No. _______

# In the Supreme Court of the United States

BRUCE GILES, PETITIONER,

*v.*

SALVADOR A. GODINEZ, ET AL., RESPONDENTS.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296 (1989), the Court held that 28 U.S.C. § 1915 does not provide statutory authority "to make coercive appointments of counsel" in civil cases. *Id.* at 310. The Court expressly reserved whether federal courts have the inherent authority to make such appointments. *Id.*

The Fifth Circuit answered this question in *Naranjo v. Thompson*, 809 F.3d 793 (5th Cir. 2015), holding that a federal court has the inherent authority to make a coercive appointment of counsel in a civil case that presents exceptional circumstances.

The Seventh Circuit in this case, along with the Courts of Appeals for the Second, Third, and Eleventh Circuits, disagree, holding that federal courts lack inherent authority to appoint counsel in all civil cases.

This case therefore presents the question reserved in *Mallard*:

Do federal courts have the inherent authority to make coercive appointments of counsel in civil cases?

## PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellant below, is Bruce Giles.

Respondents Salvador A. Godinez, Richard Birkey, Leonta Jackson, Michael Lemke, Randy Pfister, Ron Zessin, Marc Hodge, Mark Storm, and Randy Stevenson were the defendants-appellees below.

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# In the Supreme Court of the United States

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SALVADOR A. GODINEZ, ET AL., RESPONDENTS

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 914 F.3d 1040 (7th Cir. 2019). The order of the district court (App. 60a-63a) adopting the report and recommendation of the magistrate judge (App. 55a-69a) is not officially reported but is available at 2015 WL 5062766.

### JURISDICTION

The judgment of the court of appeals was entered on January 29, 2019. The court of appeals denied rehearing on March 1, 2019. (App. 64a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition does not involve the interpretation of constitutional or statutory provisions, but presents a question about the inherent power of a district court to compel counsel to accept an uncompensated appointment in a civil case.

## STATEMENT

Petitioner Bruce Giles was a prisoner in the Illinois Department of Corrections when he initiated this case by filing a *pro se* complaint. Petitioner is mentally disabled; he "suffers from schizoaffective disorder." (App. 1a.) "His symptoms include anxiety, depression, auditory hallucinations, and suicidal ideation." (App. 2a.)

In December 2010, a prison psychiatrist prescribed Prolixin, an antipsychotic medication, for petitioner. (App. 4a.) Petitioner began talking to himself after the prison stopped providing that medication in 2011; the result was an altercation with another prisoner who "told him to shut up, and spit in his face." (*Id.*) The prison placed Giles in segregation because of the altercation. (*Id.*) While in segregation, he continued to hear voices and attempted suicide. (App. 5a.) After his release from segregation, Giles continued to hear voices and to talk to himself—conduct that in February 2012 resulted in another fight after Giles accidentally bumped into another inmate while talking to himself. (App. 6a.) Giles was again placed in segregation as a result of the fight. (App. 6a-7a.)

Giles filed this action in 2012, contending that "the defendants violated his rights under the Eighth Amendment by being deliberately indifferent to his serious medical needs, subjecting him to unconstitutional conditions of confinement, and failing to protect

him from other inmates." (App. 1a.) Giles did not identify in his complaint any person who was responsible for the alleged deliberate indifference, bringing the action against supervisory personnel in the Illinois Department of Corrections. The district court pointed out this deficiency in its screening order, noting that Giles "never identifies any Defendant who allegedly took that [alleged] retaliatory action." (App. 29a.) The district court granted Giles 35 days to file an amended complaint (*id.*) and extended this time (Text Order, 12-cv-965, S.D. Ill., Doc. 23), but petitioner never filed an amended complaint.

In his complaint, Giles hinted at potential claims under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794, for which liability could be imposed directly against the State of Illinois.[1] Giles did not, however, pursue either statutory basis of liability.

Throughout the proceedings in the district court, petitioner made a total of seven requests for counsel. (App. 9a-11a.) Petitioner supported his second motion for appointment of counsel[2] (Motion to Reconsider Request for Appointment of Counsel, 12-cv-965, S.D. Ill., Doc. 29) with an affidavit from a jailhouse lawyer, who averred that he was at "the limit of my knowledge in civil matters" and pointing out that Giles "has trouble with reading comprehension, lacks knowledge in the law. And without my assistance, Giles does not know

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[1] *See United States v. Georgia*, 546 U.S. 151 (2006); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998).

