No. 14-646

In the Supreme Court of the United States

SAI, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly required petitioner to publicly file his application for leave to proceed in forma pauperis under 28 U.S.C. 1915, on the ground that he had failed to demonstrate that his privacy interests outweighed the presumption in favor of public access to judicial proceedings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a-13a) was entered on September 8, 2014. On July 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 20, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2013, petitioner requested certain documents from the United States Postal Service pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552. Pet. App 4a. He also sought a waiver of the process-

ing fee. *Id.* at 5a. The Postal Service denied that request. *Id.* at 4a-8a. The Service explained that a fee waiver was appropriate only when disclosure of the requested records would serve the public interest, *id.* at 6a-7a (citing cases), and petitioner's request did not satisfy that standard because he apparently sought the records in order to use them in "an administrative hearing in which [he had] an interest." *Id.* at 6a-7a. The Service informed petitioner that he could "seek judicial review * * * by bringing suit for that purpose in the United States District Court for the district in which you reside * * * or in the District of Columbia." *Id.* at 7a-8a; see 5 U.S.C. 552(a)(4)(B).

2. a. In January 2014, petitioner filed a petition for review of the Postal Service's fee-waiver decision directly in the United States Court of Appeals for the District of Columbia Circuit. Pet. 5; see Pet. C.A. Mot. to Seal (Jan. 7, 2014).

Petitioner sought to proceed in forma pauperis. Pet. 5. Section 1915(a) of Title 28 of the United States Code permits a litigant to proceed in forma pauperis in federal court by filing an application containing a short statement of the applicant's claim and "an affidavit that includes a statement of all assets such [person] possesses that the person is unable to pay such fees or give security therefor." 28 U.S.C. 1915(a); see *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989) (litigant must attest in good faith "that he is unable to pay the costs of the lawsuit").

Rather than filing an in forma pauperis application, petitioner moved for leave to file his in forma pauperis application ex parte and under seal. Pet. C.A. Mot. to Seal 1-4 (Jan. 7, 2014). In support of that motion, petitioner contended that publicly filing his in forma

pauperis affidavit would force him to "choose between exercising [his] rights to privacy, [his] rights under [Section] 1915, and excessive [court] costs." *Id.* at 1.

Before the court of appeals ruled on petitioner's motion, the Postal Service filed a motion to dismiss the petition for review for lack of jurisdiction. The Postal Service argued that 5 U.S.C. 552(a)(4)(B) grants district courts, not the courts of appeals, jurisdiction over challenges to agency decisions concerning FOIA requests. Gov't C.A. Mot. to Dismiss (Feb. 25, 2014).

b. In an unpublished per curiam opinion and order, the court of appeals denied petitioner's motion to file his in forma pauperis application ex parte and under seal. Pet. App. 1a-3a. The court stated that petitioner had "failed to demonstrate that filing under seal or ex parte was warranted." *Id.* at 2a. The court cited *Johnson* v. *Greater Southeast Community Hospital Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991), cert. denied, 521 U.S. 1121 (1997), for the proposition that there is a "strong presumption in favor of public access to judicial proceedings." Pet. App. 2a. The court therefore directed petitioner either to pay the filing fee or "file on the public docket" a motion for leave to proceed in forma pauperis. *Ibid.* The court deferred consideration of all other pending motions.

c. Petitioner did not file a motion to proceed in forma pauperis, instead moving for reconsideration and for rehearing en banc. Pet. C.A. Mot. to Reconsider (May 15, 2014). Those motions were denied. Pet. App. 9a-11a. In July 2014, the panel issued an order stating that if petitioner did not file a motion for in forma pauperis status or pay the filing fee by August 15, 2014, the petition for review would be dis-

missed for lack of prosecution. Per Curiam Order (July 31, 2014). Petitioner moved for reconsideration, and in the alternative, for voluntary dismissal. Pet. C.A. Mot. to Reconsider (Aug. 7, 2014). The court granted the motion for voluntary dismissal "without prejudice to the filing of an appropriate pleading in an appropriate forum within the time established by any applicable statute of limitations." Pet. App. 12a.

