NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

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Charles L. Burgett - Petitioner

vs.

The General Store No. Two Inc., d/b/a/ Marsh's Sunfresh Market, et al. - Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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*PRO SE* PETITIONER

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## QUESTIONS PRESENTED

1. Whether the district court is required to provide the sanctioned party with adequate due process before dismissing the lawsuit?

2. Whether the imposed sanction must relate to the claim at issue in the discovery order allegedly violated?

3. Whether the district court is required to consider factors — degree of actual prejudice and effect of lesser sanctions before imposing the extreme sanction of dismissal?

## LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner, Charles L. Burgett was Appellant/Plaintiff below. Respondents, who were appellees/defendants below, are the General Store No. Two Inc., during business as Marsh's Sunfresh Market; W.S.C. Services Inc., Andrei Florea; and, police officers Thomas Bethel, Terry Grimmett, and Matthew Payne.

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IN THE SUPREME COURT OF THE UNITED STATES

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Charles L. Burgett - Petitioner

vs.

The General Store No. Two Inc., d/b/a/ Marsh's Sunfresh Market, et al. - Respondents

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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The Petitioner, Charles L. Burgett, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 17-1916, entered on March 23, 2018. Rehearing en banc and panel rehearing was denied May 17, 2018.

The decision below illustrates the harmful aftermath for sanctioned *Pro Se* parties who do not receive the procedural protections that are designed to constrain a court's inherent powers.

## OPINION BELOW

On March 23, 2018 a panel of the Court of Appeals entered its affirmance with opinion the judgment of the United States District Court for the Western District of Missouri. The affirmance with opinion of the Court of Appeals is unpublished.

## JURISDICTION

The Court of Appeals entered its judgment on March 23, 2018. On May 17, 2018, the Court of Appeals denied the Petitioner's request for panel rehearing and rehearing en banc, and a copy of the order denying rehearing appears at Appendix 19a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process; and, Rules 37(b)(2) and 41(b) of the Federal Rules of Civil Procedure.

## STATEMENT OF THE CASE

### A. Factual Background.

On April 10, 2014, Charles Burgett, an African/Black Male, entered the General Store No. Two, Inc. d/b/a Marsh's Sunfresh Market as a store customer for the purpose of shopping for groceries. Sunfresh Market did not have the item Burgett was shopping for, so he exited the store. While walking in the parking lot toward his car, Burgett was confronted by security guard Andrei Florea who violently hit, pushed and blocked Burgett, demanding to search his breast jacket pocket, while falsely alleging that Burgett had stolen an item from the store. The police were called and Kansas City, Missouri, police officer Thomas Bethel arrived. Eventually, Burgett was arrested. While Burgett was sitting on the ground, Bethel unzipped Burgett's jacket and took his wallet out of the breast pocket, upon further

search, determined that Burgett had not stolen anything from the store. Even though, as maintained by Burgett, that he had not stolen anything from the store, Bethel did not release him rather he retaliated against Burgett and wrongly charged him with resisting arrest. Despite the fact that Burgett had not stolen anything from the store, supervisory Kansas City, Missouri officer, Matthew Payne (Payne) conspired with Florea, Bethel and Terry Grimmett and supported the illegally detainment and arrest of Burgett and Payne refused to release him. Burgett was taken to Police Headquarters, booked, and illegally jailed for nearly 14 hours. The municipal charge of resisting arrest against Burgett was dismissed on August 8, 2014.

On April 6, 2016, Plaintiff Burgett brought suit against the named defendants including the respondents for assault & battery; false arrest & imprisonment; malicious prosecution; excessive force; and, racial discrimination, which were directed against some or all of the defendants.

