No. 11-10264

In the
United States Court of Appeals
for the Fifth Circuit
New Orleans, Louisiana

ZENA D. CRENSHAW-LOGAL,
Plaintiff – Appellant

v.

CITY OF ABILENE, TEXAS,
Defendant – Appellee

On Appeal from the United States District Court for the
Northern District of Texas, Abilene Division

BRIEF OF THE APPELLANT

Zena D. Crenshaw-Logal,
Appellant *Pro Se*
7519 W. 77th Avenue
Crown Point, Indiana 46307
219.865.6248

No. 11-10264

In the
United States Court of Appeals
for the Fifth Circuit
New Orleans, Louisiana

ZENA D. CRENSHAW-LOGAL,	)	Appeal from the
Plaintiff-Appellant	)	U.S. District Court for the
	)	Northern District of Texas
-vs-	)	at Abilene
	)	
CITY OF ABILENE, TEXAS,	)	Civil Action No. 1:10-CV-132-C
Defendant-Appellee	)	The Honorable Sam R. Cummings, Judge

Appellant's Fifth Circuit Rule 28.2.1 Certificate of Interested Persons

The undersigned Appellant *pro se*, certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.:

- **Zena D. Crenshaw-Logal**, Plaintiff-Appellant;
- **City of Abilene, Texas**, Defendant-Appellee;
- **George Stokes, Sr.**, Prospective Plaintiff as former president of the Texas State Client Council – Abilene Division (TSCCAD);
- **Michayl Mellen**, Prospective Plaintiff as former corresponding secretary of the TSCCAD;
- **Unascertained, previously confidential informants** of TSCCAD and / or POPULAR, Inc., Prospective Plaintiffs;
- **TSCCAD**, Prospective Plaintiff;
- **POPULAR, Inc.**, Prospective Plaintiff;
- **Taylor County, Texas**, Prospective Defendant; and
- **State of Texas**, Prospective Defendant.

On April 29, 2011, the undersigned emailed both attorneys Smith and Messer, listed below, inquiring as to any additional names they "know should be identified pursuant to 5th Cir. R. 28.2.1" and requesting their response by May 3, 2011 or such later date they specify. The Appellant had not received a response to said email, as far as she can determine, upon service of her brief in the above captioned appeal.

Opposing law firms and / or counsel in the case:

T. Daniel Santee, II, City Attorney
City of Abilene, Texas

Stanley E. Smith,
Office of the City Attorney
City of Abilene, Texas

Kelley K. Messer,
Office of the City Attorney
City of Abilene, Texas

Theresa James,
Office of the City Attorney
City of Abilene, Texas.

Appellant's statement identifying any parent corporation and any publicly held corporation that owns ten percent (10%) or more of stock:

There is no such corporation

Respectfully Submitted,

/s/ **Zena D. Crenshaw-Logal**
Zena D. Crenshaw-Logal,
Appellant *Pro Se*
7519 W. 77th Avenue
Crown Point, Indiana 46307
219.865.6248

Case No. 11-10264

In the
United States Court of Appeals
for the Fifth Circuit
New Orleans, Louisiana

ZENA D. CRENSHAW-LOGAL, **Plaintiff-Appellant** -vs- CITY OF ABILENE, TEXAS, **Defendant-Appellee**	)))))))	Appeal from the U.S. District Court for the Northern District of Texas at Abilene Civil Action No. 1:10-CV-132-C The Honorable Sam R. Cummings, Judge

Appellant's Fifth Circuit Rule 28.2.3 Statement Regarding Oral Argument

The undersigned Appellant *pro se*, hereby waives oral argument.

Respectfully Submitted,

/s/ **Zena D. Crenshaw-Logal**
Zena D. Crenshaw-Logal,
Appellant *Pro Se*
7519 W. 77th Avenue
Crown Point, Indiana 46307
219.865.6248

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Jurisdictional Statement

I.

Jurisdiction of the district court is predicated upon the United States Constitution, to wit: Article III Section 2 *(case and controversy arising under the Constitution and laws of the United States)*; Article VI *(the Supremacy Clause - the Constitution of the United States and laws enacted pursuant thereto as the Supreme Law of the Land)*; the Ninth and Tenth Amendments *(rights retained and reserved by the people)*; the First and Fifth Amendments made applicable to the several states by the Fourteenth Amendment; the due process and equal protection provisions of the Fourteenth Amendment; and various statutes to wit: Title 42 U.S.C. §1983 (*deprivation of federally protected rights under color of law*); Title 28 U.S.C. §1331 *(federal question)* and Title 28 U.S.C. §1343(a) (*deprivation of federally protected right under color of law*).

Jurisdiction is conferred on the appellate court pursuant to 28 U.S.C. §1291 as the plaintiff's motion for relief under Federal Rule of Civil Procedure 60(b)(6) was filed on **January 13, 2011**, within 28 days of the judgment and order entered against her on **December 20, 2010**. She accordingly appeals from the **February 10, 2011** denial of that motion and the underlying judgment and order of December 20, 2010. **Notice of Appeal** was filed by the plaintiff on **March 9, 2011**.

