ORIGINAL

No. 24A449

IN THE
Supreme Court of the United States

Carla Davis and Jalen Davis

Petitioners,

v.

U.S. DEPT. OF JUSTICE; MERRICK B. GARLAND-U.S. Attorney General; U.S. DEPT. OF HEALTH and HUMAN SERVICES; XAVIER BECERRA-Secretary of Health and Human Services; DUSTIN SLINKARD-Kansas U.S. Attorney; ERIC MELGREN-Former -Kansas U.S. Attorney; KRIS W. KOBACH-Kansas Attorney General; KANSAS HOME-LAND SECURITY; DAVID WEISHAAR-Adjunct General; KANSAS DEPT. OF HEALTH AND ENVIRONMENT (KDHE); JANET STANEK-KDHE Secretary; JAMES MICHAEL MOSER m.d.-Former KDHE lead public health physician; KANSAS INSURANCE DEPT; VICKI SCHMIDT-Kansas Insurance Commissioner; KANSAS HEALTH CARE STABILIZATION FUND; CLARK SHULTZ-Executive Director of Kansas Health Care Stabilization Fund; SEDGWICK COUNTY COMMISSIONERS-Board of Health; MARC BENNETT-Sedgwick County District Attorney; CITY OF WICHITA CITY COUNCIL; BRANDON WHIPPLE-Mayor of Wichita; CENTRAL PLAINS HEALTH CARE PARTNERSHIP; MEDICAL SOCIETY OF SEDGWICK COUNTY; WESLEY MEDICAL CENTER LLC; THE CHILDREN'S MERCY HOSPITAL; WICHITA CLINIC P.A.-(Name changes: Via Christi Clinic P.A., NOW: ASCENSION MEDICAL GROUP VIA CHRISTI P.A.; KANSAS UNIVERSITY SCHOOL OF MEDICINE-WICHITA and it's WICHITA CENTER FOR GRAD-UATE MEDICAL EDUCATION. INC.; GAROLD O. MINNS m.d.-Dean of KU School of Medicine-Wichita;

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STEWART E. DISMUKE m.d.-Former Dean of KU School of Medicine-Wichita; **ROBERT KENAGY m.d.**-Wichita Clinic Medical Director; **CLYDE WILSON WESBROOK m.d.**; **DEE SPADE m.d.**-Wichita Clinic; **VIRGIL F. BURRY m.d.**-Exe. Medical Director of the Children's Mercy Hospital; **HEWITT GOODPASTURE m.d.**-Medical Society of Sedgwick County; **DAVID GRAINGER m.d.**-Central Plains Health Care Partnership/ KU School of Medicine OB/GYN Chairman; **TRAVIS STEMBRIDGE m.d. OB/GYN**-Former President of Medical Society of Sedgwick County; **GERARD BASSELL m.d.- Anesthesiologist**-KU School of Medicine Program Director; **ANNA F. STORK-FURY**-Former KU Medical Student-OB/GYN; **BRENDA KALLEMEYN**-Former KU Medical Student-OB/GYN; **TOM YAO**-Former KU Medical Student- Anesthesia; **GIANFRANCO PEZZINO m.d.**-State of Kansas Epidemiologist; **FOULSTON SIEFKIN L.L.P.**; **KLENDA MITCHELL AUSTERMAN ZUERCHER L.L.C. (KLENDA AUSTERMAN L.L.C.)**

Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

CARLA DAVIS and JALEN DAVIS (Self Pay-Pro Se)
901 N. Belmont
Wichita, Kansas 67208
Telephone: 316-691-8804
Email: cardav01292021@yahoo.com

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To the Honorable Neil M. Gorsuch, as Circuit Justice for United States Court of Appeals for the Tenth Circuit:

Self-Pay/ Pro Se Petitioners, Carla Davis and Jalen Davis, pursuant to Supreme Court Rule 13 (5) respectfully apply to this Court for an order extending time to file a joint petition for a writ of certiorari for good cause. Unless extended, petitioners' time to file a petition will expire on November 29, 2024. The applicants request that the time to file their joint petition for a writ of certiorari be extended for 60 days, up to and including Tuesday, January 28, 2025. This Court has Original Jurisdiction and Appellate Jurisdiction under Article III, section 2 of the Constitution of the United States. This application is submitted more than ten (10) days prior to the scheduled filing date for the Petition. Important dates are:

August 30, 2024, the Court of Appeals filed an Order and Judgement amending its previous August 1, 2024, Judgement and Order. **(Attached to this application)**

On **August 30, 2024**, the Court of Appeals also issued an Order denying Carla and Jalen panel rehearing and rehearing en banc. **(Attached to this application)**

Background

This is a serious civil rights litigation, and <u>not</u> a malpractice tort case. Applicants Carla Davis and Jalen Davis are two United States citizens alleging ongoing irreparable injury and harm due to abuse of federal laws and violations of civil rights, involving substantive issues based on the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and remedial issues based on qualified immunity. Carla and Jalen's case was disposed of in the United States District Court for the District of Kansas and the Tenth Circuit Court of Appeals as a tort case and <u>not</u> a civil rights violation case; Carla and Jalen are dissatisfied that the lower federal courts ignored their civil rights violation claims without analysis

