No. 22A349
22-7190

IN THE
SUPREME COURT OF THE UNITED STATES

DANTE R. VOSS,

Petitioner,

VS.

KEVIN A. CARR,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Dante Voss

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Petitioner

QUESTIONS PRESENTED

1. WHETHER VOSS'S COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED?

   The district court answered: No.

   The Seventh Circuit answered: No.

2. WHETHER 28 U.S.C. § 1915(g) IS UNCONSTITUTIONALLY OVERBROAD?

   The district court did not address this question.

   The Seventh Circuit declined to answer this question.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States District Court
Western District of Wisconsin
Docket No.: 2019-CV-790-JDP
Caption: Dante R. Voss v. Kevin A. Carr
Judgment Entered: March 13, 2020

United States Court of Appeals
For The Seventh Circuit
Docket No.: 20-2015
Caption: Dante R. Voss v. Kevin A. Carr
Judgment Entered: June 24, 2022

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at Appendix A to the petition and is unpublished with a Westlaw citation of Dante R. Voss v. Kevin A. Carr, 2022 WL 2287560, (7th Cir. June 24, 2022).

The opinion of the United States District Court for the Western District of Wisconsin appears at Appendix B to the petition and is unpublished with a Westlaw citation of Dante R. Voss v. Kevin A. Carr, 2020 WL 1234433 (W.D. Wis. March 13, 2020).

JURISDICTION

The date on which the United States Court of Appeals for the Seventh Circuit decided the petitioner's case was June 24, 2022.

A timely petition for rehearing was denied by the United States Court of Appeals for the Seventh Circuit on July 28, 2022, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Since petitioner is challenging the constitutionality of 28 U.S.C. § 1915(g), 28 U.S.C. § 2403(a) may apply and the Solicitor General of the United States has been served with a copy of this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States

Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. V

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV

Grounds for dismissal.-- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A, in relevant part.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury. 28 U.S.C. § 1915(g), in relevant part.

Wisconsin

(1c) "Incarcerated person" means a person who is incarcerated in a penal facility or who is placed on probation and given confinement under s. 973.09(4) as a condition of placement, during the period of confinement for which the person has been sentenced.

(3) "Requester" means any person who requests inspection or copies of a record, except a committed or incarcerated person, unless the person requests inspection or copies of a record that contains specific references to that person or his or her minor children for whom he or she has not been denied physical placement under ch. 767, and the record is otherwise accessible to the person by law.

Wis. Stat. § 19.32, in relevant part.

(1) RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record....
Wis. Stat. § 1935, in relevant part.

STATEMENT OF THE CASE

Voss, a pro se plaintiff and prisoner, filed a complaint, pursuant to 28 U.S.C. § 1983, challenging the constitutionality of Carr's DAI Policy #309.51.01 that governs the availability of a "litigation loan," which are funds a prisoner may use for litigation. Dkt. 1. Upon screening, pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A, the district court interpreted Voss's original complaint as asserting three claims: (1) Carr's legal loan policy precluded Voss from filing a lawsuit in state court thereby denying him access to the courts; (2) Carr's legal loan policy was precluding Voss from litigating his pending cases thereby denying him access to the courts; and (3) Carr's legal loan policy is in violation of the Equal Protection Clause because it reduces a prisoner's legal loan limit from $100 to $50 if legal loans from previous years have not been repaid. Dkt. 6. The district court concluded that Voss failed to state a claim upon which relief may be granted for the following reasons: (a) Voss failed to adequately allege that he was prevented from pursuing a non-frivolous claim; and (b) Voss failed to allege adequate facts to show that Carr's policy was obstructing his current litigation. Id. However, the district court dismissed Voss's claims without prejudice with leave to file an amended complaint to address the deficiencies it had pointed out in its order. Id.

Voss filed an amended complaint. Dkt. 18. In the amended complaint Voss filed, he asserted the following claims pertinent to review in this Court: (1) Carr's legal loan policy precluded him from filing a lawsuit in state court thereby denying him access to the courts, due

process, freedom of speech, and equal protection; and (2) Wisconsin's open records law concerning prisoners, and Carr's policy implementing that law, denied him access to the courts, freedom of speech, equal protection, and due process. Id. Voss's complaint made the following allegations in support of his claims:

(1) Wis. Stat. § 301.328 authorized Voss to receive up to $100 a year for litigation endeavors becuase he was indigent and had made satisfactory arrangements for repayment of prior years' legal loans;

(2) Voss asked Carr for funds to file a Notice of Claim, pursuant to Wis. Stat. § 893.82, by certified mail, but Carr refused that request on the grounds that his legal loan policy, DAI #309.51.01, limited Voss to $50 a year for legal endeavors;

(3) Voss requested the names of the officers working in the mailroom of his prison on the days when his "legal" mail and his daughter's protected health information were opened outside his presence, but that request was denied because Carr's policy implementing Wisconsin's open records law, Wis. Stat. § 19.32(1c), (3) and 19.35(1), precluded Voss from obtaining those names;

(4) Carr's refusal to provide Voss with the funds to serve a Notice of Claim by certified mail and the names of the officers precluded him from bringing the following non-frivolous tort claims in state court:

(a) A claim of negligence in Voss v. T. Burdick, et al., in Dane County, WI case number 19-CV-387 (dismissed for his failure to comply with Wis. Stat. § 893.82 that alleged: (i) Carr's mail policy, implementing Wis. Admin. Code § 303.04(3), established a duty on officers in the prison mailroom to open Voss's legal mail in his presence; (ii) that duty was breached when officers in the mailroom had opened mail from his lawyer outside his presence; (iii) as a direct and proximate cause of that breach; (iv) Voss suffered both physical and emotional injury;

(b) A claim of negligence and violations of Wis. Stat. §§ 146.84 and 995.50 in Voss v. Fowler, et al., in Dane County, WI case number 19-CV-628 (dismissed for failure to comply with Wis. Stat. § 893.82) that alleged: (i) Fowler had a duty to keep Voss's medical records confidential; (ii) she breached that duty when she provided those records to a corrections officer without authorization; (iii) as a direct and proximate result of that breach; (iv) Voss suffered both physical and emotional injury; and

(c) A claim of negligence (not filed because Wis. Stat. § 893.82 was not satisfied) that alleged: (i) Carr's policy (see (a)(i), supra) established a duty on prison mailroom officers to open mail from healthcare providers in an

inmates' presence; (ii) that duty was breached when officers opened mail outside Voss's presence that was from his daughter's therapist; (iii) as a direct and proximate cause of that breach; (iv) Voss suffered physical and emotional injury; and

(5) As a direct and proximate result of Carr's policies and Wisconsin's open records laws, Voss was unable to exercise his fundamental rights of speech and access to the courts in direct violation of equal protection and due process.

Voss's App. Br. at Appendix J, pp. 5-7 (citations omitted).

The district court concluded that Voss's amended complaint failed to state a claim upon which relief may be granted on the following grounds:

(1) Voss isn't entitled to unlimited funds to prosecute as many suits as he wishes about the conditions of his confinement;

(2) Lewis v. Casey, 518 U.S. 343 (1996) only applies to habeas and civil rights cases, not state-law tort claims, despite the fact that Lewis can be read to encompass such claims concerning "conditions of confinement";

(3) Voss's invasion of privacy claim was frivolous;

(4) Voss's claim that Carr's policy implementing Wisconsin's open records law was futile;

(5) Carr's legal loan policy had a rational basis; and

(6) Wisconsin has a legitimate interest and rational basis for its open records law.

Dkt. 19:1-18; Appendix B. The court ordered Voss's claims dismissed with prejudice, Voss be assessed a strike under 28 U.S.C. § 1915(g), and judgment entered in favor of Carr. Dkt. 19:18-19; Dkt. 20; Appendices B and E.

Voss filed a Rule 59(e) and 60 motion and argued that: (1) Wisconsin's legal loan program is not a subsidy; (2) the law concerning how many suits he could litigate at one time was void for vagueness; (3) that his state-law tort claims were not frivolous; and (4) Carr's policy implementing Wisconsin's open records law was not narrowly tailored and violates substantive due process. Dkt. 21; Appendix H. The district court denied that motion. Dkt. 22.

On appeal to the Seventh Circuit, Voss argued that the district

court erred in dismissing his claims on the following grounds relevant to review in this Court:

(1) Lewis imposes an affirmative duty on the states to assist their prisoners in preparing and filing state-law claims that concern the conditions of their confinement;

(2) Carr's legal loan policy violates Voss's right to access the courts, free speech, equal protection, and due process;

(3) Wisconsin's open records law, and Carr's policy implementing it, violates Voss's right to access the courts, free speech, equal protection, and due process;

(4) Bounds v. Smith, 430 U.S. 817 (1977) establishes an affirmative duty on Carr to provide Voss with postage to serve a Notice of Claim by certified mail;

(5) A litigation loan is not a subsidy;

(6) Voss's state-law tort claims were not frivolous;

(7) Johnson v. Foster, 786 F.3d 501 (7th Cir. 2015) and Lindell v. McCallum, 352 F.3d 1107 (7th Cir. 2003) were void for vagueness; and

(8) 28 U.S.C. § 1915(g) is unconstitutional as applied to Voss.

Appendices J and K.

The Seventh Circuit affirmed the district court's judgment and, in relevant part to this review, held:

(1) Voss fell short of pleading a First Amendment claim because he is not entitled to a subsidy to prosecute as many civil suits as he wishes and he didn't show he was denied meaningful access to the courts;

(2) Voss's complaint did not allege selective enforcement of Carr's legal loan policy; and

(3) Wisconsin's open records law is rationally related to its legitimate interest in preventing prisoners from abusing that law.

Appendix A. The circuit declined to address whether Lewis applies to a state-law claim and whether 28 U.S.C. § 1915(g) was unconstitutional. Id.

Voss filed a petition for en banc/panel rehearing arguing that: (1) Lewis was dispositive of his case; (2) Wisconsin's legal loan program was not a subsidy; (3) Voss's access to the Wisconsin courts was impeded/obstructed in violation of the First and Fourteenth Amendments; (4) Wisconsin's open records law violates equal protection because it

burdened fundamental rights; and (5) 28 U.S.C. § 1915(g) was unconstitutional and must be reviewed as Voss had/has standing to challenge the law on the grounds he was being "sanctioned" for constitutional speech and had attained three "strikes". Appendix L. The circuit court denied that request. Appendix C.

The basis for federal jurisdiction in the court of first instance is a question of federal law pursuant to 28 U.S.C. § 1331 via 28 U.S.C. § 1983. Voss now petitions this Court for review.

