No. 23-478

In the
Supreme Court of the United States

David Harris,

Petitioner

v.

AMERICAN ACCOUNTING ASSOCIATION, LISA DE SIMONE,
MATHEW EGE,
BRIDGET STOMBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Second Circuit Court of Appeals may, with regard to a case before it and all motions in respect thereof, delegate to an unauthorized staff attorney the judicial power to determine, without legally-sufficient or even any review, the: 1) cause of action, 2) relevant facts, 3) legal authorities, 4) parties' arguments, 5) merits and sufficiency thereof, and 6) to "confidently recommend" a disposition of the case, and adopt these as the Court's opinion? These are the powers enumerated in 28 U.S.C. 636 a district court judge or the parties can delegate to a magistrate judge. Can circuit courts do so without any of the protections in 28 U.S.C. 636; in secret, without consent or even notice to the parties, who have no right to object, demand review, or even to appeal the consequent, foreseeably-wrongful decisions, because appeal to this Supreme Court is had only by permission?

When contrasted with the substantial and detailed enumerated powers, qualifications, independence and protections Congress gives to parties, as set forth in 28 U.S.C. 631-637, is it unlawful for circuit courts of appeals to delegate such unlimited judicial power to staff attorneys when in 28 U.S.C. 715 Congress explicitly provides to staff attorneys only the same powers and protections of parties it gives with respect to circuit court's secretaries and filing clerks; none?

Whether, without regard to the unconstitutionality of delegating judicial power as described above, the Second Circuit Court of Appeals may invidiously discriminate based on the "the size of an appellant's pocketbook" by inflicting this second-class legal process specifically, routinely, and officially on all pro se appellants appearing before it, but not wealthy appellants who pay the price of a first-class ticket to first-class justice by retaining high-powered, high-priced attorneys?

Whether, in Petitioner's case, the Second Circuit Court of Appeals may commit plain errors of fact and law by, without legally sufficient review, accepting and ruling in accord with the staff attorney's "confidently recommend[ed] disposition" that fails even to acknowledge the existence of facts plainly alleged in the Amended Complaint and raised in the appeal and in a motion for rehearing, let alone take them to be true, and that also fails to acknowledge the existence of on-point, controlling New York precedent similarly brought before the Court, let alone apply it as required under *Erie v. Tompkins*?

Whether this Court should consider and decide the unconstitutional over-delegation-of-judicial-power arguments, above, the so-called "legal process" Petitioner received from the Second Circuit Court of Appeals, though Petitioner did

not and could not have raised them there.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption of the case

TABLE OF CITED AUTHORITIES

Cases

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner, David Harris, respectfully submits this petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the U.S. Second Circuit Court of Appeals, filed April 13, 2022, is unreported, and is reprinted in the Appendix hereto, pp. 5a-13a. The Decision and Order of the U.S. District Court for the Northern District of New York, of September 8, 2020, dismissing Petitioner's case is reported at *Harris v. Am. Accounting Ass'n*, 2021 U.S. Dist. LEXIS 226517, *1, 2021 WL 5505515 (N.D.N.Y. November 24, 2021), and is reprinted in the Appendix hereto, pp. 15a-55a.

JURISDICTION

On September 8, 2020, Petitioner brought suit against Respondents in the U.S. District Court for the Northern District of New York, alleging unfair competition. District Court dismissed Petitioner's case on November 24, 2021. Petitioner filed Notice of Appeal in the U.S. Second Circuit Court of Appeals on April 13, 2022, which appeal was reversed in part and affirmed in part on April 6, 2023. Petitioner filed an application for an extension of time with the U.S. Supreme Court on July 22, 2023, which was granted on August 3, 2023, extending the time to file until October 16, 2023. A copy of the grant of additional time is reprinted in the Appendix, pp. 1a-2a. This petition is filed on or before this deadline. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE, IN RELEVANT PART

Article III of the U.S. Constitution, Section 1

....The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Fifth Amendment

... nor be deprived of life, liberty, or property, without due process of law....

Fourteenth Amendment

... 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.

SUMMARY OF THE CASE

Overview: circuit courts' damaging, unconstitutional, and unlawful over-delegation of judicial power to staff attorneys

Based on factually-supported research and reflecting conclusions echoed in dozens of law review articles in the most prestigious journals, leading court scholars well-describe the denial of Petitioner's constitutional rights from the grossly inferior legal process the Second Circuit Court of Appeals, and other Circuit Courts, inflict on pro se appellants. Below, Petitioner proves his appeal was destroyed by being decided by an unauthorized and grossly negligent staff attorney, not decided or effectively reviewed by an Article-III judge, and sets forth the factual, legislative, and constitutional violations of circuit court judges' doing so.

> "What should the federal courts of appeals do when confronted with assertions from among their ranks that their own judging practices are themselves unconstitutional?...denying similarly situated litigants equal treatment; systematically structurally subordinating "have-nots;" and delegating most of their workload to often under-supervised staff [attorneys] whose competence the judges mistrust?....
>
> Appellants do disproportionately poorly when their cases are "decided" this way; there is some good empirical evidence that this pattern of outcomes does not reflect the merits of their cases....poor outcomes...explained by a court culture that disparages these matters and litigants, and by shoddy decisional practices that often mean that rather than a genuine appellate review by a panel of Article III judges, what the litigant gets is a denial of certiorari based on unsafe grounds and made by a junior staff member....
>
> Rather, at least as long as the legislature specifies and the circuit courts hold themselves out as providing appeals to an Article III court as of right, I am suggesting that there should be limits to internal court delegation of Article III appellate power to staff that exceed the limits placed on delegation of adjudicatory duties to bankruptcy and magistrate judges...." (Pether, P., Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; Or Why the Federal Circuits' Nonprecedential Rules are (Profoundly) Unconstitutional, 17 Wm & Mary Bill of Rights J. 955, 957-967 (2009) (hereafter–Solipsism)

