bivens claim* to proceed past the motion to dismiss stage in *Navab-Safavi v. Broadcasting Board of Governors*, 08-cv-1125 (D.D.C).

These cases show that there is no absolute immunity for judges or government officials for violating an individual's constitutional rights, especially when equitable relief is sought.

words into the mouths of the Supreme Court in arguing that *Pulliam* is limited to the immunity enjoyed by state judges.

Furthermore, Judge Jackson, soon to be a justice of the Supreme Court, as recently as 2014 applied the reasoning of *Pulliam* to her *Smith* case, which involved a lawsuit against federal judges. "The Supreme Court has held that "judicial immunity is not a bar to prospective [injunctive] relief against a judicial officer acting in her judicial capacity[,]". . . . , so absolute judicial immunity does not dispose of these claims. *Smith v. Scalia*, 44 F. Supp. 3d 28, 43 (D.D.C. 2014).

There are also numerous law review articles and other authority on judicial immunity which have discussed and confirmed this fundamental principle. *See Absolute Judicial Immunity Makes Absolute No Sense: An Argument for an Exception to Judicial Immunity*, 84 Temp. L. Rev. 1071.; *see also Note: Pulliam v. Allen: Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity* 34 Am. U. L. Rev. 523.

> Judicial immunity, unlike other forms of official immunity in the United States, is almost entirely a creation of the men and women it immunizes. . . . Such analysis shows that the wall of judicial immunity, which uses its purposes as mortar, is not without cracks and under certain pressures should crumble. 84 Temp. L. Rev. 1071.
>
> In Pulliam v. Allen, the Court considered whether judicial immunity bars injunctive and declaratory relief, as well as legal fees

> associated [7] with gaining that relief. In Pulliam, a county magistrate judge allegedly incarcerated persons for "nonjailable offenses. . . . Similarly, American courts "never have had a rule of absolute judicial immunity from prospective relief." The Court noted that the concerns with granting injunctive relief against a judge were distinct from those alleviated by protecting judges from damages. Further, the Court noted that the hurdles for obtaining equitable relief are sufficiently high to guard against harassment of judges and the chance of compromising judicial independence is lower in the case of injunctions. 84 Temp. L. Rev. 1071
>
> In Pulliam v. Allen the Supreme Court took a major step in removing one of the last vestiges of sovereign immunity for members of the judiciary. In Pulliam the Court upheld the award of injunctive and declaratory relief under section 1983 and attorney's fees under section 1988 against a state magistrate who, although acting within a magistrate's proper jurisdiction, had violated a litigant's civil rights. Pulliam was the first Supreme Court case to reject judicial immunity by holding a judge civilly accountable for her conduct. 34 Am. U. L. Rev. 523.

Thus, it is clear that the fundamental principle that absolute immunity does not bar injunctive relief applies to both state and federal judges, and under the firm and convincing precedent set by *Pulliam, Wagshal*, and *Smith*, the Court must find that Mr.

Klayman's claims here for injunctive relief are also not barred by judicial immunity.

## II. THE COURT HAS AUTHORITY TO GRANT THE RELIEF SOUGHT BY MR. KLAYMAN

Appellees repeat the fundamentally error of the Lower Court by mischaracterizing the relief sought by Mr. Klayman. It is indisputable that Mr. Klayman never asked the Lower Court to reverse the jury verdict and judgment in [8] the Judge Kotelly Lower Court Proceeding, the Judicial Watch Appellate Proceeding, or the Judge Chutkan Rule 60 Proceeding. Instead, what Mr. Klayman sought was an order of *vacatur* and remand to another unbiased jurist for re-trial. App. 020.

This right to relief is expressly written into Fed. R. Civ. P. 60(d), which states that this rule does not limit a court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding." This is exactly the type of relief that Mr. Klayman is seeking, and therefore, the Lower Court does have authority to grant the relief sought by Mr. Klayman.

## III. *RES JUDICATA* DOES NOT APPLY

Similarly, the Defendants-Appellees further the Lower Court fundamental mischaracterization the relief sought by Mr. Klayman. In no way was he seeking to "re-litigate" jury verdict and judgment in the Judge Kotelly Lower Court Proceeding, the Judicial Watch

Appellate Proceeding, or the Judge Chutkan Rule 60 Proceeding. This instant action was brought due to the violation of Mr. Klayman's constitutional rights that occurred during these cases. This issue has never been litigated before. These constitutional violations are separate and apart from the ultimate results of these cases, and were properly brought as individual causes of action in this instant case.

[9] **IV. MR. KLAYMAN HAS STATED PROPER CLAIMS FOR RELIEF**

The District Court *sua sponte* made the findings that Mr. Klayman's complaint was both legally frivolous and factually frivolous, without even giving Mr. Klayman a chance to respond. In doing so, the District Court improperly ignored the applicable pleading standard set forth under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009), which states that a Complaint only needs to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* To make matters even worse, the District Court then usurped the fact-finding role of the jury and *sua sponte* made weighed factual determinations to dismiss the Complaint.

It is indisputable that the Complaint meticulously set forth very specific facts which clearly showed that Mr. Klayman's constitutional rights were violated by the Defendants-Appellees. *See supra* "Statement of the Case." At a bare minimum, the extremely fact-specific

Complaint should have survived dismissal and Mr. Klayman been given a chance to conduct discovery

Regrettably, the District Court's conduct in this regard actually underscores exactly why Mr. Klayman moved the Lower Court for a transfer, since he knew that he would not receive a fair ruling where the Lower Court was being asked to rule on the misconduct of its colleagues and fellow jurists in the same Court. This was the highly-predictable, but still incredibly flawed outcome, as set forth below.

[10] **V. THIS MATTER SHOULD HAVE BEEN TRANSFERRED AT THE LOWER COURT LEVEL**

At the Lower Court, Mr. Klayman moved the Court for an order transferring the case to an unbiased and impartial venue and suggested either the U.S. District Court for the Northern District of Texas or the U.S. District Court for the Southern District of Florida, where he is admitted to practice. App. 292 - 295.

As the Defendants-Appellees in this case are all of the judges at the U.S. Court of Appeals for the District of Columbia Circuit, as well as the Honorable Tanya Chutkan ("Judge Chutkan") and Colleen Kollar-Kotelly ("Judge Kotelly") of the Lower Court, it was clear that there would be an inherent bias and conflict of interest concerning Mr. Klayman by every single member of this Court, and this was borne out with the Lower Court's *sua sponte* dismissal. Mr. Klayman never intended to cast any aspersions on the Honorable

Christopher Cooper ("Judge Cooper"), who presided over this case at the Lower Court, or any other member of this Court personally, but just to point out that, as a matter of human nature, it will be incredibly difficult for any member of this Court to be completely unbiased in a lawsuit against their colleagues that they see, work with, and mingle with every single day.

In this regard, under 28 U.S.C. § 455, a judge " . . . shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). In order to preserve the integrity of the [11] judiciary, and to ensure that justice is carried out in each individual case, judges must adhere to high standards of conduct. *York v. United States*, 785 A.2d 651, 655 (D.C. 2001). "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . " ABA Code of Judicial Conduct Canon 3(C)(1); *See also Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) *(en banc)*. Disqualification or recusal is required when there is even the appearance that the court's impartiality may be called into question, and "could suggest, to an outside observer, such a 'high degree of favoritism or antagonism to defendants' position that 'fair judgment is impossible.'" *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *See also Jackson v. Microsoft Corp.*, 135 F. Supp. 2d 38, 40 (D.D.C. 2001) (recusal was proper because the judge "ha[d] created an appearance of personal bias or prejudice").

