United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 15, 2019

Ms. Joanna Burke
46 Kingwood Greens Drive
Kingwood, TX 77339

Mr. John Burke
46 Kingwood Greens Drive
Kingwood, TX 77339

No. 19-20267 Joanna Burke, et al v. Ocwen Loan Servicing, L.L.C.
USDC No. 4:18-CV-4544

We received your motion entitled, "Appellants motion for reconsideration RE Constitutional Challenges". In light of the November 13, 2019 court order already denying a motion for reconsideration, as to the prior motion, we are taking no action on this motion and the event will be deleted.

Sincerely,

LYLE W. CAYCE, Clerk

Jann Wynne

By: _____
Jann M. Wynne, Deputy Clerk
504-310-7688

cc: Mr. Mark D. Hopkins
Ms. Shelley Luan Hopkins

No. 19-20267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOANNA BURKE; JOHN BURKE,

Plaintiffs-Appellants,

v.

OCWEN LOAN SERVICING, L.L.C.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division;
USDC No. 4:18-CV-4544

APPELLANTS MOTION FOR RECONSIDERATION RE CONSTITUTIONAL CHALLENGES

Joanna Burke
46 Kingwood Greens Dr
Kingwood, Texas 77339
Telephone: (281) 812-9591
Fax: (866) 805-0576

John Burke
46 Kingwood Greens Dr
Kingwood, Texas 77339
Telephone: (281) 812-9591
Fax: (866) 805-0576

Pro Se Appellants

Appellants, Joanna Burke and John Burke ("Burkes"), now file a Motion for reconsideration [FED. R. APP. P. 27.2] of single Circuit Judge Patrick Higginbothams' Order dated Monday, 28th October, 2019. In support thereof: The Order signed by Judge Higginbotham; "IT IS ORDERED that appellants' opposed motion to stay case in Fifth Circuit awaiting a final rule or adjudication on the constitutional challenges is DENIED."

Imaginative and Innovative Steps: Questionably, this Court previously advised the Eleventh Circuit; "The Fifth Circuit has urged district courts to take "imaginative and innovative" steps in dealing with § 1983 [constitutional] cases." - *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

Nomination to become a Fifth Circuit Judge: Judge Higginbotham's nomination, due to the era in which he was appointed, is much less detailed than the questions presented in modern times by Senators when 'interviewing by email' the candidates for the position(s) on the Federal Courts. For example, THE NOMINATION of Judge James 'Jim' Ho is preceded by QUESTIONS FOR THE RECORD ("QFR") wherein there is a templated set of questions which inevitably but most importantly, address the very same subject matter discussed herein, namely the Constitution. The word **"Constitution"** is mentioned **51 times** in the QFR, highlighting the importance of the Constitution when appointing a judge to the Court

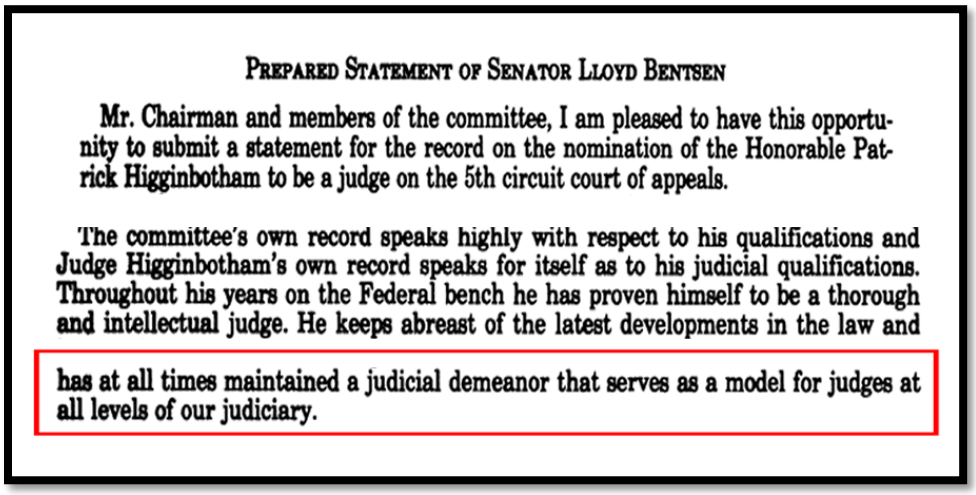
of Appeals for the Fifth Circuit. (and in the same confirmation hearing, on Nov. 15, 2017, the QFR FOR JUDGE DON WILLETT, the word **"Constitution"** was raised **76 times**). A theme of the answers to the questions in Judge Ho and indeed all of the fellow judges appointed which the Burkes' have perused, provide the same answer(s), *e.g.* "With respect to constitutional interpretation, lower court judges must follow U.S. Supreme Court precedent." And "Lower courts do not have the authority to depart from Supreme Court precedent."

