No. 20-6700

In the Supreme Court of the United States

MELISSA CALABRESE, Petitioner

vs.

STATE OF CALIFORNIA et. al., Respondents

ORIGINAL

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the collateral order doctrine permits the immediate appeal of a district court order denying appointment of counsel under 28 U.S.C. § 1915(e)(1) for an in forma pauperis Plaintiff, who is gravely-mentally-disabled [never able to provide for her own food or clothing or shelter with high suicidality] who was denied her Americans with Disabilities Act 42 U.S.C. § 12101 rights.

LIST OF PARTIES

Plaintiff - Appellant is Melissa Calabrese, Pro se.

IFP Marshall service was inexplicably repeatedly denied so these named Defendants were never served the district court complaint summons:

State of California
County of Orange, CA
Providence St. Joseph Health
Mission Hospital Regional Medical Center
Brian Choi, M.D.
Tony Chow, M.D.
Afshin Doust, M.D.,
Mahdieh Fallahtafti, D.O.
Lawrence V. Tucker, M.D.
Tara Yuan, M.D.

Providence St. Joseph Health and Mission Hospital Regional Medical Center declared "special appearances" on 04-03-20, filing their Motion to Dismiss. They are the only Defendants in the 9th Circuit record.

TABLE OF CONTENTS

TABLE OF CONTENTS - CONTINUED

APPENDICES

TABLE OF AUTHORITIES

CASES:

CASES - CONTINUED

STATUTES AND RULES:

STATUTES AND RULES - Continued

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The order of the Ninth Circuit dismissing the interlocutory appeal for court-appointed counsel No. 20-55765 is unpublished and reproduced at Appendix A to this petition.

> "dismissal of complaint with leave to amend is not appealable); *Wilborn v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986) (denial of appointment of counsel in civil case is not appealable). Consequently, this appeal is dismissed for lack of jurisdiction."
>
> Doc 80 - 9th Circuit No. 20-55765 - 08-19-20

The minute orders denying appointment of counsel the United States District Court of the California Central District are reproduced at Appendix B and C.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit 9th Circuit in interlocutory appeal for court-appointed counsel No. 20-55765 was dismissed on 08-19-20. No petition for rehearing was filed. Jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISION INVOLVED

TITLE 28 Judiciary & Judicial procedure § 1915. Proceedings in forma pauperis

- (e)(1) The court may request an attorney to represent any person unable to afford counsel.

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Ninth Circuit denied interlocutory appeal under the collateral order doctrine of a district court order denying appointment of counsel under 28 U.S.C. § 1915(e)(1) for an *in forma pauperis* Plaintiff, who is gravely-mentally-disabled [never able to provide for her own food or clothing or shelter with high suicidality] citing *Wilborn v. Escalderon.*

Petitioner's Americans with Disabilities Act 42 U.S.C. § 12101 case ended in a Motion to Dismiss because Petitioner could not legally respond at all due to documented disability and was denied any ADA assistance from her proposed 'Next Friend' under the Court's Local Rule 83-2.2.1.

On 04-28-20 (Doc 62), Defendants opposed Court-appointed counsel claiming there was no evidence Petitioner was gravely-mentally disabled (GMD). Yet Defendants' own hospital records document their diagnosis of Petitioner as GMD as recently as September 2019.

On 07-22-20 (Doc 77) Defendants made the false claim of "Failure to Prosecute" as the cause for their Motion to Dismiss, which was granted by the Court. The Petitioner's case was active in the U.S. Court of Appeals for the Ninth Circuit at that time. Defendants knew their claim was false and made no attempt to correct it with the Court. Petitioner could not respond because she was unrepresented.

