No. _____

In The

# Supreme Court of the United States

IN RE LARRY ELLIOT KLAYMAN,

*Petitioner.*

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

**PETITION FOR WRIT OF MANDAMUS**

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## QUESTION PRESENTED

Petitioner Larry Klayman filed a lawsuit styled *Klayman v. Rao et al.*, 21-cv-2473 (D.D.C.) (the "*Rao* Case") in the U.S. District Court for the District of Columbia ("District Court"), and subsequently appealed that case to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), (the "*Rao* Appeal"), to remedy totally egregious errors that occurred in a separate case styled *Klayman v. Judicial Watch Inc. et al.*, 1:06-cv-670 (D.D.C.) (the "JW Case") and its appeal *Klayman v. Judicial Watch Inc. et al.*, 19-7105 (D.C. Cir.) (the "JW Appeal").

The *Rao* Case and appeal sought to obtain injunctive relief and an order mandating that (1) the D.C. Circuit conduct a bona fide review of the record in the JW Case and JW Appeal and (2) a new trial of the JW Case. Thus, the *Rao* Case necessarily named as Defendants the judges of the D.C. Circuit, as well as judges in the District Court related to the JW Case.

The question presented is whether a writ of mandamus should issue directing the District Court to conduct a new trial in the JW Case?

## PARTIES TO THE PROCEEDING

### 1. Petitioner Larry Klayman

Mr. Klayman is an attorney and a former federal prosecutor of the U.S. Department of Justice. Mr. Klayman is also the founder, and former chairman and general counsel of non-profit Judicial Watch and founder, chairman, and current general counsel of non-profit Freedom Watch. He also is in private practice.

### 2. Respondents

Respondents are federal judges for the Lower Court and the D.C. Circuit and include Hon. Neomi Rao, Hon. Robert L. Wilkins, Hon. Laurence H. Silberman, Hon. Colleen Kollar-Kotelly, Hon. Tanya S. Chutkan, Hon. Sri Srinivasan, Hon. Karen LeCraft Henderson, Hon. Judith W. Rogers, Hon. David S. Tatel, Hon. Patricia A. Millett, Hon. Cornelia T.L. Pillard, Hon. Gregory G. Katsas, Hon. Justin R. Walker, Hon. Ketanji Brown Jackson, Hon. Harry T. Edwards, Hon. Douglas H. Ginsburg, Hon. David B. Sentelle, and Hon. A. Raymond Randolph.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Mr. Klayman states that no parties are corporations.

## STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to *Klayman v. Rao et al.*, 21-cv-2473 (D.D.C. Oct. 25, 2021) and its subsequent appeal, *Klayman v. Rao et al.*, 21-5269 (D.C. Cir. Sep. 9, 2022).

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## OPINIONS AND ORDERS ENTERED

On September 9, 2022 the D.C. Circuit entered a *per curiam* order affirming the District Court's order dismissing Mr. Klayman's claims in the *Rao* Case. App. 1; *Klayman v. Neomi Rao, Hon*, 49 F.4th 550 (D.C. Cir. 2022).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

## RELEVANT LEGAL PROVISIONS

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."

## RULE 20.1 STATEMENT

There exists truly exceptional circumstances that mandate the issuance of the writ sought by Mr. Klayman in this matter, and Mr. Klayman has been left with no adequate remedy at law from any other Court. "The writ of mandamus is the appropriate remedy to enforce the performance of some duty enjoined by law, where there is no other adequate remedy." *Bd. of*

*Comm'rs v. Aspinwall*, 65 U.S. 376, 383 (1861). This is absolutely the case here.

Mr. Klayman filed the *Rao* Case, and subsequent appeal to the D.C. Circuit, the *Rao* Appeal in order to obtain injunctive relief and an order mandating that (1) the D.C. Circuit conduct a bona fide review of the record in the JW Case and the JW Appeal and (2) a new trial of the JW Case. The Honorable Christopher Cooper of the District Court dismissed the *Rao* Case, which Mr. Klayman appealed to the D.C. Circuit. The judges of the D.C. Circuit, being parties to this case, ordered an inter-circuit assignment and thus the Honorable Stephen A. Higginson ("Judge Higginson"), the Honorable Ralph R. Erickson ("Judge Erickson") and the Honorable Robert D. Sack ("Judge Sack") presided over this appeal (collectively, the "Panel").

