No. -____

IN THE
Supreme Court of the United States

HON. WENDELL GRIFFEN,

Petitioner,

v.

HON. JOHN DAN KEMP, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. LAUX
LAUX LAW GROUP
400 W. Capitol Ave.,
1700
Little Rock, AR 72201
(501) 242-0750

AUSTIN PORTER, JR.
PORTER LAW FIRM
323 Center St., # 1035
Little Rock, AR 72201
(501) 244-8200

MICHAEL P. MATTHEWS
Counsel of Record
LAWRENCE J. DOUGHERTY
RACHEL E. KRAMER
ANDREW M. MEERKINS
FOLEY & LARDNER LLP
100 N. Tampa St., # 2700
Tampa, FL 33602
(813) 229-2300
mmatthews@foley.com

Counsel for the Hon. Wendell Griffen Petitioner for a Writ of Certiorari

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

In this civil rights action under 42 U.S.C. § 1983, a divided panel of the Eighth Circuit purported to exercise jurisdiction under the All Writs Act to conduct appellate review of a non-final order of the district court denying dismissal of the complaint and to issue a writ of mandamus ordering dismissal. *In re Kemp*, 894 F.3d 900 (8th Cir. 2018); App., *infra*, 2a-15a.

The questions presented for review are:

1. Whether the All Writs Acts grants the circuit courts jurisdiction to issue writs of mandamus to review on the merits a district court's non-final denial of a motion to dismiss.

2. Whether the Eighth Circuit's review of the facial sufficiency of the § 1983 complaint below ignored the requirements of *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014), resulting in the improper summary dismissal of plaintiff's claims that defendants' decision to preclude him from adjudicating a broad category of cases was:

> a. reached in violation of the requirements of procedural due process; and
>
> b. infected by racial bias.

3. Whether by placing on a plaintiff the burden to plead and prove a less restrictive means of furthering a compelling interest under the Arkansas Religious Freedom Restoration Act, the Eighth Circuit contravened the holdings of this Court in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Gomez v. Toledo*, 446 U.S. 635 (1980).

PARTIES TO THE PROCEEDINGS BELOW

The respondent in the circuit court is the Honorable Wendell Griffen, an Arkansas state circuit judge. Judge Griffen is the petitioner for certiorari in this Court. Judge Griffen is the plaintiff in the district court.

The petitioners in the circuit court are the Honorable John Dan Kemp, the Honorable Robin F. Wynne, the Honorable Courtney Hudson-Goodson, the Honorable Josephine L. Hart, the Honorable Shawn A. Womack, the Honorable Karen R. Baker, and the Honorable Rhonda K. Wood. All those individuals are justices of the Arkansas Supreme Court. They are the respondents in this Court and the defendants in the district court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
OPINION BELOW 1
STATEMENT OF JURISDICTION 1
STATUTE INVOLVED 2
PRELIMINARY STATEMENT 2
STATEMENT 4
I. LEGAL FRAMEWORK 4
A. The Writ of Mandamus 4
B. The Final Judgment Rule 7
C. The Motion to Dismiss 8
II. PROCEEDINGS BELOW 9
A. Background of the Case 9
B. Proceedings Before the District Court 11
C. Proceedings Before the Circuit Court of Appeals 12
REASONS FOR GRANTING THE PETITION 13
I. THE ALL WRITS ACT DOES NOT EMPOWER CIRCUIT COURTS TO ENTER WRITS OF MANDAMUS THAT EXCEED THEIR JURISDICTION, SUCH AS THE REVERSAL ON THE MERITS OF THE NON-FINAL DENIAL OF THE MOTION TO DISMISS HERE 14
A. The Eighth Circuit Lacked Any Independent Statutory Basis for Jurisdiction 14

B. The Ninth Circuit and D.C. Circuit Have Also Issued Writs of Mandamus in Excess of Their Jurisdiction 17

C. The Eighth Circuit's Writ Below Did Not Meet the Requirements for Mandamus Intervention in a Discovery Dispute 20

II. THE EIGHTH CIRCUIT'S REVIEW OF THE FACIAL SUFFICIENCY OF THE COMPLAINT IGNORES THE REQUIREMENTS OF *JOHNSON V. CITY OF SHELBY*, 135 S. CT. 346 (2014) 22

III. THE EIGHTH CIRCUIT IMPROPERLY PLACED THE BURDEN TO PROVE A LESS RESTRICTIVE MEANS ON A PLAINTIFF BRINGING A CLAIM UNDER THE ARKANSAS RELIGIOUS FREEDOM RESTORATION ACT...... 25

CONCLUSION 27

Appendix A – Judgment of the Court of Appeals (July 2, 2018)…………………………..…. 1a

Appendix B – Opinion of the Court of Appeals (July 2, 2018)……………………………….. 2a

Appendix C – Denial of Rehearing and Rehearing En Banc (August 29, 2018)………….18a

Appendix D – Complaint in the District Court (October 5, 2017)……………………………19a

TABLE OF AUTHORITIES

Page(s)

CASES

Abelesz v. Erste Group Bank AG,
695 F.3d 655 (7th Cir. 2012) 16

Alexander v. Louisiana,
405 U.S. 625 (1972) 24

Am. Hosp. Ass'n v. Burwell,
812 F.3d 183 (D.C. Cir. 2016) 18

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 8

Bank of Columbia v. Sweeny,
26 U.S. (1 Pet.) 567 (1828) 5

Belize Social Dev. Ltd. v. Gov't of Belize,
668 F.3d 724 (D.C. Cir. 2012) 19-20

In re Benvin,
791 F.3d 1096 (9th Cir. 2015) 19

Brown v. City of Oneonta,
858 F. Supp. 340 (N.D.N.Y. 1994) 25

Buck v. Davis,
137 S. Ct. 759 (2017) 24

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) .... i, 26

Capital Community College Student Senate v. Connecticut,
175 F. Supp. 2d 271 (D. Conn. 2001) 24

Catlin v. United States,
324 U.S. 229 (1945) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Cheney v. U. S. Dist. Court for Dist. of Columbia,
542 U.S. 367 (2004) 6, 16

Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985) 23

Clinton v. Goldsmith,
526 U.S. 529 (1999) 14

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 7, 9

In re a Community Voice,
878 F.3d 779 (9th Cir. 2017) 18

Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir. 1991) 25

In re Dep't of Commerce,
No. 18-557 (U.S. Nov. 16, 2018) 3, 7

Ex parte Fahey,
332 U.S. 258 (1947) 6

Gomez v. Toledo,
446 U.S. 635 (1980) .... i, 4, 26

Gulfstream Aerospace Corp. v. Mayacamas Corp.,
485 U.S. 271 (1988) 5-6, 9

In re Henson,
869 F.3d 1052 (9th Cir. 2017) 19

Holt v. Hobbs,
135 S. Ct. 853 (2015) .... i, 4, 26

TABLE OF AUTHORITIES—Continued

Page(s)

Johnson v. City of Shelby,
135 S. Ct. 346 (2014).....................i, 3, 22, 24

Kelly v. Rice,
375 F. Supp. 2d 203 (S.D.N.Y. 2005)... 25

In re Kemp,
894 F.3d 900 (8th Cir. 2018)............. i, 1

Kerr v. U.S. Dist. Court for Northern Dist. of Cal.,
426 U.S. 394 (1976)............................ 7, 8, 20

Lauro Lines s.r.l. v. Chasser,
490 U.S. 495 (1989).................................... 8, 9

Linde v. Arab Bank, PLC,
706 F.3d 92 (2d Cir. 2013) 16

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).................................... 21

Middleton's Case,
(1573) 73 Eng. Rep. 752 (K.B.) 5

Mohawk Indus. v. Carpenter,
558 U.S. 100 (2009).................................... 16

In re Murray Energy Corp.,
788 F.3d 330 (D.C. Cir. 2015).................... 15

Nat'l Cong. for Puerto Rican Rights v. City of New York,
75 F. Supp. 2d 154 (S.D.N.Y. 1999)........... 25

Peña-Rodriguez v. Colorado,
137 S. Ct. 855 (2017).................................. 24

In re Perez,
749 F.3d 849 (9th Cir. 2014)...................... 19

TABLE OF AUTHORITIES—Continued

Page(s)

Richardson-Merrell, Inc. v. Koller,
472 U.S. 424 (1985) 9, 16

Roche v. Evaporated Milk Ass'n,
319 U.S. 21 (1943) 6

Spiess v. C. Itoh & Co.,
725 F.2d 970 (5th Cir. 1984) 17

In re Sussex,
781 F.3d 1065 (9th Cir. 2015) 19

In re Tennant,
359 F.3d 523 (D.C. Cir. 2004) 14

In re U.S. (Socialist Workers Party),
565 F.2d 19 (2d Cir. 1977) 21

United States v. McDougal,
86 F.3d 1160 (8th Cir. 1996) 21

In re United States,
884 F.3d 830 (9th Cir 2018) 21

In re United States,
895 F.3d 1101 (9th Cir. 2018) 18

Village of Arlington Heights v. Metropolitan Housing Development Authority,
429 U.S. 252 (1977) 24

Will v. Hallock,
546 U.S. 345 (2006) 16-17

Will v. United States,
389 U.S. 90 (1967) 4, 7

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTION

U.S. Const. Amend. I 11

U.S. Const. Amend. XIV 12, 23

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 .... 7, 15-16

28 U.S.C. § 1292 17

28 U.S.C. § 1292(a) 7

28 U.S.C. § 1292(b) 7

28 U.S.C. § 1651 .... 2, 18-19

28 U.S.C. § 1651(a) 5, 15

42 U.S.C. § 1983 .... i, 3, 24

42 U.S.C. § 1985 12

All Writs Act .... *passim*

Judiciary Act of 1789 .... 5, 7

RULES

Fed. R. Civ. P. 12(b)(1) 12

Fed. R. Civ. P. 12(b)(6) 8, 12, 17

Fed. R. Civ. P. 23(f) 7, 17

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

1 Chester James Antieau, *The Practice Of Extraordinary Remedies* § 2.00 (1987) 5

5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1349 (3d ed. 2004).................. 8

Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 352 (2012).............. 5

S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951) 5

IN THE
Supreme Court of the United States

IN RE HON. JOHN DAN KEMP, *ET AL.*,

Petitioners below.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Honorable Wendell Griffen, the respondent in the action below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, App., *infra*, 2a-17a, is reported at 894 F.3d 900 (8th Cir. 2018).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on July 2, 2018, App., *infra*, 1a, and denied rehearing and rehearing en banc on August 29, 2018, App., *infra*, 18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The All Writs Act, 28 U.S.C. § 1651, states:

> 28 U.S. Code § 1651 - Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

PRELIMINARY STATEMENT

This petition for review of a ruling of a divided panel of the Eighth Circuit presents the Court with the opportunity to clarify several issues of nationwide significance: the proper role of mandamus within a system of orderly litigation; the standards for determining the facial sufficiency of a civil rights pleading; and the substantive requirements of a claim under the Religious Freedom Restoration Act and its state counterparts.

1. The writ of mandamus is a narrow exception to the time-tested final judgment rule, which prohibits interlocutory appeals of non-final orders such as the denial of the motion to dismiss at issue here. A circuit court may not use the writ of mandamus to enlarge its jurisdiction and reverse a non-final order on the merits that it normally would never have jurisdiction to review. The All Writs Act is not an independent grant of federal appellate jurisdiction. The Act directs that a writ of mandamus may only issue to aid the pre-existing jurisdiction of the issuing court. To that end,

this Court has recently reaffirmed that there are limits on the supervisory power of the writ of mandamus to curb discovery abuse. *In re Dep't of Commerce*, No. 18-557 (U.S. Nov. 16, 2018) (converting the government's mandamus petition challenging the scope of discovery into a petition for certiorari). In any event, the circuit courts, including the Eighth Circuit here, have improperly expanded whatever limited mandamus exceptions may exist for intrusive discovery to engage in premature review of the merits.

Erroneous grants of the writ of mandamus aggravate the problem of piecemeal review and invite floods of appeals of non-final orders. Improper grants of the writ also sacrifice efficiency by involving circuit courts in the district courts' management of pleading and discovery.

2. This Court made pointedly clear in *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) that there is no heightened pleading standard for actions under 42 U.S.C. § 1983. The decision below ignores this teaching, depriving Judge Griffen of the judicial process to which the Constitution entitles him: a plenary legal inquiry into his procedural due process claims and a well-managed factual investigation into his racial bias claims.

3. Construing the Arkansas Religious Freedom Restoration Act as having the same meaning as its federal counterpart, the Eighth Circuit placed on Judge Griffen the burden to plead and prove a less restrictive means of furthering a compelling interest. This ruling is squarely at odds with the teachings of

this Court in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), and *Gomez v. Toledo*, 446 U.S. 635 (1980).

