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Who Sues the Supreme Court, and Why? Pro Se Litigation and the Court of Last Resort

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**Who Sues the Supreme Court, and Why?
Pro Se Litigation and the Court of Last Resort**

Jona Goldschmidt*

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* Professor, Department of Criminal Justice and Criminology, Loyola University Chicago. The author thanks the editor-in-chief and the other editors and staff of the *Indiana Journal of Law and Social Equality* for their outstanding assistance in preparing this manuscript for publication. Thanks also to my colleague Vincent Samar for his usual helpful suggestions; and to Winston Bowman, Associate Historian at the Federal Judicial Center, who provided useful information about the Supreme Court’s early record keeping and other background information that contributed greatly to this Article.

INTRODUCTION

“Who sues the Supreme Court?” The short answer to the question of who sues the Supreme Court of the United States is that pro se litigants (PSLs) do. A search of federal case law (published and unpublished) reveals a wide range of subjects giving rise to these suits. While it may be hard to conceive of why anyone would sue the Supreme Court as a whole, the Justices as individuals, or the Clerk of Court, there are many PSLs who—out of anger and frustration—feel that they must. They are dissatisfied with the adverse outcome of suits they have brought or defended against in the lower courts, and the Court’s subsequent refusal to review their cases by denying their certiorari petitions.

The Supreme Court is not exempt from the reality of increased pro se litigation experienced by state and federal courts at all levels since the late 1990s. This Article examines the Supreme Court’s experience with PSLs, not only as plaintiffs who sue them, but also as petitioners for the writ of certiorari to review a lower court’s decision. Part I begins with a history of nineteenth-century pro se litigation in the Supreme Court. The PSLs in these cases came from all walks of life, and their claims arose from legitimate disputes.

Part II examines the sparse data on pro se filings in the Supreme Court. Using *in forma pauperis* (IFP) filings as a proxy, this Part estimates the number of PSLs seeking writs of certiorari to review earlier decisions resulting in outcomes adverse to them.

Part III discusses the Court’s current view of PSLs. The Court’s view, once quite sympathetic, has drastically changed. The change—to one that declares PSLs are not entitled to assistance or instruction by the trial judge—may have been prompted by the circus-like proceedings in the 1969 “Chicago Seven” case, where the trial court bound and gagged defendant Bobby Seale due to his insistence that he be allowed to represent himself. More recently, the Court has given trial judges mixed messages about the extent to which they may provide PSLs with instruction, accommodations, or assistance.

Part IV presents summaries of litigation against the Supreme Court as a whole, the Justices as individuals, and the Clerk of Court. The cases are categorized as either procedural or substantive claims. Procedural claims involve challenges to denial of certiorari petitions, challenges to the constitutionality of the Court’s rules, and challenges to the Court’s refusal to appoint counsel. Substantive claims include those accusing the Court of violating civil rights and other laws, those seeking rulings on the legality of wars, those complaining that the Court failed to do justice in their case, and those requesting the Court to strike down public policies or overrule its prior decisions. Pro se attorneys’ suits against the Court are also described. This Part concludes with an enumeration of grounds for dismissal of these claims. Part V then describes the Court’s experience with vexatious PSLs and the manner in which it has addressed this phenomenon.

Lastly, Part VI describes the means by which federal courts manage pro se litigation, followed by a description of the extent to which the Supreme Court provides pro se assistance. The Article then provides a proposal aimed at reducing

the number of certiorari petitions the Court receives and reducing the number of suits brought against the Court. It suggests that the Court should employ pro se law clerks—as done by district and circuit courts—to communicate directly with PSLs, to give them information and a voice, and to enhance their feeling that they were fairly treated. The Court could also accomplish reductions in certiorari petitions and suits against it by amending its jurisdictional rules to accept fact-based cases involving miscarriages of justice, and by accepting more cases that delineate the extent to which lower court judges should provide PSLs with reasonable assistance.

I. EARLY PRO SE CASES

The Supreme Court heard fifteen pro se cases in the latter half of the nineteenth century, but none before that. These cases—described in chronological order—make for entertaining reading and reflect a wide range of subject matter. Some of these cases are unremarkable, while others are quite interesting. The most striking thing about them: none are frivolous. They all involve legitimate claims raised by PSLs who, as plaintiffs or defendants, faced represented parties or even another PSL.

The first pro se case was *Wylie v. Coxe*.¹ In this case, a pro se attorney obtained a judgment against the administrator of a decedent's estate, for whom he had recovered "a large sum of money which was due to [the intestate] from the Mexican government."² The case arose as a consequence of Mexican-American War.³ The administrator appealed the \$3,750 judgment against the estate, but then filed a second appeal of the trial court's denial of his motion for reconsideration.⁴ The Court held the respondent's second appeal should be dismissed because the first appeal was then pending.⁵

The second pro se case heard in the Supreme Court, *Purcell v. Miner*,⁶ involved a property dispute between three parties: a purchaser claiming title to property, the seller of the property, and a subsequent purchaser who was the PSL. Noteworthy are the Court's remarks about the disadvantages facing PSLs, which were surprisingly compassionate:

Mrs. Miner did not answer, but made default. A good deal of testimony was taken, many of the interrogatories—the parties managing their own case—being of a most leading character. . . . *The case appears to have been carried on by the parties propriâ personâ, who are excusable*

¹ 55 U.S. 1 (1852).

² *Id.* at 2.

³ Treaty of Guadalupe Hidalgo, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922 (ending the Mexican-American War and settling territorial disputes, among other issues). The case returned to the Supreme Court in *Wylie v. Coxe*, 56 U.S. 415 (1853), in which the pro se attorney's claim for his fees from the estate was affirmed on the merits, *id.* at 419–20.

⁴ 55 U.S. at 2.

⁵ *Id.* at 3.

⁶ 71 U.S. 513 (1866).

*for their ignorance of all the rules of pleading and practice in a court of chancery, or the proper mode of taking testimony.*⁷

In *Effinger v. Kenney*,⁸ the appellant PSL purchased a farm in Virginia during the Civil War and agreed to pay the sale price in Confederate notes. At the war's conclusion, the seller (trustee) refused the notes, demanding U.S. currency. On appeal, the Court held that the PSL was required to make his payments with U.S. currency, but in an amount equivalent to the value of the Confederate notes.⁹

Another pro se attorney brought an appeal in *Porter v. White*,¹⁰ also for unpaid fees based on damages he collected from the Mexican government on behalf of descendants of persons killed by Mexican agents during the Mexican-American war. This appeal was dismissed; the Court found that several lawyers and law firms were involved in the recovery of damages, and that the pro se attorney was not entitled to the claimed fees.¹¹

The case of *Chappell v. Bradshaw*¹² was an appeal from a state court judgment that found the petitioner PSL liable for trespass. His servants had released a burning scow (a flat-bottomed boat used to carry heavy items), which then caused damage to the respondent's schooner. Here too, the Court dismissed the appeal on grounds that no federal question was presented.¹³

*United States ex rel. Lisle v. Lynch*¹⁴ was an appeal by a Navy veteran PSL who sought to compel the government to pay him \$288.60 in travel expenses he allegedly was owed for travel to his next assignment. The Court, however, rejected his claim by holding that the officials who decided what his reimbursement would be had acted in their discretionary authority, so that mandamus would not lie.¹⁵

Another pro se attorney in *Green v. Elbert*¹⁶ appealed to the Court from the dismissal of an action he had brought against the Colorado Supreme Court. He had alleged that its members had conspired to have him disbarred. On appeal to the Supreme Court, the lawyer failed to pay the required docketing fee for twenty months after sending in his petition and the lower court record. The Court dismissed his appeal, adding the following interesting comment:

We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many

⁷ *Id.* at 516, 518 (emphasis added).

⁸ 115 U.S. 566 (1885).

⁹ *Id.* at 567–68. Curiously, on the same day this case was decided the Court entered another order in the companion case of *Effinger. Kenney v. Effinger*, 115 U.S. 577 (1885). The Court ruled that the appeal of the trustee raised no federal question, and whether the bond of Effinger was or was not executed with reference to Confederate notes was a question of fact for the state court, “and not one of law for this court.” *Id.*

¹⁰ 127 U.S. 235 (1888).

¹¹ *Id.* at 245.

¹² 128 U.S. 132, 133 (1888).

¹³ *Id.* at 134.

¹⁴ 137 U.S. 280 (1890).

¹⁵ *Id.* at 286–87.

¹⁶ 137 U.S. 615, 616 (1891).

allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court. It is our duty to keep our records clean and free from scandal. The brief of the plaintiff in error will be stricken from the files, and the writ of error dismissed, and it is so ordered.¹⁷

In *Hudson v. Parker*,¹⁸ U.S. Judge Isaac C. Parker—the infamous “hanging judge of Indian Territory”¹⁹—was himself a PSL. He had refused to follow the order of Justice Edward D White, who had granted bail to a prisoner convicted of murder in Parker’s court. Justice David Brewer, however, was the Justice assigned to the Eight Circuit, wherein the conviction occurred; due to his unavailability, Justice White had granted the prisoner’s request for bail pending appeal. On remand from bail order, Judge Parker denied the prisoner bail on grounds that Justice White had no authority to enter the order. This prompted the prisoner to file a mandamus petition against Judge Parker.²⁰ The Court rejected Judge Parker’s objection to granting the prisoner bond, as he was ordered to do, stating:

As the district judge, in so refusing to approve the bond, appears to have acted under a misunderstanding of the powers of this court and of its justices, and of his own duty in the premises, and as in his return he expresses his readiness to enforce any decision of this court, it appears to us to be more just to him, as well as more consistent with the maintenance of the rightful authority of this court, to sustain this petition, and enable bail to be taken before him in accordance with the order heretofore made, than to dismiss these proceedings, and to deal with the matter over his head, as it were, by having the petitioner admitted to bail by this court, or by the justice thereof assigned to the Eighth circuit.²¹

One of several “Indian” cases was *Addington v. United States*,²² in which the PSL was a member of the Choctaw Nation. He appealed his murder conviction for the slaying of “a white person, and not an Indian, nor a citizen of the Indian Territory, nor a citizen of any Indian nation or tribe.”²³ This appeal was a challenge

¹⁷ *Id.* at 624.

¹⁸ 156 U.S. 277 (1895)

¹⁹ Judge Isaac Parker presided over the dangerous Indian Territory from his court in the Western District of Arkansas (Fort Smith) and came to be known by this moniker due his harsh sentences, particularly in capital cases. “In 21 years on the bench, Judge Parker tried 13,490 cases, 344 of which were capital crimes. 9,454 cases resulted in guilty pleas or convictions. Over the years, Judge Parker sentenced 160 men to death by hanging, though only 79 of them were actually hanged. The rest died in jail, appealed or were pardoned.” Kathy Weiser, *Isaac Parker – Hanging Judge of Indian Territory*, LEGENDSOFAMERICA.COM, <https://www.legendsofamerica.com/ar-isaacparker/> (last updated Oct. 2019).

²⁰ 156 U.S. at 288.

²¹ *Id.* at 289.

²² 165 U.S. 184, 185 (1897).

²³ *Id.* He was sentenced “to suffer death by hanging.” *Id.*

to jury instructions that distinguished between murder and manslaughter, and that defined self-defense.²⁴ The Court affirmed the conviction, finding no error in the instructions given.²⁵

In *Price v. United States*,²⁶ the Court considered an appeal from an obscenity conviction by a PSL who had been found guilty of “depositing in the mails of the United States obscene, lewd, and lascivious matter.”²⁷ He argued for reversal on grounds that there was no allegation in the indictment that he knew that the book he deposited in the mail was obscene or lewd and lascivious, and that the allegations are nothing more than a mere expression of the opinion of prosecutor that the material was so obscene as to be unfit for repetition in the indictment.²⁸ The Court rejected both arguments, affirmed the conviction, and addressed his claim that there was no allegation reflecting the nature of the obscenity involved as follows:

No one denies that there are degrees of obscenity, any more than that two and two make four; but, when a book is stated to be so obscene that it would be offensive if set forth in full in an indictment, such allegation imports a sufficient degree of obscenity to render the production nonmailable and obscene under the statute.²⁹

One of the more interesting cases the Court heard in the late nineteenth century is *Tla-Koo-Yel-Lee v. United States*,³⁰ an appeal by a pro se Alaskan “Indian” from a denial of a habeas corpus petition brought to challenge his murder conviction and sentence of death by hanging. In 1894, word spread to Fort Wrangel of a murder in a nearby town in the Alaska Territory. A team of agents headed by a commissioner and deputy marshal investigated and were led to the body by a woman who later testified as an eyewitness to the murder. The defendants were the woman’s husband and another man. Yet a third man testified as an eyewitness, in addition to the defendant’s wife. At trial, defense counsel posed questions to the wife seeking an admission that she was no longer married to the defendant; instead, that she was living with the second witness. The trial judge sustained all the prosecution’s objections to these questions.³¹

The Supreme Court agreed with the defendant, now as a PSL bringing his habeas petition, that the trial court erred in sustaining the objections:

We think answers to all these questions should have been permitted. The questions were directed to the purpose of showing material facts

²⁴ *Id.* at 187–88.

²⁵ *Id.* at 188.

²⁶ 165 U.S. 311 (1897).

²⁷ *Id.*

²⁸ *Id.* at 312.

²⁹ *Id.* at 314–15.

³⁰ 167 U.S. 274 (1897).

³¹ *Id.* at 275–76.

bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination, and obtain answers from the witness to that end. The two Indian witnesses (of whom the woman was one) did not agree in regard to the details of the alleged murder, and there is enough in the record to show that they were both of a low order of intelligence, and that they testified without any very solemn appreciation of their responsibilities as witnesses upon the trial of one individual for the murder of another. The whole occurrence at the time of the alleged murder is left in a good deal of confusion, and the credence to be given to the testimony of the woman was of the highest importance.³²

The pro se respondent in *United States v. Winston*³³ was a U.S. Attorney. Winston was designated by the Attorney General to represent the United States in a Ninth Circuit appeal. As of 1861, the Attorney General oversaw U.S. Attorneys,³⁴ and ten years later they fell under the Department of Justice.³⁵ District attorneys until 1896 were paid fees for their services,³⁶ but their role as attorney for their “district” did not include representation in “circuit courts.”³⁷ As the *Winston* Court stated, “[n]o express provision was made for appearances in those courts by the district attorneys of the several districts, and the control of cases in them comes within the general jurisdiction of the Attorney General as head of the Department of Justice.”³⁸

When Winston submitted his claim for services rendered in that case between 1890 and 1893, the United States refused to pay him.³⁹ The government reasoned that compensation for these services was already included in his normal salary as a U.S. District Attorney within the Department of Justice, and that a certain certificate had not been filed by the Attorney General indicating the services were

³² *Id.* at 277.

³³ *United States v. Winston*, 170 U.S. 522 (1898).

³⁴ *Historical Timeline of the U.S. Attorneys: Attorney General Oversees U.S. Attorneys*, U.S. DEP’T JUST., <https://www.justice.gov/usao/timeline/history#event-556026> (last updated June 20, 2018).

³⁵ *Historical Timeline of the U.S. Attorneys: U.S. Attorneys Work Under Department of Justice*, U.S. DEP’T JUST., <https://www.justice.gov/usao/timeline/history#event-556031> (last updated June 20, 2018).