Indeed, an impartial judiciary is a fundamental component of the system of justice in the United

States. The right to a "neutral and detached judge" in any proceeding is protected by the U.S. Constitution and is an integral part of maintaining the public's confidence in the judicial system. *Ward v. City of Monroeville*, 409 U.S. 57, 61-62 (1972); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (The U.S. Constitution guarantees a party an impartial and disinterested tribunal in civil cases). To ensure that this right is protected, Congress [12] has sought to secure the impartiality of judges by requiring them to step aside, or in some circumstances, disqualify themselves, in various circumstances.

Here, it is clear that Lower Court fell within the conditions set forth by 28 U.S.C. § 455 as well as 28 U.S.C. § 144. Furthermore, because every single judge in the Lower Court would also have the same conflict of interest where recusal is mandated, the only solution was to transfer this matter to another truly independent jurisdiction.

There is precedent for this type of transfer in the Federal Rules of Criminal Procedure, Rule 21(a), which states, "[u]pon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." This same principle should apply here, as Mr. Klayman stands no chance at a fair and impartial trial here. Buttressing this argument is the fact that the the underlying proceeding, the bar

disciplinary proceeding against him, is quasi-criminal. "These are adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226 (1968). Thus, it is even more crucial that Mr. Klayman's rights are protected.

It is clear under any lens that this is not the recipe for a fair and unbiased proceeding. This is why the Code of Conduct for United States Judges expressly [13] prohibits this situation. *See* Code of Conduct for United States Judges 3(C)(1)(a), which states that a judge may not preside over a case where "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding" and 3(C)(1)(d)(i) "the judge. . . . is a party to the proceeding. . . ." Every single judge in the Lower Court clearly has a personal bias against Mr. Klayman, as their colleagues, Judge Kotelly and Judge Chutkan were being sued, and there by the grace of God go thee. Thus, this case should have been transferred to another Court for litigation.

## CONCLUSION

For the foregoing reasons, if the Court does not summarily find the District Court's decision should be reversed, this case must be remanded and ordered transferred to another impartial Court. A simple and

thorough review of the underlying record will bear this out. App. 022 – 175.

Dated: May 17, 2022

Respectfully Submitted,

/s/ Larry Klayman, Esq.

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[Certificates Omitted]

**ORAL ARGUMENT REQUESTED**

**CASE NO. 21-5269**

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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LARRY KLAYMAN

Plaintiff-Appellant,

v.

HON. NEOMI RAO, et. al

Defendants-Appellees.

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APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# PETITION FOR REHEARING EN BANC

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**Dated**: October 10, 2022

## FED. R. APP. P. 35 STATEMENT

Under Federal Rule of Appellate Procedure 35(a), there are two primary bases for en banc rehearing: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or (2) the proceeding involves a question of exceptional importance. Both of these bases are strongly at issue here.

## TABLE OF CONTENTS

## Table of Authorities

*CASES*



*STATUTES*



*SECONDARY SOURCES*

## [1] **STATEMENT OF THE CASE**

This case centers around the unconstitutional and other illegal actions of Defendants-Appellees, each and every one of them, acting in concert, in not just violating their oath of office as federal judges but worse violating Appellant Larry Klayman's rights and discriminating against him in *Klayman v. Judicial Watch, Inc., et al*, 19-7105 (D.C. Cir.) (the "Appellate Proceeding"). The Appellate Proceeding was an appeal from a case before the Hon. Colleen Kollar-Kotelly ("Judge Kotelly") in the Lower Court styled *Klayman v. Judicial Watch, Inc., et al*, 06-cv-670 (D.D.C.) (the "Lower Court Proceeding"). As a result of these violations, Mr. Klayman was forced to bring a Complaint for injunctive relief which forms the basis for this current appeal.

Lastly, as this case involves members of this Court as Defendant/Appellees, this Petition must be transferred and heard by another Court due to the clear conflict of interest here. Indeed, this occurred with regard to the Merits Panel whose opinion is subject to this petition for en banc review, and this matter is not different.

## I. Facts Pertaining to the Lower Court Proceeding

During the Lower Court Proceeding, which has lasted over sixteen (16) years, Judge Kotelly committed numerous highly prejudicial, intentional, and/or reckless manifest errors which resulted in a highly flawed and outrageous jury [2] verdict against Mr. Klayman in the sum of $2.8 million dollars, plus a requested pending award of attorneys fees for this fiasco over nearly $2 million dollars more. These highly prejudicial and manifest errors, which Mr. Klayman cannot cover in detail herein due to character space limitations, are set forth in detail in Appellant's Initial Brief and Appellant's Reply Brief. Thus, he implores the Panel to read and digest them thoroughly. App. 022 – 175.

These highly prejudicial errors include but are hardly limited to: ***(1)*** allowing highly prejudicial, inflammatory, and false statements accusing Mr. Klayman of domestic violence and sexual harassment into evidence, purportedly to show that he was ousted from Judicial Watch due to misconduct, despite there being a fully integrated Severance Agreement between the parties that stated that Mr. Klayman had left Judicial Watch voluntarily to pursue other endeavors in clear contravention of the parol evidence rule and the Federal Rule of Evidence 403[1], App. 069; ***(2)*** Entering an

[1] Some types of extrinsic acts are particularly "likely to incite a jury to an irrational decision," few would doubt that violent spousal abuse falls into this category. *United States v. Hands*, 184

overly broad, draconian sanctions order preventing Mr. Klayman from introducing evidence or calling witnesses at trial; ***(3)*** usurping and extinguishing the fact-finding role of the jury, as provided for in the Seventh Amendment to the Constitution, by weighing competing affidavits to grant partial summary judgment [3] to Judicial Watch with regard to Mr. Klayman's (a) Lanham Act claims, (b) rescission claim, and (c) defamation claims; ***(4)*** usurping and extinguishing as provided for in the Constitution the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch; ***(5)*** orally reading jury instructions that were erroneous, confusing, and highly prejudicial to Mr. Klayman, refusing to provide other jury instructions that would have stated the correct law and prevented the confusion, and then failing to disclose any written instructions that were provided to the jury, if any; ***(6)*** failing to require authentication of documents submitted by Judicial Watch that purported to show "confusion" with regard to Judicial Watch's trademark infringement and related claims; ***(7)*** failing to provide a jury instruction that a few instances of alleged confusion, notwithstanding that there were no authenticated and admissible documentary evidence to show such confusion, do not constitute trademark infringement,

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F.3d 1322, 1328 (11th Cir. 1999); *State v. Zamudio*, 57 Or. App. 545, 551 (1982).

in contravention of well-established case law; ***(8)*** failing to remit the damage award based on the actions of non-parties and the false representations to the jury by witnesses and counsel for Judicial Watch; and ***(9)*** entering judgment on the jury verdict where Judicial Watch clearly failed to prove that Mr. Klayman [4] took and used donor information owned solely by Judicial Watch, but rather was owned by American Target Advertising. *See* App. 022 – 175.

And, these highly prejudicial errors were made notwithstanding numerous due process violations and open exhibitions of bias and animus that clearly poisoned the minds of the jury, as set forth in full in Mr. Klayman's briefs. App. 022 – 175.