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and application to the facts of this case regarding their medical records place under national security Confidential-Not For Re-Release classification, and patient/physician fiduciary communications stopped by U.S. Patriot Act tools. Petitioners Carla and Jalen are seeking Equitable-Injunctive Relief, Declaratory Relief, possible money damages relief, and other and further relief as may be just and proper together with the cost of this lawsuit. In their Complaint filed on January 23, 2023, Carla and Jalen informed the United States District Court for the District of Kansas they are suffering ongoing irreparable constitutional and physical injury and harm due to their medical records being secret under national security classification without access and use to them for any fundamental purpose that medical records are needed for as a human being, including denial of medical treatment, denial to use the medical records as evidence in court cases such as this case, in auto accident claims, in social security claims, and denial of patient/physician fiduciary communications regarding diagnostic test results due to abuse of U.S. Patriot Act tools. This is a case of first impression on this matter. Carla and Jalen want to know whether this action of U.S. Executive Branch Officials, State of Kansas government officials, government medical contractors, and law firm legal advisors, violates the United States Constitution, and other federal laws, as this case needs judicial review on these government actions.

On September 28, 2023, the United States District Court for the District of Kansas dismissed the case in its entirety without a hearing, without considering, without analyzing, and without applying substantive issues based on the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and remedial issues based on qualified immunity to this case.

On August 30, 2024, the Court of Appeals filed an Order and Judgement AMENDING its previous August 1, 2024, Judgement and Order to acknowledge

that Carla and Jalen's main argument on appeal pertained to the district court not following the rule of law to resolve irreparable harm and injury to Carla and Jalen when suffering ongoing irreparable constitutional and physical injury and harm due to their medical record being secret under national security classification since January 23, 2003. The Order and Judgment did not acknowledge Carla and Jalen' Standard of Review in their Appellant Brief to resolve this Fourth Amendment challenge pertaining placing medical records under national security and physicians under U.S. Patriot Act tools to stop patient/physician communications and medical treatment. In their Appellants' Brief, Carla and Jalen asked the Court of Appeals to refer their case to the U.S. Supreme Court .
The Court of Appeals has not issued Carla and Jalen copy of a certified mandate for this case to rebuttal.

Reasons For Granting an Extension of Time

In support of this application, good cause are as follows:

1. The petitioners are not filing their case *in forma pauperis*, and do not make this application for unnecessary waste or delay.

2. This is a serious case involving degradation of human dignity with more than one petitioner and multiple defendants on issues and federal questions of first impression involving Fourth Amendment ongoing irreparable harm and injury to fundamental rights caused by abuse of national security classification and U.S. Patriot Act tools placed on medical records preventing medical treatment, preventing medical records as evidence in cases like this, along with other fundamental uses of medical records, and patient/physician communications.

3. The petitioners have been ill and have chronic health conditions preventing them from participating effectively in preparing a joint petition to comply with Supreme Court rules since start of 90-day deadline.

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4. Family emergencies and tragedies have prevented petitioners from effectively preparing a joint petition to comply with Supreme Court rules since start of 90 day deadline.

5. Due to the unforeseen circumstances listed above, Petitioners need the 60 day extension to secure and study the full appellate record, and prepare a joint petition and appendix that may be properly presented to this Court.

6. This request is made timely before the 10-day deadline, is not for delay, and will not prejudice the defendants in this case.

Conclusion

Wherefore, in the interest of good cause shown, Applicants respectfully request that this Court extend 60 days to and including January 28, 2025.
We hereby certify that under penalty of perjury that the foregoing reasons stated for granting this application is true and correct.

Executed on this 30th day of October 2024

Respectfully submitted,

Carla Davis / Jalen Davis

Carla Davis and Jalen Davis
901 N. Belmont
Wichita, Kansas 67208
Tel: 316-691-8804
Email: cardav01292021@yahoo.com

Certificate of Service
(1 original + 2 copies)

We hereby certify that a copy has been postal mailed to the Clerk of the U.S. Supreme Court and to the other parties listed below:

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Solicitor General of the United States
Rm. 5616
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, DC 20530-0001

Tom Yao M.D. Address: 4445 Magnolia Ave.; Riverside, CA., 92501-4135; Riverside County

Ascension Organization -Ascension Medical Group Via Christi, P.A. (Merger and name change for Wichita Clinic P.A.) Addresses: (1.) Corporation Service Company; 1100 SW Wanamaker Rd., Suite 103; Topeka, Ks. 66604 (2.) Mackenzie M. Baxter 100 N. Broadway, Ste. 950; Wichita, Ks. 67202

Clyde Wilson Wesbrook 7373 E. 29TH St. N., Wichita, Kansas 67226 (NO APPELLEE BRIEF FILED)

Attorneys of the Defendants:

Christopher Allman-Office of United States Attorney- KCKS; 500 State Ave., Ste. 360; Kansas City, Kansas 66101. *Defendants: U.S. Dept. of Justice, Merrick Garland; U.S. Dept of HHS, Xavier Becerra; U.S. Kansas Attorneys: Dustin Slinkard and Eric Melgren*

Barbara K. Christopher and Matthew Klose; 2600 Grand Boulevard, Ste. 1100; Kansas City Missouri 64108. *Defendants: Children's Mercy Hospital and Virgil F. Burry M.D.*

Steven C. Day; 245 N. Waco, Ste. 260; Wichita, Ks. 67202. *Defendant: Dee Spade M.D.*

Jeffery A. Jordan; 1551 N. Waterfront Pkwy., Ste. 100; Wichita, Ks. 67206. *Defendant: Foulston Siefkin L.L.P.*

