No. 18-9611

IN THE

SUPREME COURT OF THE UNITED STATES

NICHOLAS WEIR · PETITIONER

vs.

FEDERALLY FUNDED AGENCIES, ENTITIES AND ITS AGENTS, THE CITY OF NEW YORK, STATE OF NEW YORK FUNDED AGENCIES, ENTITIES AND ITS AGENTS, UNITED STATES OF AMERICA, EDWARD CURTIS, ASSISTANT ATTORNEY GENERAL, FREDERICK SCHAFFER, CUNY VICE CHANCELLOR OF LEGAL AFFAIRS, ERIC T. SCHNEIDERMAN, FORMER ATTORNEY GENERAL OF NEW YORK STATE, J. SAAB, ROSELIN ANACACY, JAMES PARDUCCI, JOHN DOE(S), JANE DOE(S) · RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

from UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

How does the lower courts rigorously determine if a factual allegation is baseless or frivolous when there is no argument in fact or law to dispute the factual allegation?

Should the Appeal Court use the abuse of discretion or de novo analysis when reviewing cases dismissed sua sponte as frivolous when there are no argument in fact or law to dispute the factual allegation?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and appears to be unpublished.

The opinion of United States district court appears at Appendix B to the petition and appears to be unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was May 8, 2019. A motion to reconsider that decision was timely filed in my case and dismissed without any substance on June 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 28 U.S.C § 1915(e)(2)(B)(i): Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determine that the action or appeal - (i) is frivolous or malicious;

STATEMENT OF CASE

This case is about the US Court of Appeals for the Second Circuit ruling on May 8, 2019 that undisputed factual allegations are frivolous allegations and therefore "lacks an arguable basis either in law or in fact" under Neitzke v. Williams (1989) and 28 U.S.C § 1915(e). The Appeal Court was represented by Judge Dennis Jacobs, Pierre N. Leval, and Christopher F. Droney. The Appeals Court made its ruling seven days prior to the Appellant's Reply Brief was due using blatant lies by the Appellee's Attorneys. The Appellant filed a motion to reconsider and to sanction on May 17, 2019. The Appeal Court provided a single statement denying the motion to reconsider on June 4, 2019: "Appellant filed a motion for reconsideration and the panel that determined the motion has considered the request." The Appeal Court then rule on the following day that motion to sanction defendants' attorneys was moot in light of denying motion to reconsider.

The district court (EDNY) represented by Joseph F. Bianco dismissed the case sua sponte pursuant to its inherent authority to dismiss frivolous complaints on September 21, 2018 after the case was removed from state court. The court essentially attempted to label the plaintiff as delusional based on the undisputed factual allegations presented. The court essentially twisted the true intent of case laws in justifying labeling my entire complaint as frivolous. On the contrary, the court was aware of an ongoing state case in New York Court of Claim which essentially gave rise to the retaliatory actions the court undermined and label as faciful and frivolous. Judge Joseph F. Bianco was subsequently promoted.

REASONS FOR GRANTING THE WRIT

Factual Allegations v. Frivolous Allegations under 28 U.S.C § 1915(e)(2)(B)(i):

The political arena has become very toxic and tribal and gave rise to the term "alternative fact." "Alternative fact" is a term for a blatant lie that an individual wants to convince others to accept as fact. Several Courts are sharply divided on certain controversial topics such as abortion. Notwithstanding these subjective differences among judges, the Courts have generally build its rules, rulings, and integrity on objectivity in assessing factual allegations and legal theory.

Some factual allegations can be easily believed or confirmed, but some factual allegations can appear unbelievable at first glance or difficult to confirm without discovery. At the end of the day, facts are facts denotatively speaking. For instance, America is located beside Canada and healthy spinach is green (my apologizes if you are biologically color-blind). These facts are easily believed or confirmed. Someone alleges being attacked or chased by someone or possibly a creature deep inside a National Park. This fact appears unbelievable and may be difficult to confirm.

Some Courts appear to arbitrarily label factual allegations as frivolous when factual allegations presented. The court essentially twisted the true intent of case laws in justifying labeling my entire complaint as frivolous. On the contrary, the pauperis. I can understand that the court do not want to be swamped with trivial complaints against government officials. In fact, that is partly the reason for providing immunity to government officials acting in their official capacity. On the

other hand, Congress has allowed exceptions when government official abuses the power of their office or role in violating certain laws or an individual's basic civil right. The Courts generally refrain from going against the guidance and laws distinctly created by the Legislative branch and focus on interpreting the Constitution and derived laws. But there are times when the Court declines to protect an individual's substantive right pertaining to basic civil right in an utter disservice to the Constitution. Sure, there are times a particular Court might not be inclined to entertain a particular case. With all due respect to the Court's inherent power and discretion, the Court should check those officials when they intentionally and outrageously abuse their power particularly when lives were lost or are endangered. Not only should the Court's conscience alarms indicating action is needed, but also the principles set forth in the Constitution demands check and balance. The Court is a pivotal surge protector that protects the American experiment from damaging power surges. Over 325 million people, both civil and government agents, in America (even people outside of America) are counting on the Court to do its sworn constitutional duty especially in those crucial cases.

