22-6787

No. 22-_____

ORIGINAL

In The
Supreme Court of the United States

MAJOR MIKE WEBB, D/B/A FRIENDS FOR MIKE WEBB (C00591537),
A/K/A MAJOR MIKE WEBB FOR CONGRESS (H8VA08167),
Pro Se Petitioner/Appellant,

v.

CITY OF FALLS CHURCH and CITY OF ALEXANDRIA
Respondents/Appellees.

***Webb v. City of Falls Church, et al.*, Record No. 22-1699 (4th Cir. 2022), on petition for writ of mandamus from *Webb v. City of Falls Church, et al.*, Civil Action No. 1:22-CV-00668-MSN-WEF, (E.D.Va. 2022)**

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether it constitutes a violation of rights to procedural due process, where a Trial Court, and later a Circuit Court, have "erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), through denial of an application to proceed *in forma pauperis*, for arbitrary and capricious reasons, in abuse of discretion. Order, *Webb v. City of Falls Church*, Civil Action No. 1:22-CV-00668-MSN-WEF (E.D.Va. June 17, 2022); Order, Record No. 22-1699 (4th Cir. August 17, 2022); Order, Record No. 22-1699 (4th Cir. December 22, 2022).

2. Whether it constitutes a violation of rights to equal protection and substantive due process, or, in the alternative, a violation of the rights or privileges of citizens, where a Trial Court, and later a Circuit Court, have "erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim," *Elk Grove Unified Sch. Dist.*, 542 U.S., at 1, *abrogated by Lexmark Int'l, Inc.*, 572 U.S., at 118, through denial of an application to proceed *in forma pauperis*. Order, City of *Falls Church*, Civil Action No. 1:22-CV-00668-MSN-WEF (E.D.Va. June 17, 2022); Order, Record No. 22-1699 (4th Cir. August 17, 2022); Order, Record No. 22-1699 (4th Cir. December 22, 2022).

PARTIES AND RULE 29.6 STATEMENT

Appellant is MAJOR MIKE WEBB, hereinafter referred to as "WEBB". Appellant has no parent corporation, and there is no publicly held corporation owning 10% of more of its stock.

The Appellees are: CITY OF FALLS CHURCH, and CITY OF ALEXANDRIA.

DECISIONS BELOW

All decisions in this case in the lower courts are styled *Webb v. City of Falls Church*. A Verified Complaint was filed with the U.S. District Court for the Eastern District of Virginia (Alexandria Division) on June 9, 2022, seeking to enjoin the Respondents enforcement of an *ultra vires* Pride Month Proclamation, but had been

denied permission to proceed *in forma pauperis*, by an order dated June 14, 2022, as attached hereto, in departure from prior approvals, which order was reversed by the Fourth Circuit, by Order, dated August 17, 2022, as attached hereto, but which order, on December 22, 2022, with no reference to the prior order being rescinded, had affirmed the decision of the Trial Court from earlier in June, as attached hereto.

JURISDICTION

Appellant had a pending appeal, in the U.S. Court of Appeals for the Fourth Circuit, pursuant to 28 U.S.C. § 1295(a)(1), and, hereby presents this petition in accordance with S.Ct.R. 10(a) and S.Ct.R. 10(c).

I. An Important Question of Federal Law

A. Justice for All

It is clear that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith", 28 U.S.C. §1915(a)(3), and the court record is devoid of any such certification. Moreover, if approved to proceed *in forma pauperis*, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases", 28 U.S.C. §1915(d), and, of record, in contravention of Fed.R.Civ.Pro. 4(c)(3), even after a reversal of the implicit denial by the Trial Court on Appellant's application to proceed *in forma pauperis*, Order, *City of Falls Church*, Record No. 22-1699 (4th Cir. August 17, 2022), such did not occur, even after Appellant had filed a motion for writ of mandamus to so compel the Trial Court, triggering the time/decision rule, articulated in *Reid v. MSPB*, 508 F.3d 674 (Fed. Cir. 2007), wherein a complainant "need not demonstrate the existence of a retaliatory motive. . . to establish that [the protected activity]. . . was a contributing

factor", *Kewley v. HHS*, 153 F.3d 1357 (Fed. Cir. 1998) (quoting *Marano v. DoJ*, 2 F.3d 1137(Fed. Cir. 1993)), when the Fourth Circuit had reversed its prior decision, without any reference to the prior decision, or presenting any new findings to substantiate the decision. Order, *City of Falls Church*, Record No. 22-1699 (4th Cir. August 17, 2022)[1].

"It certainly sounds sexy when Forbes Magazine calls Arlington County one of the richest counties in the nation[. B]ut for folks who live here, it's not exactly breaking news — more like a given", Cameron Luttrell, "Arlington Places In Top 10 In Forbes' Richest U.S. Counties," *Arlington Patch*, November 10, 2017, and in Arlington, it's axiomatic that "[i]f you can't pay the filing fee. . . how do you expect to be competitive in the race?" Scott McCaffery, "Editor's Notebook: If you can't pay the filing fee ...," *Arlington Sun Gazette/Inside NOVA*, February 2, 2016. *But see* Jo DeVoe, "Breaking: Arlington County Board gives green light to hearings on Missing Middle," *ARL Now*, January 25, 2023.

According to the American Bar Association (ABA) that had considered the problem significant enough, as attorneys, to write a report, "[f]ormer Attorney General Robert F. Kennedy said in 1962, 'If justice is priced in the marketplace, individual liberty will be curtailed and respect for law diminished'", and they suggest, at least efficaciously, that "[w]e are seeing this respect diminished throughout our country", pointing to Ferguson, Missouri, "the subject of a U.S. Department of Justice investigation." Paulette Brown, "Justice for All...Who Can Afford It," *ABA*, April 30,

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[1] "ORDER filed granting Motion to proceed in forma pauperis [7]. Copies to all parties. Mailed to: Mike Webb. [1001213734] [22-1699] JSN [Entered: 08/17/2022 12:56 PM]" *Id.*

2016. And while there is not much substantive efforts found by professional litigators on these issues that certainly may invoke passionate feelings amongst some Americans, there corporate message appears to be that "in far too many instances, an individual's access to equal justice is based less on principle and more on ability to pay." *Id. See also* State Justice Institute, "Ensuring Young People Are Not Criminalized for Poverty: Bail, Fees, Fines, Costs, and Restitution in Juvenile Court," *Defend Youth Rights*, http://defendyouthrights.org/wp-content/uploads/2018/04/Bail-Fines-and-Fees-Bench-Card_Final.pdf (January 26, 2023).

According to the Department of Justice, "[t]o the vast majority of Americans, this concept is a given; it's innate to being American", citing in example the fact that "[t]his country banned debtors' prisons under federal law back in 1833", and that, "[i]n 1970, the U.S. Supreme Court ruled that a maximum prison term could not be extended because a defendant failed to pay court costs or fines", while "[a] year later, those same justices ruled that a defendant may not be jailed solely because he or she is too poor to pay a fine." Sally Yates, "Poverty Is Not a Crime," *DoJ*, Decmber 2, 2015. "Again, in 1983, in a case called *Bearden v. Georgia*, the Supreme Court reaffirmed that the Constitution does not permit 'punishing a person for his poverty.'" *Id.* "In an opinion by Associate Justice Sandra Day O'Connor, the Court said it was 'fundamentally unfair' for Georgia to have revoked a convicted burglar's probation and sent him to jail for three years for his failure to pay the $550 fine that was a condition of his probation." Editors, "Justice Overturn Jailing of Man Who Was Too Poor to Pay Fine," *The New York Times*, May 25, 1983.