## II. Facts Pertaining to the Appellate Proceedings

At the D.C. Circuit, a three judge panel consisting of the Honorable Neomi Rao ("Judge Rao"), the Honorable Claudia Wilkins ("Judge Wilkins"), and the Honorable Laurence Silberman ("Judge Silberman") further compounded the highly prejudicial manifest errors of the Lower Court in fully affirming the jury verdict from the Lower Court Proceeding, apparently with little to no apparent review of the deep record over sixteen (16) years of litigation and still counting. In doing so, the three judge panel not only mistakenly, intentionally, and/or recklessly failed to reverse clear errors by Judge Kotelly, in effect circling the wagons to protect a fellow judge, but it also made new highly

prejudicial errors of its own. To reiterate, the three judge panel's opinion, penned by Judge Rao, brazenly appeared on its face to be an attempt to protect a fellow jurist in Judge Kotelly of which she and the others felt a kinship.

[5] Importantly, the three judge panel clearly did not take the time in good faith to actually conduct a bona fide review of the voluminous record, as it simply ignored Mr. Klayman's well documented arguments, and completely failed to address others that showed prima facie incontrovertible error by Judge Kotelly, such as her and their failure to account for the parol evidence rule, or her decision to grant partial summary judgment on the issue of alleged personal expenses owed to Judicial Watch, despite Mr. Klayman having provided a sworn affidavit countering each and every claimed expense, to name just a few by way of example.

Mr. Klayman therefore has no choice but to seek Petition for Rehearing En Banc to try to set the record straight and correct the numerous highly prejudicial manifest errors in pursuit of justice that had occurred. Given the extremely voluminous record at the Lower Court level Mr. Klayman moved for leave to file a 25-page Petition for Rehearing En Banc—a mere ten excess pages. Then, nine days elapsed from the filing of his motion, and only on the day before Mr. Klayman's Petition was due to be filed—did the D.C. Circuit rule that no additional pages would be allowed. This egregious abuse of discretion was intended to "sandbag" Mr. Klayman, compromise his rights to be fully heard,

and thus caught him off-guard and he had to scramble to prepare a 15-page Petition.

Chief among the errors by the D.C. Circuit was failing to reverse the jury verdict with regard to Judicial Watch's trademark infringement claims, which were [6] the result of unauthenticated inadmissible hearsay being admitted into evidence to prove likelihood of confusion, and the application of the incorrect standard necessary to show likelihood of confusion and any trademark or related infringement. In doing so, the three judge panel admitted that there have been unreversed and precedential decisions by courts within the D.C. Circuit which have held that likelihood of confusion requires an "appreciable number of consumers," *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980), but then still applying a much lower standard in contravention of this case law:

> **Klayman also argues that the district court failed to properly instruct the jury on an element of trademark infringement. Judicial Watch asserted that Klayman infringed on its trademarks "Judicial Watch" and "Because No One is Above the Law." To establish trademark infringement, Judicial Watch needed to prove, among other elements, that Klayman's use of its trademarks created a "likelihood of confusion" among consumers.** ***See Am. Soc'y for Testing and Materials v. Public.Resource.Org, Inc.*****, 896 F. 3d 437, 456 (D.C. 2018). Klayman argues that the**

> **court erred by failing to instruct the jury that likelihood of confusion requires confusion by an "appreciable number" of consumers. But his only support for this proposition comes from two unpublished decisions of our district court, which are of course not precedential. *See In re Exec. Office of President*, 215 F.3rd 20, 24 (D.C. Cir. 2000).**
>
> . . . .
>
> **This circuit "has yet to opine on the precise factors courts should consider when assessing likelihood of confusion.** . . . App. 252.

Thus, Panel admitted that (1) this Circuit "has yet to opine on the precise factors . . . when assessing likelihood of confusion, and (2) there are courts in this [7] Circuit who have held that likelihood of confusion requires an "appreciable number of consumers. Furthermore, as set forth below, authority from other circuits also requires an "appreciable number of consumers" to show likelihood of confusion, and thus trademark infringement. *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980).

Further highly prejudicial and manifest errors by the three judge panel include *inter alia*, but are hardly limited to:

a. Failing to reverse the Lower Court's error of letting in highly inflammatory, and completely irrelevant testimony, and completely disregarding the fact that the

Lower Court ignored the parol evidence rule.

b. Failing to reverse the Lower Court's grant of summary judgment with regard to misuse of Mr. Klayman's likeness and being.

c. Failing to set aside the jury verdict and judgment with regard to alleged access to Judicial Watch's donor list.

a. Failing to reverse the Lower Court's usurping of and thus extinguishing the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch.

Again, these highly prejudicial errors were made notwithstanding numerous due process violations, including but not limited to:

(a) Failing to reverse the jury verdict with regard to Judicial Watch's trademark infringement and related claims, which were the result of unauthenticated inadmissible hearsay being admitted into evidence to prove likelihood of confusion, and the [8] application of the incorrect standard necessary to show likelihood of confusion. In doing so, the three judge panel admitted that there have been unreversed precedential decisions by courts in this Circuit and elsewhere which have held

> that likelihood of confusion requires an "appreciable number of consumers," *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C.1980), but then still applying a much lower standard in contravention of this case law. This is a due process violation because it denies Mr. Klayman meaningful access to the appellate courts, as he presented clear, unreversed case law in his favor, which the three judge panel simply ignored.

Then, it only took Defendants-Appellees eleven (11) business days to deny Mr. Klayman's Petition for Rehearing En Banc, despite the extremely voluminous multi-decade record, which clearly shows that Defendants-Appellees simply "rubber stamped" the three judge panel and did not take any time to even read, review, digest, or consider Mr. Klayman's detailed and compelling arguments. Indeed, it would have been impossible for the Defendants-Appellees to render a decision in just eleven (11) business days if they had actually reviewed the record and considered Mr. Klayman's arguments, even assuming that they had no other cases to work on (which is obviously not the case), simply given the extremely voluminous record.

Thus, from the timing alone, it is incontrovertible that Defendants-Appellees in bad faith and in severe and blatant violation of constitutional and other legal rights gave Mr. Klayman's Petition for Rehearing zero (0) consideration. This is a [9] clear violation of Mr. Klayman's due process rights because it denies him

fair, meaningful, and non-discriminatory access to the appellate system.

## III. Facts Pertaining to the Independent Fed. R. Civ. P. 60 Action

Furthermore, Mr. Klayman had filed an independent action in this Court relief under Fed. R. Civ. P. 60 and asking that the Lower Court judgment be set aside. *Klayman v. Judicial Watch, Inc.*, 1:19-cv-2604 (D.D.C.) based on fraud and other misconduct. This matter was assigned to the Honorable Tanya S. Chutkan ("Judge Chutkan").

On September 22, 2019, Judge Chutkan stayed this matter pending resolution of the Appellate Proceeding. However, on February 16, 2021, Judge Chutkan reversed course and precipitously and inexplicably dismissed this action, well before the resolution of the Appellate Proceeding. Mr. Klayman respectfully asked Judge Chutkan via a motion if she had any "*ex parte*" communications with Judge Kotelly, which most likely explained her precipitous and contradictory decision to dismiss the action without even giving Mr. Klayman an opportunity to submit any type of brief, much more allow a collateral appeal of the judgment to proceed pursuant to a conclusion as per her earlier stay order. Judge Chutkan has refused to give any substantive answer, giving rise to the strong inference that Judges Chutkan and Kotelly did, in fact, collaborate and act in concert to deny Mr. Klayman his constitutional and other legal rights.