³⁶ In 1896 “Congress transformed them into salaried officers in response to the Attorney General’s concern that the fee system encouraged the attorneys to bring vexatious law suits [sic].” *Court Officers and Staff: U.S. Attorneys*, FED. JUD. CTR., <https://www.fjc.gov/history/administration/court-officers-and-staff-u.s.-attorneys> (last visited May 19, 2020).

³⁷ District courts exercised jurisdiction over admiralty cases and minor criminal cases and civil suits, and circuit courts were trial courts with jurisdiction over most federal crimes, disputes between citizens of different states, suits involving the government, and some appeals from the district courts. *See The U.S. Circuit Courts and the Federal Judiciary*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/u.s.-circuit-courts-and-federal-judiciary> (last visited May 19, 2020). The appellate jurisdiction of the circuit courts ended in 1891 with the creation of the U.S. circuit courts of appeals. *Id.*

³⁸ 170 U.S. at 528–29.

³⁹ *Id.* at 522.

actually rendered.⁴⁰ The Court, based on its interpretation of the statutory authority of district attorneys and attorneys general, held that by law Winston's appointment was actually one of "special counsel," that his services were not part of his district attorney duties, and that he was therefore entitled to his fees.⁴¹

Another U.S. District Attorney brought a pro se claim for legal services rendered on behalf of the government in *United States v. Johnson*.⁴² Johnson, at the request of the Secretary of War, brought a condemnation action to acquire land for a fortification on Staten Island, New York. The Court reversed the judgment of the district court in his favor:

We are of opinion that congress intended . . . to uproot the practice under which, in the absence of any statute expressly authorizing it, extra allowances or special compensation were made to public officers for services which they were required to render in consideration only of the fixed salary and emoluments established for them by law. Our duty is to give effect to the legislation of congress, and not to defeat it by an interpretation plainly inconsistent with the words used.⁴³

A Civil War veteran was the PSL in *Calhoun v. Violet*.⁴⁴ He had entered the Oklahoma Territory in 1899 before others and claimed a homestead tract, believing federal law gave him such preference. Several others disputed his claim, arguing that he had entered the Territory before the official entry date to the prejudice of other claimants. The U.S. Land Offices, the Secretary of the Interior, and the Supreme Court of the Territory of Oklahoma all ruled against the PSL veteran.⁴⁵ On appeal, the U.S. Supreme Court denied the PSL's appeal, holding that the statute relied upon

was intended only to give to honorably discharged soldiers and sailors an equal right with others to acquire a homestead within the territory described by the act, and the proviso was thus intended simply to exclude any implication that they were, in consequence of the prior provisions of the act, not entitled to avail themselves of its benefits. The proviso, therefore, in no way operated in favor of honorably discharged soldiers and sailors, to relieve them from the general restriction, as to going into the territory, imposed upon all persons by the subsequent provisions of the law.⁴⁶

In sum, the Supreme Court's early experience with PSLs covered a range of profiles, none particularly marked as pests, kooks, or vexatious litigants. These

⁴⁰ *Id.* at 525–26.

⁴¹ *Id.* at 526–27.

⁴² 173 U.S. 363 (1899).

⁴³ *Id.* at 380.

⁴⁴ 173 U.S. 60 (1899).

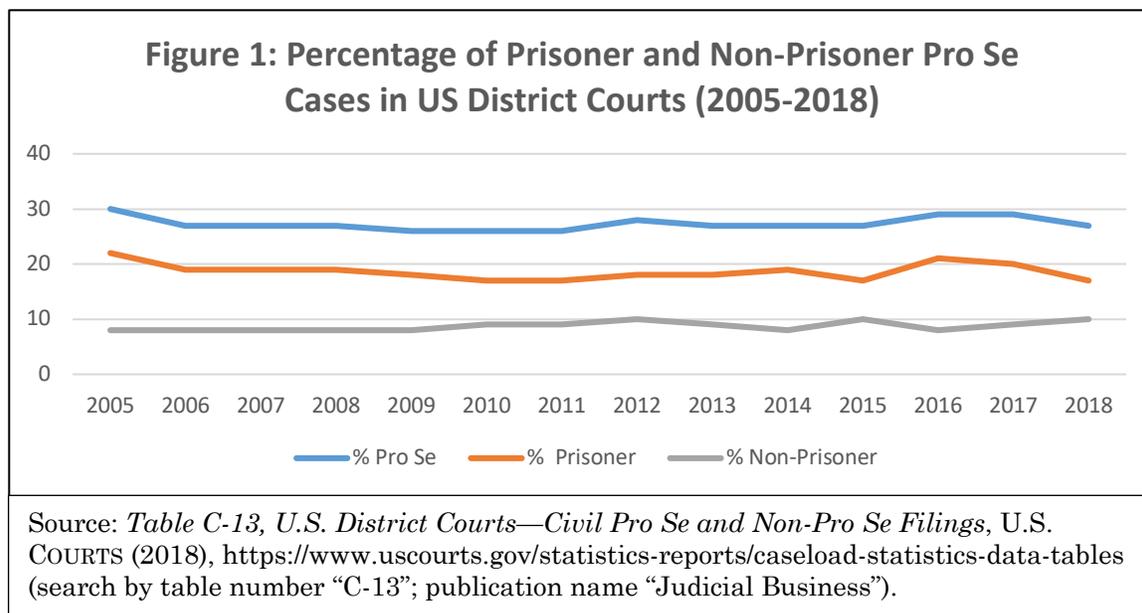
⁴⁵ *Id.* at 60–63.

⁴⁶ *Id.* at 64.

included buyers and sellers of property, owners of damaged property, veterans seeking travel expense reimbursement, private attorneys complaining of wrongful disbarment, both private attorneys and U.S. attorneys seeking unpaid legal fees, “Indians” appealing criminal convictions, a claimant stripped of his homestead claim, a defendant appealing an obscenity conviction, and even a federal district court judge challenging a single Supreme Court Justice’s order. Whether these PSLs were permitted to conduct oral argument in these cases is unknown.⁴⁷ The opinions do not provide this information. But the cases described show that PSLs’ claims were taken seriously, and in many instances were sustained. The next section describes the Supreme Court’s more recent experience with PSLs.

II. FREQUENCY OF PRO SE FILINGS

The Administrative Office of the U.S. Courts (AO) publishes statistics on the business of the federal courts, including tables reflecting the frequency of pro se litigation in district and circuit courts—but does not do so for the Supreme Court.⁴⁸ It is useful to know how much pro se litigation is part of the business of the lower courts, as these are the litigants who may file suits against the Supreme Court if they are unsuccessful at pretrial, trial, or on appeal.⁴⁹



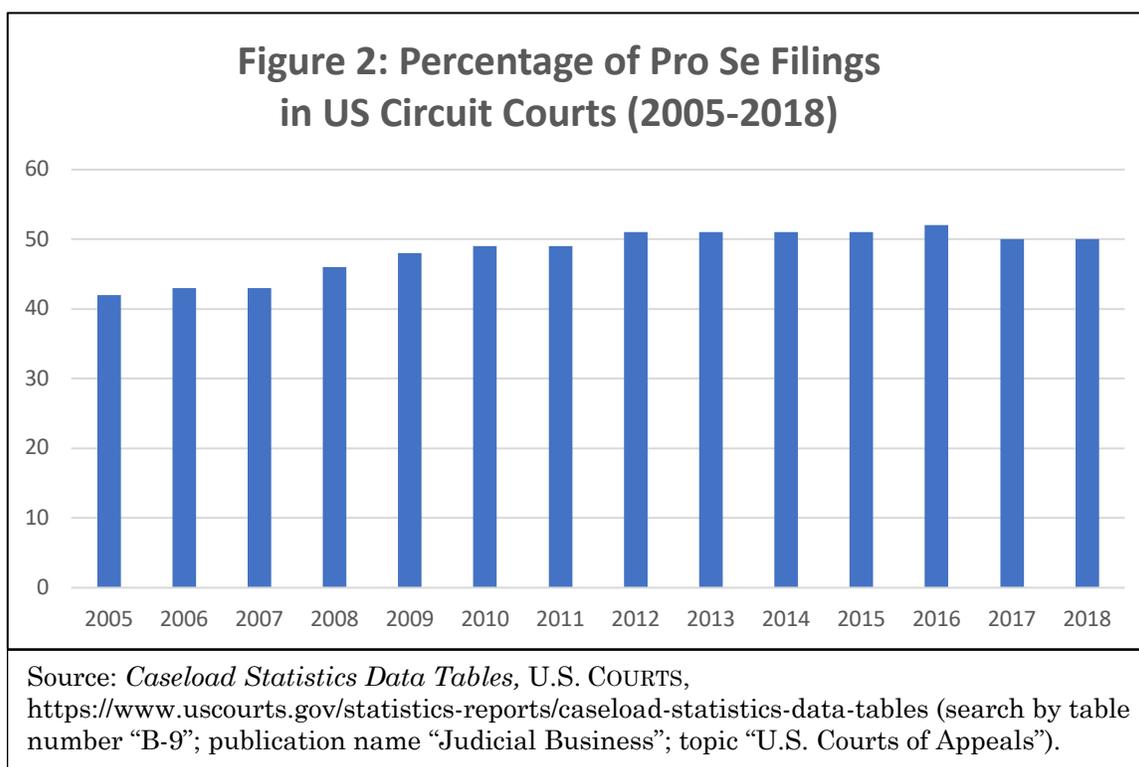
⁴⁷ Cf. SUP. CT. R. 28.8 (“Oral arguments may be presented only by members of the Bar of this Court. Attorneys who are not members of the Bar of this Court may make a motion to argue *pro hac vice* under the provisions of Rule 6.”). The quoted language was added by the Court in the 2013 amendments, “to clarify that nonlawyers are not allowed to argue.” 23 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE - CIVIL* § 528App.100, LEXIS (database updated Mar. 2020).

⁴⁸ *Caseload Statistics Data Tables*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> (last visited Apr. 29, 2020).

⁴⁹ The rate and extent of federal court litigation generally was recently found not to be increasing significantly as had been suspected. See Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, L. & SOC. INQUIRY: FIRSTVIEW (Jan. 20, 2020), <https://doi.org/10.1017/lsi.2019.69>.

Figure 1 above presents the percentage of annual pro se filings in all federal district courts during the 2005 to 2018 time period, the only years for which these data were collected. Figure 1 shows a remarkably stable pattern in which the total percentage of pro se filers ranged only from a low of 26% to a high of 30%, with an average of 27%. Similarly, prisoner pro se filings ranged from a low of 17% of all filings to a high of 22%, with an average of 19%. Likewise, non-prisoner filings remained stable and ranged from a low of 8% to a high of 10%, with an average of 8%.⁵⁰ Figure 1, however, shows that the frequency of non-prisoner pro se filings in district courts is on the rise.

Appellate pro se filings in the Circuit Courts are shown below in Figure 2.



The appellate pro se filings show a gradual increase over time from a low of 42% to the 50–52% range between 2009 and 2018. They average 47% of the circuit court filings over the twenty-two years of reported data. Unfortunately, the AO does not distinguish between prisoner and non-prisoner PSLs in its published circuit court statistics.

We know that the Supreme Court selects only a small number of certiorari petitions for review each year.⁵¹ Determining the number of PSLs who have

⁵⁰ Similar findings were made regarding the relative stability of pro se litigation in district courts by prisoners and nonprisoners over the period 1999 through 2018 by Gough and Poppe, *supra* note 49, at 8–9 (“[W]e find little evidence of a lasting pro se explosion.”).

⁵¹ *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Feb. 3, 2020) (“In fact, the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year.”).

authored these petitions throughout its history is difficult, at best. As early as 1995, the *Long Range Plan for the Federal Courts* contained a footnote stating that “[s]tatistics are limited with regard to pro se cases . . . Although the Supreme Court does not separately track pro se or prisoner filings, 4,621 *in forma pauperis* (IFP) petitions were disposed of in 1993, accounting for 69 percent of all case dispositions that year.”⁵²

The Federal Judicial Center (FJC) publishes an Integrated Database online, based on the data reported by federal courts to the AO.⁵³ While the Integrated Database includes extensive data on the business of the lower federal courts, it too lacks any data on Supreme Court filings. The FJC does, however, publish some charts and tables online regarding Supreme Court caseloads.⁵⁴ They explain on their website that case load data for the Supreme Court has been collected in fits and starts.⁵⁵ At no time has the Court reported the extent of its pro se litigation. The closest proxy to such data (also used by the Judicial Conference in the aforementioned *Long Range Plan*) is the report of IFP filings.⁵⁶ These data, too, were not always systematically collected:

Prior to 1945, petitions for writs of habeas corpus, mandamus, and other extraordinary relief that were accompanied by a motion for leave to file in forma pauperis—that is, filed by indigent litigants who could not afford to pay filing fees—were only placed on the Court's numbered docket if the motion was granted. Beginning in the 1945 term, the Court adopted the practice of numbering all motions for leave to file that accompanied these petitions and placed them on a newly created miscellaneous docket.⁵⁷

⁵² JUDICIAL CONFERENCE OF THE U.S., *LONG RANGE PLAN FOR THE FEDERAL COURTS* 63 n.14 (1995) [hereinafter *LONG RANGE PLAN*], https://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf.

⁵³ *Integrated Database*, FED. JUD. CTR., <https://www.fjc.gov/research/idb>. (last visited Feb. 3, 2020) (“The FJC receives regular updates of the case-related data that are routinely reported by the courts to the AOUSC [AO]. The FJC then post-processes the data, consistent with the policies of the Judicial Conference of the United States governing access to these data, into a unified longitudinal database, the IDB [Integrated Data Base].”).

