Jackson v. Valdez and the Treatment of Transgender Americans in the Fifth Circuit

I. OVERVIEW

Are the constitutional rights of transgender Americans protected under the law, regardless of where they live? While this question may seem polemically simplistic, recent decisions in the Fifth Circuit suggest that the answer may, in fact, be "no."

In November 2016, police in Dallas County, Texas arrested Valerie Jackson.[1] During the medical examination portion of her processing, a medical staffer learned of Jackson's gender identity.[2] After this information reached the officers on duty, officers repeatedly ordered Jackson to present her genitals to them, telling her that it was their policy to assign and process inmates based on their genitalia.[3] They also instructed her to disrobe and nearly forced her to shower with male inmates.[4] The Dallas County Sheriff's Office held Jackson with male inmates, who harassed her, and worse.[5]

After this experience, Jackson lodged a formal complaint, reports of which led to a local newspaper inquiring about how Dallas County Sherriff's Office (DCSO) policies treated transgender Texans.[6] In response, the sheriff's office told the newspaper that the office had already determined that some acts that Jackson experienced either misconstrued or failed to follow policy.[7]

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1. Jackson v. Valdez, 852 Fed. Appx. 129, 131 (5th Cir. 2021).
2. *Id.*
3. *Id.*
4. *Id.* at 131.
5. Minyvonne Jackson*, Transgender Woman Says She Was Forced to Show Genitals and Shower with Men During Arrests*, NBC NEWS (Nov. 7, 2018, 2:58 PM), https://www.nbcnews.com/news/us-news/transgender-woman-says-she-was-forced-show-genitals-shower-men-n933601.
6. *Jackson*, 852 Fed. Appx. at 132.
7. *Id.*

In April 2017, Jackson was arrested for a second time and received the same treatment as in November 2016—and, further, forced to shower with male inmates.[8] Jackson requested that the officers contact DCSO to clarify the policies for transgender inmates; they refused.[9]

In June 2018, Jackson was arrested for a third time, and once again was forced to shower with male inmates.[10] After this third arrest, she sued DCSO, Sheriff Lupe Valdez, and Sheriff Marian Brown for violations of her civil rights under 42 U.S.C. § 1983 and the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.[11]

Jackson's case went before Judge Brantley Starr of the United States District Court for the Northern District of Texas.[12] In his previous position as counsel in the Texas Attorney General's office, Judge Starr officially opposed federal guidance allowing transgender children to use bathrooms and facilities in accordance with their gender identity.[13] He also supported efforts in the Texas legislature to allow adoption agencies to discriminate against LGBTQ+ families.[14]

After learning about Judge Starr's prior advocacy, Jackson filed a motion for Judge Starr's recusal.[15] But because the statements that she pointed to were made during Judge Starr's tenure in the office of the Attorney General, the district court denied her motion; in addition, the district court also dismissed her § 1983 claims against Dallas County, Valdez, and Brown.[16] Jackson appealed.[17] The United States Court of Appeals for the Fifth Circuit *held*: (1) the district court properly denied her motion for recusal, under 28 U.S.C. § 144 and § 455(a); and (2) the district court properly dismissed Jackson's claim of municipal liability.[18]

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Leah Jessen, *Texas Sues Obama Administration Over Transgender Bathroom Directive*, DAILY SIGNAL (May 25, 2016), https://www.dailysignal.com/2016/05/25/texas-sues-obama-administration-over-transgender-bathroom-directive.
14. John Wright, *Committee Weighs License to Discriminate Adoption Bill,* TEXAS OBSERVER (Apr. 16, 2015), https://www.texasobserver.org/license-to-discriminate-adoption-bill.
15. *Jackson*, 852 Fed. Appx. at 132.
16. *Id.* at 132, 134.
17. *Id.* at 132.
18. Jackson v. Valdez, 852 Fed. Appx. 129 (5th Cir. 2021).

