No. 16-287

IN THE

Supreme Court of the United States

SAI,
Petitioner,
v.

TRANSPORTATION SECURITY ADMINISTRATION,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The petition establishes that the circuits are divided on whether denial of counsel to an indigent plaintiff is an appealable collateral order, and in response, the government first attacks the petitioner's litigation skills as a *pro se* plaintiff. That is irrelevant because the collateral order doctrine is categorical, but in any event, it proves the point of why this question is so important to the many people who have claims but cannot afford counsel—denial of counsel is conclusive, particularly in complicated litigation.

Sai is a disabled person who has sought relief through several avenues for TSA's failure to abide by regulations allowing him to bring medically necessary juices onto his flights, to be free from unreasonable search and seizure, and other civil rights. As the government notes, he has brought a claim in the District of Massachusetts arising out of an incident at Boston Logan Airport, he has brought an action in the District of the District of Columbia regarding TSA's failure to provide documents related to TSA's policies and practices in general, and its violations of Sai's rights at security checkpoints in particular, Opp. 2-5, and as the government oddly omits, he has brought an action in the Northern District of California arising out of other similar incidents—an action in which the Court has found him indigent and granted him *in forma pauperis* status, *Sai* v. *Smith*, No. 3:6-cv-01024 (N.D. Cal., Sept. 12, 2016).

Through intermittent mutism, muscle spasms, and multiple other serious disabilities, *Sai* v. *DHS*, 149 F. Supp. 3d 99, 104 (D.D.C. 2015), Sai has been forced to pursue his claims almost completely without counsel. As the government notes, he has had to dismiss one of his actions, Opposition 2, and he has

generally run into dead-end after dead-end, ironically, being unable, as a *pro se*, to set his motion for counsel in the way the court required, while also asserting his right to privacy by seeking a categorical presumption of privacy of the detailed affidavit that has been recognized in some federal courts.

Sai's failures to obtain relief are a perfect illustration of the importance of this issue—where so few would have the time and energy to pursue important claims in three districts, Sai continues on, though imperfectly, and sometimes injures his own claims through his lack of training and experience. It is hard to imagine that many, if any, would continue, and some circuits have recognized how this renders the decision of whether to provide counsel conclusive. Such failures also illustrate why orders denying appointment of counsel under Section 1915(e) should categorically be appealable under the collateral order doctrine.

The government's assertion that Sai's underlying claim is frivolous is both irrelevant to whether the Court should grant the petition on this issue and specious. Sai has successfully received *in forma pauperis* status in one district court based on a sealed affidavit, and the notion that courts presumptively *must* seal the sensitive financial information contained in the intrusive IFP affidavits has been adopted in whole by one circuit, in part by another, and rejected by two. That record presents far from a frivolous issue.

Regardless, the petition here is about Sai's ability to appeal denial of counsel, and the government's effort to refocus on issues that are neither ripe nor relevant should be ignored. The government

acknowledges the circuits are divided—while attempting to minimize the division in a way that obfuscates the landscape, Opp. 13-14—and the issue is of critical importance to thousands of *pro se* litigants in federal courts, Pet. 17-18—a point the government does not dispute. The government notes that "[t]he Court has repeatedly denied review on the question presented." Opp. 6. It keeps coming up—twice garnering dissents from denial of certiorari—and it will continue to come up every time an uncommon litigant, like Sai, somehow finds the time and energy not to abandon his claims after denial of counsel. Thus, the Court should grant the writ and reverse the decision below.

I. THE CIRCUITS ARE DIVIDED, AND THE ONES THAT HOLD ORDERS DENYING COUNSEL ARE IMMEDIATELY APPEALABLE ARE CORRECT.

The government agrees that the circuits are divided on whether orders denying counsel are immediately appealable, though it quibbles over which side of the division some circuits fall on, and the momentum of decisions. Opp. 12-15. That analysis does not accurately represent the landscape, insofar as it simply guesses that the Fifth Circuit might not allow an appeal of a section 1915(e) denial based on the underlying claims, and in any event, intra-circuit inconsistencies and numerous dissents only underscore the need for this Court to resolve the question.

