

Hon. Lyle Cayce, Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA, 70130-3408
Delivered via e-mail, Lyle_Cayce@ca5.uscourts.gov

February 3, 2022

Dear Clerk Cayce:

My name is Gabe Roth, and I am the executive director of Fix the Court, a national nonpartisan organization that advocates for greater transparency and accountability in the federal judiciary.

I write to submit a complaint against Fifth Circuit Judge Jerry Smith under Rule 6 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Canon 3(A)(3) of the Code of Conduct for U.S. Judges states that a judge “should be patient, dignified, respectful, and courteous to [...] lawyers and others with whom the judge deals in an official capacity,” and Judge Smith violated this canon during an argument last month.

In the Jan. 6, 2022, proceedings in 21-30219, *Zummer v. Sallet*, Judge Smith asked Justice Department attorney Josh Koppel to remove his mask as he began presenting his argument. Koppel, meanwhile, had just been compelled by court order to fly from Washington, D.C., to New Orleans to present oral argument, was adhering to CDC guidelines regarding indoor masking at a time when COVID-19 transmission was near a record high due to a variant about which little was known, and, as the court knew per an earlier filing, has two pre-vaccination-age children.

According to the audio recording, Judge Smith said to Koppel, “Remove your mask, if you would.” Koppel responded by saying: “I prefer to leave it on,” after which Smith said, “We would prefer that you remove it, thank you. [...] We would prefer that you remove it.” It seems as if Koppel then did remove his mask. His initial response was plainly audible on the court’s audio recording, indicating that the mask was not impeding Judge Smith’s ability to hear him.

Given that older Americans — a category that most federal judges fall into — are far more likely to get sick and die from COVID than anyone else, wearing a mask should not be considered an act of defiance or disrespect in the courtroom, especially at a time when Omicron was raging and its severity was not fully understood. And since neither the judiciary as a whole or the Fifth Circuit, to my knowledge, has mandated vaccines and boosters for its judges and everyone who appears in person in their courtrooms, not knowing the panel’s vaccination status, or that of others in the courtroom at the time, makes Koppel’s decision to wear a mask that much more a kindness.

What’s more, if Judge Smith does not take COVID seriously, even as 2,500 of his fellow Americans are dying each day on average and close to 900,000 Americans have died from it in total, it is likely he will not be unbiased should cases concerning the disease reach his courtroom.

We all want to be done with COVID, and it can be confusing knowing when and where we need to wear a mask based on how many people we might encounter at a given time, the twists and turns of the disease and its variants, the vaccination status of those around us and dozens of other variables. I, too, often roll my eyes when I see someone wearing a mask walking down my street — but then I say to myself, maybe that person is sick, or he has a sick family member, or he just left a crowded subway or grocery store or has any number of other reasons he thinks he should wear a mask, and it’s not my place to judge that decision. Neither was it the place of Judge Smith.

Finally, though there have been recent updates to the Code of Conduct stating that a judge who is a witness to misconduct must report misconduct, and if they don’t, they may be subject to their own complaint, I am not including Judge Smith’s Jan. 6 panel-mates Judge Elrod and Judge Oldham here and will leave it up to Chief Judge Owen to make any such determination.

Sincerely,
Gabe Roth

Judicial Council of the Fifth Judicial Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 4 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. Requests for copies of the rules should be directed to: Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. The rules are also available at www.ca5.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. Only an original of the complaint must be filed. Enclose the copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to: Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: Gabe Roth
Contact Address: 762 Park Pl., PH3, Brooklyn, N.Y., 11216
Daytime telephone: 312-545-8556
2. Name(s) of Judge(s): Court: Fifth Circuit Judge Jerry Smith
3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

☒ Yes ☐ No

If "yes," give the following information about each lawsuit:

Court: Fifth Circuit

Case Number: 21-30219, *Zummer v. Sallet*

Docket number of any appeal to the 5th Circuit: See above

Are (were) you a party or lawyer in the lawsuit?

☐ Party ☐ Lawyer ☒ Neither

If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

4. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

5. **Declaration and signature:**

I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature)  (Date) 2/3/2022