No. 16-1065

IN THE

Supreme Court of the United States

SAI,

Petitioner,

v.

TRANSPORTATION SECURITY ADMINISTRATION, ET AL.

Respondents.

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

REPLY BRIEF FOR PETITIONER

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The government acknowledges that the circuits are divided on the question presented. But rather than address the question presented directly, the government expands the question's scope so that it can assert a growing consensus in the circuit courts that does not exist. The question presented is whether denial of appointment counsel under the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-3(a) & 2000e-5) is immediately appealable under the collateral order doctrine. The government, for reasons that are unclear, weaves in cases involving appointment of counsel to indigent parties under a completely different statute, 28 U.S.C. § 1915(e). Courts have correctly engaged in independent analysis of denials of appointment of counsel under civil rights statutes—some deciding that, while denials of counsel under the indigence statute are not immediately appealable, denials of counsel in civil rights cases are immediately appealable. When limited to the question presented in this case, the circuit courts are closely divided. The Third, Fifth, Eighth, and Ninth Circuits have held that denials of counsel under the Civil Rights Act of 1964 are appealable, while the First Circuit here joined the Sixth, Seventh, Eleventh, and District of Columbia Circuits in holding that they are not.

Faced with the undeniable division in the circuit courts, the government focuses on the merits—and Sai agrees that the Court should address the merits of the case, but on full briefing and argument. This is an important issue on which four of nine circuits (a 4-5 split) that have decided the issue disagree with the government's analysis. And perhaps most notably, the government does not even address the Petition's

discussion of how important this issue is. Access to courts is critical—particularly in civil rights litigation. And in nearly every case, denial of counsel is outcome-determinative. The Court should resolve the division in the circuits.

I. THE CIRCUITS ARE DIVIDED ON WHETHER ORDERS DENYING COUNSEL IN CIVIL RIGHTS CASES ARE IMMEDIATELY APPEALABLE.

1. The government does not dispute that the law in four of the nine circuits that have decided the issue is that orders denying appointment of counsel in civil rights cases are immediately appealable. The government does not even address the law in the Fifth and Ninth Circuits, conceding that the law is settled in those circuits. Opp. 12–13. With respect to the Third and Eighth Circuits, it engages in unsupportable speculation that they will reverse course sometime in the future. Opp. 11–13. The government claims that the Third Circuit will reverse course because it held that denials of appointment of counsel in indigent cases are not immediately appealable. Opp. 11–12. But several circuit courts have recognized that is a completely different question from whether they are immediately appealable in civil rights cases, including the First Circuit in this case. Pet. App. 3a, *Bradshaw* v. *Zoological Society of San Diego*, 662 F.2d 1301, 1322 n.4 (9th Cir. 1981).

With respect to the Eighth Circuit, the government notes that the court has since followed its precedent, and two judges of the court have expressed disagreement with it as well as a desire to review it en banc. Opp. 13. Of course, this only highlights how

close a question this has been for the courts of appeals, and it wholly ignores the fact that the circuit's ruling that orders denying appointment of counsel in civil rights cases have not been unanimous. And they, too, may reverse course if their precedents are reviewed en banc.

For instance, when the Seventh Circuit ruled that orders denying appointment of counsel in civil rights cases are not immediately appealable in *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981), Judge Swygert vigorously dissented from the per curiam opinion, *id.* at 1067. Similarly, when the Sixth Circuit ruled en banc in *Henry* v. *Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985), Judge Krupansky filed a dissent that recognized that an appeal of denial of appointed counsel after the district court determines the merits is tantamount to no appeal at all. *Id.* at 768.

There is no dispute—nor can there be—that this question has divided the circuits and caused divisions among the judges within the circuits. At bottom, the government's speculation regarding the possibility of courts reversing course on this issue is only further evidence that this Court should take the issue up and finally determine whether orders denying appointment of counsel in civil rights cases are immediately appealable, so that there is a uniform rule throughout the country that fairly allows the most vulnerable litigants to obtain appellate review before they have irreparably harmed their claims as pro se litigants. The nine circuits that have decided this issue are divided as evenly as is possible—4–5.[1] The circuits

[1] The government asserts that nine circuits "have held that an

have been divided for decades. More time will not remedy that.