REASONS FOR GRANTING THE PETITION

As explained more fully below, this Court must grant review on the grounds that the court of appeals "has so far departed from the accepted and usual course of judicial proceedings" "as to call for an exercise of this Court's supervisory power" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. S.Ct. Rule 10(a) and (c).

ARGUMENT

I. VOSS"S COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Voss filed a complaint in this matter alleging that Defendant Carr refused to provide him with postage to file a Notice of Claim, pursuant to Wis. Stat. § 893.82, in order to preserve his ability to file a non-frivolous negligence state-law tort claims for damages. Voss further alleged that Carr's refusal had hermetically sealed the doors of the Wisconsin courts so that his claims could never be heard. The Seventh Circuit affirmed the district court's judgment and held: (1) Voss had no constitutional entitlement to subsidy; (2) Voss doesn't have the right to unlimited funds to prosecute as many civil suits as he wishes; (3) Voss didn't show he was deprived of "meaningful access" (4) Carr's legal loan policy has a rational basis; and (5) Wisconsin's

open records law also has a rational basis. As discussed below, the Seventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." See S.Ct. Rule 10(c). Further, the circuit's are split on the question of whether Lewis v. Casey, 518 U.S. 343 (1996) applies to state-law claims and this is the perfect case to finally address that question.

A. Carr's actions denied Voss his right of access to the courts.

The right of access to the courts finds support in several provisions of the Constitution including the Due Process Clause of the Fifth Amendment, see Boddie v. Connecticut, 401 U.S. 371, 376 (1971); the Due Process Clause of the Fourteenth Amendment, Wolff v. McDonnell, 418 U.S. 539, 579 (1974); the Equal Protection Clause, Pennsylvania v. Finley, 481 U.S. 551, 557 (1987); the First Amendment, Turner v. Safley, 482 U.S. 78, 84 (1987)(citing Johnson v. Avery, 393 U.S. 483 (1969)); and the Privileges and Immunities Clause of Article IV, see, e.g., Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907). "There is no iron curtain drawn beteween the Constituion and the prisons of this country." Wolff, 418 U.S. at 555. "[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'" Cruz v. Beto, 405 U.S. 319, 321 (1972)(quoting Johnsoin, 393 U.S. at 485; see also Bounds, 430 U.S. at 817. Prison officials have an affirmative duty to provide "adequate, effective, and meaningful" access to the courts. Id. at 822; see also Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Benett, 365 U.S. 708 (1961). Further, the right of individuals to pursue legal redress for claims which have a reasonable basis in law or fact and/or touch on matters of public concern are ptrotected by

the First and Fourteenth Amendments. Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1987); McDonald v. Smith, 472 U.S. 479, 484 (1985); see, e.g., Connick v. Meyers, 461 U.S. 138, 146-48 (1983); Borough of Duryea v. Guarnieri, 564 U.S. 379, 394-95 (2011); see also secs. II(B), (C), infra.

There are three things wrong with the Seventh Circuit's decision when comparing it to this Court's cases. First, the Seventh Circuit held that Voss had no constitutional right to subsidy. As discussed below, a loan for postage to mail a Notice of Claim is not a subsidy. See sec. I(E), infra. In Bounds, this Court stated that "[i]t is undisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents ... and with stamps to mail them." Bounds, 430 U.S. at 824-25 (emphasis added). Voss alleged that he was indigent. A Notice of Claim is a legal document that must be sent to the Wisconsin Attorney General by certified mail to preserve one's ability to bring a claim for damages in Wisconsin's courts. See Wis. Stat. § 893.82. Voss requested postage for that certified mail, but Carr denied his request. According to Bounds, Carr had an affirmative duty to provide Voss with such postage.

In Lewis this Court added the impediment of a non-frivolous claim requirement to an access to courts claim and reaffirmed Bounds in that it required prison officials to provide inmates with any tolol necessary "in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." Lewis, 518 U.S. at 355 (emphasis added). In an apparent showing that it was narrowly tailoring prisoner's right of access (see sec. I(B), infra), this Court discussed the state-law claims prisoners had no constitutional right to receive assistance for as they had nothing to

do with prison conditions (i.e., "shareholder derivative actions" and "slip-and-fall claims"). Id. The Court was very clear about these non-prison condition state-law claims: "Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." Id. Here, Voss had a constitutional right to Carr's affirmative assistance with postage to file a Notice of Claim (a legal document) by certified mail because he wished to file a state-law claim concerning prison officials' negligence in opening his privileged mail outside his presence, which had caused him injury. Such a claim is a clear-cut matter concerning "the conditions of [Voss's] confinement."

Finally, the Seventh Circuit held that Voss wasn't entitled to unlimited funds to prosecute as many civil suits as he wanted. Appendix A at 3. This is a clear error of fact. Voss requested postage to preserve his ability to file a lawsuit for damages, NOT to prosecute a civil suit. Voss requested the minimum amount necessary, $3.50 in postage, to preserve his ability to have "adequate, effective, and meaningful access" to the Wisconsin courts. That request was denied and Voss lost ALL access to the Wisconsin courts on his claims for damages. The Seventh Circuit held that Voss failed to show that the "loan policy deprived him "meaningful access,'" but such a holding doesn't comport with the facts. Carr's intentional refusal to provide Voss with postage deprived Voss of ALL access to the Wisconsin Courts. A denial of procedural due process (see sec. I(B), infra) amounts to a a denial of "meaningful access."

