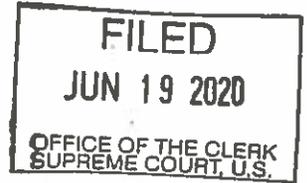


19-1455



No. 20-____

IN THE
SUPREME COURT OF THE UNITED STATES

LEIGH ANN YOUNGBLOOD-WEST,
Petitioner,

v.

AFLAC INCORPORATED, DANIEL P. AMOS,
WILLIAM LAFAYETTE AMOS, JR., CECIL
CHEVES, and SAMUEL W. OATES,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court below enforced private hush agreements with a permanent injunction sealing Petitioner Leigh Ann Youngblood-West's civil RICO complaint and restraining her from revealing evidence of a long-running cover-up by Aflac Incorporated and its CEO Dan Amos of multiple assaults committed by Aflac's then-Chief Medical Director Dr. Amos upon his sedated patients, Aflac's employees or their spouses like Youngblood-West. The Eleventh Circuit upheld the injunction without considering the public's First Amendment interest in hearing her story with its significant public implications, in disregard of the balancing test articulated by this Court in *Newton v. Rumery*, 480 U.S. 386 (1987), in conflict with the Fourth Circuit's contemporaneous opinion in *Overbey v. Mayor & City Council of Baltimore*, No. 17-2444 (4th Cir. Jul. 11, 2019), and out of step with other Circuits that have applied *Rumery* to invalidate contractual waivers of constitutional rights. The Eleventh Circuit also upheld the District Judge's refusal to recuse himself despite his spouse's being an intended beneficiary of the hush agreement and a then-member of the law firm that had executed the cover-up; the Judge's own familial and "Fish House Gang" connections to each of the five RICO defendants; his adherence to the long-abolished "duty to sit"; and his Star Chamber conduct of the proceedings.

1. Whether the injunction enforcing the hush agreements and sealing the evidence of Aflac's and Dan Amos' cover-up of Dr. Amos' serial assaults upon women, upheld by the Eleventh Circuit without the balancing test required by *Rumery*, violates the First Amendment?

2. Whether the Eleventh Circuit's affirmation of the District Judge's refusal to recuse himself despite his familial and social ties to each of the five defendants and his spouse's interests in the subject matter has violated the Due Process Clause's guarantee of "an impartial and disinterested tribunal," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), and/or "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" within the meaning of Rule 10(a) of the Court's Rules?

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OPINIONS BELOW

The underlying appeal was taken pursuant to 28 U.S.C. § 1291 from the judgment of the U.S. District Court for the Middle District of Georgia entered on March 27, 2019, in *Youngblood-West v. Aflac Inc.*, No. 4:18-cv-00083 (the “RICO Action”), consolidated with *Amos v. Youngblood-West*, No. 4:18-cv-00068 (the “Breach Action”). The District Court had original jurisdiction over federal claims in the RICO Action pursuant to 28 U.S.C. § 1331; over related state law claims pursuant to 28 U.S.C. § 1367(a); and over the Breach Action pursuant to 28 U.S.C. § 1332.

The U.S. Court of Appeals for the Eleventh Circuit denied Petitioner’s appeal on December 12, 2019, in an opinion reproduced in the Appendix to this Petition as Appx. 1, and denied her timely petition for rehearing on January 21, 2020, Appx. 2. The underlying opinions of the District Court addressing issues presented in this Petition are reproduced as Appendices 3-8.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). This Petition is timely under the Court’s order issued on March 19, 2020, Order List 589 U.S.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V, the Due Process Clause:

No person shall be . . . deprived of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

This case is about a long-running cover-up by Aflac's founders, top executives, Board members, and outside counsel of the serial assaults committed with impunity by Aflac's then-Chief Medical Director, Senior Vice President and Board member William Lafayette Amos, Jr., upon his sedated patients. Youngblood-West has alleged, and supported her allegations with evidence, that the RICO defendants facilitated Dr. Amos' flight from Georgia, destroyed physical evidence of his assaults, silenced his multiple victims with fraudulent and coerced hush agreements, repeatedly threatened Youngblood-West with criminal prosecution and incarceration to keep her quiet; and now seek to perpetuate her silence with a permanent injunction issued by the Judge with an apparent bias against her, in the proceedings with restricted public access and Petitioner's complaint, affidavits, evidence and legal briefs sealed or heavily redacted.

A permanent injunction is a "true restraint on future speech," *Alexander v. United States*, 509 U.S. 544, 550 (1993), to which the First Amendment erects a

“virtually insurmountable barrier,” *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). The Due Process Clause of the Fifth Amendment guarantees an impartial federal tribunal that “must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14 (1954), while the public’s right of access to judicial documents guarantees that “federal courts, although independent – indeed, particularly because they are independent – . . . have a measure of accountability . . . for the public to have confidence in the administration of justice.” *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). The Star Chamber proceedings below have failed to satisfy the appearance of justice, and the resulting injunction, to surmount the First Amendment’s barrier.

