No. 16-287

In the Supreme Court of the United States

SAI, PETITIONER

v.

TRANSPORTATION SECURITY ADMINISTRATION

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 a district court order that denied the appointment of counsel under 28 U.S.C. 1915(e)(1), because petitioner refused to submit an affidavit detailing his finances, is appealable on an interlocutory basis under the collateral-order doctrine.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unpublished. The minute order of the district court (Pet. App. 4a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2016. The petition for a writ of certiorari was filed on September 2, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal *in forma pauperis* statute, 28 U.S.C. 1915, "ensure[s] that indigent litigants have meaningful access to the federal courts." *Bruce* v. *Samuels*, 136 S. Ct. 627, 629 (2016) (citation omitted). Section 1915(a)(1) "permits an individual to litigate a federal action *in forma pauperis*," and to proceed without paying otherwise-applicable court fees, "if the

individual files an affidavit stating, among other things, that he or she is unable to prepay fees 'or give security therefor.'" *Coleman* v. *Tollefson*, 135 S. Ct. 1759, 1762 (2015) (citation omitted). The affidavit must include "a statement of all assets" that the litigant possesses. 28 U.S.C. 1915(a)(1). Under Section 1915(e)(1), a court may also appoint "an attorney to represent any person unable to afford counsel."

2. In addition to the present case, petitioner has filed two other suits relevant to this petition.

a. On January 1, 2014, petitioner filed suit in the court of appeals against the United States Postal Service under the Freedom of Information Act. *Sai* v. *United States Postal Serv.*, No. 14-1005 (D.C. Cir.). Petitioner moved the court for leave to file, *ex parte* and under seal, a motion to proceed *in forma pauperis* and for appointment of pro bono counsel. 14-1005 Docket entry No. (14-1005 Dkt. No.) 1,474,820 (Jan. 7, 2014). Petitioner acknowledged that a request to proceed *in forma pauperis* normally requires a litigant to submit "an affidavit of personal finances." *Id.* at 1. He stated that he was "willing to supply such an affidavit, but only if it is under seal." *Ibid.*

The court of appeals denied petitioner's request to file his motion *ex parte* and under seal, stating that petitioner had "failed to demonstrate that filing under seal or ex parte was warranted." 14-1005 Dkt. No. 1,492,737, at 1 (May 13, 2014). Petitioner moved for reconsideration, which the court denied, directing him to pay the filing fee or to "file, on the public docket, a motion for leave to proceed in forma pauperis and [an] accompanying affidavit." 14-1005 Dkt. No. 1,498,885 (June 23, 2014). Petitioner failed to do so, and the court granted his request to dismiss the case voluntar-

ily. 14-1005 Dkt. No. 1,511,095 (Sept. 8, 2014). Petitioner sought a writ of certiorari, which this Court denied. 135 S. Ct. 1915 (No. 14-646).

b. On November 5, 2014, petitioner filed suit against the Department of Homeland Security, the Transportation Security Administration (TSA), and several TSA officers and employees, alleging that they had mishandled administrative complaints he had submitted. *Sai* v. *Department of Homeland Sec.*, No. 14-cv-1876 (D.D.C.); see Pet. App. 8a-10a. Petitioner moved for leave to file, *ex parte* and under seal, a motion to proceed *in forma pauperis* and for appointment of counsel. 14-cv-1876 Docket entry No. (14-cv-1876 Dkt. No.) 3 (Nov. 5, 2014). Petitioner stated that the filing fee was "not affordable" to him and that he was unable to afford an attorney. *Id.* at 1. Nevertheless, "as a matter of principle and to preserve [his] standing in a forthcoming Supreme Court *certiorari* petition," petitioner declared himself "absolutely unwilling to submit any details of [his] personal finances" in a publicly filed document. *Ibid.* Should the district court refuse to grant him *in forma pauperis* status absent a financial disclosure statement, however, petitioner also "attached a check for the Court's filing fee." *Id.* at 2. The court denied petitioner's motion "without prejudice for failure to meet the statutory requirements of 28 U.S.C. § 1915." Minute Order (Jan. 30, 2015).