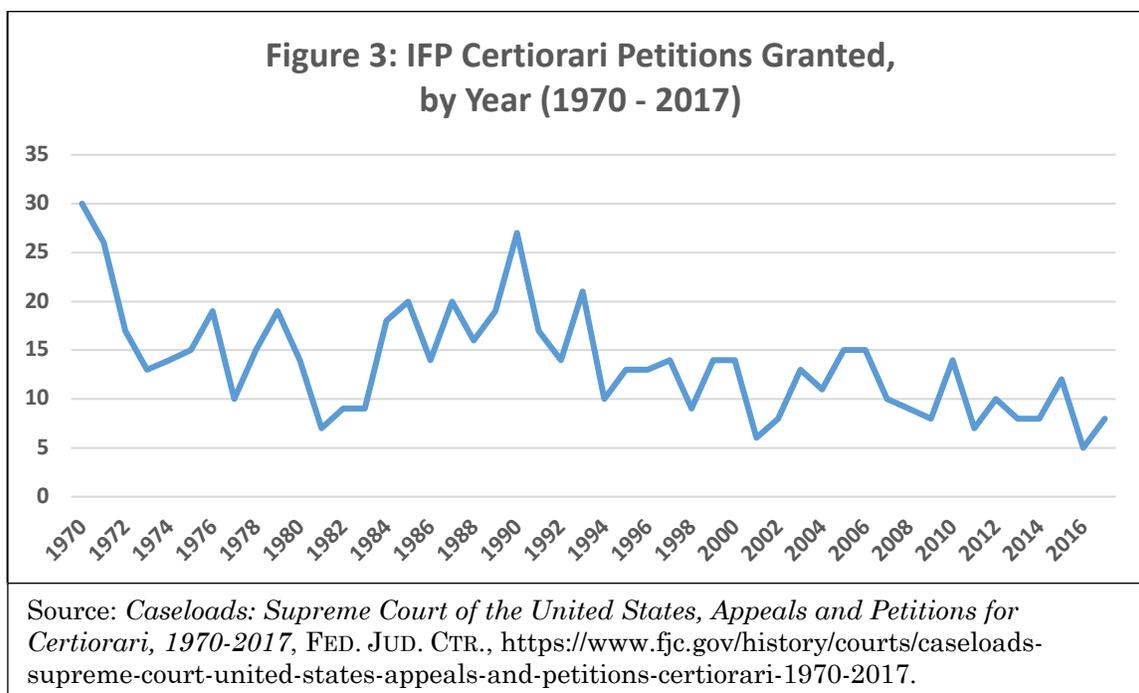
⁵⁴ *Id.*

⁵⁵ “The best source of information on the Court's workload during this period is the Court's docket books, available on microfilm at the National Archives.” *Caseloads: History of Supreme Court Caseload Reporting*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/caseloads-history-supreme-court-caseload-reporting> (last visited Jan. 24, 2020). Prior to 1887 no data was systematically collected. The Attorney General, and the Solicitor General, published caseload data from 1880 to 1928, after which the data were published in the *Harvard Law Review* until 1938. In 1932 the *Journal of the Supreme Court* began publishing case data. In 1940 the Director of the AO began publishing Supreme Court data. *Id.*

⁵⁶ Winston Bowman, the very helpful Associate Historian for the FJC, advised me that if I use IFP data as a proxy for PSLs “there may be some cause for caution depending on your definition of ‘pro se’ . . . [T]he Court often appoints counsel for indigent parties under Rule 39 . . . [and] at least some of those litigants also had appointed counsel in the courts of appeals.” Email to author from Winston Bowman (May 13, 2019, 8:08 AM) (on file with author).

⁵⁷ *Caseloads: History of Supreme Court Caseload Reporting*, *supra* note 55. The complexity of the matter is further reflected by the following explanation:

The AO does not collect data on the Supreme Court's pro se filings. However, the FJC published data from a variety of sources showing the number of IFP movants whose petitions for certiorari were granted annually from 1970 to 2017, reflected in Figure 3.

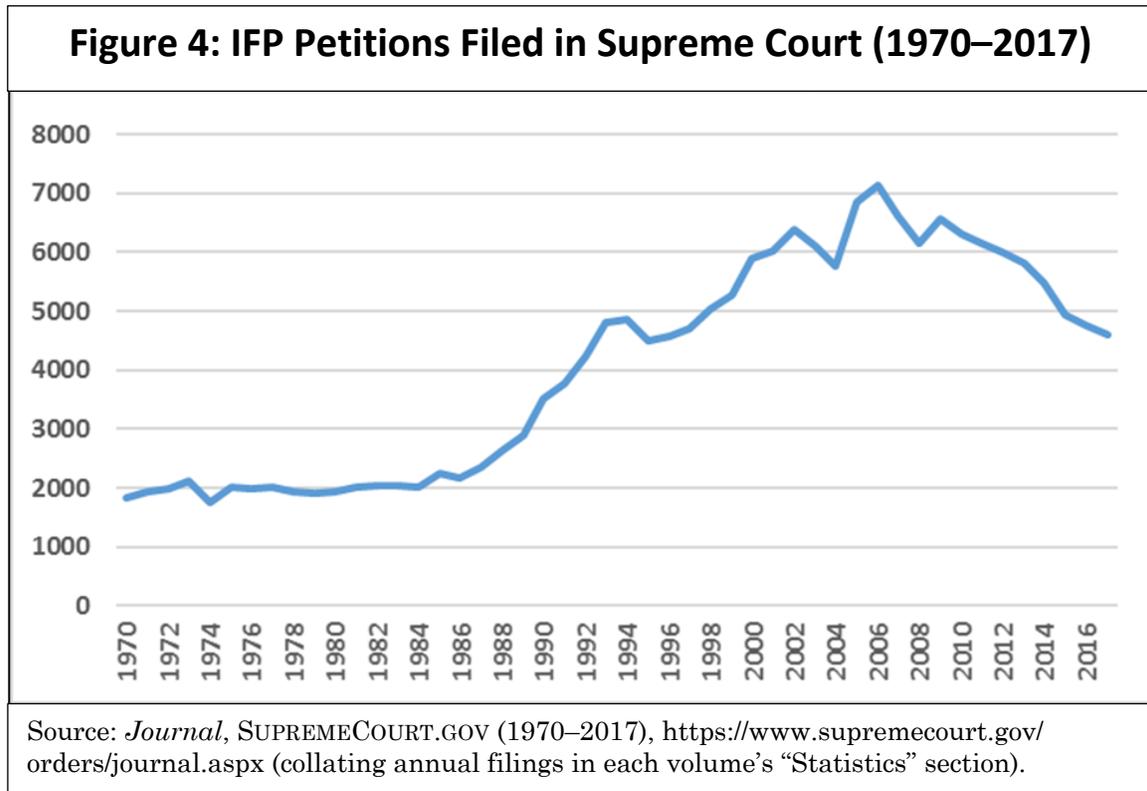


This chart shows that the certiorari petitions granted by the Supreme Court to IFP filers ranged from a high of thirty in 1970 to a low of five in 2016, with an average of almost fourteen per year. The chart, however, reflects a steady decrease in the number of certiorari petitions filed by IFP movants.

In order to determine the annual number of IFP filers of certiorari petitions since 1967 (which I use as a proxy for pro se filers) one must extract these data for each year from the *Journal of the Supreme Court*, these data not having been previously compiled. The compilation is reflected in the Figure 4. The first thing one notices about this chart is that pro se litigation in the Supreme Court started to increase dramatically in the mid to late 1980s. It continued to increase through the mid-1990s until 2005–06, when it began a continuing decline. These filings range

Beginning with the 1947 term, these petitions were included in the Court's calculation of total cases on the docket. Note that statistics on the Court's caseload are presented by the Administrative Office of the U.S. Courts include the petitions on the miscellaneous dockets for the 1945 and 1946 terms. When a motion for leave to file on the miscellaneous docket was accepted for plenary review, it was transferred to the Court's appellate docket. (No transfer is made, however, if the motion for leave to file is granted and the case is disposed of on the merits by the same order.) The statistics reported in the *Journal of the Supreme Court* count these cases when docketed and transferred from the miscellaneous docket and again when added to the appellate docket, in effect counting them twice. In 1970, the Court abolished the miscellaneous docket and instead divided *appellate cases* into original, paid, and pauper cases and ended the practice of transferring cases between dockets.

from a low of 1,759 in 1974 to a high of 7,132 in 2006. In 2017, the Court received 4,595 IFP motions.



III. THE COURT’S MODERN VIEW OF PSLs

In 1866, the Supreme Court was sympathetic to PSLs. They were to be “excusable for their ignorance of all the rules of pleading and practice in a court of chancery, or the proper mode of taking testimony.”⁵⁸ As a chronological review will show, the Court has vacillated in its perception and treatment of PSLs and pro se defendants, giving trial judges mixed signals about their obligations to them.

The Court in *Coppedge v. U.S.*,⁵⁹ for example, held that judges should take a “liberal view of papers” filed by pro se prisoners, which it found to be “equivalents of notices of appeal” despite technical deficiencies.⁶⁰ This “functional-equivalent doctrine,” allowing non-compliant papers to satisfy the relevant notice-of-appeal rule, was held in *Coppedge* and other subsequent decisions⁶¹ to properly invoke the

⁵⁸ *Purcell v. Miner*, 71 U.S. 513, 518 (1866).

⁵⁹ 369 U.S. 438 (1962).

⁶⁰ *Id.* at 444 n.5.

⁶¹ See *Becker v. Montgomery*, 582 U.S. 757, 767 (2001) (holding that “imperfection in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court” where appellant filed a notice of appeal with a typed instead of a required original signature); *Smith v. Barry*, 502 U.S. 244, 247 (1992) (holding that premature notice and appellate brief filing within time for filing notice of appeal was sufficient); *Fallen v. U.S.*, 378 U.S. 139 (1964) (holding

appellate court's jurisdiction because the papers reflected the inmate's intent to take an appeal from the judgment of the district court.⁶²

In *Haines v. Kerner*, the Court held that a pro se prisoner's § 1983 complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers."⁶³ The Court reversed the Seventh Circuit's affirmance of a trial court order dismissing a prisoner's civil rights complaint, holding that he was "entitled to an opportunity to offer proof."⁶⁴

*Faretta v. California*⁶⁵ is the landmark decision that recognized the Sixth Amendment right to self-representation in criminal cases. A trial judge had imposed the public defender on the defendant, rejecting his demand to represent himself. The Court held that the Sixth Amendment right to assistance of counsel implies a right to self-representation:

In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an "assistance" for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.⁶⁶

In addition to the extensive historical and interpretive analysis, the Court—consistent with its relatively compassionate past treatment of PSLs—placed great weight on philosophical, autonomous grounds in justifying its recognition of the right to self-representation:

The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own

letter to sentencing court was sufficient), *abrogated by* *Carlisle v. U.S.*, 517 U.S. 416 (1996); *Foman v. Davis*, 371 U.S. 178 (1962) (holding that one early notice, one late notice, and a post-trial motion collectively were effective though technically deficient). State courts have followed the same approach, construing certain documents as the functional equivalent of those required by court rules. *See, e.g., Hughes v. Habitat Apartments*, 860 S.W.2d 872 (Tex. 1993) (construing an *in forma pauperis* affidavit as an answer).

⁶² Lower courts have recognized the distinction between pro se non-compliance with rules versus imperfect compliance. Latitude has been given those litigants in cases of imperfect compliance with pleading rules, *U.S. v. \$41,320 U.S. Currency*, No. WDQ-12-1449, 2014 WL 6698426, at *3 n.18 (D. Md. Nov. 25, 2014).

⁶³ 404 U.S. 519, 520 (1972).

⁶⁴ *Id.* at 520. Pro se "pleadings" now include "documents" generally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

⁶⁵ 422 U.S. 806 (1974).

⁶⁶ *Id.* at 832.

detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."⁶⁷

Of note is the obligation the Court placed on trial judges when defendants state their desire for self-representation. Those who choose self-representation "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"⁶⁸ And, so long as a defendant is "literate, competent, and understanding," his "his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself."⁶⁹

The foregoing language in *Faretta* does reflect a continuation of the Court's concern with how PSLs and pro se defendants are treated, and many lower courts cite this language when addressing Sixth Amendment issues. Embedded in the Court's opinion, at note 46, however, is cautionary language, inserted because, as the footnote begins, "[w]e are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials."⁷⁰ In that event, "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."⁷¹

Faretta was decided only three years after *United State v. Dellinger*,⁷² a case which most likely prompted the Court to empower judges to sternly handle disruptive pro se defendants. At the same time, the Court made seemingly contradictory rulings, holding, on the one hand, that a pro se defendant's "technical

⁶⁷ *Id.* at 834 (citation omitted).

⁶⁸ *Id.* at 835 (citation omitted).

⁶⁹ *Id.* at 835–36

⁷⁰ *Id.* at 834 n.46.

⁷¹ *Id.* (citation omitted).

⁷² 472 F.2d 340 (7th Cir. 1972). *Dellinger*, commonly known as the "Chicago Seven" case, resulted in a reversal of convictions of defendants charged with coming to the 1968 Chicago Democratic Convention to incite a riot. The accompanying contempt citations imposed by the trial judge were also reversed. One of the defendants was Bobby Seale, a Black Panther party activist:

Conflict over the defense attorneys reemerged when Bobby Seale refused to be represented by anyone other than Charles Garry, who originally agreed to represent the defendants but remained in California because of an illness. Judge Hoffman refused Seale's subsequent request to represent himself, and Seale responded with a barrage of courtroom denunciations of the judge as a "pig," a "fascist," and a "racist." When the prosecuting attorney accused Seale of encouraging Black Panthers in the courtroom to defend him, the proceedings degenerated into worse shouting matches. Seale condemned the judge for keeping a picture of the slave owner George Washington above the bench, and Hoffman then followed through on his repeated warning to restrain Seale. In what provided for many the indelible image of the trial, Judge Hoffman ordered U.S. marshals to bind and gag Seale before his appearances in the courtroom. Hoffman allowed Seale in court without restraints the following week, but when Seale argued for his right to cross-examine a witness, Judge Hoffman sentenced him to four years in prison for contempt of court and declared a mistrial in the prosecution of Seale. The Chicago Eight were now the Chicago Seven.

Bruce A. Ragsdale, *Famous Federal Trials: U.S. v. Dellinger: The Chicago Seven Conspiracy Trial*, FED. JUD. CTR. (2008), <https://www.fjc.gov/history/famous-federal-trials/us-v-dellinger-chicago-seven-conspiracy-trial>.

legal knowledge” is not relevant to an assessment of his knowing and voluntary waiver of his right to counsel, and, on the other hand, mandating that pro se defendants comply with relevant procedural and substantive law. Thus began the Court’s mixed messaging to judges about how pro se defendants (and, by implication, PSLs) should be treated.

No further pro se-related decisions were handed down for nine years after *Faretta*. Then the Court’s relatively accommodating perception and treatment of pro se defendants took a turn in *McKaskle v. Wiggins*.⁷³ In *Wiggins*, the Court upheld a trial judge’s discretionary decision to appoint standby counsel to assist the pro se defendant at trial over the defendant’s objection:

A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense.⁷⁴

In so holding, the Court—citing language in *Faretta*’s footnote 46—made an unfortunate comment:

A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course. *Faretta* recognized as much. “The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.”⁷⁵

These two decisions (*Faretta* and *Wiggins*) not only cast pro se defendants (and, by extension, PSLs) in a false light, portraying them as potentially disruptive and non-compliant with rules of procedure and courtroom decorum. They also reflect the Court’s recognition that pro se defendants may need assistance to understand rules of procedure and substantive law, thus justifying appointment of standby counsel. Yet, if no standby counsel is appointed, the defendant is on his

⁷³ 465 U.S. 168 (1984).

⁷⁴ *Id.* at 184

⁷⁵ *Id.* at 183–84 (1984) (citing *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975)). Of course, *Faretta* did not “recognize” that pro se defendants are entitled to no instruction from the trial judge. In fact, the Court established the trial judge’s duty of warning the defendant about the risks of self-representation. And, the fact that *Faretta* held that proceeding pro se is not a license to be disruptive, and that pro se defendants need to comply with procedural rules, does not logically lead to the decision in *Wiggins* that they are entitled to no instruction regarding courtroom procedure.

own, with no entitlement to “personal instruction by the trial judge on courtroom procedure.”

