No: 22-5501

ORIGINAL

In The
Supreme Court of the United States

In re ERIC DRAKE,

On Petition For A Writ of Mandamus to The United States Court of Appeals For The Fifth Circuit

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

Under the First Amendment, every U.S. citizen has a right of speech (*right to petition*), and 42 USC §1981 (*right to sue, give evidence, to be parties to suits)*, the 14th Amendment right (*due process*), and access to the courts, even if the person have been determined vexatious by a state court or when there is a federal prefiling injunction against the party. Therefore,

- Should federal courts issue prefiling injunctions without notification and a hearing where evidence and testimony can be provided to a court and considered?
- Should federal courts be allowed to adopt sanction orders from another district or another state to be used against U.S. citizens without conducting a hearing?
- Should state courts be allowed to violate U.S. citizen's rights that have been determined vexatious by appointing state judges who are grossly incompetent in reviewing or even to comprehend civil law?
- Should state courts be allowed to violate U.S. citizen's rights that have been determined vexatious by not responding to requests to file civil lawsuits or blocking the *pro se* litigants right to file a cross claim in a legal matter?
- Should there be penalties against state officials and judicial officers and federal judicial officers for determining a

U.S. citizen as a vexatious litigant by fraud, conspiracy, and or by not evaluating the *pro se* litigant's case properly and thus restricting his or her access to courts, and their ability to sue?

- Should there be a prescribed time limit on how long any court could sustain a prefiling injunction against a *pro se* litigant?
- Should a *pro se* litigant be allowed to file his or her petition in any other state or district, if he or she can reasonable show that the proper state and district and or jurisdiction is hostile towards him or her?
- Should a pro se litigant be allowed to refile cases that were dismissed improperly because of a prefiling injunction or state vexatious litigant order that was issued against the *pro se* litigant unjustly or by fraud or by conspiracy—regardless of how long the case has been dismissed.

PARTIES TO THE PROCEEDING

Applicant, Eric Drake, an individual person, a citizen of the United States. In addition parties include: Travelers Indemnity Company; Travelers Indemnity Company of America; Harrison County; The City of Hallsville; East Texas Bridge, Incorporated; Texas Department of Transportation, Walmart, Incorporated; Wal-Mart Stores Texas, L.L.C., doing business as Wal-Mart Stores Texas 2007, L.L.C., State Farm Mutual Automobile Insurance Company; Government Employees Insurance Company, doing business as Geico Indemnity Company, doing business as Geico Casualty Insurance Company, doing business as Geico Secure Insurance Company, doing business as Geico Mutual Insurance Company; City of Dallas; City of Farmers Branch; Doris Smith; Eric Knight; Police Chief Floyd Burke; Ulyshia Renee Hall; Michael Beach; Tyler Bonner; David C. Godbey; John Doe Trucking; Cowboy Trucking; Sam West, Incorporated; Noteboom The Law Firm; Charles Noteboom; Jordan Taylor; Farah Rabadi; Chevron; Braxton Carter Thompson; Dallas County; Tenna Schultz, and Lyle W. Cayce (clerk of court for the Fifth Court of Appeals).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Applicant, Eric Drake, is an individual person, who is representing himself in this Mandamus *pro se*.

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PRELIMINARY STATEMENT

This Court has repeatedly recognized that the U.S. Constitution guarantees each and every U.S. citizen certain inalienable rights contained in the First Amendment: right of speech and the right to petition. Without the enforcement of these rights, African Americans were powerless to protest racism in America by petitioning courts for relief from enforced segregation. And without this reform, blacks would still have to give up their seats on public transportation. In another approach, but of the same derivative of bigotry, judicial biased labels nonwhite *pro se* litigant petitions as frivolous when the pleadings have merit and are well-pled. *See* **App. A1.** Applicant believes that the facts of this case involving the Fifth Circuit suggest that a Wirt of Mandamus would be appropriate for the Court's review of this legal controversy. The Fifth Circuit's decision to unjustly deny Applicant's *in forma pauperis* (IFP) and to grant frivolous sanctions is contrary to case law. Denial of Drake's IFPs closed his access to the courts. The three appeals that the Fifth Circuit dismissed were casualties of an Eastern District of Texas (EDT) 2012 prefiling order which was issued improperly, and a prefiling order issued by the Fifth Circuit

on April 28, 2022. Applicant has requested hearings on the EDT and Northern District of Texas (NDT) prefiling orders. But the courts have been silent on allowing any testimony and or evidence to be produced so that Drake can prove that these prefiling injunctions are invalid. The Fifth Circuit's prefiling order and sanction order is also frivolous and without legal merit. There are no other means by which Applicant may attain the relief that he is seeking but by Mandamus review for the reasons stated in this writ.

Applicant have a right to petition courts as white citizens are allowed in America pursuant to the First Amendment and 42 USC §1981 (right to sue, give evidence, to be parties to suits). Drake has 14th Amendment and Fifth Amendment rights of due process. The Fifth Circuit has attempted to rob Applicant of the aforementioned rights and the Equal Protection Clauses of Fifth and Fourteenth Amendments through its prefiling order.

The Appeals Court's decision to deny Applicant's *in forma pauperis* application, also denied Drake's ability to be heard (1st Amendment right of speech) by denying his appeals.

As a trend of the Fifth Circuit regarding *pro se* litigant's appeals, the Respondents never had to answer Drake's appeals because the Fifth Circuit realized that the Respondents could not

prove that Drake's claims were deficient. Hence, the Fifth Circuit assists law firms by finding their own reasons for the dismissal of *pro se* litigant's appeals—even when counsel was not qualified in appellate law to file an adequate answer to Applicant's appeals.

