

No. \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

Sai<sup>1</sup>  
*Plaintiff-appellant-petitioner*

v.

Abdi *et al.*  
*Defendants-appellees*<sup>2</sup>

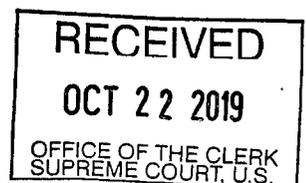
On petition for writ of *certiorari* from No. 18-35954 (9th Cir.)  
On appeal from *Sai v. Abdi*, No. 2:17-cv-1941 (W.D. Wash.)

**Application & motion to Justice Kagan for stay pending *certiorari*,  
abeyance pending D.C. Circuit case and/or extension,  
IFP status, and appointment of *cert* stage counsel**

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<sup>1</sup> "Sai" is Petitioner's full legal name, i.e. they are mononymous. They are agender, and request to be referred to using gender-neutral language. They are a registered CM/ECF user in the court below, partially blind, and have multiple other disabilities and situational factors impairing the use of paper documents, and therefore request to receive all responses as PDFs by email to [legal@s.ai](mailto:legal@s.ai), rather than by physical mail.

<sup>2</sup> Defendants were not served, and have not appeared, in either district or appellate court. Defendants will not, and need not, be served for this petition; they have no right to oppose the relief requested.



## Background

Petitioner presented the following questions to the Ninth Circuit on appeal<sup>3</sup>:

1. When a *pro se* party has filed a motion for CM/ECF access, may a district court deny, refuse to rule on, or refuse to docket the motion because the movant has a pending motion for IFP status or has not yet paid the court's filing fee?
2. May a federal court refuse to allow a *pro se* party to file case initiation documents via CM/ECF, solely on the basis of being *pro se*, when the party otherwise qualifies for CM/ECF access?
3. Is a party seeking IFP status entitled to file the IFP affidavit under seal and/or *ex parte*?

These questions include matters that are variously of nationwide first impression<sup>4</sup>, intra-circuit conflict<sup>5</sup>, and broad inter-circuit conflict<sup>6</sup>.

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<sup>3</sup> ECF No. 5

<sup>4</sup> QP 1 & 2. One case, *Greenspan v. Administrative Office of U.S. Courts*, No. 5:14-cv-2396 (N.D. Cal. Dec. 4, 2014) at \*13-14, discusses it in *dicta*. However, it does not address any of Appellant's arguments, and that decision was primarily about Greenspan's inability to represent his corporation *pro se*.

<sup>5</sup> QP 3. N.D. Cal. said yes; W.D. Wash. said no. S.D. Cal. said yes as to CJA affidavits.

<sup>6</sup> QP 3. Nearly every circuit is involved; the summary is non-trivial. *See e.g. cert. petition for Sai v. USPS*, 135 S. Ct. 1915 (2015) (represented *pro bono*, 3 *amici*, BIO requested, *cert* denied). The split also extends to unpublished quasi-seal policies of holding IFP applications in different courts, holding IFP applications "locked" but not "under seal".



Petitioner has active IFP status, and appointed counsel, in both *Sai v. Smith*, No. 3:16-cv-1024 (N.D. Cal) and *Sai v. TSA*, No. 1:14-cv-403 (D. D.C.). Both courts granted Petitioner leave to file the affidavit in support of an IFP motion under seal and either *ex parte* or under “eyes only” protective order.

Being allowed to file for IFP status with the affidavit under seal is a prerequisite for Petitioner being able to file for IFP status at all, because their IFP affidavit contains personally private, privileged, and 5th Amendment sensitive material.

However, in this case, the court below (W.D. Wash.) explicitly split from its sister court and denied Petitioner’s motion for leave to file under seal.

On appeal, a 2-judge panel of the Ninth Circuit denied<sup>7</sup> Petitioner’s IFP motion, without any justification given for denying leave to file under seal.

