No. 22-7394

In the
Supreme Court of the United States

MAJOR MIKE WEBB, DOING BUSINESS AS FRIENDS FOR MIKE WEBB, ALSO KNOWN AS MAJOR MIKE WEBB FOR CONGRESS
PETITIONER-APPELLEE, *PRO SE*

V.
DEPARTMENT OF THE ARMY, *ET AL.*
RESPONDENT-APPELLEES

WEBB V. DEPARTMENT OF THE ARMY, CIVIL ACTION NO. 1:22-CV-02236-UNA, ON APPEAL, RECORD NO. 22-5292 (4TH CIRCUIT 2023)

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

"On his first full day in office, January 21, 2009, the President[, Barack Obama,] issued a memorandum to all executive departments and agencies emphasizing that the *FOIA* reflects a 'profound national commitment to ensuring an open Government'", Department of Justice Guide to the *Freedom of Information Act*, "President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines," *DoJ*, July 23, 2014, calling for "federal executive departments and agencies to administer the *FOIA* with 'a clear presumption: [i]n the face of doubt, openness prevails.'" *Id.*

According to (DoJ), President Obama "directed departments and agencies not to withhold information 'merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears'", *Ibid.*, and "[h]e instructed agencies to respond to requests 'promptly and in a spirit of cooperation.'" *Id.* (citations omitted).

He "further directed agencies to adopt a presumption in favor of disclosure with regard to all *FOIA* decisions", *Ibid.*, and "[t]hat presumption requires agencies to proactively release records, without waiting for specific requests, and use technology to inform citizens 'about what is known and done by their [g]overnment.'" *Ibid.* The *FOIA* is central to the matter raised, in assignments of error, on appeal, and, since "'[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), presenting the following questions:

I. Whether, given "the accepted rule that a complaint should not be dismissed for

failure to state a claim 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", as articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), it constitutes a violation of due process, under the *Fifth Amendment*, when an agency fails to respond, in any manner, to a request for documents under the *Freedom of Information Act (FOIA)*, 5 U.S.C. § 552/*Privacy Act (PA)*, 5 U.S.C. § 552a.

II. Whether, under Fed.R.Civ.Pro. 8, the guidance that "all the Rules require is 'a short and plain statement of the claim' [footnote omitted] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests", *Id.* (citing Fed.R.Civ.Pro. 8(a)(2)), imposes a limit upon the extent to which an unrepresented plaintiff may articulate allegations in his or her claim.

III. Whether a Trial Court, in abuse of discretion, offends Fed.R.Civ.Pro. 8(f)'s mandate that "all pleadings shall be so construed as to do substantial justice," where, granted priority of action, under statute, 28 U.S.C. § 1657, and where granted a specific right to "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant", 5 U.S.C. § 552(a)(4)(B), having been acknowledged to have been "deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph", 5 U.S.C. § 552 (6)(C)(i), by dismissing said complaint.

IV. Whether, under Fed.R.Crim.Pro. 6(a), which provides, in relevant part that "the court must order that one or more grand juries be summoned", it is sufficiently in

the public interest, where a court is presented a *prima facie* case for commission of a felony, precluding prosecutorial discretion.

PARTIES AND RULE 29.6 STATEMENT

Petitioner-Appellant is MAJOR MIKE WEBB, hereinafter referred to as "WEBB". Appellant was the Petitioner in WEBB V. DEPARTMENT OF THE ARMY, Civil Action No. 1:22-cv-02236-UNA, a matter, *inter alia*, brought under the *FOIA*, 5 U.S.C. § 552/ *PA*, 5 U.S.C. § 552a, dismissed and presented on appeal at Record No. 22-5292 (4th Circuit 2023), consequent to the failure of the Agency, *i.e.*, Respondent-Appellee DEFENSE INTELLIGENCE AGENCY (DIA), to provide any response, at all, as required under the controlling provisions. Appellant has no parent corporation, and there is no publicly held corporation owning 10% of more of its stock.

Additional Respondent-Appellees include Department of the Army (DA), Merit Systems Protection Board (MSPB) and Axiom Corporation of Atlanta (Axiom).

DECISIONS BELOW

All decisions in this case in the lower courts are styled Webb v. Department of the Army. A Verified Complaint was filed by Appellant, a *pro se* litigant, with the U.S. District Court for the District of Columbia Circuit Court for the District of Columbia on July 27, 2022, and, three months later, notwithstanding the priorities of civil actions, under 28 U.S.C. § 1657, which dictate that "the court shall expedite the consideration of any action brought. . . any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown", and that "[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", was considered, on the record, for dismissal, on October 27, 2022. On November 7, 2022, the *pro se* litigant, timely appealed to the U.S. Court of Appeals for the District of Columbia, and, considered on the record, in accordance with Fed.R.App.Pro. 34(a)(2); D.C. Cir. Rule 34(j), the decision of the Trial Court was affirmed, four months after commencement of the appeal, on March 20, 2023.

JURISDICTION

Pursuant to Sup.Ct.R. 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion", and "[a] petition for a writ of certiorari will be granted only for compelling reasons." Moreover, in accordance with Sup.Ct.R. 10(c), "although neither controlling nor fully measuring the Court" discretion," this Honorable Court may consider for review decisions on "an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court", and, as was expressed so eloquently by this Court, and reiterated in multiple historic decisions, "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Nixon,* 418 U.S., at 683 (citations omitted).

I. An Important Question of Federal Law

A. History Is Written by the Victors, Not the Victims

Just months before this matter was first brought to the federal judiciary, "Judge Ketanji Brown Jackson was in the ninth hour of a grueling session of questions on Wednesday, having defended her record again and again under aggressive questioning and interruptions by Republicans when Senator Cory Booker, Democrat

of New Jersey, began to speak." Emily Cochrane, "Booker tells Jackson: 'You have earned this spot. You are worthy," The New York Times, March 23, 2022. "Repeatedly proclaiming his joy over her nomination, Mr. Booker likened her to historical figures like Harriet Tubman and proclaimed Judge Jackson 'my harbinger of hope' that the United States could live up to its promises of freedom and equality", Id., and Tracey Michae'l Lewis-Giggetts, the author of, Black Joy: Stories of Resistance, Resilience, and Restoration, told reporters for television, "'Watching Booker express Black joy, in that space, felt like an affirmation for all the times we've all had to laugh or dance or cry out in exaltation in the face of racism and white supremacist systems'". Kiara Alfonseca, "Cory Booker delivers impassioned speech at Ketanji Brown Jackson hearing," ABC News, March 24, 2022. "'Even in the midst of clear racism and racist dog whistles, Booker could look into the face of Judge Brown-Jackson, see the long line of Black people who came before her, and rejoice with her'", she said. Id.