[10] **ARGUMENT**

At the August 24, 2022 oral argument in this matter, the Panel more than appeared to agree with many of Mr. Klayman's arguments but indicated that they were hesitant to find that they were the proper vehicle to seek the relief sought by Mr. Klayman, suggesting that a Petition for Writ of Certiorari to the Supreme Court may be more appropriate. As stated by Judge Erickson "You know, because, you know, kind of the ordinary course is, you know, you have a three judge panel, you petition for rehearing en banc, you file your petition for cert and if they grant it, fine; if they don't, it dies, right?" Exhibit 1 at 10:4-10. However, as Mr. Klayman pointed out, under these circumstances, the Supreme Court's jurisdiction is discretionary, and they only hear a very limited number of cases per year. Then, the Court appeared to suggest that a standard could be implemented to permit these types of cases – namely those that "shock the conscience." "Is that the standard - shocks the conscience? Is that what we're talking about? We're looking for a standard, a rule." Exhibit 1 at 32:9-11. Mr. Klayman concurred, saying, "[y]eah, I would say, I would say he hit the nail on the head, this shocks the conscience." Exhibit 1 at 32:12-14.

As set forth above, and in more detail in Mr. Klayman's briefs and appendix, this is a case that truly shocks the conscience given the enormous stakes at issue and the continued and egregious due process and other violations involved. Given [11] this, and as set forth below, that there is no absolute immunity in this

case and there exists a statutory vehicle for this type of case – Fed. R. Civ. P. Rule 60 – Mr. Klayman's Complaint should never have been dismissed and doing so what a clear, reversible error.

## I. THERE IS NO JUDICIAL IMMUNITY FOR INJUNCTIVE RELIEF

*First and foremost*, Mr. Klayman has not conceded that Defendants-Appellees were acting in their judicial capacities. Mr. Klayman has indisputably alleged that Defendants-Appellees have violated his constitutional rights, which cannot be deemed to part of a jurist's judicial duties, and therefore, no judicial immunity can apply.

It is important to recognize that the entire concept of judicial immunity was created and adopted by none other than the Courts themselves – which essentially means that the Court decided that it would be immune from liability from their judicial acts.[2] However, this flies on the fact of well-established case law that clearly states that a court's role is to interpret the laws, not to legislate and manufacture an immunity for itself. "The courts declare and enforce the law, but they do not make the law." *United States v. First National Bank of Detroit*, 234 U.S. 245, 34 S.Ct. 846, 58 L.Ed. 1298; *United States v. Consolidated Elevator Co.*, [12] 8 Cir., 141 F.2d 791 . . . This is for the reason that

[2] *See generally;* J. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke Law Journal 879-925 (1980

courts do not have the function of legislating or the power to legislate." *In re Shear, 139 F. Supp.* 217, 220 (N.D. Cal. 1956) (cites in original).

### A. *Pulliam v. Allen*, 466 U.S. 522 (1984) is Controlling

In any event, Mr. Klayman's action only seeks injunctive and declaratory relief against Appellees. Thus, based on well-settled and established case law, judicial immunity does not preclude his case.

In the landmark case of *Pulliam v. Allen*, 466 U.S. 522 (1984), the United States Supreme Court expressly held that "[w]e conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id.* at 541-42. In *Pulliam*, the Petitioner, Gladys Pulliam was a Magistrate judge. She had a practice of imposing bail on persons arrested for nonjailable offenses and then incarcerating those persons if they could not meet *bail. Id.* at 524. Respondents challenged this practice under 42 U.S.C. § 1983. The District Court found that this was a violation of due process and equal protection and enjoined Pulliam. *Id.* at 526. The Supreme Court affirmed. In doing so, it provided sound landmark legal reasoning that resonates and applies to this day:

> If the Court were to employ principles of judicial immunity to enhance further the limitations already imposed by principles of comity and federalism on the availability of injunctive relief against a state judge, it would

> foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and [13] necessary to prevent irreparable harm. Absent some basis for determining that such a result is compelled, either by the principles of judicial immunity, derived from the common law and not explicitly abrogated by Congress, or by Congress' own intent to limit the relief available under § 1983, we are unwilling to impose those limits ourselves on the remedy Congress provided. *Id.* at 539-40.

This Supreme Court precedent has been followed and adhered to by the U.S. Court of Appeals for the District of Columbia Circuit in *Wagshal v. Foster*, 307 U.S. App. D.C. 382, 28 F.3d 1249, 1251 (1994) (finding that the Appellant's claim for injunctive relief was not barred by judicial immunity). As recently as 2014, the Honorable Ketanji Brown Jackson ("Judge Jackson") of the Supreme Court cited both *Pulliam* and *Wagshal* in finding that "The Supreme Court has held that 'judicial immunity is not a bar to prospective [injunctive] relief against a judicial officer acting in her judicial capacity . . . " *Smith v. Scalia*, 44 F. Supp. 3d 28, 43 (D.D.C. 2014).[3]

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[3] Mr. Klayman directs the Court's attention to analogous legal authority that shows that there is simply no "absolute immunity," whether judicial or otherwise, when government officials or judges violate an individual's constitutional rights.

In *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001), a landmark case that Plaintiff served as counsel, filed, and argued before the U.S. Court of Appeals for the Fourth Circuit, plaintiffs, an ex-intelligence official in the Department of Energy and his

[14] There are also numerous law review articles and other authority on judicial immunity which have discussed and confirmed this fundamental principle. *See Absolute Judicial Immunity Makes Absolute No Sense: An Argument for an Exception to Judicial Immunity*, 84 Temp. L. Rev. 1071.; *see also Note: Pulliam v. Allen: Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity* 34 Am. U. L. Rev. 523.

## II. THE COURT HAS AUTHORITY TO GRANT THE RELIEF SOUGHT BY MR. KLAYMAN

The Lower Court fundamentally erred by misunderstanding the relief sought by Mr. Klayman. Mr. Klayman never asked the Lower Court to reverse the jury verdict and judgment in the Judge Kotelly Lower Court Proceeding, the Judicial Watch Appellate

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assistant, sought review of an order of the U.S. District Court for the Eastern District of Virginia, which dismissed their action against defendants, FBI Director Louis Freeh, his agents, and his supervisors, alleging an unconstitutional seizure and search of their home and computer in retaliation for the official's published criticism of the FBI. *Id.* at 397-98. The U.S. Court of Appeals for the Fourth Circuit held that plaintiffs First Amendment claim could proceed and that the officials, including FBI Director Freeh, were not entitled to qualified immunity because "a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right. *Id.* at 405. Additionally, the court ordered the case to proceed to discovery. *Id.*

Furthermore, the Honorable Ellen Segal Huvelle of this Court has allowed for a First Amendment retaliation *Bivens* claim to proceed past the motion to dismiss stage in *Navab-Safavi v. Broadcasting Board of Governors*, 08-cv-1125 (D.D.C).

Proceeding, or the Judge Chutkan Rule 60 Proceeding. Instead, what Mr. Klayman sought was an order of *vacatur* and remand to another unbiased jurist for retrial. App. 020.