Several federal government agencies enjoy minimal oversight. They are trusted to be "compassed" to operate independently and respect the State and US Constitution. Whenever either the chain of commands or lower ranked agents/officers get overwhelmed or loss by the power bestowed to them by the Constitution, the check and balance systems should respond accordingly. If an individual don't believe in check and balance, such individual do not respect the US

Constitution and do not respect America. The DOJ is selective and reserved when it comes to bringing any charges for violation of the law by government officials. The Court should not be selective especially when there are lost of life or potential for lost of life. The Court should (1) allow a civil trial to pursue, (2) recommend charges or disciplinary actions be brought for the crimes, (3) allow for sanction, and/or (4) rule that the official has abandon his or her sworn constitutional duty.

There are rare occasions where judicial experience and commonsense are not enough to confidently label allegations as frivolous or factual. Additionally, implicit bias and/or bias can result in the court unintentionally or intentionally labeling factual allegations as fanciful or frivolous. While it is impractical for the court to be perfect, the court prides itself at yearning for improvement in interpreting the US Constitution and its derived laws. One of the reasons I love science is that findings are generally objective and reproducible. Findings are not arbitrary or at the mercy of anyone's current emotional state or belief system. I am intrigued by the protocols taken in probing and analyzing different legal theories which are generally objective and structured.

The Court will come across controversial cases and may use its inherent power to seal or redact portions of the case. It is the inherent power or prerogative of the court to seal and redact. However, it is not the inherent power of the court to arbitrarily label factual allegations as fictional or frivolous. When the court operates at the mercy of its current emotional state or belief system, the court is bound to contribute to preventable lost of lives and the undermining of State and US

Constitutions. Regardless of how controversial the factual allegations may appear, the Court is not pardoned from its constitutional duty in assessing the plausibility or merits of the facts in conjunction with the legal theory.

How does the court rigorously determine if a factual allegation is baseless or frivolous when there is no argument in fact or law to dispute the factual allegation?

This Court has not settle how the lower courts should determine if a factual allegation is baseless or frivolous when there is no argument in fact or law to dispute the factual allegation. Consequently, there are several cases across all Appeal Courts that were overruled as not frivolous or affirmed as frivolous based on the subjective or bias eyes of the court. In some instances, the lower court departed from the accepted and usual course of judicial proceedings when determining frivolousness. Despite Alfred citing evidence that he "received both his and another inmate's medical records, and that on another occasion he received another inmate's records" to support his legal theory of deliberate indifference, the magistrate and the district court labeled Alfred's entire complaint as "fanciful and fantastic or its assertions conclusional." Alfred v. Corr. Corp. of Am. 437 Fed. Appx. 281 (5th Cir. 2011). The factual allegations were clear and supported the legal theory but yet the magistrate and district court "ignored" them. Id.

Legal Standard for Pleading and Analysis of Frivolousness

Even though the court "liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the strongest arguments they

suggest," McLeod v. Jewish Guild for the Blind, 864 F.3d 154 , 156 (2d Cir. 2017) (internal quotation marks omitted), pro se appellants must still comply with Federal Rule of Appellate Procedure 28(a) , which "requires appellants in their briefs to provide the court [*2] with a clear statement of the issues on appeal," Moates v. Barkley, 147 F.3d 207 , 209 (2d Cir. 1998). The court afford a pro se litigant "special solicitude" by interpreting the pro se complaint "to raise the strongest claims that it suggests." Hill v. Curcione, 657 F.3d 116 , 122 (2d Cir. 2011). See also Terry v. Inc. Village of Patchogue, 826 F.3d 631 , 632-33 (2d Cir. 2016) ("Although we accord filings from pro se litigants a high degree of solicitude, even a litigant representing himself is obliged to set out identifiable arguments in his principal brief." (internal quotation marks omitted)); LoSacco v. City of Middletown, 71 F.3d 88 , 93 (2d Cir. 1995) ("[W]e need not manufacture claims of error for an appellant proceeding pro se.").