II. BACKGROUND

A. Recusal

Under 28 U.S. Code § 144, a party who believes that a judge has a personal bias or prejudice against them may file an affidavit for recusal, citing the facts and reasons that such belief exists.[19] This is a subjective tool that allows the movant to explain why she believes the judge to be prejudiced. In addition, under 28 U.S.C. § 455, judges have an objective standard to meet—they are required to recuse themselves when their impartiality could be questioned by a reasonable observer. Specifically, recusal is required whenever a reasonable observer could believe that a judge has a "personal bias or prejudice concerning a party."[20]

The bar for requiring recusal for bias is high. Under 28 U.S.C. § 144, a successful motion for recusal must: (1) "state material facts with particularity" that (2) "if true, would convince a reasonable person that a bias exists" which (3) is "personal."[21] Under 28 U.S.C. § 455, however, a successful motion for recusal must show facts that an objective, reasonable observer would find demonstrate the appearance of impropriety, as opposed to actual bias.[22] In the Fifth Circuit, the Court of Appeals reviews denials of motions to recuse for abuses of discretion.[23]

B. § 1983 Liability

Congress enacted 42 U.S.C. § 1983 to provide citizens a mechanism to protect their Constitutional rights when state actors violate them.[24] Indeed, its legal roots are in Reconstruction, when the Ku Klux Klan terrorized the southern United States with impunity, without resistance and often with cooperation from southern state governments.[25] It is designed "to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."[26] To successfully argue a 42 U.S.C. § 1983 claim, a plaintiff must prove that (1) there is a practice or custom, of which (2) an official had actual or constructive knowledge, and (3) that

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19. 28 U.S.C. § 144.
20. 28 U.S.C. § 455.
21. Patterson v. Mobil Oil Corp., 335 F.3d 476, 483 (5th Cir. 2003).
22. Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1408 (5th Cir. 1994).
23. *Patterson*, 335 F.3d at 483.
24. 42 U.S.C. § 1983.
25. Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT'L CONST. CTR. (Apr. 20, 2021), https://constitutioncenter.org/interactive-constitution/blog/looking-back-at-the-ku-klux-klan-act.
26. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 700-01 (1978).

custom is the "moving force" behind the violation of a constitutional right; if the plaintiff can show all three elements, liability attaches to the municipality's policymaker. [27]

A 42 U.S.C. § 1983 claim can also arise from a municipality's inadequate training of its officers to protect constitutional rights.[28] Under this "failure to train" paradigm, municipal liability attaches when a plaintiff shows (1) the municipality's training was inadequate to protect a right, (2) the municipality was deliberately indifferent to that right in its adoption of an inadequate training policy, and (3) that inadequate policy directly caused a constitutional violation.[29] To show inadequacy, a claimant must show sufficient evidence of repeated constitutional violations to put a policymaker on notice, or, as an exception, a singular constitutional violation so grave that it would obviously alert officials of the likelihood of continued violations.[30]

The Fifth Circuit reviews motions to dismiss for failure to state a claim *de novo*.[31]

III. COURT DECISION

In the noted case, the United States Court of Appeals for the Fifth Circuit held that (1) the district court properly denied Jackson's motion for recusal, under both 42 U.S.C. § 144 and § 455(a); and (2) the district court properly dismissed Jackson's claim of municipal liability.[32] In dismissing Jackson's motion for recusal, the court further held that the district court went too far (under 42 U.S.C. § 144) when it analyzed Judge Starr's statements for their content; rather than evaluate the statements, the court should have ended its analysis at the fact that the statements were "merely the position of Texas advanced [by Judge Starr] in litigation," and could not be personally attributed to Judge Starr whatsoever.[33] Because Judge Starr made those statements while serving in the state attorney general's office, and because he affirmed during his confirmation that he would set aside any of his own personal beliefs about the LGBTQ+ community, the court held that Jackson failed to show any evidence of Judge Starr's *personal* bias.[34]

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27. Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002).
28. *Id.*
29. *Id.* at 331-32, 335.
30. *See id.* at 332 & n.29, 335.
31. *Jackson*, 852 Fed. Appx. at 137.
32. *Id.* at 133.
33. *Id.*
34. *Id.* at 132.