The Court acknowledged that Petitioner's psychiatric disability precluded self-representation on 01-17-20:

> "The Court finds Petitioner has demonstrated Plaintiff's mental incompetence precludes her from appearing on her own behalf in this action, and Petitioner has a significant relationship to Plaintiff (as Plaintiff's mother) and is dedicated to the best interests of Plaintiff."
> APPENDIX B

The IFP Petitioner was left with three choices by the Court:

1. Pay an attorney - precluded by grave-mental disability
2. Find pro bono counsel - precluded by grave-mental disability
3. Drop the ADA case and abandon her rights to Federal and State statutorialy required hospital care and discharge

Res ipse loquitor, Petitioner, as gravely-mentally disabled, could not file anything without assistance and the result was NO DUE PROCESS.

Petitioner has relied her entire life on the proposed 'Next Friend', her mother, Dorothy Calabrese, M.D. This includes but is not limited to food, clothing, shelter without government assistance and direct help with activities of daily living. Always following advise from the Federal Pro se Clinic attorneys, Dr. Calabrese prepared all the paperwork in this case with Petitioner's input, as the proposed 'Next Friend' under FRCP Rule 17c(2):

> Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem.

> The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

Relentless efforts were made by Dr. Calabrese to obtain pro bono counsel, which were unsuccessful due to:

1. the nature of Petitioner's grave-mental illness
2. this ADA case for the rights of the mentally ill not being precedential
3. no potential for contingency fees from a money judgment
4. the challenges presented by the Covid 19 pandemic stress on resources

Denied interlutory relief, Dr. Calabrese legally filed declarations as the primary case witness to preserve the record after final judgment. For the disabled, being denied their statutory rights to the standard of care after 9 months, before there can be any due process, risks preventable morbidity and mortality.

On 10-18-20, the U.S. Court of Appeals for the Ninth Circuit appeal was filed - case No. 20-56133. A Motion for Stay is being filed in the appellate case pending this Court's decision on the entirely separate issue of interlocutory appeals for district court denial of appointment of counsel.

REASONS FOR GRANTING THE WRIT

I. IFP GRAVELY-MENTALLY-ILL DENIED TIMELY DUE PROCESS ARE AT HIGH RISK FOR INCREASED MORBIDITY AND MORTALITY

Nothing can be adjudicated in the district court when Plaintiffs are unrepresented IFP gravely-mentally disabled. It served no purpose to go through the

NINE months required to dismiss the case when the Plaintiff is completely silenced. Delay risks morbidity and mortality. Interlocutory orders are not dependent on the merits of Petitioner's case when she is unable to even present the merits of her own case without 'Next Friend' and Court-appointed counsel.

Justice arbitrarily delayed for the gravely mentally ill but not delayed for those competent to self-represent is separate but not equal justice. This discrimination case harkens back to *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) The seriously mentally ill present case complexity and exceptional circumstances of a different sort - an X-Ray of the soul of who we are as Americans. Who will stand for equal justice under law for the least among us if they are silenced in an ADA case in the district court because of their disability?

II. THE CIRCUITS ARE DIVIDED ON WHETHER ORDERS DENYING COUNSEL ARE IMMEDIATELY APPEALABLE

Over thirty years ago, Justices White and Blackmun dissented from a denial of certiorari on whether denial of appointment of counsel orders were immediately appealable collateral orders, asserting that the issue must be resolved by this Court because of its importance and the developing division among circuits. *Welch v. Smith,* 484 U.S. 903 (1987) (White, J. dissent from denial of writ of certiorari).

The collateral order doctrine applies appellate jurisdiction under 28 U.S.C. § 1291 to collateral orders and allows review of district court orders that:

(1) "conclusively determine the disputed question;"

(2) "resolve an important issue completely separate from the merits of the action;"

(3) are "effectively unreviewable on appeal from a final judgment."

(listing the *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) factors).

Three decades after Justice White's prescient dissent, all thirteen circuits have now weighed in and remain intractably divided. The circuits holding the issue is immediately appealable correctly apply the collateral order doctrine.

A. The Third, Fifth, Eighth, and Federal Circuits Hold Orders Denying Counsel Under § 1915(e) Are Immediately Appealable.

