22-7748

No. 23-A_____

In The
Supreme Court of the United States

MAJOR MIKE WEBB, D/B/A FRIENDS FOR MIKE WEBB (C00591537), A/K/A MAJOR MIKE WEBB FOR CONGRESS (H8VA08167), A/K/A MAJOR MIKE FOR VA, A/K/A MIKE WEBB FOR APS BOARD

Pro Se Applicant-Apellant,

v.

JAMES CHRISTIAN KIMMEL, AMERICAN BROADCAST COMPANY, INC., D/B/A JIMMY KIMMEL LIVE!, WJLA TV, a/k/a NEWS CHANNEL 8, SINCLAIR BROADCAST GROUP, WUSA9, a/k/a CHANNEL 9, ABC LEGAL SERVICES, and JANE AND JOHN DOES

Respondent-Appellees.

To the Honorable John Roberts, Chief Justice of the United States Supreme Court and Acting Circuit Justice for the Fourth Circuit

Application for Writ of Certiorari to Review a Case Before Judgment

MAJOR MIKE WEBB, *PRO SE*
Counsel of Record
955 S. Columbus Street
Apartment 426
Arlington, Virginia
(856) 220-1354
GiveFaithATry@gmail.com

QUESTIONS PRESENTED

As a rule, it is generally clear that "[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. . . within 21 days after being served with the summons and complaint", Fed.R.Civ.Pro. 12(a)(1)(A)(i), and "[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." Fed.R.Civ.Pro. 55(a), unless, apparently, the plaintiff is an unrepresented litigant in a civil suit brought under the federal racketeering statute, in which Article III courts have assumed upon themselves, regarding "'an unusually potent weapon—the litigation equivalent of a thermonuclear device'", *Brookhaven Town Conservative Comm. v. Walsh*, No. 14CV6097JFBARL, 2016 WL 1171583, at *1–8 (E.D.N.Y. Mar. 23, 2016) (quoting *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649 (S.D.N.Y. 1996) (quoting *Miranda v. Ponce Fed. Bank*, 948 F.2d 41 (1st Cir. 1991)), *aff'd*, 113 F.3d 1229 (2d Cir. 1997)), to strive to flush out frivolous *RICO* allegations at an early stage of the litigation'". *Id.* (quoting *Figueroa Ruiz v. Alegria*, 896 F.2d 645 (1st Cir. 1990). Accordingly, the questions presented are:

1. Whether it is an abuse of discretion, before the opening of discovery, under Fed.R.Evid. 403, for a Trial to "exclude relevant evidence", deeming it substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence", specifically, dismissing an affidavit, filed pursuant to Fed.R.Civ.Pro. 55, pertaining to default judgment.

2. Whether, in a matter brought under the federal racketeering statute, the Trial Court had abused discretion, refusing to "accept as true all factual allegations in the complaint, construe[ing] the record in favor of

plaintiff, and decid[ing] whether as a matter of law, the plaintiff could prove no set of facts which would entitle it to relief." *In re: JET 1 Center, Inc.*, 319 B.R. 11 (M.D.Fl. 2004) (citing *Parker v. Wakelin*, 822 F.Supp. 1131 (D.Me. 1995); *Straka v. Francis*, 867 F.Supp. 767 (N.D. Ill. 1994); *Bensch v. Metropolitan Dade County*, 855 F.Supp. 351 (S.D.Fla. 1994)).

3. Whether, pursuant to Fed.R.Civ.Pro. 8(a), "which requires a short and plain statement of the grounds for this Court's jurisdiction and a statement of the claims showing that the plaintiff is entitled to relief," ECF No. 43, Order, dated May 18, 2023, for failure to state a claim in a case brought under the federal racketeering statute, 18 U.S.C. § 1964(c), pre-empting motions to dismiss filed by defendants.

4. Whether, defendants in a civil matter, brought under the federal racketeering statute, 18 U.S.C. § 1964(c), which for elements of proof include predicate offenses under state and federal criminal code, are precluded from generally averring an inability to understand allegations that in criminal court may only be defeated by presenting a reasonable doubt, consistent with a *Fifth Amendment* right to avoid self-incrimination.

PARTIES AND RULE 29.6 STATEMENT

Applicant-Appellant is MAJOR MIKE WEBB, D/B/A FRIENDS FOR MIKE WEBB (C00591537), A/K/A MAJOR MIKE WEBB FOR CONGRESS (H8VA08167), A/K/A MAJOR MIKE FOR VA, A/K/A MIKE WEBB FOR APS BOARD. Applicant/Appellee has no parent corporation, and there is no publicly held corporation owning 10% of more of its stock.

Respondent-Appellees include are various, but for the present application, in relevant part, include JAMES CHRISTIAN KIMMEL, AMERICAN BROADCAST COMPANY, INC., D/B/A JIMMY KIMMEL LIVE!, WJLA TV, a/k/a NEWS CHANNEL 8, SINCLAIR BROADCAST GROUP, WUSA9, a/k/a CHANNEL 9, ABC LEGAL SERVICES, and JANE AND JOHN DOES. Respondent-Appellants were Defendants in the United States District Court for the Eastern District of Virginia, Richmond

Division, in an action commenced, pursuant to 18 U.S.C. § 1964(c), on May 23, 2022, for which an Amended Complaint, filed *sua sponte*, *see* Fed.R.Civ.Pro. 15[1], by Appellant on July 29, 2022, after the matter had languished, for the purpose of triggering notice under Fed.R.Civ.Pro. 5(d). Despite a grant of permission to proceed *in forma pauperis*, under 28 U.S.C. §1915, on October 24, 2022, and service of process perfected by the U.S. Marshals on all Respondent-Appellees, Fed.R.Civ.Pro. 4(c)(3)[2], Respondent-Appellees WJLA, an ABC News affiliate, Sinclair Broadcasting Group and ABC Legal have, in contravention of Fed.R.Civ.Pro. 12(a)(2)[3], have elected a *Fifth Amendment* right to remain silent regarding allegations raised under 18 U.S.C. §§ 1961 and 1962, predicate offenses arising from violations of state and federal law, having failed to even make an appearance in the matter, while all other remaining Respondent-Appellees have only generally averred that pleadings were inscrutable as an affirmative defense, under Fed.R.Civ.Pro. 8 and 12, in direct contravention of the rule that "[t]o properly convict, the government must prove every element of each offense charged beyond a reasonable doubt". *U.S. v. Kimble*, 719 F.2d 1253 (5th Cir. 1983).

