

Docket No. 23-7704

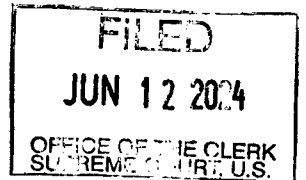
In the Supreme Court of the United States

ORIGINAL

Michael Jarrow,
Petitioner

v.

Heath H. Orr,
Respondent



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

Petition for Writ of Certiorari

Name: Michael Jarrow

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Questions Presented For Review

1. Has the United States Court of Appeals for the Fifth Circuit arbitrarily denied taking action on the petitioner's motion filed under Rule 26(b) of the Federal Rules of Appellate Procedure?
2. Is the judgment by the United States Court of Appeals for the Fifth Circuit erroneous under 5th Cir. R. 42.3 inasmuch as the petitioner filed a motion for an extension of time to continue to prosecute his appeal?

List of Parties and Related Cases

1. Michael Jarrow - Petitioner
 2. Heath H. Orr - Respondent
- Jarrow v. Orr, Case No. 2:21-cv-00065-Z-BR, United States District Court for the Northern District of Texas Amarillo Division. Judgment entered on August 9, 2023.
 - Jarrow v. Orr, Case No. 23-11195, United States Court of Appeals for the Fifth Circuit. Judgment entered on April 4, 2024.

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Appendix B Order denying Plaintiff's Motion for Reopening and Relief in the United States District Court for the Northern District of Texas Amarillo Division entered on October 5, 2023. Jarrow v. Orr, Case No. 2:21-cv-00065-Z-BR.

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Appendix D Order Adopting Findings, Conclusions, and Recommendation entered on August 9, 2023 in the United States District Court for the Northern District of Texas Amarillo Division. Jarrow v. Orr, Case No. 2:21-cv-00065-Z-BR.

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 Shumar v. United States, 423 U.S. 879 (1975)
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Opinions Below

Unreported

The opinions of the lower courts have not been published.

Statement of Jurisdiction

The Supreme Court of the United States has jurisdiction under Title 28 of the United States Code, Section 1254(1) to review the case at bar upon the Court's granting of this Petition for Writ of Certiorari by the petitioner Michael Jarrow in the case captioned hereinbefore. Title 28 of the United States Code, Section 1254(1) states: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;". Furthermore, on the date of April 4, 2024 the United States Court of Appeals for the Fifth Circuit Office of the Clerk dismissed the petitioner's appeal under 5th Cir. R. 42.3 for want of prosecution for failing to timely

Pay the fee.

Constitutional and Statutory Provisions

1. United States Constitution Amendment 1: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. See *Meyer v. Grant*, 486 U.S. 414, 421, 100 L.Ed.2d 425, 108 S.Ct. 1886 (1988). "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* See *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 575-576, 65 L.Ed.2d 973, 100 S.Ct. 2814 (1980). In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. *Id.*, at 575. What this means in the context of trials is that the First Amendment guarantees in the context of press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. *Id.*, at 576. See also *Baptiste v. Kennealy*, 490 F.Supp.3d 353, 2020 U.S. Dist. LEXIS 176264, at 64 (2020). "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Id.* See *Bieregu v. Reno*, 59 F.3d 1445, 1453 (3rd Cir. 1995). The First Amendment's right to petition "has a pedigree independent of — and substantially more ancient than — the freedoms of speech and press." *San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994), cert. denied, — U.S. —, 115 S.Ct. 735, 130 L.Ed. 2d

638 (1995). In colonial times, it referred primarily to the power of the people to petition their legislatures. In fact, a significant amount of colonial legislation was initiated by citizen petition. *Id.*, at 1453. In the modern era, the Supreme Court has held that the Petition Clause encompasses a right of access not only to the legislative branch, but to the Courts as well. *Id.* See *Matal v. Tam*, 582 U.S. 218, 239-240, 137 S.Ct. 1744, 198 L.Ed.2d 366, 2017 U.S. LEXIS 3872 (2017). "[W]e have held that the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected... freedom of speech even if he has no entitlement to that benefit.'" *Id.*, at 239-240. See *Pell v. Procunier*, 417 U.S. 817, 837, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Prisoners are still "persons" entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process. ... Free speech and press within the meaning of the First Amendment are, in my judgment, among the pre-eminent privileges and immunities of all citizens." *Id.*, at 837.