The court then turned to the issue of municipal liability, based on either (1) a policy being the moving force of a constitutional violation, or (2) a deliberate indifference toward, and failure to train officials in, the protection of constitutional rights.[35] The court held that Jackson failed to sufficiently state a claim in either argument.[36] In first examining whether Jackson showed that a policy existed, the court held that the instances she pointed to—six incidents against herself and a friend in the span of five years—were insufficient to show a practice severe enough for moving-force liability to attach.[37] Alluding to the lack of evidence under the policy framework, the court further held that Jackson did not show that officials were or should have been on notice of violations of constitutional rights, such that their failure to act would constitute deliberate indifference toward those rights.[38]

Notably, one judge dissented from this second portion of the ruling—finding that the court was overly restrictive in its expectations of Jackson.[39] Judge Southwick pointed out that Jackson's factual allegations should be assumed to be true, including her allegation that Dallas County employees told her that a policy existed—that she would "probably see some like [her] over there. You aren't the first and you won't be the last."[40] Judge Southwick believed that Jackson showed *some* policy existed and that, in and of itself at this pre-discovery stage, should be enough to survive a motion to dismiss; at the very least, Jackson should be afforded the opportunity to further inquire as to whether an official policy in fact existed.[41]

IV. ANALYSIS

All attorneys have a professional responsibility to be enthusiastic advocates for their clients. It is certainly true that while employed by the attorney general's office, Judge Starr had a professional responsibility to advocate in accordance with that office's positions. But 28 U.S.C. § 455 creates an objective test centered on the perception of a reasonable person.[42] Under the statute, a judge must recuse herself when "his

35. *Id.* at 135.
36. *Id.* at 136-37.
37. *Id.* at 135-36.
38. *Id.* at 136-37.
39. *See id.* at 138 (Southwick, J., dissenting).
40. *Id.*
41. *Id.* at 139.
42. 28 U.S.C. § 455.

impartiality might be questioned."[43] A reasonable analysis should, at minimum, examine to what extent Judge Starr, as an attorney, expressed an opinion that would lead a reasonable observer to conclude that his impartiality might be questioned, regardless of his own beliefs.[44]

The case that the court relied on to find that Judge Starr's prior participation in LGBTQ+-related cases was insufficient to question his impartiality was *Higganbotham v. Okla. ex rel. Okla. Transp. Comm'n*.[45] In that case, the United States Court of Appeals for the Tenth Circuit affirmed the denial of a motion for recusal where the justification for recusal was the judge's personal and political affiliations.[46] In *Higginbotham*, the plaintiff raised claims against the State of Oklahoma, and motioned for recusal because the presiding judge was related to the Governor of Oklahoma through the marriage of their (the judge's and the governor's) children; further, the plaintiff noted the political connections between the judge and governor, as both were active members of the same political party.[47] In affirming the denial of the motion, the court reasoned that, by their nature, judges are often drawn from governmental and political fields, and that familial and political affiliations alone do not demonstrate any impartiality.[48]

Although Judge Starr was previously part of Texas's governmental field, *Higginbotham* and its facts are not on point to the analysis required here—Jackson did not motion for recusal based solely on Judge Starr's governmental or political affiliation, but because Judge Starr was specifically involved in several controversies that directly affected LGBTQ+ rights in Texas.[49] The court even pointed out that if Jackson's claim involved Judge Starr's former employer or the "same exact issue," recusal may have been warranted.[50] In doing so, they disregarded the fact that Judge Starr's speech and actions while working with the Texas Attorney General's office directly addressed state treatment of transgender persons.[51] Judge Starr publicly commented that Texas would challenge federal guidance that instructed states to accommodate gender identity in schools—respecting gender identity in state facilities, the essence of

43. *Id.*
44. *Id.*
45. Higganbotham v. Okla. ex rel. Okla. Transp. Comm'n, 328 F.3d 638 (10th Cir. 2003).
46. *Id.* at 644-46.
47. *Id.* at 644.
48. *Id.* at 645.
49. *Jackson*, 852 Fed. Appx. at 132.
50. *Id.* at 133.
51. Jessen, *supra* note 14.