**B. District Court Proceedings.**

District judge Bough avers, "On October 4, 2016, WSC informed the Court of the parties' ongoing discovery dispute involving Burgett's answers to all Defendants' interrogatories. The Court set an in-person hearing [in an *ex parate* fashion (App. 26a)] for October 11, 2016, with Burgett and all Defendants' counsel required to attend. (Doc. #55)." App. 9a. Burgett did not received written or oral

notice from district judge Bough or his staff in advance of the hearing. App. 26a. At the beginning of the October 11, 2016 hearing, district judge Bough said, "I just left a voicemail message for Mr. Burgett at the number that's been listed on his pleadings. We're going to proceed with the hearing (App. 21a)." During the hearing, Petitioner Burgett returned the call of district judge Bough and stated, "This message is for Judge Bough. This is Charles Burgett. I received his message about ten minutes ago. I'm on the road out of town. He indicated that he is proceeding with a hearing. I'd like to know what the hearing is about. I'd appreciate a call back at 816-521-0339. I have been out of town for several weeks; so, again, appreciate knowing what the hearing is about. I'm at 816-521-0339. I expect to be in town this afternoon, and I will proceed from there. Thank you (App. 22a-23a)."

On October 25, 2016, district judge Bough issued a discovery order for Burgett to answer two interrogatories — residential address, employment history; and sign four authorizations — 1) records from the Circuit Court of Missouri, 2) Plaintiff's employers, 3) Medicare and Medicaid Services, and 4) Plaintiff's medical providers. App. 15a.

On October 26, 2016, district judge Bough made a statement "that the parties "are all free to get together like a discovery dispute" if they needed more time to complete Burgett's deposition (App. 3a)." District judge Bough did not issue or enter an order. Id. "Burgett clearly scheduled with the defendants' counsel and

agreed to a date, time and location for appearance at the continued deposition; however, Karaim and Patterson did not operate in good faith and unilaterally extended the deposition parameters (App. 34a)". Due to the foregoing, on October 31, 2016, Burgett filed a Motion to Quash Deposition (Doc. #76). App. 28a, 34a. On November 2, 2016, district judge Bough issued an order denying as moot Burgett's Motion to Quash Deposition and for the continued deposition to resume on November 10, 2016 (Doc. #77). App. 12a.

"On November 3, 2016, Burgett filed Motions for Protective Order, (Doc. #78), and a Motion to Vacate Orders, (Doc. #79), both requesting that the Court vacate its discovery orders (App. 12a)." Burgett asserted in his Motions, *inter alia*, that "[district] Judge Bough did not follow the law regarding the scope of discovery. The 2015 amendments to Federal Rule of Civil Procedure 26(b)(1) made several changes to the scope of discovery . . . The amended scope of discovery [Amended Rule 26(b)(1)], requires that discoverable information be not only relevant to any party's claim or defense but also proportional to the needs of the case. 2015 Adv. Cmte. Notes to Fed. R. Civ. P. 26 at ¶2. Second, the amendments eliminated the language allowing for discovery of information relevant to the subject matter of the action, on a showing of good cause; only information relevant to the parties' claims or defenses can be sought. See id. at ¶18. Finally, the amendments deleted the statement allowing discovery of information "reasonably

calculated to lead to the discovery of admissible evidence." See id. at ¶19 (App. 31a)." Burgett timely served his Amended Answers and Objections to discovery requests on November 7, 2016 and filed copies of Certificates of Service with the court clerk's office on November 8, 2016. App. 28a.

On, November 8, 2016, Burgett filed Motion to vacate the order setting deposition (Doc. 80). App. 12a. Later, on that day, district judge Bough denied Burgett's Motion (Doc. 81). App. 13a. Burgett did not receive the order until after November 10, 2016. Burgett had good cause not to appear. App. 29a.

All defendants moved for dismissal of Burgett's case (Docs. 83, 84, 86). On December 28, 2016, Judge Bough dismissed Burgett's case as sanctions and denied Burgett's Motion for Protective Order (Doc. #78) and Motion to Vacate Orders (Doc. #79) (App. 18a), which were filed prior to any of the defendants' motions for dismissal. App. 29a.

On January 24, 2017, Burgett filed Motion to reconsider order of dismissal. App. 24a-36a. The district court denied the same.

**C. The Court of Appeals' Opinion.**

The court of appeals entered its affirmance with opinion the judgment of the district court. App. 1a-6a.