Eighth Circuit: In *Hudak v. Curators of University of Missouri,* 586 F.2d 105 (8th Cir. 1978) cert. denied, 440 U.S. 985 (1978); see also *Slaughter v. City of Maplewood,* 731 F.2d 587 (8th Cir. 1984)., the Eighth Circuit noted that it has held that a denial of counsel under 28 U.S.C. § 1915 and 42 U.S.C. § 2000 is immediately appealable because it causes irreparable harm to the plaintiff on appeal of the final judgment. The Eighth Circuit has declined to extend its holding in Slaughter to habeas cases, however, on the ground that the district court must evaluate the merits of a plaintiff's case to determine if counsel is appropriate. *Pena-Calleja v. Ring,* 720 F.3d 988 (8th Cir. 2013). In habeas cases, unlike in denial of counsel under 28 U.S.C. § 1915 and 42 U.S.C. § 2000, the court evaluates the plaintiff's likelihood of success—not just potential merit—when deter-

mining whether counsel is appropriate, so the counsel determination is not separable from the merits. Id.

Federal Circuit: The Federal Circuit agrees that orders denying the appointment of counsel under § 1915 satisfy *Cohen* and are immediately appealable collateral orders. *Lariscey v. United States, 861 F.2d 1267 (Fed. Cir. 1988)* (highlighting that decisions of counsel were "conclusively answered" even if decided without prejudice).

Third Circuit: In *Spanos v. Penn Central Transportation Company* 470 F.2d 806 (3d Cir. 1972), the Third Circuit determined that orders denying counsel under 42 U.S.C. § 2000 are immediately appealable.. The Third Circuit has emphasized the separability of counsel orders made in civil cases. *Ray v. Robinson*, 640 F.2d 474 (3d Cir. 1981) (expanding on the *Spanos* holding). These orders are separable because they are not dependent on the merits of a plaintiff's case. See id. at 477.

Fifth Circuit: The Fifth Circuit similarly held that orders denying counsel under 28 U.S.C. § 1915 and 42 U.S.C. § 2000 are immediately appealable. See *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977); see also *Robbins v. Maggio*, 750 F.2d 405, 409 (5th Cir. 1985). The Fifth Circuit has ruled differently in cases not decided pursuant to the statutes at issue in this case. In, for example, products liability suits or cases brought pursuant to 28 U.S.C. § 2254, the district court determination of whether plaintiff receives counsel is tied to whether the court believes plaintiff will be successful on the merits. See *Marler v. Adonis*, 997 F.2d 1141 (5th Cir. 1993) (declining to extend Caston to products liability suits

because "counsel accept products liability cases on contingent fees, even in the weakest of cases").

B. The First, Second, Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits Hold Orders Denying Counsel Are Not Immediately Appealable.

The First, Second, Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits all erroneously relied on this Court's holding in *Firestone* to determine that orders denying counsel are not immediately appealable as collateral orders. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (holding that orders disqualifying counsel in civil cases are not immediately appealable under the collateral order doctrine).

First Circuit: In the First Circuit, orders denying counsel under 28 U.S.C. § 1915 are not immediately appealable, because the court reasoned that the orders are not conclusively determined. *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983). The court cited to the theory that a district court can reassess a plaintiff's need for counsel throughout the litigation and that these orders are reviewable on appeal. See id.

Second Circuit: The Second Circuit also holds that orders denying counsel are not immediately appealable. See *Miller v. Pleasure,* 425 F.2d 1205 (2d Cir. 1970), cert. denied, 400 U.S. 880 (1970), overruling *Miller v. Pleasure*, 296 F.2d 283, 283 (2d Cir. 1961), cert. denied, 370 U.S. 964 (1962). The court reversed the its prior holding in *Miller* on the rationale that there was a growing burden of appeals,

and denial of counsel does not in itself destroy a plaintiff's claim. *Miller v. Pleasure*, 425 F.2d 1205 (2d Cir. 1970). Instead, denial of counsel simply denies an "added facility in the prosecution of his claim." Id. Despite the law in the Second Circuit that denial of appointment of counsel orders are not final orders, the court evaluated a denial of request for counsel in a Title VII case "in the interest of judicial economy." *Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc.*, 865 F.2d 22 (2d Cir. 1988) The court allows the interlocutory appeal of orders denying IFP status, and noted that "the same factors" are relevant to appellate review of denial of counsel orders. Id.