For these reasons and those plead in Mandamus more fully, Applicant, Eric Drake, respectfully request that this Court issue a Writ of Mandamus to the Fifth Court of Appeals, ordering that appeals court to:

a). Reverse the dismissals of Applicant's three appeals, and order them back on the Fifth Circuit's docket;

b). Order the Respondents to file a response to each of the Applicant's appeals—if they can;

c). Reinstate the Applicant's IFP or Grant Drake's IFP;

d). Order the Appeals Court to conduct a live in-person hearing on the Applicant's appeals; or

Alternatively:

e). Order that each of the Applicant's appeals that were unfairly dismissed by the Fifth Circuit be transferred to the Sixth Court of Appeals and that all and any future appeals that should be filed in the Fifth Circuit by the Applicant, be filed in the Sixth Circuit Court of Appeals because of the obvious derision and hostility by the Fifth Circuit staff towards Applicant.

Moreover, because of the biased and racial prejudice towards the Applicant is to such a high degree by the judicial officers at the Fifth Circuit that it would be very unlikely for Drake to obtain impartial reviews of his appellate briefs by any of its judges or judicial staff.

JUDICIAL ORDER BELOW

The April 28, 2022 Order—in which the Clerk of Court, Lyle W. Cayce, for the Fifth Circuit denied the Applicant's motion for *in forma pauperis* and wrongfully consolidated and dismissed the subsequent appeals: *Drake v. Travelers Indemnity Co. et al*, No. 20-40492; *Drake v. Walmart et al*, No. 21-10248; and *Drake v. State Farm Ins., et al*, No. 21-10797 is attached as **Appendix A1**.

JURISDICTION

This Court has jurisdiction to grant a writ of Mandamus. *See* 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Not even the Congress (U.S. law makers) or the president of the United States may circumvent the U.S. Constitution, let alone a clerk of court who is being puppeteer by judicial officials in the

Fifth Circuit Court of Appeals and federal district judges who preside in federal courts within the Fifth Circuit jurisdiction.

U.S. Const. art. I, § 4.

a) The Supreme Court and all courts established by Act of Congress may issue *all writs* necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule *NISI* may be issued by a justice or judge of a court, which has jurisdiction. 28 U.S.C. § 1651.

STATEMENT OF THE CASE

I. THE EASTERN DISTRICT OF TEXAS IMPROPERLY ISSUED PREFILING INJUNCTION AGAINST DRAKE

A. Federal and State Judicial Officials Has Abused Their Powers to Violate Constitutional Rights of Non-White Pro Se Litigators.

On March 5, 2012, Magistrate Caroline Craven presiding in the Eastern District of Texas submitted to Judge David Folsom a recommendation for a prefiling injunction regarding several of Applicant's cases: *Drake v. Travelers Indemnity et al* (Cause No. 2:11-cv-318), *Drake v. Bank of America* (No. 2:11-cv-515), and

Drake v. Travelers Casualty Ins. Co., et al (No. 2:11-cv-516). Craven is ignorant to civil insurance litigation law. She believed that there was a two-year statute of limitation regarding UM/UIM cases. But UM/UIM cases have a 4-year statute from the date that the insurance company denies the case. However, that fact did not alter Craven's perspective that Drake's cases against Travelers were allegedly frivolous. In regards to the *Drake v Bank America* case, Applicant re-filed that case in another district and was successful. Judge Keith Ellison in the Southern District heard the case, and Applicant settled his case against Bank of America, and other major financial institutions such as American Express. The fact that the Applicant was able to settle his cases with the very defendants, and with the same pleadings that the Eastern District of Texas (EDT) alleged was frivolous proves that the civil case had merit. Moreover, it proves that the EDT prefiling injunction that was issued against Applicant was unwarranted.

On March 16, 2012, Judge Folsom signed an order requiring the Applicant to obtain permission to file any cases *in forma pauperis*. Prior to signing the order neither Judges Folsom nor Craven allowed any hearings, and there were no notices provided to Drake that a prefiling injunction would be considered. The aim was to permanently block Drake from filing any future petitions.

Thereafter, the Northern District of Texas (NDT) judges used Folsom and Craven prefiling order to take matters even further by requiring Applicant to obtain permission regarding any litigation filed, whether it is filed *in forma pauperis* or not. The order also requires for judges in the NDT to review all cases filed by Applicant or that is transferred to that court. This allows the judges in the NDT to disrupt any cases that other courts have deemed competent. Courts nationwide, but especially Texas courts have utilized their prefiling orders to dismiss many of Applicant's cases. Fifth Circuit misappropriated the Applicant's rights that are enshrined in the U.S. Constitution. Drake has lost hundreds of thousands of dollars in compensation because of such tactics.

II. The Fifth Circuit's Prefiling Order

The unjustifiable and conspired Fifth Circuit prefiling order is drafted in a similar manner as the Eastern District of Texas and Northern District of Texas prefiling orders as shown below:

> "Drake shall be required to pay a sanction in the amount of $2000, payable to the clerk of this court. He shall be barred from filing or prosecuting any motion, action, or appeal in this court or any court subject to this court's jurisdiction, until he has paid the sanction.
>
> Even after paying the sanction, Drake shall be permanently enjoined from filing or prosecuting any civil appeal, motion,

or action in this court or in any court subject to this court's jurisdiction, without first receiving permission from the forum court. When seeking leave of court, Drake shall be required to certify that any claim he wishes to present has not been raised and disposed of on the merits, or is not pending, in any federal court. If a case is removed or transferred to a court within this court's jurisdiction, Drake shall be required make the required payments and obtain the required permission within 30 days of removal or transfer, or the case will be dismissed. The clerk of this court and the clerks of all courts subject to the jurisdiction of this court shall be directed to return to Drake, unfiled, any attempted submission until Drake has complied with the sanction order."

III. Analysis of the Fifth Circuit Clerk's Order

The Fifth Circuit's prefiling order and sanction order annexed as Exhibit A1 purposely infringe upon Drake's Constitutional rights as set forth herein and shown more specifically below.