This appeal is from a final order and judgment disposing of all parties' claims and the trial court's interim denial of plaintiff's motion for relief, filed within 28 days of that final order and judgment against her as contemplated by Federal Rule of Appellate Procedure 4(a)(A)(vi).

II.

On June 23, 2010, the plaintiff filed a *pro se* complaint with jury demand before the U.S. District Court for the Northern District of Texas at Abilene, alleging as follows pursuant to Title 42 U.S.C. §1983:

. . .

1. I am an American citizen residing in the State of Indiana and a volunteer administrator of multiple grassroots, nonprofit, non-governmental organizations that are anti-corruption, good government advocates;

2. One such organization is POPULAR, Inc. (POPULAR), a national legal reform advocate;

3. POPULAR stands for "Power Over Poverty Under Laws of America Restored." It is an association of public interest attorneys and law school graduates committed to helping poor and other disadvantaged people access affordable and competent legal representation, important civil and criminal justice system reforms, as well as appropriate judicial oversight;

4. POPULAR is advised by a board of lay community leaders. Its Advisory Board members have included Michayl Mellen of Abilene, Texas since POPULAR began in late 2008;

5. I have regularly communicated and pursued social justice initiatives with Mr. Mellen throughout most of this millennium;

6. In the process I shared many thoughts and impressions with Mellen by written communications, some of which are reportedly among his electronic and paper files searched and / or seized by one (1) or more agents of the Abilene Police Department on or about April 9, 2010;

7. Those writings reflect sensitive aspects of my advocacy, including lawful but controversial reforms I am contemplating and otherwise pursuing with fellow citizens and organizations for certain Taylor County, Texas residents;

8. In addition to confidential writings and documents I created, Mellen reportedly collected and maintained items and information to facilitate our shared monitoring of criminal law enforcement in Taylor County, Texas;

9. Mellen regularly disseminated related contentions through local media, broad email circulation, and blog posts;

10. Some have been conveyed via POPULAR's website which links to webcasts, videos, and press releases collectively appearing many hundred thousand times online;

11. In fact Mellen has long been an outspoken critic of the criminal justice system directly serving Taylor County, Texas on a local, state, and federal level. Prior to the search and seizure at issue, he regularly and widely advised agents of that system of his association with POPULAR and the Texas State Client Council Abilene Division (TSCCAD);

12. Mellen is "Corresponding Secretary" for and has been an officer of TSCCAD at all relevant times;

13. At all relevant times Mellen's computer(s) and files included "work product materials" within the meaning of the Privacy Protection Act, specifically Title 42 U.S.C. § 2000aa-7(b);

14. All and certainly the key government agents involved with searching and seizing that work product material must or should have known it could include confidential items belonging or relating to me and other POPULAR as well as TSCCAD affiliates;

15. All and certainly the key government agents involved with searching and seizing that work product material must or should have known it could identify one (1) or more confidential informants of TSCCAD and / or POPULAR and / or disclose information gleaned by the group(s) from one (1) or more confidential informants;

16. "(R)esponsible officials, including judicial officials, must take care to assure that (corresponding searches) are conducted in a manner that minimizes unwarranted intrusions upon privacy." *See, Andresen v. Maryland*, 427 U.S. 463 at 482, n.11 (1976);

17. Such precautions were not brought to bear for the referenced search and seizure of Mellen's computer(s) and files;

18. That search and seizure subverts many fundamental objectives of the Privacy Protection Act, Title 42 U.S.C. § 2000aa *et seq*,

19. The search and seizure unduly chills all criminal justice system watchdogs, particularly individuals and groups operating in the U.S. on a grassroots basis, their information gathering processes and corresponding informants;

20. The search and seizure theoretically if not actually provides unfettered access by law enforcement officers, prosecutors, and judges serving Taylor County, Texas to work product material of private citizens monitoring their conduct;

21. Neither agent nor their agencies self-recused given the prospect of that work product material implicating one (1) or more of them in unethical, illegal, and / or criminal conduct;

22. Neither agent nor their agencies self-recused despite the foreseeable, unavoidable, and irreparable harm attendant to that failure;

23. Apparently no arrangements were made for Mellen to be represented by appropriate experts during the referenced search and seizure;

24. Apparently Mellen was not provided an inventory of items accordingly seized;

25. All acts of omission and commission of which I am aware and on which I now premise this lawsuit, transpired pursuant to the defendant's prevailing practices, policies, and / or operating procedures;

26. Jacob Weise, who I believe is with the Abilene Police Department, is the affiant who precipitated the April 9, 2010 "SEARCH AND ARREST WARRANT" issued by Magistrate Lee Hamilton against Mellen;

27. As of at least May 20, 2010, the Taylor County District Attorney's Office has been aware of this matter;

28. As a direct and proximate result of said practices, policies, and / or operating procedures as well as the corresponding acts and omissions, I have experienced and continue experiencing a violation of privacy; my ability to associate with fellow citizens in petitioning government and otherwise accomplishing appropriate government oversight is unduly impeded; and I am accordingly denied due process as well as the equal protection of law;

29. As a direct and proximate result of the indicated violations of constitutional rights and my corresponding losses of liberty, I have been and continue to be inconvenienced, forced to incur the cost of this action, and subjected to emotional distress; WHEREFORE I pray for judgment against the defendant for compensatory damages, the costs of this action as well as any and all other relief, just and proper upon the premises.