2. Faced with this undeniable division among the circuits, the government spends much of its opposition defending the First Circuit's decision on the merits. The petition, as well as the opinions of the four circuits disagreeing with the government, refutes those arguments, which should be decided only after plenary briefing. The collateral order doctrine establishes appellate jurisdiction under 28 U.S.C. § 1291 for district court orders before final judgment is entered if the orders, as a category: (1) "conclusively determine the disputed question;" (2) "resolve an important issue completely separate from the merits of the action;" and (3) are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 368 (1978) (listing the *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) factors).

On the first factor, an order denying appointment of counsel closes the door on proper litigation, particularly given the complexity of civil rights cases and the vulnerability of the plaintiffs. *Robbins* v. *Maggio*, 750 F.2d 405, 412 (5th Cir. 1985). The

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order denying appointment of counsel is not immediately appealable as a final order," Opp. 11, but it includes within those nine circuits courts that have not decided the issue under the Civil Rights Act of 1964. Thus, the government falsely equates the issue under the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-3(a) & 2000e-5) and the indigent litigants provision (28 U.S.C. § 1915(e)), even though several courts have stated that the analysis is different for the Civil Rights Act of 1964, *see*, *infra*, at 2, and the government does not cite a single case for the proposition that the statutes should be treated alike.

government chides Sai for not addressing the fact that a district court can reconsider its order denying appointment of counsel at any time before final judgment. Opp. 8. But that is true of *all* interlocutory orders. Fed. R. Civ. P. 54. For instance, a district court always can revisit an order denying qualified immunity based on new information, but that does not render an order denying qualified immunity inconclusive; when the district court revisits the order, the damage already will have been done. The circuits that disagree with the government have recognized that a question is conclusively determined if the order has repercussions that cannot be repaired by later reconsideration of the order. Pet. 6–8 (citing *Robbins*, 750 F.2d at 412); *see also Spanos* v. *Penn Cent. Transp. Co.*, 470 F.2d 806, 807 n.3 (3d Cir. 1972). By the time a district court revisits an order denying counsel in civil rights litigation, the plaintiff already will have waived arguments, confused the record, and provided binding discovery responses without the aid of counsel.

Similarly, these circuits disagree with the government's assessment of the second *Coopers & Lybrand* factor. In *Bradshaw*, the Ninth Circuit recognized that the second factor does not bar any overlap between appellate analysis of the collateral order and the merits of the case. 662 F.2d at 1307. Otherwise, again, an order denying qualified immunity would not be collateral. It only means that the court must not become "enmeshed" in the merits. *Id.* Determining that a claim is not frivolous is far from becoming "enmeshed" in the merits—when a district court determines that the underlying claim has "some merit," as required in most circuits for appointment of counsel in civil rights cases, the court

does not need to decide the merits of the action. *Id.* at 1308. And the decision on whether to appoint counsel will not bind the court "or in any way affect the district court's determination on the merits 'of the cause itself.'" *Id.* (quoting *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

Orders denying appointment of counsel also meet the third *Coopers & Lybrand* factor, as the harm they cause is "irreparable" on appeal. *Hudak* v. *Curators of Univ. of Missouri*, 586 F.2d 105, 106 (8th Cir. 1978) (per curiam). The Fifth Circuit recognized in *Robbins* that the third factor is not about a "theoretical existence of the right to proceed" with an appeal, but rather, the likelihood that a litigant will be able to prosecute his claim after a successful appeal. 750 F.2d at 412. So the key is not whether an appeal may be had procedurally, but whether a successful appeal will provide meaningful relief. *Id.* In the context of a pro se litigant in a civil rights case, it will not. Once the plaintiff has gone through discovery, motions for summary judgment, and potentially, a trial, the opportunities for waiver and a sloppy record are so great that one could never expect a litigant to return to the trial court in the same position he or she would have been had the court of appeals held appointed counsel was warranted *before* all the waivers, misstatements, and failures to elicit critical information in discovery and at trial. *Id.* *See also Bradshaw*, 662 F.2d at 1310 (noting that "inevitable prejudicial errors" would irreparably harm the few pro se litigants who continued their claims after being denied counsel).