On June 10, 2015, petitioner filed a renewed motion for leave to proceed *in forma pauperis* and for appointment of counsel. 14-cv-1876 Dkt. No. 65. He asked to "be granted IFP status, refunded [his] filing fee, given free copies of transcripts, granted prospective and retroactive waiver of PACER fees related to

researching this case, and appointed *pro bono* counsel." *Id.* at 1. In the alternative, petitioner asked the district court to reconsider his prior request to submit a financial statement *ex parte* and under seal. *Ibid.* Should the court decline both requests, petitioner asked the court to certify an interlocutory appeal of the following question: "Does the general presumption of public access to *judicial* documents require that *in forma pauperis* (IFP) affidavits, which contain historically and widely protected private financial information, are not sealable or reviewable *ex parte*?" *Ibid.*

The district court denied petitioner's motion. The court explained that "Section 1915 requires the submission of a detailed affidavit" of a party's assets, which "under the Court's practice * * * [and] like other filings, are a matter of public record." Pet. App. 53a. In his request to file his motion *ex parte* and under seal, petitioner had provided no explanation "why or how disclosure of the required information would cause Plaintiff any unique or identifiable harm." *Id.* at 52a; see *id.* at 53a-54a ("Plaintiff refuses to disclose his finances to Defendants without any explanation of how he might be harmed or reason to believe that Defendants' counsel would not maintain the confidentiality of that information."). Accordingly, the court declined to disturb its previous order, concluding that petitioner may not seek *in forma pauperis* status under Section 1915 "while refusing to comply with the relevant rules and procedures and declining to offer any individualized rationale short of his personal conviction that the information at issue should not be disclosed." *Id.* at 54a. Finally, because the court had separately "dispose[d] of all claims in this

case," the court denied as moot petitioner's request for an order certifying an interlocutory appeal. *Ibid.*

3. On March 13, 2014, petitioner filed the complaint in this case, which seeks relief against the TSA under the Freedom of Information Act and the Privacy Act. D. Ct. Doc. 5. At the same time, petitioner moved the district court for leave to file, *ex parte* and under seal, a motion to proceed *in forma pauperis* and for the appointment of counsel. D. Ct. Doc. 2. Petitioner also lodged with the court a $400 check, which he described as "a surety" in the event that the court denied his motion for leave to file under seal and *ex parte*, or if the court granted that motion but denied a "subsequent (sealed) motion" to proceed *in forma pauperis*. D. Ct. Doc. 1, at 2 (Mar. 13, 2014).

The district court denied petitioner's request for leave to file his motion under seal and *ex parte*, and it denied without prejudice his motion for leave to proceed *in forma pauperis* and for appointment of counsel. Minute Orders (Mar. 13, 2014). At a January 2016 status conference, petitioner made an oral motion for reconsideration. Pet. App. 4a. The court denied the motion "for the same reasons as stated in" the court's ruling in *Sai* v. *Department of Homeland Security* (No. 14-cv-1876). *Ibid.*

4. Petitioner filed an interlocutory appeal, and the court of appeals ordered petitioner to show cause why the appeal "should not be dismissed for lack of jurisdiction." C.A. Doc. 1,594,367 (Jan. 19, 2016). In response, petitioner acknowledged that his request for interlocutory review was contrary to circuit precedent; he accordingly asked the court to grant initial hearing en banc. C.A. Doc. 1,599,236 (Feb. 17, 2016). The court denied petitioner's request, Pet. App. 3a,

and because petitioner filed no further response to the show cause order, the court dismissed the appeal for lack of jurisdiction, *id.* at 1a.

ARGUMENT

The court of appeals correctly held that an order denying the appointment of counsel under 28 U.S.C. 1915(e)(1) is not immediately appealable under the collateral-order doctrine. That decision is consistent with the views of the great majority of the courts of appeals. Although two courts of appeals long ago reached a contrary conclusion, intervening precedents of this Court may cause them to reconsider—and one circuit has already signaled its willingness to do so. Finally, to the extent that any genuine disagreement on the issue persists, that conflict is best addressed through this Court's rulemaking authority; in any event, this case would be a poor vehicle to resolve it.

This Court has repeatedly denied review on the question presented. See *Wilson* v. *Johnson*, 562 U.S. 828 (2010) (No. 09-1143); *Welch* v. *Smith*, 484 U.S. 903 (1987) (No. 86-6884); *Henry* v. *City of Detroit Manpower Dep't*, 474 U.S. 1036 (1985) (No. 85-237). The same result is warranted here.