---

[1] "A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." *Id.*

[2] "At 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." *Id.*

[3] "Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: (A) A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint; or (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States." *Id.*

DECISIONS BELOW

All decisions in this case in the lower courts are styled *Webb v. Kimmel, et al.* The text of the order of the United States District Court for the Eastern District of Virginia,, dismissing an Affidavit, filed in accordance with Fed.R.Civ.Pro. 55(a), dated May 9, 2023, is attached hereto as Exhibit **A** (the "Affidavit Dismissal Order), and the Order dismissing the action, without prejudice, dated May 18, 2023, is attached hereto as Exhibit **B** (the "Dismissal Order"). No transcript record has been created. The docket number in the United States District Court for the Eastern District of Virginia, Richmond Division is Civil Action No. 3:22cv392, but while a prior matter, *Webb v. Kimmel,* Record No. 23-1152 (4th Cir. 2023), remains pending at the Circuit Court of Appeals for the Fourth Circuit, filed on February 10, 2023, the docket number at the Fourth Circuit Court of Appeals for the present matter has yet to be assigned.

JURISDICTION

Applicant-Appellant currently has an pending appeal before the United States District Court for the Eastern District of Virginia, Richmond Division, pursuant to 28 U.S.C. § 1331, which provides, in relevant part, that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States", from which arose two timely appeals to the United States Court of Appeals for the Fourth Circuit, granting preliminary grounds for standing in under S.Ct.R. 11.

This action was dismissed by the U.S. District Court, Hon. M. Hannah Lauck presiding, on May 18, 2023, to which Applicant made timely notice of appeal and presented an Informal Brief to the Fourth Circuit Court of Appeal, in a prior matter

regarding amendment, on February 10, 2023, *Webb v. Kimmel,* Record No. 23-1152 (4 th Cir. 2023), and the present matter, raised for prejudgment decision, filed on May 22, 2023.

This Court has jurisdiction pursuant to S.Ct.R. 11, which provides that "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

A. A Case of Imperative Public Importance

Mindful that this Honorable Court has "rejected an interpretation of civil *RICO* that would have confined its application to 'mobsters and organized criminals'", *Brookhaven Town Conservative Comm.*, No. 14CV6097JFBARL, 2016 WL 1171583, at *1–8 (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), on application for prejudgment intervention, pursuant to S.Ct.R. 11, Applicant-Appellant aspires to present four issues of imperative importance for prejudgment decision, on novel issues regarding the federal racketeering statute, 18 U.S.C. § 1964(c), arising from patent abuses of Fed.R.Civ.Pro. 8 and 12 *vis á vis* unrepresented litigants, in clear contravention of the rule handed down by this Honorable Court that "[i]t is now established doctrine that pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated," *Gordon v. Leeke*, 574 F.2d 1147 (4th Cir. 1978) (citing *Rice v. Olson*, 324 U.S. 786 (1945); *Holiday v. Johnston*, 313 U.S. 342 (1941), and that solicitous attitude to protect the rights of litigants, such that, "especially a *pro se* complaint, should not be dismissed summarily unless 'it appears

'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'". *Id.* (quoting *Haines v. Kerner*, 404 U.S. 519 (1972) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)).

1. *Whistleblower Protection*

A widely disseminated piece of correspondence had averred that "[a]s former leaders in the Defense Department — civilian and military, Republican, Democrat and independent — we all took an oath upon assuming office 'to support and defend the Constitution of the United States,' as did the president and all members of the military," Leon Panetta, *et al.*, "89 former Defense officials: The military must never be used to violate constitutional rights," *Washington Post*, June 5, 2020 (quoting 5 U.S.C. § 3331, and Applicant-Appellant falls within the definition of that community.

Military records endorse the proposition that, even as a newly commissioned lieutenant, assigned to echelon above corps, strategic counterintelligence,in the opinion of his rater, regarding candor, Applicant-Appellant had evidently "always told me the truth, even when I didn't want to hear it", George E. Conklin, DA Form 67-9, *Officer Evaluation Report (OER)*, July 9, 1996.and, as a commissioned officer, albeit in retirement status, arguably, like all members of the uniformed military, at least, it is clear that "[t]he 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).

"The ultimate purpose of the judicial process is to determine the truth", *Caldor,*

Inc. v. Bowden, 330 Md. 632 (1993), and "[w]e who are seeking truth and not victory, whether right or wrong, have no reason to turn our eyes from any source of light which presents itself, and least of all from a source so high and so respectable as the decision of the supreme court of the United States." *U.S. v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807).

By decision of the Congress, to which our courts grant great deference, *Carlson v. Green*, 446 U.S. 14 (1980)[4] with specified exceptions therefor[5], "[t]he *Whistleblower Protection Act (WPA)*, as amended, prohibits retaliation against most federal executive branch employees when they blow the whistle on significant agency wrongdoing or when they engage in protected conduct such as testifying before Congress", and, while arguably exempted from the provisions of this *Act*, as a uniformed military service member, albeit in retirement status, subject to recall, and as a member of the Intelligence Community, albeit in gray area retiree status, Applicant-Appellant has been acknowledged, nonetheless, as a "whistleblower". Order, *Webb v. Dep't of the*

---

[4] "This Court should defer to Congress even when Congress has not explicitly stated that its remedy is a substitute. . ." *Id.* (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)).

[5] "Who Is(n't) Covered?

- Most executive branch employees, former employees, and applicants fall within the WPA's protections.
- Employees of the Government Publishing Office, a legislative branch agency, are also covered.
- Some executive branch employees are excluded from the WPA's protections, including (but not limited to):
    - Political appointees (e.g., federal inspectors general)
    - Uniformed military service members
    - Noncareer Senior Executive Service employees
    - Employees of the 18 intelligence community "elements" and the FBI
    - Members of the U.S. Public Health Service Commissioned Corps
    - Officers of the National Oceanic and Atmospheric Association (NOAA) Commissioned Corps
    - Employees of the U.S. Postal Service", Office of the Whistleblower Ombuds, "Whistleblower Protection Act," *U.S. House of Representatives*, https://whistleblower.house.gov/sites/whistleblower.house.gov/files/Whistleblower_Protection_Act_Fact_Sheet.pdf (accessed May 26, 2023).

Army, Order, Civil Action No. 1:22-cv-02236 (UNA) (D.D.C. Oct. 7, 2022), as in evidence in a longstanding matter currently on petition for certiorari. *Webb v. Department of the Army*, Civil Action 1:22-cv-02236 (UNA) (D.D.C. 2022), *aff'd* Record No. 22-5292 (D.C. Circuit 2022), *on petition for cert.* Record No. 22-7394 (U.S. 2022). *See also Webb v. DoD*, Docket Number DC-3443-18-0299-I-1 (MSPB 2018).

"Intelligence community (IC) whistleblowers are employees or contractors of the federal government working in any of the 18 elements of the IC who disclose their reasonable belief of a violation of law, rule, or regulation; gross mismanagement; waste of resources; abuse of authority; or a substantial danger to public health and safety", and "IC whistleblower protections have evolved in response to perceptions of gaps that some observers argued left these whistleblowers vulnerable to reprisal." Michael E. Devine, "Intelligence Community Whistleblower Provisions," *CRS*, June 15, 2022.

Yet, regardless of legal protections, Article III Courts have held that "mere acquiescence or silence or failure of an officer to perform a duty does not make one a participant in a conspiracy unless he acts or fails to act with knowledge of the purpose of the conspiracy 'and with the view of protecting and aiding it." *Luteran v. U.S.*, 93 F.2d 395 (8th Cir. 1937) (citing *Burkhardt v. U.S.*, 13 F.2d 841 (6th Cir. 1926)).