. . .

[R.E. #14/ **Pltf's 1983 Cmplt w Cover Sht**, D.E. #1, pp 2-5].

In response to the defendant's corresponding claim that she lacks standing, the plaintiff advanced the following contentions:

. . .

I. Whether analyzed as a facial or "as-applied" challenge of relevant practices, policies, and / or operating procedures, "(t)he causation and redressability prongs of the standing inquiry are easily satisfied here."

A. "(I)nterests protected by the Supremacy Clause . . . are at issue" even if the defendant has not searched or seized material I possessed, prepared, produced, authored, and / or created.

. . .

B. In proposing my injuries are speculative, the defendant ignores ". . . concerns in the First Amendment context that are 'weighty enough to overcome our well-founded reticence' regarding facial challenges."

. . .

C. A group's functioning is undoubtedly enhanced by one (1) or more administrators, which bureaucracy should not impede constitutional freedoms.

. . .

D. By penalizing poorer people engaged in PPA activities, the defendant creates a distinction ". . . unless shown to be necessary to promote a compelling governmental interest, (that) is unconstitutional."

. . .

E. In bringing to bear against Michayl Mellen, unbridled access to work product material, the defendant ensured constitutional requirements and "basic practical and prudential concerns underlying the standing doctrine are generally satisfied" in this case.

. . .

The plaintiff's briefing on the foregoing matters are incorporated herein by reference. [R.E. #11/ **Pltf's Brf Sptng Rsp to Dft's 12(b)(6) Mtn**, D.E. #9-1].

When the trial court determined that she lacks standing based on considerations the defendant had not proposed, the plaintiff advanced the following contentions pursuant to Federal Rule of Civil Procedure 60(b)(6):

. . .

> **I. Obviously when the search and seizure precipitating this case occurred, the defendant did not have an apparatus to minimize unwarranted intrusions upon privacy or failed to train and / or supervise so it would be utilized.**
>
> > **A. The defendant hardly avoids "to the greatest possible extent, seizure of (confidential information that has) no relationship to the crimes being investigated" by "theoretically if not actually (providing) unfettered access by law enforcement officers, prosecutors, and judges serving Taylor County, Texas to work product material of private citizens monitoring their conduct."**
>
> . . .
>
> **II. I seek vindication for the defendant's reported invasion of my privacy, unwarranted degradation of me as a reform advocate, and corresponding inhibition of my First Amendment activities; not to ". . . transform the federal courts into '. . . a vehicle for the vindication of the value interests of concerned bystanders'."**
>
> . . .

The plaintiff's briefing on the foregoing matters are incorporated herein by reference. [R.E. #7/ **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1].

Statement of Issues

1. Whether the plaintiff had "fair notice of what was necessary to successfully plead (her 42 U.S.C. §1983) cause of action";
2. Whether the record lacks 'ample and obvious grounds' to affirm the denial of plaintiff's motion for relief from judgment and order;
3. Whether the plaintiff's trial court motion pursuant to Federal Rule of Procedure 60(b)(6) and preceding response to the defendant's motion to dismiss, confirm the error of dismissing this case, particularly with prejudice.

Statement of the Case and of the Facts

The plaintiff is a volunteer administrator of multiple grassroots, nonprofit, non-governmental organizations that are anti-corruption, good government advocates. [*See,* R.E. #14/ **Pltf's 1983 Cmplt w Cover Sht**, D.E. #1, ¶ 1, p. 2]. She has regularly communicated and pursued social justice initiatives with Mr. Michayl Mellen of Abilene, Texas. [*See,* R.E. #14/ **Pltf's 1983 Cmplt w Cover Sht**, D.E. #1, ¶ 5, p. 2]. In the process she shared many thoughts and impressions with Mr. Mellen by written communications, some of which are reportedly among his electronic and paper files searched and / or seized by one (1) or more agents of the Abilene Police Department on or about April 9, 2010. [*See,* R.E. #14/ **Pltf's 1983 Cmplt w Cover Sht**, D.E. #1, ¶ 6, p. 2]. The plaintiff alleges that the search and seizure "subverts many fundamental objectives of the Privacy Protection Act, Title 42 U.S.C. § 2000aa *et seq*". [*See,* R.E. #14/ **Pltf's 1983 Cmplt w Cover Sht**, D.E. #1, ¶ 18, p. 4]. She contends that "(a)s a direct and proximate result of (related) practices, policies, and / or operating procedures as well as . . . corresponding acts and omissions, (she) experienced . . . a violation of privacy; (her) ability to associate with fellow citizens in petitioning government and otherwise accomplishing appropriate government oversight is unduly impeded; and (she is) accordingly denied due process as well as the equal protection of law". [*See,* R.E. #14/ **Pltf's 1983 Cmplt w Cover Sht**, D.E. #1, ¶ 28, p. 5].