1. Under 28 U.S.C. 1291, federal courts of appeals have jurisdiction over "final decisions of the district courts." This final judgment rule prevents litigants from engaging in "piecemeal, prejudgment appeals," conduct that "undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)).

Notwithstanding the final judgment rule, this Court has permitted litigants to appeal a "small class" of collateral rulings that may be treated as final even though they do not end the proceedings in the district court. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). For a trial-court order to come within this narrow exception, the collateral-order doctrine, "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). This Court has repeatedly stressed that the collateral-order doctrine is a "'narrow' exception" and "should stay that way and never be allowed to swallow the general rule." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); see *Mohawk Indus.*, 558 U.S. at 113 ("[T]he class of collaterally appealable orders must remain 'narrow and selective in its membership.'") (quoting *Will* v. *Hallock*, 546 U.S. 345, 350 (2006)); *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) ("small category").

In this case, the court of appeals correctly determined that the district court's denial of petitioner's request for appointed counsel was not immediately appealable under the collateral-order doctrine. Petitioner can satisfy none of the three criteria necessary to successfully invoke that doctrine.

First, as explained in the precedent on which the decision below relied, "denials of motions for appointment of counsel rarely, as a practical matter, 'conclusively determine the disputed question.'" *Ficken* v.

Alvarez, 146 F.3d 978, 980 (D.C. Cir. 1998) (quoting *Coopers & Lybrand*, 437 U.S. at 468). That is because the considerations used to determine whether counsel should be appointed—such as a litigant's "capacity to present the case adequately and without aid of counsel," "the merits of the [litigant's] case," and the litigant's "efforts to secure counsel"—may change as the case progresses and are thus subject to reevaluation. *Id.* at 980-981 (ellipsis and citation omitted); see *id.* at 981 (noting the "evolutionary nature" of the relevant considerations).

Petitioner admits (Pet. 9) that orders denying the appointment of counsel "are potentially subject to revision by the district court," but he nevertheless asserts (Pet. 9-10) that "in practice courts rarely grant plaintiffs counsel after an initial denial." Yet petitioner offers no support for that assertion. Orders denying appointment of counsel are generally issued without prejudice, see, *e.g.*, pp. 3, 5, *supra*, and the D.C. Circuit noted in *Ficken* that "district judges often reevaluate the need for appointed counsel at various stages of the proceedings," 146 F.3d at 981. In any event, the collateral-order test is not satisfied where the order being appealed merely determines the disputed question "in practice," or where the order is of a type that only "rarely" will be overturned. To satisfy the test, an order must "*conclusively* determine the disputed question." *Coopers & Lybrand*, 437 U.S. at 468 (emphasis added); see *Firestone Tire & Rubber*, 449 U.S. at 376 ("[T]he challenged order must constitute 'a complete, formal and, in the trial court, final rejection.'") (quoting *Abney* v. *United States*, 431 U.S. 651, 659 (1977)). As petitioner concedes (Pet. 9), an

order denying appointment of counsel does not satisfy that criterion.

Even if a district court's decision not to appoint counsel were generally thought to conclusively resolve the issue, moreover, petitioner's request for counsel was denied in this case for a unique reason: The court denied his request "without prejudice" based on his refusal to submit a financial statement supporting the request. See p. 5, *supra*. The denial in this case thus was not based on the court's assessment of the normal considerations used to determine whether counsel should be appointed; rather, it was based on petitioner's failure to comply with a procedural requirement. If, at some point in the future, petitioner were to comply with that requirement—a contingency that is wholly within his control—his request for counsel would be evaluated on the merits at that time. Accordingly, the order sought to be appealed in this case did not "conclusively" determine whether petitioner will be appointed counsel.