1. Proceedings below

These proceedings commenced around midnight on Sunday, April 15, 2018, when the Honorable Clay D. Land, Chief Judge of the U.S. District Court for the Middle District of Georgia, Columbus Division, after a brief telephonic conference conducted from his home with counsel for Dr. Amos and Youngblood-West, granted Dr. Amos’ application and issued a TRO restraining Youngblood-West from publicly filing or commenting on her draft RICO complaint until a preliminary injunction hearing, which the Judge scheduled for the following Monday morning. In his concurrently filed Breach Action, Dr. Amos sought to enforce his alleged 1992 and 1993 hush agreements with Youngblood-West, claiming that she had breached them by discussing her potential action with counsel in 2018.

Following a telephonic conference with counsel on April 16, 2018, the Court issued a preliminary injunction requiring Youngblood-West to file her intended civil

RICO complaint under seal and prohibiting her from publicly disclosing or discussing the subject matter of her complaint, of Dr. Amos' Breach Action, also sealed, and of any other document required to be sealed by the Court. Appx. 3 p. 22a.

On May 1, 2018, Petitioner filed her RICO complaint under seal, and amended it on July 9, 2018. All defendants moved to dismiss under Rule 12(b)(6), and Aflac and Dan Amos also moved for Rule 11 sanctions against Petitioner's counsel, alleging that the complaint was frivolous.

On June 21, 2018, the Court granted Aflac's and Dan Amos' written motion filed three days earlier to seal the record in the RICO Action, depriving Petitioner of her right to respond within the 21-day period provided by the Local Rules.

On July 18, 2018, the Court granted defendants' motion to stay discovery in the RICO Action.

On August 8, 2018, the Court publicly issued an order to show cause whether the case should remain sealed, whereupon defendants made *ex parte* contacts with the chambers requesting that the order itself be sealed, which it then was, without prior notice to Petitioner. Appx. 4 p. 66a.

On September 7, 2018, the Court issued a sealing/redaction protocol for the consolidated RICO-Breach Action, dismissing Petitioner's request to unseal on First Amendment and other grounds as "a rant." Appx. 3 p. 18a.

On September 21, 2018, Petitioner moved to recuse the District Judge, with an 18-page affidavit filed pursuant to 28 U.S.C. § 144, which the Judge denied on October 5, 2018. Appx. 4.

On October 22, 2018 the Court granted defendants' motions to dismiss the RICO Action as implausible, time-barred and/or released by the hush agreements. Appx. 5.

On November 13, 2018, the Court denied Youngblood-West's motion for leave to file her whistleblower complaint with the U.S. Securities & Exchange Commission (the "SEC"). Appx. 6.

On November 16, 2018, the Court denied Youngblood-West's motion to dissolve the preliminary injunction, Appx. 7, which she timely appealed.

On November 30, 2018, Dr. Amos moved for summary judgment on his Breach Action claims, seeking a permanent injunction to enforce the hush agreements. On December 19, 2018, the Court denied Youngblood-West's request made pursuant to Rule 56(d) to defer or deny the motion and allow Petitioner time to take discovery (even though "[t]he law in [the Eleventh] circuit is clear: the party opposing a motion for summary judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion," *Jones v. City of Columbus*, 120 F. 3d 248, 253 (11th Cir. 1997)).

On March 27, 2019, the Court granted Dr. Amos' summary judgment motion, issued the permanent injunction, and entered final judgment pursuant to Rule 54(b), Appx. 8, which Youngblood-West timely appealed, mooting her prior appeal.

The Eleventh Circuit affirmed in an unpublished opinion issued on December 12, 2019. Appx. 1. On December 16, 2019, Dr. Amos moved the Eleventh Court to "immediately seal its December 12 opinion," claiming that "a dozen or so references

in the unpublished decision . . . reveal information subject to the District Court’s injunction.” Dr. Amos made a similar motion before the District Court, which the Court granted and sealed the Eleventh Circuit’s public opinion on its docket.

On January 2, 2020, Youngblood-West filed a petition for rehearing of the Eleventh Circuit’s opinion. On January 6, 2020, Dr. Amos filed a motion with the District Court to hold Youngblood-West in contempt for quoting from the Eleventh Circuit’s public opinion in her rehearing petition and in her opposition to his sealing motion, seeking “coercive relief [including incarceration] as well as a compensatory fine, an award of attorneys’ fees, or both,” and filed a parallel motion for contempt before the Eleventh Circuit on January 9, 2020.

On January 16, 2020, the Eleventh Circuit denied Dr. Amos’ motion to seal its opinion. On January 21, 2020, the Eleventh Circuit denied Youngblood-West’s rehearing petition. On February 5, 2020, the Eleventh Circuit denied Dr. Amos’ contempt motion. On February 21, 2020, Aflac and Dan Amos withdrew their Rule 11 motion.