A. The Fifth Circuit Improperly Denied the Applicants IFP.

The Fifth Circuit denied Drake's IFPs to proceed, claiming that each of his three-appeals were frivolous. There is an unconstitutional potential for bias against the Applicant in the entire state of Texas judicial courts, which include the Fifth Circuit. *Rippo v.*

Baker, 137 S. Ct. 905. There is no probability that the Applicant could ever obtain an impartial hearing, judgment, or trial in the Fifth Circuit Court of Appeals, nor the Eastern District, Northern District, or Western District of Texas courts, with the exception of Judge Keith Ellison, in the Southern District of Texas who is reasonably impartial and even handed towards Applicant.[4] *Bracy v. Gramley*, 520 U. S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). Our Constitution demands, as well as our Country deserves, a Judiciary willing to hold our judicial court accountable when they defy our most sacred legal commitments and laws.

Applicant should not be refused access to the courts on account of his poverty.[5] Other appellate courts have reversed dismissals of IFPs: *Escobedo v. Applebees*, 787 F.3d 1226, *Hicks v. Collins*, 1995 U.S. App. LEXIS 42374; *Ginelli v. Los Angeles Fire Dep't*, 1994 U.S. App. LEXIS. Drake filed a motion to proceed *in forma pauperis* and an affidavit listing his assets as required by

[4]"The probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U. S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); see *Williams v. Pennsylvania*, 579 U. S.136 S. Ct. 1899, 195 L. Ed. 2d 132, 141 (2016).

federal law. See *Haynes v. Scott*, 116 F.3d 137, 139-40 (5th Cir. 1997). It took the Fifth Circuit nearly two years to deny Drake's IFPs. The Fifth Circuit in its order as revealed in Exhibit A1 states on page (3) that the three appeals that Applicant filed were allegedly frivolous.[6] The Clerk of Court provides a summary of his opinion of vexatious litigant history. However, the clerk does not specify under what federal laws that Drake's appeals were allegedly frivolous, nor is he legally competent to make such a claim.

The Fifth Circuit failed to demonstrate in what manner the Applicant's (3) appeals were wholly without merit. Not even the lawyers who represented Travelers, State Farm, or Walmart could perform that miracle. Walmart attorneys knew they could not be successful against the Applicant. So, they improperly removed the

[5]An order denying an application to proceed IFP is immediately appealable and is properly before this court. See Flowers v. Turbine Support Division, 507 F.2d 1242, 1244 (5th Cir. 1975). The denial of IFP status is reviewed for an abuse of discretion. *Id.* at 1243-44. Whether a party may proceed IFP in the district court is based solely upon economic criteria. Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976). Poverty sufficient to qualify does not require absolute destitution. Adkins v. E.I. du Pont de Nemours & Co., 335 U.S. 331, 339, 69 S. Ct. 85, 93 L. Ed. 43 (1948). The central question is whether the movant can afford the costs without undue hardship or deprivation of the necessities of life. *Id.* at 339-40.

case, for one reason: it is known by defense counsel that the NDT will dismiss Drake's cases. During the district court proceedings, Walmart, in their pleadings, begged the court to dismiss Applicant's case and wrote quote: "Why haven't the court dismiss this case like it has all of the rest of Drake's cases." *See* Large Excerpt of Drake's Walmart brief: "Argument to Issue No. 4," *See* **App. A3**. Drake has a wealth of evidence in this case: an eyewitness, medical reports, expert witnesses, and medical billing records. Walmart has in its custody a video that shows the accident, but refused to release the video to Applicant through discovery. The Fifth Circuit erred in dismissing Drake's appeal against Walmart.

The Walmart case was dismissed based on the EDT fraudulent and improperly issued prefiling injunction, which does not propose that the case against Walmart was frivolous. Further, the Walmart appeal invoked appellate jurisdiction because the prefiling injunction was not issued using established standards

[6]"An appeal is frivolous if it is 'wholly without merit.' " United States v. Kitsap Physicians Serv., 314 F.3d 995, 1003 n.3 (9th Cir. 2002) (quoting Amwest Mortg. Corp. v. Grady, 925 F.2d 1162, 1165 (9th Cir. 1991)).

pursuant to case law, which is cited herein. *Schering Corp. v. First DataBank, Inc.*, No. C 07-01142 WHA, 2007 WL 1747115 at *3 (N.D. Cal. June 18, 2007) (quoting *Apostol*, 870 F.2d at 1339).

The Fifth Circuit clerk made several comments that were hearsay, but no proof was offered that the district court properly denied Drake's motion to remand in the Walmart case, which was an issue before the Circuit Court in Drake's brief. The Fifth Circuit cannot wipe away a well-pled appeal by making ineffectual conclusory comments. Yet, Walmart's dismissal based on the EDT 2012 prefiling injunction is also a basis for appellate review. Applicant has repeatedly pled in many district courts and appeals courts that the prefiling injunction was improperly issued.

Fifth Circuit alleged that Drake filed inflammatory and unauthorized amended complaints in the Walmart case, which is false. The district court struck the Applicant's amended pleadings because Drake provided proof that the EDT prefiling order was issued without due process; proof it was unjustified, and judges who issued the order erred. Fifth Circuit clerk's hearsay comments are not legally competent to dismiss Applicant's (3) appeals.

Fifth Circuit even made the assertion that the 2012 prefiling injunction was valid, when the clerk proffered no proof thereof.

The clerk also dismissed the Applicant's case against *State Farm Mutual et al*, Fifth Circuit No. 21-10797. Fifth Circuit clerk noted that the magistrate judge administratively closed the case because Applicant failed to comply with prior prefiling injunction. By the time Drake had notice that his case had been transferred, it was already closed. The Northern District of Texas did not allow Applicant even a full two days notice before it had closed the case. But again, the district court closed the case pursuant to the EDT 2012 prefiling injunction, which Drake briefed to the Fifth Circuit. Applicant also appealed the September 10, 2021 denial of his IFP in his brief to the Fifth Circuit, which is also an appealable issue.

Again, this case has substantial evidence that would convict all of the defendants. Applicant filed this case in Georgia, his legal resident state, and because of the hostile nature of the courts in Texas against him. The district judge transferred the case, even when State Farm and many other defendants conduct business in that state and jurisdiction. The district court did so knowing that

the NDT would likely dismiss Applicant case without notice, since Drake informed the Georgia federal district court of this outcome.