Further negative treatment of pro se defendants is reflected in *Piler v. Ford*,⁷⁶ a habeas case:

District judges have no obligation to act as counsel or paralegal to pro se litigants. . . . Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a pro se litigant in such a manner would undermine district judges' role as impartial decisionmakers. And, to the extent that respondent is concerned with a district court's potential to mislead pro se habeas petitioners, the warnings respondent advocates run the risk of being misleading themselves.⁷⁷

While cautioning judges that they have no obligation to act as counsel or paralegal to pro se defendants, the Court at the same time requires them to provide notice and warnings to habeas petitioners if they decide to recharacterize a prisoner's motion as his or her first habeas petition:

[T]he court cannot so recharacterize a pro se litigant's motion as the litigant's first § 2255 motion unless the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's “second or successive” restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing.⁷⁸

The Court explained that:

the very point of *the warning is to help the pro se litigant understand not only (1) whether he should withdraw or amend his motion, but also (2) whether he should contest the recharacterization, say, on appeal. The “lack of warning” prevents his making an informed judgment in respect to the latter just as it does in respect to the former. Indeed, an unwarned pro se litigant's failure to appeal a recharacterization simply underscores the practical importance of providing the warning. Hence, an unwarned recharacterization cannot count as a § 2255 motion for purposes of the “second or successive” provision, whether the unwarned pro se litigant does, or does not, take an appeal.⁷⁹*

⁷⁶ 542 U.S. 225 (2004) (district courts are not required to give the particular advisements required by the Ninth Circuit before dismissing a pro se petitioner's mixed habeas petition).

⁷⁷ *Id.* at 231–32 (citations omitted); *see also* *McNeil v. United States*, 508 U.S. 106, 113 (1993) (the Supreme Court has “never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel”).

⁷⁸ *Castro v. United States*, 540 U.S. 375, 377 (2003).

⁷⁹ *Id.* at 384. (emphasis added).

The Court has also cautioned trial judges against interpreting the procedural prescriptions in federal habeas case law that would “trap the unwary *pro se* prisoner.”⁸⁰

The Court in other civil cases appears to have returned to a somewhat compassionate approach toward PSLs by requiring trial judges to provide them with certain warnings and notices. For example, the Court has held that an overly technical reading of Title VII would be “particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.”⁸¹ Then, in *Erickson v. Pardus*,⁸² reversing the Tenth Circuit’s departure from the liberal-interpretation-of-pleadings rule established in *Haines v. Kerner*, the Court stated: “The case cannot, however, be dismissed on the ground that petitioner’s allegations of harm were too conclusory to put these matters in issue.”⁸³ In other words, PSLs, despite inartful pleadings, are entitled to their day in court if their pleadings raise plausible allegations.

Thus, we see that this Court has given trial and appellate courts mixed messages about their obligations to PSLs. This has caused a lack of uniformity among judges in their treatment of PSLs. As retired Seventh Circuit Judge Richard Posner notes:

Depending on the type of case brought, the cooperativeness of the SRL [self-represented litigant], the philosophy of the trial judge about pro se litigation generally, and other factors make it such that some SRLs receive notices, warnings, and accommodations, while others do not, without a clear standard distinguishing who is entitled to them and who is not.⁸⁴

The Court has sown confusion among trial judges who are, on the one hand, advised to construe PSLs’ papers liberally, provide them with certain warnings and notices, etc.; and, on the other hand, are cautioned in the infamous language in *Wiggins* that pro se defendants are not entitled to instruction by the trial judge regarding court procedures.⁸⁵ The lack of consistency in the Court’s rulings—not to mention a desire to avoid any appearance of bias in favor of PSLs—makes it easy for some judges and courts to decline to assist PSLs altogether.

⁸⁰ *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)); *cf. Day v. McDonough*, 547 U.S. 198, 209–10 (2006) (holding that while a district court has discretion to dismiss a habeas petition as untimely where the State has incorrectly conceded timeliness, nonetheless “a district court is not required to doublecheck the State’s math. If . . . [d]istrict judges have no obligation to act as counsel or paralegal to pro se litigants’ then, by the same token, they surely have no obligation to assist attorneys representing the State” (second alternation in original) (citations omitted)).

⁸¹ *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

⁸² 551 U.S. 89 (2007).

⁸³ *Id.* at 94–95.

⁸⁴ RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS 226 (2017).

⁸⁵ *See id.* at 223 (“So, the Court, on the one hand, requires SRLs [self-represented litigants] to comply with the same rules of procedure and evidence as represented parties. But, on the other hand, it declares that they have no right to be informed of what those rules are.”).

Judge Posner is the lone jurist to decry the view of most federal judges:

[F]or a judge (including a judge on an appellate panel) to assist a litigant, even an unrepresented litigant in desperate need of guidance, is to discriminate impermissibly against the litigant's adversary. But that belief ignores the imbalance in litigation between a party having legal representation and a party unable, for lack of resources, to obtain legal representation.⁸⁶

Fortunately, in *Turner v. Rogers*, the Court recently recognized the potential “asymmetry of representation” facing single parents in the context of a child-support arrearage cases if prospective contemptors would be given a right to counsel.⁸⁷ The Court has provided no additional guidance to judges regarding PSL management since *Turner*. Thus, the lack of consistency in the Court's approach to the question of whether—and if so, the extent to which—judges may assist PSLs is still in flux. Consequently, trial judges each have their own policy regarding PSL assistance, latitude toward imperfect rule compliance, or other accommodations.

The Court's fickle approach to the question of PSL assistance by way of instruction by the trial judge or otherwise has not only caused a lack of uniform judiciary policy, it is a barrier to the adoption of its own programs and policies to assist PSLs. This lack of uniformity has resulted in many disappointed and angry PSLs who believe that justice was not done in their case. Research has shown that PSLs feel that they cannot access courts because they are unable to obtain legal representation, making them less likely to hold favorable views of the legal system.⁸⁸ Moreover, when judges fail to assist them in prosecuting or defending their cases, PSLs perceive courts as having less legitimacy, and are less likely to comply with the law.⁸⁹

IV. SUITS AGAINST THE SUPREME COURT

A Westlaw search resulted in approximately 300 decisions (not all opinions) involving suits against the Supreme Court, its individual justices, or the Clerk of the Court. Other than those few brought by pro se lawyers, most were filed by pro se non-lawyer. These cases can be grouped into those making procedural claims, substantive claims, and those with unintelligible pleadings. Many of these cases were filed primarily in district courts after the failure of the PSL's underlying litigation, which ended at the Supreme Court. Summaries of a sample of these cases follow.

⁸⁶ *Id.* at 270.

⁸⁷ 564 U.S. 431, 447 (2011) (declining to declare a due process right to counsel in civil child support contempt cases; to do so would create “a degree of formality or delay” that would unduly slow payments to single parents).

⁸⁸ Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URB. L. J.* 473, 503 (2010) (“[W]hether people feel represented in the litigation shapes their satisfaction, their willingness to accept the decisions made, and their evaluations of law and legal authorities more generally.”).

⁸⁹ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 89 (Princeton Univ. Press 2006) (1990).

A. Procedural Claims

i. Challenges to Denial of Certiorari

As expected, many of the cases involve a challenge to the Court's decision to deny certiorari. These cases include both civil plaintiffs⁹⁰ and criminal defendants⁹¹ whose cases were refused review by the Court. These PSLs sometimes seek injunctive relief and money damages against the Court for refusing to review their appeals.⁹² For example, in *Johnson v. Supreme Court of the United States*,⁹³ the district court described the PSL's mandamus claims as being that the Supreme Court "(1) unfairly rejected all of his petitions for 'not being totally correct and perfect'; (2) unfairly rejected at least three of his petitions even after he filed an application to proceed *in forma pauperis* as instructed; and (3) only returned some of his petitions, which 'smell' and 'crumble' in his hands."⁹⁴ The court dismissed the case "because the justices of the Supreme Court have absolute immunity from suit and because Yi fails to meet the standard for a writ of mandamus."⁹⁵

PSLs, by definition, do not always understand what the Court's rules require, nor do they have the capacity to comply with them. Thus, in *Panko v. Rodak*, the Seventh Circuit described the PSL's claim as involving the Court's return of his certiorari petition for failure to comply with Supreme Court Rule 39(1) regarding the printing of documents submitted to the Court.⁹⁶ Parts of the appendixes to each document had been reduced in size through photo-copying and failed to comply with the print-size requirements.⁹⁷ Other PSLs have complained that the Court or its clerk refused to file a certiorari petition out of time,⁹⁸ refused to file his petition multiple times due to rule non-compliance,⁹⁹ and claimed damages due of \$50 million because "the defendant Clerk improperly rejected plaintiff's petition."¹⁰⁰

⁹⁰ See *Yi v. Supreme Court of the U.S.*, No. TDC-15-3731, 2016 WL 54804, at *1 (D. Md. Jan. 4, 2016) ("[S]elf-represented Plaintiff Chong Su Yi filed the above-captioned action against the Supreme Court of the United States of America and each of its justices, alleging that his constitutional rights were violated when the Supreme Court denied Yi's petition for writ of certiorari in a separate case."); *Curry v. U.S. Supreme Court*, No. 1:16-cv-02733-JFA, 2017 WL 5951984, at *1 (D.S.C. Dec. 1, 2017); *Hammer v. Supreme Court of the U.S.*, No. 05 Civ. 4137(RJH), 2005 WL 1946038, at *1 (S.D.N.Y. Aug. 11, 2005).

⁹¹ *Fels v. Supreme Court of the U.S.*, 586 F. App'x 230 (7th Cir. 2014).

⁹² *Hafed v. U.S. Supreme Court*, No. 09 0327, 2009 WL 453122, at *1 (D.D.C. Feb. 20, 2009), *aff'd*, 352 Fed.Appx. 447 (D.C. Cir. 2009) (alleging wrongful denial of certiorari petition and seeking injunctive relief and \$1 in "punitive" damages).

⁹³ No. Civ.A. 05-759-KAJ, 2006 WL 167555 (D. Del. Jan. 24, 2006).

⁹⁴ *Id.* at *1.

⁹⁵ *Id.*

⁹⁶ 606 F.2d 168, 169 (7th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980).

⁹⁷ *Id.*

⁹⁸ *Morris v. Supreme Court of the U.S.*, 559 U.S. 901 (2010) (mem).

⁹⁹ *Brown v. U.S. Supreme Court*, No. 08 2070, 2008 WL 5082141, at *1 (D. D.C. Dec. 2, 2008).

¹⁰⁰ *Humphrey v. Court Clerk ex rel. U.S. Supreme Court*, No. 5:11-CV-938 (GLS/ATB), 2011 WL 7112904, at *2 (N.D.N.Y. Aug. 12, 2011).

In *Humphrey v. Court Clerk*,¹⁰¹ the PSL acknowledged that he was required, as a federal court litigant, to provide the Court's Clerk with a current mailing address for purposes of service and correspondence. He alleged, however, that the Court's Clerk, named as a defendant, refused to communicate with him by email, and claimed that the defendants' actions caused him to suffer severe mental distress.¹⁰² And, in *Hirsch v. Harris*, the PSL complained that the Clerk of the Court improperly "refused to acknowledge or transmit my Application to an individual Justice," which action he alleged violated his First Amendment right of access to the courts and his Fifth Amendment right to due process.¹⁰³ He sought a writ of mandamus compelling the respondent to "transmit [the Rule 22 Application] promptly to the Justice concerned," and to "show positive proof of the transmission."¹⁰⁴

ii. Challenges to the Constitutionality of Supreme Court Rules

Some PSLs are so offended by the Court Clerk's refusal to file a petition for rule non-compliance that they charge the rules themselves are unconstitutional. Thus, in *Kitley v. Supreme Court of United States*,¹⁰⁵ the PSL's suit, arising from the refusal of the Supreme Court Clerk's Office to accept for filing an untimely petition in which he sought rehearing of a denial of certiorari, sought (1) a declaration that the applicable Rules of the Supreme Court are unconstitutional, (2) an injunction prohibiting the enforcement of those rules, (3) a revision of the rules to conform to the Constitution, and (4) the acceptance of his petition for rehearing.¹⁰⁶

Wattleton v. U.S. Supreme Court,¹⁰⁷ raised a similar claim. There, the PSL, a federal prisoner, sought an order "declaring Supreme Court Rule 39.8, with respect to case no. 12-7476, violates [plaintiff's] right of access to the courts, right to due process of law, and right to equal protection," and requested the "enjoining [of] the Supreme Court to deny the petition."¹⁰⁸

iii. Damage Claims for Court's Refusal to Appoint Counsel

Civil PSLs often request appointment of counsel to pursue their claims. Federal law provides that prepayment of filing fees may be waived by court order for those proceeding *in forma pauperis*,¹⁰⁹ but courts under the same statute also have discretion in appropriate cases to "request" counsel to represent them.¹¹⁰ While

¹⁰¹ No. 5:05-CV-1159(NAM)(GJ), 2005 WL 2490155 (N.D.N.Y. Oct. 7, 2005).

¹⁰² *Id.* at *1. The district court found that "plaintiff has failed to set forth any facts in support of his claim that he is entitled to communicate with these federal courts by e-mail, nor has he demonstrated that he has suffered any harm from the actions complained of." *Id.* at *3.

¹⁰³ *Hirsch v. Harris*, 1:15e4-cv-00488, 2015 WL 1540490, at *1 (D.D.C. Apr. 6, 2015).

¹⁰⁴ *Id.*

¹⁰⁵ 899 F.2d 14 (Table), No. 89-3619, 1990 WL 39436, at *1 (6th Cir. Apr. 6, 1990).

¹⁰⁶ *Id.*

¹⁰⁷ *Wattleton v. U.S. Supreme Court*, Civ.A. 13-9228, 2013 WL 654193, at *1 (D.D.C. Feb. 22, 2013).

¹⁰⁸ *Id.* at *1.

¹⁰⁹ 28 U.S.C. § 1915(a)(1) (1996).

¹¹⁰ "The court may request an attorney to represent any person unable to afford counsel." *Id.* § 1915(e)(1).

many PSLs request counsel, courts rarely exercise their discretion to request representation for them.¹¹¹ Courts take into consideration factors such as “the complexity of the case, the ability of the plaintiff to investigate the case, and his ability to present the case at trial.”¹¹²

State prisoner Jermaine Miller was upset at being denied counsel for his various civil rights claims arising from appeals of his conviction, so he sued the Supreme Court in the district court,¹¹³ alleging

that defendants [the Supreme Court Justices] have violated rights protected under the Fifth, Seventh, Eighth and Fourteenth Amendments to the United States Constitution. He claims to have sent subpoenas to six of the defendants to ask “[f]or their aid in [his] legal defense to [his] innocence,” yet none of these defendants “contacted [him] to confirm their stance with their summoning.” He further alleges that he received “a Writ of Certiorari package” in response to the “formal letter [he sent] to the U.S. Supreme Court . . . [e]xplaining [his] legal situation in full detail,” instead of the necessary “forms to commence [a] Civil Action against the six rogue agencies” he had requested. Generally, he contends that “the seven defendants are guilty of wrongdoing by not answering a subpoena” and for relief from “the cruel injustive [sic] denials of government and the mental anguish [he] endured.”¹¹⁴

Miller’s prayer for relief was an “initial lump sum of 8 million dollars up front from each of the defendant[s]’ and other relief.”¹¹⁵ Needless to say, his complaint was dismissed.

