No. 20-1037

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

—*versus* —

GARY L. WALKER, DEFENDANT-APPELLEE, COLORADO SPRINGS FELLOWSHIP CHURCH, MOVANT-APPELLANT.

On Appeal from the United States District Court for the District of Colorado, the Hon. Christine Arguello, presiding, Nos. 09-cr-00266, 15-cv-02223

MOVANT-APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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A

The Court of Appeals Has Jurisdiction to Review the
District Court's Unsealing Order
(Reply to Government's Point I.A.)

The Government argues that this court lacks jurisdiction to review the unsealing order of the lower court as the Notice of Appeal made no specific reference to that Order. See Gov't Brief at pp. 9-11.

This reading of the Notice of Appeal and the record is so tortured as to have the effect of making a ruling by this Court on the recusal matter totally illogical. On November 21, 2019 the District Court issued its unsealing order. The final unsealed transcripts were not actually filed by the Court Report and made available to Movant-Appellant's counsel until December 13, 2020. See Dkt. Entry Nos. 1150, 1151, 1152. Further, the Order upon which the Notice of Appeal was filed was entirely premised upon the lower court's actions in the Walker habeas proceeding. It would be an absurd result for this Court to rule that Judge Arguello should have recused herself, and then to remand the matter to another district court judge, and to do so without a direction to review the transcript and records to determine what, if

anything, should be under seal. As is noted *infra*, the Government has, itself, acknowledged that the two issues are inextricably tied to one another.[1]

While it is true that Rule 3 of the F.R.App.P. has been interpreted as being jurisdictional in nature (*Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012)), "it is well settled that courts should apply a liberal interpretation to that requirement, . . ." *Conway v. Village of Mt. Kisco, N.Y.*, 750 F.2d 205, 211 (2d Cir. 1984).

In accord see *Foman v. Davis*, 371 U.S. 178, 181-82 (1962); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006); *Simpson v. Norwesco, Inc.*, 583 F.2d 1007, 1009 n. 2 (8th Cir. 1978); *Brooks v. Toyotomi Co., Ltd.*, 86 F.3d 582, 584-85 (6th Cir. 1996).

Indeed, in the 1979 amendments to the Rule, the drafters explicitly cited with approval cases holding that "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." Fed.R.App.P. 3 Advisory Comm. Note.

Furthermore, in the 1998 amendments to the Rule, the Advisory Committee re-iterated the rule that as long as it is clear what is being appealed, the appellate court should not dismiss the appeal, and should allow it to go forward, *viz*.,

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[1] In its discussion regarding recusal the Government argued that, "Impartiality must be considered with regard to the exact issue before the court. The issue here is the court's decision not to unseal all the transcripts." Gov't Brief at p. 25. Emphasis added.

> Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Failure of the Court to rule on the key underlying issue of the unsealing of the record should not be precluded.

B

The District Court Abused its Discretion in its Unsealing Order
(Reply to Government Point I.B)
(Reply to Walker's Point B)

In Appellant's Brief it was argued that the District Court failed to obey the Order of the Court of Appeals in its January 2019 Decision and Order (*Walker v. United States*, 761 Fed. App'x 822 (10th Cir. Jan. 23, 2019)), and in the Mandamus ruling in August 2019 (*In re Colorado Springs Fellowship Church*, 19-1276 (10th Cir. Aug. 12, 2019)), when it only unsealed a bare 15% of the lower Court record. See Appellant's Brief at pp. 29-39. It was argued, therein, that the lower court failed to apply the proper standards as enunciated by the various courts, violated this Court's and the District Court's own Local Rules, and disregarded the fundamental principles of openness and public access to judicial proceedings in an arbitrary and capricious manner, motivated by bias and prejudice, (see Argument Points B and C, and Reply Points III.C and III.D) in sealing the habeas corpus transcript (and restricting access to most of the filings).

One reading the Government's Response and that of Mr. Walker would come to believe that the presumption is that such proceedings should normally be under seal, and that the burden to claim openness is upon the Appellant (see Gov't Brief at pp. 13-14, phrasing the issue as being defined by "weigh[ing] the interests of the public, which are presumptively paramount, against those advanced by the parties [seeking sealing]", and then quoting extensively from case law rebutting that presumption.) That, however, is a Bizzarro World view of what the law is.[2] The legal fact of the matter is that, as this Court has itself stated, there exists a "*strong presumption* in favor of access" of disclosure. *Walker v. United States, supra*, 761 Fed. App'x at 834, quoting *United States v. Pickard*, 733 F.3d 1297, 1303 (10th Cir. 2013). Emphasis added. And, in addition thereto, any Order that does seal the record "must be 'narrowly tailored to serve th[e] interest' being protected by sealing or restricting access to the records." *Walker, supra*, 761 Fed. App'x at 835, quoting *Press-Enterprise Co. v. Superior Court of California for County of Riverside,* 478 U.S. 1, 13-14 (1986).