Jackson's lawsuit—due to the supposed threat that that guidance posed to children's safety.[52] A reasonable person could deduce from that statement that the speaker believes that transgender people inherently pose a threat to others' safety.[53] Given that the central issue in Jackson's case was DCSO's repeated denial of Jackson's gender identity, Judge Starr's statements could reasonably create the impression that he would be prejudiced against the claim.

Because Judge Starr was acting as part of the Texas Attorney General's office when he made those statements, the district court found that they could not be construed as his true feelings; rather, they should be seen as the position of his client, i.e. the State of Texas.[54] But the Fifth Circuit has previously held that when a reasonable person could suspect a judge would not be impartial in presiding over a claim, independent of their actual feelings or statements, motions of recusal should be granted.[55] In *Republic of Panama v. American Tobacco Company*, the Fifth Circuit held that a judge whose name appeared on a motion to file an amicus brief addressing the addictive nature of tobacco erred in not granting a tobacco company's motion for recusal.[56] There, the judge presiding over the case was not listed as counsel on the amicus brief, and did not help draft or even sign the amicus brief; however, his name appeared on the motion in error because he served as president of the state trial attorney's association when it was drafted.[57] Although the amicus brief's case and the case over which the judge was presiding had distinguishable facts, the court reasoned that a reasonable person may still doubt the judge's impartiality.[58] The United States Supreme Court later reversed their decision, finding that a reasonable person truly appreciating all the facts would not find the judge to be biased.[59]

While serving as president of the trial lawyers' association and working in the office of the state attorney general are distinguishable, the

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52. *Id.*
53 *Id.*
54. *Jackson*, 852 Fed. Appx. at 133.
55. Republic of Pan. v. American Tobacco Co., 217 F.3d 343, 347 (5th Cir. 2000).
56. *Id.* at 346-47.
57. *Id.*
58. *Id.*
59. The United States Supreme Court held that the Fifth Circuit's ruling failed to take into account *all* of the relevant facts, especially the fact that the judge's name was listed as a clerical error. Because evaluating all of the facts would include appreciating this mistake, the Court found that it was "self-evident that a reasonable person would not believe he had any interest or bias." Sao Paulo State of Federative Republic of Brazil v. Am. Tobacco Co., 535 U.S. 229, 233 (2002).

principle in *Panama* points toward recusal.[60] Like the judge in *Panama*, Judge Starr's name appeared in prior controversies about LGBTQ+ rights; for example, his name appeared on a letter drafted for the lieutenant governor of Texas concluding that state officials could refuse to recognize marriages after *Obergefell v. Hodges*, saying the decision conferred a "new right"—excluding same-sex couples from the right to marriage.[61]

Moreover, unlike in *Panama*, where the judge did not participate in the drafting or creation of the document that suggested potential impartiality, Judge Starr *did* actively participate in LGBTQ+ legal controversies in Texas.[62] Beyond having his name appear on anti-LGBTQ+ documents for the Texas attorney general, in 2015 Judge Starr testified in support of a bill that would allow discrimination against LGBTQ+ foster parents based on religious belief—even though, as he noted, the Texas Attorney General's office was neutral on the issue.[63] To a reasonable observer, that statement alone could demonstrate a bias against arguments asserting LGBTQ+ rights as constitutional rights—which goes to the heart of Jackson's claims. The district court should have granted Jackson's motion for recusal.