Mackenzie M. Baxter; 100 N. Broadway, Ste. 950; Wichita, Ks. 67202. *Defendants: Ascension Organization- Ascension Medical Group Via Christi P.A., Wichita Clinic P.A., Robert Kenagy M.D.*

Jennifer Magana and Eric S. Houghton- City of Wichita Attorneys; 455 N. Main, 13th Floor; Wichita, Ks. 67202. *Defendants: Wichita City Council and Brandon Whipple-City Mayor*

Christopher S. Cole; 245 N. Waco, Ste 260; **P.O. Box 127** Wichita, Ks, 67201-0127. *Defendants: Wichita Center for Graduate Medical Education, Clark Shultz, Kansas Health Stabilization Fund, Clyde Wilson Wesbrook M.D., Stewart E. Dismuke M.D., Brenda Kallemeyn M.D.*

Christopher A. McElgunn; 301 N. Main, Ste. 1600 Wichita, Ks. 67202. *Defendant: Klenda Mitchell Austerman & Zuercher L.L.C. now Klenda Austerman L.L.C.*

Stanley R. Parker- Asst. Att. General; 120 SW 10th Ave. 2nd Floor; Topeka, Ks. 66612-1597. *Defendants: Kansas University School of Medicine and its Wichita Center for Graduate Medical Education, Inc., Garold O. Minns M.D., Kansas Homeland Security, Davis Weishaar- Ks. Adjunct General*

Matthew Lee Shoger- Ass. Att. General; 120 SW 10th Ave. 2nd Floor; Topeka, Ks. 66612-1597. *Defendants: Kris Kobach and Marc Bennett*

Justen P. Phelps; 301 N. Main, Ste. 1300; Wichita, Kansas 67202. *Defendant: Wesley Medical Center LLC*

Rebecca E. Bergkamp, Marl R. Maloney, Brian L. White; 1617 N. Waterfront Pkwy., Ste. 400; Wichita, Ks. 67206. *Defendant: Anna F. Stork-Fury M.D.*

Andrew Foulston and Katy Olson; 300 W. Douglas, Ste. 500; Wichita, Kansas 67202. *Defendants: Central Plains Health Care Partnership, Medical Society of Sedgwick County, Hewitt Goodpasture M.D.*

Samantha M.H. Woods; 645 E. Douglas, Ste. 100; Wichita, Ks. 67202. *Defendants: Travis Stembridge M.D., David Grainger M.D.*

Jay F. Fowler; 1551 N. Waterfront Pkwy # 100; Wichita, Kansas 67206. *Defendant: Gerard Bassell M.D.*

Kevin T. Stamper; 100 N. Broadway, Ste 650; Wichita, Kansas 67202. *Defendants: Board of County Commissioners of Sedgwick County*

Justin Louis McFarland- Kansas Insurance Department; 1300SW Arrowhead Road; Topeka, Kansas 66604. *Defendants: Kansas Insurance Department and Vicki Schmidt*

Katelyn Radloff-KDHE; 1000 SW Jackson, Ste. 560; Topeka, Ks, 66612. *Defendants: Janet Stanek, James Michael Moser M.D. Kansas Dept. of Health and Environment (KDHE), Gianfranco Pezzino M.D.*

FILED
United States Court of Appeals
Tenth Circuit

August 30, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CARLA DAVIS; JALEN DAVIS,

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, U.S. Attorney General, in his official and individual capacities; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, Secretary of Health and Human Services, in his official and individual capacities; DUSTON J. SLINKARD, Kansas U.S. Attorney, in his official and individual capacities; ERIC MELGREN, former Kansas U.S. Attorney, in his official and individual capacity; KRIS W. KOBACH, Kansas Attorney General, in his official and individual capacity; KANSAS HOMELAND SECURITY; DAVID WEISHAAR, Kansas Homeland Security Director and Adjunct General, in his official and individual capacity; KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT; JANET STANEK, KDHE Secretary, in her official and individual capacity; JAMES MICHAEL MOSER, M.D., Kansas Department of Health and Environment Lead Public Health Physician, in his official and individual capacity; KANSAS INSURANCE DEPARTMENT; VICKI SCHMIDT, Kansas Insurance Commissioner, in her official and individual capacity; KANSAS HEALTH CARE STABILIZATION FUND; CLARK

No. 23-3244
(D.C. No. 6:23-CV-01010-JAR-BGS)
(D. Kan.)

* (Double sided)

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SHULTZ, Executive Director, Kansas Health Care Stabilization Fund, in his official and individual capacity; SEDGWICK COUNTY, KANSAS, BOARD OF COMMISSIONERS, Board of Health; MARC BENNETT, Sedgwick County District Attorney, in his official and individual capacity; CITY OF WICHITA CITY COUNCIL; CENTRAL PLAINS HEALTH CARE PARTNERSHIP; MEDICAL SOCIETY OF SEDGWICK COUNTY; WESLEY MEDICAL CENTER, LLC; THE CHILDREN'S MERCY HOSPITAL; WICHITA CLINIC, P.A., f/k/a Christi Clinic, P.A. n/k/a Ascension Medical Group Via Christi, P.A.; KANSAS UNIVERSITY SCHOOL OF MEDICINE, Wichita, and its Wichita Center for Graduate Medical Education, Inc.; GAROLD O. MINNS, M.D., Dean of KU School of Medicine-Wichita, in his official and individual capacity; STEWART E. DISMUKE, M.D., former Dean of KU School of Medicine-Wichita, in his official and individual capacity; ROBERT KENAGY, M.D., Wichita Clinic Medical Director, in his official and individual capacity; CLYDE WILSON WESBROOK, M.D., in his official and individual capacity; DEE SPADE, M.D., Wichita Clinic, in her official and individual capacity; VIRGIL F. BURRY, M.D., Exe. Medical Director Children's Mercy Hospital, in his official and individual capacity; HEWITT GOODPASTURE, M.D., Medical Society of Sedgwick County, in his official and individual capacity; DAVID GRAINGER, M.D., Central Plains Health Care Partnership/KU School of Medicine OB/GYN Chairman, in his official and individual capacity; TRAVIS STEMBRIDGE, M.D., OB/GYN Former