This right to relief is expressly written into Fed. R. Civ. P. 60(d), which states that this rule does not limit a court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding." This is exactly the [15] type of relief that Mr. Klayman is seeking, and therefore, the Lower Court does have authority to grant the relief sought by Mr. Klayman.

## III. *RES JUDICATA* DOES NOT APPLY

In the same vein as the preceding section, the Lower Court fundamentally misconstrued the relief sought by Mr. Klayman. In no way was he seeking to "re-litigate" jury verdict and judgment in the Judge Kotelly Lower Court Proceeding, the Judicial Watch Appellate Proceeding, or the Judge Chutkan Rule 60 Proceeding. This instant action was brought due to the violation of Mr. Klayman's constitutional rights that occurred during these cases. This issue has never been litigated before. These constitutional violations are separate and apart from the ultimate results of these cases, and were properly brought as individual causes of action in this instant case.

## IV. MR. KLAYMAN HAS STATED PROPER CLAIMS FOR RELIEF

The District Court *sua sponte* made the findings that Mr. Klayman's complaint was both legally frivolous and factually frivolous, without even giving Mr. Klayman a chance to respond. In doing so, the District Court improperly ignored the applicable pleading standard set forth under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009), which states that a Complaint only needs to "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* To make matters even worse, the District Court then usurped the [16] fact-finding role of the jury and *sua sponte* made weighed factual determinations to dismiss the Complaint.

It is indisputable that the Complaint meticulously set forth very specific facts which clearly showed that Mr. Klayman's constitutional rights were violated by the Defendants-Appellees. At a bare minimum, the extremely fact-specific Complaint should have survived dismissal and Mr. Klayman been given a chance to conduct discovery.

## CONCLUSION

For the foregoing reasons, it is clear that Mr. Klayman's due process rights were violated. This case, which clearly shocked the conscience, warrants the type of relief sought by Mr. Klayman, as set forth at the oral argument of August 24, 2022. The findings of the Merits Panel must thus be set aside and this cause

considered en banc, with appropriate relief being according to Mr. Klayman.

Dated: October 10, 2022 Respectfully Submitted,

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[Certificates Omitted]

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT
DOCKET NO. 21-5269

LARRY ELLIOT KLAYMAN,

Appellant,

v.

NEOMI RAO, HON., et al.,

Appellees. /

TRANSCRIPTION OF ORAL ARGUMENT
HELD ON WEDNESDAY, AUGUST 10, 2022
VIA VIDEOCONFERENCE
BEFORE JUDGE ERICKSON,
JUDGE HIGGINSON, AND JUDGE SACK

(Pages 1 to 33)

Transcription By: Gail Hmielewski

Court Stenographer

[2] ALL PARTIES APPEARED VIA VIDEOCONFERENCE:

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[3] INDEX OF PROCEEDINGS



[4] (This is a transcription of Zoom proceedings via a YouTube link. The YouTube link was provided by Larry E. Klayman.)

PROCEEDINGS

THE CLERK: Case No. 21-5269, Larry Elliot Klayman, Appellant, v. Neomi Rao, The Honorable, et al., Mr. Klayman for the appellant, Mr. Soter for the appellees.

JUDGE HIGGINSON: Good morning. Our panel consists today of Judge Sack, Judge Erickson, and myself. We're sitting by inter-circuit assignment. We're very grateful for all the assistance of the clerk's

office and we are very grateful that you have given us your presence today.

Since the case has already been called, Mr. Klayman, you can proceed whenever you're ready.

MR. KLAYMAN: Thank you, Your Honors. It's my honor to appear in front of you, and may it please the Court.

This case presents a very important and exceptional situation. What do you do when the D.C. Circuit Court does not review the record and overlooks – intentionally, regrettably, because it became very controversial in terms of the lower court judges – overlooks major errors of law?

THE COURT: At some point, would you explain [5] the intentional part? I understand everything you're saying, but at some point if you'll explain to us the argument that it's –

MR. KLAYMAN: I've had –

THE COURT: – intentional rather than bad.

MR. KLAYMAN: Yeah. Regrettably, Your Honor, I've had a very contentious relationship with Judge Colleen Kollar-Kotelly over the years. It spans many, many years. We probably don't have enough time to get into it. I moved to disqualify her on a number of occasions, and I have no personal animus towards her, but this case took 16 years to litigate and that tells you something, and the judges of the panel of

the D.C. Circuit found this to be commendable and that tells you something.

THE COURT: I'm asking –

MR. KLAYMAN: Now, I –

THE COURT: I do want to let you make your argument, but since you mentioned multiple efforts to recuse her, can you give – is it easy for you to give a record cite to any example of her impartiality that you would point to that's extrinsic to her rulings against you?

MR. KLAYMAN: Yes, Your Honor. The very fact [6] that she let in, as we talk about in the briefs, issues dealing with alleged wife beating, sexual harassment, had nothing to do with this case.

Liteky – you know, the famous Supreme Court case – says that if legal errors are so grave and so extreme, that that can give rise to an inference of extrajudicial bias, but let me get to the crux of the argument here because I'm asking for prospective relief.

What I'm asking for – and under Pulliam there's no immunity in that regard, I'm sure Your Honors have read that carefully – I'm asking for this case to be – the judgment to be vacated to go back to the D.C. Circuit so they can review the record. They never reviewed the record.

There are major errors here, not just with regard to the prejudice in terms of injecting this inflammatory material allegation, which has never been proven –

they didn't bring the woman in here that I allegedly sexually harassed, they didn't bring my wife in there, nothing, former wife – but there are major errors with regard to trademark infringement. The law of the D.C. Circuit itself says you have to have appreciable number of consumers that are confused to give rise –

[7] THE COURT: Mr. Klayman, if I could ask again, these are, therefore, as I understand it, you agree these are errors that Mr. Simkovitz (phonetic), if I'm pronouncing his name correctly, did particularize in his brief to the D.C. Circuit, but your contention is they just didn't pay attention to that?

In other words, there are no – there are no errors in the trial that you're pointing to that you hadn't already pointed to the D.C. Circuit?

MR. KLAYMAN: I put all the errors in front of them and it's clear they didn't review the records, so what I'm asking for –

(Inaudible.)

MR. KLAYMAN: What I'm asking for, Your Honor, I was denied due process. I'm asking for you, under Rule 60, to order them – and you can order them on the basis of any other reason justifying relief from operation of the judgment, as well as mistake, inadvertence, surprise, or excusable neglect – I'm asking prospectively to go back and order them to thoroughly review the record. They didn't do it.

The very fact that they come out with a statement that a 16-year administration of the case [8] is commendable tells you they're protecting a fellow jurist.

JUDGE SACK: It seems a little –

(Inaudible.)

MR. KLAYMAN: It's human nature –

JUDGE SACK: – if I may say so – Go ahead, Judge Erickson.

JUDGE ERICKSON: Go ahead, Judge Sack.

JUDGE SACK: I was just going to say –

(Inaudible.)

JUDGE SACK: – this is a little strange because you're talking, I'm sorry, when you're talking about sending it back to the D.C. Circuit, what makes it strange is, for the present purposes, aren't we the D.C. Circuit?

