

20-1355 ORIGINAL
NO. 21-

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID JOHNSON,

Petitioner,

v.

STEVEN MNUCHIN, SECRETARY
DEPARTMENT OF THE TREASURY,
SERGIO ARELLANO, SUSAN J. KASS, DAVID
OYLER, LARRY G. KOTTKE, JAMES M
JOHNSON, LYNN G. GANZ, PATRICK WOZEK,
FRED SAVAGLIO, ROBERT TRZAKUS, and
DARLENE MCVEY,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeal
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On the eve of a trial, David Johnson was deprived of his day in court because Defendants have refused to appear at trial unless the district court agreed to adopt all changes to the federal laws as pronounced in the model jury instructions published in the 4th Circuit, 9th Circuit, and the other circuits. In light of the right to a trial jury is guaranteed by the 7th Amendment, and the Supreme Court's precedent in cases like this that a jury must decide the Court has consistently granted this Writ to compel a jury trial. Where the employer and its employees violate the federal law by taking unlawful employment actions targeting only blacks when the lower court has dismissed the lawsuit that a jury must decide it violated the 7th Amendment as announced in *Curtis v. Loether*, 415 U.S. 189 (1974). The questions present are:

1. Whether a plaintiff is guaranteed the right to a jury trial by the 7th Amendment that leaves no discretion in the lower courts to deny a jury trial?
2. Whether a plaintiff is guaranteed the right to a jury trial as to legal claims authorized by 42 U.S.C. § 1985, and 42 U.S.C. § 1986?
3. Whether the findings by the Equal Employment Opportunity Commission that the employer took the "unwarranted" personnel action(s) the lower court must perform the ministerial duties imposed by the Backpay Act and entry of the Order of Remittitur?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings docketed as 14-cv-02233 in the Northern District of Illinois:

1. Petitioner David Johnson has filed the Verified Complaint at Law against Defendants STEVEN MNUCHIN in his official capacity as SECRETARY at the DEPARTMENT OF THE TREASURY, SERGIO ARELLANO, SUSAN J. KASS, DAVID OYLER, LARRY G. KOTTKE, JAMES M. JOHNSON, LYNN G. GANZ, PATRICK WOZEK, FRED SAVAGLIO, ROBERT TRZAKUS, and DARLENE MCVEY (collectively Defendants in the district court, and real parties in interest in the court of appeals).

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PETITION FOR WRIT OF CERTIORARI

Plaintiff David Johnson respectfully petitions for a writ of certiorari vacating the Orders of the lower courts depriving Plaintiff of his right to a jury trial, and the prohibition of such future orders of any kind in the Seventh Circuit denying the right to a jury trial, or in the alternative for a writ of certiorari to review the mandate of the Seventh Circuit dismissing Plaintiff's duly filed appeal "for want of prosecution" in this case.

OPINION BELOW

The mandate of the Seventh Circuit is not reported, but is reproduced at Pet. App. 1a-3a granting to Defendants a "dismissal for want of prosecution".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and 28 U.S.C. § 1651(a). Under 28 U.S.C. § 1254(1), the jurisdiction of this Court is invoked to review the final judgment of the district court depriving Plaintiff of his right to a trial by jury in this case that was finally scheduled for a trial by jury on November 4, 2019. 28 U.S.C. § 1651(a) describes the jurisdiction of this Court to issue extraordinary writs as necessary or appropriate to aid its appellate jurisdiction over this practice and policy of depriving Plaintiff his day in court by dismissing legal claims “for want of prosecution” without ever reaching the merits in the Seventh Circuit. Furthermore, the Court has the jurisdiction to instruct the lower courts to confine its exercise of authority to a following of the Constitution, applicable federal law(s) and the clearly established legal precedent set by the Supreme Court. Accordingly, the Court clearly possesses its jurisdiction to direct the lower court to empanel a jury and vacate all void Orders dismissing this federal civil rights cases for “want of prosecution”, or entry of a final judgment on the merits reviewable on appeal to this Court. The Seventh Circuit has filed its opinion on October 23, 2020. There was no petition for rehearing. Under this Court’s COVID-19 rule, the time to file this Petition is on or before March 23, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Seventh Amendment to the United States Constitution guarantees the right to a trial by jury provides as follows:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law. U.S. Const., amend. VII.