On February 10, 2011, the Abilene Division of the U.S. District Court for the Northern District of Texas recounted the background of this case as follows:

> Plaintiff filed her original complaint against Abilene on June 23, 2010, asserting a number of constitutional violations related to an allegedly illegal search and seizure conducted in Abilene, Texas, on April 9, 2010. Abilene filed its 12(b) motion to dismiss on July 13, 2010. On December 20, 2010, the Court granted

> Abilene's motion to dismiss based on Plaintiff's lack of standing and, even assuming that she did have standing, her failure to state a claim upon which relief can be granted. Plaintiff filed her Rule 60(b)(6) motion for relief from judgment and order on January 13, 2011.
>
> . . .
>
> [*See,* R.E. #3/ **Dist. Ct. Order of 2/10/11**, D.E. #19, pp 1-2].

According to the trial court, the referenced Rule 60(b)(6) motion does not ". . . allege any extraordinary circumstances or other exceptional arguments that merit . . ." relief from its judgment and order dismissing this case on December 20, 2010. [*See*, R.E. #3/ **Dist. Ct. Order of 2/10/11**, D.E. #19, p. 3]. The district court interjects, "(r)ather, Plaintiff's [60(b)(6)] motion consists entirely of argument that is either a restatement of her response to Abilene's motion to dismiss or argument that could have been raised in said response." [*See,* R.E. #3/ **Dist. Ct. Order of 2/10/11**, D.E. #19, p. 3].

> The central points of plaintiff's trial rule 60(b)(6) motion are as follows:
>
> **I. Obviously when the search and seizure precipitating this case occurred, the defendant did not have an apparatus to minimize unwarranted intrusions upon privacy or failed to train and / or supervise so it would be utilized.**
>
> **A. The defendant hardly avoids "to the greatest possible extent, seizure of (confidential information that has) no relationship to the crimes being investigated" by "theoretically if not actually (providing) unfettered access by law enforcement officers, prosecutors, and judges serving Taylor County, Texas to work product material of private citizens monitoring their conduct."**
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> **II. I seek vindication for the defendant's reported invasion of my privacy, unwarranted degradation of me as a reform advocate, and corresponding inhibition of my First Amendment activities; not to ". . . transform the federal courts into '. . . a vehicle for the vindication of the value interests of concerned bystanders'."**
>
> . . .

> **III. "(P)roof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury."**
>
> . . .
>
> [*See*, R.E. #7/ **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1].

According to the defendant, "(w)hat Plaintiff has done (with these contentions) is made further and additional argument(s) in support of her Response to Defendant's 12(b)(6) motion to dismiss." [*See*, R.E. #5/ **Dft's Brf Sptng Rsp to Pltf's 60(b)(6) Mtn**, D.E. #18, p. 3].

In asserting to the trial court that the plaintiff lacks standing and / or fails to state a claim upon which relief can be granted, the City of Abilene, Texas contends:

> . . .
>
> 9. In the complaint, Plaintiff alleges that she is a volunteer administrator of multiple grassroots, nonprofit, non-governmental organizations that are anti-corruption, good government advocates. Plaintiff further alleges that one such advocate is POPULAR, Inc.
>
> 10. In the complaint, Plaintiff alleges that Michayl Mellen, of Abilene, Texas, is an advisory board member of POPULAR, Inc., and that she has communicated her thoughts and impressions with Michayl Mellen regarding controversial reforms which she is purusing in Taylor County, Texas. Plaintiff further alleges that on or about April 9, 2010, Michayl Mellen's electronic and paper files were searched and/or seized by the Abilene Police Department, and that such files belonging to Michayl Mellen reportedly contained Plaintiff's thoughts and impressions.
>
> 11. In the complaint, Plaintiff alleges that Michayl Mellen is corresponding secretary and former officer of Texas State Client Council Abilene Division, and that Michayl Mellen is an out-spoken critic of the criminal justice system of Taylor County, Texas. Plaintiff further alleges that Michayl Mellen's computer(s) and files are 'work product materials' and therefore protected from unlawful search and seizure.
>
> 12. Plaintiff attempted to invoke subject matter jurisdiction of this Court by alleging violation of her rights under the Privacy Protection Act of 1980 (42 U.S.C. § 2000aa). Plaintiff, however, did not allege that any computer(s), electronic or paper files were seized from her. 42 U.S.C. § 2000aa-6 provides that 'a person aggrieved by a search for or seizure of materials in violation of this chapter shall have a civil cause of action for

damages for such search and seizure . . .' At best, Plaintiff has alleged that Michayl Mellen, POPULAR, Inc., and/or Texas State Client Council Abilene Division have standing to bring this action. Also, Plaintiff has not demonstrated an injury to herself. At best, Plaintiff has alleged an injury to Michayl Mellen, POPULAR, Inc., and/or Texas State Client Council Abilene Division.

13. Also, because Plaintiff alleges in her complaint that her 'thoughts and impressions' were reportedly among or could have been included in Michayl Mellen's electronic and paper files, it is speculative as to whether Plaintiff will actually suffer injury due to the search and/or seizure of the computer(s) and files belonging to Michayl Mellen.

. . .