In *Holt*, this Court unanimously reversed the Eighth Circuit's dismissal of a Muslim prisoner's complaint against Arkansas jailors seeking a religious accommodation to grow a half-inch beard. 135 S. Ct. at 859.

Writing for this Court, Justice Alito faulted the Eighth Circuit for its "unquestioning deference" to the decisions of Arkansas prison officials. *Id.* at 864. Justice Alito confirmed that the least-restrictive-means prong is "exceptionally demanding," *id.*, and that a defendant seeking to avoid it bears the burden of showing why no less-restrictive provision will work. *Id.* at 865-66.

But in its summary dismissal, the Eighth Circuit reversed the burden, notwithstanding that under *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), the burden of pleading in such situations falls to the same party as does the burden of proof. Review is warranted.

STATEMENT

This case concerns whether a divided circuit court panel may issue a writ of mandamus to reverse the non-final denial of a motion to dismiss, and whether, in using mandamus to reject civil rights claims on the merits, the circuit court applied the correct pleading standard.

I. LEGAL FRAMEWORK

A. The Writ of Mandamus

The writ of mandamus is among "the most potent weapons in the judicial arsenal." *Will v. United States*, 389 U.S. 90, 107 (1967). A very early case

involving a judicial writ of mandamus was *Middleton's Case*, (1573) 73 Eng. Rep. 752 (K.B.).[1] At that time, the writ's most common purpose was to restore individuals to public positions from which they were wrongfully removed. By the eighteenth century, the writ had developed a broader use as an extraordinary remedy to restrain inferior courts.[2]

The first U.S. Congress codified this power in Sections 13 and 14 of the Judiciary Act of 1789.[3] Early on, however, Chief Justice Marshall warned that use of mandamus to review interlocutory orders "would be a plain evasion of the provision of the Act of Congress, that final judgments only should be brought" before appellate courts. *Bank of Columbia v. Sweeny*, 26 U.S. (1 Pet.) 567, 569 (1828). Congress later consolidated the various federal courts' mandamus powers under the All Writs Act of 1948,[4] 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Federal courts have traditionally issued the writ only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Gulfstream*

---

[1] *See* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 352 (2012); 1 CHESTER JAMES ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES § 2.00 (1987); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951).

[2] *The Prerogative Writs,* 11 CAMBRIDGE L.J. 51.

[3] Judiciary Act of 1789, 1 Cong. ch. 20 §§ 13, 14, 1 Stat. 73, 80-82.

[4] Pub. L. No. 80-773, 62 Stat. 944 (1948).

Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). In accordance with this tradition, "only exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion'" will justify the writ. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (citations and some internal quotation marks omitted).

Thus, this "drastic and extraordinary" remedy is unavailable unless three conditions are met, in addition to jurisdiction: First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires"; second, that party must satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable'"; and third, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81 (brackets, citations, and some internal quotation marks omitted). Together, these safeguards ensure that the writ does not substitute for the regular appeals process. *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

In extraordinary cases, the writ of mandamus is available as a curb on intrusive discovery to preserve privilege, separation of powers, and other interests not amenable to remedy on appeal. But this Court has never approved the use of that power where, as here, the aggrieved party never sought relief in the district court.

Moreover, in the context of discovery, mandamus is only properly issued to rectify some specific abuse, not

to adjudicate the propriety of a general class of discovery. This Court recently reaffirmed that principle in *In re Dep't of Commerce*, No. 18-557 (U.S. Nov. 16, 2018) (converting the government's mandamus petition challenging the scope of discovery into the residency question in the 2020 census into a petition for certiorari and granting same).

In any event, the mandamus powers possessed by the circuit court do not entitle it to engage in the very different mission of merits review of non-final orders.

B. The Final Judgment Rule

Overly expansive issuance of the writ of mandamus threatens the longstanding policy considerations embodied in the final judgment rule. Since the Judiciary Act of 1789, Congress has provided that "appellate review should be postponed . . . until after final judgment has been rendered by the trial court." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (quoting *Will*, 389 U.S. at 96).[5] The modern statutory framework enumerates several limited and exceptionally narrow mechanisms for interlocutory appeals, none of which were applied in this case. *See, e.g.*, 28 U.S.C. § 1292(a)-(b) (interlocutory review of injunctions, receiverships, admiralty cases, or if the district court certifies a controlling question of law); FED. R. CIV. P. 23(f) (interlocutory review of orders granting or denying class-action certification); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (interlocutory review under § 1291's collateral order doctrine). By articulating these discrete mechanisms,

---

[5] *See* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

Congress mandated deference to non-final district court rulings and sought to prevent costly and unnecessary piecemeal litigation "in an era of excessively crowded lower court dockets." *Kerr*, 426 U.S. at 403. Consequently, "[a] judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." *Id.*

C. The Motion to Dismiss

"[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945); *see also Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 500 (1989) (quoting *Catlin* with approval). This holding reflects the principle that the district court's ruling upon a motion to dismiss, especially when it arises under Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim), falls into the core of its discretion to manage its docket and to separate flatly invalid claims from those with potential merit. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1349 (3d ed. 2004) ("The district court has a wide range of discretion in handling motions to dismiss under Rule 12(b), but ordinarily they should be granted sparingly and with caution to make certain that the plaintiff is not improperly denied a right to have his claim adjudicated on the merits."). The legal analysis is a "context-specific task . . . requir[ing] the reviewing court to draw on its judicial experience and common sense" to assess the "plausibility" of the claims alleged in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The denial of a motion to dismiss provides no final judgment for appellate review. Such a denial can hardly be considered a final judgment, since it essentially "ensures that litigation will continue in the District Court." *Lauro Lines*, 490 U.S. at 498 (quoting *Gulfstream Aerospace Corp.*, 485 U.S. at 275). And interlocutory review undercuts the role of the judge in regulating the litigants' conduct; rather "the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and . . . the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) (emphasis in original) (cited in *Lauro Lines*). The mere chance of increased and ultimately fruitless litigation from an erroneous legal decision on a motion to dismiss is not sufficient to thwart this duty. *Lauro Lines*, 490 U.S. at 499; *see also Cohen*, 337 U.S. at 546 ("Appeal gives the upper court a power of review, not one of intervention.").

II. PROCEEDINGS BELOW

A. Background of the Case

In 2009, Wendell Griffen began serving as a pastor of New Millennium Church in Little Rock, Arkansas. The next year, he was elected Circuit Judge for the Fifth Division of the Sixth Judicial Circuit of Arkansas. Judge Griffen was reelected in 2016.

In a religious blog post published on April 10, 2017, Judge Griffen expressed his personal view that the death penalty is "morally" unjustifiable, according to his religious beliefs.

On April 14, 2017, Judge Griffen attended, in his personal capacity, a Good Friday prayer vigil in opposition to the death penalty at the Arkansas Capitol. He did not address the public at this event. Later the same day, he attended another prayer vigil also in opposition to the death penalty, outside the Governor's Mansion. Judge Griffen did not address the public, wear judicial robes, or identify himself as a judge. He lay on a cot to express solidarity with Jesus who, as recounted in the New Testament Gospels of the Bible, was crucified by the Roman Empire.

On the same day as these Good Friday prayer vigils, April 14, 2017, McKesson Medical-Surgical Inc. ("McKesson") a distributor of the drug vecuronium bromide, filed a replevin complaint against the State of Arkansas, Arkansas Governor Asa Hutchinson, the Arkansas Department of Corrections, and the Director of the Arkansas Department of Corrections. The complaint alleged that defendants had defrauded McKesson by using false pretenses to procure the drug for performing executions. In filing the complaint, McKesson sought a temporary restraining order ("TRO") against defendants preventing them from using the vecuronium bromide in executions while the claim for replevin was pending. Judge Griffen granted McKesson's TRO and scheduled a hearing for the following Tuesday on April 18, 2017.

On April 15, 2017, the Saturday following the prayer vigils and Judge Griffen's grant of the TRO, the Arkansas Attorney General filed an emergency petition for writ of mandamus, writ of certiorari, or supervisory writ with the Arkansas Supreme Court

seeking to vacate the TRO and remove Judge Griffen from the McKesson case. App., *infra*, 26a ¶ 28.

On the following Monday, April 17, 2017, the Arkansas Supreme Court considered the petition on an ex parte basis, granting the Attorney General's writ and not only removing Judge Griffen from the McKesson case but also—without any request, hearing, or prior notice—permanently barring Judge Griffen from all cases, civil and criminal, involving the death penalty or the state's execution protocol. App., *infra*, 26a ¶¶ 29-30.

B. Proceedings Before the District Court

In response to the Arkansas Supreme Court permanently, immediately, and prospectively barring Judge Griffen from hearing death penalty cases based on his exercise of his religious beliefs, on October 5, 2017, Judge Griffen filed a complaint in United States District Court for the Eastern District of Arkansas, Western Division, against the Supreme Court of Arkansas and the following Justices thereof in their official capacities: Hon. John Dan Kemp; Hon. Robin F. Wynne; Hon. Courtney Hudson Goodson; Hon. Josephine L. Hart; Hon. Shawn A. Womack; Hon. Karen R. Baker; and Hon. Rhonda K. Wood (collectively, the "Defendants"). App., *infra*, 19a-46a.

Judge Griffen's complaint alleged that the Defendants had unconstitutionally deprived him of his "rights to freedom of speech, freedom of assembly, and freedom of religion and religious exercise" under the First Amendment of the Constitution of the United States. App., *infra*, 20a. Additionally, the complaint alleged that the Defendants had violated his rights to equal protection and due process under the

Fourteenth Amendment of the Constitution of the United States and conspired to violate his civil rights as prohibited by 42 U.S.C. § 1985. App., *infra*, 20a. Lastly, under state law, Judge Griffen alleged that the Defendants had violated his right to exercise his religious beliefs under the Arkansas Religious Freedom Restoration Act. App., *infra*, 20a.

The Defendants moved for dismissal of the case on December 19, 2017, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court denied the motions to dismiss the claims for declaratory relief against the Defendants in their official capacities, but granted the motion to dismiss the claims against the Supreme Court of Arkansas and the claims seeking injunctive relief against the Defendants. App., *infra*, 6a. The district court also lifted the temporary stay of discovery.

The Defendants had not moved the district court to limit the scope of discovery, nor had the district court issued any orders to compel discovery from the Defendants, when the Defendants petitioned the Eighth Circuit Court of Appeals for a writ of mandamus on April 24, 2018. App., *infra*, 6a.

C. Proceedings Before the Circuit Court of Appeals

Defendants sought the writ of mandamus to intervene in the district court's authority over the case and vacate the district court's non-final order denying in part the Defendants' motion to dismiss, and thereby halt the discovery process. App., *infra*, 6a-7a.

On July 2, 2018, a divided panel of the Eighth Circuit Court of Appeals, in a 2-1 decision, entered the writ of mandamus, vacating the district court's denial

of the Defendants' motion to dismiss and remanding. App., *infra*, 2a-17a.

In its opinion, the Eighth Circuit adjudicated all Judge Griffen's claims on the merits, App., *infra*, 8a-16a, without remand for leave to replead or to engage in discovery.

Dissenting from the panel opinion, Judge Kelly observed that the Defendants "did not ask the district court to limit the scope of discovery . . . or to shield disclosed records from public view." App., *infra*, 17a (Kelly, J., dissenting). Rather, the Defendants "only asked the district court to dismiss Judge Griffen's suit on the merits," when they "have not attempted to exhaust their 'adequate means' in the district court." *Id.*

On July 16, 2018, Judge Griffen filed a Petition for Panel Rehearing and Rehearing En Banc. On August 29, 2018, the Eighth Circuit denied Judge Griffen's petitions for rehearing and rehearing en banc. App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

The opinion below typifies the creeping misuse of mandamus jurisdiction by circuit courts to revisit non-final decisions of a district court over which the circuit courts normally would lack jurisdiction. The circuit courts have expanded whatever limited mandamus exception may exist for intrusive discovery to authorize review on the merits. This Court should hold the line against overexpansion of the writ of mandamus to engage in premature review of the merits. The opinion below also undermines the correct standards for determining the facial sufficiency of a civil rights pleading and the substantive requirements

of a claim under the Religious Freedom Restoration Act and its state counterpart.