"President Biden signed legislation. . . to make Juneteenth a federal holiday, enshrining June 19 as the national day to commemorate the end of slavery in the United States", and told reporters, "'All Americans can feel the power of this day, and learn from our history,'" while "at a ceremony at the White House, noting that it was the first national holiday established since Martin Luther King's Birthday in 1983." Annie Karni & Luke Broadwater "Biden Signs Law Making Juneteenth a Federal Holiday," *The New York Times*, June 17, 2021, *updated* June 19, 2021. "He said signing the law was one of the greatest honors he will have as president." *Id.*

Yet one friend of Appellant's father, with whom Appellant had shared a spiritual

mentor in Dr. Benjamin Elijah Mays, the former President of Morehouse College in Atlanta, and in whose pulpit the President had preached on the weekend celebration of the slain civil rights leader's birthday, Peter Baker, "A Year After a Fiery Voting Rights Speech, Biden Delivers a More Muted Address," New York Times, January 15, 2023, had taken the view a century after the signing of the Emancipation Proclamation, that, while "[t]his momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice", and had come "as a joyous daybreak to end the long night of their captivity", still, "one hundred years later, the Negro still is not free." Martin Luther King, Jr., I Have a Dream, August 28, 1963.

According to that dreamer, "[o]ne hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination." Id. According to that aspirational leader, "[o]ne hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity." Id. According to that martyr, "[o]ne hundred years later, the Negro is still languished in the corners of American society and finds himself an exile in his own land", and, accordingly, he had declared, stating his purpose for another speech, "we've come here today to dramatize a shameful condition." Id. And, of record, Appellant, in the eyes of the President, ain't really Black. 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.

B. Justice Flowing Like Waters and Righteousness a Mighty Stream

It is well-established generally in American jurisprudence that "[t]o survive, 'a

complaint must contain factual matter, accepted as true, to 'state a claim of relief that is plausible on the face'", *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)), and a claim is presumed to have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged". *Twombly*, 550 U.S., at 544.

While "[t]he Court is not required to 'conjure up questions never squarely presented' in the complaint", *Brice v. Jenkins*, 489 F. Supp. 2d 538 (E.D. Va. 2007) (citations omitted), Article III Courts have noted that "[i]n the great run of *pro se* cases, the issues are faintly articulated and often only dimly perceived", *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir. 1978). Accordingly, "[t]he Court is mindful that a *pro se* plaintiff's complaint, 'however inartfully pleaded,' is subjected to 'less stringent standards than formal pleadings drafted by lawyers'," *Brice*, 489 F. Supp. 2d, at 538 (citations omitted). Moreover, "[t]he Court further notes that the 'district courts must be especially solicitous of civil rights plaintiffs.'" *Id.* (citations omitted).

While "the liberal construction applied to a *pro se* plaintiff's complaint has its limits", *Id.* (citations omitted), in the present matter raised on appeal, in assignment of error, a Reviewing Court should find that "[f]ollowing the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." *Conley v. Gibson*, 355 U.S. 41 (1957).

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

A. The Process That Is Due

It has oft been repeated that "'[i]t is emphatically the province and duty of the judicial department to say what the law is'," *Nixon,* 418 U.S., at 683 (citations omittted), and it has often been stated that due process, when not derogated, is defined as "the process that is due under particular circumstances and does not invariably mandate trial-type proceedings." *Sec'y of Labor v. T.P. Mining, Inc.*, 8 FMSHRC 687 (1986).

In a matter brought not by an unrepresented litigant, but rather two trained and licensed legal professionals, this Honorable Court was compelled, at the outset to disabuse a misconceived notion of the law, stating, "We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, c. 75) is in derogation of rights secured by the *Preamble* of the *Constitution of the United States*', and observing that, "[a]lthough that *Preamble* indicates the general purposes for which the people ordained and established the *Constitution*, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments." *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

And, in that landmark decision, this Honorable Court had observed, at the outset, that "[a]lthough, therefore, 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." *Id.* (citing 1 *Story's Const.* § 462).

Some jurists in the inchoate democratic republic had observed that "[n]o consent can give jurisdiction against the plain words of the act of Assembly; which are too clear to admit of a doubt", *M'Call v. Peachy*, 5 Va. 55 (1797), and, apparently or perhaps, in the present matter, "the whole difficulty arises from confounding the ancient with the present jurisdiction of the. . . Courts", *Wilkinson v. Mayo*, 13 Va. 565 (1809), for, unless the *pro se* Appellant misperceives the plain word meaning of the controlling provisions under the *FOIA*, it is crystal clear that, "[o]n complaint, the district court of the United States. . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant", 5 U.S.C. § 552(a)(4)(B)[1].

Yet, despite the observation by one court that that which is "arbitrary and unreasonable" is, *per se*, that which should have "constituted an abuse of discretion", *Azalea Corp. v. City of Richmond*, 201 Va. 636 (1960), according to the Trial Court, "[t]he prolix complaint, totaling 90-pages, is difficult to follow." Order, *Webb v. Department of the Army*, Civil Action No. 1:22-cv-02236-UNA (E.D.Va. 2022). However, despite being affirmed on appeal to the Fourth Circuit, *Webb v. Department of the Army*, Record No. 22-5292 (4th Circuit 2023), as noted in his petition for that appeal, the document described as "totaling 90-pages" did not even describe his complaint.

[1] "In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B)." *Id.*

As noted to the Circuit Court, that found no abuse of discretion, on appeal, "'[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.'" Petition for Appeal, (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364 (1948)). And, at least according to the Trial Court, "the complaint is mostly incomprehensible" conforming to a description of "[a] confused and rambling narrative of charges and conclusions", a short and plain statement of the claim showing that the pleader is entitled to relief', *Id.* (quoting *Cheeks v. Fort Myer Constr. Corp.*, 71 F. Supp. 163 (D.D.C. 2014)).