The Presentment Clause, which is contained in Article I, Section 7, Clauses 2 and 3 provides as follows:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . U.S. Const., Article I, Section 7, Clauses 2 and 3.

INTRODUCTION

Plaintiff seeks a writ of certiorari vacating the order of Judge John Z. Lee dismissing this case on the eve of trial without a jury trial and the Writ directing the Seventh Circuit lead by Judge Frank Easterbrook to remand this case for a jury trial. Certiorari relief is warranted because the lower courts have exceeded its jurisdiction by depriving Plaintiff of a trial by jury in this a case pending for more than five (5) years when Plaintiff is trial ready and awaiting a jury trial but instead Defendants are granted a “dismissal for want of prosecution” without ever reaching the merits, which is patently unconstitutional. Defendants after the procedural posturing for now more than a decade but will not agree to a pre-trial order unless Plaintiff waives his legal claims therein leading to the “dismissal for want of prosecution” by the district court, which is outrageous and patently unconstitutional. The Seventh Circuit has dismissed “for want of prosecution” Plaintiff’s appeal of the deprivation of the right to a jury trial by the district court. Accordingly, the Court should issue a Writ directing the lower courts to empanel a jury for a trial on the merits.

Plaintiff and Defendants agree that the facts in this case are undisputed and on submission thereof to the Administrative Law Judge Wardell thereafter the findings of the Equal Employment Opportunity Commission (“EEOC”) are that Defendant is the employer acting by and through its supervisors it did rely solely on the harassers in taking the prohibited employment

actions against Plaintiff. The findings of facts by the EEOC in this case did arise at the same time period within the Seventh Circuit paralleling the decision pronounced by the Supreme Court reversing the ruling of the Seventh Circuit in *Staub v. Proctor Hosp.*, 421 F. App'x 647, 648 (7th Cir. 2011). Thus, a decade later it appears that the Seventh Circuit continues to disregard the legal precedent set by this Court.¹ This Court should issue the Writ directing that the lower courts to empanel a jury and follow the precedent set by the Supreme Court. It is furthermore baffling why Respondents contend that no ministerial duty is imposed upon the lower courts to have already entered an Order as to Backpay following the uncontested findings by the EEOC that the employer having admitted it did rely solely on the harassers in taking the employment actions against Plaintiff and the employer is therefore liable under the clearly established law pronounced by this Court. The Respondents on the contrary would prefer to argue this case into a judicially created "federal common law(s)" in the Seventh Circuit of dismissing federal civil rights cases "for want of prosecution" without reaching the merits despite the lack of jurisdiction to execute an enactment of any such a "federal common law" these unconstitutional practices are subject to review and reversal by this Court.

¹See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 753-754 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

Respondents have further refused to exercise the jurisdiction of the federal court over Plaintiff's legal claims brought pursuant to the FTCA on the theory of Negligent Supervision. Plaintiff has received the previously concealed emails stating therein that Defendant failed to supervise its employees to which Respondents contend that this newly discovered evidence does not give rise to a trial by jury on the legal claims under the FTCA on the theory of Negligent Supervision albeit Congress has waived immunity for Negligence under the FTCA. Furthermore, Plaintiff has also alleged that his legal claims for damages against the individual Defendants are authorized under 42 U.S.C. § 1985, and 42 U.S.C. § 1986 unless Congress has not expressly provided otherwise. However, the district court acting *sua sponte* has granted "immunity" to the individual Defendants from liability for the violation of the federal civil rights in this case despite the lack of authority to execute an enactment of any federal law(s). This case raises a pure legal question of liability for the legal claims to damages suffered by a plaintiff because of the unlawful conduct of Defendants and the right to a trial by jury as to all issues so triable without exception. The precedent of the Supreme Court and circuits are not in conflict as the right to a trial by jury is guaranteed by the Seventh Amendment in this case. The Seventh Amendment guarantees the right to a jury trial in federal actions wherein a plaintiff seeks money damages and Plaintiff is entitled to his right of appeal of the deprivation of the right to the jury trial dismissed "for want of prosecution" warranting a Writ directing the Respondents to empanel a jury.