2. United States Constitution Amendment 14 Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. See *Pearson v. Grand Blanc*, 961 F.2d 1211, 1217, 1992 U.S. App. LEXIS 4157 (1992).

3. An action of state or local government which "shocks the conscience" of the federal court, may violate substantive due

process. *Id.* The Supreme Court in recent years has at least thrice reaffirmed a general right of substantive due process, stating that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions (regardless of the fairness of the procedures used to implement them)." *Id.*, 961 F.2d at 1220. See *Obergefell v. Hodges*, 576 U.S. 644, 663, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." *Id.* The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. *Id.* In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. *Id.* See *Board of Regents v. Roth*, 408 U.S. 564, 571, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). "Liberty" and "property" are broad and majestic terms. *Id.* They are among the "[g]reat [constitutional] concepts... purposely left to gather meaning from experience... [T]hey relate to the whole domain of social and economic fact, and the Statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *Id.* "While this Court has not attempted to define with exactness the liberty... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. *Id.*, 408 U.S., at 572. See *Obergefell v. Hodges*, *supra*, at 673. Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. *Id.* See *Obergefell*, *supra*, 576 U.S., at 672.

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. *Id.* See *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 1074-1075, 145 L.Ed.2d 1060 (2000). Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). In so doing, we have explained that "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.*, 528 U.S., at 562-564, 120 S.Ct., at 1074-1075. See *Engquist v. Oregon Dep't. of Agriculture*, 553 U.S. 591, 597, 128 S.Ct. 2146, 2150, 170 L.Ed.2d 975 (2008). Engquist argues that the Equal Protection Clause forbids public employers from irrationally treating one employee differently from others similarly situated, regardless of whether the different treatment is based on the employee's membership in a particular class. *Id.* She reasons that in *Olech*, *supra*, we recognized in the regulatory context a similar class-of-one theory of equal protection, Brief for Petitioner 14-15; that the Equal Protection Clause protects individuals, not classes, *id.*, at 15-17; that the Clause proscribes "discrimination arising not only from a legislative act but also from the conduct of an administrative official," *id.*, at 17; and that the Constitution applies to the State not only when it acts as regulator, but also when it acts as employer, *id.*

At 23-29. Thus, Engquist concludes that class-of-one claims can be brought against public employers just as against any other state actors, *id.*, at 29-32, and that differential treatment of government employees—even when not based on membership in a class or group—violates the Equal Protection Clause unless supported by a rational basis, *id.*, at 32, 39-45. *Id.*, 553 U.S., at 597, 128 S.Ct., at 2150. Engquist correctly argues, however, that we recognized in *Olech* that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called “class of one.” *Id.*, at 601, 128 S.Ct., at 2153. As we explained long ago, the Fourteenth Amendment “requires that all persons subjected to legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” *Id.*, 553 U.S., at 602.

3. Rule 26(b) of the Federal Rules of Appellate Procedure: (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law. See *Shumar v. United States*, 423 U.S. 879, 46 L.Ed. 2d 107, 96 S.Ct. 145 (1975). Federal Rule App Proc 26(b) authorizes the courts of

appeals to permit motions to be made out of time only "for good cause shown." *Id.* The question in these cases is whether the Government showed good cause for its untimely motion to extend time to petition for rehearing in the Court of Appeals. *Id.* The Government's motion to extend time was itself untimely. Its burden was to show good cause, not only for the extension, but also for its untimely motion for an extension. *Id.* Rule 26(b) requires a showing of good cause both for extensions of time and for motions made out of time: "The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time..." (Emphasis added). *Id.*

4. Fifth Circuit Rule 42.3.1: In direct criminal appeals proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 and 42.3.1.2 apply. In habeas cases, actions filed under 28 U.S.C. § 2255, and other prisoner matters proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 apply if the appellant is represented by counsel; prisoners proceeding pro se will be given an initial written deadline for filing a certificate of appealability, filing any briefs, for paying fees, or for complying with other directives of the court. If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal without further notice, 15 days after the deadline date.