The ABA has intimated that "[f]ees imposed by a court must be related to the justice system, services rendered to the defendant, and never be in excess of a person's ability to pay", Staff, "Ten Guidelines on Court Fines and Fees," *FFJC*, August 6, 2018, and "[t]he Supreme Court has held that 'punishing a person for his poverty' is unconstitutional", but "[f]ees and fines are most often evaluated by courts and criminal justice agencies, legislators, and policymakers on the basis of the revenue they generate, but they come at a great cost to the criminal justice system." Matthew Menendez, *et al.*, "The Steep Costs of Criminal Justice Fees and Fines," *Brennan Center for Justice*, November 21, 2019. Accordingly, "[t]oday, many states and localities rely on these fees and fines to fund their court systems or even basic government operations", accounting for up to half the operating revenue for not only the courts, but also supporting agencies, under the rationale that "fees are intended to shift the costs of the criminal justice system from taxpayers to defendants, who are seen as the 'users' of the courts." *Id.*

Yet and still, the Supreme Court of Virginia, under state law, but recognizing the *Fourteenth Amendment* has "often warned our trial courts about granting motions that 'short circuit' the legal process and deprive litigants of their 'day in court and depriv[e] this Court of an opportunity to review a thoroughly developed record on appeal.'" *Dodge v. Trustees of Randolph-Macon Woman's Coll.*, 276 Va. 1 (2008) (quoting *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93 (1997)).

B. Separate But Equal

"The fundamental requisite of due process of law is the opportunity to be

heard", *Grannis v. Ordean*, 234 U.S. 385 (1914), and that such should occur "at a meaningful time and in a meaningful manner", *Armstrong v. Manzo*, 380 U.S. 545 (1965). And yet, in earlier times, it was true that "all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons", *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan dissenting), and "[u]nder that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate". And, in the hometown of the President, "the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). However, " a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in *Plessy*", at a time when the nation's highest court had at least intimated that "education is perhaps the most important function of state and local governments", and had concluded that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* How much more true than with a right that would "lead to nothing more than 'a day in court' to a day in court"? *Singh v. Gonzales*, 499 F.3d 969 (9th Cir.2007).

Almost two centuries before, it had been the conclusion of this Court, regarding essentially chattel cargo, that "[t]hese negroes were never taken from Africa, or brought to the United States, in contravention of those acts", and [w]hen the *Amistad*

arrived, she was in possession of the negroes, asserting their freedom, and in no sense could they possibly intend to import themselves here, as slaves or for sale as slaves", *U.S. v. The Amistad*, 40 U.S. 518 (1841), but that was in a far less "enlightened age", of report, and this is now, and, further, perhaps the essential question revolves around the substantive promise regarding "the process that is due," *Sec'y of Labor v. T.P. Mining, Inc.*, 8 FMSHRC 687 (1986), an irreparable harm, in derogation or abnegation thereof. *Cohen v. Rosenstein*, 691 F. App'x 728, (Mem)–730 (4th Cir. 2017). *But see 2nd Amendment.*

C. A Day in Court

"The legal term *pro se*, which refers to self-representation in a court of law, is directly translated from Latin as 'for oneself' or "on one's own behalf", and "[i]n federal courts, the rights of self-represented litigants are addressed in the *U.S. Judiciary Act*, the *Code of Conduct for United States Judges*, the *Federal Rules of Civil Procedure*, the *Federal Rules of Criminal Procedure*, the *Federal Rules of Evidence*, the *Federal Rules of Appellate Procedure*, and the *Federal Rules of Bankruptcy Procedure*." Staff, "Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019", February 11, 2021.

"Most federal *pro se* cases are civil actions filed by people serving time in prison", and "[*p*]*ro se* prisoner petitions spiked in 2016 after a pair of Supreme Court rulings made it possible for certain prisoners to petition to have their sentences vacated or remanded", but "[n]on-prisoners who file *pro se* actions most often raise civil rights claims." *Id.* ("[A]fter the Supreme Court decided in Welch v. United States, that Johnson v. United States applied retroactively, which made prisoners serving

sentences that were enhanced under an unconstitutional clause of the Armed Career Criminal Act eligible to have their sentences vacated or remanded." *Id.* (citing *Johnson v. U.S*, 576 U.S. ____ (2015); *Welch v. U.S.*, 578 U.S. ____ (2016); Office of the General Counsel, *Selected Supreme Court Cases on Sentencing Issues* (November 2019),https://www.ussc.gov/sites/default/files/pdf/training/case-law-documents/2019-supreme-court-cases.pdf).

In 2019 alone, from a total of 220,179 total cases before the federal judiciary, 76,512, or 34.7%, were unrepresented plaintiffs or defendants, from which 25,925, or 33.9% were civil litigants, with the remainder being prisoner cases, *Id.*, and there is often much political rhetoric, at least, regarding demands for "potential policy changes that can help Virginia end its mass incarceration crisis", suggesting that "Virginia must break its overreliance on prisons to hold people accountable for their crimes and examine whether laws that criminalize homelessness, addiction, and mental illness should be enforced through arrest, prosecution, and imprisonment", 50 State Blueprint, *Blueprint for Smart Justice Virginia* (2018), https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-VA.pdf (accessed January 26, 2023), but, under federal law, "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law". *Fifth Amendment.* Moreover, as this Court has stated on prior occasion, "[a]lthough. . .one of the declared objects of the *Constitution* was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the *Preamble*, it be found in some express

delegation of power or in some power to be properly implied therefrom." *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (citing 1 *Story's Const.* § 462).

Similarly, some purported civil rights organizations have promoted the provocative message that "funneling of students out of school and into the streets and the juvenile correction system perpetuates a cycle known as the 'School-to-Prison-Pipeline,' depriving children and youth of meaningful opportunities for education, future employment, and participation in our democracy", Staff, "Our Impact: Education: Case: School To Prison Pipeline," *LDF*, February 16, 2018, evocative of sentiments expressed by this Court that as "perhaps the most important function of state and local governments", education "is required in the performance of our most basic public responsibilities, even service in the armed forces", and represents "the very foundation of good citizenship", "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown*, 347 U.S., at 483. And, at least in the Fourth Circuit, the federal judiciary has been most prolific in expressing the sentiments that "district courts must be especially solicitous of civil rights plaintiffs." *Brice v. Jenkins*, 489 F. Supp. 2d 538 (E.D. Va. 2007) (quoting *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir.1978)); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir.1990). Yet, at least in science, "To an action there is always an equal and contrary reaction: or the actions of two bodies between themselves are always mutually equal and directed in opposite directions." Isaac Newton, *Philosophiae Naturalis Principia Mathematica. 3st Ed.*, trans. Ian Bruce (1686).