STATEMENT OF THE CASE

I. Plaintiff is trial ready these Defendants after procedural posturing for more than a decade refuse to appear at a trial by jury on the merits unless the district court enters a “pre-trial order” that waives Plaintiff’s legal claims and further aids Defendants in defending the case at trial. Plaintiff has “met and conferred” with Defendants thereafter provided them a draft of the “Pre-Trial Order” (hereinafter referred to as “Judge John Z. Lee’s PTO”) and the pattern jury instructions he owes no other duty to these Respondents under any federal law(s). Plaintiff and Defendants do not agree to any matter(s) or discussion(s) between the parties in this democracy it is only for jury at trial to decide merits of the case. Plaintiff was deprived his right to a trial jury on the eve of trial because of the refusal by Defendants appear at trial without Judge John Z. Lee’s PTO and the district court was unable to extract from Plaintiff a waiver of his legal rights *i.e.*, the right to amend the complaint at trial as authorized by Rule 15 of the Federal Rules of Civil Procedure. The final judgment states that district court could not perform “case management” of the jury trial because the pro-se plaintiff would not accommodate the legal demands made by Defendants, which is unconstitutional as a matter of law. The Seventh Circuit has failed to mandate that the district court empanel a jury without exception. The Seventh Circuit has not remanded the case to a different judge for a trial by jury on the merits and instead the appeal has “for want of prosecution” without reaching the merits.

II. Plaintiff's legal claims are for damages he suffered from the injuries because of the failure to promote him into the position of Senior Flow Thru Specialist at a Grade 14 as set forth in Announcements 10PH-LMB0512-14-BK, 10PH4-LMB0152-0512-TR, and 10PH4-LMB0156- 0512-14-BK (hereinafter collectively "Senior Flow-Through Specialist") by Defendants, as well as racial discrimination, harassment, and retaliatory discharge by Defendants on May 7, 2010. Plaintiff first identifies the specific employment practices that are responsible for the gross disparity in the hiring, training, promotion, and termination of African-Americans these statistical² disparities are reported annually since as early as 2000 by Defendant Agency on its own EEOC MD 715; and second Plaintiff can prove causation by offering Defendant Agency's own statistical evidence sufficient to show that discrimination was the standard operating procedure through a combination of these statistics and anecdotes. The official records of the Equal Employment Opportunity Commission that the EEO Investigator has provided to Defendants contains the statement from Mr. Enoch Cruickshank he states "I never endured any form of harassment with Larry's two predecessors. I was the only African American in Larry Kottke's unit for about one and half years before the Complainant joined the unit. Under Larry Kottke, I had felt harassment because of my race." Defendants have requested that Judge John Z. Lee in the final PTO exclude from testifying at trial as a witness only Mr. Cruickshank because he is black.

²*Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

Thus, Plaintiff provides the statistical evidence and supplemental anecdotal testimony of the culture at Defendant bringing the statistical evidence of systemic discrimination “convincingly to life.”³

III. Plaintiff has timely filed his EEO Complaint complaining of the racial discrimination, harassment, and retaliation at Defendant Agency. Defendant Agency’s prohibited employment practices are guided by Senior Management and implemented throughout Agency permitting a culture of discrimination to flourish and thrive the evidence of which is reported as the gross disparities on Defendant’s own EEOC MD 715. Respondents each of them have had ample opportunity but failed to rebut on the record its forty percent (40%) gross disparity consistently reported in its own EEOC MD 715 since the early 2000s.⁴ Furthermore, Plaintiff states that Defendants each them have required Plaintiff to perform far more work and more difficult work than the similarly situated comparable employee who is white. Plaintiff has personal knowledge from his observation that he observed the similarly situated and comparable employee who is not African-American failed to complete any work within the benchmark set by Defendants for demonstrating the satisfactory job performance however the comparable employee having never complaining of the preferential treatment because of her race she remained

³*Id.*

⁴See *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

employed at Defendant. Respondents have produced no admissible evidence of the work performed by the comparable employee who is not African-American. Accordingly, Plaintiff is entitled to a judgment as a matter of law on the issue of liability against Defendants for the reasons as stated on the record, or in the alternative a trial by jury.