At the August 24, 2022 oral argument in the *Rao* Appeal, the Panel more than appeared to agree with many of Mr. Klayman's arguments but indicated that they were hesitant to find that they were the proper vehicle to seek the relief sought by Mr. Klayman, suggesting that a Petition for Writ of Certiorari to the Supreme Court (or presumably Petition for Writ of Mandamus) may be more appropriate. As stated by Judge Erickson "You know, because, you know, kind of the ordinary course is, you know, you have a three-judge panel, you petition for rehearing en banc, you file your petition for cert and if they grant it, fine; if they don't, it dies, right?" App. 148. However, as Mr. Klayman pointed out, under these circumstances, the Supreme Court's jurisdiction is discretionary, and they

only hear a very limited number of cases per year. Then, the Panel appeared to suggest that a standard should be recognized to sanction relief for these types of cases – namely those that "shock the conscience." "Is that the standard – shocks the conscience? Is that what we're talking about? We're looking for a standard, a rule." App. 167. Mr. Klayman concurred, saying, "[y]eah, I would say, I would say he hit the nail on the head, this shocks the conscience." App. 167.

As set forth below, this is a case that truly shocks the conscience given the enormous stakes at issue and the incendiary, irrelevant and highly prejudicial testimony that Mr. Klayman had sexually harassed an office manager and beat his wife that was allowed to be put before the jury, as well as other egregious legal errors, not to mention due process and other violations. And, because it has been confirmed by the Panel that Mr. Klayman has no adequate remedy at law other than filing this instant Petition, the Court respectfully must exercise its discretion and grant the relief sought herein, which is to order a new trial that comports with the law.



## STATEMENT OF THE CASE

The *Rao* Case and subsequent appeal was filed by Mr. Klayman in order to seek injunctive relief from the Respondents – federal judges – to obtain an order that (1) the D.C. Circuit conduct a bona fide review of the record in the JW Case and the JW Appeal and (2) a

new trial of the JW Case. Thus, it is important for the Court to have an understanding of the egregious errors committed in the JW Case and Appeal, which are set forth below. These egregious errors clearly show why the Court must step in and exercise its discretion to grant the relief sought by Mr. Klayman in the *Rao* Case.

The JW Case involved a dispute between Mr. Klayman and Judicial Watch, Inc. ("Judicial Watch"), a non-profit government watchdog organization which Mr. Klayman founded and left in 2003 to run for U.S. Senate in Florida.

## I. Facts Pertaining to the JW Case

During the JW Case, which has lasted over sixteen (16) years, the Honorable Colleen Kollar-Kotelly ("Judge Kotelly") committed numerous highly prejudicial, intentional, and/or reckless manifest errors which resulted, largely because of the incendiary and prejudicial testimony that was allowed to be put before the jury, in a highly flawed and outrageous jury verdict against Mr. Klayman for the huge sum of 2.8 million dollars, plus a requested pending award of attorney's fees for this fiasco over 1.6 million dollars.

Chief among these highly prejudicial errors was Judge Kotelly allowing highly prejudicial, inflammatory statements and an irrelevant court order into evidence, in contradiction of both the Federal Rules of Evidence as well as the parol evidence rule. App. 46. These false, inflammatory, prejudicial, and irrelevant

statements included (1) Mr. Klayman's alleged acknowledgment of an incident with his wife that provided the basis for his wife's allegation that **he physically assaulted her – that is beat her – in front of their children**, (2) an alleged effort to pursue an improper relationship with a JW employee, **claiming he effectively sexually harassed her**, and (3) Mr. Klayman's alleged admission that he was in love with the employee, had purchased gifts for her and had kissed her. Indeed, this highly prejudicial, inflammatory, and false testimony was introduced, with the District Court's consent if not blessing, by Judicial Watch to perpetuate the falsity that Mr. Klayman did not voluntarily leave to run for the Senate; rather, they forced him out due to this alleged misconduct. However, this ignores the plain fact that the Severance Agreement[1] between the parties, which was undeniably signed and agreed to by all the parties, unequivocally stated that Mr. Klayman left JW voluntarily to pursue other endeavors:

> [Mr. Klayman's departure] shall be treated for all purposes as a voluntary resignation.

Included was the language of a press release that stated:

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

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[1] *Klayman v. Judicial Watch Inc. et al.*, 06-cv-00670 (D.D.C. 2006), ECF 265-2.