> "[A] litigant on Track One will receive first-class treatment from the courts of appeals....A [pro se] litigant who is poor, without counsel, and with a boring, repetitive problem, on the other hand, can expect only the second-hand treatment that is available on Track Two....This disparity does not seem to bother the judges at all. Sworn to provide equal justice to rich and poor alike, the circuit courts are satisfied to provide justice in varying degrees, acting beyond their statutory mandate...appropriating a power for themselves that the Constitution and the statutes have assigned to the legislative branch....
>
> "[T]he two-track appellate justice regime has led to the transformation of the federal appellate courts from their traditional and statutory role as appellate courts, which must hear and decide all appeals, into what are effectively discretionary courts, which get to decide which cases they will hear. They have become, in other words, certiorari courts....This unilateral change in the circuit courts' function must be seen as judicial activism of the highest order, involving not merely tinkering with some sociopolitical hot-button issue, but rather with the role of the courts themselves. A unilateral change in the function of one of the branches of our tripartite government thus is deeply subversive of the entire constitutional scheme. (footnotes omitted) (Richman, W. & Reynolds, W., Injustice on Appeal: The United States Courts of Appeals in Crisis, 115-120 (2013))

Factual Background

Petitioner is a professor at Syracuse University, who, technically pro se, is a previously-licensed attorney of 30 years (in Illinois, until retiring his license to focus on academic research) who has practiced before the IRS, but never represented a client in court, and has written numerous legal memorandums successfully disputing IRS positions. He is a full professor and Director of a tax-law research fund at Syracuse University. He has taught tax law, including extensive coverage of tax research in every class, and graduate classes on tax-law research, for over forty years. He has five college degrees, including a JD, LLM, and PHD. Petitioner has published more than a dozen original legal research papers in blind, peer-reviewed, national-level law journals, including some based on his LLM dissertation. He has won national awards for his research, and another of his publications has been favorably discussed on the floor of Congress.

Petitioner unofficially published a preliminary working paper with his co-authors in 2008 stating four things: two hypotheses and two results of testing them. While Petitioner continued work on this project, in 2012 Author-Defendants published a series of working papers claiming them to have originated Petitioner's work; plagiarism. Their plagiarism had increased from ½ of his work to ¾ of it when Author-Defendants submitted their plagiarizing paper for publication to Defendant

American Accounting Association (AAA). Petitioner informed AAA that Author-Defendants' paper was a plagiarizing paper and requested that it not be published or have the offending claims removed, if so. Petitioner submitted his paper to AAA for publication in 2013, which AAA rejected in large part because the editor and reviewer gave credit for his work to Author-Defendants; incontrovertible evidence of the reviewer's confusion and the editor's confusion or willful participation in their plagiarism.

For two years, Defendants communicated with one another about the paper, and, specifically, about its plagiarizing contents. AAA published it in 2014 and plagiarizing claims were not removed, but increased to 100% of Petitioner's work, preventing Petitioner from publishing the financially valuable paper; only one paper officially can be published with these claims. Defendants' discussion of and agreement to increase the plagiarism is the definition of a conspiratorial "meeting of the minds." The published paper did acknowledge Petitioner's prior work, but, nonetheless, in explicit contradiction thereof, plainly claimed them to be the true originators of it.

Proceedings Below

Petitioner filed suit in District Court, Northern District of New York (Case No. 5:20-cv-01057-MAD-ATB), on September 8, 2020. He alleged a single cause of action; that Defendants had violated New York's unfair competition law "by falsely claiming that they had originated the hypotheses and results reported in Plaintiff's work," (Amended Complaint, ¶406), which "false claims, lies, misleading statements and deceptions were intended to, and did, deceive and confuse the public as to whom credit and recognition for Plaintiff's research properly belonged" (*Id.*, ¶409) and intentionally injured Petitioner thereby. (*Id.* ¶407) Petitioner also specifically alleged that AAA rejecting his paper would not injure him, and even might improve the chance of eventual publication elsewhere, if Author-Defendants' paper were published without plagiarizing claims. (*Id.* ¶323) In Exhibits, Petitioner proved actual deception of some 180 researchers giving credit to Defendants for his work after their publication.

District Court granted Defendants' motions to dismiss, but failed to acknowledge, let alone take as true, factual allegations in the Amended Complaint and also failed to acknowledge, let alone follow, binding federal and New York case law; all of which was briefed to the Court. Petitioner filed letter motions for reconsideration on May 25 and 26, 2022, which were denied on May 31, 2022. Petitioner filed notice of civil appeal to the Second Circuit Court of Appeals on April 13, 2022 and other documents on a timely basis. (22-811)

Events transpiring at Second Circuit Court of Appeals proving Petitioner's damage from delegation of judicial power to a staff attorney

At oral argument, a member of the Panel strongly argued that Petitioner's case was without merit based on his assertion that the cause of action was Petitioner demanding AAA substitute his paper for Author-Defendants' in AAA's journal; indeed, an unmeritorious cause of action. But, as stated above, it is not the cause of action alleged in the Amended Complaint! Petitioner attempted to correct this egregious and potentially fatal misunderstanding, but failed, as shown by later discussion of the Panel with opposing counsel, Andrew Holland. They discussed the element of bad faith, asserting that if an Author-Defendant had been related to AAA's editor then there would be a bad-faith conflict of interest. Though relevant to the mistaken cause of action, this is utterly irrelevant to the actual claim, which requires bad faith from intentional deception of the public, as alleged.

This falsity originated with Holland's Response Brief (Doc. 74) in which he copied unrelated sentences from Petitioner's Brief (Doc. 46) and reassembled them so as to support this false assertion of the cause of action, which did deceive the Court. In a verified response (Doc. 149) to Petitioner's motion for sanctions (Doc. 137) that carefully documents this fraud, Holland did not deny the factual accuracy of these accusations (See, Petitioner's Reply in support of sanctions, Doc. 152). Though the Court chose not to sanction him, it did not find him innocent of them (Doc. 159).

This was a shocking development. This false cause of action was to be found nowhere in any legal paper submitted by Petitioner to any court. AAA's publishing Author-Defendants' paper was explicitly denied to be injurious–only the plagiarizing claims in it were objected to. Also, in Petitioner's Reply (Doc. 87) this specific lie was identified, criticized, and proved false. All these papers were filed before oral argument and the Panel's egregious error proved no one to have read anything Petitioner had written, but only relied on Holland's Response Brief.

Not surprising, given this error and Petitioner's inability to convince the Panel of it, the summary order, which was unpublished and nonprecedential like almost all pro se appellants' decisions, denied Petitioner's appeal of this claim. Petitioner filed a motion for rehearing and *en banc* review on April 19, 2023.