5. The United States Constitution Article 3 Sections 1 and 2: 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. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 757-758, 70 L.Ed. 2d 700 (1982). Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." *Id.* The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to

adjudge the legal rights of litigants in actual controversies." *Liverpool S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). The requirements of Art. III are not satisfied merely because a party requests a Court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with Courts of law in terms that have a familiar ring to those trained in the legal process. *Id.* The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. *Id.* The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892). Otherwise, the power "is not judicial... in the sense in which judicial power is granted by the Constitution to the Courts of the United States." *United States v. Ferreira*, 13 How. 40, 48, 14 L.Ed. 42 (1852). *Id.*, 454 U.S., at 471, 102 S.Ct., at 757-758. See also *Allen v. Wright*, 468 U.S. 737, 750, 82 L.Ed. 2d 556, 104 S.Ct. 3315, 3324 (1984). Article III of the Constitution confines the Federal Courts to adjudicating actual "cases" and "controversies." *Id.* As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 102 S.Ct. 752, 757-761, 70 L.Ed. 2d 700 (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. *Id.* The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper - and properly limited -

role of the Courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). *Id.*, 468 U.S., at 751, 104 S.Ct., at 3324. The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government. *Id.* The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines. *Id.*

Statement Of The Case

On January 26, 2024 in the United States District Court for the Northern District of Texas Amarillo Division the petitioner's Motion for Leave to Proceed in forma pauperis on Appeal was denied relevant to Case Number: 2:21-cv-00065-Z-BR and Case Name: Jarrow v. Orr. See ECF No. 41. Cf. ECF No. 37. On the date of February 6, 2024 the United States Court of Appeals Fifth Circuit Office of the Clerk mailed the petitioner a directive informing the petitioner relevant to Case No. 23-11195, that the petitioner had 30 days from the date of February 6, 2024 to pay the \$605.00 appellate filing fee to the Clerk of the district court or to apply for in forma pauperis status with the United States Court of Appeals for the Fifth Circuit and include the financial affidavit required by Fed. R. App. P. 24, moreover, the United States Court of Appeals for the Fifth Circuit also informed the petitioner that if the petitioner was not to pay the filing fee, the petitioner would be enabled to file a motion for leave to proceed in forma pauperis in the United States Court of Appeals for the Fifth Circuit. Moreover, in the directive mailed to the petitioner on February 6, 2024 from the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the Fifth Circuit also informed the petitioner that the petitioner may receive an extension of time from the United States Court of Appeals for the Fifth Circuit within the time provided therein. On

April 1, 2024 the petitioner mailed a motion for an extension of time filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis to the United States Court of Appeals for the Fifth Circuit Office of the Clerk relevant to Case No. 23-11195. On the date of April 16, 2024 the United States Court of Appeals for the Fifth Circuit Office of the Clerk mailed the petitioner a correspondence relevant to Case No. 23-11195 informing the petitioner that the United States Court of Appeals for the Fifth Circuit Office of the Clerk was taking no action on my motion for an extension of time aforesaid hereinabove to file a motion for leave to proceed in forma pauperis because it was untimely. Furthermore, on the date of April 4, 2024 in between the dates of April 1, 2024 and April 16, 2024 aforesaid hereinabove, the United States Court of Appeals for the Fifth Circuit Office of the Clerk (Clerk's Office) dismissed the petitioner's appeal under 5th Cir. R. 42.3 for want of prosecution relevant to Case No. 23-11195 stating that the petitioner failed to timely pay the fee.

Reasons For Granting The Petition

This Petition for a Writ of Certiorari should be granted for the following reasons: (1) The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, whereby erroneously refusing to take action on the petitioner's motion for an extension of time that the petitioner filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the court of appeals. Moreover, the United States Court of Appeals for the Fifth Circuit erroneously refused to take action on the

Petitioner's motion for an extension of time that the Petitioner filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals, in view of the fact that the United States Court of Appeals for the Fifth Circuit departed from the usual and accepted provisions set forth in Rule 26(b) of the Federal Rules of Appellate Procedure, whereby determining the petitioner's motion filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to be untimely. Rule 26(b) of the Federal Rules of Appellate Procedure explicitly states: "(b) Extending Time. For good cause, the Court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the Court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, Commission, or officer of the United States, unless specifically authorized by law." Furthermore, on the date of February 6, 2024 the United States Court of Appeals for the Fifth Circuit Office of the Clerk mailed the petitioner a directive informing the petitioner that he may receive an extension of time to file a motion for leave to proceed in forma pauperis in the Court of appeals, from the United States Court of Appeals for the Fifth Circuit Office of the Clerk of the Court sites: relevant to Case No. 23-11195. Moreover, the United States Court of Appeals for the Fifth Circuit Office of the Clerk's pronouncement, relevant to the Clerk of the Court aforesaid above, was erroneous inasmuch as the Clerk of the Court pronounced not to take action relevant to the petitioner's motion for an extension of time to file a motion for leave to proceed in forma pauperis, in view of the fact that the Clerk also pronounced the petitioner's motion for an extension of time to be untimely. Although, the petitioner demonstrated good cause in