The court also denied Petitioner’s motion for appointment of counsel, despite Petitioner’s severe disabilities, and even ordered Petitioner not to move for reconsideration, clarification, or modification, without a word of explanation, let alone the analysis required.<sup>8</sup>

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<sup>7</sup> ECF No. 11

<sup>8</sup> See *Bradshaw v. Zoological Society*, 662 F.2d 1301 (9th Cir. 1981), *Kuster v. Block*, 773 F.2d 1048, 1049 (9th Cir. 1985), and *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 fn. 2 (9th Cir. 1986).



On March 27, 2019, Petitioner moved<sup>9</sup> for reconsideration *en banc* because:

1. The panel's order violates *Adkins v. El DuPont de Nemours & Co.*, 335 U.S. 331, 339-340 (1948), by requiring Petitioner's destitution or debt.
2. The panel's order required Petitioner to write a brief that they are unable to do without exacerbating life-threatening disabilities, and appointment of counsel is therefore case-dispositive.
3. The panel's order violated FRAP 27(b), by prospectively denying the ability to *seek* reconsideration.
4. The panel's order violates the binding circuit precedent in *Kuster* and *Wilborn* that *mandates* ongoing reconsideration of appointment of counsel.
5. *Weygandt*<sup>10</sup>, *Kuster*, and *Wilborn* were wrongly decided.<sup>11</sup>

Petitioner submitted, under seal, *extremely* extensive and sensitive record proving both their poverty and disability, and the fact that the record thereof merited seal.

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<sup>9</sup> ECF No. 13

<sup>10</sup> *Weygandt v. Look*, 718 F.2d 952, 953-54 (9th Cir. 1983)

<sup>11</sup> See e.g. the unanimous agreement of the *Wilborn* panel, 789 F. 2d at 1331 n.3: "We feel compelled to remark that we are troubled by what we perceive to be the incoherence of the two-pronged inquiry into exceptional circumstances by which we are bound. The present case aside, we question how a court reasonably can expect a strong showing by a § 1983 claimant on the first prong when it is manifestly unlikely that a pro se petitioner involved in a complex case which he cannot litigate effectively would be capable of demonstrating a likelihood of success on the merits."



On August 29, 2019<sup>12</sup>, a 2-judge panel:

1. denied the petition for rehearing *en banc* without notification or opportunity for vote by the full court
2. granted seal as to everything that Petitioner sought to file under seal, namely the extensive IFP and disability related affidavits & medical record
3. struck Petitioner's memorandum and *public* affidavit as to IFP status, for which Petitioner had *not* requested seal<sup>13</sup>
4. denied reconsideration of IFP status, and further ordered Petitioner not to file for any reconsideration, clarification, or modification thereof
5. ordered Petitioner to pay the filing fee, and to brief the appeal *pro se*.

On October 7, 2019, the clerk entered an order dismissing the appeal for failure to pay fees.<sup>14</sup>

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<sup>12</sup> ECF No. 24

<sup>13</sup> The struck documents were those imported from another case, *Sai v Pekoske*, No. 15-2356 (1st Cir.), and for which no seal was sought, namely:

15-3 2017-09-18 6120606 Sai Renewed Motion to Proceed In Forma Pauperis

15-4 2017-09-18 6120606-1 Public Affidavit

15-5 2017-09-18 6120607 Sai Memorandum in Support of Motion for IFP

15-6 2017-09-18 6120607-1 ULS Financial Eligibility Guidelines

15-7 2017-09-18 6120607-2 First Proposed Order

15-8 2017-09-18 6120607-3 Second Proposed Order

15-11 2017-10-16 6125917 Sai Reply re renewed IFP etc motion

<sup>14</sup> ECF No. 27



**Potential questions presented on *certiorari*<sup>15</sup>**

1. May a party seeking IFP status file the IFP affidavit<sup>16</sup> under seal?
2. May a court deny IFP status, and dismiss a case for lack of fee payment, despite an IFP motion and filed, sealed affidavits demonstrating qualification?
3. May a court refuse to reconsider a motion for IFP status, or for appointment of counsel, when presented with extensive facts justifying reconsideration?
4. May a court prospectively order that no motion for reconsideration, clarification, and/or modification will be filed or considered?
5. May an appellate panel, acting alone, deny an *en banc* petition — i.e., without any opportunity for a vote by all active members of the court, as required by FRAP 35(a) & (f)?<sup>17</sup>
6. May an appeals court designate panels of only 2 judges, contrary to the 3-judge requirement under 28 U.S. Code § 46(b)?<sup>18</sup>

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<sup>15</sup> Petitioner is well aware that these will need to be better condensed and presented, and presents this summary for the benefit of potential appointed *cert* stage counsel.