On or about the middle of May, wanting to know if the time the Court was taking to decide those motions was overlong, Petitioner researched the question and retrieved a number of scholarly articles that, to Petitioner's amazement, said that his case, being pro se, was likely decided from start to finish by a newly-graduated, unauthorized staff attorney–that a real Article-III judge likely had nothing substantive to do with it. Unfortunately, Petitioner's legal process was exhausted

and his motion for rehearing and *en banc* review denied before he could be certain what was going on in the Second Circuit.

Petitioner had thoroughly examined the Second Circuit's local rules and the Federal Rules of Appellate Practice (FRAP), but had neither time nor reason to read every Second Circuit webpage. But later search for the phrase, "staff attorney," retrieved the documents cited below, verifying gross over-delegation of judicial power.

In the Second Circuit Court of Appeals, all judicial power is effectively delegated to staff attorneys for pro se appeals

The egregious error at oral argument was caused by the gross negligence of a staff attorney. The Second Circuit's webpages state,

> A staff attorney handles "all pro se appeals and motions," concerning "the merits of the appeals; many are dispositive." https://www.ca2.uscourts.gov/staff_attorneys/sao_about.html
>
> They are newly-graduated and inexperienced, "By long tradition, the Second Circuit has hired recent law graduates to serve in the Staff Attorney's Office." (https://www.ca2.uscourts.gov/staff_attorneys/staff_attorneys_office.html)
>
> "[T]he assigned staff attorney drafts a single, neutral bench memo for all three members of the panel....[which] ensures that the judges are, quite literally, on the same page." (*Id.*) In Petitioner's case–the wrong page!
>
> Staff attorneys are overworked and must "manage their time effectively in order to meet tight deadlines...." https://www.ca2.uscourts.gov/staff_attorneys/sao_applying.html
>
> And, they do not just check citations and fetch coffee, **staff attorneys must "confidently recommend dispositions,"** [emphasis added] (*Id.*) in those memos.

For pro se appellants, the Court relies for its final decision on these dispositions,

> "[I]n the Second Circuit, all "pro se civil cases"...are first "reviewed by the staff attorneys, who prepare a memo and draft summary order [including a "confidently recommend[ed] disposition]."...an unpublished opinion,...before the panel has even seen the case. For these cases, "[p]anels rely upon the draft summary order in varying degrees according to the case"...."In all other cases a member of the panel drafts the decision." (Brown, R., et al., Is Unpublished Unequal?: An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals, 107 CORNELL L. REV. 1,77-78

(2022)) (survey of Circuits' Chief Judges and Chief Executives)) (hereafter–Unequal)

Depending on judges' reviews of staff attorneys' work, which, as shown below, many judges state to be nonexistent or legally insufficient, this is delegation of 100% of the Court's judicial power, the same as 28 U.S.C. 636(c), but done without consent or right of appeal.

Evidencing insufficient or no review, the summary order, consistent with the Panel's error about the cause of action and Petitioner's inability to correct it, denied his appeal. Though the bases of Petitioner's appeal were several blatant errors and omissions in the District Court's opinion, the order showed no evidence that Petitioner's papers had been read, but, without comment, only repeated District Court's mistakes virtually verbatim.

First, the order repeated the District Court's opinion that no facts were alleged proving a meeting of the minds. This fails to acknowledge, let alone take to be true, the allegations and evidence in exhibits that Defendants communicated for two years about revising the paper and increased the plagiarism. Second, the order repeated, without discussion, the error in the opinion that Author-Defendants had no control over AAA. But, it was alleged that they controlled the plagiarizing contents of their paper, and could decline AAA's offer to publish it; more than sufficient control under New York law. Third, the order repeated the error that there was no plausible allegation of likely consumer confusion. This is false. Not only were detailed explanations provided of how it would happen, evidence in exhibits proves AAA's own agents and some 180 expert researchers were confused; not mere allegations; better proof does not exist. Finally, the order repeats the error in the opinion that because a citation to Petitioner's prior work was provided, no confusion could result. Petitioner had briefed an appellate New York case in which a full and honest acknowledgement of another's work was insufficient to prevent confusion when accompanied by an explicit false claim of origin–exactly as Petitioner's case. This controlling precedent was not acknowledged, let alone followed. Proof of a vast number of expert researchers giving credit to Author-Defendants for Petitioner's work absolutely proves this assertion false; also unacknowledged in the order.

It is important, on the one hand, to prove something is achieved by reversing and remanding this case; that it was fundamentally wrongly decided. But, relevant to the Second Circuit's unconstitutional delegation of judicial power to a staff attorney are the order's unjustifiable omissions of key facts, evidence, and legal precedents briefed to the Court; as if Petitioner had stated no reasons for his appeal.

These plain errors are consistent with oral argument–the staff attorney failed to read any of Petitioner's papers. One might ask why were the motions for sanctions and rehearing and *en banc* review ineffective? As to *en banc* review, as shown below, that was dead *ab initio* because, being nonprecedential, the summary order could not meet the FRAP 35 criteria and create a break with precedent. The obvious answer as to the rest is that they were decided by the staff attorney (as stated on the Second Circuit's website) who previously misinformed the court of the cause of action. Either he/she continued to read none of Petitioner's papers, or, realizing that properly informing the Panel of the merit of these motions would reveal his/her prior gross negligence, chose to tell the Panel that they were only more frivolous, pro se whining and complaining that should be denied without wasting precious Article-III-judge time. In any event, these errors and omissions strongly suggest that no competent Article-III judge with personal knowledge of the underlying legal papers wrote or reviewed the order.

The Second Ciruit's delegation of judicial power to a grossly negligent, inexperienced, and unsupervised staff attorney did inestimable damage to Petitioner's appeal

There is no doubt of the substantial prejudicial effect on Petitioner's appeal of a grossly negligent staff attorney's briefing the entire Panel with the wrong cause of action and causing the judges to conclude before oral argument, and after, that it was without merit. Failure to reference anything Petitioner put before the Court continued with the staff attorney preparing a proposed summary order that references none of the reasons for the appeal and, without comment, merely repeats District Court's plain errors and omissions.