his motion for an extension of time that the petitioner filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals. Moreover, Federal Rule of Appellate Procedure 26(b) provides, that for good cause, the court may permit an act to be done after that time expires. Furthermore, the petitioner, in his motion for an extension of time filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals, precisely clarified that the petitioner was delivered the directive aforesaid hereinbefore from the United States Court of Appeals for the Fifth Circuit Office of the Clerk, twenty-one days past the time for the petitioner to file a timely motion for leave to proceed in forma pauperis in the Court of appeals and fifty-one days from the time (i.e., date) that the directive was printed (on February 6, 2024) by a mailroom staff worker at the prison unit that I am assigned to, thereby demonstrating good cause for the petitioner's request for an extension of time after the time had expired to file a motion for leave to proceed in forma pauperis in the Court of appeals. Furthermore, the directive aforesaid hereinbefore relevant to case No. 23-11195 and USDC No. 2:21-CV-65 informed the petitioner that if he applied to the district court for in forma pauperis status and were denied, that the petitioner had 30 days from the date of February 6, 2024 to pay the \$605.00 appellate filing fee to the clerk of the district court, or to apply for in forma pauperis status with the United States Court of Appeals for the Fifth Circuit Office of the Clerk and include the financial affidavit required by Fed. R. App. P. 24, or receive an extension of time to do so from the United States Court of Appeals for the Fifth Circuit Office of the Clerk. Similarly, Federal Rule of Appellate Procedure 26(b) partly states, "For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires." Therefore, Federal Rule of Appellate Procedure 26(b) permits the court to permit an act to be done after the time expires. Which gave rise to the petitioner filing a motion for an extension of time under Rule 26(b) of the Fed. Rules

of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals. Furthermore, the United States Court of Appeals for the Fifth Circuit Office of the Clerk's pronouncement to take no action on the petitioner's motion for an extension of time filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals was erroneous, thereby pronouncing the petitioner's motion as untimely. See *Shumar v. United States*, 423 U.S. 879, 96 S.Ct. 145, 46 L.Ed. 2d 107 (1975). Federal Rule App Proc 26(b) authorizes the Courts of appeals to permit motions to be made out of time only "for good cause shown." *Id.* See also Fed.R.App.P. 26(b). Moreover, the petitioner did in fact demonstrate good cause in his motion for an extension of time filed under Rule 26(b) of the Federal Rules of Appellate Procedure, whereby clarifying that the petitioner was delivered the directive aforesaid hereinbefore from the United States Court of Appeals for the Fifth Circuit Office of the Clerk, twenty-one days past the time for the petitioner to file a timely motion for leave to proceed in forma pauperis in the Court of appeals; and fifty-one days from the date that the directive from the United States Court of Appeals for the Fifth Circuit Office of the Clerk was printed (on February 6, 2024) which a mailroom staff worker at the prison unit that I am assigned to delivered to me behind-hand. See *Shumar v. United States*, *Supra*, at 879. "The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time..." *Id.* Therefore, the erroneous pronouncement to take no action on the Office of the Clerk's for an extension of time filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals is unconstitutional inasmuch as the pronouncement aforesaid above has abridged the petitioner's First Amendment rights to the United States Constitution, whereby critically constraining the petitioner's First Amendment rights of freedom of speech and to petition the Government for a redress of grievances. Thereby, the United States Court of Appeals for the Fifth Circuit Office of the Clerk has put