Second, the decision whether to appoint counsel is not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. Petitioner asserts without citation (Pet. 11) that "[i]n requests for counsel made pursuant to 28 U.S.C. § 1915(e), the plaintiff's indigence is the only relevant fact." That is incorrect. In evaluating a plaintiff's request for counsel under Section 1915(e), courts typically must consider a number of factors, including whether the plaintiff has asserted "a potentially meritorious claim." *Perez* v. *Fenoglio*, 792 F.3d 768, 784 (7th Cir. 2015); see, *e.g.*, *Carmona* v. *United States Bureau of Prisons*, 243 F.3d 629, 632 (2d Cir. 2001) ("When deciding whether to assign counsel to an indigent civil litigant

under 28 U.S.C. § 1915(e)(1), we look first to the likelihood of merit of the underlying dispute.") (internal quotation marks omitted); *Parham* v. *Johnson*, 126 F.3d 454, 457 (3d Cir. 1997) ("the plaintiff's claim must have some merit in fact and law"); *Wood* v. *Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990) ("Counsel should only be appointed in exceptional circumstances, based on such factors as the likelihood of success on the merits"). Moreover, when a litigant who was denied appointed counsel seeks to challenge that denial on appeal after final judgment, "[o]nly after assessing the effect of the ruling on the final judgment could an appellate court decide whether the [litigant's] rights had been prejudiced." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985). For those reasons, this Court has held that "orders disqualifying counsel in civil cases are not 'completely separate from the merits of the action.'" *Ibid.* (citation omitted); see *Flanagan* v. *United States*, 465 U.S. 259, 269 (1984) (order disqualifying criminal defense counsel "does not qualify as an immediately appealable collateral order in a straightforward application of the necessary conditions laid down in prior cases"). There is no reason for a different rule insofar as the denial of appointed counsel is concerned.

Third, a district court's order denying appointment of counsel is not "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. To satisfy that criterion, it is not enough to show that waiting to appeal the order would cause "practical" difficulties (Pet. 12); rather, "denial of immediate review [must] render impossible any review whatsoever." *Firestone Tire & Rubber*, 449 U.S. at 376 (citation omitted). An order denying appoint-

ment of counsel does not meet that standard: If the district court abuses its discretion in denying counsel under Section 1915(e), the court of appeals can remedy that error by vacating the final order and remanding the case for further proceedings. See, *e.g.*, *Pruitt* v. *Mote*, 503 F.3d 647, 660-661 (7th Cir. 2007) (en banc) (reversing jury verdict against plaintiff because the district court applied the wrong legal standard in denying plaintiff's request for counsel); *Abdullah* v. *Gunter*, 949 F.2d 1032, 1038 (8th Cir. 1991) (reversing jury verdict against plaintiff and remanding with instructions to appoint counsel), cert. denied, 504 U.S. 930 (1992). "That remedy [is] plainly adequate should petitioner's concerns of possible injury ultimately prove well founded." *Firestone Tire & Rubber*, 449 U.S. at 378.

Petitioner's only response is that forcing a litigant to proceed in the trial court without counsel, and then to seek on appeal to have the trial proceedings "declared a nullity," is "not an efficient use of either personal or judicial resources." Pet. 12 (citation omitted). Yet that potential outcome "does not 'diffe[r] in any significant way from the harm resulting from other interlocutory orders that may be erroneous.'" *Firestone Tire & Rubber*, 449 U.S. at 378 (citation omitted). "Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291." *Ibid.* For that reason, this Court has held that "[a]n order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judg-

ment, and not within the much smaller class of those that are not." *Id.* at 377. The same reasoning applies to orders denying the appointment of counsel.

2. As petitioner concedes (Pet. 6-9), most courts of appeals have held that an order denying appointment of counsel under Section 1915 is not immediately appealable as a final order. That is the rule in ten circuits. See *Appleby* v. *Meachum*, 696 F.2d 145, 146 (1st Cir. 1983) (per curiam); *Miller* v. *Pleasure*, 425 F.2d 1205, 1205-1206 (2d Cir.) (per curiam), cert. denied, 400 U.S. 880 (1970); *Smith-Bey* v. *Petsock*, 741 F.2d 22, 26 (3d Cir. 1984); *Miller* v. *Simmons*, 814 F.2d 962, 964 (4th Cir.), cert. denied, 484 U.S. 903 (1987); *Henry* v. *City of Detroit Manpower Dep't*, 763 F.2d 757, 759 (6th Cir.) (en banc), cert. denied, 474 U.S. 1036 (1985); *Randle* v. *Victor Welding Supply Co.*, 664 F.2d 1064, 1066-1067 (7th Cir. 1981); *Wilborn* v. *Escalderon*, 789 F.2d 1328, 1330 & n.2 (9th Cir. 1986); *Cotner* v. *Mason*, 657 F.2d 1390, 1391-1392 (10th Cir. 1981) (per curiam); *Holt* v. *Ford*, 862 F.2d 850, 853-854 (11th Cir. 1989) (en banc); *Ficken*, 146 F.3d at 980 (D.C. Cir.) (regarding appointment of counsel under 42 U.S.C. 2000e-5(f)(1)); *Rodriguez* v. *Chertoff*, No. 07-5189, 2007 WL 3527757 (D.C. Cir. Aug. 22, 2007) (per curiam) (applying *Ficken* to request for appointment of counsel under Section 1915(e)); Pet. App. 1a (same).