According to its one proclamation, "[t]he NAACP Legal Defense and Educational Fund, Inc. ('LDF') is a non-profit, non-partisan legal organization founded in 1940 under the leadership of Justice Thurgood Marshall", and their "mission is to achieve racial justice and to ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other people of color". *Amicus Curiae* Br., *Arizona Republican Party v. Democrat National Committee*, Nos. 19-1257 and 19-1258 (U.S. January 20, 2021). Similarly, in a recent "sermon", the President had suggested that "we know there's a lot of work that has to continue on economic justice, civil rights, voting rights and protecting our democracy", but focused, under the mantra that his "job is to redeem the soul of America", bolstered by invoking "we shall overcome, someday" aspirations, but one Negro clergyman who had stood and preached in that pulpit had poignantly noted that "For years now" he had "heard the words [sic]'Wait!'", affirming that "[i]t rings in the ear of every Negro with a piercing familiarity", but inferred from the sound that "[t]his 'Wait' has almost always meant 'Never.'" Martin Luther King, Jr., *Letter From Birmingham Jail*, April 16, 1963.

Yet, "[b]ecause the franchise is 'a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for over 80 years to combat threats to Black people's right to vote and political representation", *Id.* and, at least in science, under *Boyle's Law*, " pressure is inversely proportional to the volume", Brian J. Kenny & Kristen Ponichtera, *Physiology, Boyle's Law*, StatPearls Publishing LLC, October 10, 2022, where there is a vacuum, a liquid or gas will always fill the volume, *ceteris paribus*. Karl Jousten, *Handbook of*

Vaccuum Technology, "Gas Laws and Kinetic Theory of Gases (Wolfgang Jitschin)," Wiley-VCH Verlag GmbH & Co. KGaA, June 9, 2016, https://doi.org/10.1002/9783527688265.ch3. And as one Great Communicator had said that "I believe we, the Americans of today, are ready to act worthy of ourselves, ready to do what must be done to ensure happiness and liberty for ourselves, our children, and our children's children." Ronald Reagan, *First Inaugural Address*, January 20, 1981.

And, at least one of the predecessors of that office had at expressed at least a hope that he had believed "this government cannot endure permanently half slave and half free", that he did "not expect the Union to be dissolved" not "the house to fall", but did yet still "expect it will cease to be divided", becoming "all one thing, or all the other", but "[a] house divided against itself cannot stand." Abraham Lincoln, *A House Divided Against Itself Cannot Stand*, June 16, 1858.

II. Has Not Been, But Should Be, Settled by This Court

A. Clearly Erroneous

At least according to prior precedent, "[i]t is now established doctrine that pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated, and even if the claim is insufficient in substance, it may be amended to achieve justice." *Gordon*, 574 F.2d, at 1147 (citing *Rice v. Olson*, 324 U.S. 786 (1945); *Holiday v. Johnston*, 313 U.S. 342 (1941). Moreover, "it was said that a complaint, especially a *pro se* complaint, should not be dismissed summarily unless 'it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his

claim which would entitle him to relief."" *Id.* (quoting *Haines v. Kerner*, 404 U.S. 519 (1972) (quoting from *Conley v. Gibson*, 355 U.S. 41 (1957)). *But see Webb v. Northam*, Civil Number Civil Action No. 3:20CV497 (E.D.Va. 2020), *aff'd* , Record Number 20-1968 (4th Cir. 2020), *denied cert.* Record No. 21-6170 (U.S. 2021).

The Supreme Court of Virginia, under state law, but recognizing the *Fourteenth Amendment* has "often warned our trial courts about granting motions that 'short circuit' the legal process and deprive litigants of their 'day in court and depriv[e] this Court of an opportunity to review a thoroughly developed record on appeal.'" (quoting *Seyfarth, Shaw, Fairweather & Geraldson*, 253 Va., at 93), apparently an interpretation of due process not recognized by the Trial Court, in application of the *Due Process Clause* guarantees under the *Fifth Amendment*—a right to some level of due process that has been afforded under various circumstances, of far less significance, extending to a conceived property-like right by this Court in *Greene v. McElroy*, 360 U.S. 474 (1959); *Goldberg v. Kelly*, 397 U.S. 254 (1970). And, under prior precedent, any citizen is afforded "the process that is due," *Sec'y of Labor v. T.P. Mining, Inc.*, 8 FMSHRC 687 (1986), an irreparable harm, in derogation or abnegation thereof. *Cohen v. Rosenstein*, 691 F. App'x 728, (Mem)–730 (4th Cir. 2017).

Generally, "any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the

person is unable to pay such fees or give security therefor", 28 U.S.C. § 1915(a), which, of record has been accomplished. And, "[c]itizenship, for the purpose of *in forma pauperis* proceedings in the federal courts, is solely a matter of federal law", while "Congress has not specified criminal convictions, except for desertion and treason, as grounds for loss of citizenship." *Roberts v. District Court*, 339 U.S. 844 (1950) (citing 8 U.S.C. § 801.) Moreover, it is established that "[t]he denial by a District Judge of a motion to proceed *in forma pauperis* is an appealable order", *Id.* (citing 28 U.S.C. § 1291; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), giving rise to the current matter raised in clear assignment of error.

On appeal, "[a] party who was permitted to proceed *in forma pauperis* in the district-court action, . . . may proceed on appeal *in forma pauperis* without further authorization, unless: (A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed *in forma pauperis* and states in writing its reasons for the certification or finding; or (B) a statute provides otherwise", Fed.R.App. 24(a)(3), and "[i]f the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise", but, "[i]f the district court denies the motion, it must state its reasons in writing." Fed.R.App. 24(a)(2).

And, of record, such application, *in lieu* of payment of a sum of $505.00, was approved by the Circuit Court, *City of Falls Church*, Record No. 22-1699 (4th Cir.

2022), at ECF 8[2], in an interlocutory appeal in an action commenced on June 9, 2022, *City of Falls Church*, Civil Action No. 1:2022cv00668 (E.D.Va. 2022), at ECF 1, *see also Id.*, at ECF 2[3], of a denial of an *in forma pauperis* application in the Trial Court, to waive a $402.00 fee to commence the subject action, on June 17, 2022. *Id.*, at ECF 8[4]. Yet, the former Chief Justice Rehnquist, joined by Justices Thomas and O'Connor, in dissent, had, in the past, expressed his objection, when "[t]he Court. . . erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

On appeal, "[e]xcept as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal *in forma pauperis* must file a motion in the district court", attaching the prescribed affidavit, designated as Form 4 of the Appendix. Fed.R.App. 24(a)(1). And, "[t]he second paragraph permits one whose indigency has been previously determined by the district court to proceed on appeal *in forma pauperis* without the necessity of a redetermination of indigency, while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith, 28 U.S.C. §1915(a), and permitting an inquiry into whether the circumstances of the party who was originally entitled to proceed *in forma pauperis* have changed during

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[2] "ORDER filed granting Motion to proceed *in forma pauperis* [7]."
[3] Application to proceed *in forma pauperis*.
[4] "ORDER denying #2 Motion for Leave to Proceed *in forma pauperis*. The Court ORDERS plaintiff to pay the required filing fee on or before July 8, 2022. All existing deadlines and consideration of all motions will by STAYED pending receipt of that filing fee. Signed by District Judge Michael S Nachmanoff on 06/17/2022. (dvanm, c/m 6/17/2022)." *Id.*

the course of the litigation." *Notes of Advisory Committee on Rules—1967*, Fed.R.App. 24 (citing Sixth Circuit Rule 26).