Sixth Circuit: The Sixth Circuit holds that requests for counsel under 42 U.S.C. § 2000 and § 1983 are inherently not final decisions. *Henry v. City of Detroit Manpower Dep't, 763 F.2d 757 (6th Cir. 1985)* (citing that because of the timing of orders denying counsel—before the complaint, the record development, etc.—the orders "should be presumed tentative"). The court relied on *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) and *Flanagan v. United States, 465 U.S. 259* (1984) to determine orders disqualifying counsel in criminal cases are not separate from the merits. See id.at 762.

Seventh Circuit: The Seventh Circuit determined that orders denying counsel under 28 U.S.C. § 1915 for products liability claims are not appealable because they are in essence reviewable after final judgment. *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981). Quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the Seventh Circuit emphasized that orders "at worst ... merely result[] in the delay caused by the need to retry the case." See id.

at 1066-67.

Tenth Circuit: The Tenth Circuit also relied on *Firestone* for the conclusion that orders denying counsel under 28 U.S.C. § 1915 meet the *Cohen* conclusiveness and separability prongs, but are "fully reviewable after final judgment," and therefore "a single controversy.". *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)).

Eleventh Circuit: The Eleventh Circuit determined that denials of counsel under 28 U.S.C. § 1915 are not immediately appealable. *Holt v. Ford,* 862 F.2d 850, 851 (11th Cir. 1989) (en banc) ("such an order fails all three prongs of the Cohen test"). It later held that Holt implicitly overruled *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977), and seeing no basis for distinguishing denial of counsel in § 1983 cases from Title VII cases, extended this holding to 42 U.S.C. § 2000 as well. *Hodges v. Dep't of Corrections, State of Ga.*, 895 F. 2d 1360 (11th Cir. 1990).

D.C. Circuit: The D.C. Circuit was the last circuit to address this issue, and determined that orders denying counsel pursuant to 42 U.S.C. § 2000 are not immediately appealable. *Ficken v. Alvarez*, 146 F.3d 978, 979 (D.C. Cir. 1988). The court reasoned that these orders are not conclusive and that they are reviewable on appeal (and by the district court throughout trial). See id. at 980-81.

C. The Ninth Circuit Has Conflicting Orders Denying Counsel

Ninth Circuit: The Ninth Circuit, as has previously been noted by this Court, has created a complicated interpretation of whether denial of counsel orders are

immediately appealable. See *Welch v. Smith*, 484 U.S. 903 (1987) (White, J. dissent from denial of writ of certiorari). Orders denying requests for counsel under 42 U.S.C. § 2000 were immediately appealable in the Ninth Circuit. *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301 (9th Cir. 1981) The court distinguished requests for counsel made in habeas proceedings, because in these cases the court is required to look to the merits of the plaintiff's claim; therefore, the orders are not separable under the collateral appeal doctrine. *Weygandt v. Look*, 718 F.2d 952 (9th Cir. 1983).

The Ninth Circuit provides just one example of line drawing between statutes when determining whether the denial of appointed counsel is immediately appealable. In *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301 (9th Cir. 1981), the court allowed the immediate appeal of a denial of appointment of counsel order when brought as part of a Title VII suit. 662 F.2d at 1320 (allowing appeal under 42 U.S.C. § 2000). But the court refused to extend the holding to habeas proceedings in *Weygandt v. Look*, 718 F.2d 952 (9th Cir. 1983) (distinguishing habeas proceedings from Title VII suits because of separability concerns).