16. In the complaint, Plaintiff alleges that the Abilene Police Department violated the Privacy Protection Act of 1980 (42 U.S.C. § 2000aa) by unlawfully seizing and/or searching the computer(s) and files owned by Michayl Mellen. The Privacy Protection Act of 1980 provides that 'it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.' The Privacy Protection Act of 1980 also provides that 'this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if . . . the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography . . .' Plaintiff did not allege that the search and/or seizure of computer(s) and electronic and paper files owned by Michayl Mellen involving the possession of child pornography. Therefore, even if Plaintiff proves the facts alleging in the complaint, she cannot prove the elements necessary to state a claim for violation of 42 U.S.C. § 2000aa.

17. Plaintiff may have also attempted to state a cause of action for violation of her Fourteenth Amendment due process constitutional rights. Plaintiff, however, did not allege that the Defendant purposefully intended to cause her harm, nor did she allege that the Defendant's actions were taken with deliberate indifference. Therefore, even if Plaintiff proves the facts alleged in the complaint, she cannot prove the elements necessary to state a claim for violation of her Fourteenth Amendment constitutional rights. County of Sacramento v. Lewis, 523 U.S. 833 (1998).

. . .

[*See*, R.E. #13/ **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6, ¶¶ 9-13, 16-17, pp 2-3].

In dismissing this case, the district court never quotes or specifically references these contentions or otherwise suggests they were not firmly refuted by the plaintiff's corresponding, trial court

response. [*See*, R.E. ## 8 & 9/ **Dist. Ct. Jdgmt of 12/20/11**, D.E. #15 / **Dist. Ct. Order of 12/20/11**, D.E. #14].

Summary of the Argument

I. The plaintiff could not have had fair notice of what was necessary to successfully plead her 42 U.S.C. §1983 cause of action; the record even lacks 'ample and obvious grounds' for denial of her motion for relief from judgment and order.

In dismissing this case, the district court never quotes or specifically references the defendant's contentions or otherwise suggests they were not firmly refuted by the plaintiff's trial court response. Instead the court sets forth new considerations. The defendant's preceding motion to dismiss gives no indication that such matters are in dispute beyond stating principles of justiciability from cases that are not central to the judgment and orders at issue. In fact neither the defendant nor the trial court cite *Allen v. Wright, et al,* 468 U.S. 737 (1984), which is pivotal in evaluating the trial court's *sua sponte* conclusions about standing.

Plaintiff's ". . . extensive treatment of (relevant) pleading requirements . . . evidences a clear effort to cross the required threshold", but without a meaningful (i.e. intelligible) trial-court critique of those arguments, "(w)e must (not) assume . . . that (she) pleaded (her) best case" or ". . . that remanding the case to allow another pleading would do nothing but prolong the inevitable . . ." And while this Court "need not defer to the district court's" determination of pivotal factors, a record lacking 'ample and obvious grounds' for that lower court decision is 'fatal to affirmance'.

II. As of the plaintiff's trial court motion pursuant to Federal Rule of Procedure 60(b)(6), if not before, the error of dismissing this case, particularly with prejudice, was obvious.

A district court generally ". . . errs in dismissing a *pro se* complaint for failure to state a claim under Rule 12(b)(6) without giving the plaintiff an opportunity to amend" to include available details, especially when the dismissal is largely *sua sponte*. As of the plaintiff's Rule 60(b)(6) motion if not before, it was obvious per the pleadings that the defendant did not have an apparatus to minimize unwarranted intrusions upon privacy or failed to train and / or supervise so it would be utilized. Such proof ". . . would suffice to establish that the (defendant) itself was liable for the plaintiff's constitutional injury."

The Argument

I. The plaintiff could not have had fair notice of what was necessary to successfully plead her 42 U.S.C. §1983 cause of action; the record even lacks 'ample and obvious grounds' to affirm the denial of her motion for relief from judgment and order.

In 1988, the U.S. Supreme Court made clear that . . .

> Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment. In particular, Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5). The Rule does not particularize the factors that justify relief, but . . . it provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,' . . . while also cautioning that it should only be applied in 'extraordinary circumstances'
>
> . . .
>
> *Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847 at 863-864 (1988). (internal footnotes and citations omitted).

'To overturn the district court's denial of (a) 60(b) motion, it is not enough that a grant of the motion might have been permissible or warranted; rather, the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion.' *Lancaster v. Presley*,

35 F.3d 229 at 231 (5th Cir. 1994) (quoting *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir.1977)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1380, 131 L.Ed.2d 233 (1995). 'A trial court abuses its discretion when its ruling is based on an erroneous view of the law . . . ' *U.S. v. Garcia*, 530 F.3d 348 at 351 (5th Cir. 2008) (quoting *U.S. v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008).

On February 10, 2011, the Abilene Division of the U.S. District Court for the Northern District of Texas recounted the background of this case as follows:

> Plaintiff filed her original complaint against Abilene on June 23, 2010, asserting a number of constitutional violations related to an allegedly illegal search and seizure conducted in Abilene, Texas, on April 9, 2010. Abilene filed its 12(b) motion to dismiss on July 13, 2010. On December 20, 2010, the Court granted Abilene's motion to dismiss based on Plaintiff's lack of standing and, even assuming that she did have standing, her failure to state a claim upon which relief can be granted. Plaintiff filed her Rule 60(b)(6) motion for relief from judgment and order on January 13, 2011.
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> [*See,* R.E. #3/ **Dist. Ct. Order of 2/10/11**, D.E. #19, pp 1-2].