ARGUMENT

Petitioner contends (Pet. 6-17) that the court of appeals improperly refused to permit him to file a motion for in forma pauperis status and supporting affidavit under seal and ex parte. The court of appeals acted within its discretion in concluding that petitioner had not demonstrated that publicly filing his in forma pauperis motion and affidavit would harm his privacy interests. Its unpublished order does not squarely conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. The federal in forma pauperis statute seeks "to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989). At the same time, Congress has recognized the potential for abusive litigation from plaintiffs who are not made to bear the financial costs of filing suit. *Ibid.* The in forma pauperis provision, now codified at 28 U.S.C. 1915, strikes a balance between those competing objectives.

Since the statute was originally enacted in 1892, it has required individuals seeking in forma pauperis status to file an affidavit attesting to inability to pay any filing fee and other costs. Under the original statute, a citizen seeking to "commence and prosecute

to conclusion" a lawsuit in federal court "without being required to prepay fees or costs" was required to file "a statement under oath" attesting to his inability to pay and affirming his belief that "he is entitled to the redress he seeks." Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. That affidavit requirement, through which an indigent litigant "expose[d] himself 'to the pains of perjury in a case of bad faith,'" was understood to serve as "a sanction important in protection of the public" against abuse of the privilege of proceeding in forma pauperis. *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U.S. 331, 338 (1948) (quoting *Pothier* v. *Rodman*, 261 U.S. 307, 309 (1922)).

The current in forma pauperis statute continues to require a person seeking in forma pauperis status to "submit[] an affidavit that includes a statement of all assets such [person] possesses that the person is unable to pay [court] fees." 28 U.S.C. 1915(a)(1). The court may deny in forma pauperis status if it concludes, among other things, that the assertions in the affidavit are untrue, or that the litigant is in fact able to pay the applicable fees. 28 U.S.C. 1915(e)(2); *Lee* v. *McDonald's Corp.*, 231 F.3d 456, 458-459 (8th Cir. 2000) (affidavit provisions help "weed out the litigants who falsely understate their net worth in order to obtain in forma pauperis status when they are not entitled to that status based on their true net worth"); *Williams* v. *Cherokee Nation Entm't, LLC*, 446 Fed. Appx. 86, 88 (10th Cir. 2011) (affirming district court's conclusion that affidavit demonstrated that plaintiff was in fact able to pay the filing fee).

In accordance with the in forma pauperis statute, the federal courts require persons seeking in forma pauperis status to file an affidavit attesting to their

inability to pay the relevant fees. See, *e.g.*, Fed. R. App. P. 24; Form 4, App. of Forms (model affidavit that must be used in the courts of appeals); Sup. Ct. R. 39.1-.2 (requiring filing of in forma pauperis motion together with an affidavit in the form prescribed by Fed. R. App. P., App. of Forms 4). Those affidavits are routinely filed publicly. See, *e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* 572 (10th ed. 2013) (*Supreme Court Practice*) (discussing Supreme Court's standard for granting in forma pauperis status based on review of publicly filed affidavits). In 2010, Form 4—the model affidavit used in the courts of appeals and this Court—was amended to account for privacy concerns related to electronic filing, so that an applicant need not provide his full Social Security number, home address, or the names of minor dependents. See Form 4, App. of Forms.

On occasion, an individual will seek to file the affidavit under seal. Courts have generally evaluated those requests based on the demonstrated need for confidentiality in the particular case. See, *e.g.*, *In re Mesaba Aviation, Inc.*, 386 Fed. Appx. 580 (8th Cir. 2010); *Schmidt* v. *Dragisic*, No. 13-CV-00348, 2013 WL 1912214 (E.D. Wis. May 8, 2013) (denying motion to seal affidavit based on failure to identify any reason that it should be kept confidential); *Olsen* v. *United States*, No. 07-34-B-W, 2007 WL 1959205 (D. Me. July 3, 2007) (granting motion to file affidavit under seal); *Lyons* v. *Eastern Airlines, Inc.*, No. 86-3395, 1986 WL 4333 (E.D. Pa. Apr. 9, 1986) (denying motion for failure to demonstrate need for confidentiality).