2. *The Very Spine of America*

The President, who has personally acknowledge that Applicant-Appellant is "passionate", as in evidence at Exhibit **C**, had said of veterans generally that they have "come through the trials and testing, braved dangers and deprivations, faced down tragic realities of war and death", they have "done it for us" and "done it for America. . . [t]o defend and serve American values", "[t]o protect our country and our *Constitution*

against all enemies", "[a]nd to lay a stronger, more secure foundation on which future generations can continue to build a more perfect union". Maegan Vazquez, "'You are the very spine of America': Biden honors those who served on Veterans Day in Arlington," *CNN* , November 11, 2021, while of another former Commander in Chief, he had "repeatedly disparaged the intelligence of service members, and asked that wounded veterans be kept out of military parades, multiple sources tell it has been said." Jeffrey Goldberg, "Trump: Americans Who Died in War Are 'Losers' and 'Suckers'," *The Atlantic*, September 3, 2020. Accordingly, if we are to believe what has been said in the press, they "are the very spine of America – not just the backbone, the spine of this country", and "all of us owe you."

Article III Courts have made it clear that due process is "the process that is due," *Sec'y of Labor v. T.P. Mining, Inc.*, 8 FMSHRC 687 (1986), and the "fundamental requisite" of providing "the opportunity to be heard", *Grannis v. Ordean*, 234 U.S. 385 (1914), and "at a meaningful time and in a meaningful manner", *Armstrong v. Manzo*, 380 U.S. 545 (1965).

Accordingly, to the extent that"'[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)), "[i]t is to be pointed out here that even the jurists of the Third Reich did not dare to put on paper that obedience to orders is above all", *Government of Israel v. Eichmann*, 36 I.L.R. 5 (Supreme Court of Israel, 1961), and "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, 1963.

3. *A Right to Remain Silent*

In the late 18th Century, this Honorable Court had held that "[m]eans of knowledge with the duty of using them are, in equity, equivalent to knowledge itself", *Cordova v. Hood*, 84 U.S. 1 (1872), and certainly "[a]s noted by the Second Circuit [in *Armstrong v. McAlpin*, 699 F.2d 79 (2d Cir.1983)] where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." *Town of Poughkeepsie v. Espie*, 402 F. Supp. 2d 443 (S.D.N.Y. 2005) (quoting *Prestandrea v. Stein*, 262 A.D.2d 621 (N.Y.App.Div.1999) (citations omitted). And, at least Courts of the Commonwealth have held that, as for one willfully ignorant litigant, "[b]y her conduct, as disclosed by the record, the appellant is estopped from questioning the verity of the record." *Hill v. Woodard*, 78 Va. 765 (1884).

That Court had found that that appellant's "evident knowledge of the pendency of this suit and its object, her seeming acquiescence, and her delay and refusal to speak, though not served with notice in the regular way, makes it proper for her to remain silent now that others have acquired rights while she was standing by in silence, if not in actual acquiescence", since ""[i]t was not only competent for her to speak in time and be made a party if she had not been, but it was her duty." *Id.* Similarly, in the past, this Honorable Court has held that

> [I]f the gentleman had believed this decision to be favorable to him, we should have heard of it in the beginning of his argument, for the path of inquiry in which he was led him directly to it. Interpreting the American constitution, he would have preferred no authority to that

> of the supreme court of the country. Yes, sir, he would have immediately seized this decision with avidity. He would have set it before you in every possible light. He would have illustrated it. He would have adorned it. You would have seen it, under the action of his genius, appear with all the varying grandeur of our mountains in the morning sun. He would not have relinquished it for the common law, nor have deserted a rock so broad and solid to walk upon the waves of the Atlantic. But he knew that this decision closed against him completely the very point for which he was laboring. Hence it was that the decision was kept so sedulously out of view, until, from the exploded materials of the common law, he thought he had reared a Gothic edifice so huge and so dark as quite to overshadow and eclipse it. Let us bring it from this obscurity into the face of day. *Burr*, 25 F. Cas., at 55.

One aspirational Negro leader, a friend of Applicant-Appellant's father, with whom Applicant-Appellant had shared a spiritual mentor in Dr. Benjamin Elijah Mays, the former President of Morehouse College in Atlanta, had asserted that "[w]e will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people", Martin Luther King, Jr., *Letter from a Birmingham Jail*, April 16, 1963, and yet, notwithstanding the rule that "[t]he power to create presumptions [wa]s not a means of escape from constitutional restrictions", *Bailey v. Alabama*, 219 U.S. 219 (1911), "[i]f a prosecutor had stood before a jury and denied that a defendant was entitled to a presumption of innocence; if the judge refused to correct him and failed to give any instruction on the presumption of innocence; if the judge's instructions affirmatively suggested there might not be a presumption of innocence; would anyone doubt that there was a reasonable possibility that the jury had been misled?" *Brown v. Payton*, 544 U.S. 133 (2005).

Courts considering the civil remedies available under the federal racketeering

statute, 18 U.S.C. 1964(c), have suggested that "[a]t least three different standards of proof are within the realm of possibility: proof beyond a reasonable doubt, proof by clear and convincing evidence, and proof by a preponderance of evidence", *Spinelli, Kehiayan-Berkman, S.A. v. Imas Gruner, A.I.A., & Assocs.*, 602 F. Supp. 372 (D. Md. 1985), two, clearly suggesting burdens of proof applicable to civil actions, while the other invokes those proceedings contemplated under the Federal Rules of Criminal Procedure, dictating different tactics and strategies, if only to avert triggering the rule that "[w]hen the public interest so requires, the court must order that one or more grand juries be summoned." Fed.R.Crim.Pro. 6(a). And, Article III Courts have ruled that "[t]o properly convict, the government must prove every element of each offense charged beyond a reasonable doubt", *Kimble*, 719 F.2d, at 1253, issues raised in the present context in a matter involving a litigant at least characterized by the Trial Court as one for whom ""the great run of *pro se* cases, the issues are faintly articulated and often only dimly perceived", *Leeke*, 574 F.2d, at 1147.

This Honorable Court has stated that "the cost of protecting a constitutional right cannot justify its total denial", *Bounds v. Smith*, 430 U.S. 817 (1977), and "the existence of an individual's right of access to courts which, without question, is a fundamental right of all persons whether incarcerated or free", *Williams v. Leeke*, 584 F.2d 1336 (4th Cir. 1978), a rule applying both to those simply seeking redress in civil courts, as well as those to those who "can be shut away from the watchful eyes of courts to suffer clear violations of established constitutional rights." *Id.*

Nonetheless, clearly, and mindful of concerns that "prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions", and that

the "underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways", *Younger v. Harris*, 401 U.S. 37 (1971), as has been done under the *Freedom of Access to Clinic Entrances (FACE) Act*, 18 U.S.C. § 248(c)(1), under the federal racketeering statute, Congress has determined that a civil remedy should be available to aggrieved persons, 18 U.S.C. § 1964(c), and "[a] familiar canon of statutory construction cautions the court to avoid interpreting a statute in such a way as to make part of it meaningless", *Abourezk v. Reagan*, 785 F.2d 1043 (1987) (citing 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (4th ed.1984)), while a basic rule of statutory construction dictates that "the plain meaning rule, [should control unless] the construction caused absurd results." *U.S. v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004), and "we are unconvinced by anything in the legislative history that this definition should be given less than its full effect." *U.S. v. Turkette*, 452 U.S. 576 (1981).