The court's dismissal of Jackson's claims for municipal liability are emblematic of the larger problems victims of state actors face when attempting to show that either a) the municipality's policy was the moving force behind a constitutional violation or b) the municipality's failure to adequately train its officers caused sufficient harm to provide constructive notice of a constitutional violation.[64] While the court noted it was "a close call," it affirmed the district court's reasoning that "two incidents of strip searches and four incidents of sex-based classifications of two transgender people in a span of five years" were insufficient to show a policy.[65] In addition, the court affirmed that Jackson failed to show a pattern that would have demonstrated deliberate indifference on the part of the policymaker.[66]

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60. *Id.* at 346.

61. Op. Tex. Att'ys Gen. KP-0025 (2015).

62. *Republic of Pan.*, 217 F.3d at 347.

63. H.B. 3864, 2014-15 Leg., 84th Sess. (Tx. 2015) (introduced); *Subcommittee Hearing Before the H. Comm. on Juvenile Justice & Family Issues*, 2014-15 Leg., 84th Sess. (Tx. 2015) (Witness List for HB 3864), available at https://capitol.texas.gov/tlodocs/84R/witlistbill/html/HB 03864H.htm; *see also* Wright, *supra* note 15.

64. *Jackson*, 852 Fed. Appx. at 134-35.

65. *Id.* at 135.

66. *Id.* at 136-37.

To show that a municipal policy violates constitutional rights, a plaintiff must show evidence of either (1) a policy statement or regulation that is officially adopted by the municipality, or (2) a "persistent, widespread practice" that demonstrates a customary practice.[67] In *Pineda v. City of Houston*, the Fifth Circuit Court of Appeals held that a § 1983 claim was properly dismissed where plaintiffs identified only eleven incidents of illegal police action in Houston, Texas.[68] There, the plaintiffs sued after police officers shot and killed their family member during a warrantless entry to his residence, and pointed to the aforementioned eleven incidents as evidence of a larger departmental policy.[69] The court rejected this argument, reasoning that Houston was one of the largest cities in the country, with one of the largest police forces; as such, a showing of eleven incidents was insufficient to demonstrate a pattern and, moreover, would not suggest the policymaker's actual or constructive knowledge of illegal conduct.[70]

Pineda is distinguishable on the facts for several reasons. The most notable difference in this case is that the DCSO officers that subjected Jackson to unconstitutional treatment did so while explicitly telling her it was their office's policy to do so.[71] Unlike in *Pineda*, where plaintiffs attempted to demonstrate a policy or custom through data analysis, Jackson claimed that officers explicitly told her that a policy existed.[72] It is true that after Jackson's first mistreatment reached the media, the sheriff's office stated that some of the acts Jackson complained of violated official DCSO policy; but surely DCSO were aware of a customary policy after Jackson lodged an official complaint, and media organizations *successfully contacted them about the incident*.[73] It would be illogical to suggest that DCSO did not have actual or constructive knowledge of an unconstitutional custom after they were explicitly alerted to it, by both Jackson's formal complaint and the media, just as it would be illogical to suggest that this customary policy was not the moving force behind the

67. *Id.* at 135.
68. *Pineda*, 291 F.3d at 327, 329.
69. *Id.*
70. *Id.* at 329, 331.
71. *Jackson*, 852 Fed. Appx. at 135.
72. *Id.* at 131; *Pineda*, 291 F.3d at 329.
73. *Jackson*, 852 Fed. Appx. at 132.

violation of Jackson's constitutional rights. [74] As Judge Southwick noted, clearly *some* kind of policy—official or customary—existed.[75]