2. Aflac’s and Dan Amos’ 33-year cover-up of Dr. Amos’ serial assaults

What defendants do not want the world to hear is Youngblood-West’s story how Aflac’s then-Chief Medical Director, Senior Vice President, Board member and a member of its founding family Dr. Amos sedated and assaulted her in his private OB/GYN office in Columbus in 1984, and similarly sedated and assaulted multiple other patients, Aflac’s employees or their spouses like Youngblood-West, videotaping his assaults – but has managed to escape any prosecution for his crimes under the

cover provided by Aflac and two generations of its CEOs for the last 33 years and counting.

What defendants do not want the world to see is Youngblood-West's evidence of the alleged Aflac RICO Enterprise, including (a) a 50-page transcript of Dr. Amos' 2016 confession to his serial assaults and his revelation of the knowledge and cover-up of those assaults by Aflac, its successive CEOs John and Dan Amos, and outside counsel; (b) Youngblood-West's affidavits and documentary evidence filed in support of her 70-page RICO complaint, including evidence of her reporting, in vain, of Dr. Amos' 2016 revelations to the local FBI office in Columbus; (c) the 1992 hush payment made by someone other than Dr. Amos, with Aflac and Dan Amos being the only plausible candidates, and copies of the secret 1992 and 1993 hush agreements; (d) the March and April 2018 written threats of criminal prosecution made by Aflac's and Dan Amos' counsel to prevent Youngblood-West from pursuing her RICO Action; and (e) the identities of seven other victims of Dr. Amos' assaults known to Youngblood-West. Petitioner had diligently and painstakingly collected this evidence prior to filing her action, and obtained nothing further since its commencement because the Court had not allowed her any discovery.

Defendants have gone to great lengths to keep evidence of the assaults and the hush agreements concealed and witnesses silenced. In 1987, defendants facilitated Dr. Amos' flight from Georgia and destroyed incriminating evidence. In 1989, Aflac forced Petitioner's late husband Scott Youngblood to resign after a stellar and loyal 13-year career as Aflac's corporate pilot for John Amos following a distinguished

service as a U.S. Special Forces Captain (Green Berets), awarded Purple Heart, Bronze Star and The Air Medal after two tours of duty in Vietnam.

In 1992, defendant Cheves, a partner at the Columbus law firm of Page, Scrantom, Harris & Chapman, P.C. (“Page Scrantom”), regular outside counsel to Aflac, orchestrated seven separate settlements with Dr. Amos’ known victims and their husbands, including the Youngbloods, on behalf of the absent Dr. Amos, Cheves’ brother-in-law. Immediately following that settlement, Page Scrantom sued Youngblood-West, laying claims on the settlement payment, threatening her with incarceration, and extracting the 1993 hush agreement with its expanded list of beneficiaries including Page Scrantom and all of its shareholders and employees, with the Judge’s spouse among them.

On September 30, 2016, during a personal meeting with Youngblood-West, Dr. Amos admitted his serial assaults, revealed that he had been protected by his Aflac-Amos friends and relations since 1987, and warned her to “be careful” about revealing anything traceable back to him or his family. Appx. 1 p. 5a.

In the March 23, 2018 letter sent in response to Petitioner’s pre-suit demand, Aflac’s and Dan Amos’ counsel threatened Youngblood-West and her counsel with criminal prosecution to intimidate them into foregoing this action, and repeated that threat on April 15, 2018 (the same Sunday when Dr. Amos sought, and obtained, the

midnight TRO), with no legal and factual basis for their threats, which were made in clear violation of the applicable state rules of professional conduct.¹

In sum, the Aflac RICO Enterprise is as alive and well today as it was 33 years ago. The Enterprise has allowed Dr. Amos to commit his heinous assaults with complete impunity, to keep his medical licenses for twenty years after his flight from Georgia, and to enjoy a scot-free life of luxury on Amelia Island, Florida, collecting Ferraris. The Enterprise has allowed Aflac to maintain its public image as the “world’s most ethical company,” and Dan Amos to remain at its helm since 1990 with an “impeccable record and reputation for honest and ethical conduct in both professional and personal activities,” according to Aflac’s 2017 Proxy Statement – all false, according to Youngblood-West’s sealed RICO case.

3. The District Judge’s apparent bias towards defendants

The District Judge’s spouse has an interest in the Court’s enforcement of the challenged 1993 hush agreement because she is among its beneficiaries-releasees. She also has a reputational interest in avoiding public disclosure of Page Scrantom’s role in executing the cover-up of Dr. Amos’ assaults because she was a member of the law firm at the time.

