No. 22-637

In The

Supreme Court of the United States

IN RE LARRY ELLIOT KLAYMAN,

Petitioner.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREAMBLE

Pursuant to Rule 44.1 of this Court, Petitioner Larry Klayman ("Mr. Klayman") respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").

PETITION FOR REHEARING

Mr. Klayman filed the underlying case and subsequent appeal to the D.C. Circuit, the order to obtain injunctive relief and an order mandating that (1) the D.C. Circuit conduct a bona fide review of the record in the *Klayman v. Judicial Watch Inc et al*, 06-cv-670 (D.D.C.) ("the JW Case") and (2) a new trial of the JW Case.

At the August 24, 2022 oral argument in the underlying case, the Honorable Stephen A. Higginson ("Judge Higginson"), the Honorable Ralph R. Erickson ("Judge Erickson") and the Honorable Robert D. Sack ("Judge Sack") (collectively 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?" App. 148. 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 Panel 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. App. 167. Mr. Klayman concurred, saying, "[y]eah, I would say, I would say he hit the nail on the head, this shocks the conscience." App. 167.

A review of the record in this case will show that this case is one that truly shocks the conscience given the enormous stakes at issue and the continued and egregious due process and other violations involved, but the Court here denied review of Mr. Klayman's writ. Mr. Klayman therefore petitions for rehearing given the enormous stake involved, not just for him, but for all litigants around the country.

REASONS FOR REHEARING

A petition for rehearing should present intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Supreme Court Rule 44.2. Here, there are substantial circumstances that mandate the relief sought herein as the issue of "judicial immunity" must be

resolved for the sake of not just Mr. Klayman, but litigants all over the country.

I. There is no Judicial Immunity for Injunctive Relief

It is indisputable that Mr. Klayman's action only sought injunctive and declaratory relief against Respondents, 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 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 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 a member of this 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).

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.
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> 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 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.

II. The Events at Issue Truly "Shock the Conscience"

As suggested by the Panel at the August 24, 2022 a standard could be implemented to determine whether the type of relief sought by Mr. Klayman could be granted – namely conduct that "shocks the conscience." App. 167.

A review of the record will reveal events that truly meet this standard suggested by the Panel, as the JW Case and Appeal truly involved events that "shock the conscience," including but not limited to (1) the Lower Court gratuitously admitting highly prejudicial,

completely irrelevant, and totally false testimony that Mr. Klayman had physically assaulted his ex-wife in front of their children, and (2) the D.C. Circuit completely failing to conduct any sort of review of a very voluminous sixteen (16) year record and then admitting 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, resulting in an inconsistent application of trademark law and a circuit split.

These are just the chief errors amongst the numerous other errors fully set forth above. Taken together, there is no possible way to assert that what happened to Mr. Klayman does not "shock the conscience."

CONCLUSION

The Court respectfully must step in and address the standard under which judges may be held liable for injunctive and declaratory relief, as the events of the underlying case truly "shock the conscience" and litigants such as Mr. Klayman who are forced to face these circumstances must be given some type of recourse

pursuant to their due process and other constitutional rights.

Dated: March 29, 2023

Respectfully Submitted,

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CERTIFICATE OF GOOD FAITH

Pursuant to Rule 44, Rules of the Supreme Court, I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2, Rules of the Supreme Court, and is being presented in good faith and not for delay.

LARRY KLAYMAN