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President of Medical Society of Sedgwick County, in his official and individual capacity; GERARD BASSELL, M.D., Anesthesiologist, KU School of Medicine Program Director, in his official and individual capacity; ANNA F. STORK-FURY, Former KU Medical Student OB/GYN, in her official and individual capacity; BRENDA KALLEMEYN, Former KU Medical Student OB/GYN, in her official and individual capacity; TOM YAO, Former KU Medical Student Anesthesia, in his official and individual capacity; GIANFRANCO PEZZINO, M.D., State of Kansas Epidemiologist, in his official and individual capacity; FOULSTON SIEFKIN LLP; KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC, a/k/a Klenda Austerman, LLC; BRANDON WHIPPLE, Mayor; in his official and individual capacity; WICHITA CENTER FOR GRADUATE MEDICAL EDUCATION, INC.,

Defendants - Appellees.

ORDER

Before **TYMKOVICH, MATHESON,** and **MCHUGH**, Circuit Judges.

This matter is before the court on "Appellant's Petition for Panel Rehearing and Rehearing En Banc." Upon careful consideration, we direct as follows.

Pursuant to Fed. R. App. P. 40, the petition for panel rehearing is GRANTED IN PART to the extent of the modifications in the attached revised order and judgment. The

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court's August 1, 2024 order and judgment is withdrawn and replaced by the attached revised order and judgment, which shall be filed as of today's date.

Because the panel's decision to partially grant rehearing resulted in only non-substantive changes to the order and judgment that do not affect the outcome of this appeal, Appellants may not file a second or successive rehearing petition. *See* 10th Cir. R. 40.3.

The petition for rehearing en banc and the attached revised order and judgment were transmitted to all non-recused judges of the court who are in regular active service. As no member of the panel and no non-recused judge in regular active service requested that the court be polled, the petition for rehearing en banc is denied. *See* Fed. R. App. P. 35(f).

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

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FILED
United States Court of Appeal
Tenth Circuit

August 30, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CARLA DAVIS; JALEN DAVIS,

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, U.S. Attorney General, in his official and individual capacities; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, Secretary of Health and Human Services, in his official and individual capacities; DUSTON J. SLINKARD, Kansas U.S. Attorney, in his official and individual capacities; ERIC MELGREN, former Kansas U.S. Attorney, in his official and individual capacity; KRIS W. KOBACH, Kansas Attorney General, in his official and individual capacity; KANSAS HOMELAND SECURITY; DAVID WEISHAAR, Kansas Homeland Security Director and Adjunct General, in his official and individual capacity; KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT; JANET STANEK, KDHE Secretary, in her official and individual capacity; JAMES MICHAEL MOSER, M.D., Kansas Department of Health and Environment Lead Public Health Physician, in his official and individual capacity; KANSAS INSURANCE DEPARTMENT; VICKI SCHMIDT, Kansas Insurance Commissioner, in her official and

No. 23-3244
(D.C. No. 6:23-CV-01010-JAR-BGS)
(D. Kan.)

13-30

individual capacity; KANSAS HEALTH CARE STABILIZATION FUND; CLARK SHULTZ, Executive Director, Kansas Health Care Stabilization Fund, in his official and individual capacity; SEDGWICK COUNTY, KANSAS, BOARD OF COMMISSIONERS, Board of Health; MARC BENNETT, Sedgwick County District Attorney, in his official and individual capacity; CITY OF WICHITA CITY COUNCIL; CENTRAL PLAINS HEALTH CARE PARTNERSHIP; MEDICAL SOCIETY OF SEDGWICK COUNTY; WESLEY MEDICAL CENTER, LLC; THE CHILDREN'S MERCY HOSPITAL; WICHITA CLINIC, P.A., f/k/a Christi Clinic, P.A. n/k/a Ascension Medical Group Via Christi, P.A.; KANSAS UNIVERSITY SCHOOL OF MEDICINE, Wichita, and its Wichita Center for Graduate Medical Education, Inc.; GAROLD O. MINNS, M.D., Dean of KU School of Medicine-Wichita, in his official and individual capacity; STEWART E. DISMUKE, M.D., former Dean of KU School of Medicine-Wichita, in his official and individual capacity; ROBERT KENAGY, M.D., Wichita Clinic Medical Director, in his official and individual capacity; CLYDE WILSON WESBROOK, M.D., in his official and individual capacity; DEE SPADE, M.D., Wichita Clinic, in her official and individual capacity; VIRGIL F. BURRY, M.D., Exe. Medical Director Children's Mercy Hospital, in his official and individual capacity; HEWITT GOODPASTURE, M.D., Medical Society of Sedgwick County, in his official and individual capacity; DAVID GRAINGER, M.D., Central Plains Health Care Partnership/KU School of Medicine OB/GYN Chairman, in his official and