However, paragraphs 1 through 68, including a certification for the notary, in addition to an exhibit, total only 27 pages, and 7,455 words, as determined by the word processor word count, found the Trial Court, apparently, borrowing a template for other unrepresented litigants, or conceivably reviewing a complaint that contained "a confused and rambling narrative of charges and conclusions", and had determined that the Verified Complaint, filed by Appellant, "does not comply with the requirements of Rule 8", *Id.* (citations omitted), containing "bold conclusions, sharp harangues and personal comments", *Id.* (citations omitted), and, the Trial Court, thereby, dismissed Appellant's case, in clear error. While perhaps appropriate and proper had this been that case, but this is not that case.

The circumstances are quite akin in character to a matter once brought before the Courts of the Commonwealth in which, according to that court of competent jurisdiction, on review, "The plaintiff in error [wa]s a negro" apparently, "indicted for

killing a man whom the negro witnesses describe[d] as the 'Jew,'", in "[m]ost of the witnesses for and against him were also negroes, and a very ignorant set", finding "[s]ome of them. . . unable to tell their ages, or the time by the clock, and one of them could not tell whether five minutes or ten minutes were the longer time", and "[m]any of their statements seemed highly improbable, and they had very inadequate ideas of time or distance, and yet they did not hesitate to give their opinions on the time of day or night when events occurred, or the distance of one place from another." *Patterson v. Commonwealth*, 139 Va. 589 (1924). According to that Reviewing Court, convened in the year in which Appellant's grandfather, a Negro preacher, had been shot for simply appearing that he was determined to exercise his franchise rights, "[i]t was chiefly with reference to such matters that their statements were confused or contradictory", and "[w]hen confronted with inconsistent statements in their testimony and asked which was correct, several of them answered both, and one of those who gave such an answer was a preacher, who was supposed, at least, to be better educated than the rank and file of his race." *Id.*

It was the opinion of that court that "[t]he jury who saw their demeanor on the stand and heard them testify were far better qualified to ascertain the facts than this court can be from simply reading the printed record", and that "[t]here was enacted before them a scene that could not be transmitted to this court." *Id.*

At least according to some noted authorities in the scientific press, " African Americans have a dim view of the nation's health care system, which they see as infected by the same racism they encounter on the job, out shopping, in the classroom

or interacting with the police." Michael A. Fletcher, "Black Americans see a health-care system infected by racism, new poll shows," *National Geographic*, October 16, 2021. Beyond a finding that "[d]ifferent treatment contributed to mistrust, which only compounded medical problems," that article had noted that "[d]octors have poorer communication with Black patients than white ones", that "[d]octors tended to dominate visits with Black patients by talking, rather than listening and connecting with patients," while "[w]ith white patients, the conversation more often flowed two ways". *Id.* "The result is that Black patients often are reluctant to share whatever ails them and, more often than white patients, leave doctor's visits feeling unheard." *Id.*[2]

At least one case within the confines of his federal jurisdiction had described such a substantive right derogated in irreparable harm, *Cohen v. Rosenst*ein, 691 F. App'x 728, (Mem)-730 (4th Cir. 2017), a material finding for at least, in equity, a grant of injunctive relief upon infringement thereof, a legal cause of action even recognized, even if in dissent, by the Virginia State Attorney General. *See* Opp. Brief, *Hughes v. Northam*, Civil Action No. CL20-415 (Russell Cy. Cir.) (quoting *School Bd. of Richmond v. Wilder*, 73 Va. Cir. 251 (City of Richmond Cir. Ct. 2007))[3]. And, under the *FOIA*, accordingly, injunctive relief is provided therefor. 5 U.S.C. § 552(a)(4)(B).

B. Privileges or Immunities

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[2] "'Physicians tend to dominate the conversations when they are seeing African American patients,' Cooper said. 'African American patients get to ask fewer questions, they get less opportunity to explain themselves or to offer their opinions or their preferences.'" *Id.*

[3] "A party seeking injunctive relief 'must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.*

It is a fundamental tenet of American law that "[n]o 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", *Fourteenth Amendment*, and, in direct and actual injury, this Honorable Court has observed that "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)[4].

And, evidence of a contemporary character from Carrie Leestma, an education specialist with the Fairfax County Public Schools, warningly suggests that "We shouldn't be able to look at a group of kindergartners and know in six years who is not going to be reading, based on race." Sarah Carr, "How Black activists in Northern Virginia transformed the way children learn to read," *Washington Post*, December 27, 2022.

And, yet, "'[i]t is emphatically the province and duty of the judicial department to say what the law is'", *Nixon,* 418 U.S., at 683 (citations omitted); however, according to the President, Appellant, in an identity politic, "ain't really Black." Eric Bradner,

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[4] "The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'" *Id.*

Sarah Mucha & Arlette Saenz, "Biden: 'If you have a problem figuring out whether you're for me or Trump, then you ain't black'," *supra.*

Still, one Negro preacher had declared, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." Martin Luther King, Jr., *I Have a Dream*, *supra.* "I have a dream today." *Id.*

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

A. Entitlement to Relief

On March 20, 2023, the Circuit Court of Appeals had affirmed the judgment of the District Court, in a decision "considered on the record. . . on the brief filed by Appellant, Order, *Webb v. Department of the Army*, Record No. 22-5292 (D.C. Cir. 2023) (citing Fed.R.App. Pro. 41(b); D.C. Cir. Rule 41), and had concluded that "Appellant has not shown that the district court abused its discretion in dismissing the complaint and case without prejudice for failure to comply with the pleading standard of Federal Rule of Civil Procedure 8(a), which requires 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed.R.Civ.Pro. 8(a)). However, in review of what may be perceived in complaint as a departure from established norms and precedent, this Court had prudently determined, in the past, that the test is whether there is "no reasonable basis for the state court to deny relief." *Estep v. Ballard,* 502 F. App'x 234 (4th Cir. 2012) (citations omitted).