For much the same reasons, Applicant's appeal against *Travelers et al* invokes appellate jurisdiction. The *Travelers et al* appeal involved a serious permanent injury to Applicant's right eye. On Sept. 24, 2016, while traveling on U.S. Highway I-20 an object fell on the windshield of the Applicant motor vehicle, which broke part of the windshield and caused damage to Drake's eyes.

The object, which fell from a bridge, did so in a downward direction with velocity and force. No cars or trucks were in front of Applicant's car when the object broke the windshield of the vehicle he was operating. But there were men working on a bridge at FM 450 and I-20 that Applicant just had passed underneath. The evidence in the Travelers case is also substantial. Unfortunately, the accident occurred in EDT jurisdiction, which the judges and staff are extremely hostile and biased towards Drake. Parading hearsay comments that are not based in actual fact-finding or credible provable evidence does not substantiate that Applicant's three appeals that the Fifth Circuit dismissed are frivolous.

As an alterative, Applicant filed the Travelers case in Maryland where Travelers does business, but the Maryland court transferred the case to EDT were the judges are hostile to Drake.

The Fifth Circuit clerk attacked the Applicant by inserting additional hearsay comments such as "abusing the judicial system by bringing" the action there [in Maryland] in order "to avoid the orders restricting his ability to file his claims in a proper venue." Unquestionably, Applicant was avoiding filing his petitions in the Eastern District of Texas where that court **had already refused to accept his original petition** regarding the Travelers case, even after the Applicant had borrowed money to pay the fees from a friend to timely file it. The Eastern District of Texas (EDT) judges and clerks are not only *hostile* towards Applicant; but they are racially discriminative towards him, and their behavior in the small town of Marshall, Texas is comparable to the *Ku Klux Klan* in the state of Alabama in the 1950s. Furthermore, the Applicant did in fact reply to defendant's motions to dismiss and motion for prefiling injunction. Fifth Circuit failed to establish adequate evidence in *Travelers et al* No. 20-40492 to dismiss Drake's appeal.

Moreover, the clerk failed horribly to demonstrate that any of Applicant's personal injury claims were without merit—because the evidence is extensive. Neither could the Respondents show that the Applicant eye was not injured while driving underneath the bridge. As in the other two appeals, Applicant has considerable evidence that no lawyer could defend the case successfully before a jury. The Fifth Circuit dismissed Drake's appeals without legal cause, and filed a baseless, vexatious, unconscionable, and unjustifiable sanctions order, which included monetary sanctions.

Applicant does not find the comments contained in the Fifth Circuit clerk of court order to have an argumentative basis for the blind dismissals of Applicant's three appeals and denial of Drake's IFPs. As the Court recognize, no judge signed any orders, including the sanction order at the Circuit Court level, hence: the April 28, 2022 clerk of court Order is subject to Mandamus review by this Court for such unscrupulous abuses by the Fifth Circuit.

B. Fifth Circuit Inaccurate Assessment of Applicant's Appeals

Fifth Circuit alleges that the Applicant made no nonfrivolous claims pursuant to the three (3) appeals that the Circuit Court

dismissed on April 28, 2022. The Applicant argues differently. The question of jurisdiction may be raised for the first time on appeal. *Caesar v. Burgess et al.*, supra. *United States v. Bustillos*, 31 F.3d 931, 933 (10th Cir. 1994); *Namgyal Tsering v. U.S. Immigration,* 403 F. App'x 339 (10th Cir. 2010). Jurisdiction may be challenged for the first time on appeal. *Franzel v. Kerr Mfg.*, 959 F.2d 628, 630 (6th Cir. 1992). The issue of jurisdiction can be raised at any time, including for the first time on appeal. *United States v. White*, 139 F.3d 998, 999-1000 (4th Cir. 1998). Further, Fifth Circuit claims that the Applicant did not bring up improper service in the district court, which again is untrue. Judges and defense counsels, and now a federal Circuit Court have greatly exaggerated Drake's history as a supposed vexatious litigant. The Fifth Circuit cannot afford for this Court to hear the Applicant's Writ of Mandamus.

The clerk further indicated that obtaining a fair hearing was not a subject that needs to be addressed, nor the denial of the Applicant's IFPs in the district court was an important factor to consider on appeal. This of course, is the opposite to case law. Certainly, the prefiling sanction in and of itself is not considered

to be a final order under 28 USC §1291. Pursuant to *Click v. Abilene National Bank*, sanctions orders are not of themselves appealable final decisions. As such, filing a traditional Writ of Certiorari may not be effective in allowing this Court to review the Fifth Circuit's misapplication of the law. Thus, Mandamus would be the proper legal format and provision for this Court to assess the Fifth Circuit's dismissals and sanction order it filed against Applicant. And it would also allow this Court, the U.S. Supreme Court, to realize the urgent call for justice by *outlawing prefiling injunctions* that judges in many courts abuse, which targets only *pro se* litigants in this land of the theoretical 'free,' called America.

In regards to the prefiling sanction by the Eastern District of Texas, Applicant awaited the conclusion of the underlying lawsuit and then appealed to the Fifth Circuit under §1291, which is noted in Applicant's *Travelers et al* brief under jurisdiction.

C. Appealable Issues Were Raised In Applicant's Briefs

1. As already set forth, Drake raised several issues with merit in his briefs that the Fifth Circuit dismissed. But let's look at the conduct of the NDT pursuant to *State Farm et al* case in the

district court. The NDT administratively closed a case pending Drake's complying with an injunction for an unknown period of time demands Mandamus review. Since the NDT district court refused to allow a hearing regarding the prefiling injunctions validity, the only recourse to Applicant was appellate review of the matter. The EDT 2012 prefiling order and NDT adopting EFT prefiling order has been the subject of much debate for about a decade. Applicant requested the Fifth Circuit review these prefiling injunction orders. But the Fifth Circuit has apparently deemed these injunctions legitimately issued (by hearsay—but no provable evidence) even though the EDT and the NDT has refused to conduct any hearings on the matter. Applicant also provided Fifth Circuit with a well-pled argument in his briefs regarding the EDT and NDT prefiling orders. Drake also expressed due process right violations regarding the NDT closure of his case. Drake pled to the Fifth Circuit that the Georgia district court erred when it transferred Applicant's case to a hostile jurisdiction. The Georgia district court erred. Under this situation, since Georgia's district court had personal jurisdiction over State Farm, the transfer was an abuse of discretion, which is also an appealable issue. Drake's only option is for this Court to review the Fifth Circuit rulings.

