No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID HARRIS,

Applicant,

v.

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

Respondents,

JIAN ZHOU,

Defendant.

APPLICATION DIRECTED TO THE HON. SONIA SOTOMAYOR FOR AN ALLOWANCE OF ADDITIONAL WORDS AND AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Sonia Sotomayer, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

The jurisdiction of this Court is based on 28 U.S.C. 1254(1). In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicant David Harris respectfully requests that the time to file his petition for a writ of certiorari be extended for 60 days, up to and including Monday, November 13, 2023. The Court of Appeals issued its Summary Order on April 6, 2023 (Exhibit B) and denied rehearing en banc on May 17, 2023 (Exhibit A), which are the judgments sought to be reviewed. Absent an extension of time, the petition would be due on August 15, 2023. In accordance with this Court's Rules, above, and with Rule 33.1(d), Applicant also requests leave to submit a petition for writ of certiorari of 12,000 words; 3,000 more than provided per Rule 33.1(g)(i) and as stated above. Respondents' counsels were contacted with respect to this motion, but did not reply.

Brief summary of reasons for additional words and time

On or about the end of May, after Applicant's legal process in the Second Circuit was exhausted, he learned without doubt that the Court had unconstitutionally delegated grossly excessive judicial power to a staff attorney, the same as per 28 U.S.C. 636, with little or no judicial oversight, and does so to all pro se appellants. This violates Article III, directly. As this second-class, inferior legal process is targeted specifically and intentionally at pro se appellants, who self-represent because they cannot afford high-powered legal representation appropriate to their

cases, it discriminates invidiously on the basis of appellants' wealth, in violation of both Due Process and Equal Protection. Because pro se appellants are punished for self-representing, a fundamental right since 1789, it is similarly unconstitutional for this reason. As all Circuit Courts of Appeals do similarly, this case reaches far beyond Applicant's specific problem.

Applicant has worked seven days per week on these complex issues in the brief time since learning of them but needs additional time to properly prepare. Also, to properly present them, and to argue why this Court should hear an issue not raised below, as well as his underlying, wrongly-dismissed claim, more words are required.

Applicant can well present the important issues raised by this appeal, if allowed the time and words to do so

Applicant, 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 legal research in every class, and graduate classes on legal research, for over forty years. He has five college degrees, including a JD, LLM, and PHD. Applicant 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. With

adequate time and pages, Applicant can well present the complex and important matters raised in this appeal.

Summary of the bases of this appeal

Though this is an appeal of Applicant's patently wrongful decision in the Second Circuit Court of Appeals, it raises issues reaching far beyond his personal case; fundamental Constitutional violations affecting all pro se appellants before all Circuit Courts of Appeals. These Courts, in secret, star-chamber proceedings, routinely and officially violate Article III, Due Process, and Equal Protection Constitutional requirements, and inflict these depredations specifically on pro se appellants.

Simply put, Circuit Courts of Appeals, in violation of Article III, unconstitutionally delegate the same judicial powers to unauthorized staff attorneys as Congress permits District Courts to delegate to Magistrate Judges, but with none of the Constitutionally required protections.

Staff attorneys, newly-graduated, grossly-unqualified persons, provide deficient, second-class justice to pro se appellants, as expected and intended. In contrast, wealthy appellants employing costly, elite, high-powered attorneys, receive full, first-class justice from authorized Article III judges.[1]

[1] "...a litigant in an "important" antitrust or securities case, one who is represented by serious counsel, will get the full Learned Hand treatment..... A 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." (William M. Richman & William L. Reynolds, *Injustice on Appeal* 119-120 (2013))

In the Second Circuit, all pro se appeals and all pro se motions, including dispositive motions, are "handled" by overworked staff attorneys[2] who, like the judges, disparage pro se appellants, think they are trash and cannot be bothered to read their papers.[3] Why read Applicant's Briefs when there is the much shorter Response Brief of an attorney from one of the largest, high-powered law firms on earth! Surely, given the District Court's decision supporting such super-star work, everything the Applicant wrote is just frivolous and not worth wasting even a staff attorney's time. Provably, this happened in Applicant's case – neither the record nor Applicant's Briefs were read or referenced; all weight was given only to Respondent's brief and the Decision below.[4]

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[2] Staff attorneys "handle" "**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) Staff attorneys must "manage their time effectively in order to **meet tight deadlines**; and **confidently recommend dispositions**." (https://www.ca2.uscourts.gov/staff_attorneys/sao_applying.html)

[3] "About six months ago," Judge Posner 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)

[4] Proof is that at oral argument a member of the Panel stated that Applicant's claim was based on a non-meritorious cause of action. But this assertion was false. It was not the cause of action pled in the Amended Complaint, or referenced in any of Applicant's Briefs. It was, in fact, specifically contradicted in all of them.