The Judge himself is a relative of Donald Land, Jr., Aflac’s senior associate counsel (albeit “more stranger than a ‘kissing cousin,’” in the Judge’s words. Appx. 4

¹ Rule 3.4(h) of the Georgia Rules of Professional Conduct provides: “A lawyer shall not . . . present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter. The maximum penalty for a violation of this Rule is disbarment.”

p. 60a). Donald Land, Jr., is not just an in-house counsel at Aflac but he is also a grandson of Aflac's co-founder and first CEO John Amos, which makes him and the Judge related to John Amos' nephews defendants Dan Amos and Dr. Amos (as well as to Dr. Amos' brother-in-law defendant Cheves). The Judge has nowhere acknowledged, let alone addressed, his connections to the Amos family defendants.²

The Judge also confirmed that he was a member, along with defendants Dan Amos, Cheves and Oates, of the "Fish House Gang" – an exclusive social club of Georgia's power elite established by John Amos and the District Judge's great-uncle, the late Judge John H. Land – and regularly attended its coveted invitation-only dinners of fried catfish, a local delicacy giving name to the moniker.³

Also apparent from the record is the Judge's hostility towards Petitioner and her counsel, whom the Judge had singled out as targets for gratuitous *ad hominem* invectives that pepper his rulings. Thus, the Judge attributed Youngblood-West's recusal motion to her "frustration," "anger," and "disappointment," and accused her of "[l]ashing out with reckless and frivolous accusations" because "it is human nature

² The family and business ties between the Land and the Amos families go back decades: "Aflac, a company based in Columbus, Georgia, was established in 1955 by John Amos for the purpose of selling various lines of insurance. In 1978, AFLAC entered into an agreement with Underwriters South, Inc., a company owned by Mr. and Mrs. Donald Land, the son-in-law and daughter of Amos." *Southeastern Underwriters v. Aflac*, 210 Ga. App. 444, 445 (Ga. Ct. App. 1993). Donald Land, Jr., is their son.

³ Unlike the Fish House Gang members (such as the Judge and defendants), outside independent observers have described it in local media in such terms as a "secretive network of politicians, lawyers and businessmen," "powerful ad hoc group," "singular opportunity to network," "shadowy association," "private freemasonry," and "behind-the-scene leadership," as cited in Youngblood-West's Section 144 affidavit.

to blame others when we do not get what we want” (Appx. 4 p. 68a) – even though the Judge had not yet ruled against her on any of the dispositive motions. (*id.* p. 54a) (“The Court must decide the motion to recuse before deciding the motions to dismiss.”). Nor has the Judge ever had a chance to observe Youngblood-West’s demeanor, or any other basis to conclude that she, an experienced ER nurse, would be prone to lashing out in anger and frustration under pressure.

In another example, the Judge labelled Petitioner’s threshold argument in opposition to Dr. Amos’ summary judgment motion – that the hush agreements do not constitute fully formed contracts as a matter of contract law because they lack the second party (promisee) required for any contract to be formed – as “border[ing] on violating Rule 11,” and her other arguments as “the product of creative brainstorming sessions unrestrained by Rule 11.” Appx. 8 p. 147a. Yet, the Court’s own reasoning – “because the agreements identify Dr. Amos as a released party, they are not invalid for lack of a counterparty” (Appx. 5 p. 105a) – is contrary to hornbook law that third-party beneficiaries such as Dr. Amos and other releasees are neither necessary nor sufficient for contract formation.

REASONS FOR GRANTING THE PETITION

- I. The injunction is an unconstitutional prior restraint on speech.**
 - a. The injunction is a “true restraint on future speech.”**

A permanent injunction is a “classic example” of a “true restraint on future speech,” *Alexander*, 509 U.S. at 550, which is “the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).

The Eleventh Circuit's threshold ruling that "[t]he enforcement by the district court of Youngblood-West's obligations in those private agreements did not constitute state action" (Appx. 1 p. 13a), is erroneous because the injunction extends far beyond the scope of the private hush agreements that serve as its sole basis. The injunction prohibits Youngblood-West from publicly disclosing or discussing the subject matter of her RICO complaint, which centers not on Dr. Amos' assaults but on their subsequent cover-up by Aflac and Dan Amos. By contrast, the hush agreements do not mention Aflac or Dan Amos, and do not cover their concealment at the heart of the RICO Action because Youngblood-West had had no inkling of their behind-the-scene involvement until Dr. Amos' revelations in 2016, as she alleged in her complaint and attested to in her affidavits.

Furthermore, state action would be present even if the injunction merely enforced the hush agreements as written, without exceeding their scope, because the underlying agreements themselves are invalid as a matter of state contract law and void on public policy grounds.

The hush agreements are invalid, first and foremost, because they fail the threshold requirement of having at least two parties to form a "contract," which "the Georgia Code defines as 'an agreement between two or more parties for the doing or not doing of some specified thing.'" *Coleman v. H2S Holdings, LLC*, 230 F. Supp. 3d 1313, 1319 (N.D. Ga. 2017) (citing O.C.G.A. § 13-1-1). Here, the Youngbloods are the only party appearing on the face of the hush agreements, and no promisee: both hush

agreements provide that the undersigned Youngbloods, for value received, have agreed to release a number of identified persons and entities, including Dr. Amos and Page Scrantom's shareholders and employees, from liability and to keep the hush agreements and their subject matter confidential – but there is nobody identified on the other side of the Youngbloods' "agreement."