In this case, there was no appellate adjudication at all despite the lower court recognizing the Appellant's grave mental disability. Interlocutory appeal in this case was arbitrarily denied under *Wilborn v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986) "denial of appointment of counsel in civil case is not appealable." *Wilborn v. Escalderon* was not an ADA case and there was no issue of mental

competence. The Ninth Circuit did rule that "The district court should have permitted Wilborn leave to amend his complaint." Indeed, in this case, the district court did allow for leave to amend an amended complaint. Yet, the Court knew for certain that amending was IMPOSSIBLE because:

1. Plaintiff was IFP, unrepresented and mentally incompetent
2. Plaintiff's proposed 'Next Friend' could not assist without facing 1 year in jail, $1,000 fine and loss of her medical license for the unlicensed practice of law.

The dicta of *Wilborn v. Escalderon* cannot be binding in subsequent cases as legal precedent when the Plaintiff is not mentally competent.

III. THE CIRCUITS THAT HOLD THESE ORDERS ARE IMMEDIATELY APPEALABLE ARE CORRECT

First, orders denying counsel are conclusively determined. Conclusively determined orders are ones that are the district court's "last word on the subject." *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301 (9th Cir. 1981) Final orders include orders made without prejudice. See *Spanos v. Penn Central Transportation Company* 470 F.2d 806 (3d Cir. 1972) An order denying counsel is a complete, formal court order that impacts all future proceedings.

Some circuits have held that because district courts can reassess a plaintiff's need for counsel throughout litigation, orders denying counsel are not con-

clusive. See, e.g. *Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983). This evaluation incorrectly interprets the conclusively determined prong. When the district court determines that a plaintiff is not entitled to counsel, the denial is a complete and formal order that governs all further proceedings. *Lariscey v. United States, 861 F.2d 1267 (Fed. Cir. 1988)*

Therefore such orders are effectively conclusive for the duration of the case. Although the orders are potentially subject to revision by the district court, for example if a meritorious case begins to develop, in practice courts rarely grant plaintiffs counsel after an initial denial. It is also practically unlikely that an indigent plaintiff will develop a meritorious case without the assistance of counsel, particularly when the case involves complex legal issues.

Second, orders denying counsel are separable from the merits of an action. An order is separable if the district court does not have to get enmeshed in the case's substantive issues, but instead minimally inquires into the merits of the action. See Henry v. City of Detroit Manpower Dep't, 763 F.2d 757 (6th Cir. 1985), cert. denied 474 U.S. 1036 (1985). This includes cases where the underlying issue in the order is of "critical importance" to the litigation. Id.

In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court left the question for another day of whether an order disqualifying counsel in a civil case is separable from the merits. *Firestone*, 449 U.S. at 376. Three years later, this Court determined that orders disqualifying counsel were not immediately appealable in a criminal case because the orders were not separable. *Flanagan v. United States, 465 U.S. 259* (1984). To determine whether counsel should

be disqualified, the court must determine whether the defense was impaired, which substantively analyzes the viability of a defendant's claim. Id. It is clear that orders disqualifying counsel are not independent from the merits of the case. In evaluating an order denying appointment of counsel on appeal, however, the appellate court would not need to make any substantive evaluation of the plaintiff's case.

Conversely, under 28 U.S.C. § 1915, the district court's determination of whether a plaintiff is entitled to counsel is wholly unrelated to the substance of plaintiff's claim, or to any issues that occur during proceedings. In requests for counsel made pursuant to 28 U.S.C. § 1915, the plaintiff's indigence is the only relevant fact. The circuits have created different standards for what circumstances are just. For example, in the Eighth Circuit the determination of whether plaintiff is entitled to counsel depends on whether the plaintiff has made a prima facie claim, the plaintiff has tried and failed to retain counsel, and whether the "nature of the litigation is such that plaintiff as well as the court will benefit from the assistance of counsel." *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984).

In general, entitlement to counsel is dependent on whether plaintiff's claim is potentially meritorious, not on an actual determination of the merits. See, e.g., *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301 (9th Cir. 1981) (discussing that plaintiffs with potentially non-meritorious claims are sometimes unable to find counsel, as "the provision for appointment of counsel would be wholly unnecessary if all meritorious claims attracted retained counsel"); see also *Caston* v.