"[I]t 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". *Leeke*, 574 F.2d, at 1147 (citations omitted). And to suggest that in a 21-page complaint, liberally construed as "a prolix complaint, totaling 90-pages," Order, *Webb v. Department of the Army*, Civil Action No. 1:22-cv-02236-UNA (E.D.Va. 2022), with three months to review, notwithstanding the mandate under 28 U.S.C. § 1657, that a court of competent jurisdiction, somehow found inscrutable a prayer "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant", 5 U.S.C. § 552(a)(4)(B), is a "proffered explanation [that] is unworthy of credence". *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981).

And Appellant, under law, is "deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph". 5 U.S.C. § 552 (6)(C)(i). Clearly, under the plain word meaning of that rule, this was "the process that is due under particular circumstances". *T.P. Mining, Inc.*, 8 FMSHRC, at 687.

This Honorable Court has recognized that [t]he defense of necessity traditionally addresses the dilemma created when physical forces beyond the actor's control render 'illegal conduct the lesser of two evils.'" *Buckley v. City of Falls Church*, 7 Va.App. 32 (1988) (quoting *U.S. v. Bailey*, 444 U.S. 394 (1980)). And, in *Buckley*, it had been recognized that:

> The essential elements of this defense include: (1) a reasonable belief that the action was necessary to avoid an imminent threatened harm; (2) a lack of other

adequate means to avoid the threatened harm; and (3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm.[footnote omitted] *United States v. Cassidy*, 616 F.2d 101, 102 (4th Cir.1979). One principle remains constant in modern cases considering the defense of necessity: if there is "a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' " the defense is not available. *Bailey*, 444 U.S. at 410, 100 S.Ct. at 635 (quoting W. LaFave & A. Scott, *Criminal Law* § 49 at 379 (1972)).

B. Strict Scrutiny

"The highest standard, strict scrutiny, applies where '[w]here certain 'fundamental rights' are involved, and requires that legislation or actions 'limiting these rights may be justified only by a 'compelling state interest,' requiring legislation and action 'must be narrowly drawn to express only the legitimate state interests at stake." *Hawkins v. Grese*, 68 Va.App. 462 (1982) (citations omitted). "Such fundamental rights include not only those listed in the *Bill of Rights* but additional implied rights protected by the *Fourteenth Amendment*. And some jurists have observed that "*Hart v. Seixas*, 21 Wend. 40, seems to have been founded on the mistaken supposition that a court of error cannot look beyond the record, as returned or certified, for the purpose of ascertaining whether the rules of law have been observed", for "[a] certiorari will then issue to ascertain the truth of his statement, and the judgment be reversed if it is sustained, unless the omission is merely formal and accidental, when it may be corrected by an entry *nunc pro tunc*." *Hill v. Woodward*, 78 Va. 765 (1884). Nonetheless, upon "conduct, as disclosed by the record, the appell[ee] is estopped from questioning the verity of the record." *Id.*

With no entry of appearance by any Respondent-Appellee, *sua sponte*, the Trial Court had acknowledged that "[t]his matter [wa]s before the Court on its initial

review of plaintiff's *pro se* complaint, ECF No. 1, and application for leave to proceed *in forma pauperis* ('IFP'), ECF No. 2", and "[t]he Court. . . grant[ed] petitioner's IFP application". Order, *Webb v. Department of the Army,* Civil Action No. 1:22-cv-02236-UNA (E.D.Va. 2022).

Under Fed.R.Civ.Pro. 4(c)(3), "[a]t the plaintiff's request, *the court may order* that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court"; however, "[t]he court *must so order* if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916." As disclosed by the record, while there is a zealous application asserted regarding Fed.R.Civ.Pro. 8, no such effort was made, after approval of the IFP to assure "that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court", as mandated under Fed.R.Civ.Pro. 4(c)(3), and no Appellee-Respondent has yet entered an appearance, even on appeal to the Circuit Court. Clearly, under the plain word meaning of that rule, this was "the process that is due under particular circumstances". *T.P. Mining, Inc.*, 8 FMSHRC, at 687.

Under Fed.R.Civ.Pro. 12(a)(A)(i), "[u]nless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: . . . [a] defendant must serve an answer: (i) within 21 days after being served with the summons and complaint", and, of record, since commencement of the action, on July 27, 2022, or even the approval of the IFP, on October 27, 2022, even after a notice of appeal had been filed, upon certification of service to Respondent-Appellees, not even

one has yet to enter an appearance in the matter. And, clearly, under the plain word meaning of that rule, this was "the process that is due under particular circumstances". *T.P. Mining, Inc.*, 8 FMSHRC, at 687.

Under Fed.R.Civ.Pro. 55(a), "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." And, clearly, under the plain word meaning of that rule, this was "the process that is due under particular circumstances". *T.P. Mining, Inc.*, 8 FMSHRC, at 687.

Yet, "[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) (Rehnquist J., dissenting with O'Connor and Thomas joining), essentially serving as gatekeeper for Respondent-Appellees, impugning the impartiality of the Trial Court.

At least in the Tenth Circuit, "[i]t is not reasonable for a court. . . to speak on behalf of courts in other circuits in the country; those courts are capable of taking appropriate action on their own." *Sieverding v. Colorado Bar Ass'n*, 469 F.3d 1340, 1342–45 (10th Cir. 2006). Moreover, in arguments similar to those raised by Appellant in other matters, see *Webb v. Garland*, Civ. Action No. 1:22-cv-01128-MSN-IDD (E.D.Va 2022), in a recent appeal that found a plaintiff disappointed with his damage award, his attorneys informed the press that "they will focus on the 'gatekeeping function' of the court in weighing testimony by their defense experts

that they said added credence to Nazario's claim that the trauma from the stop affected his mental health." Bill Atkinson, "Army officer requested $1.5M in damages after violent traffic stop by Virginia police. Jury awarded him $3,685," *USA Today*, January 18, 2023, indicating that the Trial Court may have found, with regard to Respondent-Appellees, represented by licensed counsel, that "[i]n the great run of . . . cases, the issues are faintly articulated and often only dimly perceived", requiring matriarchal assistance.