Miller is not the only PSL who sought money damages against the Supreme Court. There is also Marco Gallo-Rodriguez, who sued the Supreme Court of the United States, the United States Courts of Appeals for the Fifth and Eleventh Circuits, and the United States District Courts for the Southern District of Florida and the Eastern District of Texas, alleging that these courts had “refused to hear plaintiff’s underlying constitutional claims that were brought to their attention

¹¹¹ Lawyers cannot be mandated to represent an indigent civil litigant who is eligible for *in forma pauperis* status. See *Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296 (1989). *But see* Sarah B. Schnorrenberg, *Mandating Justice: Naranjo v. Thompson as a Solution for Unequal Access to Representation*, 50 COLUM. HUM. RTS. L. REV. 260, 295 (2019) (citing *Naranjo v. Thompson*, 809 F.3d 793 (5th Cir. 2015)) (explaining that “if indigent parties cannot find a willing and able legal aid organization, then they rarely have another accessible option for counsel”; summarizing the various tests used by different Circuit Courts to *request* counsel’s representation of the indigent; and noting the court in *Naranjo* is the first to compel representation for *in forma pauperis* litigants under the court’s inherent authority).

¹¹² Kevin W. Brown, Annotation, *Appointment of Counsel, in Civil Rights Action, Under Forma Pauperis Provisions (28 U.S.C.A. § 1915(d))*, 69 A.L.R. Fed. 666 § 3[a] (1984).

¹¹³ *Miller v. Supreme Court*, 1:15-cv-00861, 2015 WL 3619072, at *1 (D.D.C. June 5, 2015) (alterations, except last, in original) (citations omitted).

¹¹⁴ *Id.* (citation omitted).

¹¹⁵ *Id.*

through a habeas corpus petition.”¹¹⁶ He also sought money damages, in the amount of \$500 million.¹¹⁷

B. Substantive Claims

i. Claims that Court Violated Civil Rights, Engaged in Conspiracy, and Similar Claims

Aside from the aforementioned procedural claims, some PSLs make substantive claims against the Court. For example, PSL Longinus Yen appealed from a judgment of the Southern District of New York dismissing sua sponte his complaint which alleged that former Chief Justice William Rehnquist violated his civil rights.¹¹⁸ Specifically, Yen alleged that Justice Rehnquist had engaged in antitrust conspiracies with two Supreme Court clerks, in order to ensure that the appeal from his previously filed lawsuit, which was dismissed for lack of subject matter jurisdiction, was not heard by the Supreme Court.¹¹⁹

PSL Benjamin Jones brought a similarly conspiratorial complaint against the Supreme Court.¹²⁰ The Second Circuit described his claim as follows:

Mr. Jones has not fared well in the past two decades. By his own admission, he is impoverished, homeless, and mentally ill. He attributes his plight to the success of a government conspiracy created to destroy his mental, financial, and social well-being. He alleges that, in the early 1970s, while he was confined to a mental institution in California, federal agents implanted a microwave transmitter/receiver into his body. This implant continuously transmits Mr. Jones’s location to a global satellite surveillance system that, in turn, monitors Mr. Jones’s activities. The implant can also receive and amplify digital signals broadcast by the government at Mr. Jones; these signals, once amplified, disturb his mental processes and can inflict excruciating pain.

Mr. Jones, in this action, seeks damages for his torment. He names as defendants virtually every judicial officer in the United States government, save those associated with this circuit. Before the district court, Mr. Jones petitioned for leave to proceed in forma pauperis. The district court denied his motion, and Mr. Jones appeals that denial.¹²¹

¹¹⁶ Gallo-Rodriguez v. Supreme Court of the U.S., Civ. A. No. 08–1890, 2009 WL 3878073, at *1 (D.D.C. Nov. 19, 2009).

¹¹⁷ *Id.*

¹¹⁸ Yen v. Supreme Court of the U.S., No. 99-6198, 2000 WL 232664, at *1 (2d Cir. Feb. 28, 2000).

¹¹⁹ *Id.*

¹²⁰ Jones v. Supreme Court of the U.S., No. 94-4134, 1994 WL 582934, at *1 (10th Cir. Oct. 20, 1994).

¹²¹ *Id.*

Not all PSLs with substantive claims seek money damages against the Supreme Court. For example, Jaime Luevano filed a petition for writ of mandamus to compel the United States Congress “to conduct an investigation and hold hearings regarding the United States Supreme Court, the United States District Court for the Districts of Columbia and the Texas unnamed federal judges, and others in Washington D.C. and Texas,” and sought an investigation of various unnamed judges and courts and others allegedly involved in a “grand, unspecified conspiracy.”¹²² This was not Luevano’s first action against the Court. He had previously filed an action against the Chief Justice for the conduct of the Court’s clerks.¹²³ In that case, he alleged that the Clerk and Deputy Clerks of the Supreme Court had “failed to file his petition for a writ of certiorari, and that the *Chief Justice has failed to properly supervise these employees*. For these alleged violations of rights protected by the United States Constitution, plaintiff demand[ed] no particular relief.”¹²⁴

ii. Complaints Seeking Rulings on Legality of Wars

Some PSLs have a political agenda, such as those who seek an order of the Supreme Court declaring a war to be illegal. Steve Perdue and other co-plaintiffs brought such an action seeking a declaratory judgment that the Vietnam War was illegal.¹²⁵

The named defendants were the Supreme Court of the United States and the individuals who at that time were the Chief Justice and the Associate Justices of that Court. The relief sought was that: 1. The petition be accepted and that the defendants be ordered to establish a hearing date for the issues presented. 2. That the Supreme Court of the United States declare whether or not participation in the Viet Nam War by the United States is legal or illegal.¹²⁶

Perdue’s claim was dismissed by the district court, which called the complaint “a sham.”¹²⁷ The Ninth Circuit affirmed on the grounds that the complaint failed to state a claim; the court lacked jurisdiction; no case or controversy existed; and the plaintiffs lacked standing. Moreover, “[n]either the district court nor this court has authority to enlarge the jurisdiction of the Supreme Court as defined by Congress, 28 U.S.C. § 1251, and by the Constitution, Article III,

¹²² Luevano v. U.S. Supreme Court, CIV. No. 12–00200 SOM/KSC, 2012 WL 1491865, at *1 (D. Haw. Apr. 27, 2012).

¹²³ Luevano v. U.S. Supreme Court Clerks, Civil Action No. 09 0071, 2009 WL 82189, at *1 (D.D.C. Jan. 13, 2009)

¹²⁴ *Id.* (emphasis added).

¹²⁵ Perdue v. Supreme Court of the U.S., 439 F.2d 806 (9th Cir. 1971) (per curiam).

¹²⁶ *Id.* at 807.

¹²⁷ *Id.*

§ 2, to include cases between private citizens and the Court or the Justices of the Court.”¹²⁸

iii. Claims the Court Failed to Do Justice

This category of cases against the Supreme Court involves PSLs who complain of its failure to do justice to remedy adverse outcomes in previous suits against third parties. For example, PSL Wesley Hotchkiss brought an action against the Court alleging:

[S]ince 1991 numerous state and federal courts have done nothing to assist him to obtain back pay and interest from his former employer; that his retained attorney failed to represent him; and that the Oregon and American Bar Associations, and numerous state and federal agencies, failed to take any action.¹²⁹

Richard Muzzi sued the Supreme Court due his dissatisfaction with the grant of summary judgment against him in a prior suit¹³⁰ against his former employer and the Equal Employment Opportunity Commission for disability discrimination and retaliation under the Americans with Disabilities Act.¹³¹ His complaint alleged that the Court violated his constitutional rights via the federal judicial process when his prior case was dismissed on summary judgment. He complained that he was harmed “by the unconstitutional laws passed by the United States Congress, by the misinterpretation and the misapplication of the laws by the federal courts, and by statements made by the judges presiding over his case.”¹³² He prayed for the reinterpretation of the laws and the restructuring of the courts and judiciary powers.¹³³ He also prayed for the changing of the jurisdiction of each appeals court.¹³⁴ Lastly, he sought compensation of “at least \$23.00.”¹³⁵

Another PSL, Lawrence Harris, had brought suit contesting his unsuccessful tryout for a basketball team—the Tulsa 66ers—which was dismissed by the Northern District of Oklahoma for lack of subject matter jurisdiction, with the

¹²⁸ *Id.*

¹²⁹ Hotchkiss v. Supreme Court of the U.S., No. 97-35059, 1997 WL 542305, at *1 (9th Cir. Aug. 28, 1997). In addition to the defendants the Circuit Court noted, Hotchkiss also sued:

Janet Reno, sued as “Janice Reno,” Attorney General of the United States; Attorney General for the State of Oregon; Foreman of Federal Grand Jury; the American Bar Association; Oregon Medical Association; Saif Corporation; Oregon Department of Workmans Compensation; Department of Finance Oregon, sued as “Oregon Department of Insurance and Finance”; Oregon Vocational and Rehabilitation Division; Campus Drive in Cleaners Incorporated; Yergen & Meyer Corporation; John Does, Defendants-Appellees.

Id.

¹³⁰ See Muzzi v. U.S. Gov't, No. Civ.A.02-0297, 2002 WL 922378 (E.D. La. May 6, 2002).

¹³¹ Muzzi v. U.S. Supreme Court, No. Civ.A.02–2017, 2002 WL 31324140, at *1 (E.D. La. Oct. 16, 2002).

¹³² *Id.* at *2.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at *3.

Tenth Circuit affirming and certiorari ultimately denied.¹³⁶ He then sued the Supreme Court “to challenge the wisdom of the Justices’ decision” refusing to hear his appeal.¹³⁷ The U.S. District Court for the District of Columbia dismissed that suit, holding that it “lacks any power to review the Supreme Court’s actions.”¹³⁸

And then there was Henry Astrop, a PSL who sued a pharmacy in Virginia state court for failing to have his medications in stock; the trial court dismissed the case on the defendants’ motion.¹³⁹ He then took the same complaint to federal court and saw it dismissed for failure to state a claim.¹⁴⁰ Astrop appealed to the Fourth Circuit, which affirmed the dismissal.¹⁴¹ He petitioned the Supreme Court for certiorari and was denied.¹⁴² At that point, Astrop decided to sue the Supreme Court on the grounds that denying his certiorari petition infringed his First and Fourteenth Amendment rights because he “was legally blocked from further pursuing the injuries [he] endured.”¹⁴³ The Eastern District of Virginia dismissed that complaint, because it “fail[ed] to allege any facts that amount to a plausible claim against the Supreme Court of the United States.”¹⁴⁴ Astrop appealed to the Fourth Circuit, which affirmed the dismissal.¹⁴⁵ Mr. Astrop did not pursue another petition for certiorari.

iv. Requests that Court Strike Down Public Policies or Prior Decisions

Occasionally, a PSL will sue the Supreme Court to request that it strike down certain public policies or overrule its own decisions, such as when PSL James Skelton filed suit against the Court asking it to overrule *Roe v. Wade*.¹⁴⁶ The *Roe* decision,¹⁴⁷ he argued, “violates the right of unborn babies to ‘life, liberty and pursuit of happiness,’ as well as being a violation of the ‘separation of powers by’ the Court ‘legislating from the bench.’”¹⁴⁸ He also requested that the Court “‘outlaw abortion’ and ‘order all abortion clinics closed,’ as well as have a memorial built” for the aborted fetuses.¹⁴⁹

¹³⁶ *Harris v. PBC NBADL, LLC*, No. 10–cv–00782, 2011 WL 719619 (N.D. Okla. Feb. 22, 2011), *aff’d*, 444 F. App’x 300 (10th Cir. 2011), *cert. denied*, 566 U.S. 1011 (2012).

¹³⁷ *Harris v. U.S. Supreme Court*, No. 12–1577, 2012 WL 5240811, at *1 (D.D.C. Oct. 23, 2012).

¹³⁸ *Id.* (citing *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

¹³⁹ *Astrop v. Rite Aid Distribs.*, No. CL08000133-00 (Va. Cir. Ct. Jan. 12, 2009).

¹⁴⁰ *Astrop v. Eckerd Corp.*, No. 3:09CV681, 2010 WL 1779992 (E.D. Va. Apr. 29, 2010).

¹⁴¹ *Astrop v. Eckerd Corp.*, 397 F. App’x 881 (4th Cir. 2010) (per curiam).

¹⁴² *Astrop v. Eckerd Corp.*, 562 U.S. 1152 (2010), *reh’g denied*, 562 U.S. 1266 (2011).

¹⁴³ *Astrop v. U.S. Supreme Court*, No. 3:11CV203, 2011 WL 9517440, at *1 (E.D. Va. Apr. 18, 2011) (alteration in original).

¹⁴⁴ *Id.* at *2.

¹⁴⁵ *Astrop v. U.S. Supreme Court*, 447 F. App’x 492 (4th Cir. 2011).

¹⁴⁶ *Skelton v. U.S. Supreme Court*, No. 3:09–1435–MBS, 2009 WL 2485983, at *1 (D.S.C. Aug. 12, 2009).

¹⁴⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴⁸ *See Skelton*, 2009 WL 2485983, at *3.

¹⁴⁹ *Id.*

PSL Tyrone Hurt also brought an action in diversity requesting the Supreme Court reverse its ruling in *Roe v. Wade*.¹⁵⁰ He was a little more specific than Skelton, however, by claiming that “abortion is violence against women and should be abolished because it violates the 8th Amendment, human rights, and world order.”¹⁵¹ He sought “one million dollars punitive and compensatory damages” against the Court and its individual Justices.¹⁵² Likewise, PSL David Mantle requested the District Court to order the Supreme Court to “fix the *Roe v. Wade* law—so that all of us fathers who want to file a complaint later—to save the baby, can file a complaint later to claim custody of the baby.”¹⁵³

In addition to challenges to *Roe v. Wade*, other actions against the Supreme Court include those seeking to overrule the decision barring prayer in schools. One example is a different action brought by the aforementioned PSL, James Skelton, “to overturn the previous 1962 Supreme Court ruling that outlawed prayer in public schools.”¹⁵⁴ His complaint stated:

I James Skelton as a born again Christian and disabled American veteran do hereby file this pro se law suit against the United States Supreme Court in an effort to overturn the previous 1962 Supreme Court ruling that outlawed prayer in public schools. By the previous Supreme Court’s ruling against prayer and the posting of the ten commandments in public schools they have in fact made God an outlaw. As one nation under God the United States Supreme Court has acted as an enemy of domestic terrorism and therefore bringing the wrath of God on our schools, children and society. If prayer and the posting of the ten commandments had been allowed the possibilities of the mass shooting and violence would have never happened. All right came from God including the right to life, liberty and the pursuit of happiness. We the people have the right to worship

¹⁵⁰ Hurt v. U.S. Supreme Court Justices, Civil Action Nos. JFM–12–3643, –3644, –3646, –3647, 2012 WL 9189916, at *1 (D. Md. Dec. 21, 2012). He also sued “two former United States presidents.” *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* In one related and consolidated action, Hurt sued two United States District Court judges and the United States Court of Appeals for the Northern District of California: “He states defendants are sitting judges required to render decisions and opinions in accordance with the U.S. Constitution. As relief plaintiff seeks an order requiring all judges in the twelve courts to interpret the U.S. Constitution and if unable to do so, to implement Art. II, § 4 of the *Constitution*.” *Id.* In a second, consolidated action, he named the United States of America and others as defendants.

He claim[ed] that former President Richard M. Nixon and former President George W. Bush should, in the history of this nation, be considered dictators because they were responsible for creating three unnecessary wars that were against the protocol document to the U.S. Constitution. (Viet Nam, Afghanistan and Iraq). He further state[d] that both presidents disregarded and violated the U.S. Constitution, but especially President Bush because he created two of the worst illegal and unconstitutional wars without [the] consent of the American people.