As the late Justice of the California Court of Appeal, Robert Thompson, wrote on this very point,

> "Where courts employ procedures of precalendar preparation to the point of preparing what is in essence a draft of the probable opinion of the court, they risk premature departure from a neutral position. **Where the preparation is delegated to central staff...the risks of decision based upon incomplete presentation are increased....**
>
> **If a court has reached a conclusion, even one that is labeled "tentative,"** oral argument involves a process by which minds must be changed rather than open minds persuaded. **If the minds have been made up by overlooking important information or approaches to the case, the task may be difficult indeed.**" [emphasis added] (Thompson, R. and J. Oakley, From Information to Opinion in Appellate Courts: How Funny

> Things Happen on the Way Through the Forum, 1986 Ariz. St. L.J. 1, 65 (1986))

Clearly, the staff attorney's errors were as prejudicial as possible.

ARGUMENT

Pro se appellants' dispositions are generally unsigned, unpublished and nonprecedential

One group of scholars found that only 2.1% of pro se appellants received published, precedential decisions comprising, "only 5.5% of all published opinions.....[I]n an overwhelming majority of published opinions, 94.5%, the appellant was represented. " (Unequal, 51)

Even more discriminatory is the fact that this gross disparity does not exist simply because a case includes a pro se party. It is specific to a pro se bringing the appeal; to pro se appellants. When a pro se is the appellee, rates of publication are identical with cases in which both parties are represented, 26.2%. Only when the pro se is the appellant does the rate fall to 2.1%! (Id., 50) Not only are parties with costly high-powered attorneys protected from pro se appeals, by shuffling them off to staff attorneys who more likely affirm lower courts' decisions; when the wealthy appeal a pro se's district court victory, they get first-class treatment more likely to reverse it.

Consistent with the above, Petitioner's summary order is unpublished and nonprecedential.

Judges candidly describe their disparagement of pro se appellants and delegation of their appeals to staff attorneys

In addition to the Second Circuit's candid statements about delegation to staff attorneys, Judges' own public statements confirm their usurpation of Congress's exclusive Article-III power and the second-class legal process they hand out to pro se appellants by delegating their judicial power to staff attorneys, whose incompetence they conceal with unpublished, nonprecedential "opinions,"

> "About six months ago," Judge Posner [former Chief Judge of the 7th Cir. and most published judge] said, "I awoke from a slumber of 35 years." He had suddenly realized, he said, that people without lawyers are mistreated by the legal system, and he wanted to do something about it. .... In the Seventh Circuit, Judge Posner said, staff lawyers rather than judges assessed appeals from such litigants, and the court generally rubber-stamped the lawyers'

recommendations. .... "The basic thing is that most judges regard these people as kind of trash not worth the time of a federal judge,"" he said. (Adam Liptak, An Exit Interview With Richard Posner, Judicial Provocateur, New York Times, September 12, 2017)

"[J]udges often are distracted, preoccupied, or uninterested in pro se cases: hence the tendency of judges to rubber stamp the recommendations staff attorneys rather than scrutinize them carefully." (Posner, R., Reforming the Federal Judiciary, 31 (2017) (Hereafter–Reforming))

"In our circuit, staff attorneys prepare routine drafts that judges approve but do not research or write. (Reagan, R., et al., Citing Unpublished Opinions in Federal Appeals, Federal Judicial Center, 70 (2005) (hereafter-Citing Unpublished Opinions))

"[J]udges view unpublished opinions with discomfort or even embarrassment. Every day, judges are forced to put their name on work that is not theirs–on words that they may have barely read, much less written–on results to which they have given only a few moments' thought. (Chief Judge of the District Court of Minnesota (then reporter for the FRAP 32.1 enactment committee), Schiltz, P., Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions, 62 WASH. & LEE L. REV. 1429, 1489 (2005))

"[Unpublished] dispositions were drafted by our central staff and presented to a panel of three judges in camera, with an average of five or ten minutes devoted to each case. During a two–or three–day monthly session, a panel of three judges may issue 100 to 150 such rulings." (Former Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, comment letter to Judge Samuel A. Alito, Jr., Chairman, Advisory Comm. On Appellate Rules, 5 (2004) (hereafter–Kozinski Letter))

"After you decide a few dozen such cases on a [pro se] screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible." (Alex Kozinski, The Appearance of Propriety, LEGAL AFFAIRS, 19-20 (Jan.-Feb. 2005))

"As we explain, unpublished dispositions-unlike opinions-are often drafted entirely by law clerks and staff attorneys." (Kozinski Letter, 2)

"While federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished—and non-precedential—dispositions to achieve the same end: They select a manageable number of cases in which to publish precedential opinions, and leave the rest

> to be decided by unpublished dispositions or judgment orders" (*Hart v Massanari,* 266 F.3d 1155, 1177 (9th Cir. 2001))

Legal scholars, commenting on these testimonials and other evidence point out the gross deficiency of this so-called "legal process,"

> "Judging is delegated overtly for reasons of efficiency; thus, it is unlikely that most or even many judges read the documents, or do more than edit or sign off on completed opinions—that would duplicate work. **Sometimes even the staff, the people actually making the decisions, may not read the papers**. And, thus, it is unsurprising that **nonprecedential status rules exist because the people who are doing most of the Article III judging get it wrong**." (footnotes omitted) [emphasis added] (Solipsism, 975)

> "In the absence of reading an appeal's fundamental documents, the claim that screening panels decide or ensure the decisional accuracy of staff-attorney-produced opinions is untenable...." (Pether, P., Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law, 39 Ariz. St. L.J. 1, 34 (2007))

It is undeniable that no legally–sufficient "review" can be made of another's work only by hearing what they say or reading what they write. Without personal knowledge of the underlying documents, one can evaluate only what one is told or what lies between the "four corners" of a "confidently recommended disposition;" its grammar, internal logic, and law one already knows. One cannot verify it is based on the actual and complete facts, the parties' legal arguments, law actually applicable to the case, or, as proved in Petitioner's case, even the cause of action. Because delegation to staff attorneys is done only to enhance efficiency and efficiency comes at the cost of insufficient, or no, review, the fact of it proves judges play no substantive role. It is delegation of 100% of their judicial power, the same as per 28 U.S.C. 636(c), but done in secret, without consent, and with no right of appeal!