As the United States Supreme Court has noted, under the failure-to-train paradigm, a municipality's liability is more difficult to show; it provides the most tenuous link for culpability.[76] In *Connick v. Thompson*, the plaintiff sued the district attorney's office after attorneys in that office failed to provide exculpatory evidence in the plaintiff's criminal case, as required by law.[77] This failure to provide exculpatory evidence, which likely would have altered the outcome of his conviction, was a violation of the standard set by *Brady v. Maryland*, which established that prosectuors' suppression of material evidence favorable to a defendant violates due process.[78] *Brady* made no distinction as to whether the suppression was done in good or bad faith.[79] But in *Connick,,* the court reasoned that the district attorney's subordinates's mere failure to carry out their responsibilities did not show that the district attorney was deliberately indifferent to the training of those attorneys.[80] Because attorneys practice law within a "regime of legal training and professional responsibility," a policymaker—here, a district attorney—could reasonably rely on that regime to have instructed those attorneys on their responsibilities.[81] A failure to train claim is unsuccessful unless a plaintiff shows the policymaker's deliberate indifference to violations of constitutional rights.[82]

Jackson's case is easily distinguishable from the cases cited by the court. First, and most crucially, Jackson goes further than merely trying to show that her rights were violated due to a failure of training that should have been sufficient to alert a policymaker—she alleges that DCSO *explicitly told her* that a training failure caused the violation of her rights.[83] When Jackson first contacted DCSO to protest her treatment while in jail, Capt. Knight, DCSO's LGBTQ+ liaison, told Jackson that what she experienced was a training issue, going so far as to give Jackson her cell phone number and to have intake personnel call her if such treatment

74. David Taffet, *Anti-Trans Harassment at Dallas County Jail*, DALLAS VOICE (Nov. 16, 2018), https://dallasvoice.com/anti-trans-harassment-at-dallas-county-jail.
75. *Jackson*, 852 Fed. Appx. at 139 (Southwick, J., dissenting).
76. Connick v. Thompson, 563 U.S. 51, 61 (2011).
77. *Id.* at 54.
78. Brady v. Maryland, 373 U.S. 83, 87 (1963).
79. *Id.*
80. *Connick*, 563 U.S. at 66.
81. *Id.*
82. *Id.* at 71.
83. Taffet, *supra* note 74.

happened again.[84] Knight made a similar statement to a local newspaper, again stating that there was a training failure.[85] As alluded to in the opinion, when Jackson was arrested again, she requested that the officers contact Knight, believing Knight's statement and commitment to helping her to be true; the officers refused.[86] Jackson plausibly alleged that DCSO policy was inadequate (as DCSO itself claimed that her constitutional injury was a training failure) and, since she continued to experience the same mistreatment over the course of two years and after her formal complaint, that DCSO was deliberately indifferent to her rights.[87]

The noted case, while a per curiam opinion, highlights several disturbing trends within the Fifth Circuit, the most obvious of which is the precarious protection of LGBTQ+ rights. First, Jackson's case went before a judge with a history of anti-LGBTQ+ rhetoric; her motion for recusal was denied, and that denial was affirmed, despite § 455's requirement that a judge recuse when a reasonable person could find bias or partiality and the judge's history of commenting on LGBTQ+ issues.[88] It is highly plausible that, should any other issue affecting LGBTQ+ rights come before a court in the Fifth Circuit—cases involving anti-discrimination or marriage protections, for example—LGBTQ+ people will face judges with histories of anti-LGBTQ+ rhetoric with no recourse.

Secondly, Jackson's case is not unique—as evidenced by the anti-LGBTQ+ animus motivating the court's opinion in *United States v. Varner*.[89] In *United States v. Varner*, defendant Varner requested that the court address her by female pronouns and change her name in convinction documents to reflect her gender identity, a motion denied by the district court and then again by the Fifth Circuit Court of Appeals.[90] But writing for the majority, Judge Kyle Duncan went well beyond simply denying her motion.[91] The court published a six-page opinion in which it declared that the district court had no jurisdiction to even entertain the motion, and repeatedly and unnecessarily misgendered Varner.[92] The court stated, in essence, that no existing authority could compel the court to acknowledge Varner's gender identity; it further went on to claim that using a person's