The official record indicates that Appellant had timely filed an interlocutory appeal on June 29, 2022, *City of Falls Church, et al.*, Record No. 22-1699 (4th Cir. 2022), at ECF 1, triggering a fee notice, *Id.*, at ECF 3, demanding a sum of $505.00, to repeal a denial of an application to proceed *in forma pauperis* in the Trial Court, which application to proceed without payment of fees had been approved by the Circuit Court of Appeals, by order dated August 17, 2022, *Id.*, at ECF 8[5], reviewing the same financial information that had been reviewed by the Trial Court, and without issue, of record, of any certification from the Trial Court that the appeal had been taken in bad faith, pursuant to Fed.R.App.Pro. 24(3)(a), indicative that, absent such certification of bad faith from the Trial Court, any determination contrary to an order to reverse and remand the prior decision would on review be determined to have been "arbitrary and unreasonable and constitut[ing] an abuse of discretion", *Azalea Corporation v. City of Richmond*, 201 Va. 636 (1960), a factual determination that is clearly erroneous, and "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

B. Absurd Result

In prior decisions of this Court, there has been reluctance when "[i]t would also be incongruous to read this provision," *Webster v. Reprod. Health Servs.*, 492 U.S. 490

[5] "ORDER filed granting Motion to proceed in forma pauperis [7]. Copies to all parties. Mailed to: Mike Webb. [1001213734] [22-1699] JSN [Entered: 08/17/2022 12:56 PM]" *Id.*

(1989), in such a way that "'[i]nterpreting the phrase literally would produce an absurd result, which the Legislature is strongly presumed not to have intended'", *Id.* (quoting *Bell v. Mid–Century Ins. Co.*, 750 S.W.2d 708, 710 (Mo.App.1988)), since, clearly, such "violates well-accepted canons of statutory interpretation used in the. . . courts, where '[t]he basic rule of statutory construction is to first seek the legislative intention, and to effectuate it if possible, and the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression'". *Id.* (quoting *State ex rel. Stern Brothers & Co. v. Stilley*, 337 S.W.2d 934 (Mo.1960)).

What appears, on the face, to be a simple rule, nonetheless, has been the subject of multiple amendments, for both the rules of civil procedure, *Notes of Advisory Committee on Rules—1987 Amendment*, Fed.R.Civ.Pro 4; *Notes of Advisory Committee on Rules—1993 Amendment*, Fed.R.Civ.Pro 4; *Committee Notes on Rules—2000 Amendment*, Fed.R.Civ.Pro 4; *Committee Notes on Rules—2007 Amendment*, Fed.R.Civ.Pro 4; *Committee Notes on Rules—2015 Amendment*, Fed.R.Civ.Pro 4; *Committee Notes on Rules—2016 Amendment*, Fed.R.Civ.Pro 4; Pub. L. 97–462, as well as for the appellate rules. *Notes of Advisory Committee on Rules—1967*, Fed.R.App.Pro. 24; *Notes of Advisory Committee on Rules—1979 Amendment*, Fed.R.App.Pro. 24; *Notes of Advisory Committee on Rules—1986 Amendment*, Fed.R.App.Pro. 24; *Committee Notes on Rules—1998 Amendment*, Fed.R.App.Pro. 24; *Committee Notes on Rules—2002 Amendment*, Fed.R.App.Pro. 24; *Committee Notes on Rules—2013 Amendment*, Fed.R.App.Pro. 24, despite being "a determination

involving 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense'", *In re Enron Corp. Sec., Derivative & Erisa Litig.*, 762 F. Supp. 2d 942 (S.D. Tex. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)), and despite being a situation analogous to a transaction familiar at least to the common man, and definitely an indigent person, *i.e.*, a denial of a credit application, Major Mike Webb for Congress, "Swimming with the Sharks: A Day in Court," *YouTube*, January 29, 2023, https://youtu.be/hsQhbXNSfYU, finding one, oft quoted, aspirational Negro religious leader observing poignantly, when he came to the nation's capital "to dramatize a shameful condition", having "come to our nation's capital to cash a check", described as "a promissory note to which every American was to fall heir", but for some amounting to "a bad check, a check which has come back marked 'insufficient funds.'" Martin Luther King, Jr., *I Have a Dream*, August 28, 1963.

It would strike the average person, of modest means, as quite irrational simply to remit a sum of $505.00 to obtain an appeal for a prior denial of consumer credit decision on a matter for which the impoverished person had perceived he or she was unable to afford the original fee of $402.00, simply for the hope that another person of power would be gracious enough to grant them essentially mercy, conforming with their limited sense of justice, an understanding of jurisprudence one untrained in law might reasonably be expected to possess, at least in the past, "'for whom such heightened judicial solicitude is appropriate'" *U.S. v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938).

According to one aspirational Negro clergyman, who had "refuse[d] to believe that the bank of justice is bankrupt", and who had "refuse[d] to believe that there are insufficient funds in the great vaults of opportunity of this nation", Martin Luther King, Jr., *I Have a Dream*, *supra*, "All we say to America is, 'Be true to what you said on paper,'" Martin Luther King, Jr., *I've Been to the Mountaintop*, April 3, 1968, but, ultimately, '[i]t is emphatically the province and duty of the judicial department to say what the law is'," *U.S. v. Nixon*, 418 U.S. 683 (1974) (quoting *Marbury v. Madison*, 1 Cranch 137 (1803)), while "We who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States." *U.S. v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (a case brought for treason), and "[t]he ultimate purpose of the judicial process is to determine the truth". *Caldor, Inc. v. Bowden*, 330 Md. 632 (1993).

III. Decided in a Way That Conflicts with Relevant Decisions of This Court

A. Strict Scrutiny

"A statute challenged on equal protection grounds is evaluated under 'strict scrutiny' if it interferes with a 'fundamental right' or discriminates against a 'suspect class'", *Gray v. Commonwealth*, 274 Va. 290 (Va. 2007) (quoting *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), and as a Negro, at least by birth record, *but see* Eric Bradner, Sarah Mucha & Arlette Saenz, "Biden: 'If you have a problem figuring out whether you're for me or Trump, then you ain't black'," *CNN*, May 22, 2020, in a jurisdiction with a complex history of court-ordered desegregation, *Loving v. Virginia*, 388 U.S. 1 (1967); Mark Jones, "Boundary Stones: Nazis in

Arlington: George Rockwell and the ANP," *WETA*, January 2, 2013; Ryan Prior, "A storm destroyed part of the 'segregation wall' in Arlington, Virginia," *CNN*, July 10, 2019; *Hall v. Commonwealth*, 188 Va. 72 (1948); Staff, "The Story of Arlington Public School Desegregation," *Arlington Public Library*, January 11, 2008; *Carter v. Sch. Bd. of Arlington Cy.*,182 F.2d 531 (4th Cir. 1950); *see also Seattle Sch. Dist. No. 1 v. State of Washington*, 633 F.2d 1338 (9th Cir. 1980); Appellant would satisfy the threshold of being a member of a suspect class, while also raising a claim in redress of a basic substantive right.