And, if the burden of proof in a criminal matter generally shall not find a defendant generally averring a lack of understanding runs afoul of the rule that "'[t]here is no such defect in the law. . . as that the person who intentionally inflicts a wound calculated to destroy life, and from which death ensues, can throw responsibility for the act upon either the carelessness or ignorance of his victim, or shield himself behind the doubt which disagreeing doctors may raise as to the

treatment proper for the case", *Clark v. Commonwealth*, 90 Va. 360 (1893) (quoting 3 *Greenl. Ev.* § 139), or that "[w]here an election is once made by a party bound to elect, either expressly or impliedly, with full knowledge of all the facts, it binds him and those who claim under him, although made in ignorance of the law." *Waggoner v. Waggoner*, 111 Va. 325 (1910) (citing *Penn v. Guggenheimer*, 76 Va. 839 (1882)).

In one historic precedent, this Honorable Court had, at the outset reminded two attorneys 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." *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (1 Story's *Const.* § 462). And, it is quite axiomatic that "[i]gnorance of law is no excuse for a party's conduct." *Waggoner*, 111 Va., at 325.

B. **Extraordinary Circumstances**

1. *Rule of Law*

Bearing in mind that "[o]nslaught, commando, and scorched earth come to mind", and that "[t]hose are usually employed in relation to the fall campaign when yet another Republican, an 'independent' who is really a Republican, or a real independent (often a pesky candidate who finds a way onto the ballot almost every year) is about to be drubbed in an election in the small but intensely political county just across the Potomac from the nation's capital", Cragg Hines, "Arlington Dems Pour

It On, Boost 'Regular' Dem Mary Kadera to Big Victory in School Board Caucus Over 'Insurgent Candidate,'" *Blue Virginia*, May 26, 2021, to the "ordinary sense and understanding", *Calley*, 22 U.S.C.M.A., at 534, of at least a paralegal, in "a very competitive legal market, arguably the most selective in the country", Dan Binstock & Matt Schwartz, "Law Student's Guide to the Washington, DC-Area Law Firm Market," *Garrison & Sisson* (November 2020), with over 15 years of experience in discovery, motions and appellate practice, with one year of formal law school training at a Tier I law school, albeit unemployed since his run for Congress in the "[h]ome to the highest concentration of paralegal jobs in the nation," "Becoming a Paralegal in District of Columbia - Washington, DC," *Paralegal EDU* (December 2021), "[t]he Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding", Fed.R.Civ.Pro. 1.

Moreover, as at least any competent discovery paralegal should know, "[a] party may serve on any other party a request within the scope of Rule 26(b)[6]: (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample *the following items* in the responding party's possession, custody, or control: (A) any *designated documents or electronically stored information*—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or

[6] "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." Id.

data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any *designated tangible things*; or (2) to permit *entry onto designated land or other property possessed or controlled* by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it", Fed.R.Civ.Pro. 34 (emphasis added), a limited scope of early discovery.

Furthermore, as any competent paralegal should know, under the controlling rule, "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that. . . the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed.R.Civ.Pro. 26(b)(2)(C)(i). And, under the controlling rules, "*[m]ore than 21 days after the summons and complaint are served on a party*, a request under Rule 34 may be delivered", Fed.R.Civ.Pro. 26(d)(2)(A), and "[t]he request is considered to have been served at the first Rule 26(f) conference", Fed.R.Civ.Pro. 26(d)(2)(A), and, of record, no conference has yet occurred in this matter.

A priori, any competent motions practice paralegal should be able to recite by rote that, just as, under Fed.R.Civ.Pro. 12(a)(1)(A)(i), "[u]nless another time is specified by this rule or a federal statute, . . . [a] defendant must serve an answer. . . within 21 days after being served with the summons and complaint", under Fed.R.Civ.Pro. 36, "[a] matter *is admitted* unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney", and of record,

Respondent Appellees ABC Legal, Sinclair Broadcast Group and WJLA, having failed to enter an appearance or file a reply, have engaged in conduct that under the controlling rules is deemed an admission, subject to default judgment, a matter with which the Trial Court has deemed "frivolous", when directed to its attention under the required affidavit under Fed.R.Civ.Pro. 55(a). Affidavit Dismissal Order.

2. *Conference*

Under the controlling rule, "[e]xcept in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)", Fed.R.Civ.Pro. 26(f)(1), which conference, since commencement of the action in May 2022, has yet to have occurred. And, it is the generally accepted course of dealing in trial practice that, during the preliminary stages of an inchoate civil action, "[a] motion to dismiss under Rule 12(b)(6) tests [only] the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses". *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir.1992).

Accordingly, at least licensed counsel, if not a layperson, should know that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its 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.

Furthermore, under the controlling rule, "[i]f a matter is not admitted, *the answer must specifically deny it* or state in *detail why the answering party cannot truthfully admit or deny it.*" Fed.R.Civ.Pro. 34(a)(4). And yet further, exacting more details, "[a] *denial must fairly respond to the substance of the matter*; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest", and "[t]he answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny." *Id.*

3. *A Criminal Enterprise*

As a rule, of record, "dismissals with prejudice are rare ... [[[,] because of the formal nature of the pleading requirements", *Pyke v. Laughing*, No. 92-CV-555, 1996 WL 252660, at *1–16 (N.D.N.Y. May 9, 1996) (citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* §1248 (2d ed. 1990)), and while threatening such in the future, the Trial Court has not yet gone to that extent in this longstanding matter, arsing under a provision of law in which "[b]ecause the 'mere assertion of a *RICO* claim ... has an almost inevitable stigmatizing effect on those named as defendants,"[7] suggesting a predisposition against plaintiffs, *Brookhaven*

[7] "'[C]ourts should strive to flush out frivolous *RICO* allegations *at an early stage of the litigation*.'" *Id.* (quoting *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990)); *see also DLJ Mortg. Capital*, 726 F. Supp. 2d at 236. Indeed, although civil *RICO* may be a 'potent weapon,' plaintiffs wielding *RICO* almost always miss the mark. *See Gross v. Waywell*, 628 F. Supp. 2d 475, 479-83 (S.D.N.Y. 2009) (conducting survey of 145 civil *RICO* cases filed in the Southern District of New York from 2004 through 2007, and finding that all thirty-six cases resolved on the merits resulted in judgments against the plaintiffs, mostly at the motion to dismiss stage)." *Id.*

Town Conservative Comm., No. 14CV6097JFBARL, 2016 WL 1171583, at *1–8, "courts have expressed skepticism toward civil *RICO* claims." *Id.* (citing *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225 (E.D.N.Y. 2010))[8].