The excuse for such delegation, judges argue, is overburdened circuit courts. But delegation of pro se cases to staff attorneys is not driven by caseload. Scholarly work documents that, in fact, the frequency of unpublished and non-precedential opinions, the hallmarks of over-delegation, are not correlated with courts' caseloads but only with the numbers of pro se appeals." (McAlister, M., "Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals, 118 MICH. L. REV. 533, 554-561 (2020)) Thus, the real motivation is judges' disparagement of such appellants. As documented above and discussed below, appellate judges disparage pro se appellants and do not want to "waste" their

precious time on them. But, courts of appeal do not exist for the enjoyment of the judges, they exist solely to provide "equal justice under law" and judges swear to "do equal right to the poor and to the rich...."; an oath this so-called "legal process" makes only a cynical joke.

Justice Samuel Alito put his position succinctly when discussing Judge Kozinski's more detailed and frank revelations about the processing of unpublished opinions, stating,

> "If these comments are accurate, the described practices should be changed." (footnote omitted) (Solipsism, 957-967)

But, these policies have not changed; they have expanded to deny equal justice under the law to ever more persons.

Now is the time for change; the Supreme Court can effectuate it; Petitioner's case raises the problem, proves damage directly from it, and demands this relief.

Congressional intent proves over-delegation of judicial power to staff attorneys unlawful

Below describes, compares, and contrasts Congressional legislation establishing magistrate judges to staff attorneys', proving such delegation unlawful. In summary, magistrate judges' judicial powers, appointments, reappointments, terminations, qualifications, independence, and training are extensively and carefully described in the law. Similarly set forth are the parties' protections from magistrate judges' errors; the right to object and receive district and circuit court Article-III-judge review. In contrast, Congress established Circuit Courts' staff attorneys' "requirements" and parties' protections from their errors the same as for secretaries and filing clerks – none.

Judicial powers delegable to magistrate judges and parties' rights with respect thereto

The judicial powers district courts can delegate to a magistrate judge under 28 U.S.C. 636 relevant hereto are to determine and submit to the court proposed findings of fact and recommendations for the disposition of dispositive motions, such as dismissal for failure to state a claim upon which relief can be granted.[1]

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[1] Not relevant hereto, is the power to conduct evidentiary hearings. The analogous appellate power is the power to determine and analyze the facts of a case as part of the bench memo.

(636(b)(1)(B)) These findings and recommendations must also promptly be copied to all parties. (636(b)(1)(C))

Any party may, within fourteen days after being served with a copy, file written objections to the proposed findings and recommendations. If so, the district court judge must make a de novo determination of them. (636(b)(1))

Congress protects parties from non-Article-III judicial officers' mistakes. These protections are, first, that magistrate judges' conclusions are copied to the parties; not done secretly. Second, parties have the right to file objections to them and receive *de novo* review by an Article-III, district court judge. Third, any party can appeal the decision of the district court to the Circuit Court, another Article-III-judge review. Of course, any party remaining dissatisfied can request review by this Court, but this appeal is only discretionary.

Magistrate judges' required competence, training and independence

Congress sets forth detailed requirements to ensure magistrate judges' competence. A magistrate judge must be: approved by the majority of active judges (28 U.S.C. 631(a)); admitted to the bar of the highest court of the State where they serve for at least five years (631(b)(1)); determined by the courts to be competent (631(b)(2)); compliant with additional rules of the Judicial Conference (631(b)(5)); nominated by a separately constituted merit selection panel (*Id.*); given a fixed term of eight years (631(e)); administered an oath of office under 28 U.S.C. 453 (631(g)); determined to be found guilty of incompetence, neglect of duty, or physical or mental disability before being removed as approved by the majority of the active judges and after being given an opportunity to be heard (631(i)); compensated without reduction throughout their tenure in office (28 U.S.C. 634(b)); provided initial training within one year of appointment and periodically afterward (28 U.S.C. 637).

In *Peretz v United States,* 501 U.S. 923 (1991) and *United States v Raddatz,* 447 U.S. 667 (1980) this Court highlighted the importance of these provisions in supporting the constitutionality of delegating judicial power to magistrate judges. Thus, Congress's laws addressing these concerns are not merely helpful. They give constitutional validity to Congress's delegation of judicial power to non-Article-III judges.

Staff attorneys exercise the same powers as magistrate judges, but do so in secret, without authorization, requirements, or checks and balances, and parties have no right to object or receive any Article-III-judge review

In parts relevant hereto, the statute establishing staff attorneys' positions states only:

> (b) The senior staff attorney, with the approval of the chief judge, **may appoint necessary staff attorneys and secretarial and clerical employees**....The senior staff attorney **may remove such staff attorneys and secretarial and clerical employees** with the approval of the chief judge. [emphasis added] (28 U.S.C. 715)

No statutory provision permits any judicial powers to be delegated to staff attorneys or describes their: required qualifications; fixed compensation; fixed term; protections from job termination; training; being appointed by majority vote of active judges after being nominated by a merit selection committee.

No statutory provision requires their "confidently recommended dispositions" or other findings to be copied to the parties, let alone giving parties' rights to dispute the foreseeably material and numerous errors of overworked, grossly unqualified, unauthorized, newly-minted, and unsupervised law-school graduates. There is no right to any appeal to an Article-III judge from the consequent error-ridden circuit court opinions based on their work as appeal to this Court is only by permission.

Congress's descriptions of magistrate judge's powers, qualifications, etc. prove its great concern with non-Article-III-judicial-power delegation. It is not a congressional oversight that staff attorney appointments have no such legislative machinery. Its total absence and their being no differently established than secretaries and filing clerks definitively proves no such powers legally delegable to them.

The Federal Judicial Center reported to Congress and the Judicial Conference the same conclusion; staff attorneys should not draft opinions but be limited to research, preparation of memoranda, and managing and monitoring appeals administratively. (Commission on Structural Alternatives for the Federal Courts of Appeals, 51 (1993))

If courts can delegate judicial power as in 28 U.S.C. §636(b)(1)(B), then this law is meaningless, it violates separation of powers, and all Supreme and other Court decisions addressing it are wrongly decided

If 28 U.S.C. §636(b)(1)(B) is a proper exercise of Congress's right to delegate judicial power under Article III, as numerous decisions of this Court have held, then per the separation of powers doctrine, Courts have no such right.