C. What Is Required

Unlike the patently mandatory language codified in Fed.R.Crim.Pro.6(a), Fed.R.Civ.Pro.4(c)(3), Fed.R.Civ.Pro. 55(a), and even Fed.R.Civ.Pro. 12(a)(A)(i), the Trial Court had determined that Order, *Webb v. Department of the Army*, Record No. 22-5292 (D.C. Cir. 2023) (citing Fed.R.App. Pro. 41(b); D.C. Cir. Rule 41), and had concluded that "Appellant has not shown that the district court abused its discretion in dismissing the complaint and case without prejudice for failure to comply with the pleading standard of Federal Rule of Civil Procedure 8(a), which requires 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"

"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 (citations omitted), 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.*

(citations omitted).

"If an ambiguity exists or an absurd result occurs, this Court is to resort to the cannons of statutory construction to determine the meaning of a statutory provision by focusing on the broader, statutory context." *U.S. v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004). And, where, as here, "there is "a serious doubt" as to the statute's constitutionality", *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (citations omitted), "we must 'ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* (citations omitted). And, clearly "[m]andatory words impose a duty; permissive words grant discretion", The Writing Center, A Guide to Reading, Interpreting and Applying Statutes, "Canons of Construction (Antonin Scalia & Brian Garner)," Georgetown University Legal Center (2017), https://docslib.org/doc/12918148/a-guide-to-reading-interpreting-and-applying-statutes1-%C2%A9-2017-the-writing-center-at-gulc (accessed December 30, 2022). And, it is a fundamental tenet of legislative deference doctrine that "[h]ad the legislature intended. . . [any other purpose or meaning]. . . , it would have said so." *Alger v. Com.*, 40 Va. App. 89 (2003), *aff'd*, 267 Va. 255 (2004)..

Clearly, under the plain word meaning of that rule, this was "the process that is due under particular circumstances", *T.P. Mining, Inc.*, 8 FMSHRC, at 687, and , "'[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,* l Cranch, at 137).

D. Define Conspiracy

"A claim for punitive damages at common law in a personal injury action must be supported by factual allegations sufficient to establish that the defendant's conduct

was willful or wanton", *Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619 (W.D. Va. 2015) (citations omitted), and "[s]ch damages 'are allowable only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others'." *Id.* (citations omitted). According to some jurists, "[a] conspiracy is an agreement between two or more persons by some concerted action to commit an offense", *Gray v. Commonwealth*, 260 Va. 675 (2000) (citations omitted), and "[t]he crime may be proved by circumstantial evidence"; "because of the very nature of the offense, 'it often may be established only by indirect and circumstantial evidence.'" *Id.* (citations omitted). And, "[i]n Virginia, the crime of conspiracy is complete when the parties agree to commit an offense." *Id.* (citations omitted); "[n]o overt act in furtherance of the underlying crime is necessary." *Id.* (citations omitted).

Others suggest that "'[t]he gist of the civil action of conspiracy is the damage caused by the acts committed in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use unlawful means." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 (1993) (citations omitted). And, "[t]o recover in an action for statutory conspiracy to harm a business, a plaintiff must prove a combination of two or more persons 'for the purpose of willfully and maliciously injuring another in his reputation, trade, business or profession,' Code § 18.2–499, and resulting damage to the plaintiff, Code § 18.2–500." *Id.* (citations omitted).

The gravamen of the present action, raised in assignments of error on appeal,

finds its genesis in just one email, obtained under the *FOIA*, with considerable difficulty, and only obtained through the assistance of the offices of Senator Mark Warner, upon the refusal to provide assistance by the offices of Congressman Don Beyer, Jr., and Senator Tim Kaine, political figures whom, at the relevant time were seeking election to Vice President, and expecting ascendancy, as an heir apparent to a vacated office in the U.S. Senate, respectively. Katherine Frey, "If Kaine becomes vice president, McAuliffe can fill his Senate Seat," *Washington Post*, July 23, 2016.

The single document, is arguably exempted from disclosure document, under *FOIA* Exemption 5[5], for "deliberative process" documents, in which an unknown employee, presumptively under the employ of Respondent-Appellee DIA, who had transmitted an email, dated December 30, 2015, to a party whose identity has been redacted, under *FOIA* Exemption 3[6], expressly identifying 10 U.S.C. § 424, as the controlling statute of reference, and, even if apparently enigmatic to both the Trial and Circuit Courts, limiting the list of the usual suspects to "the following organizations of the Department of Defense: (1) The Defense Intelligence Agency[;]. . . (2) The National Reconnaissance Office[; and]. . . The National Geospatial-Intelligence Agency."

The subject correspondence reported that an individual, with an identity redacted under the same provision, had "respectfully declined our offer for the position of" a

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[5] "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested". 5 U.S.C. § 552(b)(5).

[6] "specifically exempted from disclosure by statute (other than section 552b of this title), if that statute. . . (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld". 5 U.S.C. § 552(b)(3)(A).

similarly redacted job position, and had "accepted a position with another federal agency, leaving only "two alternate applicants remaining", including Appellant, and requesting authorization "to proceed with the making a job offer to the next alternate selection", which should have been a routine selection of the next most fully qualified applicant, or, in the alternative, "request[ing] to cancel and re-advertise the position due to a change in mission requirements", which would be the proper course for an expired mission requirement, raising a reasonable inference of suspicion regarding what should have been a routine decision, not subject to discretion, nor requiring permission.

The document had been the subject of multiple litigations, *i.e.*, *Webb v. DoD,* Docket Number DC-3443-18-0299-I-1 (MSPB 2018); *Webb v. MSPB*, Record Number 2019-1130 (D.C. 2018); *Webb v. MSPB*, Record Number 20-100 (Fed.Cir. 2018); *Webb v. MSPB*, Case Number 1:19-cv-257 (E.D.Va. 2019), *aff'd* Record Number 19-1436 (4th Cir. 2019), raising a reasonable inference of suspicion, *Terry v. Ohio*, 319 U.S. 1 (1968), challenging the parameters of 5 U.S.C. § 1221(a), which arguably provides clear authorization such that "an. . . applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such. . . applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), [to] seek corrective action from the Merit Systems Protection Board", as well as challenging the defining parameters of 5 U.S.C. § 1221(f)(3), which provides that "[i]f, based on evidence presented to it under this section, the Merit Systems Protection Board determines

that there is reason to believe that a current employee may have committed a prohibited personnel practice, the Board shall refer the matter to the Special Counsel to investigate and take appropriate action under section 1215", the subject of litigation, at least coincidentally correlated to what had become the longest lack of a quorum in the history of Respondent-Appellant MSPB, Case Law Update, "MSPB Issues Answers on Lack of Quorum at Outset of New Administration." *Fed Manager*, January 31, 2017, about which, today, of report, it will take five years to eliminate the backlog caused thereby. Geoff Schweller, "Former MSPB Member Predicts Case Backlog Will Take 5 Years to Resolve," *Whistleblower Network News*, February 2, 2022.