While, even in a matter brought under the federal racketeering statute, Fed.R.Civ.P. 9(b) "requires that "the circumstances constituting fraud ... be stated with particularity", *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299 (D. Colo. 1984), in *Harrell v. Colonial Holdings, Inc.*, 923 F. Supp. 2d 813 (E.D. Va. 2013), "asserting that the heightened pleading requirements of Fed.R.Civ.P. 9(b) apply to conspiracy claims, . . . [Plaintiffs had] challenged whether Defendants ha[d] sufficiently alleged the time, place, and manner of any conspiracy", and, in that case, having "reviewed both the common law conspiracy and statutory conspiracy counts" raised had concluded "that they [we]re not based on a conspiracy to commit fraud, but instead on a conspiracy to tortiously interfere with a contract and to defame Defendants", and held that "the conspiracy counts in this case need not be held to the heightened requirements of Rule 9(b)." *See also Terry v. SunTrust Banks, Inc.*, 493 Fed.Appx. 345 (4th Cir.2012).

Nonetheless, while the Trial Court took explicit exception, *see* Order, *Webb v. Kimmel*, dated January 23, 2023, at p. 1[9], "[a] 'pattern of racketeering activity,' requires a showing of at least two related predicate acts of racketeering activity occurring within a ten year period", *Ferri v. Berkowitz*, 678 F. Supp. 2d 66 (E.D.N.Y. 2009) (citing 18 U.S.C, § 1961(5); *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*,

[8] "[P]laintiffs have often been overzealous in pursuing *RICO* claims, flooding federal courts by dressing up run-of-the-mill fraud claims as *RICO* violations." *Id.*

[9] Appellant's allegations "rely only on state violations, others rely on criminal violations which he cannot charge". *Id.*

385 F.3d 159 (2d Cir.2004); *New York Transportation, Inc. v. Naples Transportation, Inc.*, 116 F.Supp.2d 382 (E.D.N.Y.2000); *Oak Beverages, Inc. v. Tomra of Massachusetts, LLC*, 96 F.Supp.2d 336 (S.D.N.Y.2000), and "[p]redicate acts of racketeering activity include a variety of federal and state criminal offenses." *Id.*

Further yet, and complicating the requirements under Fed.R.Civ.Pro. 8, demanding a "short and plain statement", "in a multiple party, multiple claims action such as this. . . [at least] plaintiffs should be aware that the *RICO* counterclaims may be sufficiently detailed, particularly when read together with defendants' anticipated Civil RICO Statement", *Laughing*, No. 92-CV-555, 1996 WL 252660, at *1–16 (citing *Morin v. Trupin*, 747 F.Supp. 1051 (S.D.N.Y. 1990). And, "[o]nce a racketeering activity and pattern are shown, the Plaintiff must also adequately identify a *RICO* enterprise." *Lopez v. Pastrick*, No. 205-CV-452, 2007 WL 1042140, at *1–6 (N.D. Ind. Apr. 4, 2007) (quoting *Jennings v. EMRY*, 910 F.2d 1434 (7th Cir.1990)).

Moreover, while Respondent-Appellee has incredulously averred, that "it is implausible that WUSA9 – a CBS affiliate – would conspire with the ABC network and its main late-night personality on anything", WUSA9 Motion to Dismiss Second Amended Complaint, ECF No. 37, an enterprise is essentially equivalent to the tortious elements of a conspiracy, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990)[10]. And, as certainly most familiar with the federal racketeering

[10] "Because a conspiracy—an agreement to commit predicate acts—cannot by itself cause any injury, we think that Congress presupposed injury-causing overt acts as the basis of civil standing to recover for *RICO* conspiracy violations. *See Medallion TV Enters. v. SelecTV of California, Inc.*, 627 F.Supp. 1290 (C.D.Cal.1986), *aff'd*, 833 F.2d 1360 (9th Cir.1987), *cert. denied*, 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989))." *Id.*

provisions, "[a]n enterprise 'includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'" *Id.* (quoting 18 U.S.C. § 1961(4) (2000)).

Yet, certainly knowledgeable that "[u]nder Virginia law, the elements of a common law civil conspiracy are (i) an agreement between two or more persons (ii) to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, which (iii) results in damage to plaintiff' through an overt action done pursuant to the agreement." *Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619 (W.D. Va. 2015) (quoting *William v. AES Corp.*, 28 F.Supp.3d 553 (E.D.Va.2014); *Skillstorm, Inc. v. Elec. Data Sys., LLC*, 666 F.Supp.2d 610 (E.D.Va.2009)). Moreover, "[t]here must also be an underlying tort committed." *Id.* (citing *William*, 28 F.Supp.3d at 553).

And, to the extent that the Trial Court has tied Applicant-Appellant's hands, under the auspices of offenses to Fed.R.Civ.Pro. 8, "[i]t is the rule that the existence of a conspiracy may be established by inferences from circumstantial evidence." *Prichard v. U.S.*, 181 F.2d 326 (6th Cir.), *aff'd sub nom. Prichard v. U.S. of Am.*, 339 U.S. 974 (1950) (citing *Johnson v. U.S.*, 82 F.2d 500 (6th Cir. 1936)), dictating the necessity of a more elaborate statement of allegations, thus depriving Applicant-Appellant of "the opportunity to be heard", *Grannis*, 234 U.S., at 385, and "at a meaningful time and in a meaningful manner", *Armstrong*, 380 U.S., at 545.

4. *Fed.R.Civ.Pro. 55 Affidavit*

Both Respondent-Appellees, by filing of a *Roseboro* Notice, have acknowledged some familiarity with the rule that a "[p]laintiff must identify all facts stated by defendant with which the plaintiff disagrees and must set forth the plaintiff's version

of the facts by offering affidavits (written statements signed before a notary public and under oath) or by filing sworn statements (bearing a certificate that it is signed under penalty of perjury)." WUS9's *Roseboro Notice*, May 16, 2023, ECF No. 38.

Accordingly, at least all Respondent-Appellees should be aware that, *inter alia*, in a motion for summary judgment, "[a] party asserting that *a fact cannot be or is genuinely disputed* must support the assertion by. . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, *affidavits or declarations*, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials", Fed.R.Civ.Pro. 56(c)(1)(A), identified as "Supporting Factual Positions", and "[a]n affidavit or declaration used to support or oppose a motion *must be made on personal knowledge, set out facts that would be admissible in evidence*, and show that the affiant or declarant is competent to testify on the matters stated." Fed.R.Civ.Pro. 56(c)(4).