I. THE ALL WRITS ACT DOES NOT EMPOWER CIRCUIT COURTS TO ENTER WRITS OF MANDAMUS THAT EXCEED THEIR JURISDICTION, SUCH AS THE REVERSAL ON THE MERITS OF THE NON-FINAL DENIAL OF THE MOTION TO DISMISS HERE

The district court's denial of the Defendants' motion to dismiss the complaint was neither a final order, nor an appealable collateral order, nor any other type of decision that could have provided a jurisdictional basis for the circuit court to grant relief under the All Writs Act. The district court's order did nothing to frustrate eventual appellate review of the merits and, indeed, had no consequence other than to continue the lawsuit in the normal course under the supervision and management of the district court. The circuit court had no power to invoke the extraordinary remedy of mandamus and thereby evade the final judgment rule.

A. The Eighth Circuit Lacked Any Independent Statutory Basis for Jurisdiction

The All Writs Act is not itself a grant of federal appellate jurisdiction. *In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) (Roberts, J.). Rather, the Act authorizes the issuance of writs only "'in aid of' the issuing court's jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Importantly, the Act "does not enlarge that jurisdiction." *Id.* at 535. Thus, to issue mandamus, a court must ground its jurisdiction in another source.

For example, in *Tennant*, 359 F.3d at 528-29, the D.C. Circuit held it had no jurisdiction to issue

mandamus to compel a federal agency to take action because the petitioner, having failed to initiate a proceeding with the agency, had not satisfied the statutory threshold for agency review, and therefore had not laid the groundwork for the eventual jurisdiction of the circuit court.

Writing for the Court, then-Judge Roberts explained that mandamus could not be justified as "in aid of" the circuit court's jurisdiction because that jurisdiction had not been invoked. *Id.* at 530-31.

In *In re Murray Energy Corp.*, 788 F.3d 330, 333 (D.C. Cir. 2015) (Kavanaugh, J.), the D.C. Circuit confirmed that a circuit court has strictly limited jurisdiction to issue mandamus. The D.C. Circuit held in *Murray Energy* that it lacked jurisdiction to issue a writ concerning an agency's proposed rule, because the Administrative Procedure Act granted jurisdiction to the courts only to review final agency action. As then-Judge Kavanaugh clarified, "the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules." *Id.* at 335.

Here, by stating that it was ruling while "[h]aving jurisdiction under 28 U.S.C. § 1651(a)," the All Writs Act, App., *infra*, 3a, the Eighth Circuit panel majority begged the question of which pre-existing jurisdiction the All Writs Act was being invoked to aid, because the court had no pre-existing jurisdiction to review the non-final denial of a motion to dismiss. Subject to limited narrow exceptions, federal courts of appeals have jurisdiction to review only "final decisions of the district courts." 28 U.S.C. § 1291. This final judgment rule embodies Congress's "preference that some

erroneous trial court rulings go uncorrected until the appeal of a final judgment." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985); *see also Cheney*, 542 U.S. at 380-81 (noting that mandamus is not to be "used as a substitute for the regular appeals process").

Moreover, stringent limitation on exceptions to this rule "reflects a healthy respect for the virtues of the final-judgment rule," which virtues include avoiding piecemeal litigation that tends to "undermine[] 'efficient judicial administration'" and improperly encroach on the management of litigation by district judges, who are in the best position to "'police the prejudgment tactics of litigants.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106-07 (2009) (citation omitted). "[A]ppellate courts are not in the business of reviewing routine denials of motions to dismiss—not by using pendent appellate jurisdiction, not by using the collateral order doctrine, and certainly not by issuing a writ of mandamus." *Abelesz v. Erste Group Bank AG*, 695 F.3d 655, 661 (7th Cir. 2012).

The writ below was not immediately reviewable under the collateral order doctrine, which brings within the final judgment rule of § 1291 a "small category" of decisions "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus.*, 558 U.S. at 106. This category "must remain 'narrow and selective in its membership,' so that the collateral order doctrine does not 'overpower the substantial finality interests [that] § 1291 is meant to further.'" *Linde v. Arab Bank, PLC*, 706 F.3d 92, 103 (2d Cir. 2013) (quoting *Will v. Hallock*, 546 U.S. 345,

350 (2006)); *see also Spiess v. C. Itoh & Co.*, 725 F.2d 970, 974 (5th Cir. 1984) (holding that the circuit court lacked jurisdiction under the collateral order doctrine to review the district court's denial of a motion to dismiss based on Federal Rule of Civil Procedure 12(b)(6) because, far from being "completely separate from the merits of the action," the issue was "the existence, *vel non*, of a merits defense").

Likewise, the other limited exceptions described by statute and rule provide no jurisdiction here, nor were they even invoked in this case. *See, e.g.*, 28 U.S.C. § 1292 (permitting interlocutory review of injunctions, receiverships, admiralty decisions, and certifications by the district judge of a controlling question of law as to which there is a substantial difference of opinion); FED. R. CIV. P. 23(f) (permitting interlocutory review of orders granting or denying class certification). Here, the Eighth Circuit has expanded whatever limited exception may exist for intrusive discovery to authorize review on the merits.

B. The Ninth Circuit and D.C. Circuit Have Also Issued Writs of Mandamus in Excess of Their Jurisdiction

Other circuit courts have on several recent occasions used mandamus as a queue-jumping device to reverse non-final district-court orders that the circuit courts did not like, and decide the merits. In these decisions, there was no question that, absent the availability of mandamus, the circuit court would lack jurisdiction to engage in review. The law does not and should not provide for the use of mandamus for ad hoc interlocutory review. Circuit courts have expanded the limited available exceptions regarding intrusive

discovery to permit themselves to address merits questions that they would otherwise lack jurisdiction to consider. In so doing, the circuit courts have ignored the teachings of this Court.

For example, in *In re a Community Voice*, 878 F.3d 779 (9th Cir. 2017) (*no petition for certiorari filed*), the Ninth Circuit issued the writ to force the Environmental Protection Agency to act on a rulemaking petition regarding dust-lead standards that the agency had granted eight years before the writ was sought. *Id.* at 783. Though the agency estimated it would issue a proposed rule within a few years, the writ issued by the Ninth Circuit found the agency was under a duty to act under the Toxic Substances Control Act and the Administrative Procedure Act, and therefore ordered the agency to accelerate its timetable and issue a proposed rule within 90 days. *Id.* at 785, 788.

Judge Smith dissented, stating that "we lack jurisdiction to grant the writ." *Id.* at 789 (Smith, J., dissenting). Specifically, Judge Smith reasoned that, because the EPA had no clear duty to act under the statutes urged by petitioners, there was no jurisdiction for the Ninth Circuit to issue the writ. *Id.* (citing *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016)).

Indeed, the Ninth Circuit in particular routinely asserts its jurisdiction to consider a petition for writ of mandamus under § 1651 and proceeds to the merits without further analysis. *See, e.g.*, *In re United States,* 895 F.3d 1101, 1104 (9th Cir. 2018) ("We have jurisdiction over this mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651."), *stay denied*,

2018 WL 5778259 (U.S. Nov. 2, 2018); *In re Henson*, 869 F.3d 1052, 1057 (9th Cir. 2017) ("We have jurisdiction to issue writs of mandamus pursuant to the All Writs Act. 28 U.S.C. § 1651."); *In re Benvin*, 791 F.3d 1096, 1102 (9th Cir. 2015) ("We have jurisdiction to hear mandamus petitions pursuant to the All Writs Act, 28 U.S.C. § 1651."); *In re Sussex*, 781 F.3d 1065, 1068 (9th Cir. 2015) ("We have jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651."); *In re Perez*, 749 F.3d 849, 854 (9th Cir. 2014) ("This court has jurisdiction to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651.").

Then-Judge Kavanaugh anatomized the problem best in *Belize Social Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724 (D.C. Cir.), *cert. denied*, 568 U.S. 882 (2012) (Mem.). That case concerned a petition to confirm a foreign arbitration award against the government of Belize, which the Belize government successfully sought to stay in the district court pending the outcome of proceedings in Belize. 668 F.3d at 727. The panel majority granted the mandamus petition of the party seeking to confirm the award against the government, concluding that the district court's stay was "not based on a ground set forth in the New York Convention" (that governed confirmation of the international arbitration award at issue) and was "sufficiently indefinite" as to be "immoderate." *Id.* at 731-32. Significantly, the panel majority analyzed the substantive elements for mandamus without ever addressing the antecedent question of its jurisdiction.

Then-Judge Kavanaugh dissented, concluding that "we do not have appellate jurisdiction." *Id.* at 734 (Kavanaugh, J., dissenting). As Judge Kavanaugh

observed, "there [was] no final order because the company was not placed 'effectively out of court.'" *Id.* "[N]or does this case fit within the narrow confines of the collateral order doctrine." *Id.* As then-Judge Kavanaugh concluded: "Mandamus for this case is akin to using a chainsaw to carve your holiday turkey." *Id.*

C. The Eighth Circuit's Writ Below Did Not Meet the Requirements for Mandamus Intervention in a Discovery Dispute

Even beyond the failure to invoke proper jurisdiction, the Eighth Circuit panel majority made no finding, nor could it have, that the Defendants had "no other adequate means" to obtain relief. The panel majority did not find that the district court abused its discretion or usurped its authority, nor did it identify any immediate or irreparable harm that would result absent mandamus.

Indeed, the Eighth Circuit's decision identifies no irreparable harm the Defendants would suffer if this litigation continues under the management of the district court. Nor did the Defendants identify any such harm.

Critically, as the dissenting panel member pointed out, App., *infra*, 17a, the petitioners for mandamus did not first ask the district court for a remedy such as a protective order or in camera review. Mandamus was inappropriate on this basis alone. *See, e.g.*, *Kerr*, 426 U.S. at 403-05 (denying mandamus and directing petitioners to return to the district court to make specific assertions of privilege in response to discovery requests—"an avenue far short of mandamus to achieve precisely the relief they seek") (cited by the

dissent below); *see also United States v. McDougal*, 86 F.3d 1160 (8th Cir. 1996) (per curiam) (table) (finding no appellate jurisdiction to review the question of access to the videotape of President Clinton's deposition, where the district court had set a briefing schedule but not yet ruled on the access question, and declining to treat the request as a petition for a writ of mandamus); *In re U.S. (Socialist Workers Party)*, 565 F.2d 19, 22 (2d Cir. 1977).

If this case returns to the district court, the Defendants can assert objections, confer with Judge Griffen regarding those objections, and, if necessary, seek a protective order. The district court, being closest to the case, will be best positioned to adjudicate any discovery or other issues at that time.

As the Ninth Circuit recently held, "[m]andamus relief is inappropriate where the party has never sought relief before the district court to resolve a discovery dispute," and "neither we nor the Supreme Court have ever [granted mandamus relief] before a party has filed a motion for a protective order in the district court or prior to the issuance of a discovery order by the district court." *In re United States*, 884 F.3d 830, 835 (9th Cir 2018). Declining to reverse the district court's denial of a motion to dismiss, the Ninth Circuit noted that "[i]f appellate review could be invoked whenever a district court denied a motion to dismiss, we would be quickly overwhelmed with such requests, and the resolution of cases would be unnecessarily delayed." *Id.* at 837.

II. THE EIGHTH CIRCUIT'S REVIEW OF THE FACIAL SUFFICIENCY OF THE COMPLAINT IGNORES THE REQUIREMENTS OF *JOHNSON V. CITY OF SHELBY*, 135 S. CT. 346 (2014)

There is no heightened pleading requirement for civil rights cases. A civil rights plaintiff who "plead[s] facts sufficient to show that her claim has substantive plausibility" is entitled to the same judicial consideration by a district court as any other litigant. That is what this Court unanimously held in *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (per curiam), while pointedly noting that the Federal Rules of Civil Procedure require that plaintiffs be freely allowed to amend their complaints to cure any perceived deficiencies.

The Eighth Circuit in this case, however, ordered summary dismissal of the complaint while denying Judge Griffen access to the normal mechanisms of factual and legal development in the district court. As previously discussed, the Eighth Circuit never should have engaged in that analysis. But because the Eighth Circuit undertook the job, it should have applied the correct rule. It instead gave truncated consideration to a complaint that was in fact amply sufficient to survive dismissal, as the most cursory inspection reveals. App., *infra*, 19a-46a. This result was particularly disturbing for two reasons.

First, Judge Griffen was permanently removed from hearing a broad class of cases by an order entered in a proceeding to which he was not a party and without any sort of notice or opportunity to be heard. *See* Complaint, App., *infra*, 26a-27a ¶¶ 29-32. Paragraphs 79-90 of the complaint lucidly detail this

violation of Judge Griffen's right to procedural due process under the Fourteenth Amendment. App., *infra*, 36a-38a ¶¶ 79-90. But the Eighth Circuit found no violation, stating that Judge Griffen had no protectable interest under Arkansas law. App., *infra*, 12a-14a. In so holding, the Eighth Circuit overlooked the allegation in Paragraph 29, App., *infra*, 26a ¶ 29, that in proceeding against Judge Griffen the Arkansas Supreme Court violated its own rules. If it in fact did, Judge Griffen undeniably was entitled to a right protected by procedural due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

And in myopically focusing on Arkansas law, the Eighth Circuit also conflated the issue of the existence of a property right with the question of deprivation of procedural due process—the exact error condemned by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Judge Griffen was entitled to have these legal issues resolved after plenary consideration of their merits.