2. a. In its order denying petitioner's motion to file under seal, Pet. App. 2a, the court of appeals indicated that petitioner had not proffered any reason to

depart from the "strong presumption in favor of public access to judicial proceedings." The court cited *Johnson* v. *Greater Southeast Community Hospital Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991), cert. denied, 521 U.S. 1121 (1997), which held that in deciding whether "to limit access to judicial records," a court should "be informed by this country's strong tradition of access to judicial proceedings," recognized by courts as a matter of common law. *Id.* at 1277; Pet. App. 2a. The *Johnson* court explained that in applying the common-law presumption of public access to judicial proceedings, a court should "determin[e] whether and to what extent a party's interest in privacy or confidentiality of its processes outweighs this strong presumption in favor of public access to judicial proceedings" by considering a "series of factors." 951 F.2d at 1277; see *United States* v. *Hubbard*, 650 F.2d 293, 314 (D.C. Cir. 1980) (setting forth factors relevant to "common law tradition of public access"). Those factors include "(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced." *Johnson*, 951 F.3d at 1277 n.14. *Johnson* also emphasized that the ultimate "decision as to access [to judicial records] is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 1277 (citation omitted) (alteration in *Johnson*).

By citing *Johnson* in its order denying petitioner's motion to file under seal, the court of appeals indicated that it applied the analysis set forth in *Johnson* and concluded that petitioner had failed to overcome the presumption in favor of public access.[1] Pet. App. 2a (petitioner "failed to demonstrate that filing [his in forma pauperis affidavit] under seal or ex parte is warranted"). That conclusion was well within the court's discretion.

Petitioner did not offer any specific reason that his privacy interests would be impinged by publicly filing his affidavit. See *Johnson*, 951 F.2d at 1278 (proponent of sealing should proffer "specific reasons" that sealing is warranted). Instead, petitioner offered only the conclusory assertion that publicly filing the affidavit "would disclose facts that are private, of no public interest, and of no relevance to Respondent." Pet. C.A. Mot. to Seal 1 (Jan. 7, 2014); see *id.* at 3 ("My finances and personal details which would be disclosed in an IFP Motion are not otherwise relevant to this proceeding, * * * and would substantially harm

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[1] Petitioner suggests (Pet. 8) that the court of appeals held that the public has a First Amendment right of access to in forma pauperis affidavits. See *Press-Enterprise Co.* v. *Superior Ct. of Cal.*, 478 U.S. 1, 9 (1986) (recognizing "qualified First Amendment right of public access" to preliminary hearings in criminal cases, which can be overcome by an overriding justification). The court's order did not mention the First Amendment, and the circuit precedent on which the court relied concerned the common-law presumption of public access to judicial proceedings, which can be overcome by demonstrating that the factors discussed in those decisions (and restated in the text, above) weigh against disclosure. See *Johnson*, 951 F.2d at 1277-1278. This case therefore does not present any question concerning a First Amendment right of public access to in forma pauperis affidavits.

my personal privacy to disclose publicly."); *id.* at 4 n.2 (arguing that disclosure of "[t]he last 4 digits of a social security number, requested by the Court as part of an [in forma pauperis] affidavit" would "materially harm me by better enabling third parties to commit financial fraud"). In the absence of any explanation of why publicly filing the information contained in the affidavit would harm petitioner's privacy interests, the court of appeals correctly concluded that petitioner had not established that his privacy interests outweighed the presumption in favor of access to judicial documents. See *Johnson*, 951 F.2d at 1278; cf. *Kamakana* v. *City & Cnty. of Honolulu*, 447 F.3d 1172, 1186 (9th Cir. 2006) ("general" allegations rather than "specific" showing of harm were insufficient to demonstrate good cause to seal documents under Federal Rule of Civil Procedure 26(c)).

b. Petitioner contends (Pet. 15-16) that no presumption of access should attach to in forma pauperis affidavits because they are "ministerial," not judicial, documents. Petitioner is incorrect.