Yet, in a motion to dismiss, still at the preliminary pre-discovery stage, governed by Fed.R.Civ.Pro. 26 and 34, "[a] motion to dismiss under Rule 12(b)(6) tests [only] the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses". *Republican Party of N.C.*, 980 F.2d, at 943. And, hence, prior to the discovery stage, or a motion for summary judgment, particularly in a matter brought under the federal racketeering statute, " "in a multiple party, multiple claims action such as this", *Laughing*, No. 92-CV-555, 1996 WL 252660, at *1–16, in which "Plaintiff must also adequately identify a *RICO* enterprise." *Lopez*, No. 205-CV-452, 2007 WL 1042140, at *1–6, the rebuttal filed by Respondent-Appellee WUSA9 would be analogous to a motion to exclude evidence, at

least prematurely under the controlling rules.

Far more intriguingly, certainly all learned opposing counsel and the Trial Court are most certainly aware, or should be aware that, "[t]o establish standing, the plaintiff must show: (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) that the injury is not speculative and will likely be redressed by a favorable decision". Moreover, "[t]o establish an 'injury in fact,' the plaintiff must 'show that he [or she] personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant'," *Dobrich v. Walls*, 380 F. Supp. 2d 366 (D. Del. 2005) (quoting *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464 (1982) (citations omitted)).

And yet like the Trial Court, as to the plain and simply stated rule that, "[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*", Fed.R.Civ.Pro. 55(a) (emphasis added), for unknown motivating reasons, Appellee WUSA9, acting as a Good Samaritan, "speaking for a friend", had taken early and strenuous exception to this well-established rule, with the Trial Court's complete acquiescence, as interpreted by Appellant, notwithstanding, the rule, certainly bounding and restricting Appellant, that "[t]he plaintiff cannot base his claims on the legal rights or interests of third parties or on 'generalized grievances' or "abstract questions of wide public significance."' *Dobrich*, 380 F. Supp. 2d, at 366 (quoting *Valley Forge Christian College*, 454 U.S., at 464).

Under the rule, announced by the Trial Court, simply stated, at least "the

plaintiff *must assert his or her own legal rights and interests*", *Id.* (emphasis added), while, as to at least defendants, an alternative rule should be, or is available, treating in disparate treatment otherwise similarly situated parties, 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*, 1 Cranch, at 137).

Moreover, it is well-established in the laws of the Commonwealth, regarding Good Samaritans, that even "[t]he railroad company cannot be held liable for the failure of the engineer to anticipate that a person approaching a crossing is going to step upon the track immediately in front of a moving engine, unless there is something to suggest to the engineer that the person does not intend to remain in a place of safety", and this "rule is believed to be universal—it is certainly firmly established in this jurisdiction—that the engineer has the right, under such circumstances, to assume that the party is in the possession of his faculties and will retain his place of safety, and not recklessly expose himself to danger." *Wright v. Atl. Coast Line R. Co.*, 110 Va. 670 (1910) (citing *Johnson's Adm'r v. C. & O. Ry. Co.*, 91 Va. 171 (1895); *Southern Ry. Co. v. Daves*, 108 Va. 378 (1908); *N. & W. Ry. Co. v. Davis' Adm'r*, 108 Va. 514 (1908)).

"It is not denied that the law is well settled that it is not contributory negligence *per se* for one voluntarily to risk his own safety or life in attempting to rescue another from imminent danger caused by the negligence of the defendant", and "[t]his principle involves two propositions: First, it must appear that the party to be rescued is in imminent danger; and, second, that the peril must have been caused by the negligence of the defendant." *Id.*

Respondent-Appellant WUSA9 simply "assumed the risk", *Norris v. Excel*

Indus., Inc., 139 F. Supp. 3d 742 (W.D. Va. 2015), *aff'd*, 654 F. App'x 588 (4th Cir. 2016), and was certainly aware that a plaintiff "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." (quoting *U.S. v. Anderson*, 747 F.3d 51 (2d Cir.2014)).

Respondent-Appellant WUSA9 simply "assumed the risk", *Norris, supra,* and was certainly aware "that once a conspiracy is shown to exist, slight evidence is all that is required to connect a particular defendant with the conspiracy". *U.S. v. Elliott*, 571 F.2d 880 (5th Cir. 1978) (citing *U.S. v. Prince*, 515 F.2d 564 (5th Cir. 1975); *U.S. v. Reynolds*, 511 F.2d 603 (5th Cir. 1975)).

Moreover, Respondent-Appellant WUSA9 simply "assumed the risk", *Norris, supra,* and was certainly aware 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. Mann*, 161 F.3d 840 (5th Cir.1998) (quoting *U.S. v. Puig–Infante*, 19 F.3d 929 (5th Cir.1994)). "In order to show withdrawal, 'the defendant must show that he has committed affirmative acts inconsistent with the object of the conspiracy that are communicated in a manner reasonably calculated to reach conspirators." as reiterated under *U.S. v. Heard*, 709 F.3d 413 (5th Cir. 2013) (quoting *Mann*, 161 F.3d, at 840). "Mere cessation of activity in furtherance of the conspiracy is not sufficient to show withdrawal", and, "[i]n order

to show withdrawal, 'the defendant must show that he has committed affirmative acts inconsistent with the object of the conspiracy that are communicated in a manner reasonably calculated to reach conspirators.'" *Id.* (quoting *U.S. v. Torres*, 114 F.3d 520 (5th Cir.1997) (citing *U.S. v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981)).

"[M]ere 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) (quoting *Burkhardt v. U.S.*, 13 F.2d 841 (6th Cir. 1926)). And here, clearly, with impunity sanctioned by the Trial Court, Respondent-Appellee had acted in furtherance of a conspiracy, acting to protect the right of the default judgement Respondent-Appellees to continue to remain silent. And, under Fed.R.Crim.Pro. 6(a), "[w]hen the public interest so requires, the court must order that one or more grand juries be summoned."

5. *Unlawful Order*

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", and, as noted above, "even the jurists of the Third Reich did not dare to put on paper that obedience to orders is above all". *Eichmann*, 36 I.L.R., at 5. And that court had found that "'[t]he distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the given order, as a warning reading 'Prohibited!'" *Id.* (quoting *Chief Military Prosecutor v. Melinki, et al.* (13 Pesakim Mehoziim, p. 90)).

Clearly, a motion can be denied, and an action can be dismissed, but an affidavit

is but indicia of "Supporting Factual Positions", Fed.R.Civ.Pro. 56(c)(1)(A), and, a query in Westlaw will find that over 3,600 instances in which a federal court had considered a "dismissed affidavit", generally attempts by those known by courts to find among "the great run of *pro se* cases, [wherein] the issues are faintly articulated and often only dimly perceived". *Leeke*, 574 F.2d, at 1147.

