ORIGINAL

No. 23-809

IN THE SUPREME COURT
OF THE UNITED STATES

Peter Kleidman,
Petitioner,

v.

Hon. Martin Barash,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are federal judges immune from claims for equitable relief?

Pulliam v. Allen, 466 US 522 (1984) held "that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id.*, 541-542. *Pulliam* pertained to state-court judges. Does *Pulliam* also hold for federal judges?

Does a litigant in federal court have any right of action to protect him/herself from a federal judge's constitutional torts occurring dehors the written record?

PARTIES TO THE PROCEEDING

The Honorable Martin R. Barash, judge of the bankruptcy court for the Central District of California, defendant-appellee-respondent.

STATEMENT OF RELATED PROCEEDINGS

In re Kleidman, No. 1:12-bk-11243-MB, Bankr. C.D.Cal.

Kleidman v. Hilton & Hyland Real Estate, Inc., No. 1:17-ap-01007-MB, Bankr. C.D.Cal.

Kleidman v. Hilton & Hyland Real Estate, Inc., No. 2:21-cv-03287, C.D.Cal.

Kleidman v. Hilton & Hyland Real Estate, Inc., No. 22-55381, 9th Cir.

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Petitioner Peter Kleidman petitions this Court for a writ of certiorari to the US Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

Kleidman v. Barash, No. 22-55970, Order Granting Motion for Summary Affirmance (9th Cir. July 3, 2023).

Kleidman v. Barash, No. 22-55970, Order Denying Motion for Reconsideration (9th Cir. October 12, 2023).

Kleidman v. Barash, No. 2:22-cv-00610-DMG-JPR, 2022 WL 1613019 (C.D.Cal. Apr. 21, 2022).

JURISDICTION

The Court of Appeals granted Judge Barash's motion for summary affirmance (made under Ninth Circuit Rule 3-6) on July 3, 2023. Kleidman timely moved for reconsideration under Ninth Circuit Rule 27-10. The Court of Appeals denied Kleidman's motion for reconsideration on October 12, 2023.

This Court has jurisdiction under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC § 1983 - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated

or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In Kleidman's bankruptcy case, Kleidman was the plaintiff in an adversary proceeding captioned *Kleidman v. Hilton & Hyland Real Estate, Inc.* Judge Barash presided thereover. Kleidman suffered adverse rulings therein, and thereupon commenced appellate proceedings. *In re Kleidman (Kleidman v. Hilton & Hyland Real Estate, Inc.)*, No. 1:17-ap-01007-MB, 2020 WL 6937474 (Bankr. C.D.Cal. August 20, 2020) affirmed 2:21-cv-03287-JFW, 2022 WL 195338 (C.D.Cal. Jan 21, 2022), affirmed. No. 22-55381, 2023 WL 6875313 (9th Cir. Oct. 10, 2023). Those appellate proceedings have not yet completed.[1]

During these appellate proceedings, Kleidman sued Judge Barash in the US District Court for the Central District of California. Kleidman alleged that Judge Barash "developed intense feelings of animosity against [Kleidman], so much so that Judge Barash is no longer capable of ruling ... dispassionately. ... [H]is feelings of hostility ... impair his desire to do justice evenhandedly." App.16. Kleidman prayed for an injunction which prohibited Judge Barash from further presiding over *Kleidman v. Hilton & Hyland*. App.4-5. Clearly, this suit is against Judge Barash in his individual capacity, because if Judge Barash were to cease presiding over *Kleidman v. Hilton & Hyland*, the

[1] In the Court of Appeals, Kleidman filed petitions for panel rehearing and rehearing en banc on November 8, 2023, which have not yet been decided. The petition for rehearing en banc raises federal questions and if Kleidman loses he intends to petition for certiorari to this Court.

lawsuit would not continue against Judge Barash's successor. Cf. F.R.Civ.P. 25(d), F.R.App.Proc. 43(c)(2).

Since Judge Barash was sued in his individual capacity, he invoked the defense of judicial immunity. In particular, Judge Barash relied on *Mullis v. U.S. Bankr. Ct. for the Dist. of Nevada*, 828 F.2d 1385 (9th Cir. 1987). Kleidman counterargued that *Mullis* was bad law. The district court found Judge Barash immune from the claim for injunctive relief under *Mullis*. App.8-9.[2]

Kleidman appealed to the Ninth Circuit. In his opening brief, Kleidman again argued that *Mullis* is bad law. App.11-14. Judge Barash moved for summary affirmance, arguing again that he enjoyed judicial immunity under *Mullis*. App.15-16. Kleidman opposed the motion, again arguing that *Mullis* is bad law. App.17-21. The Ninth Circuit granted the motion for summary affirmance. App.1. Kleidman moved for reconsideration, again arguing that *Mullis* is bad law. App.22-24. The Ninth Circuit denied Kleidman's motion for reconsideration. App.2.