The purpose of requiring persons seeking in forma pauperis status to submit a financial affidavit is to enable the court to determine whether the litigant is "unable to pay" court fees and therefore should be granted in forma pauperis status. 28 U.S.C. 1915(a)(1); *Adkins*, 335 U.S. at 339-340. Judicial determinations of entitlement to proceed in forma pauperis implicate the public policies underlying the in forma pauperis statutory framework. As this Court has observed, an unduly strict application of the statutory standard would be in tension with the statute's purpose of ensuring "meaningful access to the federal courts" without regard to financial means. *Neitzke*,

490 U.S. at 324; see *Adkins*, 335 U.S. at 339-340 (applicant need not be "absolutely destitute," as litigants should not be forced to abandon potentially meritorious claims to "spare [themselves] complete destitution"). Conversely, an unduly permissive application of the standard could permit abusive litigation and adversely affect the federal courts' resources.

Financial affidavits are the basis on which courts determine entitlement to in forma pauperis status. The affidavits are therefore not simply "ministerial" documents that have no larger significance beyond an individual litigant's entitlement to in forma pauperis status in a particular case. Rather, they are an integral part of the public record of the courts' implementation of the in forma pauperis statute. Public access to the affidavits may help shed light on a number of important issues pertaining to that implementation. For instance, because courts do not invariably recite financial details in orders granting or denying in forma pauperis status, reviewing the affidavits may help the public ascertain courts' interpretation of the "unable to pay" standard and the range of circumstances in which courts may deny in forma pauperis status. See, *e.g.*, *Supreme Court Practice* 572-573 (explaining that "a review of the affidavits submitted" in the Supreme Court indicates "several grounds" on which the Court may deny in forma pauperis status). Reviewing in forma pauperis affidavits may also provide valuable guidance to prospective litigants. There is therefore no reason to conclude that in forma pauperis affidavits should be exempted from the presumption of access that the D.C. Circuit applies to records of judicial proceedings.

c. Petitioner also argues (Pet. 6) that the court of appeals' decision "creates an unqualified public interest in litigants' financial information." That is incorrect. As an initial matter, the court's unpublished per curiam opinion does not establish any precedential rule that binds subsequent panels of the court of appeals. See *In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011).

In any event, although the court's order in this case applied the general "presumption in favor of public access to judicial proceedings," Pet. App. 2a, the court did not suggest that the presumption can never be overcome in cases involving in forma pauperis motions. To the contrary, *Johnson* establishes that a litigant can overcome the presumption by offering "specific reasons" why the privacy interests at stake outweigh the public interest in access. See 951 F.2d at 1277; p. 8, *supra*. Petitioner is therefore wrong to suggest that the decision below requires litigants to "choose between privacy and access to courts." Pet. 14. In a case in which a prospective in forma pauperis litigant credibly shows how he will be harmed by publicly filing the motion and affidavit, the court will presumably permit the litigant to file under seal. Petitioner simply did not make that showing here.

If anything, the presumption of access recognized by the D.C. Circuit may be more easily overcome when the document in question is a financial affidavit submitted in support of an in forma pauperis motion. The D.C. Circuit has explained that while a "court's decrees, its judgments, its orders, are the quintessential business of the public's institutions," "[o]ther portions of the record—such as documents filed with the court or introduced into evidence—often have a

private character, diluting their role as public business." *EEOC* v. *National Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (1996). The court has thus indicated that a party can more easily overcome the presumption of access when the documents in question are submitted by a party, rather than issued by the court, and when they are not central to the court's adjudication of the suit. See *Hubbard*, 650 F.2d at 319-321.

3. The court of appeals' unpublished decision does not squarely conflict with any decision of this Court or another court of appeals.

In an unpublished order, the Third Circuit, like the D.C. Circuit, has applied a presumption that in forma pauperis affidavits should be publicly accessible. See *Hart* v. *Tannery*, No. 11-2008, 2011 WL 10967635, at *1 (June 28, 2011). Petitioner observes (Pet. 8) that the Third Circuit's Clerk's Office, as a matter of practice, provides the public only with courthouse access, rather than electronic access, to in forma pauperis affidavits. *Hart*, 2011 WL 10967635, at *2. But that practice does not alter the fact that before sealing an in forma pauperis affidavit from all public access—which is the relief that petitioner seeks—the Third Circuit, like the D.C. Circuit, requires a litigant to demonstrate that his privacy interests are sufficient to overcome "the presumption in favor of open process [concerning] judicial records." *Id.* at *1 (citations and internal quotation marks omitted).