The circuits are currently split in their interpretation of Lewis. The Sixth and Ninth Circuits have held that Lewis only applies to habeas and civil rights claims. See, e.g., Thaddeus-X v. Blatter, 175

F.3d 378, 391 (6th Cir. 1999); Bryant v. Karlow, 523 F.App'x 476 (9th Cir. 2013). However, such holdings are not narrowly tailored to avoid evicerating prisoner's panoply of constitutional rights afforded by the Fourteenth Amendment, including, without limitation, procedural due process. See sec. I(B), infra. On the other hand, the Second Circuit has recognized the error of the Thaddeus-X court (i.e., a failure to narrowly tailor the fundamental rights of due process and access to the courts) and held that Lewis applies to state-law claims because "not every 'challenge to conditions of confinement' takes the form of a civil rights action." Friedl v. City of New York, 210 F.3d 79, 86 (2nd Cir. 2000). This Court now has the perfect opportunity to address this important question of federal law and should do so as it is dispositive of Voss's claims.

B. Carr's actions denied Voss due process of law.

This Court's cases "interprets the Fifth and Fourteenth Amendments guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' [] interests at all, no matter what process is provided, unless the infringment is narrowly tailored to serve a compelling [governmental] interest." Reno v. Flores, 507 U.S. 292, 301-02 (1993)(citations omitted). Any inquiry into substantive due process requires a "'less rigid and more fluid'" inquiry than invisaged in other specific and particular provisions of the Bill of Rights." County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998). Any "[a]sserted denial is to be tested by an appraisal of the totality of facts in a given case." Id. "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such a denial."

Id. (quoting Betts v. Brady, 316 U.S. 455, 462 (1942)). "[F]undamental fairness is [the] touchstone of due process," Gagnon v. Scarpelli, 411 U.S. 778, 790 (1972), which "protects against government power arbitrarily and oppressively exercised." Lewis, 523 U.S. at 845-46.

"Prisoners may [] claim the protections of the Due Process Clause." Wolff, 418 U.S. at 556 ("They may not be deprived of life, liberty, or property without due process of law."). Although prisoners may have "diminished" constitutional rights, they are still entitled to minimum due process. See Won Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950); Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

Liberty, within the meaning of the Fourteenth Amendment, includes the right to be free from "unjustified intrusions upon personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977). "Personal security" includes "freedom from bodily harm" and "from [] 'emotional and psychic harm.'" Daniels v. Williams, 474 U.S. 327, 241 (1986)(Liberty "interest in freedom from bodily harm")(Justice STEVENS, concurring); Parham v. J.R., 422 U.S. 584, 597 (1979). Voss's Complaint in this matter alleges that he suffered both physical and emotional harm as a result of prison officials opening his privileged mail outside his presence, without justification, which constitutes a liberty interest. While these actions, in and of themselves, do not rise to the level of a due process claim, see Daniels, 474 U.S. at 327 (holding that the Due Process Clause is not implicated by a state officials' negligent act causing unintended loss of injury to life, liberty, or property), it is Carr's actions that result in the due process violation.

Voss argues that his "property" was taken without due process. See sec. I(D). Voss's allegations paint a very clear picture that Carr's refusal to provide him with postage for a Notice of Claim bar-

red the doors of the Wisconsin courts on his claim(s) to recover his "property" (i.e., the sum he was entitled in damages for physical and emotional injury). This is a crystal clear deprivation of "property without due process of law." Wolff, 418 U.S. at 556. Carr exercised his power in an "arbitrary and oppressive" manner.

Voss has the right to procedural due process in the state courts to recover for an injury to his property; it is not a privilege that can be granted or denied at whim by the Government or the State. It's the right to vindicate one's rights in court that is at the heart of the constitutional right to due process of law. This principle is expressed in this Court's holding that the due process clause of the Fourteenth Amendment prevents states from "denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-30 (1982)(quoting Boddie, 401 U.S. at 380). Therefore, any attempt by Carr to limit Voss's right to go to court to have his rights vindicated is a matter of serious import that this Court must address, especially since due process requires an opportunity for a hearing in advance of the deprivation of a substantive right. See Hilton v. Guyot, 159 U.S. 113, 205 (1895).

C. Carr's actions and Wisconsin's open-records law violate the Equal Protection Clause.

The Seventh Circuit held that Carr's legal loan policy and Wisconsin's open-records law satisfy the "rational basis" test. However, this Court has long held that any state law that impinges upon personal rights protected by the Constitution (i.e., fundamental rights) are subjected to strict scrutiny and will be sustained only if they are suitably/narrowly tailored to serve a compelling state interest.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 906 n. 6 (1986); City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440 (1985); San Antonio Independent School Dist. v. Rodriguez, 411 U.S.1, 16 n. 39 (1973). The Seventh Circuit failed to apply strict scrutiny because "Voss d[id] not explain what equal-protection interest he believes is at stake." Appendix A at 5. However, applying a liberal construction of Voss's documents, it is clear he was alleging a violation of his freedom of speech, petition for redress of grievances, and due process rights, which constitutes error for the court to not address these claims. Erickson v. Pardus, 551 U.S. 89,94 (2007) ("A document filed pro se is 'to be liberally construed.'"); (quoted source omitted). Freedom of speech, access to the courts, and due process are all fundamental rights. Hill v. Colorado, 530 U.S. 703, 782-83 (2000); Lewis, 518 U.S. at 346; U.S. Const. amends. V, XIV; 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 15.7, at 434 (2d ed. 1992).