The Courts below, however, ruled that the hush agreements constituted validly formed contracts because they had identified the Youngbloods as the promisor, the consideration paid to them, and Dr. Amos and other releasees as the third-party beneficiaries. Appx. 1 p. 12a, Appx. 5 p. 105a. In so ruling, the Courts confused the third-party beneficiary, who is neither necessary nor sufficient for the contract formation, with the second contracting party necessary to form any contract in the first place. *See e.g., AT&T Mobility v. National Ass'n for Stock Car Auto*, 494 F.3d 1356, 1361 (11th Cir. 2007) ("Georgia law is clear that there must be 'a promise by the promisor to the promisee to render some performance to [the] third person, and it must appear that both the promisor and the promisee intended that the third person should be the beneficiary.>"). Dr. Amos and other third-party beneficiaries of the hush agreements are no substitute for the missing promisee.

The hush agreements are also vitiated by the antecedent fraud and duress alleged by Petitioner. *See City Dodge, Inc. v. Gardner*, 232 Ga. 766, 770 (Ga. 1974)

“If the contract is invalid because of the antecedent fraud, then . . . in legal contemplation, there is no contract between the parties.”⁴

The hush agreements are further void as against public policy because of the criminal nature of the misconduct they are designed to conceal. *See Branzburg v. Hayes*, 408 U.S. 665, 696 (1972) (considering it “obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy”); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972) (“The criminal nature of the offense . . . gives the state a clear and separate interest in voiding a contract which conceals the crime, and hampers the punishment of the offender.”); *Fomby-Denson v. Dep’t of Army*, 247 F.3d 1366, 1377 (Fed. Cir. 2001) (“An agreement to not refer a matter to law enforcement authorities for investigation contravenes public policy”); *Camp v. Eichelkraut*, 539 S.E.2d 588, 597-98 (Ga. Ct. App. 2000) (“If the public policy of Georgia does not permit parties to contract to keep embarrassing-but-discoverable materials secret, then with greater force, that public policy does not permit parties to enter into an enforceable

⁴ The Eleventh Circuit’s ruling that Youngblood-West could not void the fraudulently induced hush agreement without tendering the consideration ignores Georgia law that restoration is an equitable requirement, to be applied flexibly. *Cf. Overbey*, No. 17-2444 p. 16 (“We have never ratified the government’s purchase of a potential critic’s silence merely because it would be unfair to deprive the government of the full value of its hush money. We are not eager to get into that business now.”). In any event, Petitioner’s inability to restore does not detract from the alleged fraudulent and coerced nature of the hush agreements.

agreement to keep arguably criminal matters secret in the face of an official investigation.”).⁵

In sum, the injunction enforces hush agreements that are legally invalid and contravene public policy, and goes far beyond their scope by restraining Petitioner from publicly revealing her evidence of Aflac’s and Dan Amos’ role in covering up Dr. Amos’ serial assaults at the heart of the RICO Action. The injunction thus constitutes an exercise of the government’s coercive power to restrain future speech.⁶

b. No showing of extraordinary circumstances to surmount the First Amendment’s “virtually insurmountable barrier” to prior restraints

Any imposition of prior restraint bears a “heavy presumption against its constitutional validity,” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and its proponent “carries a heavy burden of showing justification for the imposition of such a restraint.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Prior restraint on speaking on matters of public concern requires the most extraordinary justifications, *New York Times v. United States*, 403 U.S. 713 (1971),

⁵ The Eleventh Circuit erred in ruling that the hush agreements implicitly authorized Youngblood-West’s complaints to the law enforcement agencies, because under the applicable Georgia law, “[t]he introduction of an implied term into the contract . . . can only be justified when the implied term is not inconsistent with some express term of the contract and . . . it is absolutely necessary to introduce the term to effectuate the intention of the parties.” *Higginbottom v. Thiele Kaolin Co.*, 251 Ga. 148, 149 (Ga. 1983) (internal citation omitted). Here, the express terms of the hush agreements squarely prohibit Youngblood-West from making disclosures to anybody and to “any agency.”

⁶ The injunction also imposes a prior restraint on Youngblood-West’s undersigned counsel’s speech, even though counsel had not been a party to any hush agreement and had learned the relevant facts prior to the injunction.

found only in the most “exceptional cases,” *Near v. Minnesota*, 283 U.S. 697, 716 (1931), where there is “reasonable ground to fear that serious evil will result if free speech is practiced.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Here, the privacy interests of the unrepentant serial offender do not come close to the requisite “extraordinary justification” and cannot outweigh either the local communities’ interest in knowing about such offenders living in their midst, or the SEC’s interest in the information it needs to protect the investing public, or the society’s interest in prosecuting criminal conduct and punishing its perpetrators.