> "The separation of powers and the checks and balances that the Framers built into our tripartite form of government were intended to operate as a "self-executing safeguard against the encroachment or aggrandizement of one

> branch at the expense of the other." (citation omitted) (*Commodity Futures Trading Com v Schor*, 478 U.S. 833, 860 (1986))
>
> "Preserving the separation of powers is one of this Court's most weighty responsibilities. In performing that duty, we have not hesitated to enforce the Constitution's mandate "that one branch of the Government may not intrude upon the central prerogatives of another."" (citation omitted) (*Wellness Int'l Network, Ltd. v Sharif*, 575 U.S. 665, 696 (2015))
>
> "[W]e have emphasized that the values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole." (*Id.*)

Congress's Article-III powers deserve no less protection from courts' overreach than courts deserve from Congress's.

This Court has repeatedly framed issues of judicial power delegation under 636 in terms of Article III and inherently exclusive to Congress. In *Raddatz, supra*, 668, this Court examined provisions the same as 636(b), stating, "[W]e confront **a procedure under which Congress has vested in Art. III judges the discretionary power to delegate** certain functions to competent and impartial assistants." [emphasis added] (Blackmun and Powell concurrence) Other cases have ruled similarly: *Peretz, supra*; *Gomez v United States*, 490 U.S. 858 (1989); *Mathews v Weber*, 423 U.S. 261 (1976); and *Wingo v Wedding*, 418 U.S. 461 (1974), and many others.

If courts possess inherent authority to delegate judicial power to "competent and impartial assistants" (or, as in Petitioner's case, unsupervised, negligent, and incompetent assistants), then these cases are wrong. They should have addressed only a Due Process issue; Article III is irrelevant. Finally, but very important, if so, then 636 is unconstitutional for trampling on Courts' inherent powers; Congress and courts cannot constitutionally both be authorized to do the same.

Even if circuit courts have authority to delegate judicial power as in 28 U.S.C. 636(b), it would be unconstitutional to do so in secret without any safeguards or right to Article-III-judge review

Even if Congress (and all courts) were mistaken in believing Congress alone constitutionally authorized to delegate judicial power as per 636(b), circuit courts delegating the same powers to staff attorneys the way they do cannot be constitutional. This Court has repeatedly emphasized the constitutional necessity of consent and safeguards such as publicly disclosing a magistrate judge's findings and

recommendations, the right to object, and, especially, the right to multiple levels of Article-III-judge review. Circuit courts' delegations meet none of these requirements.

The worst is failure to provide Article-III-judge review. One might wish that judges carefully review staff attorneys' work. Unfortunately, as Judges' statements prove, legally-sufficient review is not done; courts' opinions in such cases usually, if not for some always, consist only of the staff attorney's draft opinion, even sometimes unread by any judge. Even when it is read and "reviewed," "efficiency" demands judges not read the underlying documents; meaningless review. This was the case with Petitioner–judges' comments at oral argument proved the Panel to have accepted the staff attorney's work without review; the final "decision" similarly is devoid of evidence of anyone reading Petitioner's legal papers. Arguably, it is proof no one did so.

This delegation is done so secretly that a judge was threatened with sanctions for revealing the fact that some opinions were virtually entirely written by staff attorneys.[2] Why? The answer is both depressing and obvious. The reputations of circuit courts of appeals would be destroyed if the public knew the truth; judges routinely do not decide their own cases or write their own opinions. As shown above, this is much worse than merely letting a staff attorney write a draft–effectively, it is delegation of 100% of judges' judicial power, as per 636(c). As the late Justice Rehnquist wrote,

> "It is inconceivable that a judge would call in the parties...and say: "I would like you all to meet Mary Smith. She is my law clerk, having graduated from law school last year. She really knows a lot more about your case than I do, so I am turning the whole matter over to her." (Rehnquist, W., Seen in a Glass Darkly: The Future of the Federal Courts, Wisc. L. Rev. 1, 5 (1993))

Unfortunately, the only thing "inconceivable" is circuit court judges' actually telling the parties what they are doing–not the fact they are doing it.

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[2] Judge Posner resigned his position in large part because of this secrecy. He was forbidden by the Judicial Conference's Committee on Codes of Conduct from disclosing staff bench memos copied without modification by judges as their decisions, to prove pro se appellants were receiving second-class judicial process because judicial work was not being done by Article III judges, but over-delegated to staff attorneys. (Richard A. Posner, Reforming the Federal Judiciary 251-265 (2017)).

Pro se unsigned, unpublished, and nonprecedential opinions are second-class

First, is the obvious fact that there are reasons for the extensive vetting and demanding appointment process for magistrate and Article-III judges. This process is intended to ensure a very high level of competency, integrity and independence. Thus, decisions rendered by newly-graduated law students are going to suffer, *per se*, in comparison. The comments by judges, attorneys and legal scholars in addition to statistical evidence all support this conclusion. Beyond this obvious fact, are circuit and this Courts' rules and procedures officially condemning pro se opinions to second-class, inferior, "legal" process.

Pro se opinions, objectively and officially, are less able to receive Supreme Court or en banc review

Being unpublished means being nonprecdential. An unpublished opinion is less likely to get Supreme Court review because: 1) it has no precedential value, there is no "bad law" to correct, merely an error, 2) it can produce no inter-circuit inconsistencies, 3) not being as fully articulated, or amazingly brief, it is "more difficult for the Court to determine exactly what was done." (Reynolds, W., and W. Richman, The Non-Precedential Precedent--Limited Publication and No-Citation Rules in the United States Courts of Appeals, Columbia Law Review, Oct., Vol. 78, No. 6 1167, 1203 (1978))

Lack of precedential value also means reduced chance of *en banc* review,

> In the 9th Cir., "Often we do not call a case for a vote for a rehearing *en banc* because, **although wrongly decided by the panel, it does not involve Rule 35 and Rule 40 issues.** And **it will only affect the parties.**" [emphasis added] (Citing Unpublished Opinions, 71)
>
> "Quite simply, unpublished dispositions do not get any meaningful *en banc* review–and couldn't possibly–and thus cannot fairly be said to represent the view of the whole court." (Kozinski Letter, 7)

Judges, attorneys and legal scholars write that pro se unsigned, unpublished, and nonprecedential opinions prepared by staff attorneys are second-class and more likely to be wrong

Lawyers' representative organizations also state an unsatisfied, official view of this issue,

> "[C]ircuits' attitudes toward their non-reporter published opinions [that they should not be cited] is **driven less by the belief that those opinions say nothing new than by the fear that they may say something that is**

> **wrong**." [emphasis added] (Hangley, W. (Chair of the Federal Rules of Evidence Committee of the American College of Trial Lawyers) Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication & Citation of Nonbinding Federal Circuit Court Opinions, 208 F.R.D. 645, 651 (2002))

A federal commission, chaired by the late Justice Byron White, echoed these concerns.