According to the trial court, the plaintiff's referenced Rule 60(b)(6) motion does not ". . . allege any extraordinary circumstances or other exceptional arguments that merit . . ." relief from its judgment and order dismissing this case on December 20, 2010. [*See*, R.E. #3/ **Dist. Ct. Order of 2/10/11**, D.E. #19, p. 3]. The district court interjects, "(r)ather, Plaintiff's [60(b)(6)] motion consists entirely of argument that is either a restatement of her response to Abilene's motion to dismiss or argument that could have been raised in said response." [*See,* R.E. #3/ **Dist. Ct. Order of 2/10/11**, D.E. #19, p. 3]. It should be obvious or discernible from case law that "(t)hese considerations are factual matters." *See, Koon v. United States*, 518 U.S. 81 at 100 (1996).

The *Koon Court* considered ". . . whether the (conduct at issue sufficed) to make the case atypical", and confirmed that underlying ". . . considerations are factual matters." *Id.* "This does not mean that district courts do not confront questions of law in (the process)." *Id.* According to our High Court, ". . . whether a factor is a permissible basis for (lower-court disposition) under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point." *Id.*

In representing to the trial court that the plaintiff lacks standing and / or fails to state a claim upon which relief can be granted, the City of Abilene, Texas contends:

. . .

> 9. In the complaint, Plaintiff alleges that she is a volunteer administrator of multiple grassroots, nonprofit, non-governmental organizations that are anti-corruption, good government advocates. Plaintiff further alleges that one such advocate is POPULAR, Inc.
>
> 10. In the complaint, Plaintiff alleges that Michayl Mellen, of Abilene, Texas, is an advisory board member of POPULAR, Inc., and that she has communicated her thoughts and impressions with Michayl Mellen regarding controversial reforms which she is purusing in Taylor County, Texas. Plaintiff further alleges that on or about April 9, 2010, Michayl Mellen's electronic and paper files were searched and/or seized by the Abilene Police Department, and that such files belonging to Michayl Mellen reportedly contained Plaintiff's thoughts and impressions.
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> 12. Plaintiff attempted to invoke subject matter jurisdiction of this Court by alleging violation of her rights under the Privacy Protection Act of 1980 (42 U.S.C. § 2000aa). Plaintiff, however, did not allege that any computer(s), electronic or paper files were seized from her. 42 U.S.C. § 2000aa-6 provides that 'a person aggrieved by a search for or seizure of materials in violation of this chapter shall have a civil cause of action for damages for such search and seizure . . .' At best, Plaintiff has alleged that Michayl Mellen, POPULAR, Inc., and/or Texas State Client Council Abilene Division have standing to bring this action. Also, Plaintiff has not demonstrated an injury to herself. At

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13. Also, because Plaintiff alleges in her complaint that her 'thoughts and impressions' were reportedly among or could have been included in Michayl Mellen's electronic and paper files, it is speculative as to whether Plaintiff will actually suffer injury due to the search and/or seizure of the computer(s) and files belonging to Michayl Mellen.

. . .

16. In the complaint, Plaintiff alleges that the Abilene Police Department violated the Privacy Protection Act of 1980 (42 U.S.C. § 2000aa) by unlawfully seizing and/or searching the computer(s) and files owned by Michayl Mellen. The Privacy Protection Act of 1980 provides that 'it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.' The Privacy Protection Act of 1980 also provides that 'this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if . . . the offense involves the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography . . .' Plaintiff did not allege that the search and/or seizure of computer(s) and electronic and paper files owned by Michayl Mellen involving the possession of child pornography. Therefore, even if Plaintiff proves the facts alleging in the complaint, she cannot prove the elements necessary to state a claim for violation of 42 U.S.C. § 2000aa.

17. Plaintiff may have also attempted to state a cause of action for violation of her Fourteenth Amendment due process constitutional rights. Plaintiff, however, did not allege that the Defendant purposefully intended to cause her harm, nor did she allege that the Defendant's actions were taken with deliberate indifference. Therefore, even if Plaintiff proves the facts alleged in the complaint, she cannot prove the elements necessary to state a claim for violation of her Fourteenth Amendment constitutional rights. County of Sacramento v. Lewis, 523 U.S. 833 (1998).

. . .

[*See*, R.E. #13/ **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6, ¶¶ 9-13, 16-17, pp 2-3].

In dismissing this case, the district court never quotes or specifically references these contentions or otherwise suggests they were not firmly refuted by the plaintiff's corresponding trial court response. [*See*, R.E. ## 8 & 9/ **Dist. Ct. Jdgmt of 12/20/11**, D.E. #15 / **Dist. Ct. Order of**

12/20/11, D.E. #14]. Instead the court sets forth new considerations, prompting the plaintiff to advance the following key points:

> **I. Obviously when the search and seizure precipitating this case occurred, the defendant did not have an apparatus to minimize unwarranted intrusions upon privacy or failed to train and / or supervise so it would be utilized.**
>
> > **A. The defendant hardly avoids "to the greatest possible extent, seizure of (confidential information that has) no relationship to the crimes being investigated" by "theoretically if not actually (providing) unfettered access by law enforcement officers, prosecutors, and judges serving Taylor County, Texas to work product material of private citizens monitoring their conduct."**
>
> . . .
>
> **II. I seek vindication for the defendant's reported invasion of my privacy, unwarranted degradation of me as a reform advocate, and corresponding inhibition of my First Amendment activities; not to ". . . transform the federal courts into '. . . a vehicle for the vindication of the value interests of concerned bystanders'."**
>
> . . .
>
> **III. "(P)roof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury."**
>
> . . .
>
> [*See*, R.E. #7/ **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1].