Second, the Eighth Circuit faulted the detailed allegations of racial bias in the complaint, App., *infra*, 38a-43a ¶¶ 91-121, for failure to "allege an intent to discriminate." App., *infra*, 15a. But even if one overlooks the complaint's manifold allegations of intent—asserting "discriminatory animus," App., *infra*, 20a; retaliation "out of discriminatory racial animus toward him as a person of African-American ancestry and racial identity," App., *infra*, 28a ¶ 40; deprivation of equal protection with "intent," App., *infra*, 43a ¶ 123, "based on racial animosity toward Judge Griffen as a black person," App., *infra*, 44a ¶ 132—this basis for dismissal is squarely at odds with

the holding in *Johnson*, *supra*, that no particular form of words is required in a complaint under § 1983.

The complaint in this case alleges a series of facts, including Voting Rights Act litigation respecting Judge Griffen's judicial district, and more lenient treatment of white judges for conduct more serious than his, that are entirely sufficient under *Village of Arlington Heights v. Metropolitan Housing Development Authority*, 429 U.S. 252, 265-68 (1977), to trigger an inquiry into the issue.

That conclusion is particularly true here because the complaint challenges a system of administrative discretion that lends itself to invidious discrimination. *See Alexander v. Louisiana*, 405 U.S. 625, 631 (1972). Racial bias in the administration of justice delivers "poisons . . . deadly in small doses," *Buck v. Davis*, 137 S. Ct. 759, 777-78 (2017), and accordingly normal protections may have to yield where that issue is raised. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017).

Judge Griffen was entitled to have his claims investigated, not erased through peremptory dismissal that could have been averted—however needlessly, in light of the allegations recited above—by slight rewording in an amended complaint. *Johnson* requires this result. And if the Eighth Circuit intended to usurp the role of the district court, it should have proceeded as district courts do. *See, e.g.*, *Capital Cmty. Coll. Student Senate v. Connecticut*, 175 F. Supp. 2d 271, 273-74 (D. Conn. 2001) (dismissing plaintiffs' equal protection claim without prejudice and with leave to refile an amended complaint pleading intentional discrimination);

Brown v. City of Oneonta, 858 F. Supp. 340, 344-45 (N.D.N.Y. 1994) (granting plaintiffs leave to replead intentional discrimination under § 1981); *Kelly v. Rice*, 375 F. Supp. 2d 203, 210 (S.D.N.Y. 2005) (dismissing equal protection claim without prejudice with leave to replead); *Nat'l Cong. for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 167-68 (S.D.N.Y. 1999) (granting leave to replead similarly situated prong) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("It is the usual practice upon granting a motion to dismiss to allow leave to replead.") (citations omitted)).

III. THE EIGHTH CIRCUIT IMPROPERLY PLACED THE BURDEN TO PROVE A LESS RESTRICTIVE MEANS ON A PLAINTIFF BRINGING A CLAIM UNDER THE ARKANSAS RELIGIOUS FREEDOM RESTORATION ACT

The Eighth Circuit also erred in its summary disposition of Judge Griffen's claim under the Arkansas Religious Freedom Restoration Act, which is interpreted consistently with the federal Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). App., *infra*, 11a.

The Eighth Circuit barely noted the extremely critical second half of the relevant legal test, *i.e.* whether the state could achieve its objective by less restrictive means. It simply stated in a single sentence that "Judge Griffen does not allege any less restrictive means of furthering this compelling interest." App., *infra*, 12a.

This conclusion is incorrect, because Judge Griffen did explicitly allege in his complaint that the "permanent reassignment in Order No. 17-155 is not

narrowly tailored to achieve any compelling interest in a way that is least restrictive to Judge Griffen's rights." App., *infra*, 36a ¶ 77. The Eighth Circuit's error compounded its failure to recognize the heavy burden that the less-restrictive-means test imposed on the Defendants challenging Judge Griffen's RFRA claim.

This "exceptionally demanding" test that RFRA imposes on defendants was dispositive in both *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014), and *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

In *Holt*, this Court reversed the Eighth Circuit's dismissal of a Muslim prisoner's complaint against Arkansas jailors seeking a religious accommodation to grow a half-inch beard. 135 S. Ct. at 859.

Writing for this Court, Justice Alito faulted the Eighth Circuit for its "unquestioning deference" to the decisions of Arkansas prison officials. *Id.* at 864. Justice Alito confirmed that the least-restrictive-means prong is "exceptionally demanding," *id.*, and that a defendant seeking to avoid it bears the burden of showing why no less-restrictive provision will work. *Id.* at 865-66.

A government actor who bears the burden of proving a defense obviously also bears the burden of pleading it. *See, e.g., Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The Eighth Circuit's misinterpretation of the law therefore puts at risk the RFRA protections currently provided by about 30 states.

CONCLUSION

This court should grant Judge Wendell Griffen relief through the issuance of a writ of certiorari or another appropriate judicial order.

Respectfully submitted,

MICHAEL P. MATTHEWS
Counsel of Record
LAWRENCE J. DOUGHERTY
RACHEL E. KRAMER
ANDREW M. MEERKINS
FOLEY & LARDNER LLP
100 N. Tampa St., # 2700
Tampa, FL 33602
(813) 229-2300
mmatthews@foley.com

MICHAEL J. LAUX
LAUX LAW GROUP
400 W. Capitol Ave.,
1700
Little Rock, AR 72201
(501) 242-0750

AUSTIN PORTER, JR.
PORTER LAW FIRM
323 Center St., # 1035
Little Rock, AR 72201
(501) 244-8200

Counsel for Hon. Wendell Griffen
Petitioner for a Writ of Certiorari

November 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1864

IN RE: HONORABLE JOHN DAN KEMP; HONORABLE ROBIN F. WYNNE; HONORABLE COURTNEY HUDSON-GOODSON; HONORABLE JOSEPHINE L. HART; HONORABLE SHAWN A. WOMACK; HONORABLE KAREN R. BAKER; HONORABLE RHONDA K. WOOD,

Petitioners.

Appeal from U.S. District Court for the
Eastern District of Arkansas - Little Rock
(4:17-cv-00639-JM)

JUDGMENT

Before COLLOTON, BENTON and KELLY, Circuit Judges.

The petition for writ of mandamus has been considered by the court and is granted. The order denying the Justices' motions to dismiss is vacated, and the case is remanded for proceedings consistent with this opinion. Mandate shall issue forthwith.

July 02, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-1864

IN RE: HONORABLE JOHN DAN KEMP; HONORABLE ROBIN F. WYNNE; HONORABLE COURTNEY HUDSON-GOODSON; HONORABLE JOSEPHINE L. HART; HONORABLE SHAWN A. WOMACK; HONORABLE KAREN R. BAKER; HONORABLE RHONDA K. WOOD,

Petitioners.

Appeal from United States District Court for the Eastern District of Arkansas - Little Rock

---

Submitted: April 25, 2018
Filed: July 2, 2018

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

BENTON, Circuit Judge.

The Honorable Wendell Griffen, an Arkansas trial judge, sued the Arkansas Supreme Court and Justices John Dan Kemp, Robin F. Wynne, Courtney Hudson Goodson, Josephine L. Hart, Shawn A. Womack, Karen R. Baker, and Rhonda K. Wood, in their official capacities, alleging they violated his constitutional rights by permanently barring him from presiding

over death penalty cases. The district court dismissed the claims against the Arkansas Supreme Court as barred by sovereign immunity. The court denied the Justices' motions to dismiss. The Justices now petition this court for a writ of mandamus, to direct the district court to dismiss Judge Griffen's complaint with prejudice. Having jurisdiction under 28 U.S.C. § 1651(a), this court grants the writ, vacates the district court's order denying the Justices' motions to dismiss, and directs the district court to dismiss Judge Griffen's complaint.

I.

In 2010, Judge Griffen, an African-American and ordained Baptist minister, was elected as a judge on the Sixth Judicial Circuit of Arkansas (the Fifth Division). In 2016, he was reelected to a six-year term.

On April 10, 2017, Judge Griffen wrote a blog post stating, in part:

> Premeditated and deliberate killing of defenseless persons—including defenseless persons who have been convicted of murder—is not morally justifiable. Using medications designed for treating illness and preserving life to engage in such premeditated and deliberate killing is not morally justifiable.
>
> Any morally unjustified and unjustifiable killing produces moral injury. Beginning a week from today, and three days after Good Friday—on Monday, April 17—the political, religious, commercial, and social captains of empire in Arkansas will commence a series of morally unjustified and unjustifiable killings. Each death will be a new, and permanent, moral injury. These deaths will join the

> existing long list of atrocities, oppression, and other moral injuries associated with our state to cause people around the world to associate Arkansas with bigotry, hate, and other forms of injustice as long as human memory continues.

On April 14 (Good Friday), Judge Griffen participated in an anti-death penalty rally on the steps of the Arkansas Capitol. Later that day, he attended a prayer vigil with his church outside the Arkansas Governor's Mansion. During the vigil, he "laid on a cot in solidarity with Jesus."

Also on April 14, McKesson Medical-Surgical, Inc., a distributor of the drug vercuronium bromide, sued the State of Arkansas, the Arkansas Department of Correction, Arkansas Governor Asa Hutchinson (in his official capacity), and the Director of the Arkansas Department of Correction (in her official capacity), alleging they obtained the drug under false pretenses, intentionally failing to disclose its use in upcoming executions. McKesson sought a temporary restraining order, preventing the state from using the drug and seeking its return. The case was assigned to Judge Griffen. That day, he issued a TRO prohibiting defendants from "us[ing] the vercuronium bromide obtained from Plaintiff until ordered otherwise by this Court."

The next day, the Arkansas Attorney General (on behalf of the *McKesson* defendants) filed an emergency petition for writ of mandamus with the Arkansas Supreme Court, seeking to vacate the TRO and remove Judge Griffen from the case. The petition said:

> Judge Griffen cannot be considered remotely impartial on issues related to the death penalty. Judge Griffen has demonstrated that he is

> unlikely to refrain from actual bias regarding matters related to the death penalty, and at a minimum, he cannot avoid the appearance of unfairness and his impartiality might reasonably be questioned. *See* Arkansas Code of Judicial Conduct Rules 1.2, 2.2, 2.3(A), 2.10(A), 2.10(B), 2.11(A).

Rule 2.11(A)(5) of the Arkansas Code of Judicial Conduct states:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

Citing Rule 2.11, the Arkansas Supreme Court issued a per curiam order (Order No. 17-155), to "immediately reassign all cases in the Fifth Division that involve the death penalty or the state's execution protocol, whether civil or criminal," including all "future cases involving this subject matter." The order also referred Judge Griffen "to the Judicial Discipline and Disability Commission to consider whether he has violated the Code of Judicial Conduct."

Five months later, Judge Griffen sued the Arkansas Supreme Court and the Justices in federal court, alleging First Amendment retaliation, violation of the Arkansas Religious Freedom Restoration Act, denial of his procedural due process rights, violation of his

equal protection rights, and civil conspiracy. The defendants moved to dismiss, arguing no plausible claims for relief. The district court dismissed the claims against the Arkansas Supreme Court as barred by sovereign immunity. It also held that Judge Griffen was "precluded from seeking injunctive relief against the individual Justices in their official capacities pursuant to Section 1983." However, without analysis, it denied the Justices' motions to dismiss, ruling that "the Court cannot state that Plaintiff has failed to state plausible claims for relief."

On April 13, 2018, Judge Griffen sought discovery on "All Documents and Communications regarding" Judge Griffen, his conduct in death penalty cases, his religion or race, his public statements about the death penalty, his participation in anti-death penalty rallies, his "fitness or perceived fitness to serve as a judge," his grant of the TRO, his potential impeachment, the Arkansas Attorney General's request for his recusal, and the Supreme Court's issuance of Order 17-155. (The district court later stayed discovery, pending the outcome of this petition).

On April 24, the Justices petitioned this court for a writ of mandamus, to vacate the district court's order denying their motions to dismiss and order dismissal of all claims with prejudice.

II.