Similarly, the government's appeal to rulemaking is an issue on the merits that should be decided after

plenary briefing and argument. The government cites *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995) and *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), but it fails to acknowledge that, in both cases, the Court considered the rulemaking power only *after* analyzing the orders under the *Coopers & Lybrand* factors to determine whether they meet the collateral order doctrine. Opp. 14–15. Thus, the Court has not held that the rulemaking power the government invokes here was intended or has been applied to replace the collateral order doctrine. The Court noted that, to the extent the orders at issue in those cases were *not* appealable collateral orders, the proponents of interlocutory appeal could seek recognition outside the scope of the collateral order doctrine in rulemaking proceedings. And while the Court recognized that the types of orders appealable under the collateral order doctrine "must 'remain narrow and selective in its membership,'" it did not suggest that membership is closed. Indeed, in four of nine circuits to decide the issue, orders denying appointment of counsel in civil rights cases already are part of the club, and plaintiffs "fortunate" enough to have their civil rights violated in states encompassed in those circuits have the opportunity for meaningful review of orders denying them appointed counsel.

The circuits are intractably divided on whether the courts of appeals may immediately review orders denying appointed counsel in civil rights cases. The Court thus should grant the petition so that the parties may fully brief the merits of whether denying appointment of counsel in civil rights cases is a collateral order subject to immediate review. The Third, Fifth, Eighth, and Ninth Circuits have

correctly ruled that the orders are appealable after thorough and reasoned review of the *Coopers & Lybrand* factors, and this Court should join them after plenary briefing and argument on the merits of this issue.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The government has no response to Sai's discussion of how important this case is to the most vulnerable plaintiffs. Denying appointed counsel shuts the door on parties with civil rights claims, and thus, this case directly raises a critical issue regarding access to courts. As noted in the Petition, "the denial of appointed counsel in a civil rights plaintiff's case is likely outcome determinative." Pet. 12. Litigation—particularly civil rights litigation—is a complex web of rules and standards that requires the expertise acquired after graduate level education and experience. *See* Am. Bar Ass'n*, Report to the House of Delegates* 9 (Aug. 7, 2006).[2] Of course, in light of scarce resources, the district courts deny counsel in frivolous cases, but this determination of access to justice should not be plainly unreviewable, as it is in the five circuits that have denied appellate review of orders denying access to counsel in civil rights litigation.

The injustices stemming from the inability to obtain counsel in civil rights cases are myriad, particularly given these claims' natural tendency to pit parties of vastly unequal strength against each

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[2] Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06a112a.authcheckdam.pdf

other. *See* Pet. 15–16. The government apparently does not disagree. In this case, a physically disabled plaintiff has been denied appointed counsel, and he has been denied the ability to challenge that decision on appeal. He has been the rare pro se plaintiff to continue to pursue his claims, through intermittent mutism and other manifestations of his neurological disorder that prevent him, at times, from being able effectively express himself in briefs and oral arguments, and from otherwise being able to vigorously prosecute a complex civil rights case.

Pursuing an appeal regarding denial of counsel is far less daunting than pursuing the civil rights claims themselves. If the Court grants this petition and reverses the First Circuit, Sai will return to the district court in this litigation and related litigation having waived important rights and claims, having lost procedural motions because of his lack of training and experience, and having created a record that is not as well-developed as it could be—or would be if he had the assistance of counsel. But thankfully, it would be the last time someone in his condition had to fight over so many hurdles just to receive meaningful review of his denial of counsel from a court of appeals.

As noted in the Petition, this Court already has recognized the great need for competent counsel in civil rights cases. Pet. 15 (citing *Kay* v. *Ehrler*, 499 U.S. 432, 438 (1991). Filing claims in these cases without counsel, and then being forced to pursue them to final judgment without counsel before having the opportunity to challenge the district court's refusal to appoint counsel amounts to no effective access to the courts at all.

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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