Sears, Roebuck & Co., 556 F.2d 1305 (5th Cir. 1977) (comparing denials of IFP status, which are immediately appealable collateral orders that do not evaluate the claim's merits, to denials of counsel). When the district court does evaluate the merits, it is not a problematic assessment of the validity of plaintiff's claim; instead, the district court merely assures the claim is not "patently frivolous." *Poindexter v. Fed. Bureau of Investigation*, 737 F.2d 1173, 1188 (D.C. Cir. 1984). The court need only determine that "the plaintiff appears to have some chance of prevailing" for the litigant to meet the "meritorious" factor of the test. Id. at 1187. Finally, orders denying counsel are not effectively reviewable upon final appeal, because there are no other practical remedies available to a plaintiff once counsel is denied. For immediately appealable orders, "appellate review must occur before trial to be fully effective." *Flanagan v. United States, 465 U.S. 259* (1984). Here, whether the plaintiff can benefit from the appointment of counsel is essential to a pro se litigant's case. If the plaintiff is entitled to counsel, "he needs such counsel now" to benefit at trial; otherwise, the plaintiff will be forced to litigate the complex legal system without guidance. *Lariscey v. United States, 861 F.2d 1267 (Fed. Cir. 1988)*

If appeal of denials of counsel await the outcome of proceedings, only four outcomes are possible:

1. The most likely outcome is that the pro se plaintiff will not be able to pursue complex claims alone and will simply give up.
2. The pro se plaintiff engages in the full gamut of proceedings without the assistance of counsel, and if the plaintiff is successful on the subsequent

appeal, the entire prior proceedings "would be declared a nullity: not an efficient use of either personal or judicial resources." Id.

3. In the exceedingly rare circumstance, the pro se plaintiff may find success but at what price when there is serious mental illness and the patient was denied timely statutorily mandated medically-necessary care, forced homelessness, or death by suicide.
4. The pro se litigant could pursue claims to conclusion and lose on appeal.

This Court determined in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) that orders disqualifying counsel are not immediately appealable because, in order to be unreviewable, "denial of immediate review would render impossible any review whatsoever." 449 U.S. at 376 (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)). Disqualification of counsel is distinguishable from denial of counsel, however, in part because "a decision on appellant's need for counsel must be made before the trial if it is to be of any practical effect to him." *Ray v. Robinson*, 640 F.2d 474 (3d Cir. 1981). Additionally, disqualification is distinguishable because when counsel is denied, there are no other practical remedies available to plaintiff. See *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981) (Swygert, J., dissenting). Finally, the potential harm from disqualification is not as great as outright denial of counsel, as denial effectively limits litigants' access to the courts. See id.

The importance of having counsel at the beginning of litigation highlights the need for immediate reviewability of denial of counsel orders. *Slaughter v. City*

of Maplewood, 731 F.2d 587 (8th Cir. 1984) (finding that the harm from denying appointment of counsel "can be irreparable"); *Peterson v. Nadler*, 452 F.2d 754, 756 (8th Cir. 1971). A pro se plaintiff does not necessarily understand the complexity of the law or possible errors committed at trial that must be preserved for proper appeal. See *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301 (9th Cir. 1981).

Many of the circuits that determined that denial of counsel orders are not collateral orders base their holdings on the reviewability prong. For example, the First Circuit has held the pro se plaintiff can "persist long enough [in his case] to raise the issue of appointed counsel along with any other issues he preserves in his appeal from a final judgment." *Appleby* v. *Meachum*, 696 F.2d 145 (1st Cir. 1983). This determination was over thirty years ago—as were many circuit determinations—and litigation has only gotten more expensive, complicated, and time consuming. A correct application of the collateral order doctrine, therefore, allows the interlocutory appeal of orders denying the appointment of counsel.