Regardless, the division in the circuits plainly establishes that the question here is not settled, nor is it as simple as the government attempts to make it seem. The government discusses the merits of the

question presented, but misconstrues the test under the collateral order doctrine. According to the government, for an issue to be conclusively decided, the district court must resolve the issue for eternity, never to be revisited. Opp. 7-9. But that is clearly not what the Court means, as *all* orders are reviewable before final judgment is entered. Fed. R. Civ. P. 54(b). Rather, "final rejection," *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 376 (1981), depends on whether rejection will finalize the detriment of losing the asserted right, even if a subsequent order by the district court or the court of appeals reverses the decision. *Bradshaw* v. *Zoological Soc'y*, 662 F.2d 1301, 1311-12 (9th Cir. 1981).

For example, it is well-settled that orders denying qualified immunity are appealable under the collateral order doctrine. *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985). But under the government's reasoning, such orders clearly are not reviewable. They are not conclusively decided as the government attempts to define the concept. They can—and often are—revisited. There are numerous instances of a district court denying a motion to dismiss on the ground of qualified immunity, and then revisiting that order and dismissing the case on summary judgment or even on the court's on *sua sponte* reconsideration. *See*, *e.g.*, *Corrigan* v. *District of Columbia*, No. 12-173, 2015 U.S. Dist. LEXIS 112017 at *89-90 (D.D.C. Aug 25, 2015).

Whether an order is conclusively decided depends more on whether, once relief is denied, irreparable harm occurs to the affected litigant. So in the qualified immunity context, erroneous denial of a motion to dismiss on that ground irreparably requires an immune litigant to undergo the time and expense

of the litigation—thereby defeating the purpose of immunity. *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) ("[w]hether or not a later summary judgment motion is granted, denial of a motion to dismiss [on the qualified immunity ground] is conclusive as to this right" because it is meant to avoid the burdens of litigation). Similarly, after counsel is erroneously denied, the *pro se* litigant is forced to litigate his or her case—forever affecting his or her ability to obtain relief by, for instance waiving an argument or irreparably prejudicing the record through stipulations and misstatements. *Lariscey* v. *United States*, 861 F.2d 1267, 1270 (Fed. Cir. 1988). Once counsel has been denied, appeal after final judgment cannot un-ring the bell. The right has been irreparably denied. That defeats the purpose of offering counsel to the indigent and renders a denial of counsel conclusive.

Similarly, the qualified immunity context is instructive on resolving whether the decision to appoint counsel is "completely separate from the merits of the action." In resolving a motion to dismiss on the qualified immunity ground, an appellate court must consider the facts alleged and the legal boundaries of the defendant's conduct, but that is separate from actually deciding the merits of the action, and the immunity decision does not resolve the merits. *Mitchell*, 472 U.S. at 528.

The same is true in the context of a motion for appointment of counsel. As the petition acknowledges, some circuits consider "whether the plaintiff has made a prima facie claim" when determining whether to appoint counsel. But generally, "entitlement to counsel is dependent on whether the plaintiff's claim is potentially

meritorious, not on an actual determination of the merits, Pet. 10-11. Regardless, accounting for the fact that some circuits may evaluate "likelihood of success on the merits," Opp. 10, that is beside the point. As noted, the determination-of-the-merits prong is about whether the district court must make a decision that resolves all or part of the merits determination—not an issue of law—adequate and plausible pleading. *See* Pet. 10-11. Thus, orders denying counsel do not run afoul of the collateral order doctrine's requirement that the order not resolve the merits.

Naturally, the government's misperception of the conclusiveness prong imbues its analysis of whether the decision is effectively unreviewable on appeal. Without analysis—or even addressing the petition's discussion of the irreparable harm that can be done while the litigant is *pro se*—the government simply claims that the error of denying counsel may be remedied by reversal on appeal. Not so. Orders denying counsel are effectively unreviewable on appeal after final judgment because *pro se* litigants do not have the expertise and training—nor the time, resources, or legal research tools—to effectively present their cases. So most litigants will not be able to litigate their own cases to final judgment, and to the extent they are able to, their best claims may be waived or otherwise incontrovertibly damaged. Pet. 12-13, citing *Slaughter*, 731 F.2d at 589 (noting that the harm from denying appointment of counsel "can be irreparable").