[2] As one Court described it, "Only in Superman Comics' Bizarro world, where reality is turned upside down, . . ." *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 754 (D.C. Cir. 2000).

It is beyond baffling how the Government and Walker can argue that fully 85%[3] of the lower court record constitutes a "narrow tailoring" of the record. This is not a case involving undercover informants, or trade secrets, or national security. This was not a case where agents of the CIA or NSA or DIA would be testifying. As the Sixth Circuit articulated it,

> There are, of course, limited common-law exceptions to the potent presumption in favor of maintaining openness to the courtroom and court documents. . . . the presumption may be overcome by the need to keep order and dignity in the courtroom or by a particularized special need for confidentiality, such as when trade secrets, national security, and certain privacy rights of trial participants or third parties are implicated.

In re Perrigo Co., 128 F.3d 430, 446 (6th Cir. 1997).

In accord see *Salcedo v. D'Arcy Buick GMC, Inc.*, 227 F. Supp.3d 960, 962 (N.D. Ill. 2016); *United States v. Bon Secours Cottage Health Svces.*, 665 F. Supp.2d 782, 785 (E.D. Mich. 2008).

As opposed to this enumerated list, is that here the Court is dealing with a simple habeas corpus petition in a fraud case. The case had no national import and set no major [or minor] precedents. Nevertheless, the lower court, in a pre-emptive manner

[3] Neither the Government nor Walker contest this percentage of the transcript that has been redacted; only Walker stating that it is "alleged" (Walker Response at p. 11), but offering no alternative thereto.

deemed not only the identities of the witnesses, but also their entire testimony subject to redaction.[4]

The over-arching principle should be as the Third Circuit framed it simply and succinctly in *United States v. Thomas*, 905 F.3d 276 (3d Cir. 2018),

> The First Amendment "provides a public right of access to criminal trials," other aspects of criminal proceedings such as voir dire, and "the records and briefs that are associated with those proceedings."

Id. at 281, and n. 4 therein collecting cases.

As set forth in Appellant's Brief, the overwhelming concern, on the record, for Judge Arguello's sealing order was that to disclose both the identities and testimony of the witnesses would expose them to some form of undefined harassment. See Appellant's Brief at pp. 34-35. In other words, it was entirely prospective, in that the testimony and identities of the witnesses needed to be protected from some possible harassing behavior, *in futuro*. However, disregarding the fact that none of Judge Arguello's cited examples contained any such harassing behavior (merely the First Amendment expression of dissatisfaction with how the Court and Government

[4] This Court must remember that the manner and process whereby Judge Arguello redacted 85% of the transcripts is inextricably tied into the bias and prejudice that she has demonstrated against the Movant-Appellant. One cannot separate the two, as Judge Arguello effected her bias and prejudice by denying the Movant-Appellant Church access to these proceedings. There can be little, if any, doubt that the record would be publicly available through PACER had Judge Arguello not engaged and entered into rulings regarding her disputes with how the Movant-Appellant practices its religion.

had handled the entire case[5]), the sealing order was entirely based upon some potential behavior sometime in the future. Indeed, in the Government's Brief they specifically state,

> The court was deeply concerned that testimony critical of CSFC would subject the witnesses to harassment.

Gov't Response at p. 17. Emphasis added.

In other words the lower court's actions were entirely based upon what might happen, not what the content of the testimony was, nor who was testifying. To uphold the lower court's ruling on such a basis would be a monumental abrogation of the public's right to know. Any judge, based upon the mere hint or possibility that a witness may be "harassed" (however that may be defined) could seal not only that witness's testimony, but his or her identity, and the entire record. To allow such an order as was issued by the Court here to stand would make a shambles of the First Amendment and make Star Chamber proceedings the norm.

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[5] Indeed, the Government itself acknowledges that a prime basis for the sealing order was the following, *viz*.,

> To address CSFC's allegation (on its web site) that the court was concealing its own misconduct, . . .

Gov't Response at p. 16.

There are two glaring problems with this statement: (1) by the very language of this objection it is clear the Government's [and the lower court's ruling] was designed to protect the court from undesired criticism — something clearly protected by the First Amendment (see *Lucas v. Monroe County*, 203 F.3d 964 (6th Cir. 2000) ("Freedom to criticize public officials and expose their wrongdoing is at the core of First Amendment values, even if the conduct is motivated by personal pique or resentment.", *id*. at 973, citation omitted));and (2) the published comments were not from CSFC, and never appeared on its website. See Appendix at pp. A-126 thru A-146. This mischaracterization of the actions of the Church goes directly to refute any claim of harassment by the Movant-Appellant.