Likewise, the public’s general interest in ensuring enforcement of private contracts and the encouragement of settlement is insufficient to justify a waiver of a constitutional right. Recognizing that “[t]his policy interest is admittedly important,” the Ninth Circuit reasoned in *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1398-99 (9th Cir. 1991):

However, it is an interest that will be present in every dispute over the enforceability of an agreement terminating litigation. In a case presenting no public interest that would be harmed by enforcement of the waiver provision, the countervailing interest in settlement will be enough to justify enforcement. But where a substantial public interest favoring nonenforcement is present, the interest in settlement is insufficient. Otherwise, there would be no point to the *Rumery* balancing test: since the interest in settlement is present in every case, every settlement agreement would be enforced. Clearly then, when there is a substantial public interest that would be harmed by enforcement – as is unquestionably the case here – the party seeking enforcement must, at the least, advance some important interest in addition to the interest in settlement.

More recently, the Fourth Circuit in *Overbey*, No. 17-2444, cited *Davies* and held that “[t]he City cannot succeed merely by invoking its general interest in settling

lawsuits. It must point to additional interests that, under the circumstances, justify enforcing Overbey's waiver of her First Amendment rights." No such additional interest is present here; to the contrary, even the generally insufficient interests in contract enforcement and the encouragement of settlements are attenuated in this case of the invalid and void hush agreements.

c. The hush agreements fall far short of an effective First Amendment waiver.

Although this Court has not articulated a test for the First Amendment waiver in the civil context, the Court stated in *Brady v. United States*, 397 U.S. 742, 748 (1970), that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (internal citations and quotation marks omitted). See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) ("Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued [First Amendment] freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling."); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights . . . and 'do not presume acquiescence in the loss of fundamental rights.") (citation omitted). Dr. Amos' hush agreements procured by fraud, duress and collusion are light-years away from "the voluntary, knowing, and intelligent waiver of such important constitutional rights"; nor did the District Court "indulge in every reasonable presumption against waiver," but all too readily "presume[d] acquiescence in the loss of such rights." *Id.*

More importantly, had Youngblood-West waived her First Amendment rights in an otherwise valid contract, any court enforcement of such a waiver should have been subject to the balancing-of-interests test whereby “a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Rumery*, 480 U.S. at 392.

“The threshold question” for the application of the *Rumery* balancing test is “whether compelling [a waiver of rights] impairs to an appreciable extent any of the policies behind the rights involved” and “may infringe important interests . . . of society as a whole.” *Id.* Here, enforcing the hush agreements impairs, to an appreciable extent, the public’s First Amendment rights to know about Dr. Amos’ serial assaults committed with impunity under the cover provided by Aflac and Dan Amos, triggering the *Rumery* balancing inquiry, which the Eleventh Circuit has failed to perform.

II. The Eleventh Circuit is out of step with other Circuits in its failure to consider public interests weighing against waivers of constitutional rights.

“An injunction against speech harms not just the speakers but also the listeners,” *McCarthy v. Fuller*, 810 F.3d 456, 462-63 (7th Cir. 2015), because “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010) (referring to “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus”).

The Eleventh Circuit’s failure to consider the First Amendment interests of the public in the non-enforcement of the hush agreements stands in marked contrast to

the Fourth Circuit's ruling in *Overbey*, No. 17-2444, issued just three months prior to the Eleventh Circuit's and applying *Rumery* to invalidate a settlement agreement between a city and a victim of police brutality for violating the First Amendment rights of the public to hear information of public significance.

From the "well-settled" premise that "a person may choose to waive certain constitutional rights pursuant to a contract," the Fourth Circuit reasoned:

Yet we do not presume that the waiver of a constitutional right – even one that appears in an otherwise valid contract with the government – is enforceable. *Id.* On the contrary, such a waiver is enforceable only if it meets two conditions: First, it was made knowingly and voluntarily. *Id.* Second, under the circumstances, the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement. . . . Today, we restrict our analysis to the second prong of this test, because the second prong is decisive as a matter of law. Under the circumstances, the City's asserted interests in enforcing *Overbey*'s waiver of her First Amendment rights are outweighed by strong policy interests that are rooted in the First Amendment and counsel against the waiver's enforcement.

The Fourth Circuit ruled that "[c]laims of police misconduct, as well as the circumstances in which the City litigates and settles such claims, assuredly fall into the 'public issues' category," and concluded that "enforcing the non-disparagement clause, which subjected *Overbey* to contractual liability for speaking about the allegations giving rise to her complaint and the circumstances under which she settled with the City, was contrary to the public's well-established First Amendment interest in 'uninhibited, robust, and wide-open' debate on 'public issues.'" *Id.*, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Youngblood-West's claims of serial assaults committed with impunity by Aflac's Chief Medical Director under the cover provided by Aflac and its successive

CEOs propel this matter into the sphere of public interest just as assuredly as the claims of police misconduct in *Overbey*.⁷ The Courts below, however, have ignored the public's strong First Amendment interests in hearing information of significant public concern from a willing speaker manifestly present in this case.