Beyond stating principles of justiciability from cases that are not central to the judgment and orders at issue, the defendant's preceding motion to dismiss gives no indication that such matters[1] are in dispute. [*See*, R.E. ## 12 & 13/ **Dft's 12(b)(6) Mtn**, D.E. #5 / **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6]. In fact neither the defendant nor the trial court cite *Allen v. Wright, et al*, 468 U.S. 737 (1984), [*See*, R.E. ## 8, 9, 12 & 13/ **Dist. Ct. Jdgmt of 12/20/11**, D.E. #15 /

[1] According to the defendant, "(w)hat Plaintiff has done (with these contentions) is made further and additional argument(s) in support of her Response to Defendant's 12(b)(6) motion to dismiss." [*See*, R.E. #5/ **Dft's Brf Sptng Rsp to Pltf's 60(b)(6) Mtn**, D.E. #18, p. 3].

Dist. Ct. Order of 12/20/11, D.E. #14 / **Dft's 12(b)(6) Mtn**, D.E. #5 / **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6], which is pivotal in evaluating the trial court's *sua sponte* conclusions about standing. [*See*, R.E. #7/ **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1].

The plaintiff begins her brief for relief from judgment as follows:

> The U.S. Constitution and related principles counsel ". . . against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of apparatus established by the Executive Branch to fulfill its legal duties." *Allen v. Wright, et al*, 468 U.S. 737 at 761 (1984). This is not such a case.
>
> [*See*, R.E. #7/ **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1, p. 1].

Again, the defendant's motion to dismiss never suggests otherwise beyond stating principles of justiciability from cases that do not include *Allen v. Wright*. [*See*, R.E. ## 12 & 13/ **Dft's 12(b)(6) Mtn**, D.E. #5 / **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6]. "We traditionally presume, absent some indication in the record suggesting otherwise, that '[t]rial judges . . . know the law and apply it in making their decisions'." *U.S. v. Ruiz-Terrazas*, 477 F. 3d 1196 at 1201 (10th Cir. 2007) (quoting *United States v. Russell*, 109 F.3d 1503, 1512-13 (10th Cir. 1997) quoting *Walton v. Arizona*, 497 U.S. 639, 652, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). Hence there was no reason for the plaintiff to anticipate a misapprehension of *Allen v. Wright* until it was clear from the judgment and order dismissing this case with prejudice. [*See*, R.E. ## 8, 9, 12 & 13/ **Dist. Ct. Jdgmt of 12/20/11**, D.E. #15 / **Dist. Ct. Order of 12/20/11**, D.E. #14 / **Dft's 12(b)(6) Mtn**, D.E. #5 / **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6].

Of course "(t)he district court may dismiss an action on its own motion under Rule 12(b)(6) 'as long as the procedure employed is fair'." *Bazrowx v. Scott*, 136 F. 3d 1053 at 1054

(5th Cir. 1998). In this case, "(t)he plaintiff (can) now object that (she) did not have fair notice of what was necessary to successfully plead (her) § 1983 cause of action". *Cf., Jacquez v. Procunier*, 801 F. 2d 789 at 793 (5th Cir. 1986). Plaintiff's ". . . extensive treatment of (relevant) pleading requirements . . . evidences a clear effort to cross the required threshold", but without a meaningful (i.e. intelligible) trial-court critique of those arguments, "(w)e must (not) assume . . . that (she) pleaded (her) best case" or ". . . that remanding the case to allow another pleading would do nothing but prolong the inevitable . . ." *Cf., Jacquez v. Procunier.* While this Court "need not defer to the district court's" determination of pivotal factors, a record lacking 'ample and obvious grounds' for that lower court decision is 'fatal to affirmance'. *See, Carroll v. Fort James Corp.*, 470 F. 3d 1171 at 11175 (5th Cir. 2006) citing *Mayeaux v. Louisiana Health Service and Indem. Co*., 376 F. 3d 420, 426 (5th Cir. 2004).

II. As of the plaintiff's trial court motion pursuant to Federal Rule of Procedure 60(b)(6), if not before, the error of dismissing this case, particularly with prejudice, was obvious.

