

No. 14–646

IN THE
Supreme Court of the United States

SAI,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

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

Brief of
Maryland Volunteer Lawyers Service as
Amicus Curiae in Support of
Petition for Writ of Certiorari

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BRIEF OF AMICUS CURIAE

Maryland Volunteer Lawyers Service, as *amicus curiae*, submits this brief in support of Petitioner Sai and urges this Court to grant the petition for a writ of certiorari.¹

INTEREST OF AMICUS

The mission of Maryland Volunteer Lawyers Service is to provide free or low cost quality civil legal assistance and representation to Marylanders with limited income. Its interest in the petition is to provide the population it serves a clear and just answer regarding the consequences of seeking leave to file suit *in forma pauperis*.

SUMMARY OF ARGUMENT

The privacy of personal financial information and equal access to the federal courts are bedrock principles of American democracy that should coexist in perfect harmony. All Americans should have the freedom to choose whether or not to disclose their personal assets and liabilities to their enemies, or even to their friends and neighbors. All Americans should have the right to bring their meritorious and jurisdictionally appropriate cases and controversies before the federal courts.

Wealthy Americans enjoy both privileges without question or conflict. Nevertheless, under

¹ Pursuant to Rule 37.6, amicus certifies that no party's counsel authored this brief in whole or in part and that no person or entity other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. All counsel of record received timely notice of amicus's intent to file this brief, and all parties consented to the filing of this brief.

the rule applied by the United States Court of Appeals for the District of Columbia Circuit in this case, poor Americans are forced to choose one or the other.

If poor litigants choose to keep their personal financial information private, they forfeit their right of access to the federal courts, unless they pay a filing fee which they cannot afford. If they choose to disclose their personal financial information in pursuit of an *in forma pauperis* fee waiver — not only to the court, but to opposing parties and to the world at large — they may obtain access to the federal courts, but they forfeit their personal privacy and expose themselves to potential embarrassment, fraud, or even identity theft.

This is a dilemma facing not only the Petitioner in this case, but poor people across the United States, especially those in federal appellate circuits which have not ruled on this issue, such as the Fourth Circuit, or which have denied confidential review of *in forma pauperis* applications, such as the Third and Ninth Circuits and the District of Columbia Circuit in this case.

This dilemma and its concomitant anxiety are entirely avoidable. The courts may easily relieve poor people of this Hobson's Choice by allowing them to file *in forma pauperis* applications *ex parte* and under seal. Indigent litigants would be allowed to invoke their right of access to the federal courts and preserve their privacy — indeed, their dignity — without diminishing in any way the courts' ability to determine their financial eligibility for fee waivers.

By granting the petition for a writ of certiorari in this case, this Court has the opportunity to place rich and poor Americans on an equal footing when it comes to two of the basic privileges of modern American life: personal financial privacy and access to the federal courts.

ARGUMENT

I. It Undermines Federal Privacy Laws to Condition Poor People's Access to Federal Courts on Public Disclosure of Their Financial Information.

Over the past several decades, Congress has set a clear policy that the privacy of personal financial information should be protected. Conditioning indigent litigants' right of access to the federal courts on disclosure of personal financial information in public court filings contravenes this policy and can lead to perverse results.

Congress has established a wide range of civil remedies to guard against invasion of personal privacy and unauthorized disclosure of personal financial information. For example, the Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417(a), provides a private right of action against government agencies and financial institutions for unlawful disclosure of financial records. The Privacy Act of 1974, 5 U.S.C. § 552a(g), provides a private right of action against government agencies who disclose government records concerning an individual unlawfully or without authorization. The Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, 18 U.S.C. § 1030(g), provides a private right of action against persons

who access computers of financial institutions and obtain personal financial records without authorization. The Fair Credit Reporting Act of 1970, 15 U.S.C. §§ 1681n–p, provides a private right of action against persons who disclose or obtain consumer credit reports unlawfully, without authorization, or without a permissible purpose. The Fair Debt Collection Practices Act of 1977, 15 U.S.C. § 1692k, provides a private right of action against debt collectors who communicate with third parties about a debt unlawfully or without the consumer's authorization. The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3), provides a private right of action against persons or entities who invade the privacy of the home by placing unsolicited calls to residential telephone lines using a pre-recorded or artificial voice.