Additionally, Plaintiff has the written statements by Defendants having admitted that they relied solely on the false statements compiled by Plaintiff's supervisor as the grounds for the termination of Plaintiff on May 7, 2010. Furthermore while disregarding the investigative duties imposed by law and bypassing the Union in violation of the federal Labor-Management Relations Act, Defendants have stated that they did not conduct any investigation into false statements by Plaintiff's supervisors stating that Defendants simply accepted the recommendation of the harassers as the grounds for the termination of Plaintiff. The findings of the EEOC are that "(1) Complainant's job coach James Johnson learned of this alleged discrimination complaint and was not happy about it, and 2) the responsible management officials relied on Johnson in making the challenged decisions". On the contrary, Defendants have previously denied any knowledge of the harassment to the EEOC but Plaintiff has received newly discovered statements made by the Senior Responsible Management Official at Defendant stating that she did receive an inquiry from the National Treasury Employees Union about the unlawful conduct of the harassers clearly targeted against Plaintiff to which Plaintiff has alleged his legal claims for

Negligent Supervision because Defendant did not control, monitor, and supervise its employees who took the unlawful employment actions against Plaintiff. Plaintiff has provided timely notice to Defendants of his legal claims under Federal Tort Claims Act, 28 U.S.C. § 2671 (“FTCA”) for the Negligent Supervision by Defendants. Defendants have a duty not satisfied by a simple attempt at the rationalization of the unlawful conduct by these Defendants targeted against blacks. Accordingly, Plaintiff's viable legal claims are for damages he suffered because of the unlawful conduct of Defendants in violation of and brought pursuant to 42 U.S.C. §§2000e, *et seq.* (“Title VII”); Federal Tort Claims Act, 28 U.S.C. § 2671 (“FTCA”); Administrative Procedure Act (“APA”), 5 U.S.C. §706; and the Backpay Act, 5 U.S.C. § 5595 (“Backpay Act”), or other applicable laws guaranteed a jury trial. This petition has followed the mandate by the Seventh Circuit invoking the jurisdiction of the Court to entertain only punishing the Plaintiff specifically dismissing his appeal “for want of prosecution” instead of remedying the deprivation of the right to the trial by jury, and violation of the clearly established federal law at all times relevant herein.

REASONS FOR GRANTING THE WRIT

Plaintiff is guaranteed a trial by jury and Defendants have simply refused to appear before a jury on the merits for over a decade since May 7, 2010, which is outrageous warranting the issuance of the Writ directing the lower courts to enter a final judgment mandating the district court to empanel a jury without exception. Additionally, Respondents have no jurisdiction to dismiss the case “for want of prosecution” without ever reaching the merits thereof unless or without, *inter alia*, Plaintiff waiving his legal rights “off-the-record” the district court will not perform the “case management” of a jury trial. The Seventh Circuit is without any authority to deny Plaintiff his right to appeal the decisions of the district court in this case. The only question presented here is whether Plaintiff is guaranteed a trial by jury or a plaintiff is subjected to the deprivation of a jury trial by because the district court cannot influence the outcome of the jury trial for the reasons as stated on the record. The Seventh Amendment provides that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”⁵ As long ago as 1918,⁶ the Supreme Court has recognized certiorari as the appropriate vehicle to cure erroneous denials of a civil jury trial. The All Writs Act, 28 U.S.C. § 1651 authorizes the Supreme Court to issue

⁵ U.S. CONST., amend. VII.

⁶ *In re Simons*, 247 U.S. 231 (1918).

extraordinary writs and the Courts⁷ have consistently held that the protection of the right conferred by the Seventh Amendment to trial by jury in federal civil cases is a traditional office of the writ of certiorari. *See Ex parte Peterson*, 253 US 300 (1920); *Ex parte Skinner & Eddy Corp.*, 265 US 86 (1924); *Dimick v. Schiedt*, 293 U.S. 474, 486, (1935); *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942) (“The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment.”). Thus, “the right to grant certiorari to require jury trial where it has been improperly denied is settled.” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511, (1959) (reversing circuit court’s refusal to issue writ of certiorari reinstating Plaintiff’s jury demand). In *Dairy Queen, Inc. v. Wood*, the Court held that it is “the responsibility of the Federal Courts of Appeals to grant certiorari where necessary to protect the constitutional right to trial by jury.” *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962). Accordingly, the Supreme Court has consistently granted this Writ to compel a trial by jury although the Seventh Circuit⁸ allows use of the writ only in cases of “necessity” but now on appeal it instead only entertains punishing the Plaintiff instead of addressing the deprivation of the right to a trial by jury warranting the issuance of a Writ.