Simply stated, albeit apparently presenting a mystery to the lower courts, this litigation calls into question not just the integrity of government agencies, under the *FOIA*, but also the integrity of the civil service system, and the President himself had conceded, on the first anniversary of the pandemic declaration, that "We lost faith in whether our government and our democracy can deliver on really hard things for the American people." Briefing Room, "Remarks by President Biden on the Anniversary of the COVID-19 Shutdown," *The White House*, March 21, 2021.

"Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law", *Richlands Med. Ass'n v. Commonwealth*, 230 Va. 384 (1985), but, since the earliest days of an inchoate democratic republic, it has been established that "[t]o render a mandamus a proper remedy, the officer to whom it is directed must be one to whom, on legal principles,

such writ must be directed, and the person applying for it must be without any other specific remedy."*Marbury*, 5 U.S., at 137.

"The writ of mandamus issues, no matter from what court it is issued, only in those cases in which there is no other adequate legal remedy, and, therefore, to prevent a failure of justice", *Clay v. Ballard*, 87 Va. 787 (Va. 1891), and "[mandamus] may be appropriately used and is often used to compel courts to act where they refuse to act and ought to act, but not to direct and control the judicial discretion to be exercised in the performance of the act to be done; to compel courts to hear and decide where they have jurisdiction, but not to pre-determine the decision to be made; to require them to proceed to judgment, but not to fix and prescribe the judgment to be rendered." *Page v. Clopton*, 71 Va. (30 Gratt.) 415 (1878).

This Honorable Court has said, "this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." *Ex parte Ayers*, 123 U.S. 443 (1887)[7]. And, "[w]here the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are

[7] "In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void." *Id.*

regarded as the real party, and the relator at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such, interested in the execution of the laws." High, *Extr. Rem.*, sec. 431. *See also Ferry v. Williams*, 41 N.J.L. 332 (Sup. Ct. 1879).

Appellant only sought to pursue the exercise of this right, and arguably duty of a citizen, and, coming "to dramatize a shameful condition," as one dead Negro preacher said, " "All we say to America is, 'Be true to what you said on paper,'" Martin Luther King, Jr., *I've Been to the Mountaintop*, August 28, 1968.

It clear, under law, with no ambiguity, that "a defendant is presumed to continue his involvement in a conspiracy unless he makes a substantial affirmative showing of 'withdrawal, abandonment, or defeat of the conspiratorial purpose.'" *U.S. v. Heard*, 709 F.3d 413 (5th Cir. 2013) (citations omitted). "Mere cessation of activity in furtherance of the conspiracy is not sufficient to show withdrawal." *Id.* (citations omitted).

And, while "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control", *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (quoting 18 U.S.C. § 2339B(h)), "a terrorist is 'any one who attempts to further his views by a system of coercive intimidation.'" *U.S. v. Christianson*, 586 F.3d 532 (7th Cir. 2009) (citations omitted).

"Means of knowledge with the duty of using them are, in equity, equivalent to

knowledge itself." *Cordova v. Hood*, 84 U.S. 1 (1872). Moreover, while a "lack of vigilance . . . is not enough; *there must also be proof of knowledge of the facts, coupled with an intention to aid in the unlawful act by refraining from doing that which he was in duty bound to do." Burkhardt v. U.S.*, 13 F.2d 841 (6th Cir. 1926). And, relying upon this precedent, later courts had observed 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) (citations omitted).

"The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful." *U.S. v. Calley*, 22 U.S.C.M.A. 534 (1973). Moreover, under a rule of law, "once the conspiracy has been established, the government need show only 'slight evidence' that a particular person was a member of the conspiracy." *U.S. v. Elliott*, 571 F.2d 880 (5th Cir. 1978) (citations omitted).

One tribunal, of international fame and notoriety, had found dispositive of its accused that "undoubtedly he knew the value of the tale about 'administration of tonics,' to which he put his signature" *Government of Israel v. Eichmann*, 36 I.L.R. 5 (Supreme Court of Israel, 1961). Clearly, under the plain word meaning of that rule, this was "the process that is due under particular circumstances", *T.P. Mining, Inc.*,

8 FMSHRC, at 687, and , "'[i]t is emphatically the province and duty of the judicial department to say what the law is'", *Nixon,* 418 U.S., at 683 (citations omitted).

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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 ("Appellant" or "Webb") respectfully petitions for grant of certiorari regarding a dismissal ordered, dated October 27, 2022, and affirmed on March 20, 2023, in error, finding no abuse of discretion in the matter raised, in assignments of error, on appeal in petition of certiorari.

STATEMENT OF THE CASE

On December 31, 2015, an email, obtained under the *FOIA*, arguably exempt from disclosure under *FOIA* Exemption 3, set off a series of litigations regarding an improper job offer to a former biological warfare planner while he was a congressional candidate, which, would at least provide a *prima facie* case for an illegal gratuity, under 18 U.S.C. § 201(c), but for which a decision to pursue an investigation regarding a whistleblower complaint, in accordance with of 5 U.S.C. § 1221(f)(3), remains extant in disposition. *Webb v. DoD*, Docket Number DC-3443-18-0299-I-1 (MSPB 2018).