For instance, *Ghee v. Goodwill Industries of Chesapeake, Inc.*, 2009 WL 692115 (Md. 2009), while the Court did acknowledge that, along with two other substantive motions, a *pro se* litigant had pending a "motion to dismiss affidavit submitted in bad faith", the Court, like one landmark decision from the nation's highest court that, at the outset had made it clear that "[w]e 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", *Jacobson*, 197 U.S., at 11, chose not to draw any more attention to this attempt by an unrepresented litigant, attempting to "catch people doing something right," Ken Blanchard and Spencer Johnson, *One Minute Manager*, Berkley (1986). *See also Clark v. Gross*, 2016 WL 6637941 (S.D.S.Dakota. 2016). While some other Article III Courts, demonstrating solicitousness toward the civil rights of unrepresented litigants have elected to treat a motion to dismiss an affidavit, when responding to a demurrer, as a motion for summary judgment, *Boro Hall Corporation v. General Motors Corporation*, 124 F.2d 822 (2nd Cir. 1942), seeking to "not dismiss[] 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 (quoting *Kerner*, 404 U.S., at 519

(1972) (quoting *Gibson*, 355 U.S., at 41). *But see In re: JET 1 Center, Inc.*, 319 B.R. 11[11]. And the consensus appears to be amongst Article III Courts that "motions under 12(b) may be supported by affidavits presenting relevant facts bearing upon the objections listed therein", *F.E. Myers & Bros. Company v. Goulds Pumps, Inc.*, 5 F.R.D. 132 (W.D.N.Y. 1946) (quoting *Boro Hall Corporation*, 124 F.2d, 822), not subject to dismissal of themselves.

This Honorable Court may take judicial notice regarding support for why the jurist should have recused herself, in a prior matter where the authority of federal agencies on safety standards, *i.e.*, the National Institute for Occupational Safety & Health (NIOSH), *see* Samy Rengasamy, *et al.*, *Simple Respiratory Protection—Evaluation of the Filtration Performance of Cloth Masks and Common Fabric Materials Against 20–1000 nm Size Particles*, 54 Ann. Occup. Hyg. 7, pp. 789–798 (2010); *see also* Ben Guarino, Chelsea Janes & Ariana Eunjung Cha, "Spate of new research supports wearing masks to control coronavirus spread," *Washington Post*, June 13, 2020; Derek K. Chu, *Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: a systematic review and meta-analysis*, 395 The Lancet, pp. 1973-1987, June 27, 2020, https://doi.org/10.1016/S0140-6736(20)31142-9 , had, in a matter involving a discipline in which the nation's highest court had observed that "[t]he only 'competent evidence' that could be presented to the

[11] Holding that "on a motion to dismiss, the court must limit its analysis to the four corners of the complaint" and that "it may dismiss the complaint only if it is clear the plaintiff can prove no set of facts upon which it would be entitled to relief", *Id.* (citing *Bharucha v. Reuters Holdings PLC*, 810 F.Supp. 1131 (D.Me. 1995), *see also Harvey M. Jasper Retirement Trust v. Ivax Corp.*, 920 F.Supp. 1260 (S.D.Fla. 1995), but concluding that a reviewing court may take cognizance of supplementary materials at its discretion.

court to prove these propositions was the testimony of experts, giving their opinions", *Jacobson*, 197 U.S., at 11, this Trial Court had deemed these authorities as "mere criticisms" and "enigmatic allegations", Order, *Webb v. Northam*, Civil Action No. 3:20CV497 (E.D.Va. August 25, 2020), reversing prior precedents regarding a demurrer and sufficiency of pleadings, *Twombly*, 550 U.S., at 544[12]; *Republican Party of N.C.*, 980 F.2d, at 943[13] (citation omitted), and overturning that which had been established doctrine for regulatory deference.

6. *Disqualification*

In addition to that which has been averred above, this Honorable Court may take judicial notice that that the presiding judge, at a most suspicious time, *see Webb v. Fauci*, Civil Action No. 3:21- CV-00432 (E.D.Va. 2021), *aff'd* Record No. 21-2394 (U.S. 2022); *cert.* denied Record No. 21-8242; *see also Webb v. Fauci*, Record No. 21-6868 (U.S. 2022), had been nominated for a promotion to fill a vacancy at the Fourth Circuit, Press Release, "Warner & Kaine Recommend Three for Vacancy on U.S. Court of Appeals for the Fourth Circuit," *Senator Tim Kaine*, May 24, 2021, anticipating a thing of value that would increase her salary from $218,600 to $231,800, Staff, "Judicial Compensation," *US Courts*, https://www.uscourts.gov/judges-judgeships/judicial-compensation (accessed November 1, 2021), at least presenting the appearance of impropriety, mindful that in the Commonwealth "a judge must diligently avoid not only impropriety but a reasonable appearance of impropriety as well", *Davis v.*

[12] Noting that "facial plausibility" is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged". *Id.*
[13] "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses". *Id.*

Commonwealth, 21 Va. App. 587 (1996). Moreover, "[t]he bribery statute, 18 § 201(b)(1), makes it a crime to 'directly or indirectly, corruptly give[ ] ... anything of value to any public official ... with intent ... to influence any official act'", *Heard*, 709 F.3d, at 413.

C. Requirement for Immediate Action

It is clear that, under the controlling rule, "[i]f a matter is not admitted, *the answer must specifically deny it* or state in *detail why the answering party cannot truthfully admit or deny it*", Fed.R.Civ.Pro. 34(a)(4), of imperative importance when within a civil complaint there exist elements that would require proof beyond a reasonable doubt.

"A 'pattern of racketeering activity,' requires a showing of at least two related predicate acts of racketeering activity occurring within a ten year period", *Ferri*, 678 F. Supp. 2d, at 66, and the yet the Trial Court has generally averred Applicant-Appellant's allegations "rely only on state violations, others rely on criminal violations which he cannot charge". Order, *Webb v. Kimmel*, dated January 23, 2023, at p. 1. Yet, both those Respondent-Appellees that have elected to make an appearance and file a responsive pleading, as well as the Trial Court have conspicuously elected to refrain from mentioning specific averments in the Amended Complaint and the Second Amended Complaint, which include allegations, in an attempt, violation of 18 U.S. Code § 1961(1)(a), describing a racketeering activity, involving "any act or threat involving murder, . . . which is chargeable under State law and punishable by imprisonment for more than one year".

Well satisfying the requirement for immediate action under S.Ct.R. 11, "in cases

where the acts of the defendant or the enterprise were inherently unlawful, such as murder or obstruction of justice and were in pursuit of inherently unlawful goals, such as narcotics trafficking or embezzlement, the courts generally have concluded that the requisite threat of continuity was adequately established by the nature of the activity, even though the period spanned by the racketeering acts was short", and, "[i]n contrast, in cases concerning alleged racketeering activity in furtherance of endeavors that are not inherently unlawful, such as frauds in the sale of property, the courts have generally found no threat of continuing criminal activity arising from conduct that extended over even longer periods." *Eisert v. Town of Hempstead*, 918 F. Supp. 601, 601–19 (E.D.N.Y. 1996) (citing *U.S. v. Aulicino*, 44 F.3d 1102 (2d Cir.1995); *Mathon v. Marine Midland Bank, N.A.*, 875 F.Supp. 986 (E.D.N.Y.1995)).