⁷*Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446, 7 L.Ed. 732 (1830) (Story, J.).

⁸*First National Bank of Waukesha v. Warren*, 796 F.2d 999, 1006 (7th Cir 1986).

I. PLAINTIFF HAS A CLEAR AND INDISPUTABLE RIGHT TO A WRIT GRANTING RELIEF FROM THE DEPRIVATION OF A JURY TRIAL

Plaintiff states that the jury demand contained in his complaint satisfied Rule 38 when it was filed in the district court. The issue presented in this case is not whether the district court's order dismissing the case on the eve of trial was "discretionary", "ministerial", or "case management" but whether Respondents lacked the authority to enter the order denying Plaintiff his right to a trial by jury on the merits. A writ of certiorari is warranted when a party establishes that(1) that there are no other adequate means for the party to obtain the desired relief, and (2) the party has a "clear and indisputable" right to issuance of the writ. *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 402 (1976). The Court in order to decide whether the Seventh Amendment entitles a particular litigant to a Writ directing the district court to conduct the jury trial in a particular case must determine whether the case will resolve legal rights, or only equitable rights. As explained by Justice Story, "[b]y common law, [the framers of the Amendment] meant not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Curtis v. Loether*, 415 U.S. 189, 193 (1974)(quoting *Parsons v Bedford*, 28 U.S. (3 Pet.) 433, 446-47, 7 L.Ed. 732 (1830)(alteration in original)).

In making this determination, the Court engages in two different inquiries in the first instance comparing the case at issue to “18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.” *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990)(quoting *Tull v. United States*, 481 U.S. 412, 417 (1987)). If the case at issue was unknown in eighteenth century England, the Court must look to an analogous claim that existed then as a guide in deciding whether the present case is legal or equitable. *Id.* at 565–66. “Second, we examine the remedy sought and determine whether it is legal or equitable in nature.” *Id.* at 565. The second inquiry by Court is more important. *Id.* In considering the first part of the test some courts took the view that no jury trial right attached to purely statutory causes of action which had no direct common-law counterpart. The Supreme Court has explicitly rejected this view in *Curtis v. Loether*, 415 U.S. 189 (1974), and held that a jury trial was available in a housing discrimination suit under Title VIII of the Civil Rights Act where the plaintiff sought actual and punitive damages. The *Curtis* case shifts the focus to the second issue: the nature of the relief sought. A key dividing line between law and equity has historically been that the former deals with money damages and the latter with injunctive relief. A claim for actual and/or punitive damages is viewed as purely “legal.” See *Curtis*, 415 U.S. at 195-96. These authorities mandate a jury trial in this case for the damages that are recoverable.

Here, Plaintiff's legal claims that his damages and injuries occurred because of the unlawful conduct by Defendants taken against Plaintiff are purely legal in nature. Plaintiff has a clear legal right to pursue his legal claims to damages for injuries suffered because of unlawful conduct taken against him by Defendants for which he seeks monetary relief. Plaintiff is clearly seeking a money judgment entered against Defendants emanating from legal claims that is unquestionably legal as opposed to "equitable." Plaintiff has suffered injuries and the damages for which he seeks are a legal remedy therefore he is guaranteed by the Seventh Amendment jury trial that cannot be forfeited at the "discretion" or whim of Respondents. Accordingly, Plaintiff's legal claims are properly considered legal in character and hence triable before a jury as guaranteed by the Seventh Amendment.

Repeated decisions of the Supreme Court have established the rule that this court has power to issue a certiorari, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause." *Knickerbocker Ins. Co. of Chicago v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872). As the Supreme Court has stressed "[d]iscretion is not whim." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016). "[A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Id.* at 1932 (citation omitted). Plaintiff has filed a timely Notice of Appeal, a routine unopposed motion to set a briefing schedule for an

adjudication of the appeal but once again Defendants are effortless the beneficiaries of preferential treatment under the judicially created “federal common law” specifically the Seventh Circuit acting *sua sponte* believes it should entertain the granting bills of attainder prohibited by the Constitution punishing the Plaintiff for seeking to enforce his legal claims to damages under federal civil rights laws against these Defendants. The Presentment Clause, or Lawmaking Clause Article I, Section 7, Clause 2 outlines the exclusive method for the passage of federal statutes that punishes this Plaintiff for seeking to enforce his legal claims for damages against these Defendants notwithstanding the bills of attainder are prohibited by the Constitution. Thus, the Plaintiff has a clear legal right to a jury trial and the right to appeal any deprivation of the right to a trial by jury in favor of these Defendants who refuse to appear at a trial on the merits. Respondents have had no authority to invoke the jurisdiction of the courts for the purpose of entertaining instead of a jury trial the punishment of Plaintiff for seeking to enforce his legal rights against these Defendants warranting the issuance of a Writ vacating the void Orders of the lower courts for lack of jurisdiction.