In the Applicant's *State Farm et al* brief filed with the Fifth Circuit, he argues under issue number four as follows:

> "The Supreme Court held that the district court's stay order was an appealable "final decision" under 28 U.S.C. § 1291. A stay order may be "final for purposes of appellate jurisdiction" where the order puts the litigant "effectively out of court." ***Id***. at 9, 103 S.Ct. 927 ; see also *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962)."

The Fifth Circuit Court of Appeals alleged that since the magistrate signed the order it wasn't appealable. Of course, Applicant disagrees with that legal opinion. In the magistrates order of administratively closing the Applicant case, (in two days after receiving the transfer) she reinforces and elaborates about Applicant filing numerous cases in that district and list several cases, though some of the information she list is completely in error. Principally, she make note apparently of the NDT and the EDT prefiling orders, which were issued improperly on the first page of her order to close the case. *See* **App. A2**. Then she writes:

> "The plaintiff is still subject to, but did not comply with, the prior sanction order by obtaining leave to file this transferred action."

The gist of what the magistrate wrote allegedly is that the Applicant somehow requested his case to be transferred to the Northern District of Texas from Georgia, is hilarious. Applicant pleaded with the district court in Georgia *not* to transfer his case to the Northern District of Texas because the NDT would dismiss the case immediately. What also indicates the magistrate's order appealability is the language she used in bold: **Any pending and future motions in this action shall be docketed for administrative purposes only and terminated**. The intent by the magistrate's order is to close Drake's case for an indefinite period of time, which is an indirect way: a dismissal. See *Muhammad v. Warden, Balt. City Jail*, 849 F.2d 107, 110 (4th Cir. 1988). It is Applicant's legal opinion that the *State Farm et al* administratively closed case is appealable by either a collateral order or an order with "practical finality." The Eleventh Circuit held in *Kobleur* that an order administratively closing a case but retain-

Kobleur, 954 F.2d 705 (11th Cir.1992)

ing jurisdiction, (as in the *State Farm et al* case before the Court) pending exhaustion of remedies, was a final, appealable order.

More importantly, in each of the Applicant's appeals that were dismissed by the Fifth Circuit, the clerk's records do not reveal a judge's signature on any orders. For the Orders of the Fifth Circuit to be in effect, those orders need to be signed by a judge ordering the clerk to carry out what the clerk has alleged, which did not occur in this case. Furthermore, no justice or judge filed a memorandum of their views or recommendations indicating dismissal of any of Applicant's three appeals, and or the denials of Applicant's application for IFPs, or the alleged sanctions. Again, Mandamus appears to be proper antidote for this circumstance. *Radio Television Espanola S.A. v. New World Entertainment, Ltd.*

The issues contained in the brief that Applicant filed in the *Travelers et al* appeal were: prefiling orders, tolling, jurisdiction, recusals, and IFP denial, all of which are valid arguments before an appellate court. Since the EDT Marshall division refused to accept the Applicant's pleadings, even after he had borrowed money from a friend, this is also an appealable issue. Yet, the Fifth Circuit clerk has labeled these issues contained in Drake's briefs as frivolous. Constitutional violations are not meritless.

And in the *Walmart et al* appeal the Applicant also pled arguable points. Despite the fact the clerk made the assumption that Walmart case was not untimely or improperly removed is not

evidence or verifiable proof, but hearsay. A large excerpt of Drake's Walmart brief is annexed to this Writ of Mandamus, which was filed in the Fifth Circuit. *See* **App. 3**.

Counsel for Walmart removed Drake's case for the sole purpose of escaping discovery sanctions, and to block submitting a video that was in Walmart's possession that shows the accident. And that is a matter that this Court should review: if there are pending sanctions and discovery due in a state court, the defense should not be allowed to remove a case to *escape sanctions* and *producing discovery*. Defense should be made to settle any discovery issues before removal. If a party cannot escape sanctions prior to a dismissal; neither should defense be able to evade sanctions and discovery by merely removing the case without penalties. *Stehney v. Ferguson*, No. 6:16-3955-TMC (D.S.C. Jul. 13, 2017).

Applicant pled in his Walmart appeal that the adoption of a prefiling order that the district court was aware might have been issued improperly is a matter for an appeals court to address. Question for this Court: How many times does a *pro se* litigant with a prefiling injunction need to have the same case reevaluated

to obtain permission. The main purpose of an alleged prefiling order is only for [a] judge to declare that the case has merit. If one judge has already made that finding, it is a waste of judicial resources to have the case reviewed—yet again by a separate judge. The supposed reason for instituting the vexatious litigant statute and federal prefiling injunctions were to allegedly save judicial resources. But these statutes have caused a decade of litigation in Drake's cases alone. The NDT erred and abused its discretion after learning the Walmart case had already been reviewed by a judge to demand another review by one of its judges.

IV. The Fifth Circuit Sanction Order is Without Merit

Pursuant to *Zarnow v. Wichita Falls,* 500 F.3d 401 (5th Cir. 2007) "A meritless appeal by the City, was not so unjustified as to merit sanctions." The Fifth Circuit attacked Applicant's appeals without establishing a legal theory or a basis for its actions. The Fifth Circuit denial of Applicant's IFPs was improper.[7] Denial of IFP status "has the effect of delaying litigation of the merits of a claim until the [filing] fee is paid in full." *Baños v. O'Guin*, 144 F.

