No. 20-699

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SAMMONS;
Petitioner,

ORIGINAL

vs.

GEORGE ECONOMOU,
DRYSHIPS, INC.,
Respondents.

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

FILED
NOV 16 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

(i) Whether, as the Ninth Circuit has held, a plaintiff has an "absolute right" to voluntary dismissal under **FRCP, Rule** 41(a)(1)(A)(i), if no answer or motion for summary judgment has been filed, or whether, as in the Fifth Circuit, courts have the discretion to disregard such a dismissal. A circuit split exists on this question, with the Ninth Circuit holding that the right is "absolute," while the Fifth Circuit holds the right is subject to court "discretion."

(ii) Whether generally a *pro se* litigant should receive at least one warning before a monetary sanction is imposed for presenting a "frivolous" issue, in this case a sanction for seeking mandamus review to challenge refusal to allow a FRCP, Rule 41(a)(a)(A)(i) voluntary dismissal.

II. PARTIES TO THE PROCEEDING

The parties to the mandamus proceeding in the United States Court of Appeals for the Fifth Circuit were only Petitioners Michael and Elena Sammons, while Respondents George Economou and Dryships, Inc. were interested parties to that proceeding.

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V. PETITION FOR WRIT OF CERTIORARI

Michael Sammons, *pro se*, petitions for a writ of certiroari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

VI. OPINIONS BELOW

The court of appeals' opinion, in which it held that a voluntary dismissal under Rule 41(a)(1)(A)(i) need not be recognized by either the district court or the court of appeals, is unreported. That opinion also imposed a $200 monetary sanction upon finding that raising such a *pro se* challenge via mandamus was "frivolous." (App. 1).

The district court opinion implicitly refusing to recognize Mr. Sammons's voluntary dismissal under FRCP, Rule 41(a)(1)(A)(i), *with prejudice* pursuant to FRCP, Rule 41(a)(1)(B) as successive, is unreported. (App. 4).

VII. JURISDICTION

The court of appeals entered judgment on June 10, 2020. (App. 1). A petition for rehearing and for en banc review were denied on November 12, 2020. (App. 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

VIII. CONSTITUTIONAL PROVISIONS INVOLVED

This case involves those constitutional provisions applicable to access to the courts, and due process and equal protection, for pro se litigants, under the First and Fifth Amendments to the U.S. Constitution.

IX. STATEMENT OF THE CASE

The facts are simple and undisputed, and the issues are wholly of law: whether FRCP, Rule 41(a)(1)(A)(i) is "mandatory" or "discretionary" and whether, generally, a *pro se* litigant should receive at least one warning before a monetary sanction is imposed for presenting a "frivolous" issue.

On February 27, 2018, after dismissing a prior similar lawsuit in the Marshall Islands, Mr. Sammons filed a second identical lawsuit in district court in San Antonio, TX. Defendants moved for Rule 41(d) costs of the first case, which was granted in part, and the case was stayed on October 31, 2018, until Mr. Sammons paid those prior costs. Sammons v. Economou, 940 F.3d 183, 185 (5th Cir 2019). Dr. Elena Sammons, his wife and co-plaintiff, was explicitly found *not* liable for any Rule 41(d) costs. U.S. Magistrate's recommendation, accepted

by the district judge, Case No. 5:18-cv-00194, Dkt. 56, pg. 14 ("the Court should impose the costs on Mr. Sammons only"). Mr. Sammons made no payment in 2018, 2019, or 2020.

In 2019 the district court denied a motion by Dr. Sammons's (filed by she alone) to dismiss or sever Mr. Sammons so that her separate and independent claims could go forward. The Fifth Circuit denied review by direct appeal or mandamus, holding that if Dr. Sammons wished to continue with her individual claims she could pay Mr. Sammons Rule 41(d) sanction for him (although she had no legal obligation to do so). Elena Sammons v. Economou, et al, No. 19-51097 (5th Cir. Feb 2, 2020).

On February 18, 2020, electing not to ever pay the Rule 41(d) costs, and to allow Dr. Sammons to pursue her separate and independent claims, Mr. Sammons filed a voluntary dismissal in the district court pursuant to FRCP, Rule 41(a)(1)(A)(i), which was effectively "with prejudice" pursuant to FRCP, Rule 41(a)(1)(B) as successive. (App. 6).[1]

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[1] The notice of dismissal by Mr. Sammons stated, "**Plaintiff Michael Sammons, pro se, hereby gives notice that he hereby withdraws from this case and is dismissing all of his claims, pursuant to FRCP, Rule 41(a)(1)(A).**" App. 6.

It is undisputed that no answer or motion for summary judgment had been filed in the district court.