"Extraordinary writs like mandamus are 'useful safety valves for promptly correcting serious errors.'" *In re Lombardi*, 741 F.3d 888, 893 (8th Cir. 2014) (en banc), *quoting Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009). However, "'only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion' will justify the

invocation of the extraordinary remedy of mandamus." *Id.* at 893-94, *quoting Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). To grant a writ of mandamus, this court weighs three factors: (1) the "petitioning party must satisfy the court that he has 'no other adequate means to attain the relief he desires;'" (2) "his entitlement to the writ is 'clear and indisputable;'" and (3) "'the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.'" *Id.* at 894, *quoting Cheney*, 542 U.S. at 380-81.

The Justices argue that subjecting "internal deliberations in a judicial matter to discovery will evade appellate review" and "threaten[] judicial independence and federalism." While these concerns are "significant and complex," this court "express[es] no view on them, because it is clear and indisputable that the discovery" sought by Judge Griffen "is not relevant to any claim that should survive a motion to dismiss." *Id.* at 895. "Although denial of a motion to dismiss ordinarily is not appealable, a writ of mandamus to correct an erroneous denial may be warranted in extraordinary circumstances where continued litigation would have significant unwarranted consequences." *Id.* "Discovery orders likewise are not ordinarily appealable, but mandamus may issue in extraordinary circumstances to forbid discovery of irrelevant information, whether or not it is privileged, where discovery would be oppressive and interfere with important state interests." *Id.* "These propositions taken together, along with the unavailability of alternative means for . . . relief, lead [this court] to conclude that a writ should issue." *Id.*

Judge Griffen asserts six claims: (1) "First Amendment Retaliation on the Basis of Speech;" (2) "First Amendment Retaliation on the Basis of Religious

Exercise;" (3) "Violation of the Arkansas Religious Freedom Restoration Act;" (4) "Denial of Procedural Due Process;" (5) "Violation of the Equal Protection Clause;" and (6) "Civil Conspiracy in Violation of 42 U.S.C. § 1985." None of these states a plausible claim for relief.

A.

Judge Griffen alleges that by permanently barring him from all death penalty cases, the Arkansas Supreme Court "retaliated against Judge Griffen for exercising his First Amendment right to free speech." A First Amendment retaliation claim must allege: (1) the plaintiff "engaged in a protected activity," (2) "the government official took adverse action" against the plaintiff "that would chill a person of ordinary firmness from continuing in the activity," and (3) "the adverse action was motivated at least in part by the exercise of the protected activity." *Revels v. Mincenz*, 382 F.3d 870, 876 (8th Cir. 2004).

The free speech claim fails for two reasons. First, Judge Griffen does not allege he engaged in a protected activity. The recusal order applies to him in his role as a public employee. *See Bauer v. Shepard*, 620 F.3d 704, 718 (7th Cir. 2010) ("The recusal clause applies to a judge in his role as public employee."). It thus specifies how he "will perform official duties," or rather, to which duties he is assigned. *Id.* Citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Seventh Circuit held that "[t]he state, as employer, may control how its employees perform their work, even when that work includes speech (as a judge's job does)." *Id.* Therefore, the state also may "assign to each lawsuit a judge who has not made any statement that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or

controversy." *Id.* (internal quotation marks omitted). *See Ligon v. City of New York*, 736 F.3d 166, 169 n.8 (2d Cir. 2013) ("The freedom of speech protected by the First Amendment does not mean that there can be no limitations, such as those contemplated under section 455(a), on what a federal judge may say, much less on where she can say it, especially as it relates to pending litigation. As discussed in our accompanying opinion, numerous courts of appeals have reassigned cases due to an appearance of partiality that was traceable to speech by a district judge.").

Second, there is no adverse employment action. An "adverse employment action must be one that produces a material employment disadvantage," such as "[t]ermination, cuts in pay or benefits, and changes that affect an employee's future career prospects," or "circumstances amounting to a constructive discharge." *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1016 (8th Cir. 1999) (internal quotation marks omitted). "Minor changes in duties or working conditions that cause no materially significant disadvantage do not meet the standard of an adverse employment action." *Id.* at 1016-17. Recusal from death penalty cases is not an adverse employment action. *See Bauer*, 620 F.3d at 718 ("No public employee is entitled to do any particular task; a state may select the employee who can best do the job. . . . [A] state may decide to assign each case to a judge whose impartiality is not in question. . . . States are entitled to protect litigants by assigning impartial judges before the fact, as well as by removing partial judges afterward.").

Judge Griffen does not plausibly allege a free speech claim. The district court erred in allowing this claim to proceed.

B.

Judge Griffen claims the "permanent reassignment in Order No. 17-155 chills [his] religious exercise." Yet, nothing in the order affects his right to practice religion. "The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*'" *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 876-77 (1990) (internal citation omitted), *quoting* U.S. Const., Amdt. 1. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 877. "The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Id.* (internal citations omitted).

Order 17-155 does not prohibit Judge Griffen's free exercise of religion: it does not "compel affirmation of religious belief," "punish the expression of religious doctrines," "impose special disabilities on the basis of religious views," or "lend its power to one or the other side in controversies over religious authority." *Id.* Rather, the order reflects neutral principles applicable to all judges who exhibit potential for bias. *See Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("Absent evidence of an intent to regulate religious worship, a law is a neutral law of general applicability.") (internal quotation marks omitted). This does not violate the free exercise clause. *See Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991)

(holding that in *Smith*, 494 U.S. at 879, "the Court held that a neutral law of general applicability that incidentally impinges on religious practice will not be subject to attack under the free exercise clause"). Additionally, Judge Griffen does not allege the order has an anti-religious purpose or was intended to regulate religious worship. *See id.* Thus, it is "properly viewed as a neutral law of general applicability" that does not offend the free exercise clause. *Id.*

Judge Griffen does not plausibly allege a free exercise claim. The district court erred in allowing this claim to proceed.

C.

Judge Griffen asserts a violation of the Arkansas Religious Freedom Restoration Act (RFRA) which prohibits the government from substantially burdening "a person's exercise of religion" unless the burden is "[t]he least restrictive means of furthering [a] compelling governmental interest." Ark. Code Ann. § 16-123-404(a)(2). The Arkansas RFRA is "interpreted consistent with the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, federal case law, and federal jurisprudence." Ark. Code Ann. § 16-123-402(2).

Even assuming that Order 17-155 substantially burdens Judge Griffen's exercise of religion, the claim fails. Arkansas has compelling interests in the impartiality of the judiciary and in public perception of an impartial judiciary. *Cf. Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) ("The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. . . . The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. . . . It follows that public perception of

judicial integrity is a state interest of the highest order.") (internal citations and quotation marks omitted); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (recognizing "a vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges"); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *Platt v. Board of Commis on Grievances & Discipline of Ohio Supreme Court*, 2018 WL 3097582, at *12 (6th Cir. June 25, 2018) (holding that "maintaining judges' actual independence and impartiality, and maintaining the public's trust in the judiciary's independence and impartiality" are "compelling" interests); *French v. Jones*, 876 F.3d 1228, 1237 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1598 (2018) (holding that "an interest in both actual and perceived judicial impartiality" is a "genuine and compelling" interest). Judge Griffen does not allege any less restrictive means of furthering this compelling interest. The district court erred in allowing this claim to proceed.

D.

Judge Griffen alleges the Arkansas Supreme Court violated his due process rights by depriving him of his "constitutionally-protected property interest in his ability to discharge" his duties as a judge and his "constitutionally-protected liberty interest in his reputation and his good name." To state a claim for procedural due process, a plaintiff must show "a deprivation of life, liberty, or property without sufficient process." *Hughes v. City of Cedar Rapids*, 840 F.3d 987, 994 (8th Cir. 2016).

Judge Griffen alleges no cognizable life, liberty, or property interest. He asserts a property interest in

discharging the responsibilities of his office. "A protected property interest must be derived from a source independent of the Constitution, such as state law." *Buchanan v. Little Rock Sch. Dist. of Pulaski Cty.*, 84 F.3d 1035, 1038 (8th Cir. 1996). While he has a property interest in his employment as a state judge in Arkansas, he does not allege the source of his property interest in presiding over specific types of cases. *See id.* at 1039-40 (holding no due process violation when a principal was reassigned to an administrative post without a hearing because he "had no property interest in a particular assignment"). To the contrary, Judge Griffen has no right to hear specific categories of cases. *See* Ark. Const. amend. LXXX, § 6 (establishing circuit courts "as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution," but not establishing that a particular judge has a right to hear specific cases); Ark. Const. amend. LXXX, § 4 ("The Supreme Court shall exercise general superintending control over all courts of the state."); *Parker v. Crow*, 368 S.W.3d 902, 906 (Ark. 2010) ("Superintending control is an extraordinary power that is hampered by no specific rules or means."). *See also Ligon*, 736 F.3d at 169 n.8 ("[T]he Due Process Clause of the Fifth Amendment is inapplicable in these circumstances, because reassignment of a case is not a legal injury to the district judge."). *Cf. Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011) ("The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.").

Even if Judge Griffen had a property interest in discharging his job duties, those duties do not include presiding over cases where he has actual or apparent bias. Judge Griffen claims he has the right to "discharge

those aspects of his position that are set forth in the Arkansas Constitution and that voters elected him to discharge." But the voters elected him to discharge powers circumscribed by Arkansas law. And Arkansas law states: "No judge of the circuit court shall sit on the determination of any case in which he or she is interested in the outcome . . . or is otherwise disqualified under the Arkansas Code of Judicial Conduct." Ark. Code Ann. § 16-13-214. The Arkansas Code of Judicial Conduct prohibits a judge from presiding over "any proceeding in which the judge's impartiality might reasonably be questioned." Ark. Code Jud. Conduct 2.11(A).

Judge Griffen also asserts a liberty interest in "his reputation and his good name as it relates to his duties as an elected circuit court judge." But neither his status as a judge nor his reputation is affected by recusal. *See Ligon*, 736 F.3d at 169 n.8 ("[T]he Due Process Clause of the Fifth Amendment is inapplicable in these circumstances, because . . . . we have made no finding of judicial misconduct that a judge might have the right to contest."). Even if forced recusal affected his reputation, this would be insufficient to allege a due process violation because an interest in reputation alone "is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." *Paul v. Davis*, 424 U.S. 693, 712 (1976).

Judge Griffen does not plausibly allege a due process claim. The district court erred in allowing this claim to proceed.

E.

Judge Griffen asserts that Order 17-155 violates his "rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution, in that he has been afforded less favorable terms and conditions of his employment as a state circuit court judge on the basis of his race (African-American).” He then provides four examples “where white Circuit Court Judges have been accused of and have admitted to committing criminal acts” and “the Arkansas Supreme Court did not take the extraordinary steps against these white judges as it has against Judge Griffen.”

“The Equal Protection Clause generally requires the government to treat similarly situated people alike.” *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994), *citing City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). “Thus, the first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her.” *Id.* “Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim.” *Id.* Judge Griffen fails to allege he “was treated differently than others who were similarly situated.” *Id.* Judge Griffen admits that he “did not engage in conduct that was remotely similar to that allegedly committed by” the comparison judges. Because “[d]issimilar treatment of dissimilarly situated persons does not violate equal protection” Judge Griffen does not state a claim. *Id.*

To state a plausible equal-protection violation, Judge Griffen also must allege an intent to discriminate. *See Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987) (“Proof of discriminatory racial purpose is required to establish an equal protection violation.”). He does not. Instead, he makes conclusory allegations that he was “afforded less favorable terms and conditions of his

employment with the State of Arkansas on account of his race, than similarly situated white judges." This is insufficient to establish racial animus. *Id.* ("[A]ppellant's allegation that MSP's employment practices and procedures have a discriminatory impact on black inmates fails to state a cause of action under the Equal Protection Clause, because there is no allegation of intentional discrimination."). *See Henley v. Brown*, 686 F.3d 634, 642 (8th Cir. 2012) ("In the absence of any allegations of intentional discrimination, we therefore concluded the Equal Protection Clause did not provide a ground for relief for appellant's section 1983 race discrimination claim.").

Judge Griffen does not plausibly allege an equal protection claim. The district court erred in allowing this claim to proceed.

F.

Judge Griffen claims the Justices "conspired among themselves and with others for the purpose of depriving" him of his constitutional rights. "Absent a constitutional violation, 'there is no actionable conspiracy claim.'" *Slusarchuk v. Hoff*, 346 F.3d 1178, 1183 (8th Cir. 2003), *quoting Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). Judge Griffen has failed to allege a plausible constitutional violation to support a claim for civil conspiracy as required by 42 U.S.C. § 1985(3). The district court erred in allowing this claim to proceed.

* * *

This court grants the petition for a writ of mandamus and vacates the district court's order denying the Justices' motions to dismiss. The case is remanded for proceedings consistent with this opinion.