IV. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

After three decades, circuits remain in conflict with each other and amongst themselves. Denying appointment of counsel for indigent plaintiffs certainly hinders a plaintiff's case, but refusing to hear the appeal from such a denial often hobbles a case before it ever has a chance to get out of the gate. The issue of whether a denial of appointment of counsel order is immediately appealable as

a collateral order has confused the circuits, caused line drawing between statutes, and caused one circuit to switch positions in less than a decade. Circuit courts need guidance from this Court regarding the proper analysis of the collateral appeal doctrine in regards to indigent plaintiffs and their denied appointment of counsel.

As previously mentioned, circuits remain divided as to whether plaintiffs can immediately appeal the denial of appointed counsel, which creates vastly different court determinations based on which federal court the plaintiff brings suit. Although this confusion stems from the early 1980s when this issue was first litigated, determining whether the denial of appointment of counsel is immediately appealable has continued to plague the courts. See, e.g., *Perkinson v. White*, 569 F. App'x 152 (4th Cir. 2014) (holding that denial of appointment of counsel orders under § 1915 are not appealable as a collateral order); *Christian v. Commerce Bank, N.A.*, No. 4:14CV00201 AGF, 2014 WL 2218726 (E.D. Mo. May 29, 2014) (holding that same orders under § 1915 are immediately appealable as collateral orders). Without a determinative indication by this Court, the circuits will continue to diverge in their application of the collateral order doctrine, providing a disservice to indigent plaintiffs in the process.

Apart from the confusion between the circuits, this issue has created division within the circuits themselves, causing judges to invert on position and craft minute distinctions between statutes.

In the Second Circuit, the court first held in *Miller* that a plaintiff could immediately appeal the denial of appointed counsel under 28 U.S.C. § 1915. 296

F.2d at 283 (affirming district court's decision). However, a mere nine years later, a different panel reversed position in the same case. See *I.* The court held that a plaintiff could not immediately appeal such orders because it not only required the court to get involved in the merits of the case, but also contributed to the increased burden on the appellate court system in the last decade. Id.

The Fifth and Eighth Circuits have similar distinctions. Compare *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977) (allowing appeal in Title VII cases), with *Marler v. Adonis*, 997 F.2d 1141 (5th Cir. 1993) (refusing to extend *Caston* to product liability suits); compare *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984) at 588 (allowing immediate appeal for Title VII), with *Pena-Calleja v. Ring*, 720 F.3d 988 (8th Cir. 2013) at 989 (declining to extend *Slaughter* to § 1983 claims).

Even if line drawing is appropriate, this Court should provide guidance on which statutes should allow immediate appeal and which statutes fall outside the collateral appeal doctrine so that the circuits are unified in application. **And which Plaintiffs require disability accommodations that include appointed counsel.**

This Court has previously recognized the confusion among and within circuits in previous petitions for certiorari during the 1980s that were all subsequently denied. Justice White, joined by Justice Blackmun, explained that the continued confusion demonstrated by the Second and Ninth Circuits "warranted the Court's] granting certiorari" in his dissent in *Welch v. Smith*, 484 U.S. 903 (1987).

The circuit split in the 1980s has only become more entrenched as every circuit has now decided whether the collateral appeal doctrine allows for immediate appeal of the denial of appointment of counsel orders. Without further guidance from this Court on a "plainly recurring question," the district and circuit courts will continue to hold differently on whether immediate appeal is appropriate. See *Henry v. City of Detroit Manpower Dep't,* 763 F.2d 757 (6th Cir. 1985) (White and Blackmun, J., dissenting). Allowing courts to interpret the collateral appeal doctrine differently results in immediate relief for some indigent litigants and likely devastation for others.