> "Collectively, this transformation of process and personnel in the courts of appeals over the last three decades has given rise to concerns among judges, lawyers, and legal scholars that the quality of appellate decision-making may have been eroded and that there has been undue delegation of judicial work to non-judges..... The apprehensions are intensified when the court uses staff attorneys to draft proposed dispositions, prompting claims by some critics of an "invisible judiciary,"...." (Commission on Structural Alternatives for the Federal Courts of Appeals, Draft Report, 23 (1998))

One legal scholar, based on numerous prior studies, concluded,

> "Extensive research has shown that institutionalized unpublication and staff attorney dispositions have materially disadvantaged pro se appellants." (Pether, P., Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts, 56 STAN. L. REV. 1435, 1504-1507 (2004))

Chief Judge of the District Court of Minnesota, Patrick Schiltz (then Committee Reporter), summarized relevant comments in opposition to Federal Rules of Appellate Procedure 32.1 on this issue (Schiltz, P., Memorandum to Appellate Committee on Appellate rules, re: Proposed Amendments to Federal Rules of Appellate Procedure Published for Comment in August 2003 (2004)),

> "[T]hey [judges opposing FRAP 32.1] argue that unpublished opinions contain nothing of value - that such opinions are useless, fact-free, poorly-worded, hastily-converted bench memos written by 26-year-old law clerks." (*Id.*, 51)
>
> "Because unpublished opinions are hurriedly drafted by staff and clerks, and because they receive little attention from judges, they often contain statements of law that are imprecise or inaccurate. (Id., 38)
>
> "No-citation rules also give rise to the appearance - if not the reality - of two classes of justice: high-quality justice for wealthy parties represented by big law firms, and low-quality justice for [pro se and] "no-name appellants represented by no-name attorneys." (*Id.*, 52)

> "[R]elegating this material to non-citable [unpublished] status is an invitation toward mediocrity in decisionmaking and the maintenance of a subclass of cases that often do not get equal treatment with the cases in which a published decision is rendered." (*Id.*, 52-53)

This problem of over-delegation to staff attorneys is exacerbated because, inevitably, judges' disparaging attitudes toward pro se appellants, the "tone at the top," infects staff attorneys' work.

> "Indeed, just like meaningful appellate review, the implicit value of panel appellate review ostensibly practiced in the courts of appeals—the avoidance of bias or partiality—is functionally undermined when the exercise of Article III judicial power is *de facto* delegated to a single junior and often inexperienced court staff member. This is particularly the case when that staff member works in a culture that stigmatizes screened [pro se] cases as frivolous or boring or lacking merit.
>
> These employees work in an environment that engenders disrespect for certain types of litigants, and boredom and professional status anxiety in deciding their cases. **The work culture encourages shoddy decision-making practices, ranging from overt disparagement of litigants, to not reading key documents,** to making decisions for federal appellate courts when one knows little about the world or the law, to generating disingenuous rationales for institutionalized unpublication, to normalizing **a decision-making charade in which one appears before three judges who typically know little and may know nothing about the cases they are deciding....**" [emphasis added] (footnotes omitted) (Solipsism, 976-977)

Interviews with high-level judicial staff confirm this suspicion,

> "In fact, the staff director said the court is "sensitive not to go the route of using staff attorneys as a pro se shop" [which the Second Circuit does] because **it is difficult to achieve staff attorney satisfaction if the office handles only pro se cases.**" [emphasis added] (Joe, C, and D. Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeals, Federal Judicial Center, 40 (1987))

These comments mirror Petitioner's case; "his" staff attorney's failure to read his legal papers. This so-called "legal process" demonstrably produces real, provable, and devastating damage to pro se appellants.

Staff attorneys are biased against pro se appeals and in favor of affirming district court decisions

One legal scholar analyzing a number empirical studies, of many reaching the same conclusion, states,

> "There is also evidence that the staff, exercising most Article III appellate power, practice systematically biased anti-appellant decision making....[T]hat rather than a genuine appellate review by a panel of Article III judges, what the litigant gets is a denial of certiorari [by affirmance] based on unsafe grounds and made by a junior staff member." (Solipsism, 976)

This observation follows from the definition of "efficiency" being only saving judges' time, attention, and unhappiness with their work. But, efficiency has two components that should be balanced; reduced cost of judicial effort versus the legitimacy and accuracy of the end product.

> "Even if a staff attorney, then, believes that the decision warrants publication, that attorney will have to do additional work to justify a publication decision, and the judges will have to do additional work to gain confidence in the staff attorney's product (or worse, draft an entirely new opinion themselves). In the face of these extra efforts, institutional pressures operate to preserve the initial decision identifying a case for nonpublication [affirming it]." (Robel, L., Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940, 954 (1989))

Judge Posner stated this bluntly, "Staff attorneys in circuits other than the 7th are biased in favor of affirming District Court decisions." (Reforming, 59)

And,

> "These adjustments [over-delegation to staff attorneys] come at the expense of other practices....[W]hen faced with caseload stress, courts may be concerned about the impact on certain values—typically efficiency or expediency—and may be willing to forgo some practices if they are not as concerned that other values—say, accuracy and legitimacy—will fall below some minimum standard." (Levy, M., The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts, 61 DUKE L.J. 315, 374-375 (2011))

Mirroring, this comment,

> "The danger [of overburdened courts seeking ad hoc solutions] is that some cases are affirmed rather than reversed because a reversal will require a time-consuming, researched opinion." (the late 3rd Circuit Court of Appeals

judge, Aldisert, R., Then and Now—Danger in the Courts, 1 FED. LAW. 41, 43 (1997))

"Most cases decided without argument in unpublished and non-citable opinions affirm lower court rulings.....[consistent with] less benign explanations: 1) the **affirmance rate is high because staff attorneys have heavy caseloads and may not see an error** in the disposition below unless the error is glaring; or 2) there exists **a self-serving default rule to affirm because otherwise there would be more work, which would require the commitment of scarce judicial resources.** [emphasis added] (Vladeck, D. and M. Gulati, Judicial Triage: Reflections on the Debate over Unpublished Opinions, 62 Wash. & Lee L. Rev. 1667, 1675 (2005))

Even if courts have authority to delegate judicial powers as does Congress, specifically targeting pro se appellants with second-class legal process is unconstitutional, invidious discrimination in violation of Due Process and Equal Protection

As documented herein, pro se opinions are second class. Also documented is that unpublished, nonprecedential opinions are most frequently given to pro se appellants, as to Petitioner. Because pro se appellants are persons who have determined they cannot afford first-class-ticket, high-priced attorneys; targeting them with inferior justice is invidious discrimination based on wealth.