> President of Judicial Watch, said: "Larry conceived, founded and helped build Judicial Watch to the organization it is today, and we will miss his day to day involvement. Judicial Watch now has a very strong presence and has become the leading non-partisan, public interest watchdog seeking to promote and ensure ethics in government, and Larry leaves us well positioned to continue our important work."

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

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

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

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

and clear of an error the admission of this testimony was. This testimony clearly poisoned the jury to Mr. Klayman, and in conjunction with the other errors set forth below, gave Mr. Klayman no chance at a fair trial. Other egregious legal errors include, but are not limited to:

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

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

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

d. Orally reading jury instructions that were erroneous, confusing, and highly prejudicial to Mr. Klayman, refusing to provide other jury instructions that would have stated the correct law and

prevented the confusion, and then failing to disclose any written instructions that were provided to the jury, if any.

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

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

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

h. Entering judgment on the jury verdict where Judicial Watch clearly failed to prove that Mr. Klayman took and used donor information owned solely by Judicial Watch, but rather was owned by American Target Advertising. App. 46-48.

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

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

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

b. Usurping and extinguishing the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit

countering each and every claimed expense by Judicial Watch. This is a violation of Mr. Klayman's due process rights because it denied him his right to have a jury of his peers serve as the finder of fact on his claims.

c. Entering an overly broad, draconian sanctions order preventing Mr. Klayman from introducing evidence or calling witnesses at trial, and subsequently refusing to give the jury an instruction informing them of this sanction, leaving the jury with the false impression that Mr. Klayman simply had no evidence or witnesses to support his claims. App. 49.

Taken together, all of these errors were severely compounded by District Court's decision to allow to put before the jury highly inflammatory if not incendiary, irrelevant and false testimony that Mr. Klayman had (1) beat his wife and (2) sexually harassed an office manager. This incredibly prejudicial inflammatory and incendiary testimony obviously poisoned the jury against Mr. Klayman, and these further errors made it so that he simply had absolutely no chance at a fair trial based on the facts and the law.

## II. Facts Pertaining to the JW Appeal

At the D.C. Circuit, a three-judge panel consisting of the Honorable Neomi Rao ("Judge Rao"), the Honorable Claudia Wilkins ("Judge Wilkins"), and the Honorable Laurence Silberman ("Judge Silberman") (the

"three-judge panel") further compounded the highly prejudicial manifest errors of the District Court in fully affirming the jury verdict from the JW Case, apparently with little to no apparent review of the deep record over sixteen (16) years of litigation and still counting. In doing so, the three-judge panel not only mistakenly, intentionally, and/or recklessly failed to reverse clear errors by Judge Kotelly, but it also made new major errors of its own.

Regrettably, it was apparent from the three-judge panel's opinion that was it intended to protect Judge Kotelly, and as an egregious example the three-judge panel, unprompted and gratuitously incredibly wrote that Judge Kotelly had done a "commendable" job in administering the case. This flies in the face of the cold, hard fact that this case took over sixteen (16) years to administer, an unprecedented delay in the history of litigation. Objectively, this is not commendable in any way.

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

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

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

> **number" of consumers. But his only support for this proposition comes from two unpublished decisions of our district court, which are of course not precedential. *See In re Exec. Office of President*, 215 F.3rd 20, 24 (D.C. Cir. 2000).**
>
> . . . .
>
> **This circuit "has yet to opine on the precise factors courts should consider when assessing likelihood of confusion. . . ."** App. 54.

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

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

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

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

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

d. Failing to reverse the Lower Court's usurping of and thus extinguishing the fact-finding role of the jury by weighing competing affidavits to grant partial summary judgment on Judicial Watch's counterclaim for repayment of personal expenses when Mr. Klayman submitted a sworn affidavit countering each and every claimed expense by Judicial Watch. App. 52-53.

Chief among these highly prejudicial errors was a refusal to correct the District Court's decision to allow in highly prejudicial, inflammatory, incendiary and completely false and irrelevant testimony that Mr. Klayman had (1) beat his wife and (2) sexually harassed an office manager, which completely poisoned the jury against Mr. Klayman.