This is not, as referenced above, a sealing of a record that, in and of itself, contained information that needed to be kept from the public view. *See, e.g., United States ex rel. Reed v. Keypoint Government Solutions*, 923 F.3d 729 (10th Cir. 2019);[6] *United States v. John Doe,* 629 Fed. App'x 69, 72-73 (2d Cir. 2015), *cert. denied* — U.S. — (2016).[7]

Indeed, the contradictory nature of the lower court's rulings is well pointed out by the Government. In its Responsive Brief it notes that,

> As to the evidentiary hearing itself, the court declined to seal the courtroom. The entire hearing was open to the public and again was attended by one or more members of CSFC.

Gov't Response at p. 15.

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[6] In *Keypoint* this Court articulated the reasons for holding portions of the Record on Appeal under seal — none of which are present in the case at Bar, *viz*.,

> Three considerations lead us to conclude that sealing is appropriate here. First, KeyPoint has articulated a strong national-security interest in sealing. The OPM contract and handbook contain sensitive materials regarding the techniques used in performing background checks; revealing this information could compromise future background investigations. Second, KeyPoint has preserved the public's right to view judicial records by publicly filing a redacted version of the appendices proffered under seal. This publicly available—albeit redacted—version of the appendices leaves the content of the appendices visible in significant measure. Finally, sealing is appropriate because the documents at issue "play[ed] no role in our resolution of this appeal."

Id. at 772 n. 22. Emphases added.

[7] For example, in *Doe*, the Court of Appeals affirmed the lower court's sealing order on the following basis,

> The district court properly determined that sealing was required in order to serve the Government's compelling interest in promoting safety and ongoing national security investigations. Indeed, as the district court concluded, revealing John Doe's identity could "jeopardize the safety of numerous individuals," and the "investigation involves national security issues and [its] non-public nature ... is crucial to its success."

Ibid.

Yet this raises the obvious question, as to how the proceedings could be open to anyone in the public, but then the transcripts later on sealed? This makes no sense whatsoever.[8]

The Government also seems to find fatal to the Movant-Appellant's request for unsealing that their interest is "less a public interest than a private interest". Gov't Response at pp. 17-18. This is, indeed, an odd argument. Nowhere in the case law is the motive of the party seeking to unseal a record the determining factor — and the Government cites no case law for this bizarre principle. What this argument by the U.S. Attorney misses (and likely purposely) is the overall principle that public access is a right under the First Amendment. The party seeking to unseal a record or access to a presumably public document has a right to that record not needing to establish what they intend to do with the information, but merely the fact that the subject record itself should be made public. It is the record in and of itself that is of a public nature, not what some party is seeking to do with it that makes it public — a principle seemingly lost on the Appellees. A perfect example is the Freedom of Information Act, 5 U.S.C. § 552, which, as it should, contains no requirement that the party requesting the information disclose why they are seeking it — merely that

[8] The question then may arise as to what the Court would have done had someone in the gallery been transcribing the proceedings verbatim, and then sought to publish them. Would the Appellees then sought some order from the court preventing that publication? And, would Judge Arguello have granted that prior restraint order?

it is a record that the Government must make public. See *Ebling v. U.S. Dep't of Justice*, 796 F. Supp.2d 52, 62 (D.D.C. 2011).[9] The Government would appear to believe, in its Bizarro World view, that governmental restriction of access to records is the rule, and public disclosure is the exception. Unfortunately for the Appellees' (and thankfully) this is not the case.

C

The District Court Erred in Not Re-Assigning the Matter Under 28 U.S.C. § 144
(Reply to Government's Point II.C.2)
(Reply to Walker's Point C)

In Appellant's Brief it was argued that Judge Arguello should have re-assigned this matter to another Judge based upon her demonstrated bias and prejudice. Further, it was argued that this Court, in the event that they remand the matter to the lower Court has the authority under 28 U.S.C. § 2106, and under its general

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[9] In *Ebling* the Court made clear these principles of public access and where the burden to establish such access lies,

> Congress deliberately conferred the right to make a FOIA request upon "any person," 5 U.S.C. § 552(a)(3)(A), a term that is defined broadly to include any individual or organization other than a federal agency, *id.* § 551(2). Consistent with this broad "any person" standard, "the identity of the requesting party [generally] has no bearing on the merits of his or her FOIA request." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, 771 (1989). The reason is simple: the statute's exclusive concern is with what must, and what must not, be made public. *North v. Walsh,* 881 F.2d 1088, 1096 (D.C. Cir. 1989). For this reason, whether disclosure is required turns on the nature of the records requested, and requestors are not required to explain who they are or why they seek information. *See Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 172 (2004).