1. Carr's legal loan policy.

Voss alleged that Carr refused to provide him with "legal loan" funds to file a Notice of Claim and that Carr raised the affirmative defense of Wis. Stat. § 893.82 to bar the doors of the Wisconsin courts on Voss's non-frivolous claim for damages. While Carr may have a legitimate interest in reducing the amount he loans to Voss under Wis. Stat. § 301.328, that interest in cost cannot justify the complete denial of a constitutional right. Bounds, 430 U.S. at 825 ("[T]he cost of protecting a constitutional right cannot justify its total denial."). Carr's actions resulted in the complete denial of Voss's constitutional rights. See secs. I(A)-(B), (D); Johnson, 393 U.S. 483 (right of access to the courts cannot be denied); Armstrong v. Manzo, 380 U.S. 545

(1965)(due process requires a fair opportunity to be heard and Voss was denied that opportunity).

2. Wisconsin's open-records law.

Voss alleged that he was unable to provide the names of the state officials in his Notice of Claim because Carr's policy, based on Wisconsin's open-records law, precluded him from receiving those names because of his status as a prisoner. See Wis. Stat. §§ 19.32(1c), (3) and 19.35. The Notice of Claim statute requires strict compliance with providing the names of the employees. See Wis. Stat. §§ 893.82(2m). (3); Modica v. Verhulst, 195 Wis.2d 633, 647, 536 N.W.2d 466 (Ct. App. 1995). Voss further alleged that Carr then used Voss's failure to name the employees as an affirmative defense to have his non-frivolous claim for damages heard in state court. Such facts are "shocking to the universal sense of justice" in violation of substantive due process. Betts, 316 U.S. at 462.

Further, while Wisconsin may have a legitimate interest in preventing prisoners from abusing the open-records law, that law is not narrowly tailored to avoid the complete denial of Voss's fundamental right to access the courts. Johnson, 393 U.S. at 485 (right of access cannot be denied). Currently, Wisconsin's open-records law prevented Voss from obtaining the names of the officers working in the mailroom to file a statutorily compliant Notice of Claim, which is a prerequisite to a suit for damages. In effect, the law denies Voss all access to the Wisconsin courts in violation of his constitutional rights. See secs. I(A)-(B), (D). In order for this law to be narrowly tailored, Wisconsin must make a narrow exception for inmates wishing to file a Notice of Claim that complies with the mandates of Wis. Stat. § 893.82 (3) so that their claims for damages may be heard in the Wisconsin

courts. Any abuse of this narrow exception can be dealt with by a law Wisconsin already has on the books, which is specifically designed to deal with such situations. See Wis. Stat. § 807.15.

While the Seventh Circuit stated such names are available through the prison's grievance process, that statement was explicitly refuted by Voss's own personal knowledge of that system rather than the court's assumption based on an assertion by Carr. See Appendix L at 12 (citing Voss's Dec. at ¶2).

D. Carr's actions operate as a "taking" in direct violation of the Takings Clause.

The Takings Clause of the Fifth Amendment mandates that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This amendment is made applicable to the states through the Fourteenth Amendment. U.S. Const. amend. XIV; Dolan v. City of Tigard, 512 U.S. 374, 383 (1994); Pennsylvania Central Transportation Co. v. City of New York, 438 U.S. 104, 122 (1978). Thus, a Takings Clause violation is defined by two elements: (1) a public taking of private property (2) without just compensation. Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162, 2167 (2019).

First, Voss must demonstrate that he possesses a "property interest" that is constitutionally protected. Buckelshaus v. Mansanto Co., 467 U.S. 986, 1000-01 (1984); Penn. Central Transp. Co., 438 U.S. at 125. Voss alleged that he was precluded from filing a non-frivolous common-law negligence claim in state court because Carr refused to provide him with postage for a Notice of Claim, which totally barred the courthouse doors on his claim for physical and emotional injuries. Voss has a "protected property interest" for the physical/emotional injury he suffered as he would have received damages for those injuries. See, e.g., Daniels v. Williams, 720 F.2d 792, 794-95, 795 n. 2 (4th Cir.

1983)(protected property interest in bodily injuries); Baker v. Dorfman, 239 F.3d 415, 425 (2nd Cir. 2000)("Baker lost his property interest in that sum [of damages] when his case was dismissed due to Dorfman's malpractice."). Voss's case is similar to Baker in that he lost his property interest in the sum for his damages when Carr refused to provide the postage necessary to file a Notice of Claim and Carr then used that failure as an affirmative defense to have Voss's claims for damages dismissed. Further, Voss's property interest in those damages is protected because Wisconsin's common-law of negligence recognizes and proitects that interest. Paul v. Davis, 424 U.S. 693, 710-11 (1976); cf. Melchert v. Pro Electric Contractors, 2017 WI 30, ¶37, 374 Wis.2d 439, 892 N.W.2d 710 (elements of a common-law negligence claim).