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individual capacity; TRAVIS STEMBRIDGE, M.D., OB/GYN Former President of Medical Society of Sedgwick County, in his official and individual capacity; GERARD BASSELL, M.D., Anesthesiologist, KU School of Medicine Program Director, in his official and individual capacity; ANNA F. STORK-FURY, Former KU Medical Student OB/GYN, in her official and individual capacity; BRENDA KALLEMEYN, Former KU Medical Student OB/GYN, in her official and individual capacity; TOM YAO, Former KU Medical Student Anesthesia, in his official and individual capacity; GIANFRANCO PEZZINO, M.D., State of Kansas Epidemiologist, in his official and individual capacity; FOULSTON SIEFKIN LLP; KLENDA, MITCHELL, AUSTERMAN & ZUERCHER, LLC, a/k/a Klenda Austerman, LLC; BRANDON WHIPPLE, Mayor; in his official and individual capacity; WICHITA CENTER FOR GRADUATE MEDICAL EDUCATION, INC.,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MATHESON**, and **McHUGH**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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Carla Davis and her son, Jalen Davis, proceeding pro se, filed the underlying lawsuit against 43 defendants. They sought declaratory, injunctive, and monetary relief under 42 U.S.C. §§ 1983 and 1985 for alleged violations of the Fourth, Fifth, and Fourteenth Amendments. The district court denied the Davises' judicial recusal motions, dismissed the action, and denied reconsideration. The Davises filed this pro se appeal.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual Background*[2]

The Davises generally alleged that certain defendants used them as test subjects to research bioterrorism; that some defendants injected or inserted drugs, substances, or devices into their bodies during medical treatment in 2003, 2004, and 2008; and that other defendants were complicit in or refused to investigate or stop these experiments.

In January 2003, Ms. Davis gave birth to Mr. Davis at Wesley Medical Center, LLC ("Wesley") in Wichita, Kansas. Before her scheduled induction, she told her

[1] Because the Davises are pro se, we construe their filings liberally, but we do not act as their advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

[2] This factual history derives from the allegations in the Davises' complaint and the attached exhibits. *See Commonwealth Prop. Advocs., LLC v. Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1201 (10th Cir. 2011) (noting that we "accept[] as true all well-pleaded factual allegations in the complaint" on an appeal from a motion to dismiss and "may consider not only the complaint, but also the attached exhibits").

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health care providers she wanted to deliver her baby at a different hospital. The complaint alleged, "Without [her] knowledge or consent," she was "forced to go to Wesley," where she was "placed in the hands of indigent and research training programs." R., vol. 1 at 45. The complaint alleged that during labor, she "was incapacitated with toxic [doses] of" fentanyl, "raped" when a doctor "penetrated [her] vagina" with gloved hands and an unknown object, "stabbed" with a needle in her lower back by another doctor, "administered toxic doses of antibiotics[] when [she] did not have an infection," and "administered toxic doses of Bupivicaine and other drugs without a medically necessary reason." *Id.*

The complaint further alleged that in February 2004, Ms. Davis was treated at Wesley for a cardiac issue, and an "unknown device was placed in [her] chest blood vessels without [her] knowledge and consent." *Id.* And it alleged that in August 2008, Mr. Davis was treated at another hospital, where "public officials stole" his blood, he was prevented from receiving medical care, and a "U.S. Military Social Worker" attempted to "abduct[]" him. *Id.* at 46. The complaint noted that Ms. Davis was accused of neglect, but after an investigation, state officials found the allegation was unsubstantiated. *See id.*

Some of the Davises' medical records were attached to the complaint. The Davises alleged that they have been denied access to other records that are in "Confidential" status because "public officials and their cooperators are keeping concealed the unlawful bodily intrusions and the serious injuries resulting from it."

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Id. at 45-46. They claimed the denial of access to records is "ongoing," making it difficult for them to obtain medical treatment and public benefits. *Id.* at 46.

B. *Procedural Background*

The Davises filed their complaint on January 23, 2023. R., vol. 1 at 38. They brought constitutional claims under 42 U.S.C. § 1983 and a conspiracy claim under 42 U.S.C. § 1985. The 43 defendants included various federal agencies and federal employees, state and municipal agencies and employees, private entities, and private individuals. One of the defendants, Eric Melgren, was the former United States Attorney for the District of Kansas and is currently the Chief Judge of the United States District Court for the District of Kansas—where the Davises filed their complaint. President George W. Bush appointed Chief Judge Melgren to the court.

The case was assigned to Judge Robinson, also a President Bush appointee. Shortly after filing the complaint, the Davises requested that no judge appointed by the Bush administration or any judge with "fiduciary loyalties" to any of the defendants be assigned to the case. Suppl. R., vol. 1 at 15, 16.[3] Judge Robinson treated this request as a motion to recuse her under 28 U.S.C. § 455(a), and denied it for failure to allege facts that would suggest that she had "an actual bias or an appearance of bias solely based on" her appointment by President Bush, *id.* at 18, or that she had a "conflict of interest with any of the parties," *id.* at 19.

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[3] The Davises submitted two filings on the same day making the exact same request. *See* Suppl. R., vol. 1 at 15, 16. We treat them here as a single motion.