KELLY, Circuit Judge, dissenting.

If the petitioners were seeking mandamus to quash a discovery order that would compel disclosure of the internal deliberations of the Arkansas Supreme Court, their petition would be well taken. But that is not what the petitioners seek. Instead, they ask for—and the court today grants them—reversal of the district court's denial of their motion to dismiss. *See* Fed. R. Civ. P. 12(b)(6). The petitioners did not ask the district court to limit the scope of discovery, *see* Fed. R. Civ. P. 26(b)(1), (c), or to shield disclosed records from public view, *see* Fed. R. Civ. P. 5.2(d). They only asked the district court to dismiss Judge Griffen's suit on the merits. Mandamus is appropriate only when the petitioners "have no other adequate means to attain the relief [they] desire[]." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Kerr v. U. S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). Because the petitioners have not attempted to exhaust their "adequate means" in the district court, I cannot conclude that mandamus is "the *only* means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations." *Will v. United States*, 389 U.S. 90, 95 (1967) (emphasis added). Therefore, I respectfully dissent from the grant of mandamus.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1864

IN RE: HONORABLE JOHN DAN KEMP, *et al.*,

Petitioners.

Appeal from U.S. District Court for the
Eastern District of Arkansas - Little Rock
(4:17-cv-00639-JM)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Kelly would grant the petition for rehearing en banc.

Chief Judge Smith did not participate in the consideration or decision of this matter.

August 29, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Case No. 4:17cv639-DPM

HONORABLE WENDELL GRIFFEN,

Plaintiff,

vs.

THE SUPREME COURT OF ARKANSAS, HONORABLE JOHN DAN KEMP, IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE SUPREME COURT OF ARKANSAS, HONORABLE ROBIN F. WYNNE, IN HIS OFFICIAL CAPACITY AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF ARKANSAS, HONORABLE COURTNEY HUDSON GOODSON, IN HER OFFICIAL CAPACITY AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF ARKANSAS, HONORABLE JOSEPHINE L. HART, IN HER OFFICIAL CAPACITY AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF ARKANSAS, HONORABLE SHAWN A. WOMACK, IN HIS OFFICIAL CAPACITY AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF ARKANSAS, HONORABLE KAREN R. BAKER, IN HER OFFICIAL CAPACITY AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF ARKANSAS, AND HONORABLE RHONDA K. WOOD, IN HER OFFICIAL CAPACITY AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF ARKANSAS,

Defendants.

**JURY TRIAL DEMANDED

This case assigned to District Judge Marshall
and to Magistrate Judge Harris

COMPLAINT

Plaintiff, the Honorable Wendell Griffen ("Judge Griffen"), Judge for the Sixth Judicial Circuit (Fifth Division) in Pulaski County, Arkansas, hereby files this Complaint against Defendants, the Supreme Court of Arkansas and its seven Justices, to remedy the following: Defendants' unconstitutional deprivations of Judge Griffen's rights to freedom of speech, freedom of assembly, and freedom of religion and religious exercise that are guaranteed by the First Amendment to the Constitution of the United States; Judge Griffen's rights to due process of law and equal protection under the law that are guaranteed by the Fourteenth Amendment to the Constitution of the United States; Defendants' violation of Judge Griffen's rights to exercise his calling as an ordained member of the clergy and follower of Jesus' religion, which is prohibited by the Arkansas Religious Freedom Restoration Act; and Defendants' conspiracy among themselves and with others based on discriminatory animus for the purpose of depriving, directly or indirectly, Judge Griffen's right to equal protection under the law in violation of 42 U.S.C. § 1985, with the object of that conspiracy being to prevent Judge Griffen from being assigned to and presiding over civil and criminal cases involving the death penalty or the method of execution in Arkansas. Judge Griffen seeks an injunction against Defendants' permanent reassignment of all such cases away from Judge Griffen, among other relief as set forth below.

In support of this Complaint, Judge Griffen states as follows:

JURISDICTION AND VENUE

1. This Court possesses subject matter jurisdiction over this case because the actions alleged herein arise under the Constitution and laws of the United States. *See* 28 U.S.C. § 1331.

2. This Court possesses supplemental jurisdiction over state law claims that are so related to the claims within the original jurisdiction of this Court that they constitute part of the same case or controversy. *See* 28 U.S.C. § 1367(a).

3. This Court possesses personal jurisdiction over Defendants, who are all citizens of Arkansas.

4. Venue is proper in this district because multiple defendants reside in this district and because a substantial part of the events or omissions giving rise to the claims alleged herein occurred in this district. *See* 28 U.S.C. § 1391(b)(1), (2).

PARTIES

5. Judge Griffen is the duly elected Circuit Judge for the Fifth Division of the Sixth Judicial Circuit of Arkansas and an adult citizen of the State of Arkansas.

6. The Supreme Court of Arkansas is the highest court in the judicial system of the State of Arkansas, has authority over assignment of cases to the judges of the Arkansas Courts, and is responsible for promulgating rules concerning the conduct of Arkansas judges.

7. Each individual defendant named herein is a sitting justice of the Supreme Court of Arkansas, an

adult citizen of the State of Arkansas, a person of white racial identity and ancestry, and is sued in his or her official capacity.

STATEMENT OF FACTS

8. In 2010, Judge Griffen—a person of African-American ancestry and racial identity—was elected to a six-year term as Circuit Judge for the Fifth Division of the Sixth Judicial Circuit of Arkansas. He was reelected in 2016.

9. Judge Griffen has been a baptized follower of Jesus since 1960. He was ordained in 1988 to the work of the gospel ministry by authority and order of the Mount Pleasant Missionary Baptist Church of Little Rock, Arkansas.

10. Since May 2009, Judge Griffen has served as pastor of New Millennium Church, a congregation affiliated with the Cooperative Baptist Fellowship, the Cooperative Baptist Fellowship of Arkansas, the Samuel DeWitt Proctor Conference, and the Association of Welcoming and Affirming Baptists.

11. Judge Griffen's convictions as a follower of Jesus are central to his identity. As a follower of Jesus and as pastor of New Millennium Church, Judge Griffen's religious convictions compel him to speak, write, preach, and engage in other conduct arising from his understanding of the religion of Jesus and its prophetic traditions concerning love, truth, peace, justice, and redemptive hope.

12. In his personal life and his capacity as a pastor, Judge Griffen has expressed his personal religious and moral views on the death penalty. As an exercise of his religious expression, he also has participated in prayer

vigils. Judge Griffen has always conducted his religious activities outside the auspices of his judicial role.

13. Indeed, notwithstanding his personal religious and moral views about the death penalty, Judge Griffen has always attempted to interpret Arkansas law on the death penalty fairly, without predisposition, and according to law and precedent. Judge Griffen has never made a public statement that has committed him to rule for or against any party in any case before him involving the death penalty.

14. In the most recent case in which Judge Griffen was called upon to rule on the death penalty, he expressly demonstrated his ability to follow the law and precedent without regard to his personal religious and moral beliefs. In *Johnson v. Kelley,* Case No. 60CV-15-2921 *("Johnson"),* Judge Griffen *dismissed* nine death row inmates' complaint challenging the constitutionality of their method of execution and *denied* the inmates' request for leave to amend, thereby allowing their executions to go forward.

15. In that case, Judge Griffen held, "This Court must and will abide by the ruling issued by the Arkansas Supreme Court" precluding the inmates' challenge to their execution method.

16. In an April 10, 2017 blog post about religious faith and the Holy Week, at a time when neither the *Johnson* case, the *McKesson* case (described below), nor any other case involving the death penalty or the state's execution protocol was pending before Judge Griffen, Judge Griffen expressed his personal view that the death penalty is *"morally"—not* legally—unjustifiable.

17. Judge Griffen has been open and forthright in his personal and religious life concerning his religious

and moral views about the death penalty, while at the same time, demonstrating his commitment to follow the law when fulfilling his judicial duties. He renders to the law the things that are the law's, and to his God the things that are God's.

Good Friday Prayer Vigil

18. On Good Friday, April 14, 2017 (the Friday before Easter Sunday), Judge Griffen—acting in his personal rather than in any official capacity—attended, but did not publicly address, a peaceful rally organized to demonstrate opposition to the death penalty on the steps of the Arkansas Capitol. Later that day, he also attended a prayer vigil with other members of New Millennium Church outside the Arkansas Governor's Mansion. During the prayer vigil, Judge Griffen laid on a cot in solidarity with Jesus, who, according to the New Testament Gospels of the Bible, was crucified by the Roman Empire by order of Roman governor Pontius Pilate.

19. Judge Griffen did not wear a judicial robe or any other accoutrements of his judicial office, did not state that he was a member of the judiciary, and did not exercise any judicial duties while he was engaged in quiet prayer during the prayer vigil in front of the Arkansas Governor's Mansion.

20. Judge Griffen's attendance and participation in these gatherings was peaceful, orderly, respectful of the rights of all other persons, and a constitutionally-protected expression of his deeply held religious beliefs as a follower of Jesus who, according to the New Testament Gospels, was publicly put to death by crucifixion on what followers of Jesus commonly refer to as Good Friday *(See Matthew 27:15-50, Mark 15:1-37, Luke 23:13-46, John 19:1-30).*

Judicial Proceedings

21. Also on April 14, 2017, McKesson Medical-Surgical Inc. ("McKesson"), a distributor of the drug vercuronium bromide, filed a lawsuit against the State of Arkansas, Arkansas Governor Asa Hutchinson, the Arkansas Department of Corrections, and the Director of the Arkansas Department of Corrections, *McKesson Medical-Surgical Inc. v. State of Arkansas, et al.,* Case No. 60CV-17-1921 *("McKesson I").*

22. In *McKesson I,* McKesson alleged that defendants had defrauded McKesson and obtained vercuronium bromide from McKesson under false pretenses by intentionally failing to disclose that the State intended to use the vercuronium bromide in upcoming executions.

23. Vercuronium bromide is one of the pharmaceuticals in the multi-pharmaceutical "cocktail" used as part of Arkansas's lethal injection death-penalty regimen.

24. When it filed its Complaint in *McKesson I,* McKesson sought a temporary restraining order (TRO) against defendants that would prevent the State from using the vercuronium bromide while McKesson's replevin claim, seeking return of the pharmaceutical, was pending. By verified complaint supported by exhibits, McKesson provided evidence that its property had been wrongfully obtained through deception and was in imminent risk of being disposed of by the respondent parties.

25. *McKesson I* was assigned to Judge Griffen.

26. Applying well-settled Arkansas property and contract law, Judge Griffen ruled that McKesson had demonstrated it was threatened by conduct causing imminent irreparable harm unless a TRO was issued

and that McKesson was likely to succeed on the merits of its claim. He issued a TRO prohibiting defendants from "us[ing] the vercuronium bromide obtained from Plaintiff until ordered otherwise by this Court."

27. Judge Griffen set a hearing for the following Tuesday, April 18, which was the first date the parties indicated they were available, but invited the parties to apply to the Court "should Defendant desire an earlier hearing."

28. Choosing not to ask Judge Griffen to recuse himself, on Saturday, April 15, the Arkansas Attorney General filed an emergency petition for writ of mandamus, writ of certiorari, or supervisory writ with the Arkansas Supreme Court seeking to vacate the *McKesson* TRO and remove Judge Griffen from the *McKesson* case.

29. On April 17, 2017, without any notice to Judge Griffen, and in violation of its own rules concerning *ex parte* proceedings, the Supreme Court of Arkansas considered and ruled on the writ petition *ex parte.*

30. The Supreme Court, going beyond the relief sought by the Attorney General, issued Order No. 17-155, in which it "immediately reassign[ed] all cases in the Fifth Division [*i.e.,* the cases assigned to Judge Griffen] that involve the death penalty or the state's execution protocol, whether civil or criminal." The Court ruled that this was to be a "permanent reassignment" not just of any present cases, but all "future cases involving this subject matter," for all time.

31. Although Order No. 17-155 did not explain the reasoning for the decision to remove Judge Griffen from the cases, the court stated that its decision was necessary "No protect the integrity of the judicial system."

32. The Arkansas Supreme Court provided no notice to Judge Griffen about the possibility of entering Order No. 17-155 prior to its entry, nor did the Court provide Judge Griffen with a forum to be heard prior to its entry of that Order. The Court gave no notice whatsoever that it was considering reassignment from Judge Griffen of all cases involving the death penalty for all time.

33. At the time Order No. 17-155 was entered, Judge Griffen was not presiding over nor assigned to hear any death penalty cases. He was presiding over and assigned to hear *McKesson I,* a property law case.