**D. The Court of Appeals' Denial of Panel Rehearing and Rehearing En Banc.**

The court of appeals denied rehearing and rehearing en banc. App. 19a.

## REASONS FOR GRANTING THE WRIT

**The Eighth Circuit Court's Affirmance Of The District Court's Dismissal Of Case As A Sanction Involving This Recurring Issue Of Exceptional Important Violates The Public Policy Favoring Disposition Of Cases On The Merits, Conflicts With This Court's And The Standard Employed By Other Courts, And Sets A Serious Precedent That Will Undermine The Public's Perception Of The Right For A Pro Se Party To Have His Case Heard, Which Call For An Exercise Of This Court's Supervisory Power.**

### I. This Court Will Intervene When A Lower Court Employ A Misapprehension Of Factual Issues.

The district court's underlying factual findings on alleged willfulness and prejudice were biased and clearly erroneous; and, the district court's order of dismissal was an abuse of discretion. App. 24a-36a.

The district court severely misapplied the facts to the detriment of Petitioner and improperly dismissed his case as a sanction. The court of appeals wrongly adopted the misapplied facts in affirming the dismissal of Petitioner's case. This Court has granted review to correct a lower courts mishandling of factual issues. *Tolan v. Cotton*, 572 U.S. —, 134 S. Ct. 1861 (2014).

**II. The Eight Circuit's Decision Conflicts With This Court, Other Courts Of Appeals, And What It Has Applied In Its Own Circuit On Dismissing A Case As Sanction.**

The primary purpose of a sanction under Rule 37 will be to secure or encourage compliance with the underlying discovery order alleged to have been violated. The advisory committee's note (1937) (suggests that Fed. R. Civ. P. 37 as originally created was intended primarily to serve the purpose of securing compliance and not to impose contempt type punishment). *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781 (1976). The authority of federal courts to impose discovery sanctions and dismissal actions pursuant to Federal Rule of Civil Procedure 37(b)(2)(A) and 41(b) [the provision for dismissal under Rule 41(b) overlaps with the provision of Rule 37(b)(2)(A)] is circumscribed by substantive and procedural due process protections for parties threatened with sanctions. *Insurance Corp. of Ireland, Ltd. v. Compagniedes Bauxites de Guinee*,456 U.S. 694, 707 (1982). Because the court's sanctioning power is so potent, it must be exercised "with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Also, the Fourth Circuit found ("discretion not without bounds") – *Hathcock v. Navistar Unt'l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995). Likewise, a court must be cautious in exerting its sanctioning power to levy sanctions and "must comply with

the mandates of due process." Id. This Court and the Eleventh Circuit found that severe sanctions warrants more due process. *Roadway Express Inc. v. Piper*, 447 U.S. 752, 764 (1980); *De Vaney v. Continental Am. Ins. Co.*, 989 F.2d 1154, 1159 (11th Cir. 1993).

**A. There Must Be A Failure To Comply With Order.**

The district court alleged that Petitioner willfully and in bad faith defied orders as a way to circumvent the due process requirement and to unjustly dismiss his case. Under Fed. R. Civ. P. 37(b), before a district court imposes sanctions, it must first satisfy several requirements. First, a district court judge must find a failure to comply with a discovery order. Petitioner did not receive two of the four orders. In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781 (1976) any alleged failure to comply with orders that he had issued or received was not considered willful. The Second Circuit in *Baba v. Japan Travel Bureau Int'l, Inc.*, 111 F.3d 2, 5 (1997); and, the Eighth Circuit in *Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1260 (1997) found the same. It was impossible for Petitioner to have complied with orders never issued or received.