On February 21, 2020, with Mr. Sammons now presumably out of the case, Dr. Elena Sammons moved to lift the Rule 41(d) stay caused by Mr. Sammons (and by he alone) as moot. (App. 5)

On March 11, 2020 the district court denied the motion to lift stay without comment. (App. 4)

On March 18, 2020 Mr. and Dr. Sammons, unsure whether they should file a notice of appeal or a petition for writ of mandamus, filed a petition for writ of mandamus in the Fifth Circuit, challenging the refusal of the district court to recognize the voluntary dismissal of Mr. Sammons. (App. 3)

On June 10, 2020 the Fifth Circuit made clear that Mr. Sammons could *not* voluntarily withdraw from the case pursuant to Rule 41(a)(1)(A)(i) until he paid the Rule 41(d) costs and again stated that Dr. Sammons could lift the stay if she paid the sanction for Mr. Sammons (although she had no legal obligation to do so):

> " ... **Michael Sammons filed a notice of voluntary dismissal** ... (T)hey may (must) pay the Rule 41(d) costs (imposed against only Mr. Sammons) to lift the stay, litigate the suit to completion, and seek appellate review of a final judgment." (App. 1, pgs 2-3)

As to Michael Sammons, the Fifth Circuit, in holding that he could not voluntarily dismiss his claims, but must rather "pay the Rule 41(d) costs," is the first circuit court to hold that a voluntary

dismissal under FRCP, Rule 41(a)(1)(a) is not a matter of "absolute right," as held in the Ninth Circuit, but is discretionary with both the district and circuit court.

The Fifth Circuit further held that the reliance by the *pro se* Mr. and Dr. Sammons upon the clear language of FRCP, Rule 41(a)(1)(A), as interpreted by the Ninth Circuit (agreeing that the right to a voluntary dismissal under Rule 41(a)(1)(A) was "absolute"), and seeking review via mandamus, was nevertheless "frivolous," and imposed a $200 sanction. (App. 1). The *pro se* plaintiffs had never received any warning – nor has any court ever held in any other case - that challenging a district court refusal to recognize a voluntary dismissal via mandamus was "frivolous."

The petitions for panel rehearing and for *en banc* review were denied without comment, on November 12, 2020. (App. 2)

X. REASONS TO GRANT THE WRIT

This case presents the perfect vehicle to resolve an important circuit court split on FRCP, Rule 41(a)(1)(A)(i), the only means of voluntary dismissal without court action or permission.

Because this voluntary dismissal rule applies to innumerable federal cases every year, including many *pro se* cases, a consistent understanding and treatment of the rule is important.

This case also presents the perfect vehicle to establish the standard for imposing monetary sanctions upon non-indigent *pro se* litigants who present a "frivolous" issue, here an issue never before deemed frivolous in their case or in any other court – ever - and indeed an issue upon which identical relief was granted by another circuit court panel (vacated *en banc*).

FRCP, Rule 41(a)(1)(A)(i)

The Fifth Circuit has now created a circuit split over the clear language of FRCP, Rule 41(a)(1)(A)(i).

The Fifth Circuit decision in this case, refusing to recognize Mr. Sammons's absolute right to withdraw under Rule 41(a)(1)(A)(i), presumably as a matter of its discretion, is contrary to the express language of the rule:

> "(T)he plaintiff may dismiss an action without a court order by filing ... a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment."

As the Ninth Circuit correctly held in Concha v. London, 62 F.3d 1493, 1506 (9th Cir 1995):

> "Under Rule 41(a)(1), a plaintiff has an absolute right voluntarily to dismiss his action prior to

> service by the defendant of an answer or a motion for summary judgment ... The dismissal is **effective on filing and no court order is required.**" (emphasis added)

Here it is undisputed that the defendants had served no answer or motion for summary judgment.

Allowing the Fifth Circuit to write into FRCP, Rule 41(a)(1)(A)(i) an additional requirement that, in addition to the rule's explicit requirement that no answer or motion for summary judgment have been filed, that there also be no pending sanctions order (or perhaps any pending order at all) before such voluntary dismissal would be recognized, ignores the express and explicit language of the rule.

Standard for *Pro Se* Monetary Sanctions

Perhaps even more important, given that almost 50% of U.S. litigation is now *pro se*, is the issue whether a court should impose monetary sanctions for a filing deemed "frivolous" with no prior warning to those litigants that the issue was frivolous – an issue here which no court, anywhere, had ever held was in fact frivolous.

Pro se filings are most often made by citizens who cannot afford legal counsel. The potential threat of monetary sanctions for a filing deemed "frivolous" chills all *pro se* litigation. Even well-established legal principles to attorneys are

sometimes simply not common knowledge to *pro se* litigants.

Here, Mr. Sammons was sanctioned $200 for challenging a Rule 41(a) voluntary dismissal rejection via mandamus. The question as to whether mandamus review was available to review a denial of a voluntary dismissal had never been raised in this case before. Before finding such an attempt "frivolous" in this case, the Fifth Circuit had never before held such an attempt would be frivolous; indeed other circuit courts have expressly allowed challenges involving rejection of a voluntary dismissal via mandamus. Cf. In re Michael Flynn, D.C. Circuit, No. 20-5143 (June 24, 2020)(granting mandamus relief for refusal of district court to recognize a voluntary dismissal)(over-ruled *en banc*).

In a typical non-indigent civil complaint or appeal (or mandamus), there should be a general presumption that a reasonable litigant would not pay a $500 filing fee to present a frivolous issue – at least where such *pro se* litigant had no warning such attempt would be deemed frivolous and sanctionable.