[2] The court denied petitioner's first request for counsel because it was not supported by a showing that petitioner had been unsuccessful in securing counsel on his own. (App. 24a.)

what to do next in this civil matter." (Affidavit of Donald Shaw, 12-cv-965, S.D. Ill., Doc. 29 at 4.)

Petitioner stated in his second motion for appointment of counsel, "my mental health seems to only be getting worst." (Motion to Reconsider Request for Appointment of Counsel, 12-cv-965, S.D. Ill., Doc. 29 at 4.) The magistrate judge, who was presiding over pretrial proceedings, denied this request, finding that petitioner "appears competent to litigate his own civil case through the exhaustion of administrative remedies phase." (App. 37a.) The magistrate judge similarly denied petitioner's third request for counsel, instructing petitioner to await resolution of any exhaustion issue. (App. 38a.)

The defendants did not seek an immediate adjudication of their affirmative defense of exhaustion of administrative remedies.[3] Petitioner against asked the district court to appoint counsel, and the magistrate judge agreed to attempt to recruit counsel. (App. 40a.) The magistrate judge stated:

> The Court has no statutory authority to "appoint counsel" in cases brought under 42 U.S.C. 1983. *Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866-67 (7th Cir. 2013) (citations omitted). "All a district court can do is seek a volunteer." *Id.* at 867.

(*Id.*) The magistrate judge stated that the court had circulated the request for representation to "approxi-

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[3] In *Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008), the Seventh Circuit fashioned a procedure to adjudicate an affirmative defense of exhaustion of administrative remedies in advance of merits discovery. The defendants, while raising exhaustion as an affirmative defense in this answer (Answer, 12-cv-965, S.D. Ill., Doc 33 at 14), did not request the early hearing contemplated in *Pavey*.

mately 50 licensed and registered attorneys that have indicated an interest in representing indigent litigants in this district," but could not locate a volunteer attorney for petitioner. (*Id.*)

Petitioner advised the district court that he did "not know what to do next" and requested "assistance to either settle this case or proceed to trial." (Motion for Recruitment of Counsel, 12-cv-965, S.D. Ill., Doc. 69.) Petitioner pointed out that he could not get help from a jail house lawyer because most prisoners at his institution "suffer from serious mental illness as myself." (*Id.*) The district court denied petitioner's request as moot because it had granted the earlier motion and stated that the court was once again seeking to locate volunteer counsel for petition. (App. 42a.)

Defendants deposed petitioner on April 11, 2014. (Defendants' Motion for Summary Judgment, Exhibit G, 12-cv-965, S.D. Ill., Doc. 74-8.) Petitioner explained how he had been transferred from Dixon Correctional Center after filing grievances (*id.*, Doc. 74-8 at 8, Giles Dep. 8:20-21) and how he had been denied access to programs for his mental health problems. (*Id.*, Doc. 74-8 at 9, Giles Dep. 9:1-5.) Petitioner described how he would "be in my cell all day with inmates that were constantly just making fun of me," (*id.*, Doc. 74-8 at 11, Giles Dep. 11:20-22), and stated that, in response to his request for mental health treatment, he had been told it "wasn't available." (*Id.*, Doc. 74-8 at 12, Giles Dep. 12:11.)

After defendants moved for summary judgment (Defendants' Motion for Summary Judgment, 12-cv-965, S.D. Ill., Doc. 74), petitioner filed a motion captioned, "Motion of Extension of Time to Respond to Summary Judgment Motion Until I Have Discovery Needed to Respond." (Motion, 12-cv-965, S.D. Ill., Doc. 76.) Peti-

tioner averred in the motion that without representation by counsel or the assistance of a jailhouse lawyer, he could not take discovery. (*Id.*, Doc 76 at 3 ¶ 12.) Petitioner told the district court that "due to the lack of counsel, [he] could not take necessary depositions of Defendants, Witnesses, Mental Health staff and [etc.]" (*Id.*, Doc 76 at 1 ¶ 4.) Petitioner also referred to his mental illness and lack of education, which, combined with his lack of counsel, prevented him from taking discovery. (*Id.*, Doc 76 at 3 ¶ 12.) Petitioner asked that he should "not be [held] at fault for failing to do something that he was unable to do on his own, such as depositions, interrogatories, relevant Discovery from Defendants." (*Id.*)