This false assertion was, however, written in Respondent's Attorney's, Mr. Holland's, briefs together with lies about facts in the case and controlling legal authorities. Mr. Holland's false statement of the cause of action in his Response Brief even was specifically and separately highlighted, complained of, and proved false in Applicant's Reply Brief.

In a verified filing, Mr. Holland did not factually deny that in his papers and at oral argument he lied to the Panel about the cause of action, the facts, and the law, and that the Panel was materially misled thereby.

However, one of Mr. Holland's "defenses" was that the Panel had all the papers and should not have been deceived; that it was the Panel's own fault if deceived by him! This is an important point. He was right – if the Panel members had read anything in the record or in either of Applicant's Briefs, **or their staff attorney had**, then they could not have made this mistake; proof that no one did so.

An inexperienced, newly-graduated staff attorney prepares a bench memo given to all three judges on the Panel.[5] Thus, its errors infect the entire panel similarly, which, provably, happened in Applicant's case.(*See*, 4)

Like any legal memos terminating with a "confidently" recommended disposition, these:

determine relevant facts and law;

summarize and evaluate parties' arguments; and

"confidently recommend a disposition" of the entire case.

Though these are the judicial powers of a magistrate judge under 28 U.S.C. 636(b), they are not delegated by Congress but by Courts of Appeals that have no constitutional right to do so. Worse, there are no Constitutionally required protections. This is a secret procedure:[6] not in the Federal Rules of Appellate Procedure or Second Circuit's Local Rules, and internal workings of Courts of Appeals, including authorship of decisions, are forbidden from disclosure.[7] Parties have no right to object or receive *de novo* review by an Article III judge. Worst, there is no right to appeal, but only to request it of the U.S. Supreme Court.

As pro se's self-represent because they cannot afford legal representation appropriate to their case, this distributes injustice based on "The size of the

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[5] "In a given case, the assigned staff attorney drafts a single, neutral bench memo for all three members of the panel. Their work product thus ensures that the judges are, quite literally, on the same page." (https://www.ca2.uscourts.gov/staff_attorneys/staff_attorneys_office.html)

[6] 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)).

[7] See, AO 306, Model Confidentiality Statement, and other official publications describing Courts' employees' confidentiality requirements.

defendant's pocketbook [which] bears no ... relationship to his guilt or innocence .... [and] is, therefore, an 'unreasoned distinction' proscribed by the Fourteenth Amendment." (*Mayer v. City of Chicago*, 404 U.S. 189, 195–96 (1971)) This is, "...invidious discrimination is based on one of the guidelines: *poverty*." (*Boddie v. Connecticut*, 401 U.S. 371, 386 (1971), a case addressing the right to get a divorce) (In concurrence, both Justices Douglas and Brennan stated this also to be denial of Equal Protection) This scheme violates both Constitutional provisions.

As ruled above, because there is no relationship between "guilt or innocence" and wealth, this has no rational basis and cannot pass even the lowest level of scrutiny, no matter the reason for it. Worst, this is not merely the unfortunate consequence of a neutral policy; pro se's are specifically targeted by appellate judges who intend to give them second-class treatment.[8]

In addition, this discrimination targets persons for exercising their fundamental right of self-representation, a right enshrined in the first judicial law of 1789 on equal footing with the very creation of federal courts and continued today. Punishing pro se's for exercising this right is another basis for strict scrutiny.

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[8] "Why is it that the texts which make up 80 percent of the opinions produced by the U.S. Courts of Appeals are perceived [by appellate judges, themselves] to suffer from what are two different but likely related defects: fears that they may be "wrong"; and assertions that they are sloppily drafted? How could these flaws come to characterize the vast majority of federal appellate court opinions, given the rigorous appointment process to circuit judgeships? In part because, as I have indicated supra, they are not written by federal appellate judges, but rather by the predominantly recently graduated corps of judicial clerks and staff attorneys, to whom the federal appellate bench de facto delegates a significant majority of its Article III judicial power, and over whom it does not exercise meaningful supervision." (footnotes omitted) (Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1, 10 (2007)) Numerous other scholarly publications assert exactly this same conclusion, and judges have stated this to be true, as well.