Having established Voss's protected interest, the next question is whether there was a public taking of that property. Voss alleged that Carr was acting under color of state law when he not only refused Voss postage for mailing his Notice of Claim, but also when Carr used Voss's failure to satisfy Wis. Stat. § 893.82 as an affirmative defense to Voss's negligence claim. To satisfy the "without just compensation" element, Voss alleged that his negligence claim was dismissed as a direct result of Carr's actions and that he was unable to obtain damages for his injuries. Therefore, Voss has alleged not only a prima facie violation of the Takings Clause, but also a taking without procedural due process. See sec. I(B), supra.

E. Carr's legal loan program is not a subsidy.

The Seventh Circuit held that Voss had no constitutional right to have his litigation subsidized by Carr (citing/quoting Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002), and no right to Unlimited funds to prosecute as many civil suits as he wishes," (citing Johnson v. Foster,

786 F.3d 501 (7th Cir. 2015). Appendix A at 3 (emphasis added). This holding is erroneous for a number of reasons.

First, this Court, in overruling Roe v. Wade, 410 U.S. 113 (1973), stated that historical inquiries must be consulted to determine the course of our laws/fundamental rights. Dobbs v. Jackson Women's Health Organization, 2022 WL 2276808, *11 (U.S. June 24, 2022); see also New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 2022 WL 2251305, *13 (U.S. June 23, 2022). Applying this principle to the fundamental rights Voss has claimed were violated in this matter, a subsidy has historically been defined/associated with government funded programs and/or funding to aid private citizens with some endeavor the government has deemed important, but that funding never had to be repaid to the government, nor could a judgmentybe entered against the private citizen in favor of the government for such subsidies. See The Random House Dictionary of the English Language, Unabridged ed. 1966, at 1417 (a subsidy is defined as a government grant of money to aid private undertakings). The Seventh Circuit's holding contemplates a subsidy (i.e., free funding that does not have to be repaid to the entity providing the subsidy), not a loan. A loan by contrast is, historically/traditionally, money lent with the legal obligation of repayment. The failure to repay a loan has historically/traditionally been enforced in courts of law and equity by judgments in favor of the creditor.

Applying these historical/traditional definitions to Wisconsin's legal loan program, by no means can the program be termed a subsidy. In fact, Wisconsin specifically/explicitly defines "litigation loan" as a "loan" and not a subsidy. See Wis. Stat. § 301.328(1). Further, any unpaid portion of the "loan" converts to a judgment in favor of Wisconsin (after procedural due process has been observed), which may

be collected by any means allowed by law. Id. at (1m). In no sense of the word can Wisconsin's loan to Voss be termed as a subsidy because it is not free; it must be repaid. Further, such a holding acts as a judicial sanction of Carr's actions that violate Voss's panoply of constitutional rights. See secs. I(A)-(D), supra.

II. "STRIKES" INCURRED UNDER 28 U.S.C. § 1915(g) AND THE STATUTE ITSELF ARE UNCONSTITUTIONAL AS APPLIED TO VOSS.

28 U.S.C. § 1915(g) requires that prisoners be assessed a "strike" for every "action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted...." Id. Once a prisoner has obtained three "strikes," he or she is barred from proceeding in forma pauperis absent the one exception to the rule, which is not applicable here. Id.

On appeal, Voss argued that § 1915(g) was not narrowly tailored and the "strike" he received in the district court was unconstitutional. Appendix J at 29-31. The Seventh Circuit held Voss's challenge was "premature because he has not accrued three strikes," but "note[d] that he incurs another strike in this appeal." Appendix A at 5. Voss filed a petition for rehearing informing the Seventh Circuit that he had standing for his challenge to be addressed, but rehearing was denied. Appendix L at 12-15; Appendix C.

When constitutional challenges to the substance of a statute are made, federal courts have a duty to address constitutional question(s) necessary to the disposition of a case. Marbury v. Madison, 5 (1 Cranch) U.S. 137, 177 (1803). As discussed more fully below, the Seventh Circuit had a duty to address Voss's challenge to the constitutionality of § 1915(g) because he had Article III standing and because: (1) it's

not narrowly tailored; (2) it violates the "breathing space" principle; (3) it amounts to a "prior restraint"; and (4) it amounts to retaliation. Since the Seventh Circuit's failure to discharge its duty "so far departed from the accepted and usual course of judicial proceedings," this Court must exercise its supervisory power. See S.Ct. Rule 10(a).

A. Voss has standing to challenge 28 U.S.C. § 1915(g) and each individual "strike" he received under the statute.

In order to satisfy Article III's standing requirements, a plaintiff must show: (1) he/she "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000).

Voss filed his Complaint in this matter and based those allegations on the holdings in Bounds and Lewis, 518 U.S. 343, that prison officials have an affirmative obligation to assist him in preparing for his state-law tort claim lawsuit. See sec. I, supra. He further relied on McDonald's holding that his pleading must be based in law or fact to avoid being construed as baseless. See sec. II(B), infra. In response to that suit, Voss was assessed a "strike" because it failed to "state a claim upon which relief may be granted." Voss v. Carr, 2020 WL 1234433, *9 (W.D. Wis. March 13, 2020)(unpublished); 28 U.S.C. § 1915(g). On appeal, Voss was assessed a second "strike," despite making the legally and factually based argument that Lewis was dispositive of his case. Voss v. Carr, 2022 WL 2287560, *3 (7th Cir. June 24, 2022) (unpublished). Voss was also assessed a "strike" prior to this current

case, which brings his total number of "strikes" to three (3). Voss v. Carr, 2019 WL 5623002, *3 (W.D. Wis. October 31, 2019)(unpublished).