Several federal courts of appeals also have recognized some form of privacy interest in personal financial information or in personal identifiers that can be used to obtain personal financial information, such as social security numbers. *See, e.g., In re Boston Herald, Inc.*, 321 F.3d 174, 190 (1st Cir. 2003); *Denius v. Dunlap*, 209 F.3d 944, 958 (7th Cir. 2000); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999); *Greidinger v. Davis*, 988 F.2d 1344, 1354 (4th Cir. 1993); *Barry v. City of New York*, 712 F.2d 1554, 1558–59 (2d Cir. 1983).

These federal statutes and cases reflect the longstanding principle that an individual has a right to privacy that the law should protect and the infringement of which should be compensable. The

right to privacy is not a mere contractual right arising out of an agreement or relationship. It is, instead, a personal property right belonging to all individuals that persists unless and until an individual waives it or an overriding public interest, such as law enforcement, displaces it. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Considering the strength and history of the right to individual privacy in American law, the right should not apply any differently to poor people who are unable to access the federal courts without an *in forma pauperis* fee waiver. It is well documented that Congress's intent in enacting the federal *in forma pauperis* statute was "to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because . . . poverty makes it impossible . . . to pay or secure the costs' of litigation." *See Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948)). As Chief Judge Kozinski has lamented in the Fourth Amendment context, "poor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it. . . . [T]he Constitution doesn't prefer the rich over the poor[.]" *United States v. Pineda–Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of reh'g en banc), *vacated*, 132 S. Ct. 1533 (2012).

The issue in this case is not the disclosure of personal information to the court, which Petitioner acknowledges is "appropriate" to satisfy the

legitimate interest of granting fee waivers only to those who are financially eligible. *See* Petition for Writ of Certiorari at 14. Rather, the problem here is the utter lack of protection against unwarranted further disclosure to opposing parties and to the world at large. Unless the court reviews an *in forma pauperis* application confidentially and places it under seal, upon filing it becomes a public document open for general inspection and review.

This Court has recognized "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files[,] . . . much of which is personal in character and potentially embarrassing or harmful if disclosed." *See Whalen v. Roe*, 429 U.S. 589, 605 (1977). The *Whalen* Court also noted that "[t]he right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Id.* Such protections are conspicuously absent in this case. The only remedy available for unwarranted disclosure of information contained in a public *in forma pauperis* application may be a potentially costly and lengthy tort suit with an uncertain outcome.

The lower courts' requirement in this case of public disclosure without further protections stands in stark contrast to the federal statutory remedies noted *supra* for unauthorized or unlawful disclosure of personal information by the government, debt collectors, or others. The disclosure of much of the information required by the Application to Proceed in District Court

Without Prepaying Fees or Costs (Long Form) ("Long Form Application"), attached to Petition for Writ of Certiorari as Appendix G, at 22a to 26a, would be actionable if disclosed in a different context by a person other than the indigent litigant.

For example, indigent litigants are forced to disclose information regarding personal debts which they could sue debt collectors for disclosing. Item 8 of the Long Form Application requires indigent litigants to disclose the amount of monthly payments they and their spouses owe toward motor vehicle, credit card, department store, and "other" debts. Debt collectors are prohibited from communicating with third parties about a consumer's debts except to the extent reasonably necessary to collect on the debt or to ascertain the consumer's location. *See* 15 U.S.C. §§ 1692b, 1692c. Consumers may bring an action against debt collectors for violation. *See* 15 U.S.C. § 1692k.