a gratuitous constraint on the petitioner's speech to be heard in the United States Court of Appeals for the Fifth Circuit to petition the Court for leave to proceed in forma pauperis therein. See *Baptiste v. Kennealy*, 490 F.Supp. 3d 353, 2020 U.S. Dist. LEXIS 176264, at 64 (2020). "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Id.* See also *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 575-576, 65 L.Ed. 2d 973, 100 S.Ct. 2814 (1980). In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. *Id.*, at 575. What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. *Id.*, at 576. See *Meyer v. Grant*, 486 U.S. 414, 421, 100 L.Ed. 2d 425, 108 S.Ct. 1886 (1988). "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint of fear of subsequent punishment." *Id.* See *Bieregu v. Reno*, 59 F.3d 1445, 1453 (3d Cir. 1995). The First Amendment's right to petition "has a pedigree independent of - and substantially more ancient than - the freedoms of speech and press." *San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3d Cir. 1994), *cert. denied*, - U.S. -, 115 S.Ct. 735, 130 L.Ed. 2d 638 (1995). In colonial times, it referred primarily to the power of the people to petition their legislatures. In fact, a significant amount of colonial legislation was initiated by citizen petition. *Id.*, at 1453. In the modern era, the Supreme Court has held that the petition Clause encompasses a right of access not only to the legislative branch, but to the courts as well. *Id.* See *Matal v. Tam*, 582 U.S. 218, 239-240, 137 S.Ct. 1744, 198 L.Ed. 2d 366, 2017 U.S. LEXIS 3872 (2017). "[W]e have held that the Government 'may not deny a benefit to a

Person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." *Id.*, at 239-240. See *Pell v. Procunier*, 417 U.S. 817, 837, 94 S.Ct. 2800, 41 L.Ed. 2d 495 (1974). Prisoners are still 'persons' entitled to all Constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process. ... Free speech and press within the meaning of the First Amendment are, in my judgment, among the pre-eminent privileges and immunities of all citizens.", *Id.*, at 837. Moreover, the correspondence that the United States Court of Appeals for the Fifth Circuit Office of the Clerk mailed to the petitioner on April 16, 2024 relevant to Case No. 23-11195 and USDC No. 2:21-cv-65 is evidence of the United States Court of Appeals for the Fifth Circuit Office of the Clerk's departure from the accepted and usual course of judicial proceedings under Rule 26(b) of the Federal Rules of Appellate Procedure, and evidence of the United States Court of Appeals for the Fifth Circuit office of the clerk's gratuitous constraint on the petitioner's First Amendment rights under the Freedom of Speech Clause and the Petition Clause of the United States Constitution. See *West v. Love*, 776 F.2d 170, 175, 1985 U.S. App. LEXIS 24522, at 12 (1985). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Fed. R. Evid.* 401. *Id.*, 776 F.2d at 175, 1985 U.S. App. LEXIS 24522, at 12. (2) The judgment of the United States Court of Appeals for the Fifth Circuit Office of the Clerk entered on April 4, 2024 relevant to Case No. 23-11195 was erroneously dismissed under 5th Cir. R. 42.3 for want of prosecution, in view of the fact that the petitioner followed through with his appeal diligently after the petitioner filed his notice of appeal in the United States District Court for the Northern District of Texas Amarillo Division and a motion for an extension of time to file a notice of appeal therewith on the date of November 27, 2023. See ECF Nos. 35 and 36. Thereafter, on the date

Of November 29, 2023 the petitioner filed a motion to proceed in forma pauperis (i.e., a motion for leave to proceed in forma pauperis on appeal) in the United States District Court for the Northern District of Texas Amarillo Division; and an affidavit accompanying the petitioner's motion for leave to proceed in forma pauperis on appeal aforesaid above. See ECF No. 37. Thereafter, on the date of December 1, 2023 in the district court aforesaid hereinabove the petitioner's motion for an extension of time to file a notice of appeal was denied. See ECF No. 38. Then on the date of January 26, 2024 in the district court aforesaid hereinbefore the petitioner's motion for leave to proceed in forma pauperis on appeal was denied. See ECF No. 41. Subsequently, on the date of February 6, 2024 the United States Court of Appeals for the Fifth Circuit Office of the Clerk mailed the petitioner a directive relevant to Case No. 23-11195 and USDC No. 2:21-cv-65 informing the petitioner that if the petitioner applied to the district court for in forma pauperis status and were denied, that the petitioner had 30 days from the date of February 6, 2024 to pay the \$605.00 appellate filing fee to the Clerk of the district court, or to apply for in forma pauperis status with the United States Court of Appeals for the Fifth Circuit Office of the Clerk and include the financial affidavit required by Fed. R. App. P. 24, or receive an extension of time to do so from the United States Court of Appeals for the Fifth Circuit Office of the Clerk. Thereafter, on the date of April 1, 2024 the petitioner mailed a motion for an extension of time filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of Appeals to the United States Court of Appeals for the Fifth Circuit Office of the Clerk. Which the United States Court of Appeals for the Fifth Circuit Office of the Clerk took no action to consider and pronounced judicially the petitioner's motion untimely on an erroneous inquisition. Furthermore, 5th Cir. R. 42.3.1 states partly, "If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal, without further notice, 15 days after the deadline date." However, Rule 26(b) of the Federal Rules of Appellate Procedure, states partly, "For good

Cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires." Similarly, prior to the petitioner's appeal being dismissed under 5th Cir.R. 42.3 for want of prosecution on April 4, 2024 relevant to Case No. 23-11195, the petitioner mailed a motion for an extension of time filed under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals, to the United States Court of Appeals for the Fifth Circuit Office of the Clerk on the date of April 1, 2024. However, the Petitioner's appeal relevant to Case No. 23-11195 was dismissed on April 4, 2024 under 5th Cir.R. 42.3 for want of prosecution. Which was an erroneous dismissal and a violation of the petitioner's Fourteenth Amendment rights under the Due Process Clause and the Equal Protection Clause of the United States Constitution, whereby the United States Court of Appeals for the Fifth Circuit Office of the Clerk dismissing the petitioner's appeal aforesaid hereinabove for want of prosecution under 5th Cir.R. 42.3 although the petitioner filed a motion for an extension of time under Rule 26(b) of the Federal Rules of Appellate Procedure, to extend the time to file a motion for leave to proceed in forma pauperis in the Court of appeals in the United States Court of Appeals for the Fifth Circuit aforesaid hereinbefore, to proceed in forma pauperis therein to continue to prosecute my appeal with in forma pauperis status to the ultimate conclusion. See Board of Regents v. Roth, 408 U.S. 564, 569-570, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Id., at 569. When protected interests are implicated, the right to some kind of prior hearing is paramount. Id., at 569-570. Moreover, the United States Court of Appeals for the Fifth Circuit Office of the Clerk arbitrarily placed an undue restraint on the petitioner's liberty to petition the court for leave to proceed in forma pauperis therein. See Board of Regents v. Roth, supra, at 581. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against

[illegible]

Court of appeals after the expired time to file such motion," in the United States Court of Appeals for the Fifth Circuit Office of the Clerk - inasmuch as the petitioner sought an extension of time to continue to prosecute his appeal to the ultimate conclusion in forma pauperis, seemingly apparent, the petitioner has been intentionally treated differently from others similarly situated, seeking to prosecute an appeal. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 145 L.Ed.2d 1060, 120 S.Ct. 1073, 1074-1075 (2000). Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). *Id.*, 120 S.Ct., at 1074. In so doing, we have explained that "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co.*, *supra*, at 445, 43 S.Ct. 190 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154 (1918)). *Id.*, 120 S.Ct., at 1074-1075. See *Engquist v. Oregon Dep't. of Agriculture*, 553 U.S. 591, 128 S.Ct. 2146, 2150, 170 L.Ed.2d 975, 2008 U.S. LEXIS 4705 (2008). The Court of Appeals reversed in relevant part. It recognized that this Court had upheld a class-of-one equal protection challenge to state legislative and regulatory action in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed. 2d 1060 (2000) (per curiam). 478 F.3d 985, 992-993 (CA9 2007). *Id.*, 128 S.Ct., at 2150, 2008 U.S. LEXIS 4705, at 9. Engquist correctly argues, however, that we recognized in *Olech* that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called "class of one." *Id.*, 553 U.S., at 601, 128 S.Ct., at 2153. As we explained long ago, the