Indefatigable in obligation to duty, Appellant sought to revive the litigation, seeking simultaneously, through the *FOIA/PA* an attempt to identify the senior defense official, whose identity was redacted under *FOIA* Exemption 3, 5 U.S.C. § 552(b)(3), under specific authorization under 10 U.S.C. § 424(b), who had authorized the suspect job offer, noting that "Fraud" has been defined as "[a]ny intentional deception designed to unlawfully deprive the United States of something of value or

to secure a benefit, privilege, allowance, or consideration for an individual from the United States that he or she is not entitled to." Staff, "The DIA Hotline," *DIA*, https://oig.dia.mil/DIA-Hotline/ (accessed June 14, 2022). According to the Agency, "[s]uch practices include, but are not limited to the offer, payment, or acceptance *of bribes or gratuities*". *Id.* "The term also includes conflict of interest cases, criminal irregularities, and the unauthorized disclosure of official information relating to procurement and disposal matters." *Id.* And, as noted in the request, under 5 U.S.C. § 552a(g)(3)(A),

> In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter *de novo*, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

Under Executive Order 12,958, *Classified National Security Information*, April 17, 1995, Section 1.8, "[i]n no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security." However, Article III Courts have recently held, that, when "there is no indication that these materials were classified 'in order to' conceal violations of the law", such records are not thereby released for disclosure. *ACLU v. DoD*, 584 F. Supp. 2d 19 (D.D.C. 2008). Such is not at issue in the present matter.

Moreover, while under the *FOIA*, "[n]othing in this paragraph requires disclosure

of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3)", 5 U.S.C. § 552(a)(8)(B), "the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding", 5 U.S.C. § 552(a)(4)(F)(i), and, under 5 U.S.C. § 552(c)(1), "[w]henever a request is made which involves access to records described in subsection (b)(7)(A) and. . .(A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section." However, such requires an investigation to trigger this requirement, and the Agency has made no claim for exemption under this provision. Furthermore,

> The *APA* authorizes courts reviewing agency actions to[:] 1. compel agency action unlawfully withheld or unreasonably delayed; and 2. hold unlawful and set aside agency action, findings, and conclusions found to be. . . a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; b. contrary to constitutional right, power, privilege, or immunity; c. in excess of statutory jurisdiction, authority, limitations, or short of statutory right; d. without observance of procedure required by law; e. unsupported by substantial evidence in a case subject to Sections 556 and 557 of Title 5 or otherwise reviewed on the record of an agency hearing provided by statute; and f. unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court." Jonathan M. Gaffney, "Judicial Review Under the Administrative Procedure Act (APA)," *CRS*, December 8, 2020. Accordingly, the Government cannot, consistent with the *FOIA*, elect a right to remain silent to conceal violations of law.

REASONS FOR GRANTING CERTIORARI

I. Whether, given "the accepted rule that a complaint should not be dismissed for failure to state a claim 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", as articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), it constitutes a violation of due process, under the *Fifth Amendment*, when an agency fails to respond, in any manner, to a request for documents under the *Freedom of Information Act (FOIA)*, 5 U.S.C. § 552/Privacy Act (PA), 5 U.S.C. § 552a.

"The power to create presumptions is not a means of escape from constitutional restrictions," *Bailey v. Alabama,* 219 U.S. 219 (1911), and many jurisdictions have concurred that "[a] power thus essential to a State, which may be exercised so advantageously for the promotion of piety, education and works of public improvement and utility, should never be held to be surrendered by mere implication, but only by plain and express language", and such "shall not be construed to have been surrendered or diminished by the State unless it shall appear by plain words it was intended to have been done." (citations omitted). And, as at least one Justice has noted, while the *Fourteenth Amendment* clearly distinguishes a right to due process from a right to equal protection, *U.S. v. Vaello Madero*, 596 U.S. ___ (2022) (Thomas J., concurring), if a right to equal protection may be found, it "may well be found in the *Fourteenth Amendment's Citizenship Clause*", providing that "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." *Id.* (quoting Amdt. 14, §1, cl. 1.).

To the extent that Appellant had a right, *vis á vis* other citizens pertaining to equal protection, under the civil remedies availed to citizens under the *FOIA*, in

injunctive relief, 5 U.S.C. § 552(a)(4)(B), it may be stated that he had been denied "citizens of the United States and of the State wherein they reside." *Vaello Madero*, 596 U.S., at ___ (2022) (Thomas J., concurring) (quoting Amdt. 14, §1, cl. 1.). However, as argued above, Appellant had also been denied a codified process, to which every citizen is entitled, and clearly, under the plain word meaning of that rule, this was "the process that is due under particular circumstances", *T.P. Mining, Inc.*, 8 FMSHRC, at 687, and , "'[i]t is emphatically the province and duty of the judicial department to say what the law is'", *Nixon,* 418 U.S., at 683 (citations omitted).

II. Whether, under Fed.R.Civ.Pro. 8, the guidance that "all the Rules require is 'a short and plain statement of the claim' [footnote omitted] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests", *Id.* (citing Fed.R.Civ.Pro. 8(a)(2)), imposes a limit upon the extent to which an unrepresented plaintiff may articulate allegations in his or her claim.

"The constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the *Due Process Clause.*" *Tanner v. City of Virginia Beach*, 277 Va. 432 (2009) (citations omitted). "The doctrine requires that a statute or ordinance be sufficiently precise and definite to give fair warning to an actor that contemplated conduct is criminal. *Id.* (*Kolender v. Lawson,* 461 U.S. 352 (1983); *Grayned,* 408 U.S. at 104)). "Thus, the language of a law is unconstitutionally vague if persons of 'common intelligence must necessarily guess at [the] meaning [of the language] and differ as to its application." *Id.* (citations omitted).

It has been claimed that "[t]he constitutional prohibition against vagueness also

protects citizens from the arbitrary and discriminatory enforcement of laws", no more demonstrated clearly as here, where, under a vague standard, a Trial Court, affirmed on review, had proffered that a rule, establishing a minimum for notice pleading had set a bar in number of pages, paragraphs or words so as to exceed that which was tolerable, an unoffensive to a rule, which has not equivalent under Fed.R.Civ.Pro. 12, where a defendant is free, and capable, to defend himself with standard objections, without impugning the impartiality of the judiciary, while "[a] vague law invites such disparate treatment by impermissibly delegating policy considerations 'to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" *Tanner*, 277 Va., at 432 (citations omitted).

III. Whether a Trial Court, in abuse of discretion, offends Fed.R.Civ.Pro. 8(f)'s mandate that "all pleadings shall be so construed as to do substantial justice," where, granted priority of action, under statute, 28 U.S.C. § 1657, and where granted a specific right to "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant", 5 U.S.C. § 552(a)(4)(B), having been acknowledged to have been "deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph", 5 U.S.C. § 552 (6)(C)(i), by dismissing said complaint.