Id. at 62-63. Emphasis added.

supervisory authority of the lower courts within this Circuit, to so re-assign a case to another District Court Judge when necessary. Such re-assignment is required where the lower court judge has disregarded a clear mandate from this Court. See *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1263-64 (10th Cir. 2016). Appellant's Brief at pp. 55-61. In support of the motion below, under Section 144, Movant included a sworn statement from Pastor Rose Banks (as required by the statute) which set forth, in detail, the bias and prejudice demonstrated by the subject jurist. Procedurally, the original motion for recusal/re-assignment was made on November 21, 2019 (accompanied by a Declaration from Pastor Banks). See Dkt. Entry No. 1145. On that same date the Court issued its initial unsealing Order. Dkt. Entry No. 1146. It also issued a one line Order denying the Sections 144/455 requests for relief on the basis they were "moot". Dkt. Entry No. 1147. In response thereto, the Church filed a motion for re-consideration, accompanied by a second Declaration by Pastor Banks. Dkt. Entry No. 1148-1.[10] This Declaration was specific and precise as to what actions the judge had taken, along with supporting exhibits. Dkt. Entry No. 1148-1. See Appendix at pp. A-120 thru A-146. This was

[10] The Declaration submitted by Pastor Banks incorporated, by reference, the prior Declaration submitted in support of the initial Motion for Recusal/Re-assignment (see Banks' Declaration at ¶ 18, Appendix at p. A-124). Dkt. Entry No. 1145-1. This first Declaration, referenced specifically by Pastor Banks in the second Declaration, served as the bases for the Motion for Re-consideration, and is incorporated herewith by reference, and the Court may take judicial notice of the contents thereof. See *Graves v. Goodnow Flow Ass'n, Inc.*, 2017 WL 4326073 at *2 n. 5 (N.D.N.Y. Sept. 27, 2017).

followed, on December 9th, 2019, by the lower court's more detailed ruling as to the recusal/re-assignment matters. See *United States v. 3. Gary L. Walker*, 09-cr-00266 (D. Colo. Dec. 9, 2019).

In Response the Government (and Appellee Walker) stated that the "question here is whether CSFC, in its motions for recusal, satisfied the statutory requirements to show bias or prejudice, thus requiring the district judge to recuse herself." Gov't Response at p. 29. The Government went on to assert that (a) the motion was untimely (relying upon the same arguments as to timeliness in the recusal motion), (b) Pastor Banks's Declaration fails to establish any bias or prejudice (*id*. at pp. 29-30), and (c) that the Declaration of Pastor Banks reflects only her opinions as to the bias and prejudice of Judge Arguello, not any facts, as required under Section 144.

As to the issue of timeliness, the Appellant relies upon the arguments made herein as to the recusal motion. See Part III.D. *infra*.

With regard to the claims that no "facts" have been asserted in the Banks' Declaration this is clearly not the case. In their argument the Government, to support its claim that Pastor Banks was only expressing an opinion cites the following language: "I firmly believe that the aforesaid statements of Judge Arguello clearly demonstrate her bias and prejudice". Gov't Response at p. 30. First of all, how this is not an expression of a fact as required by the statute is hard to understand. Ms. Banks not only states that she has a firm belief, but she follows this up, in specific

detail (which the Government never addresses) with examples of language used by the Court that demonstrated the lower court's bias and prejudice. See Banks' Declaration at ¶ 9, Appendix at pp. A-121 to A-122. She then went on to show how the press releases cited by the District Court as evidence of witness intimidation were anything but that, and, to prove the point factually, those press releases were included as exhibits to her Declaration. See Banks' Declaration at ¶¶ 10 thru 13, Appendix at pp. A-122 thru A-123, A-126 thru A-145.[11]

In *Liteky v. United States*, 510 U.S. 540 (1994), the Supreme Court specifically defined "bias and prejudice" as follows,

> The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate,* either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . ., or because it is excessive in degree . .

Id. at 550. Emphasis in original.

This Court, in *United States v. Young*, 45 F.3d 1405 (10th Cir.), *cert. denied* 515 U.S. 1169 (1995), recognized that *Liteky* sets forth a standard to determine a judge's bias and prejudice, *viz*.,

> *Liteky* teaches that an opinion or disposition may be considered wrongful or inappropriate where it is undeserved, or because it rests upon knowledge that the subject ought not to possess, or because it is excessive in degree.