Petitioner also renewed his request for counsel after defendants filed their motion for summary judgment, stating that he "is having a hard time focusing, due to adjustment of psychotropic medication needed. Experiencing negative effects so please bear with Plaintiff. My serious mental illness makes things worst." (Motion for Assistance of Counsel, 12-cv-965, S.D. Ill. Doc 81 at 1 ¶ 6.) The district court responded to this request by repeating that it lacked authority to "appoint counsel" and that it had again sought volunteer counsel without success. (App. 43a.) The court informed Giles: "Plaintiff will be notified if an attorney volunteers to take his case and should continue to prosecute this case pro se to the best of his ability." (*Id.*)

An attorney did not volunteer to represent petitioner, (App. 44a), and the magistrate judge recommended granting defendants' motion for summary judgment. (App. 45a-59a.) The district court accepted the recommendation (App. 60a-63a), and petitioner appealed.

The Seventh Circuit successfully recruited counsel to represent petitioner and held that the district court had

"fulfilled its obligation to Giles" by repeatedly searching for volunteer counsel. (App. 21a.)

In rejecting petitioner's challenge to the district court's failure to appoint counsel, the Seventh Circuit applied its precedent that federal courts lack the authority to make such appointments in civil cases. (App. 20a.) In the view of the Seventh Circuit, federal courts "must rely on the generosity of lawyers to volunteer their time and skill on behalf of indigent civil parties." *Wilborn v. Ealey*, 881 F.3d 998, 1008 (7th Cir. 2018). The court below affirmed the grant of summary judgment against petitioner.

## REASONS FOR GRANTING THE PETITION

This case presents the question reserved in *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296 (1989): Does a federal district court have the inherent authority to appoint counsel in civil cases?

The Fifth Circuit resolved this question in *Naranjo v. Thompson*, 809 F.3d 793 (5th Cir. 2015), holding that district courts have the inherent authority to make compulsory appointments in the civil context. *Id.* at 801-02.

The Seventh Circuit applies the contrary rule. Starting with *DiAngelo v. Illinois Department of Public Aid*, 891 F.2d 1260, 1262 (7th Cir. 1989) and continuing to the present case, the Seventh Circuit has repeatedly held that a district court lacks the power to appoint counsel in civil cases but "must rely on the generosity of lawyers to volunteer their time and skill on behalf of indigent civil parties." (App. 20a) (internal quotation omitted).

The state courts that have considered this question have also reached conflicting results. The highest courts

of Utah, Wisconsin, and New York recognize the inherent authority of trial courts to appoint counsel in civil cases. *Burke v. Lewis*, 122 P.3d 533, 539 (Utah 2005); *Joni B. v. State*, 549 N.W.2d 411, 415 (Wis. 1996); *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975). The highest court of Missouri has held that trial courts lack this inherent authority. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768 (Mo. 1985).

The Court should resolve this conflict and overturn the rule of the Seventh Circuit that deprives indigent litigants of effective access to court.

### 1. Four Circuits Read *Mallard* as Having Resolved the Inherent Authority Question

In *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296 (1989), the Court held that the *in forma pauperis* statute, 28 U.S.C. § 1915, does not authorize the federal courts "to make coercive appointments of counsel" in civil cases. *Id.* at 310. The Court expressly reserved whether federal courts have the inherent authority to make such appointments:

> Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve. . . . We therefore leave that issue for another day.

*Id.* Notwithstanding this express reservation, the Seventh Circuit has consistently applied *Mallard* to hold that "[t]he court cannot appoint counsel in civil cases but must rely on the generosity of lawyers to volunteer their time and skill on behalf of indigent civil parties." *Wilborn v. Ealey*, 881 F.3d 998 (7th Cir. 2018). The Seventh Circuit first applied this rule in *DiAngelo v. Illinois Dept. of Public Aid*, 891 F.2d 1260, 1262 (7th Cir. 1989) and it is now firmly entrenched in the court's

precedents. *See, e.g.*, *Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864 (7th Cir. 2013); *Ivey v. Harney*, 47 F.3d 181, 185 (7th Cir. 1995); *Gerald v. Irons*, 16 F.3d 1225 (7th Cir. 1993); *Farmer v. Haas*, 990 F.2d 319, 323 (7th Cir. 1993); *Hughes v. Joliet Corr. Ctr.*, 931 F.2d 425, 429 (7th Cir. 1991).