Turning to this Courts recent ruling regarding the FHFA being "unconstitutional'[1], this confirms Judge Higginbothams' Order not only contradicts the precedent of the Supreme Court but this Courts' own ***'binding precedent'***.[2] In other words, the Burkes' motion should have been granted for due process and justice to be served when there is a matter of life, property and liberty at stake and the entire Circuit and Supreme Court are considering the Constitutional and indeed legislative matters the Burkes have raised in their motion(s).

[1] *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sep. 6, 2019)

[2] See *SEC v. Team Resources Incorporated*, et al (5th Nov. 2019) "Nonetheless, "we have traditionally held that **even when the Supreme Court has granted certiorari** in a relevant case, **we will continue to follow binding precedent**." United States v. Islas-Saucedo, 903 F.3d 512, 521 (5th Cir. 2018) (citing Wicker v. McCotter, 798 F.2d 155, 158 (5th Cir. 1986)). *Collins v. Mnuchin* is "binding precedent" as a published opinion.

Judge Recusal: The Order was signed by single Judge Patrick Higginbotham, who should have automatically recused himself from this case. The Burkes' mentioned the newly appointed judges in part, to refer to the following; In relation to Judge Higginbotham's nomination, he received a reference from Senator Lloyd Bentsen which is not supported by the remarks made by Judge Higginbotham in *Reinagel* [discussed below]. His bias and discriminatory words as recorded in oral argument could not possibly be interpreted or be perceived to "be a model for other judges".



PREPARED STATEMENT OF SENATOR LLOYD BENTSEN

Mr. Chairman and members of the committee, I am pleased to have this opportunity to submit a statement for the record on the nomination of the Honorable Patrick Higginbotham to be a judge on the 5th circuit court of appeals.

The committee's own record speaks highly with respect to his qualifications and Judge Higginbotham's own record speaks for itself as to his judicial qualifications. Throughout his years on the Federal bench he has proven himself to be a thorough and intellectual judge. He keeps abreast of the latest developments in the law and has at all times maintained a judicial demeanor that serves as a model for judges at all levels of our judiciary.

Confirmation of Federal Judges, 97th Congress,
Second Session, Serial No. J-97-52, Part 4

Judge Patrick Higginbotham:

"An impartial judiciary, while a protean term, translates here as the state's interest in achieving a courtroom that at least on entry of its robed

> judge becomes a neutral and disinterested temple, in appearance and fact - an institution of integrity, the essential and cementing force of the rule of law. That this interest is compelling cannot be gainsaid."
>
> - Before HIGGINBOTHAM, WIENER and CLEMENT, Circuit Judges. PATRICK E. HIGGINBOTHAM, Circuit Judge for the panel in *Jenevein v. Willing*, 493 F.3d 551 (5th Cir., 2007)

First, the Burkes address the fact ***biased*** Judge Higginbotham signed the Order. While this court may claim random assignment, there is a duty of judges to recuse themselves, even without an inkling of bias in the eyes of the judge and as SCOTUS has recently reaffirmed in *Rippo*[3]; It certainly cannot be claimed by Judge Higginbotham that he falls outside this ***'bias'*** standard.

> **"Ain't no free lunch and there sure ain't no free house" (laughing)…** (Oral Audio recording: quote begins at 36.25 mins +)[4]

In reaching this conclusion, the Burkes first remind this court of their personal interest in; (i) *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548 (5th Cir. Sep. 5, 2018) and *Deutsche Bank Nat'l Tr. Co. v. Burke*, No. 15-20201 (5th Cir. 2016) and; (ii) *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220 (5th Cir. 2013), the En Banc Order authored by Judge Higginbotham; and (iii) the

[3] *Rippo v. Baker*, 137 S. Ct. 905 (2017).

[4] See *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 12-50569 and listen to the Oral Argument Audio found at the Library HERE.