Petitioner counts the Third, Fifth, and Ninth Circuits as adopting his position (Pet. 3), but that is incorrect. While the Third Circuit held that orders denying appointment of counsel were immediately appealable in *Ray* v. *Robinson*, 640 F.2d 474, 477 (1981), it reversed that decision three years later, see *Smith-Bey*, 741 F.2d at 26 (concluding that *Ray* "has

been effectively overruled by the Supreme Court in *Flanagan*"). Petitioner is correct that the Ninth Circuit has permitted immediate appeals from orders denying the appointment of counsel under Title VII. See Pet. 5-6 (citing *Bradshaw* v. *Zoological Soc'y*, 662 F.2d 1301 (9th Cir. 1981)). But the Ninth Circuit does *not* permit immediate appeals from orders denying appointment of counsel under Section 1915(e). See *Kuster* v. *Block*, 773 F.2d 1048, 1049 (1985) ("[B]ecause the order of the district court denying appointment of counsel does not resolve an important issue entirely separate from the merits of appellant's case, we must dismiss for lack of jurisdiction."); see also *Wilborn*, 789 F.2d at 1330 n.2 (explaining that "*Kuster* does not conflict with *Bradshaw*," which was based on considerations distinct to "Title VII litigants").

The Fifth Circuit has permitted an immediate appeal from an order denying counsel in a civil rights case under 42 U.S.C. 1983, see *Robbins* v. *Maggio*, 750 F.2d 405, 412-413 (1985), but that ruling was based in part on reasoning specific to cases involving "vital civil rights claims," *id.* at 413. The Fifth Circuit has accordingly not permitted an immediate appeal in a products-liability case, see *Marler* v. *Adonis Health Prods.*, 997 F.2d 1141, 1142-1143 (1993), or in a habeas corpus action, see *Thomas* v. *Scott*, 47 F.3d 713, 715 (1995). Because petitioner's underlying suit seeks relief under the Freedom of Information Act and the Privacy Act, rather than under 42 U.S.C. 1983, it is not clear that the Fifth Circuit would exercise jurisdiction over his appeal. See *Risby* v. *United States*, 168 Fed. Appx. 655, 655-656 (2006) (per curiam) (dismissing interlocutory appeal of order denying ap-

pointment of counsel because the underlying case was a "civil action seeking the return of seized property" from the federal government).

The remaining two courts of appeals long ago issued decisions holding that an order denying appointment of counsel under Section 1915 is immediately appealable as a collateral order. *Lariscey* v. *United States*, 861 F.2d 1267, 1270 (Fed. Cir. 1988); *Hudak* v. *Curators of Univ. of Mo.*, 586 F.2d 105, 106 (8th Cir. 1978) (per curiam), cert. denied, 440 U.S. 985 (1979). Those decisions, however, were rendered before this Court's more-recent pronouncements on the collateral-order doctrine in cases such as *Digital Equipment*, *Swint*, *Will*, and *Mohawk Industries*, *supra*, which have emphasized the doctrine's modest and narrow application.

More recently, the Eighth Circuit affirmed, on an interlocutory basis, a district court order denying appointment of counsel in a case under 42 U.S.C. 1983, but it did so without discussing appellate jurisdiction. See *Nelson* v. *Shuffman*, 476 F.3d 635, 636 (2007) (per curiam); see *id.* at 637 (Colloton, J., dissenting) (arguing that jurisdiction should be declined under the rule that "a panel of the court of appeals may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent"). The Eighth Circuit has since recognized that that approach is out of step with the great majority of the courts of appeals, and it has invited an en banc petition to allow the full court to consider the issue. See *Ward* v. *Smith*, 721 F.3d 940, 942 (2013) ("A majority of this panel would revisit *Nelson*, but only the court *en banc* may overrule panel precedents."). Because the Eighth Circuit is not only aware of its con-

flicting holding, but has also indicated that it is open to reconsidering its position, that court should be permitted to correct its own precedent through its en banc procedures.