Id. at 1415. Emphases added.

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[11] It needs to be noted that none of these so-called offending press releases originated with or were published by the Movant-Appellant Church.

In the case at Bar there can be little, if any, argument that Judge Arguello's rulings, and her statements from the bench, which seriously impugned not only the Movant-Appellant, but also its Pastor, reflected an improper bias as against the Appellant. And, this improper bias is directly connected to the Court's actions in its unsealing Order, which left more than 85% of the Walker transcripts (along with most of the filings) under seal. As the Government, itself, acknowledged, "Impartiality must be considered with regard to the exact issue before the court. The issue here is the court's decision not to unseal all the transcripts." Gov't Brief at p. 25.

Instructive here is this Court's decision in *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied* 429 U.S. 951 (1976). In that case the Government moved for both recusal of the District Court Judge (under Section 455) and re-assignment on remand to another judge (under Section 144). The basis for this motion by the Government was as follows,

> They [*i.e.*, the Government] also point to the fact that at the end of the hearing the judge expressed dismay as to the treatment of Mr. Christensen [attorney for one of the defendants in the case], characterizing it as "the defamation, holding up to hatred and ridicule and contempt of Mr. Christensen."

Id. at 461.

This Court ruled as follows (as it should rule in the case at Bar applying the same standard),

> The final question, and that which disturbs us most, is whether in the light of the total facts and viewing the future of this case in the light of Section 455(a), there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in a United States district court. Unfortunately we cannot predict that it will be. Based upon all of the facts and considering the broad language of Section 455(a) requiring disqualification in any proceeding "in which his impartiality might reasonably be questioned," it is with reluctance that we conclude that the interests of justice require that the cause be tried by another judge, . . .

Id. at 464.

Applying the reasoning in *Ritter*, *supra*, this Court, on remand, should order the matter re-assigned to another Judge sitting in the District of Colorado.

D

Judge Arguello Should Have Recused Herself under 28 U.S.C. § 455
(Reply to Government's Point II.C.1)
(Reply to Walker's Point C)

In Appellant's Brief it was argued that Judge Arguello should have recused herself based upon the overwhelming appearance of impropriety and bias as demonstrated by her comments at the Walker habeas proceeding and in her opinions as filed in that case. See Movant-Appellant's Brief at pp. 40-54. It was argued that both legally and factually Judge Arguello had demonstrated a particular prejudice and inability to fairly adjudicate matters involving the Movant-Appellant Colorado Springs Fellowship Church. For example, it was pointed out that the District Court judge made comments of a religious nature as to the Church and its Pastor (Rose

Banks) using such language as "vindictive and mean-spirited" to describe Pastor Banks, and such statements as:

> That is not something that somebody who is Christian would do or say.
> * * *
> That is not something that a Christian person would ever wish on anyone.

See Appendix at A-149 thru A-150, Transcript pp. 89-90 lines 9-25, 1-19, quoted in Appellant's Brief at pp. 20-21, and n. 5; pp. 44-45.

See also Appendix at A-148 thru A-149, lines 14-25, 1-3, quoted in Appellant's Brief at p. 20 n. 5.[12]

Unfortunately, these were not the only instances of impropriety and bias demonstrated by the lower court. As set forth in Appellant's Brief, the continuing delays in obeying this Court's mandate to unseal the record (*Walker v. United States*, 761 Fed. App'x 822 (10th Cir. Jan. 23, 2019)), compelling the Movant-Appellant to needless expend resources by filing motions in the lower court, and a writ of

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[12] Appellee Walker begins its argument as to recusal by making the observation that "CSFC focuses its recusal argument solely on statements that the District Court made during Walker's Resentencing Hearing concerning his relationship with his former pastor, Rose Banks, . . ." Walker Brief at p. 14. The absurdity of this comment is evidenced by the very reason we are in Court — and that is the fact that more than 85% of the Hearing record has been sealed by Judge Arguello.