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From February to May 2023, all but one defendant filed motions to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, 12(b)(5) for insufficient service of process, and/or 12(b)(6) for failure to state a claim. On September 28, 2023, the district court granted 28 motions to dismiss and dismissed the case against all defendants. R., vol. 3 at 427. Depending on the defendant and the claim, the court dismissed based on sovereign immunity and lack of standing; failure to allege state action, personal participation, or facts supporting a municipal liability or conspiracy claim; and failure to meet the statute of limitations. The court concluded the Davises could not prevail on any of the facts alleged in the complaint and found it would be futile to allow them leave to amend. *Id.* at 427-64. The court therefore dismissed the complaint and entered judgment. *Id.* at 465-66.

The next day, September 29, 2023, the Davises moved under 28 U.S.C. § 455(a) and 28 U.S.C. § 136 (which establishes the office of chief judge) to disqualify Chief Judge Melgren from "his administrative position as Chief Judge." R., vol. 3 at 520. They argued it was improper for him to have administrative oversight of a court in which he is a defendant in a lawsuit, and that he was thus "'unable to perform his duties as chief judge.'" *Id.* at 521 (quoting 28 U.S.C. § 136(e), which provides that the most senior active district judge shall serve as chief judge if the chief judge is temporarily unable to perform his duties). Because the case had been dismissed, Judge Robinson denied the motion as moot.

The Davises moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), and also moved for leave to amend the complaint. The district court denied both motions. This appeal followed.

II. DISCUSSION

The Davises argue the district court erred by denying their motions seeking disqualification of Judge Robinson and Chief Judge Melgren. They also challenge the dismissal order, arguing that the court's partiality prevented it from properly addressing the merits of their constitutional claims.

A. *Denial of Motions to Disqualify*

1. Legal Background

We review a district court's denial of a motion to disqualify a judge for abuse of discretion. *United States v. Mendoza*, 468 F.3d 1256, 1262 (10th Cir. 2006); *Bryce v. Episcopal Church*, 289 F.3d 648, 659 (10th Cir. 2002). "Under this standard, we will not reverse unless the trial court has made an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *United States v. Wells*, 873 F.3d 1241, 1250 (10th Cir. 2017) (quotations omitted).

The judicial disqualification statute applicable here is 28 U.S.C. § 455(a). It provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *See also* Code of Conduct for United States Judges (Code of Conduct), Canon 3(C)(1) (requiring disqualification where the "judge's impartiality might

reasonably be questioned"); Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law* 17 (2d ed. 2010).

The test under § 455(a) is not whether judges believe they are capable of impartiality, but rather whether a reasonable person might question the judge's impartiality. *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). Similarly, the test is not whether someone could conceivably question a judge's impartiality, but whether a reasonable person, knowing all relevant facts, would harbor doubts. *In re McCarthey*, 368 F.3d 1266, 1269 (10th Cir. 2004); *Bryce*, 289 F.3d at 659; *Cooley*, 1 F.3d at 993. A judge has "as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require." *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995). Thus, "[t]he recusal statute should not be construed so broadly as to become presumptive or to require recusal based on unsubstantiated suggestions of personal bias or prejudice." *Bryce*, 289 F.3d at 659-60.

The party moving to disqualify a judge is ordinarily assigned the burden of proof. *See Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1247 (10th Cir. 2005) (stating party urging disqualification bears "heavy burden of showing the requisite judicial bias or misconduct"); *Cauthon v. Rogers*, 116 F.3d 1334, 1336 (10th Cir. 1997). Relevant facts must support the moving party's belief that the judge is biased. *See Mendoza*, 468 F.3d at 1262; *Nichols*, 71 F.3d at 352.

This court has held that "[a] motion to recuse under section 455(a) must be timely filed." *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1028 (10th Cir. 1988) (per

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curiam) (collecting cases); *see Cooley*, 1 F.3d at 993 (recognizing that a "motion to recuse . . . must be timely filed" (quotations omitted)). Most circuits require that it be brought "at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *See, e.g., Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994).[4] This requirement guards against a party's withholding "a recusal application as a fall-back position in the event of adverse rulings on pending matters." *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995); *see Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978).

2. **Application**

a. *Motion to disqualify based on appointing president or loyalty to a defendant*

The Davises' first motion for recusal consisted of one sentence: "[I]t is hereby being requested that NO Judge appointed by the Bush Administration be assigned to this case, and NO Judge that has any fiduciary loyalties to the Defendants in this case in any matter due to conflicts of Interests." Suppl. R., vol. 1 at 15.

By statute, Chief Judge Melgren was disqualified from assignment to this case because he was named as a defendant. *See* § 455(b)(5)(I) (providing that a judge must disqualify himself if he "[i]s a party to the proceeding"); *see also* Code of Conduct, Canon 3(C)(1)(d)(i) (same). He did not sit on the case. Because Judge

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[4] *See also* Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law* 76-77 (2d ed. 2010); 12 Alan W. Perry & Martin H. Redish, *Moore's Federal Practice* § 63.61 (2019) ("In general, one seeking disqualification must do so at the earliest possible moment after obtaining knowledge of the facts demonstrating the basis for disqualification.").