**B. The District Court Must Determine if Failure Was Substantially Justified.**

Second, once a district court determines that there has been a failure to comply with a discovery order, it must determine whether the failure was substantially

justified. Thus, sanctions are inappropriate if there is a substantial justification for the failure to comply with the discovery order or the circumstances are such that imposing sanctions would be unjust. This Court has clarified that an individual's alleged discovery conduct is likely substantially justified under Rule 37 if it arises out of a "genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action. Pierce v. Underwood, 487 U.S. 562, 565 (1988). The Second Circuit found in *Fonseca v. Regan*, 734 F.2d 944, 950 (1984) that appellate courts are likely to reject severe sanctions if the party resisting discovery had a valid objection to the discovery sought. In *Searock v. Stripling*, 736 F.2d 650, 654 (1984), the Eleventh Circuit found that an inability to comply did not justify discovery sanctions; likewise, the Seventh Circuit in *Domanus v. Lewicki*, 742 F.3d 290, 301 (2014) that Party cannot be sanctioned for failure to comply with discovery orders if compliance was impossible. Petitioner was substantially justified in providing amended answers and responses; valid objections; and, an inability to comply in resisting discovery. App. 30a.

**C. A Sanction Must Relate To The Claim At Issue.**

Finally, the district court's discretion to impose sanction of dismissal for failure to comply with order compelling discovery is bounded by the requirement of federal rule of civil procedure governing such failure that the sanction be just and specifically relate to the claim at issue in the order to provide discovery. Fed. R.

Civ. P. 37(b); Hairston v. Alert Safety Light Products, *Inc.*, 307 F.3d 717 (8th Cir. 2002). In *Bergstorm v. Frascone*, 744 F.3d 571, 576 (2014), the Eight Circuit established that although appellate court typically reviews imposition of discovery sanctions for abuse of discretion, that discretion "narrows" as severity of sanctions increases; however, it did not follow its own precedent. See also FDIC v. Connor, 20 F.3d 1376, 1383 (5th Cir. 1994)("a sanction must be narrowly tailored to serve only its necessary function"). All sanctions imposed for failing to comply with a discovery order must be reasonable in light of the circumstances, and a sanction is only reasonable if its character and magnitude are proportionate to the character and magnitude of the violation of the underlying discovery order, and the harmful consequences of that violation. Such sanction against Petitioner was not reasonable. See *Jackson v. Murphy*, 2012 U.S. App. LEXIS 4993 at *8 (7th Cir. March 9, 2012)(unpublished)("The severity of a sanction should be proportional to the gravity of the offense"); Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 559 (8th Cir. 1992)("Sanction must relate to claim at issue"). The only specific claim at issue identified by the district court is Petitioner's malicious prosecution claim. App. 32a, 36a. The district court did not specifically or legitimately named any other claim at issue. Id. The district court should endeavor to fashion a sanction that is limited to claims, defenses, or issues to the evidence that should have been produced is relevant. The sanction imposed must

have a direct relationship to the alleged offensive conduct. *See Martin v. Brown*, 63 F.3d 1252, 1263-64 (3d Cir. 1995); Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec, 854 F.2d 1538, 1546 (9th Cir. 1988). Some appellate courts are likely to insist that the sanction may only affect the claims or defenses to which the discovery would have been pertinent. This specific relationship requirement is designed to ensure that the sanction fits the wrong. In Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334, 1342-1343 (1985), the Ninth Circuit reversed a sanction for partial summary judgment after finding that the sanction was not specifically related to the claim at issue in the underlying discovery order which had been violated.

**III. The Eight Circuit's Decision Conflicts With The Authority Of Other Circuits And That Of Its Own Circuit On Sanction Of Dismissal.**

The Eight Circuit departed from the prevailing authority in the other Circuits and its Own Circuit requiring that a severe sanction is imposed only when a party's alleged conduct has substantially prejudiced the opposing party; and, when a lesser sanction would not provide adequate deterrence.