<sup>16</sup> The IFP *motion* is not at issue, and was filed publicly.

<sup>17</sup> See Ninth Circuit General Order 6.11.

<sup>18</sup> See Ninth Circuit General Order 3.2(a). There is no record indication that the unavailability provision, *id.* and G.O. 3.2(h), was relevant.



## Applications and motions<sup>19</sup>

### 1. *Stay of mandate pending certiorari*

Petitioner respectfully moves for stay of the mandate, since its issuance would terminate the case. There is no other appeared party (the district court refused to serve them under FRCP 4(c)(3)), and hence nobody else's interests are affected.

Petitioner moved for stay with the Ninth Circuit<sup>20</sup>, but the clerk issued order of dismissal (acting in 21 days as mandate), without a ruling on the motion.

### 2. *Extension*

Petitioner is unable to brief a petition for *certiorari pro se*, and therefore respectfully moves an extension of the maximum allowable time, in order to find *pro bono* counsel.

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<sup>19</sup> Petitioner is not certain which designation applies to which relief, and defers to Justice Kagan's judgment. Due to the costs involved, Petitioner asks to be excused of any additional format or copy requirements that may apply to motions.

<sup>20</sup> ECF No. 26



3. *Abeyance*

Petitioner has presented virtually identical issues in *In re Sai*, No. 19-5039 (D.C. Cir.).

On Sept. 4, 2019, a panel of that court withdrew its prior order that Petitioner file a (futile) motion to proceed IFP in the district court, and permitted Petitioner to file under seal an IFP motion, affidavit, and motion to seal.

Petitioner has complied with the new order<sup>21</sup>, except to request that the court appoint limited purpose counsel for the specific purpose of briefing the question of IFP affidavit seal. That is an issue that Petitioner previously (unsuccessfully) presented to that court *pro se*, and which the court has previously denied in *per curiam* orders without any substantive analysis.<sup>22</sup> Petitioner was represented on *cert* from that denial by *pro bono* counsel, supported by multiple *amici*, with brief in opposition requested.<sup>23</sup>

The IFP privacy question presented here is precisely identical. If the D.C. Circuit rules against Petitioner, *cert* from that ruling should be consolidated. If it rules in favor, it would constitute a direct a circuit split, on an *identically* presented question.

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<sup>21</sup> modulo the submission of the sealed record, which is pending a motion for leave to file electronically, and declining the court's offer of seal for the *motions*

<sup>22</sup> See *Sai v. USPS*, No. 14-1005 (D.C. Cir. May 13, 2014); *In re Schum*, No. 13-1041 (D.C. Cir. May 31, 2013); *Sturdza v. United Arab Emirates*, No. 07-7034 (D.C. Cir. Oct. 23, 2007); and *Wolfe v. Graham*, No. 95-7137 (D.C. Cir. Dec. 22, 1995).

<sup>23</sup> *Sai v. USPS*, 135 S. Ct. 1915 (2015).



Petitioner therefore respectfully moves for abeyance of this case until the resolution of the D.C. Circuit's decision on the pending motion for IFP affidavit privacy.

4. *Leave to file the sealed record below under seal, and transfer of sealed record by the Clerk*

Petitioner filed extensive records below addressing their finances and disability, and the court below granted seal of all of them.

Those records constitute the factual basis for the two motions *infra*. Petitioner would not consent to file them except under seal, as they are extremely sensitive. They merit seal for the reasons given below (which themselves are partially under seal).

Petitioner therefore respectfully moves for leave to file the sealed record below under seal with this Court, and that this Clerk effectuate the sealed filing by transferring the records directly from the court below.



5. *IFP status*

Petitioner has current IFP status in two other courts, as noted above, based on the *sealed* IFP affidavits which are part of the sealed record below.