These highly prejudicial manifest and clear errors deprived Mr. Klayman of meaningful and actual access to the courts to litigate his claims and extinguished his constitutional and other legal rights. These highly prejudicial errors show that the three-judge panel did not actually consider the appellate record and apply the relevant law, and make their ruling based on the

facts and the law, but instead based on their personal feelings towards Mr. Klayman and their desire to protect one of their own, Judge Kotelly, as well as to harm Mr. Klayman financially with a 2.8 million dollar flawed verdict, plus a requested multi-million dollar attorneys fees award of nearly 2 million dollars more.

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

Thus, from the timing alone, it is incontrovertible that Respondents simply gave Mr. Klayman's Petition for Rehearing no actual consideration. This is a clear violation of Mr. Klayman's due process rights because it denies him fair, meaningful, and non-discriminatory access to the appellate system.

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

Furthermore, Mr. Klayman had filed an independent action in this Court requesting relief under Fed. R. Civ. P. 60 and asking that the Lower Court judgment be set aside. *Klayman v. Judicial Watch Inc. et al.*, 1:19-cv-2604 (D.D.C. 2019) based on fraud and other misconduct. This matter was assigned to the Honorable Tanya S. Chutkan ("Judge Chutkan").

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

## REASONS FOR GRANTING THE WRIT

As set forth above, the Panel in the *Rao* Appeal has suggested that this instant Petition is the appropriate avenue for Mr. Klayman to obtain the relief that he seeks. Coupled with the fact that there is no possible absolute "judicial immunity" at issue here, the Court must therefore step in and exercise its discretion to grant the relief sought by Mr. Klayman.

### I. There is no Judicial Immunity for Injunctive Relief

*First and foremost*, Mr. Klayman never conceded that Respondents were acting in their judicial capacities. Mr. Klayman has indisputably alleged that Respondents have violated his constitutional rights under the Fifth and Fourteenth Amendments. It is undisputable that violating a litigant's constitutional rights cannot be deemed to be part of a jurist's judicial duties, and therefore, no judicial immunity can apply.

*Second*, it is important to recognize that the entire concept of judicial immunity was created and adopted by none other than the Courts themselves – which essentially means that the Court decided that it would be immune from liability from their judicial acts.[2] However, this flies on the fact of well-established case law that clearly states that a court's role is to interpret

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

the laws, not to legislate and manufacture an immunity for itself. "The courts declare and enforce the law, but they do not make the law. *United States v. First National Bank of Detroit*, 234 U.S. 245, 34 S.Ct. 846, 58 L.Ed. 1298 (1914); *United States v. Consolidated Elevator Co*., 141 F.2d 791 (8th Cir. 1944) . . . This is for the reason that courts do not have the function of legislating or the power to legislate." *In re Shear*, 139 F. Supp. 217, 220 (N.D. Cal. 1956) (cites in original). Any grant of immunity should have been legislated, and not created by judges themselves.

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

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

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

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

> If the Court were to employ principles of judicial immunity to enhance further the limitations already imposed by principles of comity and federalism on the availability of injunctive relief against a state judge, it would foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm. Absent some basis for determining that such a result is compelled, either by the principles of judicial immunity, derived from the common law and not explicitly abrogated by Congress, or by Congress' own intent to limit the relief available under § 1983, we are unwilling to impose those limits ourselves on the remedy Congress provided. *Id*. at 539-40.

> We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review. *Id*. at 541.

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

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

In *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001), a landmark case that Plaintiff served as counsel, filed, and argued before the U.S. Court of Appeals for the Fourth Circuit, plaintiffs, an ex-intelligence official in the Department of Energy and his assistant, sought review of an order of the U.S. District Court for the Eastern District of Virginia, which dismissed their action against defendants, FBI Director Louis Freeh, his agents, and his supervisors, alleging an unconstitutional seizure and search of

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

There are also numerous law review articles and other authorities on judicial immunity which have discussed and confirmed this fundamental principle. *See Absolute Judicial Immunity Makes Absolutely No Sense: An Argument for an Exception to Judicial Immunity*, 84 Temp. L. Rev. 1071 (2012); *see also Note:* Pulliam v. Allen: *Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity*, 34 Am. U. L. Rev. 523 (1985).