II. NO OTHER ADEQUATE RELIEF IS AVAILABLE TO PLAINTIFF FROM ANY OTHER COURT OR FORUM

Certiorari is warranted to correct the deprivation of the right to a jury trial and disregard for the rule of law because Plaintiff has “no other adequate means” to obtain relief from the district court’s refusal to empanel a jury or

Seventh Circuit's failure actually to provide adequate relief to Plaintiff's on the appeal thereof. Moreover, Plaintiff has "no other adequate means" to address whether by filing a routine unopposed motion setting a briefing schedule on appeal all similarly situated litigants are subject to punishment by the Seventh Circuit specifically the "dismissal for want of prosecution" of an appeal without ever reaching the merits thereof that will foreclose the legal claims thus forfeiting his right to a jury warranting the grant of a Writ by this Court. No other Supreme Court⁹ has the power to vacate the void Orders entered pursuant to the judicially created "federal common law(s)" established in the Seventh Circuit that operates to deny Plaintiff his of right to a jury trial and the right to appeal the deprivation of his right to a jury trial. Certiorari is especially appropriate because it is the only way to review the judicially created "federal common law(s)" established in the Seventh Circuit that denies Plaintiff of his legal rights is subject to any review. Notwithstanding an appellate reversal would hardly provide an "adequate means" of obtaining relief from the usurpation of power by the district court or from the resulting proceedings that violated the Constitution and federal law.¹⁰ *See, e.g., In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1163 (2015)(granting certiorari where appeal after final

⁹"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁰*Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004).

judgment would not provide an “adequate” means of obtaining relief); *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 20-25 (1st Cir. 1982); 16 Charles Alan Wright et al., Federal Practice and Procedure § 3932 (3d ed. 2005 & Supp. 2018)(citing similar cases).

In the alternative, the Court should grant further review of this case in either of two other ways. First, the Court should construe this petition as a petition for a writ of certiorari and grant certiorari on any or all of the questions presented to the Seventh Circuit including but not limited to its decision not to issue a mandate directing the district court to empanel the jury and follow the clearly established law. *Cf. Cheney*, 542 U.S. at 391 (granting petition for writ of certiorari and reversing court of appeals’ decision not to grant certiorari). Second, the Court could construe this petition as a petition for a common-law writ of certiorari under 28 U.S.C. 1651 seeking to review of the district court decisions not to empanel a jury or follow the clearly established law by this Court. *See, e.g., De Beers Consol. Mines v. United States*, 325 U.S. 212, 217 (1945); *Alkali Exp. Ass’n v. United States*, 325 U.S. 196, 201-204 (1945)(similar). Accordingly, the Court should either grant the Writ of Certiorari, or in the alternative certiorari as to any or all of the questions presented and review the decisions by Respondents to deprive Plaintiff of his right to a jury trial and disregard the clearly established law set by this Court.

III. THE FINAL ORDER DEPRIVING PLAINTIFF OF A JURY TRIAL CREATES EXCEPTIONAL CIRCUMSTANCES WARRANTING A WRIT OF CERTIORARI