34. By the time Order No. 17-155 was entered, McKesson had filed a motion to vacate the TRO Judge Griffen had entered in *McKesson I* and to voluntarily dismiss the case. By that time, a parallel injunction had been entered in the United States District Court for the Eastern District of Arkansas (Little Rock Division) in *Jason McGehee et al. v. Asa Hutchinson et al,* Case No. 4:17-cv-00179 KGB that had the practical effect of rendering the state court proceedings moot.

35. Accordingly, at the time Order No. 17-155 was entered, the Arkansas Supreme Court had no legitimate and compelling reason to enter the Order, certainly not without providing notice and an opportunity to be heard to Judge Griffen.

36. On April 18, 2017, the day after the Arkansas Supreme Court entered Order No. 17-155, *McKesson I* was dismissed by Judge Alice Gray.

37. On April 19, 2017, McKesson filed another state court lawsuit against the same defendants and making the same allegations as in *McKesson I (See* Case No. 60-CV-17-1960) *("McKesson II"),* which case was also assigned to Judge Gray.

38. On April 20, 2017, Judge Gray entered a preliminary injunction in *McKesson II* that had substantially the same effect as the TRO Judge Griffen had entered in *McKesson I.* The preliminary injunction prohibited defendants "from using or disposing of the vercuronium bromide they obtained from plaintiff until further order of the Court." Neither the Arkansas Supreme Court nor anyone else has explained how or why Judge Griffen allegedly did not interpret and apply Arkansas property and contract law in the *McKesson I* TRO order, nor has the Court explained how Judge Griffen could have failed to follow the law in the *McKesson I* order when the judge who replaced him on the case ruled the same way he did.

39. Just three days after issuing Order No. 17-155, the Arkansas Supreme Court denied the death row inmates' stay of execution in *Johnson,* the same case in which Judge Griffen committed to follow the law as governed by Arkansas Supreme Court precedent. The Arkansas Supreme Court made no comment in that order about Judge Griffen's ability to impartially adjudicate death penalty cases.

40. On information and belief, the Arkansas Supreme Court entered Order No. 17-155 in retaliation for Judge Griffen's exercise of his religious freedom through attendance at the Good Friday prayer vigil and gathering and out of discriminatory racial animus toward him as a person of African-American ancestry and racial identity. In the history of Arkansas, no white member of the Arkansas judiciary has ever been summarily banned from hearing an entire category of cases based on his or her exercise of the First Amendment protected freedoms of speech, peaceful assembly, religion, and exercise of religion. No white member of the Arkansas judiciary has ever been pre-

emptively, prospectively, and indefinitely barred from hearing any category of cases based on the exercise of First Amendment liberties. No white member of the Arkansas judiciary has ever been denied notice and an opportunity to be heard before being pre-emptively, prospectively, and indefinitely barred from hearing any category of cases based on the exercise of those First Amendment liberties.

41. In fact, as set forth in detail below, multiple white judges in Arkansas who admitted to engaging in criminal behavior have been treated more favorably for conduct much more abhorrent than Judge Griffen's attendance at a prayer vigil. For example, Judge William Pearson, who is white, pleaded guilty on April 17, 2017 to charges of driving while intoxicated and reckless driving after blowing through a police sobriety checkpoint and leading officers on a high-speed car chase. The Arkansas Supreme Court reinstated Judge Pearson after he agreed to refrain from presiding over any driving while intoxicated cases for eight months, until December 31, 2017. African-American Judge Griffen, on the other hand, is barred for life from presiding over any cases involving the death penalty or Arkansas' method of execution, as punishment for exercising his First Amendment right to pray silently on his own time. There is no possible excuse for this disparate treatment.

42. As a result of Order 17-155, Judge Griffen has been preemptively, prospectively, and indefinitely barred from adjudicating any cases involving capital punishment, the death penalty, and the method of execution in Arkansas because of his identity as a jurist of African-American ancestry and racial identity who engaged in peaceful public conduct in the exercise of his convictions as a follower of Jesus on Good

Friday, 2017. As a result of Defendants' conduct, Judge Griffen's reputation for judicial integrity, impartiality, and competence has been impugned. As a result of Defendants' conduct, Judge Griffen has no recourse aside from pursuing litigation in this forum to seek and obtain relief from the permanent ban imposed by Order 17-155.

43. Under the Arkansas Constitution, "Circuit Courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution." Ark. Const. Amend. 80, § 6(A). Among the justiciable matters assigned to the circuit court pursuant to the Arkansas Constitution are matters involving Arkansas's death penalty.

44. Since Defendants issued Order 17-155 banning Judge Griffen from assignment to cases involving capital punishment, the death penalty, and the method of execution in Arkansas, and as a result of that Order, Judge Griffen has been disqualified from assignment to such cases. Pursuant to Order 17-155, Judge Griffen was disqualified from assignment to the following criminal cases: *State of Arkansas v. Corey Williams* (60CR-17-1623, filed May 17, 2017); *State of Arkansas v. Nathaniel Brian Clark* (60CR-17-2463, filed July 18, 2017); and *State of Arkansas v. Shaun Malik Rushing* (60CR-17-2487). Pursuant to Order 17-155, Judge Griffen was also disqualified for assignment to the following civil case involving application of the Arkansas Freedom of Information Act to the confidentiality provisions of the Arkansas Method of Execution Act: *Steven Shults v. Arkansas Department of Correction* (60CV-17-4931). And pursuant to Order 17-155, the case of *Steven Shults v. Arkansas Department of Correction* (60CV-17-1419)—another case involving application of the Arkansas Freedom of Information

Act to the confidentiality provisions of the Arkansas Method of Execution Act—was re-assigned from Judge Griffen to a different Circuit Judge on April 17, 2017. The only reason Judge Griffen has not been considered for assignment to the new cases and has been removed from assignment in 60CV-17-1419 is because he was disqualified based on Defendants' Order No. 17-155. As a Circuit Judge for the Sixth Judicial Circuit of Arkansas, Judge Griffen is otherwise authorized to be considered for assignment to, hear, and preside over those cases.

45. As a result of the Arkansas Supreme Court's Order No. 17-155, the Sixth Judicial Circuit amended its Case Assignment Plan, over Judge Griffen's objection, and instructed the Circuit Clerk of Pulaski County Arkansas to immediately reassign all cases that involve the death penalty or the state's execution protocol, civil or criminal.

46. Judge Griffen has been materially harmed by the loss of prestige, job satisfaction, and job duties suffered as a result of the Arkansas Supreme Court's Order, by virtue of being barred and disqualified, forever, from hearing the most serious cases a judge can hear in Arkansas. Voters and citizens of Judicial Subdistrict 6.1 in the Sixth Judicial District have also been deprived of their choice of elected judge hearing all the matters that such judges hear under the Arkansas Constitution. This Arkansas Supreme Court may not usurp the will of the people, without any evidence that Judge Griffen committed himself to rule for a particular party appearing before him and in direct contradiction of conclusive evidence that he follows the law in death penalty cases.

47. As set forth herein in Count V, Defendants' Order No. 17-155 violates the provisions of the consent

decree in the case of *Eugene Hunt et al. v. State of Arkansas et al.,* No. PB-C-89-0406 (RD. Ark.)—hereafter termed "the *Hunt* Decree"—that was entered November 7, 1991. The *Hunt* Decree requires that the judges serving in the majority black voter judicial subdistricts prescribed by that decree shall exercise the same powers as all other judges. Because Defendants' Order No. 17-155 disqualifies Judge Griffen from exercising the same rights to be assigned to cases involving capital punishment, the death penalty, and the method of execution in Arkansas, Order No. 17-155 denies Judge Griffen equal protection under the law, as set forth in further detail below. Because Order No 17-155 disqualifies Judge Griffen from exercising the same rights to be assigned cases involving capital punishment, the death penalty, and the method of execution in Arkansas, Order No. 17-155 denies voters within Judicial Subdistrict 6.01 the right to have the judge elected by their votes to be assigned to, hear, and decide cases and controversies that are ordinarily assigned to, heard, and decided by persons elected to the office of Circuit Judge in Arkansas.

COUNT I

First Amendment Retaliation on the Basis of Speech

48. Judge Griffen restates and incorporates the foregoing paragraphs as if set forth here in full.

49. Judge Griffen's attendance at the Good Friday prayer vigil and gathering and his expression of his religious views in blog posts were protected by the First Amendment's guarantees of freedom of speech, freedom of assembly, and free exercise of religion.

50. Further, Judge Griffen's expression of his views regarded a matter of public concern.

51. Public employees have a constitutional right under the First Amendment to speak on matters of public concern and to peaceably assemble free from retaliation.

52. By engaging in the above-described activities, Judge Griffen exercised those rights.

53. In permanently disqualifying Judge Griffen from "all cases . . . that involve the death penalty or the state's execution protocol, whether civil or criminal," Defendants retaliated against Judge Griffen for exercising his First Amendment right to free speech.

54. In entering the permanent reassignment in Order No. 17-155, Defendants acted under color of state law.

55. Judge Griffen's participation in the prayer vigil and gathering and his expression of his personal religious and moral beliefs were a motivating factor in Defendants' decision to enter the permanent reassignment in Order No. 17-155.

56. Judge Griffen has suffered and will continue to suffer harm by virtue of having his judicial authority curtailed and his reputation impugned as a result of the permanent reassignment in Order No. 17-155.

COUNT II

First Amendment Retaliation on the Basis of Religious Exercise

57. Judge Griffen restates and incorporates the foregoing paragraphs as if set forth here in full.

58. Public employees have a constitutional right to the free exercise of religion under the First Amendment.

59. By attending the prayer vigil and gathering, Judge Griffen engaged in constitutionally protected religious expression.

60. Judge Griffen's private religious exercise does not affect his ability to discharge his responsibilities under the Arkansas Constitution.

61. The permanent reassignment in Order No. 17-155 chills Judge Griffen's religious exercise. It also sends a message to members of the Arkansas judiciary that they may not pray or express personal views on topics of public concern unless those prayers and personal views are in line with those of the Justices on the Arkansas Supreme Court.

62. The permanent reassignment in Order No. 17-155 creates government-imposed coercive pressure on Judge Griffen to violate or change his beliefs.

63. The permanent reassignment in Order No. 17-155 substantially burdens Judge Griffen by depriving him of his constitutional duties as an elected official.

64. Defendants promulgated the permanent reassignment in Order No. 17-155 to suppress Judge Griffen's religious exercise.

65. Defendants have no compelling governmental interest to punish Judge Griffen on account of his private religious exercise.

66. The permanent reassignment in Order No. 17-155 is not narrowly tailored to achieve any compelling interest in a way that is least restrictive to Judge Griffen's rights.

67. In entering the permanent reassignment in Order No. 17-155, Defendants acted under color of state law.

68. Absent injunctive and declaratory relief against Defendants, Judge Griffen has been and will continue to be harmed.

COUNT III

Violation of the Arkansas Religious Freedom Restoration Act

69. Judge Griffen restates and incorporates the foregoing paragraphs as if set forth here in full.

70. The Arkansas Religious Freedom Restoration Act, Ark. Code Ann. § 16-123-402 et seq., prohibits public employers from substantially burdening an employee's free exercise of religion unless such burden is the least restrictive means of furthering a compelling governmental interest.

71. Judge Griffen expressed sincerely held religious beliefs about the death penalty.

72. By attending the Good Friday prayer vigil and gathering and by writing about the death penalty on his blog, Judge Griffen exercised his religion.

73. Judge Griffen's private religious exercise does not affect his ability to discharge his responsibilities under the Arkansas Constitution. Although it is not his burden to prove this, it is conclusively proven by among other things, his dismissal of nine death row inmates' complaint challenging the constitutionality of their method of execution and denial of the inmates' request for leave to amend in *Johnson,* thereby allowing their executions to go forward.

74. The permanent reassignment in Order No. 17-155 creates government-imposed coercive pressure on Judge Griffen to violate his beliefs.

75. The permanent reassignment in Order No. 17-155 also substantially burdens Judge Griffen by depriving him of his constitutional duties as an elected official.

76. Defendants have no compelling governmental interest to punish Judge Griffen on account of his private religious exercise.

77. The permanent reassignment in Order No. 17-155 is not narrowly tailored to achieve any compelling interest in a way that is least restrictive to Judge Griffen's rights.

78. Absent injunctive and declaratory relief against the Defendants, Judge Griffen has been and will continue to be harmed.

COUNT IV

Denial of Procedural Due Process

79. Judge Griffen restates and incorporates the foregoing paragraphs as if set forth here in full.

80. The Fourteenth Amendment of the United States Constitution prohibits a state from depriving a citizen of liberty or property without due process of law.