Furthermore, "a statute will ordinarily survive an equal protection challenge if 'the challenged classification is rationally related to a legitimate governmental purpose'", *Gray*, 274 Va., at 290 (quoting *Kadrmas*, 487 U.S. at 458), while, as noted above, the challenged provision, on works an absured result.

B. A Derogated Substantive Right without Redress

This Court has said that,"[u]nder our *Constitution*, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact", and that "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots", for as "[t]he *Constitution* says that Congress (and the States) may not abridge the right to free speech." *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969). And, as observed in *Doe v. Tangipahoa Par. Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009) "[t]he loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury", *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347 (1976). And, of particular legal significance, Appellant is a

political candidate, even if "not a serious option", Scott McCaffery, "Sun Gazette endorsement: Mary Kadera for Arlington School Board," *Inside NOVA/Arlington Sun Gazette*, September 23, 2021; Scott McCafferty, "Kadera gets company in School Board race," *Arlington Sun Gazette/Inside NOVA*, June 9, 2021; *but see also San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), and this Court had recognized that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office", *Monitor Patriot Co. v. Roy*, 401 U. S. 265 (1971), wherein "a candidate's expenditure of his personal funds directly facilitates his own political speech", n.58, *Buckley v. Valeo*, 424 U.S. 1 (1976).

"No person shall. . . deprived of life, liberty, or property, without due process of law". *Fifth Amendment*, and some textualists have held that "we presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language or include omitted language", just as at least one court had been convinced that they were "'aware of no authority that supports the notion of legislation by accident.'" *Jurcoane v. Superior Court (People)*, 93 Cal. App. 4th 889 (2001) (quoting *In re Christian S.* 7 Cal. 4th 768 (1994)).

Yet, indicative of what has apparently been a longstanding issue, even before this Court, Justice Stevens had exasperatingly expressed his objections to denial of *in forma pauperis* applications, stating, in adherence to multiple prior precedents, "I would deny these petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*", noting that "[i]n the future, however, I shall

not encumber the record by noting my dissent from similar orders denying leave to proceed *in forma pauperis*, absent exceptional circumstances." *Day v. Day*, 510 U.S. 1 (1993). And, further, within the court record, preserved for review, there are found not just elements of derogated rights guaranteed under the *Due Process Clause*, but suggestions, in absurdity, that highlight an issue of concerns recently addressed by this Court regarding those liberties pertaining to a guarantee of equal protection, a topic of recent controversy imputed to conservative jurists. Mark Joseph Stern, "Clarence Thomas' Jurisprudence Is Only Getting More Chaotic," *SLATE*, April 22, 2022.

C. Privileges or Immunities of Citizens

Articulating a deference to the deliberations of elected bodies, courts have decided that "if the legislature 'meant to change something as absolutely fundamental as felons being able to possess firearms in their home or in the yard ... that would have been made manifestly clear'," and "[h]ad the legislature intended" such, "it would have said so." *Alger v. Commonwealth*, 40 Va. App. 89 (2003), *aff'd*, 267 Va. 255 (2004) (quoting *Hughes v. Commonwealth*, 39 Va.App. 448 (2002). *See also Barnes v. Commonwealth*, 33 Va.App. 619 (2000)[6]; *Reynolds v. Commonwealth*, 30 Va.App. 153 (1999)[7]. Yet, it is clear, from the plain language, that there is no provision pertaining to equal protection in the *Fifth Amendment*, and, under accepted statutory rules of construction, clearly the legislature had not only distinguished

[6] "If the legislature had intended to restrict the predicate abduction offense to a specific statute, it would have done so." *Id.*

[7] "If the legislature had intended that operators undergo a forty-hour training program for each individual type of breath test equipment, then it would have said so in the statute." *Id.*

these guarantees from due process, but further incorporated these principles in the *Equal Protection Clause* of the *Fourteenth Amendment.*

By providential design, or mere serendipity, the very first case of impression regarding this contested topic had arisen from a question revolving around an interpretation of citizenship, which this Court had recently addressed in the matter, in concurrence, "separately to address the premise that the *Due Process Clause* of the *Fifth Amendment* contains an equal protection component whose substance is 'precisely the same' as the *Equal Protection Clause* of the *Fourteenth Amendment*", on proffered "doubt whether it comports with the original meaning of the *Constitution.*" *U.S. v. Vaello Madera*, 596 U.S. ____ (2022) (Thomas concurring) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, n. 2 (1975)). And it is established that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". *Citizenship Clause.*

"In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court began in earnest to fold an 'equal protection' guarantee into the concept of 'due process' even liberally construing the "inartfully pleaded" allegations, "subjected to 'less stringent standards than formal pleadings drafted by lawyers'", *Brice v. Jenkins*, 489 F. Supp. 2d 538 (E.D. Va. 2007) (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519 (1972).

IV. Has Not Been, But Should Be, Settled by This Court

A. Extending to a Notion of *Respondeat Superior*

This Court has held "that a municipality cannot be held liable solely because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under

§ 1983 on a *respondeat superior* theory", reasoning that that provision "imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights", while, at the same time making it clear "that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658 (1978). Yet, nonetheless, "[t]he federal courts' inherent power to sanction bad faith or contemptuous conduct is 'the most prominent' of the inherent powers", *In re White*, No. 2:07CV342, 2013 WL 5295652, at *1–71 (E.D. Va. Sept. 13, 2013) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)) *See also Chambers v. MASCO*, 501 U.S. 32 (1991) (quoting *Ex parte Robinson*, 19 Wall. 505 (1874)).

This Court has suggested the idea that "[s]uch broad power necessarily inheres to the court as a means of 'protecting the due and orderly administration of justice and [of] maintaining the authority and dignity of the court...." *Id.* (quoting *Roadway Express*, 447 U.S. at 752 (quoting *Cooke v. U.S*, 267 U.S. 517 (1925) (internal quotation marks omitted) (citing 4 W. Blackstone, *Commentaries* *282–*285). *See also In re Howe*, 800 F.2d 1251 (4th Cir.1996); *U.S. v. Schaffer Equip. Co.*, 11 F.3d 450 (4th Cir.1993). And this Court has further suggested that "[i]t 'reaches both conduct before the court and that beyond the court's confines", *Id.* (quoting *Chambers*, 501 U.S. at 32), such that "[w]hen exercising this power, a court has wide discretion 'to fashion an appropriate sanction for conduct [that] abuses the judicial process," including, in the extreme case, the outright dismissal of an action." *Id.* (citing

Chambers, 501 U.S. at 32 (citing *Roadway Express*, 447 U.S. at 752)).

It was this Court that had established the rule that that "mere acquiescence or silence or failure of an officer to perform a duty does not make one a participant in a conspiracy *unless he acts or fails to act with knowledge* of the purpose of the conspiracy 'and *with the view of protecting and aiding it.*" *Luteran v. U.S.*, 93 F.2d 395 (8th Cir. 1937) (citing *Burkhardt v. U.S.*, 13 F.2d 841 (6th Cir. 1926)).