Voss's "injury in fact" is the assessment of two "strikes" in this matter, and cumulatively three "strikes," which impinges upon his First Amendment rights and precludes him from proceeding in forma pauperis despite his poverty. See Voss's 6-Month Trust Acct. Statement. Such injury is concrete, particularized, and actual. That "injury is fairly traceable to" 28 U.S.C. § 1915(g). Further, "it is likely that the injury will be redressed by a favorable decision" from this Court as two of Voss's strikes will be overturned and he will again have in forma pauperis status restored. As such, and as discussed more fully below, Voss has both personal and third-party standing to challenge 28 U.S.C. § 1915(g), and the two strikes assessed in this case, because it both "chills" and "deter[s] privileged activity." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984).

B. 28 U.S.C. § 1915(g) is not narrowly tailored.

This Court has directed the application of a "heightened" level of scrutiny in cases where the challenged action infringes upon a "fundamental" right. Soto-Lopez, 476 U.S. at 906 n. 6; Rodriguez, 411 U.S. at 16 n. 39; NAACP v. Button, 371 U.S. 415, 438 (1963)(restrictions on expression/speech must be narrowly tailored to address the issue at hand). Freedom of speech, Hill, 530 U.S. at 782-83 (quoting Schneider v. State of New Jersey; Town of Irvington, 308 U.S. 147, 161 (1939)), and access to the courts are fundamental rights. See, e.g., Lewis, 518 U.S. at 346. "In the First Amendment context ... fit matters" and this Court "still require[s] a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition

but one whose scope is in proportion to the interest served, that employs ... not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." McCutcheon v. Federal Election Com'n, 572 U.S. 185, 218 (2014)(emphasis added).

The First Amendment right to petition the government extends to the courts in general and applies to litigation in particular. California Motor Trans. Co., 404 U.S. at 510; Button, 371 U.S. at 429-30. A private grievance is protected by the petition clause of the First Amendment against retaliation. Guarnieri, 564 U.S. at 94-95. Pleadings and submissions in a lawsuit that articulate issues of public concern are within the free speech clause and/or the petition for redress of grievances clause of the First Amendment. See, e.g., Connick, 461 U.S. at 146-48; Guarnieri, 564 U.S. at 385-95.

The first question that needs to be addressed is whether Voss's actions in the lower courts were privileged/constitutionally protected activities. In McDonald, this Court held that baseless litigation is not protected by the Constitution, but pleadings/submissions that are "reasonably based in law or fact" are protected activities. McDonald, 472 U.S. at 484 (emphasis added). Here, Voss filed a civil suit that alleged Carr had violated his constitutional rights under the speech, right to petition for redress of grievances, due process, and the equal protection clauses. That Complaint and appeal in the Seventh Circuit were reasonably based, in both law and fact, on this Court's holdings in Bounds and Lewis. What makes Voss's pleadings/submissions even more reasonable is the fact that neither this Court, the Seventh Circuit, nor the Wisconsin district courts have ever held that Lewis does NOT apply to state-law tort claims concerning suits about "conditions of confinement." As such, Voss's submissions in the lower courts were

constitutionally protected under the petitions clause of the First Amendment.

For speech in court to be protected, it must be "reasonably based in law or fact," McDonald, 472 U.S. at 484, and be on a matter of public concern. Connick, 461 U.S. at 147. A matter is of public concern if it touches on the public's interests. Id. It is ALWAYS in the public's interest to prevent the violation of constitutional rights. Gannett Co. Inc. v. DePasquale, 443 U.S. 368, 383 (1979); Frisby v. Schultz, 487 U.S. 474, 479 (1988); United States v. Raines, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees.")(emphasis added). As stated above, Voss meets the "reasonable basis in law or fact" test. His Complaint and appeal both raise matters of a constitutional magnitude, namely, whether Carr and Congress has violated his constitutional rights, which are questions of federal law. Since Voss is arguing that his "constitutional guarantees" have not been "du[ly] observ[ed]," his pleadings/submissions touch on a matter of public concern and his "speech" in court is protected under the free speech clause.

Having determined that Voss's pleadings/submissions in the lower courts are constitutionally protected, the next step is to determine whether 28 U.S.C. § 1915£g· and each "strike" Voss was assessed are constitutional £i.e., narrowly tailored·. Congress's intent in enacting the PLRA, and by extension $ 1915£g·, was "to filter out the bad claims [filed by prisoners] and facilitate consideration of the good." Coleman v. Tollefson, 575 U.S. 532, 535 (2015)(quoting Jones v. Bock, 549 U.S. 199, 204 (2007); alteration in original). In other words, Congress wanted to weed out the baseless (i.e., bad) litigation and facilitate consideration of claims that have a "reasonable basis in law or

fact" under the "fail[ure] to state a claim upon which relief may be granted" standard. Id.