It should also be noted that the insinuation that Counsel herein purposely included only select portions of the record to misrepresent the Court's actions (*ibid*) is totally false. To this comment Counsel herein takes umbrage in the *extremis*. The Record speaks for itself, as do the actions of Judge Arguello, upon which even this Court has commented. If Counsel for Mr. Walker believes that Counsel herein has engaged in such conduct she is surely capable of seeking relief under Rule 46(c) of the Federal Rules of Appellate Procedure, or the court itself, can *sua sponte*, make such a finding. In accord see *In re Lightfoot*, 217 F.3d 914, 916-17 (7th Cir. 2000); *Miera v. Dairyland Ins. Co*., 143 F.3d 1337, 1342 (10th Cir. 1998). See also Tenth Circuit L.R. 46.5.

mandamus in this Court, all reflected an actionable bias against the Church. See Appellant's Brief at pp. 14-17. See *In re Colorado Springs Fellowship Church*, 19-1276 (10th Cir. Aug. 12, 2019). Indeed, even after the lower court finally "complied" with this Court's mandamus direction (*United States v. 3. Gary L. Walker*, 2019 WL 6215641 (D. Colo. Nov. 21, 2019)), a Rule 60 motion was necessary to compel the lower court to actually address the recusal issue. See Dkt. Entry No. 1145; *United States v. 3. Gary L. Walker*, 09-cr-00266 (D. Colo. Dec. 9, 2019).

The test, as the Government itself acknowledges (see Gov't Response at p. 21), is whether a reasonable person "would harbor doubts about the judge's impartiality". See *Glass v. Pfeffer*, 849 F.2d 1261, 1268 (10th Cir. 1988). And, furthermore, the standard is one of objectivity, not one based upon the individual perceptions of the movant. *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). What the Government then seeks to do is side-step the obvious bias of Judge Arguello by arguing that the recusal motion was untimely. See Gov't Brief at pp. 22-23; Appellee Walker Brief at pp. 16-17. What this ignores is the fact that the motion for recusal was based upon the attempts to secure the record in the Walker habeas proceeding. The two are inseparable and joined at the hip.[13] It was not until January

[13] Indeed, this is precisely what the Government argues when it states, "Impartiality must be considered with regard to the exact issue before the court. The issue here is the court's decision not to unseal all the transcripts." Gov't Brief at p. 25. See discussion *supra re* this Court's jurisdiction to review the lower Court's final order on unsealing.

2019 that this Court ordered Judge Arguello to actually review the lower court record and make a proper determination as to what should be sealed and what should not be under seal. See *Walker v. United States*, 761 Fed. App'x 822 (10th Cir. Jan. 23, 2019). Indeed, in that very decision this Court, itself, referenced Judge Arguello's comments regarding one's religious beliefs and Christian values. 761 Fed. App'x at 827-28. This Court went on to observe that "the district court abused its discretion" in the manner in which it failed to address issues regarding public access to Court proceedings. *Id*. at 836. See Appellant's Brief at pp. 23-25.

Any delays, thus, were the result of the lower court's failure to address the concerns of both the Movant-Appellant, and to act on the Decision and Mandate of this Court.

Further, the argument by Appellee Walker that "CSFC may have waited until after it had suffered what it perceived as unfavorable rulings to seek disqualification of Judge Arguello." (Appellee Walker Brief at p. 17), is belied by the fact that the District Court itself was the cause of any delay, as set forth above. The Church's counsel made several attempts to urge Judge Arguello to issue a ruling complying with this Court's direction, however, these were met with judicial statements that never really addressed any need for alacrity.[14]

[14] After waiting a month, after this Court's ruling in the Mandamus suit, counsel sent a letter to Judge Arguello requesting a status update on compliance. Dkt. Entry No. 1139. That same day the District Court's response was as follows, *viz*.,

What is incredible is that the Government takes the position that Judge Arguello's various and numerous comments about Christianity and how a Christian should behave are not gratuitous. See Gov't Brief at pp. 23-24. The Government never makes any observation that the last place for a court to make comments is on what the correct or proper way is for one to practice their religion. Indeed, the Government fashions these wholly inappropriate comments in the context of the necessity of dealing with Mr. Walker's habeas proceeding. Yet, first and foremost, since these records are sealed to the Appellant, there is no way to make that determination. And, even more to the point, the legal and constitutional validity of Mr. Walker's petition for habeas relief can hardly hang upon how the Colorado Springs Fellowship Church practices its beliefs, and what its Pastor says – especially in light of the fact that neither of these parties were a part of the underlying criminal proceeding, and neither the Church nor Rose Banks were ever charged with any criminal offense.

> The Judges on this Court are responsible for between two hundred and three hundred civil cases and between fifty and one hundred criminal cases on their respective dockets. Due to the right of criminal defendants to receive a speedy trial pursuant to the Sixth Amendment to the United States Constitution, criminal matters take precedence over civil matters. In addition, this Court has more than one hundred cases that have been pending long before the current issue in this case. Nevertheless, this Court is working diligently to address the Tenth Circuit's Mandate in this case, and the Court will issue an order in due course.

Dkt. Entry No. 1140.