A court will find it at least proper to reconsider a decision rendered where it may have "applied the wrong standard," *Proffitt v. Com.*, No. 1424-10-2, 2011 WL 5346032, at *1–4 (Va. Ct. App. Nov. 8, 2011), or where its conclusions may be contrary to law, *Com. v. Greer*, 63 Va. App. 561 (2014), and, indisputably, under *Conley*, this Honorable Court has endorsed the plain word language of the rule articulated in

Fed.R.Civ.Pro. 8(f)'s mandate that "all pleadings shall be so construed as to do substantial justice," and no reasonable trier of fact could find that, in the matter raised on assignments of error, substantial justice was not achieved, but rather, "[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) (Rehnquist J., dissenting with O'Connor and Thomas joining), ignoring, in the process, mandatory provisions, as noted above, under 28 U.S.C. § 1657, 5 U.S.C. § 552(a)(4)(B), Fed.R.Civ.Pro.4(c)(3), Fed.R.Civ.Pro. 55(a), Fed.R.Civ.Pro. 12(a)(A)(i) and Fed.R.Crim.Pro. 6(a).

"The board lost its quorum when Democrat Susan Tsui Grundmann left in January 2017", while "Anne Wagner, also a Democrat nominated by President Barack Obama, had left in February 2015." Louis C. LaBrecque, "Feds in Job Limbo Look to Biden to Unlock Cases Frozen for Years," *Bloomberg Law*, December 3, 2020. "MSPB's last member Mark Robbins, predicted that the nearly 2,000 cases in backlog when he departed the position in March 2019 would take three years to process." Jessie Bur, "How merit board nominees plan to address the ever-growing backlog," *Federal Times*, September 22, 2022. Congressman Gerry Connolly had agreed that "'It is clear, however, that whistleblowers will lose, because the Office of Special Counsel will no longer be able to abstain a stay of retaliatory actions against them.'" Jessie Bur, "Who will handle federal employee appeals now?" *Federal Times*, February 28, 2019. Moreover, some projected that "[t]he case backlog, which w[ould]

result in millions in back pay going to appellants who prevail, and the continued lack of board members le[ft] the government's 2.1 million federal workers without their most obvious option for appealing decisions by MSPB administrative judges." Louis C. LaBrecque, "Bypassing Memberless Federal Personnel Board Is Doable for Some," *Bloomberg Law*, December 11, 2019. And, "[s]ome federal employees who lost an initial ruling before an administrative judge ha[d] decided to leapfrog the central board and go directly to the federal circuit, a more expensive, but faster, option", Eric Katz, Federal Employee Appeals Board Nominees Pledge Equity, Quick Action on Backlog," *Government Executive*, July 19, 2018, an option available under the *All Circuits Review Act*, 28 U.S.C. § 1295, an option denied to Appellant. *See Webb v. MSPB*, Record Number 20-100 (Fed.Cir. 2018).

"During Vice Chair and Acting Chairman Mark Robbins's tenure, when the backlog was beginning to grow, the legal offices determined it would be advisable to create a recommended plan to present to the new Board on how to best approach the backlog." Susan Swafford, Memorandum to Raymond A. Limon & Tristan L. Leavitt, "Recommended Approach for the Petition for Review Backlog For resolution," March 10, 2022. For resolution, in part, in *Benton v. MSPB*, Record No. 2015-3004 (D.C. Cir. 2019), "[t]he appeals court adopted th[e] suggestion, and instructed the transfer of its remand from the 'petition for review level' to an administrative judge 'for review, investigation, and resolution of the issues for which this court remanded to the Board' in 2016." Connor D. Dirks, "Federal Circuit Skips Quorum-Less Board, Remands to MSPB Administrative Judge," *Fed Manager*, May 7, 2019. *But see* Louis

C. LaBrecque, "Bypassing Memberless Federal Personnel Board Is Doable for Some," *supra*[8]. Of record, the withdrawal policy Appellant had legally challenged, *Webb v. MSPB*, Case Number 1:19-cv-257 (E.D.Va. 2019), *aff'd* Record Number 19-1436 (4th Cir. 2019), and had formally petitioned to have repealed, *i.e.*, Mark A. Robbins, "Policy Regarding Clerk's Authority to Grant Requests to Withdraw Petitions for Review," *MSPB*, May 11, 2018, was, pursuant to his concerns presented modified, as in evidence at Exhibit **A**, but with no acknowledgment of culpability, but still raising a reasonable inference that there existed "unusual conduct which leads. . . [one] reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry*, 319 U.S., at 1.

IV. Whether, under Fed.R.Crim.Pro. 6(a), which provides, in relevant part that "the court must order that one or more grand juries be summoned", it is sufficiently in the public interest, where a court is presented a *prima facie* case for commission of a felony, precluding prosecutorial discretion.

Sufficient evidence in the record suggests a pattern of unlawful activity, as well as knowledge of such by Respondents, and "[t]he Government may prove the defendant's knowing participation in a conspiracy through circumstantial evidence, including: (1) the defendant's association with conspirators in furtherance of the conspiracy; (2) his or her presence at 'critical stages of the conspiracy that cannot be explained by happenstance'; (3) his or her 'possession of items that are of essential significance to the conspiracy'; and (4) acts that show a consciousness of guilt, including false exculpatory statements." *U.S. v. Climico*, No. S2 11 CR. 974-08 CM,

[8] "'Even if stays could be legally delegated down, they haven't been,' said Robbins at the hearing." *Id.*

2014 WL 4230320, at *1–7 (S.D.N.Y. Aug. 7, 2014) (citations omitted). Accordingly, if such conduct fails to trigger the convening of a grand jury, the standard is vague, rendering the rule meaningless.

CONCLUSION

For the reasons stated above, Appellant, Webb respectfully requests the Court to grant certiorari to determine whether the decision by the District Court 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
Address: 955 S. Columbus Street, Unit# 426, Arlington, Virginia 22204
Email Address: GiveFaithATry@gmail.com

Signature: MCW Executed on: 4-6-23
(Date)

Subscribed, acknowledged and sworn to before me, the undersigned Notary Public in the County of Arlington in the Commonwealth of Virginia, this 6 day of April, 20 23.

NOTARY PUBLIC

My commission expires: 06-30-2026 Registration Number: 8012371