In Denton v. Hernandez, 504 U.S. 25 (1992), this Court "determined that a complaint filed in forma pauperis which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6)['s]" standard "may nonetheless have 'an arguable basis in law' precluding dismissal" and that judges are only accorded "the authority to dismiss a claim based on an indisputably meritless legal theory." Denton, 504 U.S. at 31-32 (citing/quoting Neitzke v. Williams, 490 U.S. 319, 327-29 (1989)(emphasis added). As discussed earlier, Voss's claims have an "arguable basis" in law AND fact. While the district court dismissed Voss's case on the ground that Lewis does not apply to state-law tort claims about prison conditions, Voss's claim that Lewis does apply is not "an indisputably meritless legal theory" because this Court has not issued a ruling that is contrary to his asserted legal position. Further, this Court has emphasized that "not all unsuccessful cases qualify as a strike under § 1915(g)" and this is one of those cases. Nietzke, 490 U.S. at 329.

Further, Congress "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015)(quoted source omitted). "Content-based laws--those that target speech based on its communicative content--are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling [] interests." Id. (cited sources omitted). "Government regulations of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Id. (citations omitted). Strict scrutiny also applies to "facially content neutral ... laws that cannot be justified without

the content of the regulated speech." Id. (quoted source omitted; cleaned up).

Here, Voss's pleadings/submissions to the lower courts are protected under the free speech clause because they articulate matters of public concern and they are reasonably based in law and fact. Congress, via 28 U.S.C. § 1915(g), has targeted the content of Voss's speech in those submissions by labeling them as baseless just because relief could not be ultimately granted. That law, as applied to Voss, must be presumed to be unconstitutional. Congress cannot prove that § 1915(g) is narrowly tailored because it targets the content of protected/privileged conduct. The only way to tailor the law narrowly is to explicitly/expressly exclude suits that are reasonable based in law or fact under the failure to state a claim standard and/or concern matters that are of public concern.

C. 28 U.S.C. § 1915(g) violates the "breathing space" principle.

Voss's right to access the courts "is part of [his] right of petition under the First Amendment," California Motor Transp. Co., 404 U.S. at 513, and is "generally subject to the same constitutional analysis" as the right of free speech. Wayte v. United States, 470 U.S. 598, 610 n. 11 (1985). Applying the principle in Button, this Court says that the First Amendment requires "breathing space" so that true speech will not be deterred. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964). The "breathing space" principle has been applied in cases where the government sought sanctions for litigation. See California Motor Transp. Co., 404 U.S. at 511; Bill Johnson's Rests., Inc., 461 U.S. at 741. This Court has said that sanctions cannot be imposed against a party unless the litigation is both objectively and subjectively without merit. Prof'l Real Estate Investors, Inc. v. Columbia Pictures

Indus., Inc., 508 U.S. 49, 60-61 (1993).

Here, Voss's Complaint and appeal were based in law and fact. See secs. II(A)-(B), supra. Voss's pleadings/submissions in the lower courts are evidence of his subjective reliance on Lewis for his claims. Despite the fact that Voss cannot be sanctioned because his litigation had objective and subjective merit, he received two "strikes" for his claims that had merit. Therefore, 28 U.S.C. § 1915(g) acts as a sanction for his protected speech/activities in court and must not be allowed to stand.

D. 28 U.S.C. § 1915(g) acts as a prior restraint.

As discussed above, a "strike" under § 1915(g) acts as a sanction or penalty for speech. See sec. II(C), supra. In addition to being reactive for completed speech, § 1915(g) also acts proactively as a threat for future speech that is reasonably based in law or fact or that touches upon matters of public concern that ultimately fail to state a claim upon which relief may be granted. Threatening penalties for future speech is called a "prior restraint," which is a First Amendment violation. Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552-53 (1975). As such, § 1915(g) acts as a prior restraint to "chill" and "deter privileged activity" and must not be allowed to stand. Grayned, 408 U.S. at 114; Joseph H. Munson Co., 467 U.S. at 956.

E. 28 U.S.C. § 1915(g) acts as retaliation for protected conduct.

Penalties/retaliation for completed speech also violate the First Amendment. In a retaliation claim, it must be determined whether (1) the speech was constitutionally protected, see Connick, 461 U.S. at 148 n. 7, which requires the application of the Connick-Pickering two-part test: (a) the court must determine if the speech addressed a mat-

ter of public concern, Id. at 147-48, and, if so, (b) whether the plaintiff's interests "in commenting on matters of public concern" outweigh the government's interest in deterring baseless litigation. Pickering v. Bd. of Education of Township High School Dist. 205, 391 U.S. 563, 568 (1968). (2) Whether the adverse action would likely deter First Amendment activity in the future; and (3) whether the speech was a substantial or motivating factor in the adverse action. Mt. Healthy v. City School Dist. Bd. of Education, 429 U.S. 274 (1977).

As discussed above, Voss's speech is protected because it addressed a matter of public concern. See sec. II(B). In weighing Voss's interest in filing litigation that is based in law and fact that comments on public matters against the government's interest in deterring baseless litigation, Voss's interests clearly outweigh the Government's interest because Voss's pleadings/submissions are protected and far from baseless. A "strike" (i.e., adverse action) is highly likely to deter future First Amendment activity because nobody will want to lose their in forma pauperis status for trying to argue an issue of law that is not "indisputably meritless" and not settled in the courts. Finally, Voss's pleadings/submissions in the lower courts was a substantial factor that contributed to the reason he received two "strikes". As such, § 1915(g) acts to retaliate against those who file pleadings/submissions based in law or fact and/or touch upon matters of public concern and must be remedied.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari must be granted.

Respectfull submitted, Dante Voss

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