The Courts of Appeals for the Second, Third, and Eleventh Circuits also read *Mallard* as resolving the inherent authority question, holding that a district court lacks the power to appoint counsel in a civil case. *Taylor v. Pekerol*, 760 F. App'x 647, 651 (11th Cir. 2019); *Azkour v. Little Rest Twelve, Inc.*, 645 F. App'x 98, 102 (2d Cir. 2016); *Tabron v. Grace*, 6 F.3d 147, 157 (3d Cir. 1993).

**2. Conflict with the Fifth Circuit**

The Fifth Circuit in *Naranjo v. Thompson*, 809 F.3d 793 (5th Cir. 2015), held that district courts have the "inherent power to make compulsory appointments in the civil context." *Id.* at 801-02.

The plaintiff in *Naranjo* sued the private company that managed the prison where he was incarcerated, asserting several constitutional violations related to his conditions of confinement. *Naranjo*, 809 F.3d at 796. The district court found there were "exceptional circumstances to warrant the appointment of counsel," including security concerns that prevented the plaintiff from reviewing discovery materials. *Id.* at 798.

The district court in *Naranjo*, as in this case, sought unsuccessfully to obtain volunteer counsel for the plaintiff, concluded that it lacked the power to order an attorney to represent the plaintiff, and then granted summary judgment for defendants. *Naranjo*, 809 F.3d at 798.

The Fifth Circuit reversed, holding that when unable to recruit volunteer counsel under 28 U.S.C. § 1915(e)(1), "courts also have inherent power to compel counsel to accept an uncompensated appointment." *Naranjo*, 809 F.3d at 801.

The Fifth Circuit began its analysis of the question this Court reserved in *Mallard* with the unquestioned power of the federal courts to appoint counsel to prosecute criminal contempt proceedings or to serve as guardian ad litem for minors in certain situations. *Naranjo*, 809 F.3d at 802. The court of appeals recognized that the power to make these appointments rests on the court's "responsibility for the administration of justice," *id.* at 803, and held that this responsibility extended to the power to appoint counsel in civil cases. As the Fifth Circuit explained:

> The possibility of such an appointment arises only when an indigent plaintiff has colorable claims that will not receive a meaningful hearing without counsel (i.e. exceptional circumstances exist) and when all other options for making an appointment have failed. Under such conditions, a court cannot carry out its duties without ordering an attorney to take the case.

*Id.*

### 3. State Courts Are Divided on a Court's Inherent Powers to Appoint Counsel in Civil Cases

State Supreme Courts are also split on whether a trial court has the inherent power to appoint counsel in civil cases. In *Burke v. Lewis*, 122 P.3d 533 (Utah 2005), the Utah Supreme Court held a court's inherent power to "ensure the pursuit of a just process and result" includes the appointment of counsel for a civil litigant,

even one who is not indigent. *Id.* at 538. The Utah Supreme Court reached this conclusion by relying on the decision of this Court in *Ex parte Peterson*, 253 U.S. 300 (1920), that "[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." *Id.* at 312

The Wisconsin Supreme Court also relied on inherent powers to hold that "[a] court may use its inherent discretionary authority to appoint counsel in furtherance of the court's need for the orderly and fair presentation of a case." *Joni B. v. State*, 549 N.W.2d 411, 414 (Wis. 1996).

Similarly, the Court of Appeals of New York holds that, "[i]nherent in the courts and historically associated with the duty of the Bar to provide uncompensated services for the indigent has been the discretionary power of the courts to assign counsel in a proper case to represent private indigent litigants." *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975).

The Supreme Court of Missouri has parted ways with these authorities, holding that the courts of Missouri lack the inherent authority to appoint attorneys to serve in civil actions without compensation; such an appointment would violate the state's constitutional guarantee of a protectible property right in a lawyer's services. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768-69 (Mo. 1985).

**4. This Case Is an Appropriate Vehicle to Resolve an Important Question Ripe for Review**

The question presented in this case implicates fundamental rights. The majority of federal *pro se* filings seek protection of basic rights, including constitutional

and civil rights claims. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 479 (2002). About a quarter of all complaints filed in federal court in the twelve-month period ending September 30, 2018 were brought *pro se*. U.S. Courts, *Table C-13, U.S. District Courts–Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2018*, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2018.pdf.

In many *pro se* cases that survive the initial screening required by 28 U.S.C. § 1915A, district courts are able to locate volunteer counsel to present meritorious claims. For example, this Court's decision in *Manuel v. Joliet*, 137 S. Ct. 911 (2017), which reversed nearly two decades of Seventh Circuit precedent, was litigated by recruited counsel. (Order of May 31, 2013, 13-cv-3022, N.D. Ill., Doc. 29.)