Finally, the Federal Circuit's divergent holding in *Lariscey* does not warrant a grant of certiorari in this case. We are unaware of any published or unpublished decisions in the 28 years since *Lariscey* was decided in which the Federal Circuit has, under the collateral-order doctrine, considered an interlocutory appeal from an order denying the appointment of counsel. And, should a case raising the issue arise in the Federal Circuit in the future, it is likely that the court would reconsider its position in light of intervening decisions of this Court and the overwhelming consensus of the other courts of appeals.

3. Even if a meaningful circuit conflict did exist, that conflict should be resolved through rulemaking rather than adjudication. In 1990, Congress amended the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, to allow this Court to define, in its rulemaking capacity, which district court orders qualify as "final for the purposes of appeal under section 1291 of this title." Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 315, 104 Stat. 5115 (28 U.S.C. 2072(c)). In the collateral-order context, the Court has pointed to its rulemaking authority as "counsel[ing] resistance to expansion of appellate jurisdiction." *Swint*, 514 U.S. at 48; see *ibid.* ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect."); see also H.R. Rep. No. 734, 101st Cong., 2d Sess. 18 (1990) (This

Court's rulemaking authority is designed to "reduce[], if not eliminate[]," the "continuing spate of procedural litigation" regarding whether a trial-court order is final for purposes of appeal.). Indeed, the Court has stated that "rulemaking, not expansion by court decision, [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 558 U.S. at 113 (internal quotation marks omitted); see *Adler* v. *Elk Glenn, LLC*, 758 F.3d 737, 741 (6th Cir. 2014) (per curiam) (Sutton, J., concurring) ("[R]ulemaking [is] a more reliable vehicle than appellate decisionmaking for assessing the pros and cons."). Therefore, even if a substantial question existed regarding the appealability of district court orders denying the appointment of counsel, "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking." *Mohawk*, 558 U.S. at 114.[*]

4. Finally, this petition would be a poor vehicle for addressing the question presented in any event, because the argument that petitioner seeks to press on appeal is plainly frivolous. In *Cohen*, the Court explained that the purpose of the collateral-order doctrine is to ensure appellate review of claims "too important to be denied review." 337 U.S. at 546. Accordingly, "[t]he importance of the right asserted has

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[*] Petitioner himself has been an active participant in the rulemaking process and has proposed rule alterations to the appropriate advisory committees. See Sai, *Proposed Rule Changes For Fairness to Pro Se and IFP Litigants* (Sept. 7, 2015), http://www.uscourts.gov/rules-policies/archives/suggestions/sai-15-cv-ee; Sai, *Proposed Rules & Forms Change: Iqbal/Twombly* (Sept. 28, 2015), http://www.uscourts.gov/rules-policies/archives/suggestions/sai-15-cv-gg.

always been a significant part of our collateral order doctrine." *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring); see *ibid.* (citing cases); see also *Richardson* v. *United States*, 468 U.S. 317, 322 (1984) ("[W]e have indicated that the appealability of a double jeopardy claim depends upon its being at least 'colorable.'") (quoting *United States* v. *MacDonald*, 435 U.S. 850, 862 (1978)). The courts of appeals have thus exercised the prerogative to "decline collateral order review where the appeal is clearly frivolous." *United States* v. *Wilk*, 452 F.3d 1208, 1220 n.18 (11th Cir. 2006), cert. denied, 549 U.S. 1278 (2007); see, *e.g.*, *United States* v. *Dixon*, 913 F.2d 1305, 1309 (8th Cir. 1990) ("We therefore conclude that the defendants' double jeopardy claims are not frivolous and that we have appellate jurisdiction.").

In this case, petitioner seeks to appeal a district court order that denied his request for appointment of counsel due to his failure to file a financial disclosure form in accordance with 28 U.S.C. 1915(a)(1) and with the court's own rules. The court of appeals, in another case involving petitioner, *Sai* v. *United States Postal Service*, had already rejected a nearly identical request, see pp. 2-5, *supra*, which was frivolous in any event. Under these circumstances, the court of appeals properly could decline to review petitioner's claim even if, contrary to the foregoing, denial of the appointment of counsel were otherwise appealable on an interlocutory basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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