Reasons for additional words and time

On April 6, 2023, by Summary Order, the Panel allegedly "decided" Applicant's case and affirmed District Court's dismissal of it. In reality, the Panel "decided" nothing, but merely rubber-stamped, without review, a version of the grossly negligently prepared bench memo given to them by a staff attorney. Ignorant of this abuse, Applicant timely filed a corrected petition for rehearing and en banc review on April 21, 2023, pointing out egregious errors in the Summary Order; the same errors made by District Court; errors highlighted in Applicant's Principal Brief for not acknowledging important, contradictory facts alleged in the Amended Complaint, let alone taking them to be true; for failing to acknowledge contrary, on-point, controlling law, let alone applying or discussing it. Repeating without comment such egregious errors from District Court's decision proves nothing in the record or in Applicant's legal papers was read or considered. Applicant's petition was denied without explanation on May 17, 2023.

Earlier, on or about May 15, because Applicant thought the decision on his petition was overdue, he conducted research into the en banc review process to learn how long this decision might take and why the time might vary. This research inadvertently retrieved a couple of law review articles disparaging the abuse of pro se litigants from this two-class justice system. These articles claimed the existence of this process in a few of the Circuits, but said not much about the Second Circuit, and they tended to focus primarily on the unfairness of it and not on hard evidence proving it or legal arguments about the constitutional rights it violated. Applicant

began a more in-depth examination that only by the end of May confirmed his conjecture; but too late to seek redress in the Second Circuit as his legal process was exhausted.

The sequence of events outlined above shows the need for additional time and words for proper presentation of a petition for writ of certiorari to this Court. In addition to appealing Applicant's wrongly denied claim before the Second Circuit, he now must also research and brief the complex Constitutional violations noted above; Article III, Due Process, and Equal Protection. Caselaw in these areas is extensive and the scholarly commentary vast. Since the middle of May, Applicant has been working seven days a week on these topics instead of his underlying, meritorious claim. He has collected almost 300 relevant cases, law review articles, and official court reports comprising more than 2,000 pages. Applicant has made substantial progress, as seen herein, but he is far, far from done.

This case raises broadly applicable issues of special interest to the public and of special import for addressing the rights of the impoverished: welfare applicants, social security recipients, prisoners, and immigrants, all of whom are acting without counsel and trusting the Courts of Appeals to mete out justice to them and grant them greater judicial consideration, but secretly, only get the opposite. Pro se's comprise more than one-half of all appeals. It behooves the Court to allow Applicant time and words to present a petition sufficient to these purposes.

In addition, because Applicant did not know what was being done to him by the Second Circuit until after legal process there was exhausted, he confronts yet

another complex issue. He must research, digest, and argue why this Court should accept and decide these Constitutional questions, though not presented to the Court below.

Preliminarily, the first reason the Court should not limit his appeal is his unawareness of this unconstitutional process until too late to raise it in the Second Circuit, "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)) Numerous cases follow on *Olano* and establish that such waiver must be done knowingly, which is not true here.

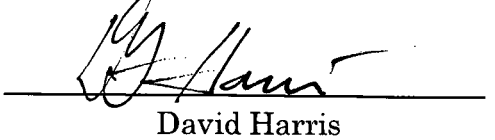
Additional bases for accepting this new argument are: it addresses the judicial power of the Court and whether it was exercised constitutionally and lawfully, not an issue of personal jurisdiction that could be waived, but whether the exercise of judicial power, itself, was constitutional; it addresses a fundamental, plain error that will result in manifest injustice and a gross miscarriage of justice if not rectified; the violations complained of are not limited to harming Applicant, but apply to injuries being sustained by hundreds, if not thousands, of pro se appellants for secretly being denied the most fundamental and substantial right to equal justice under the law, a violation happening this very moment and continuing indefinitely if left uncorrected. Simply put, this appeal addresses blatant Constitutional violations that damage the fairness and integrity of the judicial

process to such an extent that the public reputation of the federal appellate courts could be destroyed.

This Court is where this illegal process can and should be stopped and corrected. Merely fighting this in one or another Circuit Court is inadequate, and likely futile. This problem is pervasive and insidious; once appellate judges become used to not having to do "boring" work on frivolous pro se, trash appeals, but, instead, can glorify themselves by pretending to be life-tenure legislators "making law" and only spending time on cases of the rich and famous that aggrandize them, personally, then, like heroin, how can they voluntarily give it up?

As documented herein, Applicant, through no fault of his own, has gotten a very late start on a substantial and very important part of his petition. He has and will continue to work tirelessly to complete a petition worthy of this august Court's consideration. But, there is only so much time available, and as professor, his academic responsibilities, his commitments to students and co-authors will, of necessity, absorb some of it. The allowance of an additional 60 days will make a great difference. Similarly, these additional legal issues of great importance require careful and complete explication as befits arguments that may so greatly affect practices in all the Circuit Courts of Appeals and the quality of justice handed out to so many persons. This task requires and merits a few more words to do so.

Respectfully submitted,



David Harris
Dated: July 22, 2023