This Court's rules do not require that an IFP affidavit be filed on public record, only that one be filed. Sup. Ct. R. 39(1).

The issue of whether or not Petitioner may file for IFP status with the affidavit under seal *is itself* the key question presented on the merits. It would therefore be inappropriate to brief in this motion; to do so would require that Petitioner brief *pro se* the very issue which post-grant counsel should brief. Sup. Ct. R. 39(7).

Petitioner hereby reaffirms under penalty of perjury, 28 USC 1746, that they are still poor, as presented in the sealed record below and detailed in the public-version affidavit filed in *Sai v. Pekoske*, No. 15-2356 (1st Cir., *filed* Sept. 18, 2017), and unable to reasonably afford the fees and costs of filing in this Court, let alone cost of counsel.

Petitioner respectfully moves for IFP status in this Court based on the grant in other courts, and the sealed record below (which, *supra*, is moved to be filed in this Court).



6. *Appointment of cert. stage counsel*

This Court's rules do not address the appointment of *cert* stage counsel. It is therefore addressed only by statute: 28 U.S.C. § 1915, the ADA, and the Rehabilitation Act.<sup>24</sup>

Petitioner is unable to brief a petition for *certiorari pro se*, for the reasons expressed at length in the sealed medical records below. Petitioner is also unable to afford counsel, for the reasons expressed at length in the sealed financial records below.

Petitioner has previously presented, through *pro bono* counsel who no longer has the resources to represent Petitioner, petitions for *certiorari*<sup>25</sup> that garnered the interest of this Court and others: *Sai v. USPS*, No. 14-646, 135 S. Ct. 1915 (2015)<sup>26</sup>, extension granted, No. 14A70, BIO requested, multiple *amici* in support (re IFP affidavit seal); *Sai v. TSA*, No. 16-287, \_ US \_ (2017)<sup>27</sup> & *Sai v. TSA*, No. 16-1065, \_ US \_ (2017)<sup>28</sup>, BIO filed voluntarily (re interlocutory appealability of denial of counsel).

This case presents very similar, and partially identical, questions.

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<sup>24</sup> The question of appointment of merits stage counsel, Sup. Ct. R. 39(7), is premature, and must wait until after *cert* is considered.

<sup>25</sup> Previous *pro bono* counsel paid all fees and costs.

<sup>26</sup> <https://s.ai/ifp/>

<sup>27</sup> <https://www.scotusblog.com/case-files/cases/sai-v-transportation-safety-administration/>

<sup>28</sup> <https://www.scotusblog.com/case-files/cases/sai-v-transportation-security-administration/>



Petitioner's previous record, and the background explanation above, demonstrate that the questions intended present serious questions involving court-recognized inter- and intra-circuit splits. The two questions of first impression sought to be presented are structurally *impossible* to present to the court of appeals, because they are due process violations caused by the court's own rules for panel and *en banc* procedure.

Petitioner humbly submits that this demonstrates a genuine question of law for this Court, and a reasonable likelihood of success on *cert* if counsel is appointed.

By experience of working closely with *pro bono* counsel on the prior *cert* petitions, Petitioner is familiar with the work required. Petitioner hereby states, under penalty of perjury, that they are unable to brief a *cert* petition due to life-threatening disability, as explained in the sealed medical record below.

This same issue of disability prevented them from filing the *pro se* briefing demanded below, and was the reason for appointment of counsel by two other courts.

Therefore, Petitioner respectfully moves for the appointment of *cert.* stage counsel, *both* on the basis of poverty under 28 U.S.C. § 1915, *and* as an accommodation for disability under the ADA and the Rehabilitation Act.<sup>29</sup>

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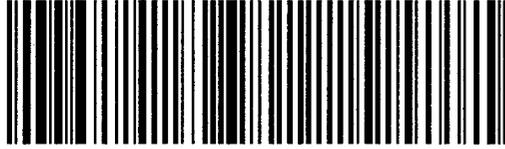
<sup>29</sup> See e.g. Brodoff, *The ADA - One Avenue to Appointed Counsel Before a Full Civil Gideon*,



SAI  
500 WESTOVER DR # 54514  
SANFORD, NC 27330-8941

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