REASONS FOR GRANTING THIS PETITION

I. This Court has never squarely ruled on whether federal judges enjoy immunity from claims for equitable relief

In the context of claims for damages, this Court has explored and developed the relative scopes of the immunities enjoyed by *federal* officials vis-à-vis the immunities enjoyed by *state-court* officials. This issue boils down to the relationship between *Bivens* actions and civil rights actions under 42 USC § 1983.

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[2] The District Court also erroneously relied on *Mireles v, Waco*, 502 US 9 (1991) and *Bradley v. Fisher*, 13 Wall 335 (1872). App.8. These authorities are clearly inapposite because they pertain to claims for damages, not equitable relief. *Mireles*, 10; *Bradley*, 345, 356-357.

Hernandez v. Mesa, 140 S.Ct. 735, 739, 747 (2020) (plurality); *Id.*, 751, 752 (Thomas, Gorsuch JJ, concurring); *Id.*, 759 (Ginsburg, Breyer, Sotomayor, Kagan, JJ, dissenting); *Ziglar v. Abbasi,* 137 S.Ct. 1843, 1848, 1854, 1855 (2017) (plurality); *Id.*, 1870, 1871, & n. * (Thomas, J, concurring); *Id.*, 1875 (Breyer, Ginsburg, JJ, dissenting).

However, this Court has not yet engaged in the same level of exploration and development as to the relative scopes of immunities enjoyed by federal officials vis-à-vis state officials in connection with claims for equitable relief.

In *Pulliam v. Allen*, 466 US 522 (1984), certiorari was granted because, at that time, "This Court ... ha[d] never decided the question" of whether judicial immunity bars "injunctive relief against a judge." *Pulliam*, 528. The *Pulliam* Court began its analysis thusly: "The starting point in our own analysis is the common law." *Id.*, 529. The Court then discussed the common law for more than eleven pages. *Id.*, 529-540. In a 5-4 decision *Pulliam* held:

> [T]here is little support in the common law for a rule of judicial immunity that prevents injunctive relief against a judge. ... [¶¶] ... [J]udicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.

Id., 540, 541-542.

Despite this broad language, *Pulliam* determined the viability of injunctive relief against only a state-court judge. It is unclear whether *Pulliam*'s rule would also apply to federal judges. In the words of one Circuit panel, whether federal judges are immune from claims for equitable relief "raises a thorny legal question." *Switzer v. Coan*, 261 F.3d 985, 990, n. 4 (10th Cir. 2001).

Certiorari is appropriate here to address this 'thorny legal question' and to give guidance on the extent to which federal judges can be sued for equitable relief. Since *Pulliam* did most of the legwork, it may be appropriate for this Court to complete what *Pulliam* started. Granting certiorari here may not unduly strain this Court's resources since, after all, this Court need not "write on an empty page." *Harlow v. Fitzgerald*, 457 US 800, 808 (1982). It is therefore reasonable for this Court to determine whether *Pulliam*'s analysis applies with equal force to federal judges (i.e., whether federal judges are immune from suits for equitable relief).

II. The Circuit Courts of Appeals have incompatible views on whether *Pulliam* applies to federal officers

A. The Sixth, Ninth and Eleventh Circuits have held that *Pulliam* does not apply to federal officers

The Sixth, Ninth and Eleventh Circuits have held that *Pulliam* does not apply to federal judges. *Mullis v. U.S. Bankr. Ct. for the Dist. of Nevada*, 828 F.2d 1385, 1392-1394 (9th Cir. 1987);[3] *Bolin v. Story*, 225 F.3d 1234, 1242 (11th Cir. 2000); *Kipen v. Lawson*, 57 F.Appx. 691, 691 (6th Cir. 2003) ("immunity in ... actions against federal judges has ... been extended to requests for injunctive relief," citing *Bolin*); *Newsome v. Merz*, 17 F.Appx. 343, 345 (6th Cir. 2001) ("federal judges are immune from ... suits for equitable relief," citing *Bolin* and *Mullis*). App.18-19.

Mullis, a non-unanimous decision, recognized that it was deciding "an issue of first impression in this [Ninth] Circuit." *Id.*, 1391. The court then proceeded with an extensive discussion from first

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[3] *Mullis* was non-unanimous. *Id.*, 1394-1395 (O'Scannlain, dissenting).

principles, leading to the conclusion that "judicial ... immunity available to federal officers ... extends to actions for ... equitable relief." *Id.*, 1391-1394.