MR. KLAYMAN: Well, you are, and consequently you can make the ruling. That's what I was saying, is that we need to have a review here, and I thank God and I thank you for your independent review of this matter, because, you know, we're all human beings, okay? If my law firm was accused of something or whatever, I mean, we would have the tendency to circle the wagons, and that's why I am very, very grateful that Your Honors have this case, because you can't do it objectively, you just [9] can't. And look at Judge Cooper, who dismissed the action sua sponte before it

was even served. I never had a chance to even respond and I got this order, so I'm just asking for due process.

There's no personal animus towards anybody here, but we're dealing here with a 2.8 million dollar judgment that, if it's allowed to be enforced by simply rubber-stamping what the lower court did, will bankrupt me, my family, and hurt me, and this is inappropriate.

And the biggest issue here, notwithstanding the trademark issue or the issue of not even providing adequate notice of what the jury instructions writtenwise were given to the jury or other issues that I outlined in here, which are serious issues, is the fact that, you know, I was accused of wife beating. I mean, even in a criminal case that can't come in, let alone a civil case – the parol evidence rule.

I signed a severance agreement with Judicial Watch, who said I left on good terms. They praised me, yet I got sandbagged with this and it was allowed in front of the jury, it was highly inflammatory, and all of these things were overlooked. In fact, there was no discussion in [10] the D.C. Circuit's rulings of the parol evidence rule. You can't go outside of the scope of the contract.

JUDGE ERICKSON: Were these issues raised in your petition for cert? You know, because, you know, kind of the ordinary course is, you know, you have a three-judge panel, you petition for rehearing en Banc, you file your petition for cert and if they grant it, fine; if they don't, it dies, right?

I mean, and so I'm not aware of any case in which a subsequent three-judge panel gets to revisit the previous holdings of the court without running into all kinds of problems with an issue of preclusion, right? And so I'm wondering if –

MR. KLAYMAN: There's no issue – I'm sorry to interrupt, Your Honor. My apologies. There's no issue of preclusion here because the issue of the D.C. Circuit not reviewing this matter has never been litigated. That's what we're here on today. We're not talking about what happened before the lower court, it's the D.C. Circuit not doing its job. In fact, when they denied it –

THE COURT: As I understand, Judge Erickson's question is did you make that argument as to the [11] panel's delinquency when you filed your en Banc petition and when you filed your cert petition?

MR. KLAYMAN: I did, Your Honor, but, as Your Honor is aware, that the Supreme Court takes very, very few cases. They actually had, you know, very important cases on their docket dealing with Roe v. Wade. It's discretionary, and that is not demonstrative of the legal duty of Your Honors, in all due respect, to address this issue, because this issue had been filed long before I filed a cert petition.

THE COURT: The issue –

MR. KLAYMAN: What I'm asking here –

THE COURT: The issue before us is the correctness of Judge Cooper's dismissal, and so I want to

give you the opportunity, before your time runs out, to actually respond to the threshold jurisdictional case law cited by the government, and I want to draw your attention particularly to the Supreme Court's Celotex decision and to the D.C. Circuit's Smalls decision.

Those both stand for the proposition that Judge Cooper has no authority to review the D.C. Circuit's ruling, so how would you – Could you respond to those two cases specifically? Because I [12] didn't see it in your reply brief.

MR. KLAYMAN: I don't read those cases that way, Your Honor, I just don't, and in fact we're in front of you right now. You do have the authority and (inaudible) –

THE COURT: Well, I'm just going to interrupt you because you need to respond. If you don't read them that way, how do you read them? Because those are binding on us and the D.C. Circuit cited them originally and now the government cited them, so I really need to know how you read them differently.

MR. KLAYMAN: Number one, we pled all that we needed to plead under a notice of pleading requirement under Rule 9.

THE COURT: Okay, but I'm not getting to the plausibility of your claims. I'm asking –

MR. KLAYMAN: Yes.

THE COURT: – what's your authority that Judge Cooper could review a decision that you took on

direct appeal all the way en Banc to cert? How do we avoid those two cases? So speak to those two cases, Mr. Klayman.

MR. KLAYMAN: This is an exceptional case. In order to get up in front of you, I had to go there first, and consequently Judge Cooper, by denying or [13] dismissing my case, actually created the predicate to be in front of you.

So now I'm in front of you, I'm in a superior court right now, that's how I got there. I couldn't file directly in front of you. I tried to do that with a petition for rehearing en Banc. It was dismissed, with a huge record of 16 years, in 11 days. That's simply not plausible.

THE COURT: So put as concisely as possible, what is the reversible error that Judge Cooper committed when he stated he didn't have jurisdiction to give you the relief, vacatur and neutral, that you're asking? What is, where is the reversible error in that jurisdictional holding of his?

MR. KLAYMAN: The reversible error is that he should have referred the matter to a higher authority at that point, but I had to start there, Your Honor. I had to start there, and I tried in front –

THE COURT: What process exists under the rules for a district judge to just refer a matter to the Court of Appeals? I was a district judge for a long time. I would have wanted to do that from time-to-time, but I didn't know any way I [14] could.

MR. KLAYMAN: I was going to start this hearing by asking you a question, okay? What would you do under these circumstances? It is so unique, it is so unbelievable that a circuit court could write that this was commendable the way this case was handled. I mean, it's beyond the pale, it's beyond imagination, and that's why I implore you to actually read the record as well, because if I need to go another route, I can go another route, but I had no other route to go at this time. Rule 60 seemed to cover it.

I'm not seeking to relitigate other cases. This is a unique case dealing with the D.C. Circuit's failure to provide me Fifth Amendment and Fourteenth Amendment due process rights. Where else do I go?

As far as the Supreme Court's concerned, that's discretionary. They're not going to be giving much time to Larry Klayman on a discretionary matter when they're dealing with Roe v. Wade and issues like that, so you're my last hope, you're my last recourse here. And I had to start with Cooper to get up to you, but I never had an opportunity to even brief the issue in front of [15] him. I was denied due process there as well. I've never seen a situation like this where before I even serve the complaint he's writing an order.

So, you know, there obviously is something going on there, and we know, and you all are not from Washington, D.C., we know the atmosphere in Washington, D.C. today. I'm the founder of Judicial Watch, I'm the founder of Freedom Watch. It's highly toxic on both sides of the political isle and Larry Klayman has been,

over the years, you know, a thorn in the side of the establishment and I wrote a book which was very critical of the judges on that court because I've been practicing there for 45 years, nearly. So –

THE COURT: And, Mr. Klayman, your answer, I mean, we have read this record, of course, and you gave us voluminous record excerpts. And so I'm looking at your Page 241, there's your en banc rehearing and you did make this argument, that the panel had overlooked your arguments. That was not to the Supreme Court, but to the D.C. Circuit en banc, and I take it your response would be the same – that they, too, overlooked everything?

MR. KLAYMAN: The Supreme Court?

THE COURT: No, the D.C. Circuit en banc.

[16] MR. KLAYMAN: Yes, yes, they did. They did, Your Honor, because, look, everybody – We know, you know, what the situation is here. People in the same courthouse, Judge, just like everybody else, you know, go to lunch together, they socialize together, they talk about litigants, they talk about what's going on, their impressions of them.

They didn't want to be bothered with this and so they just rubber-stamped it, but how can, as a matter of justice, a situation occur where someone's smeared for beating his wife that has nothing to do with the case, where they ignore their own case law in the D.C. Circuit that says you have to have appreciable number

of consumers confused to give rise to trademark infringement, and that's where most of this –

THE COURT: The ultimate question, and I hate to take your time, but in my mind the ultimate question is who are we to do something about that?

