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

APPELLANT'S PETITION FOR PANEL REHEARING

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Points of Law and / or Fact the Court Seems to Overlook or Misapprehend

I. A few isolated words and phrases from my pleadings hardly align this case with the proverbial four (4) corners of *Laird v. Tatum,* 408 U.S. 1 (1972), and ensure corresponding assignments of error are "embraced by the record of these proceedings."

II. Considering that "(l)aw of the case directs a court's discretion, (but) does not limit the tribunal's power", *Arizona v. California*, 460 U.S. 605 at 618 (1983), *de novo* review of my case may prompt a trial court, another panel of this Court, appellate courts of other federal circuits, and / or the U.S. Supreme Court to recognize the standing I have claimed and disregard any opinion to the contrary.

III. The inapposite view of my claims resolved by this appeal render the process for me a 'meaningless ritual'.

IV. Newfound, categorical implausibility of third party secrets shared with suspected criminals which this Court links to my use of the words 'chill[ing]', 'theoretically', 'unfettered access', 'work product material', and 'reportedly' is not "a decree of a conclusive character" within the power of an Article III court to issue.

Argument in Support of Appellant's Petition for Panel Rehearing

"(T)o function within their constitutional sphere of authority", federal courts must resolve "real and substantial" controversies, not issue ". . . opinion(s) advising what the law would be upon a hypothetical state of facts." *North Carolina v. Rice,* 404 U.S. 244 at 246 (1971). Yet the Court hypothecates a theory of relief in this case; in fact a First Amendment claim that the U.S. Supreme Court foreclosed long ago:

. . .

> In essence, Crenshaw-Logal alleges that her speech is being chilled because the City might use communications she sent to Mellen to her detriment at some point in the future. The Supreme Court rejected this theory of standing almost forty years ago. In *Laird v. Tatum,* the Supreme Court held that allegations of 'subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm' . . . The 'mere existence,

> without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose' is not sufficient to invoke the jurisdiction of the federal courts . . . In other words, an injury in fact does not arise merely from an individual's knowledge that the government 'was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual'.
>
> *Crenshaw-Logal v. City of Abilene*, No. 11-10264 before the Fifth Cir. C.O.A., Per Curiam Opinion 8/4/11, p. 5. (Internal citations and footnote omitted).

Except for a paragraph of background information and an erroneous suggestion that I am suspended from the Seventh Circuit bar of attorneys[1], virtually all the operative facts and circumstances on which this appeal is resolved are hypothecated. *See, Crenshaw-Logal v. City of Abilene*, No. 11-10264 before the Fifth Cir. C.O.A., Per Curiam Opinion 8/4/11.

Apparently to establish that its "hypothecated facts (are) descriptive of the proofs (or allegations) made in this case"[2], the Court sprinkles its opinion with single words and isolated phrases from my pleadings, specifically: 'chill[ing]', 'theoretically', 'unfettered access', 'work product material', and 'reportedly'. By anchoring disposition of this appeal in such sparse quotes from the record, the Court arguably drifts from its "constitutional sphere of authority", thereby inviting or at least facilitating Article III jurisdiction dispute(s). Judges Bork, Scalia (now Justice Scalia), Starr, Silberman, and Buckley warned of such a predicament for the District of Columbia Circuit Court in 1986:

> I think this decision was an unfortunate one, and would have preferred to see its plain errors corrected by this court sitting *en banc*. Since only five judges — one short of the necessary majority — voted to rehear, the task falls instead to the Supreme Court, or perhaps to the United States Court of Appeals for the Federal Circuit. As the majority indicates, any appeal from the proceedings on remand

[1] *See, Crenshaw-Logal v. City of Abilene*, No. 11-10264 before the Fifth Cir. C.O.A., Per Curiam Opinion 8/4/11, p.1 and ftnt 1.

[2] I borrow this language from *U.S. v. Shotwell Manufacturing Company*, 225 F. 2d 394 at 409 (7th Cir. 1955), which case is otherwise irrelevant to the present appeal.

> will be to the Federal Circuit, since the Tucker Act claim is all that remains. The majority suggested in *dicta* that its decision constitutes 'law of the case,' binding the Federal Circuit **unless** the panel of that court that hears the second appeal finds both 'clear error' and 'manifest injustice' in the prior opinion. *Hohri*, 782 F.2d at 241 n.31. The majority failed to **consider what effect the deficiency of its *jurisdictional* holding has on the respect due its holding on the merits by another circuit court.** As the Supreme Court has explained, '[l]aw of the case directs a court's discretion, it does not limit the tribunal's power.' *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). This court has held that a decision by a prior panel that subject-matter jurisdiction exists over a case may be departed from by a later panel in the same case. There need have been no intervening changes in the facts or the law; it is sufficient justification that the second panel determines that jurisdiction is lacking. *See Potomac Passengers Association v. Chesapeake & O.R.R.*, 520 F.2d 91 (D.C.Cir.1975). **For much the same reason that a court will be unwilling to issue a judgment when it lacks jurisdiction itself, so too, it would seem, may it exercise its discretion to refuse to resolve a case on the basis of a prior opinion issued by another court without jurisdiction.** Indeed, even within the doctrine of *res judicata*, which accords the court far less discretion and which generally gives preclusive effect even to judgments issued by courts without subject-matter jurisdiction, such effect will not be given when '[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority' or when '[a]llowing the judgment to stand would substantially infringe the authority of another tribunal.' *Restatement (Second) of Judgments* § 12 (1982).
>
> *Hohri v. U.S.*, 793 F.2d 304 at 312 (D. C. Cir. 1986). (Emphasis added).