We are not in some religious court guided by rules set forth by the Roman Curia or some other religious judicial body. This is not Henry VIII seeking some judicial determination that his marriage to Katherine of Aragon was invalid based upon interpretation by a papal legantine court's ruling. What this is, is an Article III proceeding in which religious beliefs and practices have no place, whatsoever. As Justice Stewart made the point in *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981),

> as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.

Id. at 124. Footnote omitted.

And, "judges are ill-equipped to examine the breath and content of an avowed religion." *Africa v. Commonwealth of Pa.*, 662 F.2d 1025, 1031 (3rd Cir. 1981), *cert. denied* 456 U.S. 908 (1982). In other words, those sitting on the bench may make no ruling, or base a ruling, on the religious practices and/or beliefs of those before it. See *Fallon v. Mercy Catholic Medical Center*, 877 F.3d 487, 490 (3d Cir. 2017) ("no court should inquire into the validity or plausibility of the [religious] beliefs"]; *Unification Church v. INS*, 547 F. Supp. 623, 628 (D.D.C. 1982).

As the Supreme Court observed in *Serbian Eastern Orthodox for U.S. of America and Canada v. Milivojevich*, 426 U.S. 696 (1976),

> civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of

> discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary " must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits;

Id. at 713. Emphasis added.

In accord see *Arnett v. Jackson*, 393 F.3d 681, 691-92 (6th Cir. 2005); *Dowd v. Soc'y of St. Columbans*, 861 F.2d 761 (1st Cir. 1988) ("It is well-settled that religious controversies are not the proper subject of civil court inquiry. . . . Religious bodies must be free to decide for themselves, free from state interference, matters which pertain to church government, faith and doctrine." *Id*. at 764, Citations omitted.); *Hubbard v. J Message Group Corp.*, 325 F. Supp.3d 1198, 1207-08 (D.N.M. 2018).

See also *Our Lady of Guadalupe School v. Morrisey-Berru*, — U.S. —, 2020 WL 3808420 at *9, n. 10 (July 8, 2020).[15]

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[15] It should be noted that in this past Term of the Supreme Court, three significant decisions were reached, all of which re-affirmed the key principle that governmental interference in the manner and practices of religious institutions — whether it be by the Legislative, Executive or Judicial Branch — violates the sanctity of the First Amendments Free Exercise and Establishment Clauses. See *Our Lady of Guadalupe, supra*; *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, — U.S. —, 2020 WL 3808424 at *11 (July 8, 2020) (interpreting regulation in the context and limitations of the Religious Freedom and Restoration Act, 42 U.S.C. §§ 2000bb *et seq*.); *Bostock v. Clayton County, Ga.*, — U.S. —, 140 S. Ct. 1731, 1754 (June 15, 2020). See also *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188-89 (2012). In the case at Bar what Judge Arguello has done is precisely that. Even were we to assume that Pastor Banks made the comments that Judge Arguello ascribed to her, or the Church actually did "excommunicate" Mr. Walker (which it denies doing; see Response to Walker Motion to Supplement the Record on Appeal, Doc. No. 10751473, Jul. 1, 2020), these were internal religious practices wholly beyond the reach or comment or actions by the Court. See *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); *Watson v.*

Judge Arguello's comments as to the intervenor Church, and its religious practices regarding what is and is not proper in Christianity, are wholly beyond the bailiwick of her court, this court, or any other lay entity. By making them a factor, indeed a determinative factor, she has not only violated the "sacred" principles of the First Amendment (see *Texas v. Johnson*, 491 U.S. 397, 418 (1989)), but, more to the point, has demonstrated her personal bias and prejudice against this religious institution. And, no matter how the Government and Appellee Walker seek to clothe her language, and dress it up and to fashion it as proper for an Article III judge to behave, the legal fact of the matter is that it was plain wrong, and serves as a more than valid basis for her to have recused herself. This is the underpinning of the so-called "church autonomy doctrine" or the "ecclesiastical abstention doctrine". See *Milivojevich, supra*, 426 U.S. at 709-10. And, it is what the Government and the Appellee Walker are asking this Court to ignore in ruling that Judge Arguello ought not have recused herself.

The Government continued that what these comments of Judge Arguello reflected were not a condemnation of how the Church practices its belief (notwithstanding the plain language in the record), but, rather, "the court's concern

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Jones, 80 U.S. 679 (1872) ("whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id*. at 727).

with retaliation." See Gov't Brief at p. 26. Even were this so, and the comments of Judge Arguello could be viewed through this lens, it does not negate the nature of the comments, and the fact that they were not directed to protect Mr. Walker, but, rather, were directed against the Church and its Pastor. The Government's argument that Church members supposedly were engaging in this alleged harassment at Pastor Banks' direction (see Gov't Brief at pp. 26-27), ignores the fact that, if this were so, there were many other avenues for the Court or Mr. Walker to address the problem without making the subject comments about the Church. See Appellant's Brief at pp. 35-36, n. 11.