Indigents are forced to disclose information that would make up a consumer credit report and which they could sue credit reporting agencies for wrongfully disclosing. The Long Form Application requires litigants and their spouses to disclose, among other things, Item 1: the total amount of income for the past twelve months and expected income for the next month broken down by source; Items 2 and 3: employment history for the past two years and gross monthly pay received from each employer; Item 4: the amount of cash on hand and the amount held in all bank accounts, specifying the financial institution and type of each account; Item 5: the value and nature of real property,

motor vehicles, and other assets other than clothing and ordinary household furnishings; Item 6: debts collectable from other persons or entities; Item 7: a list of all persons depending on the litigant for support; Item 8: monthly expenses broken down by category and sub-category; and Item 11: "any other information that will help explain why you cannot pay the costs of these proceedings." Consumer credit reports may be disclosed only under very limited circumstances, *see* 15 U.S.C. § 1681b, and consumers may bring an action against credit reporting agencies for willful or negligent violation. *See* 15 U.S.C. §§ 1681n, 1681o.

Indigent litigants are forced to disclose information about debts owed to them by other people which, if they qualified as debt collectors, they would be prohibited from disclosing in other contexts. Item 6 of the Long Form Application requires litigants to "State every person, business, or organization owing you or your spouse money, and the amount owed." Consumers may bring an action against debt collectors for disclosing information about debts unlawfully or without authorization. *See* 15 U.S.C. §§ 1692b; 1692c; 1692k.

When viewed in light of other federal privacy laws, it seems clear that affidavits in support of applications for *in forma pauperis* fee waivers were not meant to be public documents. By requiring applicants to file "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," Congress intended only to require that applicants provide the court with

sufficient information to determine eligibility for a fee waiver. *See* 28 U.S.C. § 1915(a)(1). There is no reason for further public disclosure. Unlike a petition for bankruptcy or similar relief, the *in forma pauperis* petitioner's financial status is not relevant to the underlying litigation in this and most other types of actions brought in federal court.

Wealthy litigants may obtain access to the federal courts simply by paying a filing fee of \$350. If successful in the litigation, the wealthy litigant may recover that \$350 as costs. Indigent litigants generally cannot afford a \$350 filing fee. Instead, the indigent litigant must pay the higher price of disclosing his full financial situation to the court, to opposing parties, and to any member of the public curious enough to examine the court file. Even if successful in the litigation, the indigent may not recover that disclosure. Even if the *in forma pauperis* application were to be sealed upon the indigent's ultimate success, once an individual's privacy is breached, it cannot be fully recovered.

II. Certiorari Will Benefit the Indigent Nationwide by Clarifying Whether Their Financial Privacy Is the Price of Access to Federal Court.

The unequal treatment of poor people is especially unjust in this case because forfeiture of the right to privacy is the price poor people are charged for exercising another basic right, access to the federal courts. Forfeiture of the right to financial privacy is an important consideration when deciding whether to bring suit, and for some that price will be too much to bear. Many indigent litigants will choose not to pursue meritorious claims in favor of maintaining their financial

privacy or even for fear of exposing themselves to potential fraud or identity theft.

Certiorari in this case would benefit poor litigants nationwide, not just those in the three federal appellate circuits with unjust rules requiring public disclosure. Certiorari would provide much needed clarity for poor litigants in circuits that have not yet generated binding precedent on this issue, such as the Fourth Circuit, the home circuit of Amicus Maryland Volunteer Lawyers Service. Certiorari would forestall much needless litigation regarding whether these circuits should join the First Circuit in protecting privacy rights, join the Third, Ninth, and District of Columbia Circuits in rejecting privacy rights, or adopt some other approach.

Amicus's mission includes educating and counseling indigent persons regarding their legal rights. Indigent individuals deserve to know, with some certainty, the consequences of filing suit in federal court. They deserve to know whether their applications to proceed *in forma pauperis* will be kept confidential and used only for their intended purpose or will instead be open for public inspection and subject to future use by unknown parties for unknown and potentially nefarious purposes.

It is of great public importance to resolve this division of authority on a question affecting equal access to justice for poor people across the country. Poor people deserve both the right to personal financial privacy and the right to access the federal courts. They should not have to choose between the two.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

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