Id.

¹⁵³ Mantle v. U.S. Supreme Court, Civil Action No. 2:09–CV–633, 2009 WL 2579428, at *1 (S.D. Ohio Aug. 17, 2009).

¹⁵⁴ Skelton v. U.S. Supreme Court, C/A No. 3:13–465, 2013 WL 1768698, at *1 (D.S.C. Mar. 14, 2013).

God in our own way without inference (sic) from the government. The United States Supreme Court has not acted in the defense of freedom of religion and its previous rulings on all Christian matters should be struck down. This is the only humanitarian (sic) thing to do if we are to have a government of the people, for the people, and by the people.¹⁵⁵

Skelton's prayer for relief added an additional claim. He asked the Court to "[s]trike down all previous United States Supreme Court rulings on prayer in public schools. Also strike down any and all United States Supreme Court ruling [sic] on the posting of the ten Commandments in public display."¹⁵⁶

In addition, PSL Jeffrey Gibson's complaint "discusse[d] his own theories on taxing and monetary policy in this country, and then [sought] wide-ranging relief, including an order granting his motion 'invoking U.S. constitutional marshal status,' as well as damages in the amount of '11 million United States dollars.'"¹⁵⁷ Gibson named the Supreme Court's Clerk of Court, as well as "all federal judges," as defendants.¹⁵⁸ He was apparently well-known to the Court, the district court having referred to him as "a prodigious, if prodigiously unsuccessful, *pro se* litigant in this Court who has filed at least 28 prior cases in federal court over the years."¹⁵⁹ A footnote in the case states, "It should be noted many of these cases have had only fleeting and evanescent existences, having been promptly dismissed by the courts."¹⁶⁰

iv. Pro se Attorneys' Claims

The cases against the Supreme Court, its Clerk of Court, or individual justices are not only filed by laymen. Pro se attorneys have also brought such cases. For example, lawyer Michael Newdow was the lead plaintiff in a group "who individually describe themselves as atheist, nonreligious and nontheistic, Secularist, or humanist," brought an action against multiple defendants.¹⁶¹ These included Chief Justice Roberts, the Presidential Inaugural Committee, the Joint Congressional Committee on Inaugural Ceremonies, the Armed Forces Inaugural Committee, and "Other Unknown Oath Administrators,' 'Other PIC Defendants,' and 'Other Unnamed Clergy' whom the President or President-elect may ask in the

¹⁵⁵ *Id.* (alterations in original).

¹⁵⁶ *Id.* at *2; *cf.* *Morris v. U.S. Supreme Court*, 286 F. App'x 24, 25 (4th Cir. 2008) (per curiam) (PSL requesting the Court "to put the Bible back in all public schools in the U.S.A., and to impose sanctions").

¹⁵⁷ *Gibson v. U.S. Supreme Court Clerk*, Civil No. 1:10-CV-2348, 2010 WL 5088232, at *1 (M.D. Pa. Nov. 16, 2010).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *1 n.1.

¹⁶¹ *Newdow v. Roberts*, 603 F.3d 1002, 1006–07 (D.C. Cir. 2010) (citations omitted) ("The complaint represented the third Establishment Clause lawsuit the lead plaintiff, Michael Newdow, has brought before federal courts against religious elements of presidential inaugural ceremonies."). Newdow was also the plaintiff and pro se counsel in *Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 16–18 (2004) (holding plaintiff, a non-custodial parent of his child, lacked standing to bring an action in federal court challenging the constitutionality of a school district policy requiring teacher-led recitation of the Pledge of Allegiance).

future to conduct and facilitate religious oaths and prayers at the 2013 and 2017 inaugurations.”¹⁶² The suit sought injunctive relief to prevent the inclusion of prayers and phrases like “So help me God” in the presidential oath at the inauguration ceremonies, alleging they would be “violations of the First and Fifth Amendments, and in particular the Establishment Clause of the First Amendment.”¹⁶³ The D.C. Circuit dismissed the case on mootness and standing grounds, noting:

The President cannot be denied the prerogative of making such a religious reference, [the plaintiffs] concede, because doing so would abrogate his First Amendment rights. For sure, if it were otherwise, George Washington could not have begun the tradition by appending “So help me God” to his own oath; Lincoln could not have offered a war-weary nation “malice toward none” and “charity for all [] with firmness in the right as God gives us to see the right”; Kennedy could not have told us “that here on earth God’s work” must be our own; nor could President Reagan have evoked “the shining city . . . built on rocks stronger than oceans, windswept, God-blessed, and teeming with people of all kinds living in harmony and peace” in his farewell address.¹⁶⁴

Another pro se attorney, Ezra Borntrager, “complain[ed] that the Clerk of the Supreme Court of the United States illegally refused to accept and process his application for admission to the Supreme Court Bar.”¹⁶⁵ He had “refused on religious grounds to provide his social security number in the space reserved for that number on the bar application form.”¹⁶⁶ The clerk “declined to process the application, informing him that Rule 5.2 of the Supreme Court Rules required applicants to complete ‘the form approved by the Court,’” but Borntrager contended “that the clerk’s actions violated his rights under the First and Fifth Amendments of the Constitution and under § 7 of the Privacy Act of 1974.”¹⁶⁷ Borntrager sought mandamus relief “commanding the clerk to process his application,” and sought “\$6.1 million in actual and punitive damages against the clerk in his individual and official capacities.”¹⁶⁸ The Eighth Circuit affirmed the grant of summary judgment for the clerk.¹⁶⁹

Lastly, pro se attorney Montgomery Sibley brought an action against the Supreme Court in the district court, claiming “that the Supreme Court ‘putatively’ suspended him from the practice of law in that Court [before] ruling on a pending

¹⁶² 603 F.3d at 1002, 1010.

¹⁶³ *Id.* at 1006–07.

¹⁶⁴ *Id.* at 1010 (alterations in original) (citation omitted).

¹⁶⁵ *Borntrager v. Stevas*, 772 F.2d 419, 420 (8th Cir. 1985).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 420–21.

petition he . . . filed in a previous case before that Court,” and that it “refus[ed] to file a motion that he submitted after his suspension.”¹⁷⁰ After being disbarred by the Court, he “continued to file petitions and motions in several other matters”; he also argued “that Justice Thomas’s failure to act on a particular motion for an extension of time to file a petition for writ of certiorari wrongfully precluded [him] from seeking review before the . . . Court in that case.”¹⁷¹

Plaintiff contends that the Justices “usurped jurisdiction” by “failing to say what the law is” and denying him an impartial tribunal. He also disputes the legality of the judicial immunity doctrine. These arguments are unavailing. Plaintiff has sued the Supreme Court and its Justices on several occasions and, like here, he has then faulted the Justices for not ruling on his motions in a timely manner, denying writs of certiorari, and failing to recuse themselves to provide an impartial tribunal. Such arguments are “nonsense.”¹⁷²

C. Unintelligible Pleadings

Some PSL pleadings are so unintelligible that they are routinely dismissed.¹⁷³ There are many examples of such cases generally and, in particular, in cases against the Supreme Court. For example, in *Rice v. U.S. Supreme Court*,¹⁷⁴ the district court quoted the PSL’s caption and claims, and found these pleadings¹⁷⁵ to be “patently insubstantial” and dismissed the complaint: “Plaintiff has not stated a coherent claim against any of the defendants. Plaintiff’s claims are so attenuated and unsubstantial as to be devoid of merit.”¹⁷⁶

Additional examples of complaints against the Supreme Court dismissed for unintelligibility or frivolousness are where courts have found:

¹⁷⁰ *Sibley v. U.S. Supreme Court*, 786 F. Supp. 2d 338, 341 (D.D.C. 2011) (citations omitted). In addition to the Supreme Court, Sibley named as defendants Justices of the Supreme Court, United States District Court Judge Richard J. Leon, United States District Court Judge Henry H. Kennedy, Jr, Attorney General Eric H. Holder, Jr, the District of Columbia Court of Appeals, Chief Judge of the District of Columbia Court of Appeals Eric T. Washington, District of Columbia Circuit Court of Appeals Clerk Mark Langer, United States Supreme Court Deputy Clerk Cynthia Rapp, the United States Marshals Service, and two unnamed officers from the United States Marshals Service. *Id.* at 340. The opinion notes his claim against the Marshals was “for escorting him to the District Court Clerk’s office upon his arrival at the United States Courthouse for the District of Columbia.” *Id.* at 341.

¹⁷¹ *Id.* at 341. Sibley had apparently been suspended from the practice of law in Florida for three years previously, and the District of Columbia Court of Appeals had also suspended his license to practice for three years. He claimed “that the District of Columbia Court of Appeals attorney disbarment rules and practices violate[d] a number of his constitutional rights.” *Id.* at 340.

¹⁷² *Id.* at 343 (citations omitted).

¹⁷³ See *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)) (“[F]ederal courts are without power to entertain claims otherwise within their jurisdiction if they are ‘so attenuated and unsubstantial as to be absolutely devoid of merit.’”).

¹⁷⁴ No. C03–05582CRB, 2003 WL 22999539 (N.D. Cal. Dec. 17, 2003).

¹⁷⁵ See *infra* Appendix.

¹⁷⁶ *Rice*, 2003 WL 22999539, at *2.

Plaintiff's complaint [was] composed entirely of vague, conclusory, disjointed and farfetched allegations. For example, in her complaint plaintiff allege[d] that "President Reagan imposed military duties to Vietnam w/o authorization to find MIAs of which his family involved," that "Mr. Clinton was given monies from New York Hospital" and that "Shirely Hauter (S.J + Sac. P.D) discovered Jerry Brown, JFK, Jr., Caroline Kennedy, et al. selling drugs: sexual misconduct, homosexuality, etc."¹⁷⁷

In *Flores v. U.S. Supreme Court*, the court stated:

Plaintiff, a homeless individual who submitted more than 30 mostly cryptic complaints within the first two weeks of March alone, sue[d] the United States Supreme Court and the United States Congress. He state[d] that his "complaint is against the countries that practice unfair trade practices . . . ," and he sues the United States apparently for failing "to react."¹⁷⁸

In *Ciriello v. U.S. Supreme Court*, the court noted that the complaint was frivolous because

the United States Supreme Court and the President of the United States, George Bush, [bore] no apparent connection to alleged offenses committed against plaintiff by St. Mary's Hospital or the Waterbury Police Department, and there [was] no indication that the Federal Bureau of Investigation [had] violated plaintiff's rights, the only apparent connection to the federal government that may be discerned from the complaint.¹⁷⁹

Lastly, case captions themselves can also be evidence of frivolousness.¹⁸⁰

¹⁷⁷ Robertson v. U.S. Supreme Court, No. 2:13-cv-1628, 2013 WL 5520068, at *3 (E.D. Cal. Oct. 3, 2013).

¹⁷⁸ No. CIV.A. 13-692, 2013 WL 2107172, at *1 (D.D.C. May 13, 2013).

¹⁷⁹ No. Civ. 3:02CV2131, 2002 WL 32254512, at *1 (D. Conn. Dec. 11, 2002); *see also* Ciriello v. U.S. Supreme Court, No. Civ. 3:03CV485, 2003 WL 22472162 (D. Conn. Apr. 23, 2003).

Plaintiff's complaint is found to be frivolous because defendant, the United States Supreme Court, bears no apparent connection to a claim of insurance fraud allegedly perpetrated by Prudential Insurance Company. Contrary to plaintiff's understanding, the Supreme Court does not oversee the conduct of state criminal proceedings, nor does it engage in factfinding on individual complaints. Its involvement in the judicial process in no way subjects it to liability for any wrong alleged by plaintiff.

2003 WL 22472162, at *1.

¹⁸⁰ *See, e.g.,* Warren v. Obama, 574 F. App'x 858, 858 (10th Cir. 2014). The caption of the complaint stated: Nikos WARRENCE, Plaintiff–Appellant, v. Barack Hussein OBAMA II, United States President; United States Justice Department, as an entity and all individual members directed police and green-lighting Nazi book-burning, felony intimidation with the threat of violence and death, infinite fascist actions on the part of any government official (Eric Holder listed separately in attached); U.S. Supreme Court as an entity (members follows, all sent via USPS notification); John G. Roberts; Sonia Sotomayor; Stephen Breyer; Samuel A. Alito; Elena Kagan; Clarence Thomas; Antonin Scalia;

D. Grounds for Dismissal

Cases brought against the Supreme Court are dismissed on several grounds. Most commonly, they are dismissed based on principles of judicial immunity. For example, in *Lyons v. U.S. Supreme Court Justices*, the court held:

In sum, plaintiffs appear to allege that defendants violated various constitutional and statutory rights in their handling of various lawsuits Mr. Lyons has filed relating to his discharge from civilian employment with the Army; among other things, they appear to allege that some of the defendants wrongfully and maliciously stated in their judicial opinions that Mr. Lyons was discharged because his performance was unsatisfactory As plaintiffs appear to acknowledge several times in their complaint, defendant judges are entitled to absolute immunity from liability for acts in the performance of their judicial duties. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (immunity applies even if judge's "exercise of authority is flawed by the commission of grave procedural errors"); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (immunity applies "even when the judge is accused of acting maliciously and corruptly"). Accordingly, this case must be dismissed as to defendant-judges and justices.¹⁸¹

Failure to state a cause of action is another common ground for dismissal. In *Astrop v. U.S. Supreme Court*, where the PSL complained of the Supreme Court's certiorari denial, the district court held that "none of Plaintiff's allegations implicate the First or Fourteenth Amendments, and the complaint fails to allege any facts that amount to a plausible claim against the Supreme Court of the United States. The complaint thus fails to state a claim and must be dismissed."¹⁸² Other courts have dismissed suits against the Court on case-or-controversy and standing grounds. For example, in *Skelton v. U.S. Supreme Court*, the PSL complained about the Court's earlier ruling prohibiting mandatory prayer in public schools by alleging that:

By the previous Supreme Court's ruling against prayer and the posting of the ten commandments in public schools they have in fact made God an outlaw. As one nation under God the United States Supreme Court has acted as an enemy of domestic terrorism and therefore bringing the wrath of God on our schools, children and

Anthony Kennedy; Ruth Bader Ginsburg; Chief Tenth Circuit Court Of Appeals Judge Mary Briscoe; and 81 Additional Nazi Bookburning Felons, Defendants–Appellees

Id. The district court had ruled that "[t]he Complaint is largely unintelligible; it is a verbose, disorganized, and confusing diatribe. In short, the Complaint makes no sense." *Id.* at 859. The Tenth Circuit held that "Mr. Warrence's appeal fails to make any improvement on the rambling incoherent statements he made below. He certainly fails to convince us of any error in the district court's disposition of this case." *Id.*

¹⁸¹ CIV.A. No. 88-1193 (RCL), 1988 WL 138776, at *1 (D.D.C. Dec. 16, 1988).