3d 883, 885 (5th Cir. 1998); *Johnson v. Abangan*, No. 18-60481 (5th Cir. Jan. 20, 2020). The Fifth Circuit never made a determination that Applicant did not qualify for the IFPs that he applied for—being that Drake live at the poverty level, they couldn't. Applicant has brain damage and lives on very little income, thus making a demand for $2,000.00 in monetary sanctions is even more horrendous, fueled by racism and judicial corruption.

A prefiling injunction against the Applicant or any U.S. citizen violates his or her Constitutional Rights. The intent was to subject Applicant to hardship.[8] Several district courts has taken a position to limit prefiling orders to a limited number of years, such as 2 or 3-years, [9] then the order could be rescinded. But the EDT, NDT, and the Fifth Circuit's actions against Applicant were not as much judicial in nature, as they were *personal attacks* against Applicant Drake strictly on account of his race, African American.

Hatred has no limitations, and racial discrimination breeds even more hatred. *Elansari v. Pennsylvania*, 2021 U.S. Dist. The district court in *Veneri v. State Corr. Inst.*, reasoned, "While '*pro se* litigants are not entitled to special treatment,' *Brown v. City of Phila.*, Nos. 05-4160, 06-2496, 06-5408, 08-3369, 2009 U.S. Dist.

LEXIS 31947, 2009 WL 1011966, at *15 (E.D. Pa. Apr. 14, 2009), the use of a pre-filing injunction against a *pro se* litigant "must be approached with caution." *Grossberger*, 535 F. App'x at 86 (citing *In re Oliver*, 682 F.2d 443, 445 (3d Cir. 1982). Unfortunately for Applicant, the Fifth Circuit does not have any legal grounds for issuing a prefiling order or sanctioning him. It was an unjustly means to put judicial chains on Applicant, as if, he was a prisoner

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[7]Once an IFP application has been denied, plaintiff is entitled to a reasonable time to pay the filing fee. *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th Cir. 2015).

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[8]According to *Wilkinson v. Wells Fargo*, subjecting a pro se litigant to a pre-filing injunction is severe. The court in Wilkinson stipulated that the Plaintiff must be offered an opportunity to explain why the Court should not impose such a pre-filing review system upon all future filings from him. See *Black v. New Jersey*, No. 7:IO-CV-57-F, 2011 U.S. Dist. LEXIS 2735, 2011 WL 102727 at *1 (E.D.N.C. Jan. 11, 2011) (Before imposing a pre-filing injunction, "the litigant must be given notice and an opportunity to be heard on the matter."). This Court will therefore provide Plaintiff fourteen (14) days to in which to file a response showing cause as to why he should not be subject to such an injunction. This Court will weigh the Cromer factors and make a determination about such a pre- filing injunction after this deadline passes. *Wilkinson v. Wells Fargo Bank, N.A.*, 2021 U.S. Dist. LEXIS 44542.

or slave owned by these court to parade around and mock. It's a kind of modern day "judicial slavery." Since lawyers are *impotent* to defeat Applicant in the courts, judges assist them by labeling any of Drake's cases as vexatious or frivolous, when that appraisal is absurd, as the Fifth Circuit carryout in its April 28, 2022 order.

Furthermore, if a prefiling order is warranted, courts have suggested that it should be narrowly tailored. "Narrowly tailored orders are needed 'to prevent infringement of the litigator's right of access to the courts.'" *De Long*, 912 F.2d at 1148 (citing *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1525 (9th

[9]"The Third Circuit has held that district courts "must comply with the following requirements when issuing such prohibitive injunctive orders against pro se litigants." Id. First, the Court should not restrict a litigant from filing claims "absent exigent circumstances, such as a litigant's continuous abuse of the judicial process by filing meritless and repetitive actions." *Id.*; see also Matter of Packer Ave. Assoc., 884 F.2d 745, 747 (3d Cir. 1989). Second, the Court "must give notice to the litigant to show cause why the proposed injunctive relief should not issue." Brow, 994 F.2d at 1038; see also Gagliardi v. McWilliams, 834 F.2d 81, 83 (3d Cir. 1987). Third, the scope of the injunctive order "must be narrowly tailored to fit the particular circumstances of the case before the [ ] Court." Brow, 994 F.2d at 1038; see also Chipps v. United States Dist. Ct. for the Middle Dist. of Pa., 882 F.2d 72, 73 (3d Cir. 1989)."

Cir. 1983). In *Neal v. Select Portfolio Servicing, Inc.*, 2021 U.S. Dist. LEXIS 35679, the district court in Neal commented:

> "The Court cannot find authority to bar plaintiff from suing the defendants in other districts or state court, but if he does so on the same matters already barred, defendants should bring this order to the attention of the supervising judge."

According to this Court, the U.S. Supreme Court, the petition clause includes the opportunity to institute non-frivolous lawsuits. In *Borough of Duryea v. Guarnieri* (2011), this Court stated regarding the Free Speech Clause and the Petition Clause: "The right to petition is an expression directed to the government seeking redress of a grievance."

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[10]"There are three requirements that must be met before a court may issue such an injunction: '(1) the litigant must be continually abusing the judicial process; (2) the litigant must be given notice of the potential injunction and an opportunity to oppose the court's order; and (3) the injunction must be narrowly tailored to fit the specific circumstances of the case.'" Holman v. Hooten, No. 11-78, 2015 U.S. Dist. LEXIS 78906, 2015 WL 3798473, at *7 (E.D. Pa. June 17, 2015) (quoting Grossberger v. Ruane, 535 F. App'x 84, 86 (3d Cir. 2013)); see also Abdul-Akbar v. Watson, 901 F.2d 329, 332 (3d Cir. 1990) (noting that a pre-filing injunction is "an extreme remedy that must be narrowly tailored and sparingly used").