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Robinson had been assigned, she appropriately treated the motion as seeking only her recusal.

i. Appointing president

This circuit has not addressed whether a judge may be disqualified based solely on which president appointed the judge. Other circuits have rejected challenges to a judge's impartiality based on the appointing administration. *See, e.g.*, *Straw v. United States*, 4 F.4th 1358, 1363 (Fed. Cir. 2021) ("There is no support whatsoever for the contention that a judge can be disqualified based simply on the identity of the President who appointed him."); *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 38 (2d Cir. 1998) (holding that appointment by a particular administration is not a ground for questioning a judge's impartiality). The D.C. Circuit denied recusal even when the appointing president was a party. *See In re Exec. Off. of the President*, 215 F.3d 25, 25-26 (D.C. Cir. 2000) (holding that neither the recusal statute nor the Code of Conduct requires a judge's recusal from a case involving the president who appointed him and collecting cases in which Supreme Court Justices participated in cases involving their appointing administrations).

We find this authority persuasive and agree that a judge's appointment by a particular president is not alone a basis for disqualification. We affirm the district court on this issue.

ii. Loyalty to a defendant

As noted, the Davises' one-sentence motion asked that "no judge with fiduciary loyalties to defendants be assigned to the case." Suppl. R., vol. 1 at 15.

It did not mention a specific defendant, define "fiduciary loyalties," or provide facts establishing "fiduciary loyalties." Judge Robinson found that the Davises "presented no facts to suggest this Court has any fiduciary conflict of interest with any of the parties in this matter." *Id.* at 19. Their motion was therefore insufficient on its face.

Assuming the Davises filed their motion with Chief Judge Melgren's listing as a defendant in mind, we note that the Judicial Conference Committee on Codes of Conduct has stated that when "a judge is a named defendant, the other judges of that court are not necessarily and automatically disqualified." Guide to Judiciary Policy, vol. 2B, ch. 2, Published Advisory Op. No. 102 (2009).[5] Whether it is "appropriate for a judge to handle a matter naming judicial colleagues depends on the surrounding circumstances." *Id.*, Op. No. 103 (2009) (addressing harassing claims against a judge and concluding that when the litigation is patently frivolous, recusal of the assigned judge "would rarely be appropriate" based on "the mere naming of a judicial colleague").[6]

For example, in *Switzer v. Berry*, 198 F.3d 1255, 1258 (10th Cir. 2000), after this court dismissed his previous appeal, the appellant sued, among others, every Tenth Circuit judge, and moved to recuse the panel assigned to his case. The panel, invoking their duty to sit and the rule of necessity, denied the motion, stating that "a judge is qualified to decide a case even if he or she would normally be impeded"

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[5] https://perma.cc/44AK-24CX.

[6] https://perma.cc/48YU-Q3RH.

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from doing so when "the case cannot be heard otherwise." *Id.* (quoting *United States v. Will*, 449 U.S. 200, 213 (1980)); *see also Rusk v. Tymkovich*, 714 F. App'x 913, 914 (10th Cir. 2018) (unpublished) (holding, under duty to sit and rule of necessity, that appellate panel members were not disqualified from hearing appeal in lawsuit against chief judge); *Jones v. Jones*, 820 F. App'x 659, 665-68 (10th Cir. 2020) (unpublished) (upholding rule-of-necessity denial of motion to recuse all district judges where movant asserted no objective basis for recusal).[7]

If naming a district judge as a defendant were sufficient to disqualify Judge Robinson, the entire district court would be disqualified. The circumstances here do not call for that. In their motion, the Davises did not mention either judge by name. They stated no facts, including any basis to impute Chief Judge Melgren's disqualification to Judge Robinson. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-27 (1986) (refusing to impute the conflict of one state supreme court justice to the entire court).

In their complaint, the Davises mentioned Chief Judge Melgren only once and without explanation as to why he and others were named at all.[8] This scattershot

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[7] We may consider non-precedential, unpublished decisions for their persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A).

[8] The complaint alleged:

> Defendant ERIC MELGREN is a former Kansas U.S. Attorney years 2002-2008. He was a partner at the law firm Foulston Sietkin and a United Way of the Plains board member 2002-2003. He is being sued in his official and individual capacity: his principle office at United

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approach implicates "the indiscriminate litigant problem," *Ignacio v. Judges of U.S. Court of Appeals for the Ninth Circuit*, 453 F.3d 1160, 1164 (9th Cir. 2006), which in this instance would enable the Davises to exercise "veto power over sitting judges" on the Kansas federal district court by naming any one of them in the complaint, *Switzer*, 198 F.3d at 1258 (quotations omitted). Under these circumstances, Judge Robinson acted within her discretion in declining to recuse.

* * * *

Because the Davises' cursory motion did not present facts to support recusal of Judge Robinson based on her appointment by President Bush or her "fiduciary loyalty" to any of the defendants, and because their complaint indiscriminately named numerous individual defendants, including her judicial colleague, without explanation as to why they were named, we find no abuse of discretion in the denial of the initial recusal motion.

b. *Motion to disqualify Chief Judge Melgren from Chief Judge duties*

The Davises filed their motion to disqualify Chief Judge Melgren from performing his duties as Chief Judge only after the case had been dismissed. No

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States District Court. 401 N. Market. Wichita. Kansas 67202.

R., vol. 1 at 40. That is the only mention of him. In its memorandum and order dismissing the complaint, the district court noted that the complaint "specifically referenced" only nine of the 43 defendants in the factual allegations. Chief Judge Melgren was not one of them. The court said the individual capacity claims "must be dismissed for failure to allege personal participation." R., vol. 3 at 454.