¹⁸² No. 3:11CV203-HEH, 2011 WL 9517440, at *2 (E.D. Va. Apr. 18, 2011), *aff'd*, 447 F. App'x 492 (4th Cir. 2011) (per curiam).

society. If prayer and the posting of the ten commandments had been allowed the possibilities of the mass shooting and violence would have never happened. All right came from God including the right to life, liberty and the pursuit of happiness. We the people have the right to worship God in our own way without inference [sic] from the government. The United States Supreme Court has not acted in the defense of freedom of religion and its previous rulings on all Christian matters should be struck down. This is the only humanitarian [sic] thing to do if we are to have a government of the people, for the people, and by the people.¹⁸³

The court dismissed Skelton's case by holding that he lacked standing to sue the Supreme Court because "[p]laintiff makes no showing of a 'personal stake' or injury 'particularized as to him' caused by the Defendants in this lawsuit."¹⁸⁴ Nor did he have standing to sue on behalf of other individuals.¹⁸⁵

Panko v. Rodak is an oft-cited case dismissing the PSL's suit for mandamus and damages against the Clerk of the Supreme Court and his assistant.¹⁸⁶ The PSL claimed the clerk had wrongfully refused to file his certiorari petition because it failed to comply with the Court's printing and jurisdictional statement rules.¹⁸⁷ The Seventh Circuit held that Panko did not establish a "clear right" to mandamus relief, that the defendants were immune from money damages, and that, in enforcing the Court's Rules and executing the Court's directives regarding the docketing of cases "the defendants were carrying out judicial or quasi-judicial functions within their authority."¹⁸⁸

In *Jones v. U.S. Supreme Court*, the PSL filed two complaints in which he named hundreds of defendants alleging that the Sharp Copier Company, among others, perpetrated fraud on American consumers.¹⁸⁹ According to the Seventh Circuit, the complaints comprised "incomprehensible legal and factual assertions against hundreds of defendants. His appellate briefs are filled with nonsensical string cites to various authority and the arguments are fragmented contentions and allegations. In addition, Jones does not state a reason for reversal of the district court in either case."¹⁹⁰ The court affirmed the district court's dismissals, because, *inter alia*, "[e]ven if his appellate briefs were comprehensible, we would still affirm the district court because the court lacked jurisdiction over the claims. . . . [Moreover,] he does not frame his arguments in a discernable fashion and, as such, we will not construct his arguments for him."¹⁹¹

¹⁸³ Skelton v. U.S. Supreme Court, C/A No. 3:13-465, 2013 WL 1768698, at *1 (D.S.C. Mar. 14, 2013).

¹⁸⁴ *Id.* at *2 (citations omitted).

¹⁸⁵ *Id.*

¹⁸⁶ 606 F.2d 168, 168 (7th Cir. 1979).

¹⁸⁷ *Id.* at 169.

¹⁸⁸ *Id.* at 170–71.

¹⁸⁹ Jones v. U.S. Supreme Court, Nos. 96–3262, –3289, 1997 WL 267878, at *1 (7th Cir. May 7, 1997).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (citations omitted).

In another oft-cited case upon which dismissals by suits against the Clerk of the Supreme Court are based,¹⁹² a PSL claimed that “the Clerk erroneously rejected certain of his filings, including a petition for writ of certiorari and an application to proceed *in forma pauperis*, and [sought] mandamus and declaratory relief directing the Clerk to accept his filings and to keep them confidential and affirming that the Rules of the Supreme Court may be challenged in the district court.”¹⁹³ The court held:

We are aware of no authority for the proposition that a lower court may compel the Clerk of the Supreme Court to take any action. The Supreme Court, on the other hand, has inherent supervisory authority over its Clerk. Thus, “it is the right and duty of the [Supreme] Court . . . to correct the irregularities of its officer and compel him to perform his duty.” We believe that this supervisory responsibility is exclusive to the Supreme Court and that neither a district court nor a circuit court of appeals has jurisdiction to interfere with it by mandamus or otherwise. Accordingly, we affirm the district court's order dismissing Marin's complaint for lack of subject matter jurisdiction and deny his mandamus petition.¹⁹⁴

What can be said of these cases against the Supreme Court, individual Justices, or its Clerk of Court? Clearly, the PSLs who filed these cases were frustrated and angry over the manner in which they were treated by lower courts in their litigation against third parties or by the Supreme Court itself in denying their certiorari petitions. The anger may or may not be coupled with mental or emotional instability. The question becomes, how can these litigants be “cooled down” in the sense of being made to feel that their voice has been heard, consistent with procedural justice and fairness? Does the Supreme Court have a duty to both (a) provide guidance to lower courts regarding the extent to which they should assist PSLs to ensure their right to self-representation can be meaningfully exercised and (b) to establish its own programs of pro se assistance—in order to reduce the frequency of the cases brought against it and other courts? I say yes to both.¹⁹⁵

V. VEXATIOUS LITIGANTS

Another category of PSLs posing a challenge to the Supreme Court beyond those who sue it are vexatious litigants. The word “vexatious” is defined as “without reasonable or probable cause or excuse; harassing; annoying.”¹⁹⁶ A “vexatious suit” is “[a] lawsuit instituted maliciously and without good cause.”¹⁹⁷ Those PSLs who sue the Court are problematic, but they are not necessarily vexatious. The Court’s

¹⁹² *In re Marin*, 956 F.2d 339 (D.C. Cir. 1992) (per curiam).

¹⁹³ *Id.* at 340.

¹⁹⁴ *Id.* (alterations in original) (citations omitted).

¹⁹⁵ See *infra* Part VI.

¹⁹⁶ *Vexatious*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁹⁷ *Id.*

concern with vexatious litigants arises in the context of their invocation of the statutory right to request a waiver of filing fees and costs.¹⁹⁸

The federal statute governing IFP proceedings states: “any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor.”¹⁹⁹ In order to be granted the fee waiver, a prisoner (to which the statute by its own terms is restricted) must submit an affidavit showing an inability to pay the filing fee and costs of litigation. The affidavit under this section “shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.”²⁰⁰ The statute prohibits fee waivers for appeals “if the trial court certifies in writing that it is not taken in good faith.”²⁰¹ While counsel for the prisoner cannot be appointed, as such, the court “may request an attorney to represent any person unable to afford counsel.”²⁰²

Most relevant here is the following provision, stating that the court may dismiss an action brought by an IFP filer, when it determines: “(A) the allegation of poverty is untrue; or (B) the action or appeal—(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.”²⁰³ Of further relevance is the so-called “three strikes” provision:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or

¹⁹⁸ Research does not disclose any cases in the Supreme Court of non-indigent, represented vexatious litigants.

¹⁹⁹ 28 U.S.C. § 1915(a)(1) (1996). The statute, however, contains additional provisions indicating that the fee waiver is not really a fee waiver. In other words:

Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner *shall be required to pay the full amount of a filing fee*. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds \$10 until the filing fees are paid.

§ 1915(b)(1)–(2) (emphasis added). In a further contradiction, the statute provides that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.” *Id.* (b)(4).

²⁰⁰ *Id.* (a)(1).

²⁰¹ *Id.* (a)(3).

²⁰² *Id.* (e)(1).

²⁰³ *Id.* (e)(2)(A)–(B).

fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.²⁰⁴

The Supreme Court's Rule 39 implements the IFP statute by requiring prospective indigent prisoners to submit a motion, in accordance with the requirements for all motions, asking for a waiver of fees.²⁰⁵ In 1991, Rule 39 was amended to state that, "[i]f satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis*."²⁰⁶ Justices Marshall, Stevens, and Blackmun dissented from the adoption of this amendment, arguing that the amendment flies against the principle of equal justice for all because it applies only to IFP filers, but not paid filers.²⁰⁷

The mere fact that an IFP motion is denied does not necessarily reflect upon the merits of the accompanying certiorari petition. In other words, an IFP motion

²⁰⁴ *Id.* (g). Another means of addressing the problem of prisoners' frivolous actions is the *Prison Litigation Reform Act* (PLRA), passed in 1995, which granted courts additional authority to dismiss prisoner complaints regarding their conditions of confinement. 42 U.S.C. § 1997e(c) (2013). The principal requirement imposed on prisoners in such cases is that they exhaust their administrative remedies. "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." §1997e(a). In addition, the PLRA states:

The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

Id. (c)(1). As the PLRA's purpose is to dismiss filed complaints, as distinguished from certiorari petitions, it does not apply to Supreme Court filings.

²⁰⁵ SUP. CT. R. 39.2. This rule requires an IFP motion to comply with Rule 21. Interestingly, this paragraph goes on to state that "[a]s provided in that Rule, it suffices to file an original and 10 copies, *unless the party is an inmate* confined in an institution and is not represented by counsel, in which case the original, alone, suffices." *Id.* (emphasis added). The implication is that, at the Supreme Court, an IFP filer need not be a prisoner, in contrast with the IFP statute which is limited to prisoners.

²⁰⁶ SUP. CT. R. 39.8.

²⁰⁷ Justice Marshall stated that:

Strikingly absent from this Court's rules is any similar provision permitting dismissal of "frivolous or malicious" filings by paying litigants, even though paying litigants are a substantial source of these filings. This Court once had a great tradition: "All men and women are entitled to their day in Court." That guarantee has now been conditioned on monetary worth. It now will read: "All men and women are entitled to their day in Court only if they have the means and the money." I dissent.

In re Amendment to Rule 39, 500 U.S. 13, 14–15 (1991) (Marshall, J., dissenting).

Justice Stevens wrote:

In my opinion it is neither necessary nor advisable to promulgate the foregoing amendment to Rule 39. During my years of service on the Court, I have not detected any significant burden on the Court, or threat to the integrity of its processes, caused by the filing of frivolous petitions. It is usually much easier to decide that a petition should be denied than to decide whether or not it is frivolous. Moreover, the cost of administering the amended Rule will probably exceed any tangible administrative saving. Transcending the clerical interest that supports the Rule is the symbolic interest in preserving equal access to the Court for both the rich and the poor. I believe the Court makes a serious mistake when it discounts the importance of that interest. I respectfully dissent.

Id. at 15. (Stevens, J., dissenting).

could be denied for one or more of the following reasons: (a) the allegations of poverty are untrue; (b) there is a technical deficiency causing a Rule 21 violation (specifying requirements of motions); (c) the appeal does not fall within the Court's jurisdiction as described in Article III of the Constitution or the Court's Rule 10, stating the categories of cases it will accept for review;²⁰⁸ (d) the claim (as set forth in the motion or accompanying petition) is frivolous; or (e) the claim is made by a vexatious petitioner who had previously filed numerous frivolous petitions. There are no data available reflecting the proportion of denied IFP motions that fall into these categories.

There are, however, a handful of published opinions describing the Supreme Court's vexatious petitioners. The first case in which the Court invoked Rule 39.8 was *Zatko v. California*,²⁰⁹ which was a consolidation of two petitioners' petitions (Zatko and Martin). The Court noted:

Over the last 10 years, Zatko has filed 73 petitions in this Court; 34 of those filings have come within the last 2 years. Martin has been only slightly less prolific over the same 10-year period and has filed over 45 petitions, 15 of them within the last 2 years.²¹⁰

The Court denied their IFP motions for their pending petitions but permitted them to pay the filing fee and have their petitions considered; the Court cautioned them, however, that “[f]uture similar filings from these petitioners will merit additional measures.”²¹¹

In dissent, Justices Stevens and Blackmun reiterated the objections they made to adoption of Rule 39.8, namely, that it makes no sense that, in an effort to avoid scarce judicial resources, the Court decided to rule on IFP motions first, rather than just denying frivolous certiorari petitions before ruling on the motions.²¹² That practice, the dissenters argued, only invites amended IFP motions and more work for the Court.

[T]he symbolic effect of the Court's effort to draw distinctions among the multitude of frivolous petitions—none of which will be granted in any event—is powerful. Although the Court may have intended to send a message about the need for the orderly administration of justice and respect for the judicial process, the message that it actually conveys is that the Court does not have an overriding concern about equal access to justice for both the rich and the poor.

²⁰⁸ See *infra* Part VI. C.

²⁰⁹ 502 U.S. 16 (1991) (per curiam).

²¹⁰ *Id.* at 17. Subsequently, the Court described Martin as a “notorious abuser of this Court's certiorari process,” noting he had, since the *Zatko* ruling, filed nine additional certiorari petitions. *Martin v. D.C. Court of Appeals*, 506 U.S. 1, 1 (1992) (per curiam).

²¹¹ *Zatko*, 502 U.S. at 18.

²¹² See *Id.* at 19. (Stevens, J., dissenting)

By its action today, the Court places yet another barrier in the way of indigent petitioners.²¹³

A review of the cases in which the Court denied IFP motions shows that every one of the filers were PSLs.²¹⁴ They appear to be frustrated and angry over prior adverse outcomes in cases brought in other courts, upset at the Supreme Court's unwillingness to hear their claims, or have mental challenges. But their number is small compared to the thousands of petitioners who seek judicial relief from the Court annually.²¹⁵ Future research, such as interviews of these vexatious PSLs, is needed to establish their motivation and to find out what methods or programs could have been established to avoid their multiple filings.

VI. PROPOSALS FOR ENHANCING ACCESS TO JUSTICE AT THE SUPREME COURT

A. Federal Courts' Management of Pro Se Cases

An historical review of federal courts' efforts to address the perceived rise in prisoner pro se litigation reveals methods potentially adaptable to the Supreme Court. In 1980, the Federal Judicial Center (FJC) published its *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Recommended Procedures)*,²¹⁶ a product of the FJC's Prisoner Civil Rights Committee's "[c]oncern over prisoner 'conditions-of-confinement' cases."²¹⁷ The

²¹³ *Id.* at 19–20. In a footnote, the dissenters noted: "And with each barrier that it places in the way of indigent litigants, the Court can only reinforce in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here." *Id.* at 20 (alteration in original) (citing *In re Demos*, 500 U.S. 16, 19 (1991) (Marshall, J., dissenting)) (where petitioner had filed forty-eight previous certiorari petitions).

²¹⁴ See *Whitfield v. Texas*, 527 U.S. 885, 886 (1999) (eight previous petitions); *Vey v. Clinton*, 520 U.S. 937, 937 (1997) (twenty-six previous petitions); *In re Gaydos*, 519 U.S. 59, 60 (1996) ("Petitioner has a history of frivolous, repetitive filings. She has been denied leave to proceed *in forma pauperis* 10 times, and she has filed at least 8 other petitions. This most recent petition is nearly incomprehensible, and alludes to, among other things, fraud by the staff of this Court and impending impeachment proceedings against Clerks Walsh and Suter in the House of Representatives."); *Attwood v. Singletary*, 516 U.S. 297 (1996) (nine previous petitions); *id.* at 297–98 (Stevens, J., dissenting) ("Perhaps one day reflection will persuade my colleagues to return to 'the great tradition of open access that characterized the Court's history prior to its unprecedented decisions.'" (first citing *In re McDonald*, 489 U.S. 180 (1989); then citing *In re Sindram*, 498 U.S. 177 (1991))); *In re Anderson*, 511 U.S. 364, 365 (1994) (twenty-two petitions and motions, including three petitions for certiorari, six motions for reconsideration, and thirteen petitions for extraordinary writs); *In re Sassower*, 510 U.S. 4, 5 (1993) (twenty-one previous petitions); *Demos v. Storrie*, 507 U.S. 290, 290 (1993) (forty-eight previous IFP motions); *In re Sindram*, 498 U.S. at 177–78, 180 (forty-three petitions and motions, including twenty-one petitions for certiorari, sixteen petitions for rehearing, and two petitions for extraordinary writs) ("Pro se petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions." (citing *In re McDonald*, 489 U.S. at 184 (1989) (noting that this PSL filed "73 separate filings with the Court, not including this petition, which is his eighth so far this Term. These include 4 appeals, 33 petitions for certiorari, 99 petitions for extraordinary writs, 7 applications for stays and other injunctive relief, and 10 petitions for rehearing.")); *Wrenn v. Benson*, 490 U.S. 89, 89 (1989) (twenty-two previous petitions).