The Eleventh Court's neglect of its duty to apply the *Rumery* balancing test to this case with its manifest First Amendment concerns creates a dangerous precedent in conflict with the Fourth Circuit's decision in *Overbey* and out of step with other Circuits that have applied *Rumery* to police contractual waivers of constitutional and statutory rights.⁸ The Eleventh Circuit had no justification for departing from

⁷ Aflac is a publicly traded international insurance giant, a Fortune 500 corporation with millions of public shareholders and policyholders in the U.S. and Japan, a "Dividend Aristocrat" with a manicured public image of the "world's most ethical company" led by one of "America's best CEOs," and a household name due to the ubiquitous Aflac Duck. The injunction, among other things, prohibited Youngblood-West from filing her whistleblower complaint with the SEC despite the SEC Rule 21F-17 that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." 17 CFR § 240.21F-17(a). *Cf. EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F. 2d 1085, 1090 (5th Cir. 1987) ("We hold that an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest. A waiver of the right to file a charge is void as against public policy.").

⁸ *See Lynch v. City of Alhambra*, 880 F. 2d 1122, 1129 (9th Cir. 1989) (remanding to the district court to address whether the enforcement of the release agreement would be in the public interest because "such an inquiry is necessary to conform with the public policy requirement announced by the Supreme Court in *Rumery*"); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 213 (4th Cir. 2007) ("Where a party knowingly and willingly enters into an agreement that waives a constitutional right, the agreement is enforceable so long as it does not undermine the public's interest in protecting the right."); *Cosmair*, 821 F. 2d at 1090 ("The public interest in private dispute settlement is outweighed by the public interest in EEOC enforcement of the ADEA."); *Davies*, 930 F.2d at 1397 (suggesting that a waiver of a constitutional right should arguably be subject to even stricter scrutiny than that required by *Rumery* for a waiver of a statutory remedy).

Rumery even if it had found no state action in the injunction because *Rumery* is a general common-law test that does not require state action for its application, and has been applied to invalidate private agreements. *See, e.g., Cosmair*, 821 F. 2d at 1090; *Pee Dee Health Care*, 509 F.3d at 213.

III. The District Judge’s refusal to recuse himself violates the Due Process Clause’s guarantee of an impartial tribunal.

“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). A “neutral and detached judge” is an essential component of due process. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). To meet this test, “justice must satisfy the appearance of justice.” *Offutt*, 348 U.S. at 14; *see also* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, at 109 (3d ed. 2017) (“It has been said . . . that there are few characteristics of a judiciary that are more cherished than that of impartiality.”).

This Court has held that the presence of a judge who objectively appears biased may violate the Due Process Clause. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903-04 (2016) (“The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.”); *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (vacating the Nevada Supreme Court’s judgment because the Court “did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable”); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887

(2009) (extreme cases “are more likely to cross constitutional limits, requiring this Court’s intervention and formulation of objective standards”).

Here, the District Judge’s spouse has interests in this case – to keep the hush agreements enforced, the matter sealed, and the witness silenced – that “could be substantially affected by the outcome of the proceeding” within the meaning of Sections 455(b)(4) and (b)(5)(iii) of 28 U.S. Code. The Judge himself has familial and old-boys-club ties to each of the five RICO defendants, creating further appearance of bias within the meaning of Section 455(a).

The Judge did not “disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification” as required by the Judicial Canons, *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995). Even after this information was brought to light in Petitioner’s Section 144 affidavit, the Judge did not acknowledge his spouse’s disqualifying non-financial interests in the subject matter, and his own familial ties to the Amos family defendants.

Furthermore, by restricting public access to the proceedings, the Judge has dispensed with another important measure of accountability necessary to maintain public confidence in the administration of justice. *See Amodeo*, 71 F.3d at 1048.

Finally, the Judge relied on his duty to “remain in the game,” Appx. 4 p. 34a, long-abolished by Section 455. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 871 (1988) (amended Section 455 “had the effect of removing the so-called ‘duty to sit’”).

In sum, the Judge’s personal ties to all five RICO defendants and his spouse’s interests in the subject matter; his failure to disclose these facts as required by the Judicial Canons; his failure to acknowledge them fully when disclosed by Youngblood-West; and his sealing of the record and adherence to the non-existing “duty to sit” raise “the risk of bias too high to be constitutionally tolerable” in this case. *Rippo*, 137 S. Ct. at 907. At a minimum, the Judge “has so far departed from the accepted and usual course of judicial proceedings” – and the Eleventh Circuit “sanctioned such a departure” – “as to call for an exercise of this Court’s supervisory power.” Rule 10(a) of the Supreme Court Rules.⁹

IV. This case presents an excellent vehicle to clarify unsettled issues of the court enforcement of private hush agreements.