MR. KLAYMAN: You have Rule 60 as a vehicle to do that, because this is – it falls in, in particular, number six, any other reason justifying relief from operation of a judgment.

What I'm saying is vacate the judgment and [17] order them to do a review, order them to do their job. Or if you can do the review, if it stays in front of you, and I trust it will, take a look at the law here, take a look at the facts. This thing is, frankly, on Mars, what came down, and then I don't get a review.

Would you, Your Honor, write that it was commendable to administer to a case for 16 years? That tells you something. Commendable? Are you kidding me? So this is where we are, and –

JUDGE HIGGINSON: Had the government – Just so you know, you'll have rebuttal time, but the government has cited law just for the proposition that we don't have equity authority when you had a remedy at law, and your answer would be that the remedy at law was just illusory?

MR. KLAYMAN: My answer is is that I was never provided due process, therefore I was never provided a remedy at law.

JUDGE HIGGINSON: Yeah.

MR. KLAYMAN: I was completely denied due process.

JUDGE SACK: Judge Higginson, I think we are into his –

JUDGE HIGGINSON: Oh, I apologize.

[18] JUDGE SACK: – rebuttal time.

JUDGE HIGGINSON: Yes.

JUDGE SACK: So we're going to have to –

JUDGE HIGGINSON: Mr. Klayman –

JUDGE SACK: – somehow, yeah, yeah, you're going to –

JUDGE HIGGINSON: Yeah.

JUDGE SACK: – have to, I think, give him an additional –

JUDGE HIGGINSON: Yes.

JUDGE SACK: – several minutes afterwards.

JUDGE HIGGINSON: I've been told that, Mr. Klayman, you will get two extra minutes added on for rebuttal because –

MR. KLAYMAN: Thank you, Your Honor.

JUDGE HIGGINSON: – I kept asking questions.

MR. KLAYMAN: Thank you.

JUDGE HIGGINSON: So we'll hear from the government now. Thank you, Judge Sack.

THE COURT: Mr. Soter, whenever you're ready.

MR. SOTER: Thank you very much. Good morning, Your Honor, may it please the Court, Kevin Soter from the Department of Justice for the defendants.

The District Court properly dismissed this [19] lawsuit for a simple reason. Litigants who are dissatisfied with the results in their cases cannot resort to suing the judges.

In a (inaudible) recent decision, the District Court relied on four independent (inaudible) bases in support of that commonsense conclusion –

THE COURT: This will be Judge Cooper?

MR. SOTER: – including –

THE COURT: Cooper, this will be Judge Cooper?

MR. SOTER: Yeah, it's Judge Cooper. Issued the (inaudible) decision that's available in the appendix that details these four (inaudible) bases to support the conclusion that a litigant that's disappointed with the results cannot sue the judges.

This Court should affirm for the reasons that we've set forth in our brief. I think we've laid out the various options this Court has for affirming and I'm happy to address any questions if the Court has them.

THE COURT: Well, when you say he did list out four, some are jurisdictional and some not, so I assume you'd agree we would start with the jurisdictional ones, and I saw at least two.

Which of those would you say have current and [20] controlling D.C. Circuit law to support them? Because judicial immunity seems to be a little bit more of a murky world.

MR. SOTER: I think this Court could certainly begin where we began in our brief, with the jurisdictional issue whether a District Court has jurisdiction to vacate the orders of another federal court, that it follows directly from the Supreme Court's decision in Celotex that Your Honor was discussing, as well as the D.C. Circuit's decision in Smalls, that there is no such jurisdiction, and that is an ample basis for affirming the results here.

(Inaudible) the Court continues on, I think everything past that is sort of an additional basis confirming this result on multiple other grounds, including immunity, issue of preclusion, and the merits.

THE COURT: Well, you do point out that Pulliam has complexities and your brief suggested even infirmities. Do you want to elaborate a little on that?

MR. SOTER: Yes. I think as an initial matter, for the reasons we've discussed, it's not necessary to get into these details of what exactly [21] the scope of Pulliam is because of this threshold jurisdictional issue.

To the extent the Court goes on to reach alternative bases for affirming that result, I think there are a few distinctions from Pulliam that are important to keep in mind. One is that Pulliam only involved a claim for truly prospective injunctive equitable relief. This case doesn't. This case involves a request to go back and retrospectively review the results reached in prior litigation.

And then the other key distinction that's been discussed by the Ninth, Eleventh, and Third Circuits is that Pulliam was a case involving state judges, state judicial officials, and there is different considerations at play.

The reasoning Pulliam doesn't extend in the same way when you're dealing with federal judges for whom, again sort of tying back to the general theme, there are avenues to obtain the sort of relief that Mr. Klayman has asked for here, a vacatur of a judgment, but those are to go through the orderly process of an appeal to seek reconsideration in the District Court, the Court of Appeals, all this of this that already happened, [22] and the process has to come to an end at some point and it ended already in this case.

THE COURT: Now, Mr. Klayman, pro se, is asking particularly, repeatedly suggesting there was

no fair trial, above all because of what we could call 404(b) evidence and in particular, you know, the alleged assaultive behavior.

Do you want to speak to whether or not that would – that specific issue, the correctness of the introduction of that evidence?

This is assuming, just for the sake of argument, that we would get to the claims. Was that never considered either in district court or in circuit court?

MR. SOTER: I think that was clearly considered in the D.C. Circuit's decision and, as Your Honor mentioned, these issues were raised in the briefing for the D.C. Circuit and any en Banc briefing and there was also a cert petition that was recently denied.

These are all the sorts of issues that can be raised in litigation and on appeal, and in fact were raised here, and there is no authority to support bringing a collateral lawsuit against the judges, asking for a do-over of those sorts of [23] decisions in trying to inject these claims of bias and improper judicial decision-making. There is a (inaudible) process that already happened here.

THE COURT: I'm curious, just –

(Inaudible.)

THE COURT: Yeah, go ahead, Judge Erickson.

JUDGE ERICKSON: I'm just contemplating is there some other orderly process for this? And

I'm wondering, you know, a court superior to the D.C. Court of Appeals, which would be by definition only the Supreme Court of the United States, couldn't you petition for a writ of mandamus directing, I mean, if you really did have evidence, I mean – And the problem here is we've got, you know, perhaps part of the problem is that we have, of course, only a complaint, it's conclusory, there was never anything developed above that, and there's no evidence other than, you know, arguments that are inferential, right?

And so but the Supreme Court would have the authority to issue a writ of mandamus to the D.C. Circuit to actually, to just say, you know, we find that you didn't actually review the case and we order you to do it, right? Or am I wrong?

MR. SOTER: Yes, Your Honor. I think the [24] important point is there are processes at law, there are what would be adequate remedies at law, which include appeal in addition to a writ of mandamus if the circumstances warrant it, but there isn't and what the case law makes completely clear is there isn't an opportunity to bring a separate collateral lawsuit where you go before a different district judge and ask that district judge to order vacatur of an existing final judgment.

THE COURT: I'm just curious a little, on a slightly side issue, but it was an issue decided below and therefore before us, if in fact all judges on a circuit are recused, what is the government's – You have multiple arguments against the authority to transfer and

I wasn't exactly sure which was your primary – that factually there would be no other venue with jurisdiction over the defendant judges or the transfer itself is an issue that's been decided and therefore there's res judicata even as to that issue?