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other motions were pending, and Judge Robinson denied the motion as moot.[9] About three weeks later, the Davises filed their Rule 59 motion, again arguing that Chief Judge Melgren should have been disqualified as Chief Judge. Judge Robinson declined to address arguments she had already considered and rejected. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (explaining that motions for reconsideration may not be used to "revisit issues already addressed").

We affirm the denial of the Chief Judge Melgren recusal motion on the alternative grounds that it was both untimely and insufficient.[10]

As noted above, a motion to recuse must be filed as soon as the movant learns of the facts relied upon for disqualification. *Hinman*, 831 F.2d at 938; *see also Cooley*, 1 F.3d at 993 (recognizing that a "motion to recuse . . . must be timely filed" (quotations omitted)). Granting such a motion "many months after an action has been filed wastes judicial resources and encourages manipulation of the judicial process." *Willner*, 848 F.2d at 1029.

The Davises were on notice of Chief Judge Melgren's position on the district court at least by March 13, 2023, when the motion to dismiss the claims against him

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[9] The court retained jurisdiction because the time for filing post-judgment motions had not passed. *See* Fed. R. Civ. P. 59(e) (providing that a motion to alter or amend judgment must be filed within 28 days after entry of judgment); *id.* R. 60(c) (providing that Rule 60(b) motions must be filed within a "reasonable time" after entry of judgment). The Davises' Rule 59(e) motion for reconsideration raised the issue again, and the court declined to consider it.

[10] We may affirm "on any basis supported by the record." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

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was filed, because the motion identified his position as Chief Judge. R., vol. 1 at 223. Yet they waited until September 29, 2023—more than six months later and after the case had been dismissed—to request that he be disqualified from serving in his role as Chief Judge. R., vol. 3 at 520. The motion was untimely. *See id.* (holding motion filed ten months after discovery of alleged bias was untimely); *see also Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) (concluding recusal motion filed five weeks after magistrate judge issued recommendation reflecting alleged bias was untimely); *Hinman*, 831 F.2d at 938 (holding motion filed three and five months after movant discovered allegedly disqualifying facts was untimely).

As this court has said:

> [Section] 455(a) motions for recusal "must be timely filed." Although this circuit has not attempted to define the precise moment at which a § 455(a) motion to recuse becomes untimely, our precedent requires a party to act promptly once it knows of the facts on which it relies in its motion. A promptly filed motion conserves judicial resources and alleviates the concern that it is motivated by adverse rulings or an attempt to manipulate the judicial process.

United States v. Pearson, 203 F.3d 1243, 1276 (10th Cir. 2000) (citations omitted).

The motion also was insufficient. The Davises alleged no facts indicating that Chief Judge Melgren had any involvement with this case. Nothing in the record suggests he performed any administrative responsibilities.[11]

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[11] Under the District of Kansas local rules, "[t]he chief judge is responsible for . . . the assignment of cases to the judges," D. Kan. R. 40.1, but responsibility for initial case assignments is delegated to the clerk of the court, *see id.* R. 72.1.2(b)

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B. ***Dismissal Order***

We review de novo the dismissal of a complaint for lack of jurisdiction or for failure to state a claim. *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1169 (10th Cir. 2021) (failure to state a claim); *Guttman v. Khalsa*, 446 F.3d 1027, 1031 (10th Cir. 2006) (lack of jurisdiction).

"Our rules of appeal require appellants to sufficiently raise all issues and arguments on which they desire appellate review in their opening brief." *Clark v. Colbert*, 895 F.3d 1258, 1265 (10th Cir. 2018) (brackets and quotations omitted). "[P]ro se parties [must] follow the same rules of procedure that govern other litigants," including the rule requiring that briefs contain "more than a generalized assertion of error, with citations to supporting authority." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840-41 (10th Cir. 2005) (quotations omitted); *see also* Fed. R. App. P. 28(a)(8)(A) (requiring briefs to explain the reasons for each contention with citations to authorities supporting each argument). "When a pro se litigant fails to comply with that rule, we cannot fill the void by crafting arguments and performing the necessary legal research." *Garrett*, 425 F.3d at 841 (brackets and quotations omitted).

In their briefs, the Davises provide a factual narrative regarding the defendants' alleged actions. They argue that the district court's partiality prevented it from properly addressing the merits of their constitutional claims. But they do not

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("The clerk of the court will assign civil cases to a magistrate judge or judge for the . . . hearing and determination of all pretrial . . . motions.").

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challenge the district court's grounds for dismissal. Their factual narrative is not a "substitute for legal argument." *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015).

The district court's decision explains in detail the bases for its dismissal of the claims against each defendant. The Davises point to no facts alleged in their complaint or any legal authority that would undermine the district court's reasoning. *See id.* ("The first task of an appellant is to explain to us why the district court's decision was wrong."). We thus affirm the district court's dismissal for substantially the same reasons given by the district court. *See id.* (affirming dismissal of claim where appellant's brief failed to challenge the basis for the district court's ruling); *see also Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) (declining to address a district court's reasoning when the appellant's opening brief did not challenge it).

III. CONCLUSION

We affirm the district court's judgment.[12]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

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[12] We deny the Davises' motion to supplement the record. All documents filed in the district court are available for our review. *See* Fed. R. App. P. 10(a). The Davises have not shown that supplementation of the record is warranted because their motion does not specify what material items they believe have been omitted from the record. *See id.* at 10(e)(2).

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