Commentators generally agree that the public’s First Amendment right to hear information of public interest from a willing speaker ought to put some limits on the private contractual right to purchase the speaker’s silence, though the proper boundary is uncertain and the guidance where to draw it is unclear. *See, e.g.*, Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 Univ.

⁹ The Judge also refused to recuse himself in an unrelated shareholder derivative action *Conroy v. Amos*, 338 F. Supp. 3d 1309, 1313 (M.D. Ga. 2018), and the Eleventh Circuit affirmed, No. 18-13834 (11th Cir. Sep. 5, 2019). In the “Fish and Family” section of that opinion, issued five weeks prior to the recusal opinion here, the Judge had denied any knowledge of having relatives working at Aflac, considered the Fish House Gang from the subjective, insider’s point of view, and resolved all doubts in favor of the “solemn duty to remain.” Old habits die hard, which is another reason for this Court to intervene and reinforce the notion that the “duty to sit” and the “in the judge’s opinion” test have long been abolished by Section 455, requiring federal courts instead to resolve reasonable doubts in favor of recusal to maintain their cherished impartiality.

Colo. L. Rev. 411 (2019); David A. Hoffman & Eric Lampmann, *Hushing Contracts*, 97 Wash. Univ. L. Rev. 165 (2019); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 Colum L. Rev. 1650 (2009). This case presents an excellent and timely vehicle for the Court to clarify unresolved issues of the federal courts' proper role in enforcing private agreements of silence when challenged on the First Amendment grounds.

First, the Court could clarify that court enforcement of an otherwise valid private hush agreement by an injunction constitutes state action for purposes of the First Amendment analysis if the censored information is of public importance. The Eleventh Circuit has recognized that “court enforcement of an agreement between private parties can, in some circumstances, be considered governmental action for constitutional analysis,” *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995), citing *Shelley v. Kraemer*, 334 U.S. 1 (1948), but that “the reach of *Shelley* remains undefined outside of the racial discrimination context.”

In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991), the Court held that a promissory estoppel enforced by the court implicates the First Amendment inquiry, leaving open the question of whether a contractual promise does so if enforced by the court. As the Supreme Court of Connecticut stated in *Perricone v. Perricone*, 292 Conn. 187, 202 (Conn. 2009):

It is not entirely clear to us whether, for purposes of determining whether the enforcement of state law in state courts constitutes state action under the fourteenth amendment, the United States Supreme Court in *Cohen* intended to distinguish promissory estoppel actions from contract actions on the ground that the former involve “a state-law

doctrine which . . . creates obligations never explicitly assumed by the parties.”

The *Perricone* opinion notes that while a number of courts “have declined to extend *Cohen* to contract actions . . . [o]ne commentator has concluded . . . that the distinction between the enforcement of a promise and the enforcement of a contract in this context ‘is dubious at best and probably false,’ because the defendant in a promissory estoppel action ‘initially create[d] his obligation by making a promise to do something.’ A. Garfield, ‘Promises of Silence: Contract Law and Freedom of Speech,’ 83 Cornell L. Rev. 261, 350 (1998). ‘The difference between a contract claim and a promissory estoppel claim is merely that in one instance a court enforces a promise because it was part of a bargain, and in the other a court enforces a promise because it induced unbargained-for reliance.’” *Perricone*, 292 Conn. at 202. *See also* Shell, Richard G., *Contracts in the Modern Supreme Court*, 81 Cal. L. Rev. 431, 516 (1993) (“[R]ights to free speech and a free press are arguably so fundamental to the functioning of a democratic society that they ought not to be subjected to unregulated market ordering backed by the state power of contract enforcement”). The Court could clarify whether the reach of *Shelley* extends into the First Amendment arena.

Second, the Court could clarify that its *Rumery* balancing test empowers and requires federal courts to deny enforcement to those private hush agreements that impair to an appreciable degree the public’s First Amendment right to hear the censored information of public interest from a willing speaker.

CONCLUSION

The permanent injunction offends the First Amendment in the service of an inequitable and immoral purpose: to conceal evidence of Dr. Amos' serial assaults, his secret hush agreements with multiple victims, and the behind-the-scene cover-up of the assaults and hush agreements by Aflac and Dan Amos. The Eleventh Circuit blessed the injunction issued against their victim without batting an eyelash or furrowing a brow in a legally and constitutionally indefensible opinion out of step with other Circuits and unworthy of the "*cert denied*" imprimatur of this Court.

The case screams out for this Court's intervention and a remand for *de novo* public proceedings before an unbiased judge, because leaving the Eleventh Circuit's ruling undisturbed will keep judicial seal over information of significant public concern and safety; ensure that heinous crimes against women escape any public scrutiny while the victim herself remains permanently exposed to "coercive incarceration" at the mercy of her assailant and his very powerful allies, and chill the willingness of other victims to challenge their powerful abusers – an unjust and intolerable outcome.

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Respectfully submitted,

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