Such a *pro se* litigant should not be sanctioned for raising a "frivolous" issue without at least one warning or some indication he/she knew or reasonably should have known the issue was frivolous, such as at least one opinion somewhere that seeking mandamus review of a denial of a voluntary dismissal would in fact be frivolous and sanctionable.

What would certainly be viewed as frivolous to an attorney could simply be misunderstood by a *pro se* litigant. If every single motion or filing by a *pro se* litigant made in good faith is subject to a monetary sanction, the constitutional right to proceed *pro se* is impermissibly chilled.

Here the Fifth Circuit held that it was patently "frivolous" to believe a challenge to a district court refusing to recognize a statutory dismissal of right under Rule 41(a)(1) could be raised via a petition for writ of mandamus. Even if a correct legal conclusion (cf. In re Michael Flynn, *supra*), how could a *pro se* litigant know for sure such a petition would be "frivolous" particularly where no warning that such a mandamus attempt would be "frivolous" was given and no court – anywhere, ever – has held that it would be frivolous to challenge a rejection of a voluntary dismissal of right via mandamus (with the D.C. Circuit having held explicitly to the contrary. *Id.*)?

To prevent chilling the right to proceed *pro se* this Court should hold as follows: (1) that, generally, payment of court or appeal filing fees creates a presumption that the litigant sincerely believes he is entitled to relief, (2) that generally monetary sanctions should not be imposed upon such a *pro se* litigant for presenting an issue for which such litigant had never been warned was frivolous by a court, and (3) that the spirit of this Court's admonition in Haines v. Kerner, 404 U.S. 519 (1972), that *pro se* filings are to be construed "liberally" also

applies to whether sanctions are appropriate for such filings.

XI. CONCLUSION

FRCP, Rule 41(a)(1)(A)(i) provides a plaintiff with the absolute right to dismiss a case prior to an answer or motion for summary judgment being filed.

Yet here, although Mr. Sammons clearly met the requirements for a voluntary dismissal, the Fifth Circuit refused to recognize such dismissal "presumably" because there was a pending unpaid Rule 41(d) judicial sanction against Mr. Sammons in the district court ("presumably" because the Fifth Circuit gave no reason for ignoring the Rule 41(a)(1)(A)(i) dismissal but did reference the Rule 41(d) unpaid Rule 41(d) sanction).

Whether FRCP, Rule 41(a)(1)(A)(i) is mandatory, as the Ninth Circuit has held, or is "discretionary," as this case shows is the contrary view of the Fifth Circuit, is a circuit split which needs to be resolved if there is to be consistency and uniformity in the federal courts when applying this important rule for voluntary dismissals.

But the true gravamen of this case is that the *pro se* Mr. Sammons, willing to have his entire case voluntarily dismissed under Rule 41(a)(1)(A)(i), and dismissed effectively *with prejudice* as successive under Rule 41(a)(1)(B), was ordered by the Fifth Circuit to "litigate the suit to completion." Never before has a plaintiff, *pro se* or otherwise, been told

that he cannot dismiss his entire case *with prejudice*, but rather must, against his wishes, "litigate the suit to completion."

Finally this case also provides the Court an opportunity to show once again that *pro se* litigants are also worthy of this Court's attention. *Pro se* petitions, like this one, are never remotely as well written as those of $500/hour appellate attorneys, but some, like this one, do have equal merit.

No court – anywhere – ever – has held that it would be frivolous to challenge the refusal of a trial court to recognize a voluntary dismissal as a matter of right via mandamus. Indeed, in a very similar case a D.C. Circuit panel granted mandamus relief (over-ruled en banc).

No judge - in this case - ever informed Mr. Sammons that filing a mandamus action would be frivolous and sanctionable.

No judge – in any other case – has ever held that it would be frivolous to challenge a denied voluntary dismissal of right via mandamus.

And while a D.C. Circuit panel granted mandamus relief on an almost identical matter, the *pro se* Mr. Sammons's almost identical mandamus petition before the Fifth Circuit was summarily dismissed as "frivolous" with monetary sanctions imposed.

This Court has long championed the right of its citizens – those educated and those less educated – to *pro se* access to the courts. Summary monetary sanctions for filings deemed frivolous, without any

prior warning, or any finding that any reasonable pro se litigant would have known the filing was frivolous – disregards the frequently repeated admonition of this Court that pro se filings are to be construed liberally. Haines v. Kerner, 404 U.S. 519 (1972).

For the foregoing reasons, Mr. Sammons, *pro se*, respectfully requests that this Court issue a writ of certiorari, and vacate the decision below denying a writ of mandamus, and remand for reconsideration (a) under the correct legal understanding that a proper Rule 41(a)(1)(A)(i) voluntary dismissal is "mandatory" not "discretionary," and (b) under the appropriate "liberal" standard for determining whether monetary sanctions are appropriate against a *pro se* litigant for a filing deemed "frivolous" (at least where no prior warning had been given, and where a reasonable *pro se* litigant could have believed in good faith that the filing was colorable).

DATED this 16 day of November, 2020.

Respectfully submitted,

Michael Sammons, pro se