Fourteenth Amendment "requires that all persons subjected to... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71-72, 7 S.Ct. 350, 30 L.Ed. 578 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a "rational basis for the difference in treatment." *Olech*, 528 U.S., at 564, 120 S.Ct. 1073, 145 L.Ed. 2d 1060. *Id.*, 553 U.S., at 602, 128 S.Ct., at 2153. Furthermore, the petitioner has been intentionally treated differently from others similarly situated under the Equal Protection Clause of the Fourteenth Amendment on the basis that the United States Court of Appeals for the Fifth Circuit Office of the Clerk arbitrarily discriminated against me on a class of one theory by the express terms of Federal Rule of Appellate Procedure 26(b) inasmuch as the rule provides that the court may permit an act to be done after that time expires. Similarly, the petitioner filed a motion for an extension of time under Federal Rule of Appellate Procedure 26(b) after the time had expired to file a motion under Federal Rule of Appellate Procedure 24(a)(5), however, the United States Court of Appeals for the Fifth Circuit Office of the Clerk took no action on the petitioner's motion under Federal Rule of Appellate Procedure 26(b) to extend the time to file a motion under Federal Rule of Appellate Procedure 24(a)(5) and the court aforesaid above dismissed the petitioner's appeal for want of prosecution under 5th Cir.R. 42.3.

(3) This petition is of essential importance under Article 3 of the United States Constitution Sections 1 and 2 on the basis of actual cases and controversies. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 102 S.Ct. 752, 757-761, 70 L.Ed. 2d 700 (1982). Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." *Id.*, at 471. The Constitutional power of federal courts cannot be defined, and indeed

has no substance without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." Id. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. Id. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892). Otherwise, the power "is not judicial... in the sense in which judicial power is granted by the Constitution to the courts of the United States." *United States v. Ferreira*, 13 How. 40, 48, 14 L.Ed. 42 (1852). Id., 454 U.S., at 471, 102 S.Ct., at 758. As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit. Id., at 471. The Art. III aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. Id., at 473. See *Valley Forge*, supra, 454 U.S., at 477, 102 S.Ct., at 761. ("The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement,"). Id. See *Allen v. Wright*, 468 U.S. 737, 750-751, 82 L.Ed. 2d 556, 104 S.Ct. 3315, 3324 (1984). Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." Id., at 750. As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476, 102 S.Ct. 752, 757-761, 70 L.Ed. 2d 700 (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper - and properly limited - role of the courts in a democratic society." *Worth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed. 2d 343 (1975). Id., 468 U.S., at 750, 104 S.Ct., at 3324. The case-or-

Controversy doctrines state fundamental limits on Federal judicial power in our system of government. *Id.* The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a Federal Court is perhaps the most important of these doctrines. *Id.* "In essence the question of standing is whether the litigant is entitled to have the Court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, *supra*, 422 U.S., at 498, 95 S.Ct., at 2205. *Id.*, 468 U.S., at 750-751, 104 S.Ct., at 3324. Furthermore, this controversy hereunder is based on the violations of the petitioner's First Amendment rights of freedom of speech and to petition the Government for a redress of grievances under the Freedom of Speech Clause and the Petition Clause of the United States Constitution, whereby the United States Court of Appeals for the Fifth Circuit Office of the Clerk constraining the petitioner of his freedom of speech inasmuch as the Court took no action on the petitioner's motion filed under Federal Rule of Appellate Procedure 26(b) to extend the time to file a motion under Federal Rule of Appellate Procedure 24(a)(5), and thereby constraining the petitioner of his right to petition the Court for leave to proceed *in forma pauperis* in the Court of appeals. Which resulted with the arbitrary and discriminatory dismissal of the petitioner's appeal under 5th Cir. R. 42.3 for want of prosecution. Which is the basis for the petitioner's claim under the Equal Protection Clause and coexisting with the petitioner's Due Process Clause claim under the Fourteenth Amendment of the United States Constitution hereunder inasmuch as the petitioner has been deprived of his liberty of procedural due process, and thereby the petitioner was not heard relevant to his motion filed under Federal Rule of Appellate Procedure 26(b) in the United States Court of Appeals for the Fifth Circuit Office of the Clerk, similarly, the dismissal of the petitioner's appeal under 5th Cir. R. 42.3 aforesaid hereinabove was also the basis of the petitioner's equal protection claim inasmuch as the United States Court of Appeals for the Fifth Circuit Office of the Clerk arbitrarily discriminated against the petitioner, and thereby intentionally treated him differently from others similarly situated on a class of one theory, whereby arbitrarily taking no action on the petitioner's motion filed under Federal Rule of Appellate Procedure 26(b) which resulted with the petitioner's appeal being dismissed under 5th Cir. R. 42.3 for want of prosecution.

Conclusion

Michael Jarrow

May 24, 2024