Petitioner also relies (Pet. 8) on the Ninth Circuit's decision in *Seattle Times Co.* v. *United States District Court for the Western District of Washington*, 845 F.2d 1513 (1988), but that decision does not establish any precedential rule concerning access to financial affidavits. There, the court "assume[d]" that a crimi-

nal defendant's financial affidavits submitted in support of an application for appointed counsel were subject to a qualified First Amendment presumption of public access. *Id.* at 1516 n.1. The court held that the presumption had not been overcome by "speculative" concerns that the affidavits might contain incriminating information. *Id.* at 1519. Contrary to petitioner's assertion (Pet. 8), the court did not hold that there is a blanket "public right of access to * * * financial eligibility forms." The court did not definitively determine the existence or scope of any right of public access to financial affidavits.

Finally, petitioner relies (Pet. 7) on the First Circuit's decision in *In re Boston Herald, Inc.*, 321 F.3d 174 (2003). There, the court of appeals considered the right of public access to financial affidavits submitted by a criminal defendant seeking appointment of counsel under the Criminal Justice Act of 1964 (CJA), 18 U.S.C. 3006A. The court explained that although the statute was silent regarding disclosure of financial affidavits, guidelines promulgated by the Administrative Office of the United States Courts established a "general rule" of disclosure that could be overcome by a showing that disclosure would "unduly" harm privacy interests. 321 F.3d at 179. In other words, the guidelines were "essentially a regulatory codification of the balancing exercise that courts employ once a qualified public right of access has attached to judicial documents under the common law." See *id.* at 200 (Lipez, J., dissenting). The First Circuit held that no First Amendment or common-law presumption of access applied to CJA affidavits. *Id.* at 189. The court relied in part on the existence of the Administrative Office guidelines, reasoning that because the guide-

lines ensured that the CJA affidavits would be "fully open to public scrutiny" in the ordinary case, there was less need for any judicial presumption of access. *Id.* at 187. The court also explained that the CJA statute and guidelines might have displaced any common-law presumption of access. *Id.* at 189 (citing *United States* v. *Gonzales*, 150 F.3d 1246, 1263 (10th Cir. 1998), cert. denied, 525 U.S. 1129 (1999)).

The First Circuit therefore had no occasion to consider the existence of a presumption of public access in the context of financial affidavits that, like in forma pauperis affidavits, are not already made presumptively available to the public by virtue of a framework of guidelines. Although aspects of the First Circuit's reasoning—such as its conclusion that CJA affidavits are ancillary to the merits of a case, 321 F.3d at 189—might also apply to in forma pauperis affidavits, the First Circuit would have to weigh those considerations against the need for public access in the distinct context of the in forma pauperis statute. *Boston Herald* therefore does not squarely conflict with the decision below.

4. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to address it. The D.C. Circuit's unpublished decision does not establish any binding precedent and therefore cannot be said to implicate any legal rule that warrants this Court's attention.

In addition, the court of appeals' denial of petitioner's motion to file his affidavit under seal has little ongoing effect on petitioner's interests. Because FOIA grants district courts, not courts of appeals, jurisdiction to review agency FOIA decisions, 5 U.S.C. 552(a)(4)(B), the court of appeals lacked jurisdiction

over petitioner's underlying petition for review. See Gov't C.A. Mot. to Dismiss 1-4; p. 3, *supra*. Although the D.C. Circuift did not expressly rule on the government's motion to dismiss for lack of jurisdiction, it ultimately dismissed the petition for review "without prejudice to the filing of an appropriate pleading in an appropriate forum within the time established by any applicable statute of limitations." Pet. App. 12a. Petitioner therefore remains free to file an action under Section 552(a)(4)(B) in the district court. See *Spannaus* v. *United States Dep't of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987) (six-year statute of limitations set forth in 28 U.S.C. 2401(a) applies to FOIA claims). If petitioner files such an action, he may seek in forma pauperis status, and he may move to file his in forma pauperis application under seal. The district court would be free to grant that motion if petitioner demonstrates that his privacy interests would be harmed by disclosure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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