Yet, none of these actions were taken, which belies the entire underlying argument as to harassment.

E

Appellant Properly Requested Release of All of the Records in the District Court Walker Habeas Proceeding
(Reply to Walker's Point B)

In Appellant's Brief it was argued that the Court of Appeals should, as part of its final Order, remanding the case to the District Court and re-assgning it to another judge, also direct that the lower court also review the filings made in the Walker habeas and similarly make a determination as to what should be granted public access and what (if any) should be under seal. See Appellant's Brief at p. 39. The reasoning is simple — documents filed in a judicial proceeding are presumptively

available to the public, and the burden of proof lies on the party seeking to keep them under seal. As this Court has, itself, noted, "Courts have long recognized a common-law right of access to judicial records." *Mann v. Boatright,* 477 F.3d 1140, 1149 (10th Cir. 2007) (citations omitted).

In accord see *Courthouse News Svce. v. Planet*, 947 F.3d 581, 592 (9th Cir. 2020); *Parson v. Farley*, 352 F. Supp.3d 1141, 1152 (N.D. Okla. 2018).

In Walker's Response it is argued that the failure to raise this issue below precludes any ruling on this matter in the current case. See Walker Response at pp. 13-14.

In fact, this issue was raised below. In the Appellant's initial motion for recusal (Dkt. Entry No. 1145, Nov. 21, 2019), the Church specifically referenced the fact that the lower court had similarly sealed an "overwhelming majority" of the filings. See n. 5 therein, at p. 15. And, indeed, a partial list (numbering 38 separate documents) was set forth in the motion's "Background". See *id*. at pp. 1-2. The issue was further brought to the lower court's attention in the Motion for Re-consideration. Dkt. Entry No. 1148. There the Movant Church specifically referenced "The continued sealing of the record . . ." *Id*. at p. 2. The record plainly meaning the entire record, not just the transcript.

As was stated in Appellant's Brief it would be an absurd waste of judicial resources for this Court to remand the matter to the lower court and restrict its order

to properly review the record as to sealing, but only limit it to the transcript — thereby forcing the Movant-Appellant to file a new motion addressing the "pleadings".

III

CONCLUSION

Based upon all of the foregoing, it is respectfully requested that this Court vacate the lower court's order regarding the unsealing of the transcripts of the Walker habeas evidentiary hearing, remand this matter to the District of Colorado, re-assign this case to another Article III judge, and direct that judge to conduct a proper analysis of the entire record — both pleadings and transcripts — and only seal those portions that should be properly kept confidential under the existing case law.

Dated: July 10, 2020
Somers, NY

/s/ *Bernard V. Kleinman*
Bernard V. Kleinman, Esq.
Attorney for Movant-Appellant

IV

CERTIFICATE OF COMPLIANCE WITH F.R.App.P. RULE 32(a)(7)(C)

Pursuant to Rule 32(e), and L.R. 32, undersigned counsel affirms that this Brief is set out in the proportionate Times New Roman, 14 point, footnotes in Times New Roman 12 point, and contains a word count of 6,387.

V

CERTIFICATE OF DIGITAL SUBMISSION & PRIVACY REDACTIONS

I hereby certify that all privacy redactions have been made to this document. I further certify that the foregoing document has been scanned for viruses with McAfee Antivirus Software Release 23.1, Definition Update Version 4127.0, July 7, 2020. According to such scan the document and the attendant Appendix are virus free.

VI

CERTIFICATE OF COMPLIANCE WITH ECF FILING

I do hereby certify that this Brief and Appendix, to be submitted in hard copy, is the same document as was ECF filed with the Office of the Clerk and submitted electronically.

/s/ *Bernard V. Kleinman*
Bernard V. Kleinman
Attorney for Movant-Appellant
Colorado Springs
Fellowship Church

VII

CERTIFICATE OF SERVICE

I, Bernard V. Kleinman, attorney of record for the Movant-Appellant herein, do hereby certify that on July 10, 2020, I did electronically file the foregoing Brief and Appendix with the Clerk of the Court using the CM/ECF filing system, and did serve a copy on the below named parties, attorney for the Appellee United States, and attorney for Appellee Walker, by ECF filing with this Court, and by email to the addresses as set forth below:

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