84. *Id.*
85. *Jackson*, 852 Fed. Appx. at 132.
86. *Id.*
87. See *id.* at 134-35.
88. *Id.* at 132; 28 U.S.C. § 455.
89. United States v. Varner, 948 F.3d 250 (5th Cir. 2020).
90. *Id.* at 252.
91. *See id.* at 252-58.
92. *Id.* at 252.

preferred pronouns—affirming their gender identity—would *harm a judge's required impartiality*.[93] Finally, the court dismissively concluded that allowing Varner to be addressed by her preferred pronouns would force a future court to permit motions to be addressed by "'xemself' (instead of 'himself')."[94]

The aggressive language of the majority opinion was so extreme that it prompted Judge James Dennis to dissent in order to state the obvious—first, that the court could have, much more simply and quickly, affirmed the district court's denial, rather than go broader and hold that the district court lacked jurisdiction over the motion altogether; and second, that using *any pronoun at all* in denying the motion was unnecessary.[95] The court could easily have understood Varner's motion as a simple request to use female pronouns in this court, in this proceeding, rather than issue the majority's opinion, which he described as "an advisory opinion on the way it would answer the hypothetical questions that only it has raised."[96] Judge Dennis went on to note that acknowledging a person's pronouns, while not required by law, is common practice in courts for a simple reason—it respects the dignity of the person requesting the acknowledgement.[97]

That the Fifth Circuit would publish a six-page opinion to discuss gender identity and pronouns—going well beyond what an affirmation of the district court ruling required in order to opine, at length, about the perceived threat to the courts of gender identity—does not bode well for future claims brought by LGBTQ+ citizens in the Fifth Circuit, especially when viewed in light of cases like Valerie Jackson's. The court's dismissive, when not outright hostile, approach to LGBTQ+ rights is not a bug, but a feature. As the LGBTQ+ rights organization Lambda Legal found, nearly forty percent of the judges appointed during the Trump Administration, as both Starr and Duncan were, came from legal backgrounds that demonstrated anti-LGBTQ+ bias.[98] Moreover, in November 2021, Judge Duncan was praised at the Federalist Society's National Lawyers Convention for the *Varner* opinion because, the speaker

93. *Id.* at 254-56.
94. *Id.* at 257.
95. *Id.* at 259-60 (Dennis, J., dissenting).
96. *Id.* at 260 (Dennis, J., dissenting).
97. *Id.*
98. *Courts, Confirmations, & Consequences: How Trump Restructured the Federal Judiciary and Ushered in a Climate of Unprecedented Hostility toward LGBTQ+ People and Civil Rights,* LAMBDA LEGAL (2021), https://www.lambdalegal.org/sites/default/files/judicial_report_2020.pdf.

asserted, transgender identity is "a lie" and Duncan was "brave" to issue the opinion.[99]

With judges on the Fifth Circuit getting national attention and praise for their anti-LGBTQ+ opinions, and the Fifth Circuit not requiring judges with anti-LGBTQ+ legal backgrounds to recuse themselves in LGBTQ+ cases—as long as their statements can plausibly be attributed to legal advocacy on behalf of a client—LGBTQ+ Americans may worry that their claims for violations of their constitutional rights will not be fairly heard. Unfortunately, they may be right.

Andrew Perry*

99. Mark Joseph Stern (@mjs_DC), TWITTER (Nov. 12, 2021, 11:53 AM), https://twitter.com/mjs_DC/status/1459217708810133514; *see also* Josh Hammer, *The Fifth Circuit Rejects the Lie of Transgender Pronouns*, NATIONAL REVIEW (Jan. 27, 2020, 6:30 AM), https://www.nationalreview.com/2020/01/transgender-pronouns-fifth-circuit-rejects-them-and-lie-they-stand-on.

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