Outside of well-populated districts like the Northern District of Illinois, however, courts have more difficulty locating volunteer counsel. *See, e.g.*, Lisa R. Pruitt & Bradley Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466 (2014).

The dearth of volunteer counsel in such districts is apparent in this case, where the magistrate judge repeatedly queried the district court's list of 50 volunteer attorneys without finding counsel. (App. 30a, 32a, 33a.) There can be no dispute that counsel was not available to petitioner through the statutory request for counsel found in 28 U.S.C. § 1915.

Nor can there be any dispute that petitioner could not adequately present his case without the assistance of counsel. Like many *pro se* litigants, petitioner had little education. These deficits were compounded by

petitioner's serious mental illness, diagnosed as "schizoaffective disorder" (App. 1a), which he repeatedly called to the attention of the court. (Motion to Reconsider Request for Appointment of Counsel, 12-cv-965, S.D. Ill., Doc. 29 at 4; Motion of Extension of Time to Respond to Summary Judgment Motion Until I Have Discovery Needed to Respond, 12-cv-965, S.D. Ill., Doc. 76 at 3 ¶ 12.) Petitioner could not rely on jailhouse lawyers because most of his fellow prisoners "suffer from serious mental illness as myself." (Motion for Recruitment of Counsel, 12-cv-965, S.D. Ill., Doc. 69.) Petitioner's incomprehensible filings makes plain his need for counsel. (Response to Defendant's by Declaration and Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, 12-cv-965, S.D. Ill., Doc 80.)

The magistrate judge provided petitioner with some assistance, but a court's involvement is not a substitute for counsel. As the Fifth Circuit noted in *Naranjo*, this Court has explained that, "Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation." *Bounds v. Smith*, 430 U.S. 817, 826 (1977).

Finally, the record strongly suggests that appointment of competent counsel would have led to a different result. Rather than proceeding against "non-medical officials who reasonably relied on the judgment of medical professionals" (App. 13a-15a, 23a), an attorney could have used the discovery tools inaccessible to petitioner to develop evidence of the sort that recently resulted in a judgment that Illinois Department of Corrections officials had been deliberately indifferent to the mental health needs of mentally ill inmates like petitioner. *Rasho v. Walker*, No. 07-1298, 2018 WL 2392847 (C.D. Ill. May 25, 2018).

### 5. A District Court's Inherent Powers Include the Power to Appoint Counsel

"[T]his Court has long recognized that a district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–631 (1962)).

The power to appoint counsel for an indigent litigant in an extraordinary case where volunteer counsel cannot be found fits squarely within a district court's power to achieve the orderly and expeditious disposition of cases.

Inherent powers include those "essential to the administration of justice," such as the power to punish for contempt, *Michaelson v. United States*, 266 U.S. 42, 66–65 (1924), and the power to appoint an attorney to prosecute contempt. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987). Similarly, in stockholder litigation against a corporation, a federal court may appoint "a temporary receiver in order to prevent threatened diversion or loss of assets through gross fraud and mismanagement of its officers." *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208, 212 (1927). And "the inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." FED. R. EVID. 706, advisory committee's note.

The authority to appoint counsel in civil cases also fits within this strain of inherent authority because federal courts have "inherent power to provide themselves with appropriate instruments required for the performance of their duties." *Ex parte Peterson*, 253 U.S. 300, 312 (1920). "The inherent powers of federal courts are those which 'are necessary to the exercise of

all others.'" *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

Finally, the authority to appoint counsel is consistent with a court's inherent authority to regulate the conduct of its bar. *E.g., In re Snyder*, 472 U.S. 634, 643 (1985). Compulsory pro bono service is already a requirement for members of the bar of the United States District Courts for Northern District of Illinois and the Southern District of Indiana. N.D. ILL. LOCAL RULE 83.35; S.D. IND. LOCAL RULE 87. As the Court noted long ago, "[a]ttorneys are officers of the court, and are bound to render service when required by . . . appointment." *Powell v. Alabama*, 287 U.S. 45, 72-73 (1932); *see also Mallard*, 490 U.S. at 310-11 (Kennedy, J., concurring) (explaining that, "[a]ccepting a court's request to represent the indigent" is one obligation that lawyers take on as members of their profession and as officers of the court).

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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