And, it was this Court that had opined that "[i]f a prosecutor had stood before a jury and denied that a defendant was entitled to a presumption of innocence; if the judge refused to correct him and failed to give any instruction on the presumption of innocence; if the judge's instructions affirmatively suggested there might not be a presumption of innocence; would anyone doubt that there was a reasonable possibility that the jury had been misled?" And, "[a]ll we say to America is, 'Be true to what you said on paper.'" Martin Luther King, Jr., *I've Been to the Mountaintop*, April 3, 1968.

"'It is emphatically the province and duty of the judicial department to say what the law is'," *Nixon*, 418 U.S., at 683 (quoting *Marbury*, 1 Cranch, at 137). And, as one aspirational Negro preacher had said, "since I feel that you are men of genuine goodwill and your criticisms are sincerely set forth, I would like to answer your statement in what I hope will be patient and reasonable terms." Martin Luther King, Jr., *Letter from a Birmingham Jail, supra.*

B. Justice Delayed

Extending beyond "the totality of the record", *Thompson v. Comm'r of Soc. Sec.*, No. 3:11-CV-493-H, 2012 WL 2089709, at *1–13 (W.D. Ky. May 7, 2012), *report and*

recommendation adopted, No. 3:11-CV-493-H, 2012 WL 2089708 (W.D. Ky. June 8, 2012) (citing *Rosic v. Comm'r of Soc. Security*, 2010 WL 3292964 at *3 (N.D.Ohio Aug. 19, 2010) (citing *Gooch v. Sec'y of H & HS*, 833 F.2d 589 (6th Cir.1987)), it is of at least probative value that the same Court of Appeals, on August 17, 2022, had simultaneously approved an application to proceed *in forma pauperis*, a matter still undecided, *Webb v. OMB*, Record No. 22-1698 (4th Cir. August 17, 2022), at ECF 9, an application filed on August 16, 2022, *Id.*, at ECF 8, an application received on the same day as the application under review in the present matter. *City of Falls Church*, Record No. 22-1699 (4th Cir. 2022), at ECF 7.

"When due process considerations are at stake, 'the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.'" *Rodriguez By & Through Corella v. Chen*, 985 F. Supp. 1189 (D. Ariz. 1996) (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976)). And, while "federal courts do not sit to re-try state cases *de novo* but, rather, to review for violation of federal constitutional standards", *Cox v. Swarthout*, No. 2:10-CV-00793 GEB, 2011 WL 463299, at *1–2 (E.D. Cal. Feb. 4, 2011))", a "grant of summary judgment is reviewable *de novo*", *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (citing *Nat'l Un. Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95 (9th Cir.1983), because "[s]ummary judgment is appropriate if there is no genuine issue of *material fact* and the moving party is entitled to judgment

as a matter of law. Fed.R.Civ.P. 56(c)", *Id.*, and a review of a denial of an application to proceed *in forma pauperis* turns on a determination by a trier of fact.

"'[O]n appeal the judgment of the lower court is presumed to be correct and the burden is on the appellant to present to us a sufficient record from which we can determine whether the lower court has erred in the respect complained of", *Motley v. Motley*, No. 2551-06-2, 2007 WL 967247, at *1–9 (Va. Ct. App. Apr. 3, 2007) (quoting *Justis v. Young*, 202 Va. 631 (1961)), and, "'[i]n the absence thereof, we will not consider the point'." *Id.* (quoting *Jenkins v. Winchester Dep't of Soc. Servs.*, 12 Va.App. 1178 (1991)). "An appellate court must dispose of the case upon the record and cannot base its decision upon appellant's petition or brief, or statements of counsel in open court", and the reviewing court "may act only upon facts contained in the record." *Smith v. Commonwealth*, 16 Va.App. 630 (1993).

And, while reserved to criminal matters, "[t]he right of a speedy trial is necessarily relative", and "[i]t is consistent with delays and depends upon circumstances." *Hodges v. U.S.*, 408 F.2d 543 (8th Cir. 1969). Yet, within the civil context, and particular to the present action, forming the genesis of the controversy, under 28 U.S.C. § 1657, "[n]otwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that *the court shall expedite* the consideration. . . any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown", and "[f]or purposes of this subsection, 'good cause' is shown if a right under the Constitution of the United States or a Federal Statute (including rights under

section 552 of title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit." And, on the record, in both the Trial Court, and the Circuit Court, it is clear that "[t]he Court. . . erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim." *Elk Grove Unified Sch. Dist.*, 542 U.S., at 1, *abrogated by Lexmark Int'l, Inc.*, 572 U.S., at 118.

On the record, in an action, commenced on June 9, 2022, seeking injunctive and declaratory relief from enforcement of a Pride Month proclamation, *City of Falls Church*, Civil Action No. 1:2022cv00668 (E.D.Va. 2022), ECF, at 1; *Id.*, at ECF 2, and, apparently where the "primary goal was to pursue a 'swift resolution of his case'," *U.S. v. Butner*, 350 F. Supp. 3d 1036 (D.N.M. 2018), Appellant's application to proceed without payment of fees had been denied by June 17, 2022. *Id.*, at ECF 8, after reviewing a form for impoverished litigants only six (6) pages long, prompting Appellant's timely action on appeal, on June 29, 2022, *City of Falls Church, et al.*, Record No. 22-1699 (4th Cir. 2022), at ECF 1, whereupon by August 17, 2022, after review of form, also only six pages in length, Appellant's application to proceed at that tribunal without payment of fees had been approved, *Id.*, at ECF 8, but it consumed four months, reviewing essentially the same financial information, to render decision, reversing its own determination, regarding Appellant's ability to pay, without, in the record, any new factual findings, nor affidavit raising bad faith from the Trial Court, pursuant to Fed.R.App.Pro. 24(3)(a). Such would constitute sufficient notice "to "warrant a man of reasonable caution in the belief,'" that it is plausible that

"criminal activity may be afoot," *Terry v. Ohio,* 392 U.S. 1 (1968), for it should be axiomatic "[t]hat the right of free speech and a free press, understood with the limitations to prevent abuses which the law has always annexed to these freedoms, is fundamental to the continuance of free political institutions, and is the right both of citizens and other persons in the United States and the several States needs no reassertion." *Powe v. U.S.*, 109 F.2d 147 (5th Cir. 1940).

At least one oft-quote Negro aspirational preacher had observed that "[f]or years now I have heard the words [sic] 'Wait!'", noting that "[i]t rings in the ear of every Negro with a piercing familiarity", and concluding that "[t]his 'Wait' has almost always meant 'Never'", and "we must come to see with the distinguished jurist of yesterday that 'justice too long delayed is justice denied.'" Martin Luther King, Jr., *Letter from a Birmingham Jail, supra.* This Court has observed that "[t]he loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury", *Elrod*, 427 U.S., at 347, that "[t]he fundamental requisite of due process of law is the opportunity to be heard", *Grannis*, 234 U.S., at 385, and that such should occur "at a meaningful time and in a meaningful manner", *Armstrong*, 380 U.S., at 545, and that, "[w]here administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process", and emphasizing "the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents

no inhibition." *Greene v. McElroy*, 360 U.S. 474 (1959).