A. Fifth Circuit Sanction Amount Is Excessive

The Fifth Circuit sanctioned Applicant monetarily, but the appeals court failed to prove that any amount of sanction was justified and not disproportionately excessive. The Fifth Court of Appeals sanctioned the Applicant on its own initiative, and it took nearly two-years for the Fifth Circuit to file its frivolous sanctions. Since the Respondents were not directed to respond to Drake's appeal, attorney fees could not be assessed against the Applicant. The Fifth Circuit failed to cite under what federal laws they were sanctioning Applicant. Objectively, a reasonable attorney would *not* conclude that Drake's (3) appeals are frivolous. *Hilmon*, 889

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[11]The district court should be careful not to conclude that particular types of actions filed repetitiously, i.e., FOIA actions, in and of themselves warrant a finding of harassment. Instead, the district court should attempt to discern whether the filing of several similar types of actions constitutes an intent to harass the defendant or the court."

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[12]Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim.

F.2d at 254. Applicant is mindful of the Fifth Circuit's display of his prior cases which some were unsuccessful, but according to *Morgan C Covington Twp.*, 563 F. App'x 896 (3d Cir. 2014), an ineffective and even weak claims and arguments on appeal are not the same as frivolous claims or arguments. Since the Respondents never had a chance to respond to the Applicants appeals, how did the Fifth Circuit arrive at the excessive amount of $2,000.00 or any amount? Moreover, the Fifth Circuit never supported the $2,000.00 monetary sanction with any reasonable argument or findings because the order itself is hopelessly frivolous. The court in *Chien Van Bui v City & County of San Francisco* commented: "the standard for a frivolous appeal ***'is quite high***,' and frivolity should be found in cases where the appeal is either 'wholly without merit' or the outcome is 'obvious." No doubt, the Fifth Circuit did not prove in any respect this high standard.

The Fifth Circuit failed to lay any legal grounds or factual findings to support imposing a sanction of even a dollar, but especially an excessive sanction of: $2,000.00. Albeit courts have broad

discretion to impose sanctions, but the sanction must be *just* and supported. Still, the Fifth Circuit realizes that this Court hears very few cases, and is gambling that the Court is not concerned about the rights of a *pro se* litigant that the Circuit Court painted vexatious. Courts must make factual findings sufficient to support its decision to impose sanctions. *Naviant Marketing Solutions, Inc. v. Larry Tucker, Inc.,* 339 F.3d 180, 185 (3d Cir. 2003) (citation omitted). A court must afford the person it proposes to sanction due process, i.e., "notice and opportunity to be heard." *In re Ames Department Stores, Inc.*, 76 F.3d 66, 70 (2d Cir. 1996).

An award of sanctions under the court's inherent power must be based on "clear evidence" and must be accompanied by "a high degree of specificity in the factual findings. . . ." *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986) (internal quotation marks omitted), cert. denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); see also *United States v. Seltzer*, 227 F.3d 36, 43 (2d Cir. 2000) (vacating sanctions order and remanding "for further development of the record" where we were "unable to determine exactly what circumstances gave rise to the district court's decision to sanction"). Courts "inherent power to sanction

'must be exercised with restraint and discretion." There was no restraint by the Fifth Circuit; the clerk was reckless to his duties and his position for the sake of seemingly a few judges who convinced him to carryout a hateful act. The Fifth Circuit failed to articulate with specificity the sanctionable conduct and provide reasons supporting the sanctions. *MacDraw*, 73 F.3d at 1258-59.

The Fifth Circuit's sanctions against the Applicant were clear error, an abuse of discretion, and an abuse of power, but it was also a *hostile* action. Racism need not have a good reason for its behavior, and in this case no sanctions were warranted against the Applicant. Yet, sanctions are warranted against the clerk of court, because his deeds were clear violations of the FRAP, and Applicant's Constitutional Rights, and the Constitution itself.

V. **Decision of Fifth Circuit Conflicts with Federal Laws.**

Applicant argues that his appeals have more than a reasonable arguable basis. As argued in many courts, the prefiling injunction issued by the Eastern District of Texas was not issued properly and the injunction did not limit the time to govern the level of punishment. It would be like having a petty thief sentence

to life in prison for the theft of a $20.00 item without trial. Conducting a hearing on the EDT injunctions and the Fifth Circuit's April 28, 2022 prefiling and sanctions order would prove that these injunctions were unjustified and issued in bad faith. Since impartiality is nonexistent, any response by Applicant would still result in sanctions. A federal court must give a litigant notice and an opportunity to be heard prior to issuing a prefiling injunction or sanction. ***Id.*** at 819. *Thomas v. Fulton,* 3:07CV200-MU (W.D.N.C. Feb. 13, 2008); *Miles v. Angelone*, 483 F. Supp. 2d 491 (E.D. Va. 2007). Before a narrowly tailored prefiling injunction is issued, the litigant must have an opportunity to be heard. *Cromer*, 390 F.3d at 819. *Odom v. South Carolina*, No. 5:16-2674-RMG (D.S.C. Sep. 14, 2016). *Johnson v. EEOC Charlotte Dist. Office*, 3:15-cv-148-RJC-DSC (W.D.N.C. Feb. 3, 2016).

In *Henderson*, the court made it very clear that, "prior to issuing a prefiling injunction, the Court "***must*** afford a litigant notice and an opportunity to be heard." The term used by the court was [must], which is not an option. The EDT failed to notify the Applicant, and he was not given a hearing on the matter before the injunction was issued. Fifth Circuit did not grant the

Applicant even a *Zoom* hearing. *Henderson v. Former City Sheriff of Richmond*, No. 3:16CV787-HEH (E.D. Va. Nov. 16, 2016).

In order to impose an injunction, a court must comply with three requirements: (1) the litigant must be continually abusing the judicial pro-process; (2) the litigant must be afforded notice of the potential injunction and the opportunity to oppose and be heard; and (3) the injunction must be narrowly tailored to the

Rodriguez v. Doe, No. 3:12-cv-00663-JAG (E.D. Va. Apr. 12, 2013)

specific circumstances of the case. *Brow v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir. 1993). These requirements were not met by the EDT or the NDT, or when the Fifth Circuit used the same biased format for its prefiling order and sanctions against Applicant.