Allowing immediate appeal of denial of appointment of counsel orders will provide greater access to the courts and promote judicial economy. Granting certiorari over this conflict will finally determine whether indigent litigants have the ability to immediately appeal the denial of appointed counsel orders, thus providing greater access to the courts. If indigent plaintiffs have to wait until a final order has been determined, many will be forced to drop legitimate claims, and others will struggle through the legal process but fail to preserve issues for appeal. By denying jurisdiction over the denial of appointment of counsel orders, courts are not only inhibiting access to counsel to those who need it most, but are also creating incoherent records to be sorted through later on appeal.

For the appointment of counsel to have any "practical effect," counsel must be appointed at the start of the case. See *Ray v. Robinson,* 640 F.2d 474 (3d Cir. 1981) at 477. Counsel benefits the judicial process by effectively developing the record and introducing legal arguments to preserve for appeal on a level that a

layperson—but especially an indigent plaintiff—would simply not be able to match. Pro se litigants do not generally have the skills or resources to develop the record in a way to help preserve appealable issues. The gravely-mentally-ill have no chance without Next Friend and appointed counsel. Meanwhile, they prospectively lose their statutory rights to care, waiting for equal justice. Justice delayed is justice denied.

If indigent plaintiffs are forced to wait until a final decision to appeal the denial of appointment of counsel, the record below will undoubtedly come to the appellate judge in disarray. If a pro se litigant does successfully bring his case to the appellate court, the judge will have to spend time parsing through an incoherent record to determine any merit to the claim and the necessity of counsel. See *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301 (9th Cir. 1981). (stating that a pro se appeal provides a "guarantee that the resources of the court and the parties would be senselessly dissipated in the process"). Without the assistance of counsel from the beginning, the plaintiff "would be bound by the inevitable prejudicial errors she would make at her first trial." Id. at 1311-12.

Even if an appellate judge grants a new trial with appointed counsel, the case essentially has to begin again, causing a greater strain on judicial time and resources than an immediate collateral appeal. Judicial economy will be better served if the appellate court can determine whether a plaintiff requires counsel to navigate complex legal matters as a collateral issue at the outset of the trial. It does not serve the judiciary's best interests to allow an indigent plaintiff to

develop a record in a case involving complex legal issues, likely committing prejudicial errors in the process that are difficult or impossible to cure on appeal. By waiting for a final decision, "the effectiveness of appellate review will be seriously impaired by the very nature of the order" because of the state of the record." *Bradshaw v. Zoological Soc. of San Diego,* 662 F.2d 1301 (9th Cir. 1981)

Laypersons do not have the same access to resources or the knowledge to adequately represent themselves in court when dealing with complicated legal issues. See *Caston* v. *Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977) at 1308 (stating that a layperson "has little hope of successfully prosecuting his case to a final resolution on the merits"). Justice and efficiency are better served by providing counsel immediately to indigent plaintiffs faced with such complex legal matters.

The purpose behind the in forma pauperis statute, moreover, was to provide effective counsel to plaintiffs when they could not otherwise afford it. Denying an appeal of such counsel until a final decision on the merits cuts contrary to this principle. Many litigants are forced to abandon their cases before trial commences if not provided counsel to assist in navigating a complex legal field. Others may try to continue through trial but fail to preserve issues for appeal. Both of these outcomes make reviewing the denial of appointment of counsel orders only after a final decision insufficient to address the needs of indigent plaintiffs. The appointment of counsel is generally outcome determinative for indigent plaintiffs. And thus, the denial of appointment of counsel is the single, most important judicial order of the entire litigation. But since the order predates any

record development and any legal theories, it falls completely outside the merits of the case and should be recognized as collaterally appealable.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

Melissa Calabrese

Melissa Calabrese 11-25-20

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document, to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

ACKNOWLEDGMENT

STATE OF CALIFORNIA)
COUNTY OF ~~RIVERSIDE~~ Orange) SS. NP

On November 25, ~~2019~~ 2020 NP, before me, James Pak, a Notary Public, personally appeared **MELISSA CALABRESE,** who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under penalty of perjury under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

JAMES PAK
Notary Public – California
Orange County
Commission # 2190333
My Comm. Expires May 6, 2021

/SEAL/

ML (Initials)