Burkes' judicial council COMPLAINTS about the 3-panel in *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548 (5th Cir. Sep. 5, 2018) and the subsequent Order of denial of reconsideration by the Appellate Review panel, as signed on March 29, 2019 by newly appointed Chief Judge R. Priscilla Owen[5]. In this order the Burkes' stated;

> "For example, ***Judge Higginbothams'*** oral statements ['no free house(s)'] in *Reinagel v Deutsche Bank*, which Graves sat on and agreed with the Opinion, rendering foreclosure in favor of the Bank."

"Absence of Finality" Bias: Secondly, the Burkes raise another alarming statement from Judge Higginbothams' confirmation;

TESTIMONY OF PATRICK E. HIGGINBOTHAM, NOMINEE, U.S. CIRCUIT JUDGE, FIFTH CIRCUIT COURT OF APPEALS

Judge HIGGINBOTHAM. I think that the desired objective; namely, attempting to achieve finality in criminal process, is one that ought to be struck for. There is indeed a problem with regard to an absence of finality. On the one hand, we value the Great Writ. We value the procedural means of perhaps correcting an unjust result.

On the other hand, I think we have to be very careful that we do not in the process of allowing collateral review of an earlier criminal conviction, to allow a person, to time after time come back to the courts in an effort to overturn his conviction. Piecemeal presentation and repeated presentations to the Federal court denigrate the Great Writ. They desensitize judges to those cases where indeed there may be merit.

[5] See Burkes judicial complaint "Or the Priscilla Owen question in *Diaz v Deutsche Bank*, where she stated she'd seen at least 50 complaints by homeowners who had mortgage payments returned without explanation, yet *Deutsche Bank* prevailed in this case she reviewed."

Confirmation of Federal Judges, 97th Congress,
Second Session, Serial No. J-97-52, Part 4

Panel Discrimination: The Burkes reference the parting sentence in this Courts Opinion in *Deutsche Bank v. Burke,* Sept. 5, 2018, #18-20026, wherein Judge Catharina Haynes for the panel stated;

> "Given nearly a decade of free living by the Burkes, there is no injustice in allowing that foreclosure to proceed."

Judge Higginbotham's discrimination in his statements regarding 'absence of finality' raises further question as to the ability of Judge Higginbotham to follow the Judicial Oath and the Constitution.

Conclusion: The Burkes requests this Court grants the Burkes motion regarding the Constitutional Questions/Challenges. The Burkes would remind **this court is inferior to the US Supreme Court[6] and *they* should not be defied**.[7] Ocwen's abuses and $3 BILLION dollars in fines have been well documented since the Great Recession, the people and the press will no doubt be highly concerned that their citizens are not being afforded access to courts, justice, liberty and due process

[6] Article III, Section 1, of the Constitution.

[7] "A contrary rule would permit judges to "substitute their own pleasure" for the law." –*Gamble v. United States,* 139 S. Ct. 1960 (2019).

per the Constitution of the United States - should this Court refuse the Burkes "Constitutional Challenges" motion upon reconsideration of a single judge's Order.

Respectfully submitted,

DATED: Nov. 10th, 2019

JOANNA BURKE

By *s/ Joanna Burke*
JOANNA BURKE

JOHN BURKE

By *s/ John Burke*
JOHN BURKE

46 Kingwood Greens Dr.,
Kingwood, TX, 77339
Telephone: (281) 812-9591
Facsimile: (866) 705-0576

Pro Se for Plaintiffs-Appellants

CERTIFICATE OF CONFERENCE

We hereby certify that on November 10th, 2019, we did not confer with Appellants Mark D. Hopkins and Shelley L. Hopkins of Hopkins Law, PLLC. We assume the joint MOTION is OPPOSED.

CERTIFICATE OF SERVICE

We hereby certify that, on November 10th, 2019, a true and correct copy of the foregoing Motion for Leave to Supplement the Record and Pleading was served via the Court's EM/ECF system on the following counsel of record for Appellees:

Mark D. Hopkins
Shelley L. Hopkins
HOPKINS LAW, PLLC
3809 Juniper Trace, Suite 101
Austin, Texas 78738
Telephone: (512) 600-4320
Facsimile: (512) 600-4326

s/ Joanna Burke
JOANNA BURKE

s/ John Burke
JOHN BURKE

CERTIFICATE OF COMPLIANCE

The undersigned counsel certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains **1,201** words according to Microsoft Word's word count, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

s/ Joanna Burke
JOANNA BURKE

s/ John Burke
JOHN BURKE