> "A court uses a prefiling injunction only when a drastic remedy becomes necessary. A court must use this remedy sparingly, consistent with the constitutional guarantees of due process and access to the courts. *Id.* at 817. The judiciary should not limit access to the courts absent "exigent circumstances . . . A court should approach the use of such a measure against a *pro se* Petitioner "with particular caution" and the issuing of a prefiling injunction should be "**the exception to the general rule of free access to the courts**." *Id.* at 818 (citing *Pavilonis v. King*, 626 F.2d 1075, 1079 (1st Cir. 1980)).

The court in *Johnson* stated that, "despite the explicit warning to Johnson, the court's cautionary language to *plaintiff* lacked specificity regarding a pre-filing injunction." The court in *Johnson* was concerned about due process rights of issuing a pre-filing injunction. *Johnson v. Hendrick Auto. Grp.*, No. 3:11-cv-00389-FDW (W.D.N.C. Feb. 16, 2012); *Bamigbade v. City of Newark*, No. 04-4419 (D.N.J. Jan. 30, 2006); *Lasko v. Caliber Home Loans, Inc.*, No. 2:18-cv-01802-GMN-VCF (D. Nev. Aug. 31, 2020). Applicant's rights <u>*were not*</u> a concern to the Fifth Circuit.

Sanctions were leveled against Applicant to antagonize him, but clearly there were no reasonable legal basis to sanction Drake. The Fifth Circuit is vague in its order for sanctions including the reasoning behind the $2,000.00 monetary sanctions are nonexistent. Fifth Circuit had not previously warned Drake of alleged liberal pleading. Yet, the description of the judges as *Klan* members is an accurate description of them. *Seal Parts v. National Parts System*, 48 F.3d 529, 529 (5th Cir. 1995) (citing *Moody v. Baker*, 857 F.2d 256, 258 (5th Cir. 1988), cert. denies, 488 U.S. 985 (1988)). In order to obtain respect, one must give respect. The appeals that Applicant filed with the Fifth Circuit were well-pled.

Factually, the Fifth Circuit is at a lost of how to frame the

monetary sanctions against Applicant. Rule 11 sanctions must be limited to those expenses actually and directly caused by the filing of the pleading, which in this case is zero. According to *Hicks v. Bexar County, Tex.*, 973 F. Supp. 653 (W.D. Tex. 1997), Fifth Circuit has adopted a rule under which a *pro se* litigant must first be warned before Rule 11 sanctions may be imposed upon them.

In regards to suing judges, any judge can be sued for injunctive relief and others sued in their official capacities or individual capacities, according to the facts of the case. The Court is fully aware that the 11th Amendment does not bar suits against state officials in their official capacity for injunctive relief. See *Ex parte Young*, 209 U.S. 123 (1908); *Garrett v. Talladega Cty. Drug & Violent Crime Task Force*, 983 F. Supp. 2d 1369, 1378 (N.D. Ala. 2013). In addition, the Federal Rules of Civil Procedure generally allow for liberal pleadings. Indeed, the Fifth Circuit has consistently held that the district courts are to be "very liberal rather than technical in Title VII pleading requirements." *Love v. Pullman*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972).

In closing, this Court, U.S. Supreme Court, has met head on

historical and landmark cases, such as: *Clay v. United States*, *Brown v. Board of Education*, *Bailey v. Patterson*, *Jones v. Mayer Co.*, *Batson v. Kentucky*, *Corfield v. Coryell* and many other decisions encompassing discrimination, segregation, and basic rights for all citizens in America. The aforementioned cases will be nullified if this Court fails to review this case. None of these landmark cases would have been reviewable without the right to petition. To by-pass this case would be to by-pass every important decision that this Court has made regarding the rights of American citizens in its 232-years of existence. This case centers on the very essence of how the American jurisprudence is purportedly fairer than those of other country's courts. But the legal safeguards that were written by our forefathers, and refined by case law, would have no impact on the human factor of bigotry, and hatred that unfortunately infiltrates into countless judicial decisions as seen in the case of the Applicant, Eric Drake.

CONCLUSION

Applicant respectfully request that this Court issue the requested Writ of Mandamus to the United States Fifth Circuit

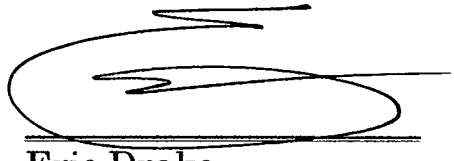
Court of Appeals, ordering the Appeals Court to: **a**) Reverse the dismissals of Applicant's three appeals, and order them back on the Fifth Circuit's docket; **b**) Grant Drake's IFPs; **c**) Order the Respondents to file a response to each of the Applicant's appeals; [*it should be apparent to the Court that the Fifth Circuit is so biased towards Applicant that impartiality is not a possibility*], ***or***,

Alternatively:

d) Order that Drake's three appeals that were dismissed by the Fifth Circuit, which is the subject of this Mandamus be transferred to the Sixth Circuit and that all future appeals that should be heard by the Fifth Circuit involving Applicant in any manner be immediately transferred and heard by the Sixth Circuit Court of Appeals; **e**) Set aside the Fifth Circuit's April 28, 2022 prefiling injunction and monetary sanction order by the clerk of court; and **f**) Order the Fifth Circuit's clerk of court be sanctioned by this Court for his intentional actions to violate the U.S. Constitution. And that this Court would further investigate the clerk of court and the Fifth Circuit judges and any other judges who were involved in violating Applicant's Constitutional rights.

Respectfully Submitted on this 27th day in August, 2022.

Respectfully submitted,



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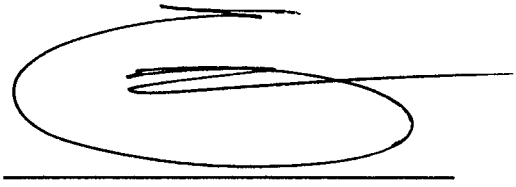
CERTIFICATE OF SERVICE

I hereby certify that, on August 27, 2022, I dispatched a copy of the foregoing Mandamus, to the Fifth Circuit Court of Appeals, Attention: Clerk of the Court, electronically by email.



Eric Drake