81. Judge Griffen possesses a constitutionally-protected property interest in his ability to discharge those aspects of his position that are set forth in the Arkansas Constitution and that voters elected him to discharge.

82. Judge Griffen possesses a constitutionally-protected liberty interest in his reputation and his good name as it relates to his duties as an elected circuit court judge.

83. Defendants issued the permanent reassignment in Order 17-155 without notice to Judge Griffen or affording Judge Griffen the opportunity to be heard.

84. Although Judge Griffen received service of a copy of the Attorney General's writ application seeking his disqualification from the *McKesson 1* case only,

the Defendants issued an order disqualifying him from all cases involving the death penalty. Defendants did so without any notice or opportunity to be heard, just two days after receiving the writ application.

85. There was no urgency to the Defendants' Order because, by the time the order was entered, United States District Judge Kristine Baker of the United States District Court for the Eastern District of Arkansas had already issued a preliminary injunction that operated to stay the scheduled executions by lethal injection in favor of condemned inmates who had been scheduled for execution in the coming days, and McKesson had sought voluntary dismissal of its state court action in *McKesson 1.*

86. Defendants had no justification for failing to provide an opportunity for Judge Griffen to respond.

87. By depriving Judge Griffen of his constitutionally defined duties under the Arkansas Constitution, and by publicly stating such actions were necessary "[t]o protect the integrity of the judicial system," Defendants have deprived Judge Griffen of a constitutionally protected liberty interest without providing any process.

88. Defendants had no legitimate basis for depriving Judge Griffen of his liberty or property interests without a pre-deprivation hearing.

89. Judge Griffen has no administrative remedies available to him. The decision banning Judge Griffen from assignment to civil or criminal cases involving the death penalty, capital punishment, or the method of execution is not susceptible to reversal by any administrative agency or body in Arkansas.

90. No state law or state forum provides adequate relief from the deprivation of rights and liberties suffered by Judge Griffen described herein.

COUNT V

Violation of the Equal Protection Clause

91. Judge Griffen restates and incorporates the foregoing paragraphs as if set forth here in full.

92. On July 27, 1989, a group of African-American plaintiffs, led by Eugene Hunt, a Pine Bluff, Arkansas lawyer, filed a voting rights case alleging violations of the Fourteenth and Fifteenth Amendments to the United States Constitution. *See Eugene Hunt et al. v. State of Arkansas et al.,* United States District Court No. PB-C-890406.

93. In the above referenced lawsuit, the plaintiff alleged that "[t]he use of a system of electing judges to the courts of general jurisdiction that features at-large, multimember districts from which judges run for numbered posts in staggered terms violates the Voting Rights Act in that it denies African-Americans equal opportunity to participate in the political process and to elect candidates of their choice."

94. On November 7, 1991, the court entered a consent decree, whereby the parties to the litigation agreed to certain terms.

95. The consent decree created judicial or electoral sub-districts within the First, Second, Sixth, Tenth and Eleventh West Judicial Districts for the purposes of elections only.

96. The consent decree created majority African-American sub-districts within the First, Second, Sixth, Tenth, and Eleventh West Judicial Districts.

97. Prior to the entry of the consent decree, only one African-American judge had been elected in the State of Arkansas post-reconstruction, that being Pulaski County Juvenile Justice Joyce Williams Warren.

98. After the entry of the consent decree in November 1991, African-American voters, in these judicial subdistricts, have been able to elect several African-American judges *("Hunt* Judges") of their choice, thus fulfilling the goals of the Voting Rights Act.

99. Judge Wendell Griffen is a *Hunt* Judge, having been twice elected (in 2010 and 2016) to his current office by the voters in Judicial Subdistrict 6.1 of the Sixth Judicial District of Arkansas.

100. The actions taken by the Arkansas Supreme Court have violated Judge Griffen's rights as guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that he has been afforded less favorable terms and conditions of his employment as a state circuit court judge on the basis of his race (African-American).

101. Despite the fact that there have been multiple instances where white Circuit Court Judges have been accused of and have admitted to committing criminal acts, the Arkansas Supreme Court did not take the extraordinary steps against these white judges as it has against Judge Griffen, as set forth in the following examples.

Judge William Pearson

102. Judge William Pearson is a white male, who is the Circuit Judge for the Fifth Judicial District, covering Pope, Johnson, and Franklin Counties in the State of Arkansas.

103. On January 20, 2017, Judge Pearson was operating his vehicle while intoxicated.

104. According to the Arkansas State Police, Judge Pearson drove his vehicle in a reckless manner through a sobriety check point, which resulted in several police agencies giving pursuit at high speeds.

105. Judge Pearson was charged with the following offenses: a) Driving While Intoxicated; b) Reckless Driving; c) Refusal to Submit to a Chemical Test; and d) Fleeing.

106. On April 17, 2017, Judge Pearson entered a plea of guilty to the charges of Driving While Intoxicated and Reckless Driving.

107. Judge Pearson maintains 100% of the criminal dockets for all three counties listed above, and he was reinstated by the Arkansas Supreme Court after agreeing not to preside over any driving while intoxicated cases through December 31, 2017.

108. Unlike Judge Pearson, Judge Griffen has not been accused, pled guilty to, nor convicted of any crime. However, Defendants have barred Judge Griffen from being assigned to and presiding over cases involving capital punishment, the death penalty, and the method of execution in Arkansas.

Michael Maggio

109. Former judge Michael Maggio served as Circuit Judge of the Twentieth Judicial District for thirteen years, from January 2001 until his suspension with pay until the end of his term effective December 31, 2014.

110. Michael Maggio is a white male.

111. Maggio was indicted for bribery, was suspended with pay pending his prosecution, and went to federal prison for bribery, due to events that took place in his handling of a case styled *The Estate of Martha Bull v. Greenbrier Nursing and Rehabilitation Center, et al.* The Arkansas Supreme Court removed him from the bench on September 11, 2014.

112. Judge Griffen did not engage in criminal behavior by participating in a prayer vigil on Good Friday, 2017. However, the action by the Arkansas Supreme Court to disqualify him from hearing civil or criminal cases involving capital punishment, the death penalty, and the method of execution in Arkansas has the same practical effect for that body of litigation as did the suspension, with pay, of Michael Maggio' s docket pending the outcome of the criminal prosecution against Maggio for bribery. In this regard, Defendants have subjected Judge Griffen to the sort of treatment that they accorded former Judge Maggio despite knowing that Judge Griffen did not engage in unlawful behavior.

Joseph Boeckmann Jr.

113. Former judge Joseph Boeckmann Jr. is a white male, who was District Judge in Cross County, Arkansas.

114. Boeckmann was allowed to resign from office on May 9, 2016, after several allegations of inappropriate sexual acts in which Boeckmann was accused of participating with male criminal defendants who appeared in his courtroom. Further, Boeckmann was found to be in possession of sexually explicit and sexually suggestive photographs of certain male criminal defendants.

115. By participating in the Good Friday 2017 prayer vigil, Judge Griffen did not engage in conduct that was remotely similar to that allegedly committed

by Judge Boeckmann. Nevertheless, Defendants acted to remove Judge Griffen from hearing civil and criminal cases involving the death penalty, capital punishment, and the method of execution in Arkansas.

Timothy Parker

116. Former judge Timothy Parker is a white male who since 2013 served as the District Court Judge in Carroll County, Arkansas (Eureka Springs).

117. Parker was accused of, and admitted to, providing judicial favors for friends and former clients, by lowering bail or allowing releases on defendants' own recognizance. Parker was accused of lowering bail or allowing releases on own recognizance in exchange for sexual favors. Parker was also accused of having sexual relations with a number of females who appeared before him as defendants.

118. Parker was allowed to resign at the end of his term, which was December 31, 2016.

119. By attending and participating in the Good Friday 2017 prayer vigil, Judge Griffen did not commit any action that was even remotely similar to what was allegedly committed by former judge Parker. However, Defendants have effectively banned Judge Griffen from being assigned to and presiding over civil and criminal cases involving the death penalty, capital punishment, and the method of execution in Arkansas.

120. Judge Griffen has been deprived of his rights of equal protection under the law, on account of his race, in violation of the Fourteenth Amendment to the United States Constitution, in that he has been afforded less favorable terms and conditions of his employment with the State of Arkansas on account of his race, than similarly situated white judges.

121. The above mentioned acts of discrimination were committed by the defendants while acting under color of law, making this cause of action enforceable pursuant to 42 U.S.C. § 1983.

COUNT VI

Civil Conspiracy in Violation of 42 U.S.C. § 1985

122. Judge Griffen restates and incorporates the foregoing paragraphs as if set forth here in full.

123. In various instances between Friday, April 14, 2017 and continuing into Monday, April 18, 2017, Defendants conspired among themselves and with others for the purpose of depriving, directly or indirectly, Judge Griffen of equal protection under the law with the intent to prevent Judge Griffen from being assigned to and preside over civil and criminal cases involving capital punishment, the death penalty, and the method of execution in Arkansas.

124. In furtherance of that conspiracy, Defendants engaged in oral, written, and electronic communications among themselves and with others about how to strip Judge Griffen of the power to hear and decide cases involving capital punishment, the death penalty, and the method of execution in Arkansas.

125. In furtherance of that conspiracy, Defendants also participated in discussions among themselves and with others about impeachment of Judge Griffen.

126. In furtherance of that conspiracy, Defendants issued Order 17-155, the per curiam order barring the assignment of any cases involving capital punishment, the death penalty, and the method of execution in Arkansas to Judge Griffen.

127. In furtherance of that conspiracy, Defendants in Order 17-155 directed the Administrative Judge of

the Sixth Judicial District to immediately submit an amendment to the Case Assignment Plan for the Sixth Judicial District of Arkansas that barred assignment of any cases involving capital punishment, the death penalty, and the method of execution in Arkansas to Judge Griffen.

128. In furtherance of that conspiracy, Defendants refused to provide Judge Griffen any notice of their intent to bar assignment of any cases involving capital punishment, the death penalty, and the method of execution in Arkansas to Judge Griffen.

129. As a result of that conspiracy, Judge Griffen has suffered and continues to suffer injury to his right to equal protection of the law by being barred from exercising the powers of his office as a duly elected Circuit Judge for the Sixth Judicial District of Arkansas concerning cases involving capital punishment, the death penalty, and the method of execution in Arkansas.

130. As a result of that conspiracy, Judge Griffen has suffered injury to his reputation for competence and ethical conduct as a Circuit Judge for the Sixth Judicial District of Arkansas concerning cases involving capital punishment, the death penalty, and the method of execution in Arkansas.

131. As a result of that conspiracy, Judge Griffen has been subjected to the threat of impeachment as a Circuit Judge for the Sixth Judicial District of Arkansas.

132. Defendants conspired together to deprive Judge Griffen of equal protection of the laws as alleged in this Complaint based on racial animosity toward Judge Griffen as a black person.

133. Defendants also conspired together to deprive Judge Griffen of equal protection of the laws as alleged in this Complaint based on religious animosity toward Judge Griffen as a liberation-minded follower of the religion of Jesus.

134. Judge Griffen reserves the right to supplement these allegations during discovery.

PRAYER FOR RELIEF

WHEREFORE, Judge Griffen respectfully requests that this Court:

a. Declare that the permanent reassignment of him from all cases relating to the death penalty or Arkansas' methods of execution in Order No. 17-155 violates the First and Fourteenth Amendments of the United States Constitution and the Arkansas Religious Freedom Restoration Act;

b. Preliminarily and permanently enjoin the enforcement of the permanent reassignment in Order No. 17-155 by Defendants or any of their officers, members, agents, or others acting in concert with them;

c. Award Plaintiff the costs of this action and reasonable attorney's fees; and

d. Award all such further relief as this Court deems proper.

JURY DEMAND

Plaintiff requests a trial by jury on all issues so triable.

Dated: October 5, 2017

Respectfully submitted,

By: /s/ Austin Porter, Jr.

Austin Porter, Jr., No. 86145
PORTER LAW FIRM
323 Center Street, Suite 1035
Little Rock, AR 72201
Telephone: (501) 224-8200
Facsimile: (501) 327-5567
Aporte5640@aol.com

Michael J. Laux, No. 6278834
LAUX LAW GROUP
400 W. Capitol Avenue, Suite 1700
Little Rock, AR 72201
Telephone: (501) 242-0750
Facsimile: (501) 372-3482
mlaux@lauxlawgroup.com

Michael P. Matthews
Foley & Lardner LLP
Pro hac vice application forthcoming
100 North Tampa Street, Suite 2700
Tampa, FL 33602-5810
Telephone: (813) 225-4131
Facsimile: (813) 221-4210
mmatthews@foley.com

Attorneys for Plaintiff
Honorable Wendell Griffen