MR. SOTER: I think there are several grounds on which this Court could affirm the decision about disqualification or transfer. Perhaps the one at the core of it that may be the most straightforward [25] is to just agree with what Judge Cooper said about why he did not need to recuse himself from this case, which was the core of Mr. Klayman's allegation for transfer there, and that was fully consistent with the ethics opinion that's been issued by the relevant committee of the Judicial Conference that we cited in our brief. I believe that's at Page 29 of our brief, there's a citation to the opinion that says that when you have this sort of case where someone tries to sue the judges and it's not a claim with merit, there is no conflict for the – for a district judge to be sitting on that, even though it's accusing that judge's colleagues of misconduct and other issues.

In addition to that, there are other bases, including that this Court can affirm for the reasons in part one of our brief, and this is not the sort of threshold issue that needs to be reached at all.

THE COURT: Mr. Klayman has already –

THE COURT: Part one of your brief being? Remind me, you said part one of your brief, which refers to what issue?

MR. SOTER: The correctness of the dismissal, rather than the – just the sort of transfer or [26] disqualification issue.

THE COURT: Oh, got you, okay, got you.

MR. SOTER: It follows from – We cited the Supreme Court Sinaham (phonetic) decision in our brief for why this sort of issue about whether the judge needs to disqualify (inaudible) something the Court needs to reach.

THE COURT: Mr. Soter, Mr. Klayman has argued that the process here that was followed by Judge Cooper is somewhat unusual, that he ruled sua sponte, he ruled sua sponte before actual service of the complaint and any opportunity on the part of the defendants to respond and that the unusual nature of that is evidence of bias or prejudice such that recusal really actually is the appropriate remedy. How would you respond to that?

MR. SOTER: I think, Your Honor, what's unusual in this case is the repeated attempts to attack the same judgment through – after going through all of the available actual processes to already collaterally attack it before, through the case that was before Judge Chutkan, and to bring these claims that just do not have any basis in law to proceed with.

And so in that circumstance, Judge Cooper [27] was – acted well within his discretion to resolve this case on threshold jurisdictional grounds that were incurable and also to rely on the D.C. Circuit's Baker

case that we've mentioned in our brief that stands for the proposition that even a standard sort of merits 12(b)(6) dismissal, when it's patently obvious from reading the complaint that that's warranted, a district court has discretion to dismiss the case without notice to the plaintiff.

THE COURT: Thank you.

MR. SOTER: If there are no further questions, I am happy to rest on my brief for the remaining points.

THE COURT: Thank you very much, Mr. Soter.

Mr. Klayman, I apologize again for not paying attention to your rebuttal time. In our court that's usually a frozen amount of time.

Why don't you go ahead and take two – I think you had two minutes. Go ahead.

MR. KLAYMAN: Thank you, Your Honor, I appreciate that.

I just want to make it clear I'm asking for prospective relief, so we do fall within the scope of Pulliam. I'm asking that the D.C. Circuit be [28] required – you can do it, obviously, now because you are the D.C. Circuit – to review the record, okay, actually look at the record and see what happened.

This is a manifest injustice and it behooves the Court to (inaudible) –

THE COURT: So that would be satisfactory, that would be satisfactory to you if we'd just say go back and look at the record thoroughly?

MR. KLAYMAN: As long as you're –

THE COURT: (Inaudible.)

MR. KLAYMAN: As long as you're doing it, yes, that would be satisfactory, Your Honor.

The other thing is there's no distinction – This is another point, but that's not the major point. There's no distinction between federal and state judges in terms of immunity for equitable relief and the power to grant it. That's just simply not in the cases. You won't find it.

So, I mean, that's the bottom line, is that we need to have due process here. This is an example that creates a very bad precedent for other litigants to come into the court, in a day and age when people are already having, on both sides of the – all sides of the political spectrum, concern [29] about the functioning of our legal system. It's very important that the courts create that confidence, for even someone like Larry Klayman, you know, who's been a public interest advocate, that he gets due process as well.

So I thank you very much, you know, for your time. I'm very grateful that you're on the case. I ask that you review the record, take a look at it. There's got to be a way to skin the cat here, because this just isn't right.

THE COURT: I'm going to ask one last question, Mr. Klayman. What would be your limiting principle? Let's just assume any litigant who feels their case is just as important as yours feels that at every level of direct appeal their arguments weren't sufficiently considered. What would be the limiting principle that they couldn't always then allege bias, hostility, and demand to have the courts just look at it again? How are you differently situated?

MR. KLAYMAN: This is that extraordinary case, Your Honor, and that's what I kept citing. I mean, look at the opinion itself which, you know, praises Judge Kotelly for 16 years of administration of the case. That was gratuitous. That didn't have to be [30] put in there. It tells you where you're coming from, or Judge Chutkan.

THE COURT: But is that, if we found – If we were to find similar language, which we disagreed calling something commendable when obviously it was not, that is the limiting principle in that case –

MR. KLAYMAN: No, what I'm saying –

THE COURT: – (inaudible).

MR. KLAYMAN: No, what I'm saying is this case is so extreme, it's the extreme case. And Judge Chutkan, another example, I asked whether there had been any communications with Judge Kotelly. She stayed the case pending appeal. She decided on her own, again, sua sponte, to dismiss it before the appeal

was even heard and withdrew her order to stay. There's something that went on over there.

THE COURT: I'm just looking – The only thing I'm trying to be sure I understand is the answer to Judge Higginson's question as to what are the limitations – I understand your view and your position, but the question is in, you know, looking for a general rule of law, what is the general rule of law that we would take out of this?

MR. KLAYMAN: In most instances, Your Honor, [31] it would not be subject to collateral attack, but this is that extreme circumstance and you can see it right from the record, and it is extreme when a lawyer, without any proof, is put in front of a jury, because a defendant wants to create inflammable prejudicial material, that he beat his wife.

That's the worst thing that you can put in front of a jury, and we cited cases in that regard. And even a criminal defendant who's accused of violence, if it's not relevant to what he's being accused of, you can't do that. I was a civil plaintiff.

THE COURT: So you're arguing essentially the limiting principle is if the case is sui generis, and is in such a way unto itself that it shocks the conscience, that there's an exception? So this is a sort of shock the conscience kind of argument, that we (inaudible) –

MR. KLAYMAN: Yes, yes. Yes, it is, and when you –

THE COURT: – and that's the only way to limit it?

MR. KLAYMAN: Yes, and when you defy the law of your own circuit with regard to trademark [32] infringement – And, again, these consumers, the documents weren't even authenticated. We don't know that Judicial Watch didn't create them. They were never authenticated, and yet the D.C. Circuit has ruled you need appreciable number of consumers to be confused about trademark infringement.

THE COURT: I'd be most interested for you to specifically address yourself to Judge Erickson's question. Is that the standard – shocks the conscience? Is that what we're talking about? We're looking for a standard, a rule (inaudible).

MR. KLAYMAN: Yeah, I would say, I would say he hit the nail on the head, this shocks the conscience.

THE COURT: Thank you.

MR. KLAYMAN: Thank you, Your Honor.

THE COURT: Thank you both. We appreciate the arguments. The case is submitted.

(The audio concluded.)

[Certificate Omitted]