According to the Sixth Circuit, a "nonexistent controversy" plucked from an actual case and controversy is as much "beyond" appellate review as any case for which there is no subject matter jurisdiction:

. . .

> If the error seeking resolution by this appellate review had been assigned by the parties as framed in the dissent and/or if it had either direct or indirect roots in the record, the dissent might have some plausible merit. Unfortunately, as a result of its misconception of the issue seeking review, the dissent has erroneously disposed of a **nonexistent assignment of error** which is not embraced by the record of these proceedings.
>
> *U.S. v. Levin*, 973 F.2d 463, ftnt 2 (6th Cir. 1992). (Emphasis added).

A few isolated words and phrases from my pleadings hardly align this case with the proverbial four (4) corners of *Laird v. Tatum,* 408 U.S. 1 (1972), and ensure corresponding assignments of error are "embraced by the record of these proceedings."

I contend that *Laird* is not dispositive of this case, but more importantly, I submit that a tentative appeal is no appeal for most if not all practical purposes. It is often confirmed in criminal matters that "adequate and effective appellate review" is generally "resolved in a way that is related to the merit of (an) appeal." *See, for eg., Smith v. Robbins,* 528 U.S. 259 at 276-277 (2000). A hallmark of that methodology or resolution process is clear resort to the record at hand.[3] In contrast, the adequacy and effectiveness of my appeal cannot be confirmed without (1). blind deference to the presiding panel's account of my claims premised on scant quotes from the record or (2). *de novo* review with reasonable comprehension of and reliance on the record. *See*, *Crenshaw-Logal v. City of Abilene*, No. 11-10264 before the Fifth Cir. C.O.A., Per Curiam Opinion 8/4/11. Surely the first choice does not comport with due process, and the second may prompt a trial court, another panel of this Court, appellate courts of other federal circuits, and / or the U.S. Supreme Court to recognize the standing I claim in this case and disregard any opinion to the contrary.[4]

Despite presenting this "appeal in a form suitable for appellate consideration on the merits", an inapposite view of my claims has been resolved, rendering the process for me a 'meaningless ritual'. *Cf, Evitts v. Lucey*, 469 U.S. 387 at 393-394 (1985). Inconsequential was the strong *Laird* dissent suggesting that even the Court's hypothecation of my case is "not a remote, imaginary conflict". *Laird at 26.* (Justices Douglas and Marshall dissenting).

[3] In confirming that "(a) different question . . . (was) presented than the (Fourth Circuit) Court of Appeals considered", the *Rice Court* looked to "the present record", *Rice at 248,* just as the *Laird Court* resorted to its record at hand - (*our conclusion is a narrow one, namely, that on this record the respondents have not presented a case for resolution by the courts*). *Laird v. Tatum*, 408 U.S. 1 at 15 (1972).

[4] "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California,* 460 U.S. 605 at 618 (1983).

Inconsequential was the Privacy Protection Act, 42 U.S.C. §2000aa, providing grounds to distinguish the *Laird* decision in my case, all of which this Court seems aware. *See, Crenshaw-Logal v. City of Abilene,* No. 11-10264 before the Fifth Cir. C.O.A., Per Curiam Opinion 8/4/11, ftnt 2 *(*"The complaint could be read as asserting claims under the federal Privacy Protection Act, 42 U.S.C. §2000aa").

In gratuitously adding that "amendment (of my underlying complaint) would be futile", the Court abandons even its concerns about the privacy of intercepted and / or stored, third party information which it displayed in addressing the Electronic Communications Privacy Act. *Cf, Steve Jackson Games, Inc. v. U.S. Secret Service,* 36 F.3d 457 (5th Cir. 1994). Worse yet, the Court links this newfound, categorical implausibility of third party secrets shared with suspected criminals to my use of the words 'chill[ing]', 'theoretically', 'unfettered access', 'work product material', and 'reportedly'. Such is not "a decree of a conclusive character" within the power of an Article III court to issue. *See, Rice at 246.*

CONCLUSION

For the foregoing reasons, the Plaintiff-Appellant prays that this Court reverse its opinion affirming as modified the district court 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/_____
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Appellant's Certificate of Service

Comes now the Appellant and certifies that on **August 15, 2011**, an original and four (4) copies of her foregoing petition for panel rehearing with attached, unmarked copy of the opinion she seeks to be reviewed was sent by private courier, adequate costs prepaid for overnight 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 **August 15, 2011**, two (2) true and accurate copies of her foregoing petition for panel rehearing with attached, unmarked copy of the opinion she seeks to be reviewed was placed in the United States Mail, adequate first class postage prepaid and addressed as follows:

Stanley E. Smith,
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and Theresa James,
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Respectfully Submitted,

/s/_____

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