In *Bolin*, Plaintiff Bolin sought injunctive and declaratory relief against federal judges. *Id.*, 1236-1237. The *Bolin* court likewise recognized that the "question of whether ... *Pulliam*'s limit on judicial immunity applies to federal judges as well [as state-court judges] ... is one of first impression in our [Eleventh] circuit." *Id.*, 1240. After citing *Mullis* for the proposition that *Pulliam* applies only to state-court judges, *Bolin* nevertheless recognized "an opposing position that warrants discussion." *Id.*, 1241. The court mentioned that the Seventh Circuit had criticized *Mullis'* holding. *Ibid.* (citing *Scruggs v. Moellering*, 870 F.2d 376, 378 (7th Cir. 1989), which found *Mullis* "of doubtful merit"). *Bolin* concluded, "this issue is a closer one than it would seem at first blush. After considering both sides ..., ... we find the stronger argument favors the grant of absolute immunity to the defendant federal judges in this case." *Id.*, 1241-1242. Remarkably, *Bolin* never articulated why it favored one side of the argument over the other; it just did. In particular, *Bolin* never identified a flaw in the argument that *Pulliam* does apply to federal judges. App.19.

B. The Second and Tenth Circuits have held that *Pulliam* does apply to federal officers

The Second and Tenth Circuits, on the other hand, have held that *Pulliam*'s rule does extend to federal officials (i.e., federal officials have no immunity for claims for equitable relief). *Dorman v. Higgins*, 821 F.2d 133, 135, 139 (2nd Cir. 1987) (under *Pulliam*, federal probation officer Higgins enjoys no absolute immunity from claim for injunctive relief); *Martinez v. Winner*, 771 F.2d 424, 426 (10th Cir. 1985) *vacated as moot on other*

grounds, 800 F.2d 230, 231; *Tyus v. Martinez*, 475 U.S. 1138 (1986) (under *Pulliam*, "absolute immunity does not bar" action for "an injunction and a declaratory judgment against [federal] Judge Winner").[4] App.18.

C. The Third and Seventh (and maybe the Eleventh) Circuits have held that *Pulliam* does apply to federal judges, but subject to the restrictions on injunctive relief appearing in 42 USC § 1983

The Third and Seventh Circuits have also held that *Pulliam* applies to federal officials, but with a twist. Namely, they have held that *Pulliam* applies to federal judges, but subject to the restrictions on injunctive relief appearing in 42 USC § 1983. In 1996, Congress partially 'abrogated' *Pulliam* by amending § 1983 so as to restrict injunctive relief against state-court judges, and directing litigants to seek declaratory relief instead. Fed. Courts Improvement Act of 1996, Pub.L. No. 104-317, §309(c), 110 Stat. 3847, 3853 (codified as amended 42 USC § 1983). The Third and Seventh Circuits have accordingly held that this partially-abrogated version of *Pulliam* applies to federal judges. *Azubuko v. Royal*, 443 F.3d 302, 303, 304 (3rd Cir. 2006) (holding that in an action against federal Judge Royal, injunctive relief was barred under § 1983, thereby impliedly ruling that an action for declaratory relief against federal judge would not have been barred by immunity); *Johnson v. McCuskey*, 72 F.Appx 475, 476, 477 (7th Cir. 2003) (holding that in an action

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[4] But see *Peterson v. Timme*, 621 F.Appx. 536, 542 (10th Cir. 2015) ("whether federal judges are entitled to absolute immunity from ... claims for injunctive relief appears to remain an open question in this circuit," citing *Switzer*, *supra*, 990, n. 9). App.18.

against federal Judge McCuskey, the 1996 "amendment to § 1983 limits the type of relief available to plaintiffs who sue judges to declaratory relief," and then ruling against plaintiff because of failure to state claim for declaratory relief, thereby ruling that actions for declaratory relief against federal judge are not barred by immunity). App.18.

As for the Eleventh Circuit, well, as mentioned above, *Bolin* was not entirely confident in holding that federal judges enjoyed immunity from claims for equitable relief. *supra*, p. 6. Therefore *Bolin* gave an alternative ruling, akin to that in *Azubuko* and *Johnson*, to the effect that *Pulliam* applies to federal judges, but subject to the restrictions on injunctive relief appearing in § 1983. *Id.*, 1242.

D. *Mullis* (Ninth Circuit) is bad law

Mullis is bad law. Its key argument runs as follows:

> Should a federal judge ... violate a litigant's constitutional rights ..., Congress has provided ... procedures for taking appeals ... and for petitioning for extraordinary writs ... Through these procedures, a litigant[] ... receives full federal court review of allegations of deprivations of federal constitutional rights by federal judicial officers acting under color of federal law.