Where there has been a perversion of procedural due process, imposed by arbitrary and capricious action, in abuse of discretion, in addition to an abdication of a commitment, whether arising from those privileges or immunities reserved to citizens, *Vaello Madera*, 596 U.S., at ____ (Thomas concurring), or a view that such would be "irrational and antithetical to the very nature of. . . the equal protection of citizens guaranteed by the Constitution", *Id.* (Sotomayor dissenting), "[t]his decision is thus only another variant of the view often expressed by some members of this Court that the *Due Process Clause* forbids any conduct that a majority of the Court believes 'unfair,' 'indecent,' or 'shocking to their consciences.'" *Goldberg v. Kelly*, 397 U.S. 254 (1970) (citing *Rochin v. California*, 342 U.S. 165 (1952)) (Black dissenting). Moreover, this Court has held that, at least as to discrimination on the basis of race that there exists a "necessary implication of a positive immunity, or right, most valuable to the colored race -- the right to exemption from unfriendly legislation against them distinctively as colored -- exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Brown*, 347 U.S., at 483 (citing *Virginia v. Rives*, 100 U.S. 313 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880)).

Whether, as averred in complaint, Appellees had, in fact, issued an *ultra vires* proclamation, or whether such proclamation constitutes a violation of the *Establishment Clause* is irrelevant to any determination regarding Appellant's

meriting a grant of leave to proceed without payment of fees, which, at least upon accepting the appeal for a final decision, only later to deny its own findings, while as stated in *U.S. v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807), "if the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry in which he was led him directly to it", and "evidence of . . . flight. . . [is] admissible even if offered solely to prove his consciousness of guilt as to that predicate act." *U.S. v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein", *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds", *Stanley v. Georgia*, 394 U.S. 557 (1969), representing unlawful pursuit of an illegitimate state interest, in violation of the *Establishment Clause.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ON PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

Pursuant to Rule 10, incorporating Rules 10-14, 29, 30, 33.2, 34 and 39 for *pro se* filers *in forma pauperis*, Guidance Concerning Clerk's Office Operations, dated November 13, 2020 and 28 U.S.C. § 1651, Appellant Major Mike Webb ("Applicant" or "Webb") respectfully petitions for grant of certiorari regarding a matter raised in interlocutory appeal, in assignment or error, by the Fourth Circuit Court of Appeals, in affirming a denial of an application to proceed *in forma pauperis*, under 28 U.S.C. § 1915, after a determination that Appellant was eligible to proceed without payment of fees, under Fed.R.App.Pro. 24.

STATEMENT OF THE CASE

The matters brought on interlocutory appeal arises from a matter seeking injunctive relief from a Pride Month proclamation, in which, in abuse of discretion, "[t]he Court. . . erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim." *Elk Grove Unified Sch. Dist.*, 542 U.S., at 1, *abrogated by Lexmark Int'l, Inc.*, 572 U.S., at 118.

REASONS FOR GRANTING CERTIORARI

I. Whether it constitutes a violation of rights to procedural due process, where a Trial Court, and later a Circuit Court, have "erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim," *Elk Grove Unified Sch. Dist.*, 542 U.S., at 1, *abrogated by Lexmark Int'l, Inc.*, 572 U.S., at 118, through denial of an application to proceed *in forma pauperis*, for arbitrary and capricious reasons, in abuse of discretion. Order, *City of Falls Church*, Civil Action No. 1:22-CV-00668-MSN-WEF (E.D.Va. June 17, 2022); Order, *City of Falls Church*, Record No. 22-1699 (4th Cir. August 17, 2022); Order, *City of Falls Church*, Record No. 22-1699 (4th Cir. December 22, 2022).

"A finding is 'clearly erroneous' when although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. Gypsum Co.*, 333 U.S., at 364. Reviewing the same set of facts as the Trial Court regarding Appellant's eligibility to proceed without payment of fees, the Circuit Court had concluded that Appellant was eligible, and under Fed.R.App.Pro. 24(3)(a), the Trial Court may certify "that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding", which, of record, has never occurred.

"A facial challenge. . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which. . . [it] would be valid", *U.S. v. Salerno*, 481 U.S. 739 (1987), and this Court has suggested that "a review of legislative history is only appropriate in a facial analysis where the application of the plain meaning of a word is ambiguous or otherwise leads to absurd or futile results" *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (citing *U.S. States v. Am. Trucking Assocs.*, 310 U.S. 534 (1940); *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir.2005)).

"Interpreting the phrase literally would produce an absurd result, which the Legislature is strongly presumed not to have intended'" *Webster*, 492 U.S., at 490 (quoting *Bell*, 750 S.W.2d, at 708), since, clearly, such "violates well-accepted canons of statutory interpretation used in the. . . courts, where '[t]he basic rule of statutory construction is to first seek the legislative intention, and to effectuate it if possible, and the law favors constructions which harmonize with reason, and which tend to

avoid unjust, absurd, unreasonable or confiscatory results, or oppression'". *Id.* (quoting *State ex rel. Stern Brothers & Co.*, 337 S.W.2d, at 934). And there is no way, in the record, which reveals a clearly arbitrary and capricious decision that the same facts found sufficient to proceed without payment of fees at the commencement of the appeal were found, with no further disturbance of the record, to be somehow altered so as to justify denial of leave to proceed *in forma pauperis* in the lower court, effectively having "erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim," *Elk Grove Unified Sch. Dist.*, 542 U.S., at 1, *abrogated by Lexmark Int'l, Inc.*, 572 U.S., at 118, accruing to the favor of Appellees, who have yet to enter an appearance, protected by Article III Courts that have impugned a reputation of impartiality to serve as gatekeeper, under a veil of judicial immunity.

"The doctrine of judicial immunity provides judges with an absolute defense in actions for money damages brought under 42 U.S.C. § 1983, *see Stump v. Sparkman*, 435 U.S. 349, 356, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331 (1978); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), even if the action alleged to have been taken by the judge 'was in error, was done maliciously, or was done in excess of his authority.'" *Battle v. Whitehurst*, 831 F. Supp. 522 (E.D. Va. 1993), *aff'd*, 36 F.3d 1091 (4th Cir. 1994) (quoting *Stump*, 435 U.S. at 356). "Judges will incur liability for money damages only when they act in the 'clear absence of all jurisdiction.' *Id.* (citing *Stump*, 435 U.S. at 356) (quoting *Bradley v. Fischer*, 80 U.S. (13 Wall.) 335 (1871)).

This Court has suggested, regarding the inherent powers of Article III Courts,

the idea that "[s]uch broad power necessarily inheres to the court as a means of 'protecting the due and orderly administration of justice and [of] maintaining the authority and dignity of the court...." *Roadway Express*, 447 U.S. at 752 (quoting *Cooke v. U.S*, 267 U.S., at 517) (internal quotation marks omitted) (citing 4 W. Blackstone, *Commentaries* *282–*285). And, just as due process has been defined as "the process that is due," *T.P. Mining, Inc.*, 8 FMSHRC, at 687, an irreparable harm, in derogation or abnegation thereof, *Cohen*, 691 F. App'x, at 728, (Mem)–730, in this instance, "'[i]t is emphatically the province and duty of the judicial department to say what the law is'." *Nixon*, 418 U.S., at 683 (quoting *Marbury*, 1 Cranch, at 137).