At the founding of the democratic republic, we held certain truths to be self-evident, and among these were included, with liberty and the pursuit of happiness, had been that of life, *Declaration of Independence*, under the *Fifth Amendment* it had been the rule that "[n]o person shall be. . . deprived of life, liberty, or property, without due process of law", and yet, due process is "the process that is due," *Sec'y of Labor v. T.P. Mining, Inc.*, 8 FMSHRC 687 (1986), as "'[i]t is emphatically the province and duty of the judicial department to say what the law is'," *Nixon*, 418 U.S., at 683 (quoting *Marbury*, 1 Cranch, at 137).

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT AND ACTING CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT

I. Strict Scrutiny

Invoking strict scrutiny, *Gray v. Commonwealth*, 274 Va. 290 (2007)[14], Applicant is an evangelical Christian who has raised a religious discrimination claim, involving a substantive right, and is Black and a member of a suspect class, who resides in a community with a history of court ordered segregation, *see generally Carter v. Sch. Bd. of Arlington Cy*, 87 F. Supp. 745 (E.D. Va. 1949), an issue found of at least probative value in discrimination cases. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Obergefell v. Hodges*, 576 U.S. 664 (2015).

Moreover, Applicant might fairly be described in status as being in a "position of political powerlessness", *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), in a community where "[b]ookies probably wouldn't even lay odds on the chance of Republicans picking up the 8th Congressional District seat, it seems so out of reach," Scott McCaffrey, "GOP challengers to Beyer hope to gain traction," *Arlington Sun Gazette*, January 29, 201, and in an identity politic where the President as a candidate has declared that he "ain't black." Marianna Sotomayor and Mike Memoli, "Biden apologizes for saying African Americans 'ain't black' if they back Trump re-election," *NBC News*, May 22, 2020, and, in testament, on the day upon which he had qualified for the ballot for the school board race, it was announced: "It likely will be

[14] "'A statute challenged on equal protection grounds is evaluated under "strict scrutiny" if it interferes with a 'fundamental right' or discriminates against a 'suspect class.'" *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988)." *Id.*

more a coronation than an election on Nov. 2, but Democratic Arlington School Board endorsee Mary Kadera will still have a race to run." Scott McCaffery, "Two candidates end up on Arlington School Board ballot," *Arlington Sun Gazette*, June 9, 2021. Nonetheless, "'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley v. Valeo*, 424 U.S. 1 (1974) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

II. Certiorari to a United States Court of Appeals Before Judgment

Pursuant to Rule 11 of the Rules of this Court, 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, Applicant Major Mike Webb, a/k/a Michael D. Webb, ("Applicant" or "Webb") respectfully requests prejudgment relief regarding the dismissal without prejudice of the Second Amended Complaint, as well as the dismissal of an Affidavit, filed in good faith, under Fed.R.Civ.Pro. 55.

STATEMENT OF THE CASE

This matter, raised for prejudgment decision, involves a familiar issue regarding protection of the rights of unrepresented litigants *vis á vis* the trial courts acting essentially as gatekeepers, protecting defendants; however, it combines the generally disfavored federal racketeering statute, and the complexities arising at the preliminary stages of litigation where a plaintiff in civil litigation is essentially granted the authority of a prosecutor, complicating the burdens of proof required to prevail on the merits.

REASONS FOR GRANTING THE APPLICATION

I. **Whether it is an abuse of discretion, before the opening of discovery, under Fed.R.Evid. 403, for a Trial to "exclude relevant evidence", deeming it substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence", specifically, dismissing an affidavit, filed pursuant to Fed.R.Civ.Pro. 55, pertaining to default judgment.**

In the matter, raised for prejudgment decision, the Trial Court had, in abuse of discretion, granted to the defendants extraordinary relief in the form of a pre-discovery stage exclusion of evidence, in error, liberally construing a rebuttal to an affidavit as motion to dismiss the same.

II. **Whether, in a matter brought under the federal racketeering statute, the Trial Court had abused discretion, refusing to "accept as true all factual allegations in the complaint, construe[ing] the record in favor of plaintiff, and decid[ing] whether as a matter of law, the plaintiff could prove no set of facts which would entitle it to relief." *In re: JET 1 Center, Inc.*, 319 B.R. 11 (M.D.Fl. 2004) (citing *Parker v. Wakelin*, 822 F.Supp. 1131 (D.Me. 1995); *Straka v. Francis*, 867 F.Supp. 767 (N.D. Ill. 1994); *Bensch v. Metropolitan Dade County*, 855 F.Supp. 351 (S.D.Fla. 1994)).**

In abnegation of the solicitude for the civil rights afforded to unrepresented litigants, the Trial Court had, in abuse of discretion, had generally deemed a complaint, brought under the federal racketeering statute, inscrutable, while dismissing without prejudice the complaint, under threat of sanctions, if the complaint was filed again, in violation of the plaintiff's rights to due process.

III. **Whether, pursuant to Fed.R.Civ.Pro. 8(a), "which requires a short and plain statement of the grounds for this Court's jurisdiction and a statement of the claims showing that the plaintiff is entitled to relief," ECF No. 43, Order, dated May 18, 2023, for failure to state a claim in a case brought under the federal racketeering statute, 18 U.S.C. § 1964(c), pre-empting motions to dismiss filed by defendants.**

In abnegation of the solicitude for the civil rights afforded to unrepresented litigants, the Trial Court had, in abuse of discretion, assumed the role of gatekeeper for defendants in a matter brought under the federal racketeering statute, dismissing an amended complaint that had already been approved by the Trial Court for service of process to the defendant parties, while using Fed.R.Civ.Pro. 8 as a bludgeon to protect defendants fully capable of defending themselves, preferring their right to remain silent over the plaintiff's rights to due process.

IV. Whether, defendants in a civil matter, brought under the federal racketeering statute, 18 U.S.C. § 1964(c), which for elements of proof include predicate offenses under state and federal criminal code, are precluded from generally averring an inability to understand allegations that in criminal court may only be defeated by presenting a reasonable doubt, consistent with a *Fifth Amendment* right to avoid self-incrimination.

In error, the Trial Court had, at the preliminary stage of litigation, permitted defendants, without specificity, to generally aver a failure to state a claim in a matter raising allegations involving conspiracy and violations of state and federal criminal law.

CONCLUSION

For the reasons stated in this application, Applicant respectfully requests that the Circuit Justice or the Court reverse and remand the Affidavit Dismissal Order and the Dismissal Order, and to grant such other relief as deemed proper by this Honorable Court.

CERTIFICATION

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

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

Signature of Party

Executed on: 5-28-23
(Date)

Subscribed, acknowledged and sworn to before me, the undersigned Notary Public in the County of Fairfax, in the Commonwealth of Virginia, this 28 day of May, 2023.

NOTARY PUBLIC

My commission expires: 03/31/2025 Registration Number: 7909976

STEPHEN JAMES INGRAM
Notary Public
Commonwealth of Virginia
Registration No. 7909976
My Commission Expires Mar 31, 2025