The government also spends some effort focusing on the district court's reason for denying counsel—a point it even included in its reiteration of the question presented. But the district court's reason for denying counsel is, of course, irrelevant. It is well settled that

the collateral order doctrine is a categorical concept. *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1978). Thus, the only right at issue is the right of indigent parties to receive counsel. That right was important enough for Congress to afford direct and specific statutory relief. The reason relief was denied in a given case is irrelevant—orders are appealable under the collateral order doctrine based on the effects of the order itself.

In any event, the issue Sai presents is far from frivolous. In the Northern District of California, Sai has received the very relief the government deems "frivolous"—sealing of his detailed affidavit and a grant of *in forma pauperis* status—after showing a categorical presumption in favor of sealing the document in that circuitovercoming the presumption against sealing the document in that circuit. *Sai* v. *Smith*, No. 3:16-cv-01024 (N.D. Cal. Sept. 12, 2016. The court ultimately denied Sai's request for counsel based on its determination that the operative complaint alone is insufficient to establish merit, and Sai has appealed. *Id.* Moreover, the First Circuit has adopted the categorical rule Sai seeks—that *all* detailed affidavits are presumptively sealed. *In re Boston Herald, Inc.*, 321 F.3d 174, 176 (1st Cir. 2003). Additionally, the Third Circuit has limited access to the forms in the interest of privacy of the declarants. *See Hart* v. *Tannery*, No. 11-2008, 2011 U.S. App. LEXIS 26170 at *2 (3d Cir. June 28, 2011) (noting that the affidavits are locked on PACER, and the public may only access them in person).

Against that the Ninth Circuit has ruled that there is a public right of access, and a presumption against sealing the affidavits, *Seattle Times Co.* v. *U.S. Dist. Court for the W. Dist. Of Washington*, 845

F.2d 1513, 1519 (9th Cir. 1988), though two district courts have distinguished that decision on the ground that it did not address the privacy arguments raised below, *United States* v. *Lexin*, 434 F. Supp. 2d 836, 846-55 (S.D. Cal. 2006), *Sai* v. *Smith*, No. 3:16-cv-01024 (N.D. Cal. Sept. 12, 2016). And in an unpublished order, the D.C. Circuit ruled in a prior case that Sai could not file his detailed affidavit under seal. On an issue that has yielded such divergent views from the handful of courts that have considered it, it is odd, to say the least, for the government to call Sai's position—a position adopted by the First Circuit and at least two district courts—frivolous.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The government apparently has no answer to the petition's discussion of the importance of this issue. The evidence is overwhelming. Despite the fact that it takes a litigant with Sai's perseverance to preserve and pursue the claim of a right to counsel all the way to this Court, the issue has come up several times before, Pet. 16 & Opp. 6, and there is no reason to believe it will not keep coming up on the uncommon occasions a *pro se* litigant can effectively preserve and pursue the issue.

The circuits are divided among each other, and they have internal conflicts on the application of the collateral order doctrine to the right to counsel under different statutes. Pet. 15-16. Additionally, this issue goes to the base of access to courts for all. Few are able to muster the time, energy, and skill that Sai has, and yet Sai has faced significant challenges, as noted by the government. Opp 3-5. Yet the government ironically uses Sai's imperfect representation of

himself without legal training as a reason to *deny* him the expertise of educated and trained counsel. *Id.* Appointment of counsel must occur early in litigation to have any meaning or value. *Ray* v. *Robinson*, 640 F.2d 474, 477 (3d Cir. 1981). Otherwise, people without time and expertise will either abandon litigation or permanently prejudice their abilities to assert their claims through imperfect representation of themselves. An indigent litigant will be "bound by the inevitable prejudicial errors she would make at her first trial." *Bradshaw*, 662 F.2d at 1311-12 (9th Cir. 1981). And until the Court resolves the question, the circuit courts will be divided both within and among them on how to apply the collateral order doctrine.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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