A writ of certiorari may issue when “exceptional circumstances warrant the exercise of the Court’s discretionary powers.” Sup. Ct. R. 20.1. There are no formal bounds to what constitutes an exceptional circumstance; the Court’s certiorari discretion is quite broad. *See Steven Wisotsky, Extraordinary Writs: “Appeal” by Other Means*, 26 Am. J. Trial Advoc. 577, 583 (2003); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1494-97 (2000). It is clearly established by the Courts that certiorari has been consistently used “to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). *See, e.g., In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30, 35-36 (2d Cir. 2014)(per curiam)(issuing writ of certiorari based on district court’s failure to grant motion to dismiss for lack of jurisdiction); *Abelesz v. OTP Bank*, 692 F.3d 638, 651-652 (7th Cir. 2012)(same). Here, Respondents have no authority to invoke the jurisdiction of the federal court to entertain the deprivation of Plaintiff of the right to a trial by jury on the merits in this case warranting the Writ from this Court directing the Respondents to empanel a jury without exception. The deprivation of the right to a trial by jury creates the extraordinary circumstances

warranting the Writ in protection of the right to trial by a jury specifically the Seventh Amendment jurisprudence of this Court is crystal clear that the constitutional nature of the right to a jury trial is an exceptional circumstance justifying the use of certiorari as the Court per Justice Sutherland once stressed:

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935). *See also Jacob v. City of New York*, 315 U.S. 752, 752-53, 62 S.Ct. 854, 854-55, 86 L.Ed. 1166 (1942)(Murphy, J.)("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."). The Supreme Court has consistently held that it is "the responsibility of the Federal Courts of Appeals to grant certiorari where necessary to protect the constitutional right to trial by jury." *Dairy Queen*, 369 U.S. at 472. As it is undisputed that Plaintiff's right of appeal his deprivation of the trial by jury was well within the time limits permitted by federal law and the Seventh Circuit should have summarily disposed of the appeal remanding the case for a jury trial refusing to entertain the contentions by the district court that it could not manage a jury trial on the merits as a violation of the

Seventh Amendment. Thus, the Courts have consistently granted this writ of *certiorari* protecting Plaintiff's right to a jury trial on the merits and directing Respondents to empanel the jury for trial on the merits without exception.

The Constitution vests “[a]ll legislative Powers herein granted” in the Congress of the United States, U.S. Const., Art. I, § 1, and “[t]he judicial Power” in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const., Art. III, § 1. The Framers determined that the creation of three coequal branches of government was “essential to the preservation of liberty.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Thus, the Constitution prohibits efforts by one branch to control, interfere with, or unduly burden the exercise of the constitutionally assigned functions of another branch. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997) (“We have recognized that ‘[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.’” (citation omitted)); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 509 (1977) (appealing to the “necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others.” (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629-30 (1935))).

The Presentment Clause requires all laws to be presented to the President for his signature or veto. The Presentment Clause is no paper tiger. The Clause provides that a bill can become a law only if, after passage

by both Houses of Congress, it is presented to the President. Here, the decisions by the lower courts in this case that a judicially created “federal common law” authorizes the “dismissal for want of prosecution” federal civil rights without ever reaching the merits cases threatens the autonomy of the Legislative branch to execute the law(s) of the land and not the promulgation of a “federal common law rule(s)” by Respondents in favor of these white Defendants not Plaintiff.¹¹ Thus, the certiorari is warranted by this Court to confine the lower courts to its jurisdiction and remedy the usurpation of power vested in the Legislative policymakers to execute the laws applicable in this case preempting the execution of a judicially created “federal common law(s)” by Respondents calling for “dismissal for want of prosecution” in favor of white Defendants.

¹¹See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) (1857).

CONCLUSION

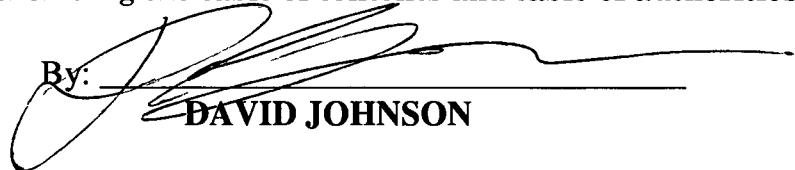
Plaintiff respectfully requests the issuance of a Writ directing the lower courts to empanel a jury for trial without exception and actually to adjudicate any issue(s) incidental to the jury trial entering a final judgment thereon, or in the alternative a writ of certiorari plus all other just and proper relief in this case.

Respectfully submitted this 18th day of March, 2021.

By: 
DAVID JOHNSON

CERTIFICATION REGARDING BRIEF FORM

I, David Johnson, hereby certify pursuant to Supreme Court Rule 33 that the attached brief is proportionately spaced, has a Century Schoolbook font and typeface of 12 points, and contains 5,843 words excluding the table of contents and table of authorities.

By: 
DAVID JOHNSON