> Judicial immunity, unlike other forms of official immunity in the United States, is almost entirely a creation of the men and women it immunizes. . . . Such analysis shows that the wall of judicial immunity, which uses its

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their home and computer in retaliation for the official's published criticism of the FBI. *Id*. at 397-98. The U.S. Court of Appeals for the Fourth Circuit held that plaintiffs First Amendment claim could proceed and that the officials, including FBI Director Freeh, were not entitled to qualified immunity because "a public official may not misuse his power to retaliate against an individual for the exercise of a valid constitutional right. *Id*. at 405. Additionally, the court ordered the case to proceed to discovery. *Id*.

Furthermore, the Honorable Ellen Segal Huvelle of this Court has allowed for a First Amendment retaliation *Bivens* claim to proceed past the motion to dismiss stage in *Navab-Safavi v. Broadcasting Board of Governors*, 08-cv-1125 (D.D.C. 2008).

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

purposes as mortar, is not without cracks and under certain pressures should crumble. 84 Temp. L. Rev. 1071.

In *Pulliam v. Allen*, the Court considered whether judicial immunity bars injunctive and declaratory relief, as well as legal fees associated with gaining that relief. In *Pulliam*, a county magistrate judge allegedly incarcerated persons for "nonjailable offenses. . . . Similarly, American courts "never have had a rule of absolute judicial immunity from prospective relief." The Court noted that the concerns with granting injunctive relief against a judge were distinct from those alleviated by protecting judges from damages. Further, the Court noted that the hurdles for obtaining equitable relief are sufficiently high to guard against harassment of judges and the chance of compromising judicial independence is lower in the case of injunctions. 84 Temp. L. Rev. 1071.

In *Pulliam v. Allen* the Supreme Court took a major step in removing one of the last vestiges of sovereign immunity for members of the judiciary. In *Pulliam* the Court upheld the award of injunctive and declaratory relief under section 1983 and attorney's fees under section 1988 against a state magistrate who, although acting within a magistrate's proper jurisdiction, had violated a litigant's civil rights. *Pulliam* was the first Supreme Court case to reject judicial immunity by holding a judge civilly accountable for her conduct. 34 Am. U. L. Rev. 523.

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

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

As set forth above in the Statement of the Case, the Lower Court Proceeding and the Appellate Proceeding truly involved events that "shock the conscience," including but not limited to (1) the Lower Court gratuitously admitting highly prejudicial, completely irrelevant, and totally false testimony that Mr. Klayman had beat his ex-wife in front of their children, and had sexually harassed an office manager and (2) the D.C. Circuit completely failing to conduct any sort of review of a very voluminous sixteen (16) year record and then admitting that there have been unreversed and precedential decisions by courts within the D.C. Circuit which have held that likelihood of confusion requires an "appreciable number of consumers," *Am. Ass'n for the Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244 (D.D.C. 1980), but then still applying a much lower standard in contravention of this case law, resulting in an inconsistent application of trademark law and a circuit split.

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

Indeed, the instant that the District Court allowed in the completely false, highly prejudicial, and totally irrelevant incendiary testimony that Mr. Klayman had (1) beat his wife and (2) sexually harassed an office manager, Mr. Klayman no longer had a chance to prevail in the jury trial. Jurors are regular people, and inevitably will be swayed by their emotions – perhaps even subconsciously. Clearly, when faced with this type of highly inflammatory testimony, the jury would grow to despise Mr. Klayman, which inevitably would influence their decisions. This is exactly why Judicial Watch sought to introduce this evidence, despite it having absolutely no bearing on their claims or defenses. Thus, allowing the jury to hear this type of testimony clearly and unequivocally "shocks the conscience."

## CONCLUSION

Based on the foregoing, the Court must exercise its discretion and order that the Lower Court conduct a new trial with a different lower court judge, as there has been a complete and total breakdown of Mr. Klayman's constitutional, statutory, and other rights.

As a direct result of the District Court allowing the introduction of completely false, highly prejudicial, and totally irrelevant incendiary testimony that Mr. Klayman had (1) beat his wife and (2) sexually harassed an office manager, along with further manifest errors set forth above, and then the D.C. Circuit's refusal to correct the blatant egregious errors, Mr.

Klayman is facing a 2.8 million dollar jury verdict and judgment, as well as $1.6 million in attorney's fees and costs sought by Judicial Watch, which will completely bankrupt him and his family. This behavior is truly egregious and "shocks the conscience," and is why the Court *must* exercise its discretion and intervene by respectfully granting the requested Petition for Writ of Mandamus.

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Respectfully submitted,

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