"[D]ismissal is only appropriate 'for a claim based on an indisputably meritless legal theory' and the frivolousness determination 'cannot serve as a factfinding process for the resolution of disputed facts.'" Fogle v. Pierson, 435 F.3d 1252 , 1259 (10th Cir. 2006) (citing Fratus v. Deland, 49 F.3d 673 , 674 (10th Cir. 1995)). See also Denton v. Hernandez, 504 U.S. 25 , 33 , 112 S. Ct. 1728 , 118 L. Ed. 2d 340 (1992) (holding that "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible"); Livingston, 141 F.3d at 437 ("[A]n action is ' frivolous' when either: (1) the factual contentions are clearly baseless . . . ; or (2) the claim is based on an indisputably

meritless legal theory.") (internal quotation marks and citation omitted). "The Supreme Court has emphasized that the standard for dismissal is higher under § 1915(e)(2)(B) because the plaintiff may not have the opportunity to respond meaningfully by opposing a motion to dismiss." Alfred v. Corr. Corp. of Am. 437 Fed. Appx. 281 (5th Cir. 2011). "The Supreme Court has likewise provided guidance for when a factual allegation is frivolous under § 1915(e)(2)(B). It has stated that a court may dismiss a claim only if the facts are "clearly baseless," " fanciful," "fantastic," or "delusional." "As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." The district court may not dismiss the case simply because it finds the plaintiffs allegations unlikely." Id.

"The Denton Court also made it clear that in reviewing a dismissal for frivolousness under the abuse of discretion standard, we should consider "whether the plaintiff was proceeding pro se; whether the court inappropriately resolved genuine issues of disputed fact; whether the court applied erroneous legal conclusions; whether the court has provided a statement explaining the dismissal that facilitates 'intelligent appellate review'; and whether the dismissal was with or without prejudice." 504 U.S. at 34 (citations omitted). Several of the factors prominently in play in this case (pro se status, legal errors, the extent of the district court's analysis, and dismissal with prejudice) are thus important factors to consider in determining whether the district court abused its discretion." Longyear

v. Utah Bd. of Pardons & Parole, 68 Fed. Appx. 878 (10th Cir. 2003). "[T]he abuse of discretion standard applies exclusively to our review of the finding of frivolousness, a question that should be reached only if we have first concluded on de novo review that the complaint is legally deficient." Id.

(A) Cases where facts appear believable but do not objectively support invoked legal theory or any uninvoked legal theory:

There are cases where the factual allegations are not enough to establish a claim or relief. For example, the 2nd Circuit has held that a plaintiff had "failed to plead facts sufficient to establish either federal question or diversity jurisdiction, and therefore affirm the District Court's judgment." Adams v. Netflix, Inc., 726 Fed. Appx. 76 (2d Cir. 2018).

The 10th Circuit Court has held that presuming the factual allegations are true, they supported the "infringement of a recognized legal interest" of religious discrimination claim against the state of Utah. Longyear v. Utah Bd. of Pardons & Parole, 68 Fed. Appx. 878 (10th Cir. 2003). Consequently, the factual allegations were not frivolous as ruled by the lower court. Similarly, the 11th Circuit Court has held that presuming the factual allegations are true, "Hyland has demonstrated actual harm to a qualified legal action, and he should be allowed the opportunity to present evidence." Hyland v. Parker, 163 Fed. Appx. 793 (11th Cir. 2006). "Moreover, Hyland's claims do not lack arguable merit, are not clearly baseless, do not rely on an indisputably meritless legal theory, or otherwise suggest that he has

little or no chance of success. Thus, these allegations are sufficient to survive frivolity analysis under sections 1915(e)(2)(B)(i)[.]" Id.

The 5th Circuit Court has held that that a "claim for relief for failure to provide a probable cause hearing within forty-eight hours is not frivolous." Buckenberger v. Reed, 342 Fed. Appx. 58 (5th Cir. 2009). The Court noted that "[w]hen a pro se plaintiff's suit raises a constitutional claim, but he has inadvertently sued the wrong parties, he should [be] given leave to amend to sue the appropriate party or parties." The Court noted that the "allegations show a probable constitutional violation by someone" and ""[i]t may be that some, or perhaps none, of the named defendants can be held responsible" for the constitutional violation." Id. However, "Buckenberger never had an opportunity for discovery because the district court never ordered service of process on the defendants other than Jarrell."

The 5th Circuit Court has held that the magistrate and district court "ignored" factual allegations supporting the legal theory and abused its discretion by labeling the claim as "fanciful and fantastic or its assertions conclusional." Alfred v. Corr. Corp. of Am. 437 Fed. Appx. 281 (5th Cir. 2011). The Court noted that "[r]egardless of whether [there was] enough evidence to prove that the action was intentional, it is sufficient to eschew conclusionality. It is up to the trier of fact to determine the sufficiency of the evidence." Id. The 7th Circuit has held even a lower standard for pleading of factual allegations as shown in Hutchinson ex rel. Baker v. Spink:

"The district court refused to allow Hutchinson to proceed on this claim because it thought the complaint failed to allege any facts supporting an inference that the state officials acted deliberately in placing Andrew in an unsafe environment. Complaints need not plead facts, however, as we have frequently noted. Palmer v. Board of Educ., 46 F.3d 682, 688 (7th Cir.1995) (citing Leatherman v. Tarrant County, 507 U.S. 163, 168, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993)); Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir.1994). It is enough if the complaint puts the defendants on notice of the claim and that some set of facts could be presented that would give rise to a right to relief. McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)); Caremark, Inc. v. Coram Healthcare Corp., 113 F.3d 645, 648 (7th Cir.1997); Venture Associates Corp. v. Zenith Data Sys., 987 F.2d 429, 432 (7th Cir.1993); see also Wright & Miller, Federal Practice and Procedure: Civil 2d §§ 1215, 1216 (1990). This complaint meets that standard; it is clearly [*901] not frivolous or malicious." Hutchinson ex rel. Baker v. Spink, (7th Cir. 1997).

The 8th Circuit Court has held that "although plaintiffs' claims were meritless, they were not "frivolous or groundless."" EEOC v. Trans States Airlines, Inc., 462 F.3d 987, 98 FEP Cases 1441 (8th Cir. 2006). Even if the factual allegations later turns out to be meritless, the 10th Circuit Court has held that the

factual allegations should not be labeled as frivolous. "[The 10th Circuit Court] emphasize that we do not take any position on the Blakelys' claim for breach of the implied covenant of good faith and fair dealing, other than to hold....that it is not frivolous." Blakely v. USAA Cas. Ins. Co., 633 F.3d 944 (10th Cir. 2011).

(B) Cases where facts appear unbelievable but may objectively support a legal theory:

There are cases where the factual allegations appear unbelievable on first glance but may objectively support a legal theory. In the 10th Circuit Court, "Gravley alleges that television networks and public figures are secretly "branding" him as a sexual predator" by using "secret code used on television." Gravley v. Hunter, 745 Fed. Appx. 795 (10th Cir. 2018). Nonetheless, the court sua sponte dismissed the suit as frivolous.

Case before this Court

Even if some of the factual allegations appeared frivolous on first glance, there were several factual allegations that were plausible and/or known by the defendants and their attorneys. They were known either from an ongoing case in state court or through their own investigations. The 7th Circuit has ruled that if out several claims or counts "at least one probably survives", the entire complaint is not frivolous. Hutchinson ex rel. Baker v. Spink, 126 F.3d 895, 7 AD Cases 599 (7th Cir. 1997). Moreover, the factual allegations are essentially sworn statements that the court may sanction the plaintiff for if the allegations were deceitful. Therefore, this

make it less likely that a plaintiff would provide deceptive factual allegations, especially in federal court. Furthermore, "the district court may not dismiss the case simply because it finds the plaintiffs allegations unlikely." Alfred v. Corr. Corp. of Am. 437 Fed. Appx. 281 (5th Cir. 2011).

Two core principles of the US Constitution are the preservation of life and check and balance. In fact, check and balance is the lifeline of the American experiment. The founders did not create the Constitution because they didn't have social media to preoccupy their time. They have observed different political systems and how people behave when they are unchecked. The US Constitution ultimately created the honorable role of the court as well as the honorable role of the chain of commands in the various agencies. The reality is that not everyone is "compassed" and strong enough to not become lost or overwhelmed by the power of their office or role. Not only the survival but also the prosperity of the American experiment depends on check and balance systems. It was self-evident to the founders and it will continue to be such throughout the existence of the American experiment.

The Appeal Court did not review my frivolousness dismissal under the abuse of discretion standard nor the de novo standard. There were virtually no check and balance by the Appeal Court.

CONCLUSION

This petition for writ of certiorari should be granted given the conflicting rulings and point of views between Circuit Courts as well as district courts. The lower courts such as the district courts and the Appeal Courts have been departing from the accepted and usual course of judicial proceedings when determining frivolousness as shown herein and in my case. My case is relevant to others similarly situated, others to come, the district courts, and Appeal Courts in being clear on how to rigorously determine if a factual allegation is baseless or frivolous when there is no argument in fact or law to dispute the factual allegation.

Thank you!

Respectfully submitted,

N. Weir

Date: 06/07/2019

CERTIFICATE OF COMPLIANCE

I, Nicholas Weir, certify that this petition for writ of certiorari contains 9,000 words or less.

CONCLUSION

This petition for writ of certiorari should be granted given the conflicting rulings and point of views between Circuit Courts as well as district courts. The lower courts such as the district courts and the Appeal Courts have been departing from the accepted and usual course of judicial proceedings when determining frivolousness as shown herein and in my case. My case is relevant to others similarly situated, others to come; the district courts, and Appeal Courts in being clear on how to rigorously determine if a factual allegation is baseless or frivolous when there is no argument in fact or law to dispute the factual allegation.

Thank you!

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