"When a district court's language is ambiguous, as it (arguably is) here, it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion"; "(a) remand directing the district court to clarify its order is generally permissible . . ." *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 at 1146 (2008). But "(t)he district court may be owed no deference, for instance, when the claim on appeal is that it made some sort of mathematical error . . . ; under these circumstances, the appellate court will be in as good a position to consider the question as the district court was in the first instance." *Koon at 98.*

The plaintiff hereby submits that her trial court motion for relief simply does not consist ". . . entirely of argument that is either a restatement of (her) response to Abilene's motion to dismiss or argument that could have been raised in said response"; in fact she contends that

motion and preceding response to the defendant's motion to dismiss, confirm the error of dismissing this case, particularly with prejudice. [*See*, R.E. ## 6,7, 10 &11/ **Pltf's 60(b)(6) Mtn**, D.E. #16/ **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1/ **Pltf's Rsp to Dft's 12(b)(6) Mtn**, D.E. #9/ **Pltf's Brf Sptng Rsp to Dft's 12(b)(6) Mtn**, D.E. #9-1]. While the district court aptly notes that a Rule 60(b)(6) motion "is generally not to serve as a substitute for an appeal", [*See*, R.E. #3/ **Dist. Ct. Order of 2/10/11**, D.E. #19, p. 2 citing *Fackelman v. Bell*, 564 F. 2d 734, 737 (5th Cir. 1977)], "(t)he purpose of the motion is to permit the trial judge to . . . correct obvious errors or injustices and so perhaps obviate the laborious process of appeal." *Fackelman v. Bell*, 564 F. 2d 734 at 736 (5th Cir. 1977). "Little turns . . . on whether we label review of this particular (case) abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon at 100*.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *See, Ashcroft v. Iqbal*, 129 S.Ct. 1937 at 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570(2007)). Undoubtedly this proposition is not limited ". . . to cases where a plaintiff has actually amended (her) complaint; it extends to any case where the pleadings, when viewed under the individual circumstances of the case, demonstrate that the plaintiff has pleaded (her) *best case*." *Cf., Jacquez at 793.* (emphasis in original).

"(E)ven if (the plaintiff should have anticipated the court's judgment and order of December 20, 2010 in whole or part) at the time of the complaint, (we cannot say their) requirements certainly were brought to (her) attention by the defendant's motion to dismiss." *Cf., Jacquez at 793* and *See*, R.E. ## 12 & 13/ **Dft's 12(b)(6) Mtn**, D.E. #5 & **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6. A district court generally ". . . errs in dismissing a *pro se* complaint for

failure to state a claim under Rule 12(b)(6) without giving the plaintiff an opportunity to amend" to include available details, especially when the dismissal is largely *sua sponte*. *See, Bazrowx at 1053* and *Jacquez at 789.* As of the plaintiff's Rule 60(b)(6) motion if not before, it was obvious per the pleadings that the defendant did not have an apparatus to minimize unwarranted intrusions upon privacy or failed to train and / or supervise so it would be utilized. [*See*, R.E. ## 4-7 & 10-14/ **Dft's Rsp to Pltf's 60(b)(6) Mtn**, D.E. #17/ **Dft's Brf Sptng Rsp to Pltf's 60(b)(6) Mtn**, D.E. #18 / **Pltf's 60(b)(6) Mtn**, D.E. #16 / **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1 / **Pltf's Rsp to Dft's 12(b)(6) Mtn**, D.E. #9 / **Pltf's Brf Sptng Rsp to Dft's 12(b)(6) Mtn**, D.E. #9-1 / **Dft's 12(b)(6) Mtn**, D.E. #5 / **Dft's Brf Sptng 12(b)(6) Mtn**, D.E. #6 / **Pltf's 1983 Cmplt w Cover Sht**, D.E. #1]. Such proof ". . . would suffice to establish that the (defendant) itself was liable for the plaintiff's constitutional injury." *See*, *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397 at 406 (1997) and *See,* R.E. #7/ **Pltf's Brf Sptng 60(b)(6) Mtn**, D.E. #16-1.

CONCLUSION

For the foregoing reasons, the Plaintiff-Appellant prays that this Court reverse the order entered below, denying her relief on February 10, 2011 from the December 20, 2010 judgment and order entered against her in *Crenshaw-Logal v. City of Abilene Texas*, No. 1:10-cv-00132-C

(N.D. Texas, Abilene); accordingly reverse that December 20, 2010 judgment and order; for costs of this appeal; and for any and all other relief, just and proper upon the premises.

Respectfully Submitted,

/s/ **Zena D. Crenshaw-Logal**
Zena D. Crenshaw-Logal,
Appellant *Pro Se*
7519 W. 77th Avenue
Crown Point, Indiana 46307
219.865.6248

Appellant's Certificate of Service

Comes now the Appellant and certifies that on **May 6, 2011**, an original and eight (8) copies of her foregoing brief with five (5) paper copies of her separate Record Excerpts and a digital version of the same was placed in the United States Mail, adequate postage prepaid for priority delivery, and addressed as follows:

Office of the Clerk
U.S. Court of Appeals, Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Appellant further certifies that on **May 6, 2011**, two (2) true and accurate copies of her foregoing brief with one (1) paper copy of her separate Record Excerpts and a digital version of the same was placed in the United States Mail, adequate first class postage prepaid and addressed as follows:

Stanley E. Smith,
Kelley K. Messer,
and Theresa James,
Office of the City Attorney

City of Abilene, Texas
P.O. Box 60
Abilene, Texas 79604

Respectfully Submitted,

/s/ **Zena D. Crenshaw-Logal**
Zena D. Crenshaw-Logal,
Appellant *Pro Se*
7519 W. 77th Avenue
Crown Point, Indiana 46307
219.865.6248