II. Whether it constitutes a violation of rights to equal protection and substantive due process, or, in the alternative, a violation of the rights or privileges of citizens, where a Trial Court, and later a Circuit Court, have "erect[ed] a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim," *Elk Grove Unified Sch. Dist.*, 542 U.S., at 1, *abrogated by Lexmark Int'l, Inc.*, 572 U.S., at 118, through denial of an application to proceed *in forma pauperis*. Order, *City of Falls Church*, Civil Action No. 1:22-CV-00668-MSN-WEF (E.D.Va. June 17, 2022); Order, *City of Falls Church*, Record No. 22-1699 (4th Cir. August 17, 2022); Order, *City of Falls Church*, Record No. 22-1699 (4th Cir. December 22, 2022)

According to the Trial Court, Appellant "has filed numerous cases in the United States District Court for the Eastern District of Virginia and previously been found ineligible to proceed *in forma pauperis* with respect to at least two other matters", making specific reference to *Webb v. OMB*, Civil Case No. 3:22-cv-00418 (E.D.Va. 2022), a matter raised on appeal and granted leave to proceed *in forma pauperis*, *Webb v. OMB*, Record No. 22-1698 (4th Cir. August 17, 2022), at ECF 9, by the same Circuit Court on the same day as the present matter had been treated in the same way. *City of Falls Church*, Record No. 22-1698, *supra*, at ECF 9. And,

"[c]ourts have long recognized that disparate treatment itself stigmatizes members of a disfavored group as innately inferior," *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) (citing *Heckler v. Mathews*, 465 U.S. 728 (1984)), because such is said to import "the 'inevitable inference' of animosity toward those impacted by the involved classification." *Id.* (quoting *Romer v. Evans*, 517 U.S. 620 (1996)).

The Trial Court further makes reference to an adverse determination in the matter *Webb v. Kimmel*, Civil Action No. 3:22-cv-00392 (E.D.Va. 2022), a matter brought under the federal racketeering statute, a provision in which "courts should strive to flush out frivolous *RICO* allegations at an early stage of the litigation'," *Brookhaven Town Conservative Comm. v. Walsh*, No. 14CV6097JFBARL, 2016 WL 1171583, at *1–8 (E.D.N.Y. Mar. 23, 2016) (citing *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649 (S.D.N.Y. 1996) (quoting *Figueroa Ruiz v. Alegria*, 896 F.2d 645 (1st Cir. 1990)). *See also DLJ Mortg. Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225 (E.D.N.Y. 2010). And Article III Courts have assured that "although civil *RICO* may be a 'potent weapon,' plaintiffs wielding *RICO* almost always miss the mark. *Brookhaven Town Conservative Comm.*, No. 14CV6097JFBARL, 2016 WL 1171583, at *1–8[8]. Yet, of record, on November 2, 2022, Appellant was, in fact, granted leave to proceed *in forma pauperis*, *Webb v. Kimmel*, Civil Action No. 3:22-

[8] "*See Gross v. Waywell*, 628 F. Supp. 2d 475, 479-83 (S.D.N.Y. 2009) (conducting survey of 145 civil RICO cases filed in the Southern District of New York from 2004 through 2007, and finding that all thirty-six cases resolved on the merits resulted in judgments against the plaintiffs, mostly at the motion to dismiss stage). Accordingly, courts have expressed skepticism toward civil *RICO* claims. *See, e.g., DLJ Mortg. Capital*, 726 F. Supp. 2d at 236 ("[P]laintiffs have often been overzealous in pursuing *RICO* claims, flooding federal courts by dressing up run-of-the-mill fraud claims as RICO violations.")." *Id.*

cv-00392 (E.D.Va. 2022), ECF 8, with no record of having ever been denied, in a matter commenced on May 23, 2022. *Id.*, at ECF 1, constituting a misrepresentation of a material fact, presumably known to be false, with apparent intent to mislead, to the detrimental reliance of Appellant, the elements of fraud. *See Thompson v. Bacon*, 245 Va. 107 (1993).

Yet, a "federal court has the inherent power ... to set aside its judgment if procured by fraud upon the court", *U.S. v. Williams*, 16 F. Supp. 3d 1301 (N.D. Okla. 2014), *rev'd and remanded*, 790 F.3d 1059 (10th Cir. 2015) (quoting *Shaw v. AAA Eng'g and Drafting, Inc.*, 138 Fed.Appx. 62 (10th Cir.2005), and, moreover, "there is no statute of limitations for bringing a fraud upon the court claim, *Hazel–Atlas* at 244, 64 S.Ct. 997, because 'a decision produced by fraud on the court is not in essence a decision at all and never becomes final.'" *Id.* (quoting *Kenner v. Comm'r of Internal Revenue*, 387 F.2d 689 (7th Cir.1968))[9]. Further, it is well-established that "a constitutional rule. . . allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)[10]. *See also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (citing *Johnson Publishing Co. v. Davis*, 271 Ala. 474 (1960)). Hence, whether in deprivation

[9] "The inquiry as to whether a judgment should be set aside for fraud upon the court ... focuses not so much in terms of whether the alleged fraud prejudiced the opposing party, but more in terms of whether the alleged fraud harms the integrity of the judicial process." *Levander v. Prober*, 180 F.3d 1114 (10th Cir.1999).

[10] "[W]e have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (quoting *Sullivan*, 376 U.S., at 254).

of the rights or privileges of a citizen, or in abnegation of equal protection and substantive due process, on the record, clearly Appellant had been treated in disparate treatment *vis á vis* himself, denied even that equal protection.

CONCLUSION

For the reasons stated above, Appellant, Webb respectfully requests the Court to grant certiorari for oral arguments to determine whether the decision by the Fourth Circuit Court of Appeals should be reversed and remanded, as well as such other equitable relief that the Court may deem proper, under the circumstances.

CERTIFICATION

I declare under penalty of perjury that the foregoing is true and correct.

Name of Party (Print or Type): Major Mike Webb, 955 S. Columbus Street, Unit # 426, Arlington, Virginia 22204, GiveFaithATry@gmail.com, 856-220-1354.

_____ Executed on: _____
Signature of Party (Date)

Subscribed, acknowledged and sworn to before me, the undersigned Notary Public in the County of _____, in the Commonwealth of Virginia, this _____day of _____, 20_____.

_____
NOTARY PUBLIC

My commission expires: _____Registration Number: _____

I declare under penalty of perjury that the foregoing is true and correct.

Name of Party (Print or Type): Major Mike Webb, 955 S. Columbus Street, Unit # 426, Arlington, Virginia 22204, GiveFaithATry@gmail.com, 856-220-1354.

Signature of Party

Executed on: 2-2-23
(Date)

Subscribed, acknowledged and sworn to before me, the undersigned Notary Public in the County of Fairfax, in the Commonwealth of Virginia, this 2nd day of February, 2023

Nicolas Lopez C

NOTARY PUBLIC

My commission expires: 08/31/2026 Registration Number: 7982388

NICOLAS LOPEZ CARDENAS
NOTARY PUBLIC
REG. #7982388
MY COMMISSION EXPIRES
08/31/2026
COMMONWEALTH OF VIRGINIA