This Court has consistently held it unconstitutionally discriminatory to ration justice that can only be gotten from a court based on the size of a party's pocketbook

First, an important feature of this discriminatory legal process is that it is a government monopoly; no other means exist to achieve justice with respect to a wrongfully decided district court decision than to appeal it. Appellate justice wrongly denied is without right to recourse or alternative.

Though the quality of a party's legal representation may depend on whom they can afford to hire, the quality of legal process courts give to them cannot. This Court holds as to governments' obligations to provide equal access to the law:

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has....this disparate treatment has the effect of classifying appellants according to wealth, which, like race, is a suspect classification." (*Griffin v Illinois*, 351 U.S. 12, 13 (1956));

> "Griffin has had a sturdy growth. 'Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution.' (citations omitted)....invidious discrimination...." (*Boddie v Connecticut*, 401 U.S. 371, 383-386 (1971) (Douglas concurrence)).

Though these address States, this Court has held that, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (*Bolling v Sharpe*, 347 U.S. 497, 500 (1954)), and Fourteenth Amendment Equal Protection applies via the Due Process Clause of the Fifth Amendment. (*Buckley v Valeo*, 424 U.S. 1, 93 (1976))

If all persons must stand equal before the law (*Chambers v Florida*, 309 U.S. 227, 241 (1940)), then no group can be singled-out for abusive legal treatment,

> "DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group." (citations omitted) (*United States v Windsor*, 570 U.S. 744, 769–70 (2013)).

Surely, circuit courts' judges are not "better" able than Congress to violate the Constitution and intentionally harm those less wealthy whom they disdain for not bringing them more entertaining, better-briefed appeals.

Because the size of a party's pocketbook bears no relation to guilt or innocence, or liability, meting out injustice based on wealth cannot withstand any level of scrutiny for having no rational basis,

> "The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony [or civil] case. The distinction...is, therefore, an 'unreasoned distinction' proscribed by the Fourteenth Amendment." (*Mayer v City of Chicago*, 404 U.S. 189, 195–96 (1971)).

Circuit Courts' over-delegation of judicial power to staff attorneys cannot be justified as masters' appointments

Staff attorneys' delegations of power cannot fall under the special master provision of FRAP 48. Staff attorneys are not specialists in any area, they are not even "specialists" in law for their lack of experience. Special masters are to provide

factual findings and dispositions only as to "matters ancillary to the proceedings" not to write opinions and "confidently recommended dispositions" of entire cases. Unlike special masters, staff attorneys are delegated work in secret, without safeguards, etc.; denying parties any right to dispute their findings and dispositions either during or after they perform their assigned duties. Finally, the Supreme Court holds, for district courts, that appointing special masters to relieve excessive caseload pressure cannot be done; Circuit Courts are no different. (*LaBuy v Howes*, 352 U.S. 249, 259 (1957)).

This Court should hear and decide the Article III, Due Process, and Equal Protection issues raised herein despite not having been raised before the Second Circuit

As set forth above, Petitioner did not waive his constitutional issues because he had no idea of their violation until after he had exhausted his post-decision appellate rights. As held by this Court,

> "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, **waiver is the "intentional relinquishment or abandonment of a known right.**" [emphasis added] (*United States v Olano*, 507 U.S. 725, 733 (1993))

And,

> "It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights."" (citations and footnotes omitted) (*Johnson v Zerbst*, 304 U.S. 458, 464 (1938))

This Court held,

> "Where the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action." (*Bowen v New York*, 476 U.S. 467, 481 (1986))

Petitioner's case is similar. This unconstitutional procedure is "disclosed," most likely inadvertently, but not in the official sense that one seeking guidance on the substantive and procedural legal conduct of a case before the Second Circuit would think to look for it. Needless to say, the Court did not inform the parties of it; courts' rules forbid disclosures of staff attorneys actually writing opinions; it is not in the Federal Rules of Appellate Procedures or the Second Circuit's local rules.

Forfeiture precludes raising a new constitutional issue on appeal only if error is harmless, and, "that before a federal constitutional error can be held harmless, the court **must be able to declare a belief that it was harmless beyond a reasonable doubt**." [emphasis added] (*Chapman v Cal.*, 386 U.S. 18, 24 (1967))

As proved above, the staff attorney's unreviewed and uncorrected gross errors are consistent with Petitioner's appeal being denied. Far "beyond a reasonable doubt," there is no doubt they were extremely harmful.

Without regard to the above, these are structural errors that should be heard because they raise strong policy concerns about the proper administration of federal judicial business that contravenes statutory requirements set by Congress. (*See, Gonzalez v United States,* 553 U.S. 242, 270-271 (2008) (Thomas dissent) and *Khanh Phuong Nguyen v United States*, 539 U.S. 69, 78-81 (2003))

Appellate courts can reverse egregious plain errors *sus sponte*, and certainly should hear and decide them when raised.

> "[A]ppellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." (*United States v Atkinson*, 297 U.S. 157, 160 (1936))

These errors are blatantly obvious (once one learns of them) and destroy the equality and fairness of the "justice" handed out by appellate courts. They extend far beyond Petitioner's case to all pro se federal appeals. They prove utter lack of integrity so severe as to rightfully destroy the reputation of all Circuit Courts of Appeals.

Requested relief

Petitioner respectfully requests that this Court:

1. Reverse the decision of the Second Circuit Court of Appeals
2. Remand the case and require:
    a. Review by a panel of judges who read the case documents,
    b. Write an opinion that:
        i. Recites the relevant facts alleged and/or proved,
        ii. Recites pertinent law,
        iii. Recites the arguments in support of the appeal, the reasons an appeal was taken,
        iv. Analyzes the above and states a decision consistent herewith.