**A. Opposing Party Must Be Substantially Prejudiced And There Must Be A Degree Of Actual Prejudice**

A court may impose a severe sanction only when the party's conduct has substantially prejudiced the opposing party. We have also held that the violating

party's misconduct "must substantially prejudice the opposing party." *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990). The Fifth Circuit also established in *FDIC v. Connor*, 20 F.3d 1376, 1381 (1994) that (violation of order compelling answers to interrogatories did not prejudice opposing party enough to justify dismissal of claims). The Fourth Circuit found that (amount of prejudice necessarily includes inquiry into materiality of evidence not produced) in *Wilson v. Volkswagen*, 561 F.2d 494, 503-04 (1977). Even the Eighth Circuit ruled in Schoffstall v. Henderson, 223 F.3d 818, 823 (2000) that (dismissal requires both substantial prejudice and willfulness). Additionally, the Tenth Circuit requires a district court to consider the degree of actual prejudice to defendants. *Archibeque v. Atchison, Topeka and Santa Fe Railway Co.*, 70 F.3d (1995).

It is unbelievable that Andrei Florea and police officers Thomas Bethel, Terry Grimmett, and Matthew Payne were prejudiced by the alleged violation of the district court orders. App. 30a. Florea and the three police officers were not involved in the discovery and second deposition matters whatsoever. App. 34a. Additionally, it is inconceivable that W.S.C. Services Inc. and Sunfresh Market were prejudiced because it received the discovery sought or stated that it was no longer seeking discovery; and/or there was an inability to comply; and/or it had an obligation and had ample opportunity to obtain the information on its own. App.

35a. Regarding, the second deposition, W.S.C. Services Inc. had already examined Petitioner; and, Sunfresh Market was the only defendant the orders pertained to. Sunfresh Market did not ask for leave to depose Petitioner a second time. It is implausible that W.S.C. Services Inc. was prejudice by the alleged second deposition violation, when the orders did not involve it. Likewise, it is inconceivable that Sunfresh Market was prejudice by the alleged second deposition violation, when it did not seek leave to depose Petitioner a second time. App. 34a, 35a. The respondents have not been substantially prejudiced, harmed or otherwise by Petitioner's alleged conduct. See *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir. 1990). App. 30a.

**B. The District Court Should Consider Effectiveness Of Lesser Sanctions**

In view of the strong policy favoring resolution of decisions on their merits, and since the magnitude of due process concerns grows with the severity of sanctions, courts have uniformly held that orders dismissing the action as sanctions for violating discovery orders are generally deemed appropriate only as a last resort, or when less drastic sanctions would not ensure compliance with the court's orders. Its follows then the court's range of discretion is appreciably narrower if it chooses to impose the most severe of sanctions.

The district court asserted that it considered lesser sanctions; however, the record clearly shows that the district court did not gave adequate consideration to a

less-severe sanction. App. 35a, 36a. Nevertheless, if the court consider sanctions, it should first consider sanctions less severe than dismissal. See *Mann v. Baumer*, 108 F.3d 145, 147 (8th Cir. 1997); *McHenry v.Renne*, 84 F.3d 1172, 1178-79 (9th Cir. 1996); *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996). The Tenth Circuit in *Archibeque v. Atchison, Topeka and Santa Fe Railway Co.*, 70 F.3d (1995) found that the efficacy of lesser sanctions must be considered in determining whether dismissal of action is an appropriate sanction for an alleged discovery violation. Further, the Tenth Circuit established that a court's finding of fact should adequately detail the culpable conduct and explain why lesser sanctions would be ineffective [Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458, 1465 (1988)]. The Eighth Circuit district court finding of fact is contrary to the standard set by the Tenth Circuit. The district did not sincerely consider lesser sanctions and did not explain how defendants were prejudiced. Although, no sanction against Petitioner (Plaintiff) was warranted; the district court could have struck Petitioner's (Plaintiff's) malicious prosecution claim for alleged violations; and, kept the rest of the complaint and defendants intact.

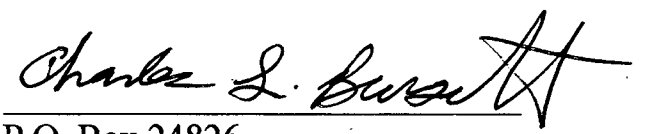
This Court is symbolic of our entire judicial system. This case presents the opportunity for the Court to exercise its Supervisory Power to guarantee the fundamental principles of fairness is untarnished; and, to secure the public policy favoring disposition of cases on the merits.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 14, 2018

Respectfully Submitted,



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