Mullis, 1394. This argument is invalid.

1. **Appellate and writ review do not provide adequate protections against a judge's constitutional torts committed dehors the written record**

Neither writ review nor appellate review can protect a litigant from constitutional violations which are based on facts dehors the written record and which require the discovery process to prove (e.g.,

depositions, interrogatories, document production). App.11-14.

Writ review is purely discretionary, *US v. Sanchez-Gomez*, 138 S.Ct. 1532, 1540 (2018), and yet "'[t]he right ... to due process ... must rest upon a basis more substantial than ... discretion.' ... 'The law itself must save the parties' rights, and not leave them to the discretion of the courts...'" *Coe v. Armour Fertilizer Works*, 237 US 413, 425 (1915); *Gonzales v. US*, 348 US 407, 417 (1955) (remedy "too little and too late" because reviewing tribunal "has discretion to refuse to reopen the case"). App.13-14.

Likewise appellate review is not a forum to develop a new factual record, but rather is a review of the trial court's "'cold paper record.'" *Gasperini v. Center for Humanities, Inc.*, 518 US 415, 421 (1996); *Russell v. Southard*, 53 US 139, 159 (1851) (appellate "court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal. ... [N]o paper not before the court below can be read on the hearing of an appeal."). App.12-13.

Thus *Mullis* is wrong in holding that writ review (an extraordinary remedy) and appellate review ensure that a litigant "receives full federal court review of allegations of deprivations of federal constitutional rights by federal judicial officers." *Mullis*, 1394. App.11-14.

2. Congressional enactments of writ and appellate review are not reasonably construed as expanding judicial immunity

Moreover, just as *Pulliam* held that 42 USC § 1983 was never "intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review," *Pulliam*, 541, it is likewise true that the Congressional

enactments of appellate and writ review were never intended to expand judicial immunity to insulate federal judges.

At bottom, *Mullis*' argument, that statutory writ review and appellate review give rise to judicial immunity from equitable relief, cannot stand. App.22-24. As a matter of common sense, the enactments of these statutory, procedural remedies cannot reasonably be construed as an expansion of immunity from suit.

3. *Mullis*' policy argument is meritless

Mullis argues: "To allow an action for declaratory and injunctive relief against federal officials ... merely engenders unnecessary confusion and a multiplicity of litigation" *Mullis*, 1394. This statement is foundationless. *Buckley v. Fitzsimmons*, 509 US 259, 268 (1993) ("'[W]e do not have a license to establish immunities ... in the interests of what we judge to be sound public policy' ... '[O]ur role is ... not to make a freewheeling policy choice'"); *Rehberg v. Paulk*, 566 US 356, 363 (2012) ("we do not have a license to create immunities based solely on our view of sound policy"). App.24.

E. Does *Pulliam* apply only to state-court judges because it applies only to *inter*-court-system actions and not *intra*-court-system actions?

This Court may be of the opinion that *Pulliam* is inapplicable to federal judges because it was guided by principles concerning the inter- relationships between different court systems, such as "the relationship between the King's Bench and its collateral ... courts." See *Pulliam*, 533 (judge of King's Bench could issue injunction against "rival court," such as an ecclesiastical court over which the King's Bench "exercised no direct review"). Therefore, perhaps, the immunity enjoyed by federal judges in federal actions may be greater than that so

enjoyed by state judges, because the state court is "rival" or "collateral" relative to the federal judiciary. If so, review is requested so that this Court can clarify this distinction between *inter*-court-system actions and *intra*-court system actions for the benefit of the legal community. Otherwise, this Court should find that *Pulliam* does apply to federal actions against federal judges.

F. Does a litigant in federal court have a remedy to prevent a federal judge from trampling on his/her constitutional rights when the torts occur dehors the written record?

A federal judge can trample on a litigant's constitutional rights without fear of monetary liability. *Mireles*, 11. But can the aggrieved litigant at least have the right to seek equitable relief from another federal judge to put an end, prospectively, to the ongoing trampling? Clearly, the federal judiciary does not want to be bothered by suits from pesky, disgruntled litigants. But does that mean that federal judges are free to trample on constitutional rights, so long as they do so dehors the written record?

If this Court holds the answer is, "Yes," then at least this Court should grant certiorari to explain why federal judges are immune from actions for equitable relief, thereby completing *Pulliam*'s work.

CONCLUSION

Based on the foregoing, Kleidman requests that the Court grant this petition for certiorari to the US Court of Appeals for the Ninth Circuit.

Dated: January 8, 2024

Respectfully,

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APPENDIX