²¹⁵ See *supra* note 49 and accompanying text.

²¹⁶ See generally FED. JUDICIAL CTR., RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS (1980), <https://www.fjc.gov/sites/default/files/materials/41/PrisCivR.pdf>.

²¹⁷ See *id.* at vii.

preface cites an earlier 1976 tentative report that recommended “experimentation with certain innovative procedures such as the staff law clerk . . . and a standard complaint form, with simple instructions” to be used in such prisoner cases.²¹⁸ The FJC had provided staff law clerks on a pilot basis to several district courts with a large volume of such cases, leading to “early favorable reports.”²¹⁹

The preface also referred to a second tentative report from 1977 based on the FJC’s continued study of the use of staff law clerks, magistrates, a model complaint form, systems for making counsel available, and other “methods of alleviating the burden in the district courts in which approximately one out of every seven civil cases filed is from a prisoner seeking various forms of relief.”²²⁰ The report notes “[t]he need is to develop a definition of the proper role of the federal court in state prisoner cases and to develop procedures that will ensure that the federal court can effectively identify the meritorious case that is brought by a state prisoner.”²²¹

Recommended Procedures went on to note that pro se prisoner cases are “troublesome” because, without counsel, “most contain a wide variety of allegations that are hard to separate and evaluate; and commonly the allegations are contained in a long, often illegible, handwritten letter from the inmate. As a consequence, the court found it difficult to understand the nature of the prisoner’s complaint.”²²² The report concludes with a number of recommendations: (1) court-approved forms for use by prisoners filing pro se;²²³ (2) a centralized processing unit in the clerks’ offices for handling these complaints;²²⁴ (3) magistrates to assist the judge with these cases;²²⁵ (4) assignment of a single judge to handle all cases by the same prisoner;²²⁶ and (5) a series of forms for *in forma pauperis* applications.²²⁷

On the issue of processing prisoner pro se complaints, the report concluded that magistrates, not staff law clerks, should be “the prime actor.”²²⁸ It noted the experimental use of staff law clerks in three district courts was “uniquely positive,” but stated magistrates can handle processing of these complaints “without the need to develop a new layer of personnel.”²²⁹ The report found no need to dismantle the

²¹⁸ *Id.* at vii–viii.

²¹⁹ *Id.* at viii.

²²⁰ *Id.*

²²¹ *Id.* at 2.

²²² *Id.* at 11–12.

²²³ *Id.* at 45.

²²⁴ *Id.* at 49.

²²⁵ *See id.* at 51–53.

²²⁶ *Id.* at 53.

²²⁷ *Id.* at 54. Additional recommendations pertain to pro se complaint dismissals, service of complaints and summons, procedure to prevent *ex parte* communications to the court, securing counsel for the pro se, motion practice, dismissals for failure to prosecute, post-answer proceedings, requiring defense counsel to submit a “special report” describing to the court the results of an investigation of PSLs’ claims, pretrial conferences, and evidentiary hearings conducted by a magistrate. *See generally id.* at 54–86.

²²⁸ *Id.* at 52.

²²⁹ *Id.*

existing staff law clerk positions, but stated that a magistrate “is the more appropriate person to handle and process these cases.”²³⁰

In 1995, the Judicial Conference published its *Long Range Plan for the Federal Courts (Long Range Plan)*.²³¹ The document contains a section on pro se litigation that includes the following recommendation: “[s]teps must be taken to confront the growing demands pro se litigation places on the federal courts.”²³² The following “implementation strategies” were proposed: (1) conduct “a broad-based study, with participation from within and outside the courts, . . . to evaluate . . . and recommend changes”; (2) explore “[a]lternative avenues for pro se prisoner litigation”; (3) “develop workable standards for addressing the substantive and procedural problems presented by pro se prisoner litigation”; and, (4) “make more effective use of pro se law clerks.”²³³ On the last recommendation, the *Long Range Plan* explained that the use of a pro se law clerk “may be one answer to developing sufficient expertise within the court to screen and recognize claims that deserve further attention by the court. . . . The most effective use of pro se law clerks should be studied and information about their effective use should be distributed widely.”²³⁴ Thus, the plan contemplated pro se law clerks might be utilized in various capacities.

In 1996, the FJC published another report entitled *Resource Guide for Managing Prisoner Civil Rights Litigation (Resource Guide)*.²³⁵ This 183-page report changed references from “staff law clerks” in the earlier 1980 report to “pro se clerks.”²³⁶ It focuses on the then-recently enacted Prison Litigation Reform Act (PLRA) and its implications for processing pro se prisoner cases.²³⁷ It also includes a discussion of methods for effective management of prisoner litigation. The *Resource Guide* presents seven such methods, some of which appeared in the earlier 1980 *Recommended Procedures* report:

- procedures for facilitating efficient filing of prisoner cases;
- court-based approaches for providing counsel to indigent prisoners;
- court-annexed mediation programs;
- litigation tracks for prisoner cases;
- case-assignment systems;

²³⁰ *Id.* at 53.

²³¹ See generally LONG RANGE PLAN, *supra* note 52.

²³² *Id.* at 63.

²³³ *Id.* at 63–66. Noteworthy are the recommendations not directly addressed to court efficiency in separating meritorious versus frivolous. These were to study “ways . . . to provide better information to pro se litigants, and the means to provide counsel to those who would otherwise proceed pro se.” *Id.* at 64.

²³⁴ *Id.* at 66.

²³⁵ See generally FED. JUDICIAL CTR., RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION, WITH SPECIAL EMPHASIS ON THE PRISON LITIGATION REFORM ACT (1996) [hereinafter RESOURCE GUIDE], <https://www.fjc.gov/sites/default/files/2012/prisoner.pdf>.

²³⁶ See *id.* at ix.

²³⁷ The PLRA affected the following six subject areas in prisoner litigation: “criteria for case screening and dismissal; requirements for achieving IFP status; provisions affecting the management of cases; limitations on relief; sanctions; and attorneys’ fees.” *Id.* at 1.

- efficient use of court personnel; and
- methods of reducing travel of prisoners to proceedings outside the penal institution.²³⁸

Let us pause here and ask, are any of the aforementioned suggestions for managing pro se prisoners adaptable to the Supreme Court? As to the first recommendation above for efficient filing procedures, the Supreme Court currently has a form for a pro se petition for certiorari and accompanying instructions posted on its website.²³⁹ Interestingly, the Court's own published guide for indigent pro se litigants makes no mention of appointment of counsel.²⁴⁰ The Court, however, appoints counsel for indigent PSLs where their certiorari petitions are granted.²⁴¹

As to mediation, the Court is not likely to adopt such a program, given that it is much easier to deny certiorari than to conduct mediations, and because many district courts already have such programs.²⁴² Nor is the Court likely to establish a prisoner track for the same reason it would not adopt a mediation program, that is, because that is considered a district court mechanism. An assignment system, used by district courts to assign particular judges to prisoner cases, would also be irrelevant. Reducing travel of prisoners to courts is also irrelevant to the Court in these days of Skype and Zoom. Thus, of these methods the most relevant to possible adoption by the Supreme Court is the recommendation for efficient use of court personnel.

Use of magistrate judges is discussed in the *Resource Guide* under the “efficient use of court personnel” section, but, given that their use is limited by statute to district courts,²⁴³ the Supreme Court does not have the option of employing its own magistrates. The most relevant discussion, therefore, focuses on pro se law clerks. Noting that in some districts personnel who handle pro se filings are alternatively referred to as “staff attorneys,” the report encourages courts to “examine whether they are entitled to any additional pro se law clerk positions

²³⁸ *Id.* at 7.

²³⁹ Office of the Clerk, Supreme Court of the United States, *Guide for Prospective Indigent Petitioners for Writs of Certiorari* (2019) [hereinafter *Guide*], <https://www.supremecourt.gov/casehand/guideforIFPcases2019.pdf>.

²⁴⁰ *See generally id.*

²⁴¹ *See, e.g.*, 2019 J. SUP. CT. U.S. 11 (“No. 18–7739. Gonzalo Holguin-Hernandez, Petitioner v. United States. Motion of petitioner for appointment of counsel granted, and Philip J. Lynch, Esq., of San Antonio, Texas, is appointed to serve as counsel for petitioner in this case.”), <https://www.supremecourt.gov/orders/journal/Jnl19.pdf>. These appointments of counsel, as such, are not “requests” for representation of a petitioner authorized by 28 U.S.C. § 1915(e)(1). Note, however, the Court has ruled that counsel may not be compelled to take the case for which representation was “requested.” *Mallard v. U.S. District Court for the S. Dist. of Iowa*, 490 U.S. 296, 301–08 (1989).

²⁴² FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 1, 29 (2011) [hereinafter 2011 SURVEYS], <https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf> (noting that 21 of 61 responding district courts have mediation programs for prisoners or nonprisoners (or both) and 55.7% of responding chief judges have referred nonprisoner pro se cases to mediation for settlement discussions).

²⁴³ *See* 28 U.S.C. § 631(a) (“The judges of each United States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges in such numbers and to serve at such locations within the judicial districts as the Judicial Conference may determine under this chapter.”).

based on their caseloads, needs, and the relevant policies established by the Judicial Conference of the United States.”²⁴⁴

In 2011, the FJC published a third report addressing the challenge PSLs present to federal courts entitled *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges (2011 Surveys)*.²⁴⁵ The report presents data from surveys administered to ninety court clerks’ offices and sixty-one chief district court judges.²⁴⁶ It provides a comprehensive view of the state of pro se assistance in federal courts, presented in thirty-one data tables on every possible aspect of pro se assistance. The most salient findings can be summarized as follows:

- In over one-half of clerks’ office, some form of pro assistance is provided.
- The most common form of pro se assistance in over one-third of the offices is staff training programs, the most common “clarify[ing] what is permissible and impermissible assistance to pro se litigants or explain[ing] how to deal with angry or upset pro se litigants.”
- Twenty percent of the offices have changed staff duties or their organization to provide pro se assistance by “designating specific staff to handle all pro se cases, rotating the responsibility for pro se cases, or referring pro se litigants to outside help.”
- In the clerks’ view, the “most effective” reforms for their offices are “designat[ing] staff for specific duties . . . [,] providing specially tailored information to pro se litigants . . . [and] making information and guidance tailored to the litigant, such as standardized forms, instructions, and handbooks, readily available.”
- One-third of the clerks noted “constraints or difficulties in handling pro se litigation.” The most common of these had to do with “the policies and practices” or corrections departments at the state and federal level, most notably the “lack of cooperation in providing materials electronically and prisoners’ lack of access to

²⁴⁴ RESOURCE GUIDE, *supra* note 235, at 12. The Judicial Conference is convened annually by the Chief Justice of the Supreme Court and comprises “the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit.” 28 U.S.C. § 331 (2012). Its functions are, *inter alia*, to “make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business.” *Id.* It appears the Judicial Conference has authority to propose suggestions and recommendations to “various courts,” which would include the Supreme Court.

²⁴⁵ 2011 SURVEYS, *supra* note 242. Rather than viewing pro se assistance as a challenge for court clerks, this report refers to results of a survey of court clerks about services to reduce “the burden of pro se cases.” *Id.* at v, viii.

²⁴⁶ *Id.* at 5, 39 n.2.

computers or forms,” including the lack of access to CM/ECF and PACER.

- Some unresolved problems relate to the PSLs themselves, such as “submissions that are hard to read, are incomplete, or whose issues cannot be discerned; an increase in pro se filings, repeat filers, and frivolous filings; [and] difficult or unstable litigants.” Coupled with the sheer volume of filings, these issues place a heavy demand on clerks.²⁴⁷

The first four of these findings evidence the role specialization established in many clerks’ offices to manage PSLs, as well as development of simplified forms and guidebooks for them. The Supreme Court presumably has similarly designated staff in the office of the Clerk of Court, and provides its *Guide* to assist PSLs.²⁴⁸ The enumerated constraints and difficulties noted by the surveyed court clerks involving repeat filers, frivolous pleadings, lack of prisoners’ access to computers, and managing unstable PSLs are common to the Supreme Court, as well.

In the *2011 Surveys*, a majority of the responding Chief Judges coalesced around certain major issues with PSLs. On the papers, the judges were concerned with the intelligibility of PSL pleadings and responses to summary judgment motions. In general, the judges noted that PSLs lack crucial knowledge about precedents or information that would help their cases; fail to object when faced with testimony or evidence; and struggle to understand certain “legal consequences of their actions or inactions,” such as requests for admissions, statutes of limitations, and other timeliness problems.²⁴⁹

The report also notes the judges’ views on the different challenges they face in prisoner versus non-prisoner PSL cases:

Prisoner and non-prisoner pro se cases do not necessarily present the same issues for chambers. Prisoner cases present special problems in discerning the substance of the case, whereas non-prisoner cases present special issues involving the litigants themselves, who are more likely than prisoner pro se litigants to demand things a court cannot provide or to be irrational, unreasonable, or mentally unstable. Judges identified procedural problems as being present in both prisoner and non-prisoner pro se cases, but they noted that frivolous cases or logistical problems pose more of a problem for prisoner cases.²⁵⁰

Two-thirds or more of the judges stated they utilize the following assistance methods: (1) “broad standards in construing pleadings and other submissions”; (2) “acceptance of letters as motions or pleadings”; (3) “appointment of counsel only

²⁴⁷ *Id.* at vi.

²⁴⁸ See 2011 SURVEYS, *supra* note 239.

²⁴⁹ *Id.* at 21–24.

²⁵⁰ *Id.* at vii.

when the merits of the case warrant it”; (4) “referral of pretrial matters to magistrate judges”; (5) a “more active personal role than in fully represented cases”; and (6) “use of broad standards in requiring compliance with deadlines.”²⁵¹ The Supreme Court also interprets PSL pleadings liberally, probably construes letters as motions or pleadings, and appoints counsel where warranted.²⁵² But it has no statutory authority to appoint federal magistrate judges. It cannot get more personally involved by definition. And it is unlikely to excuse rule non-compliance absent good cause.

In 2015, the Judicial Conference of the U.S. published its *Strategic Plan for the Federal Judiciary*.²⁵³ The summary of the nineteen-page plan states that it “takes into consideration various trends and issues affecting the judiciary, many of which challenge or complicate the judiciary’s ability to perform its mission effectively.”²⁵⁴ Given how much space the previous Judicial Conference reports devoted to the issue of PSLs, one could safely assume the scope of the report would include pro se litigation. But PSLs are only mentioned twice in the report. The first mention appears in a discussion of a strategy to protect judges, court staff, and the public in courts: “Threats extend beyond the handling of criminal cases, as violent acts have often involved pro se litigants and other parties to civil cases.”²⁵⁵

The second mention is under the heading *Enhancing Access to the Judicial Process*, where the report includes a strategy to “[e]nsure that the federal judiciary is open and accessible to those who participate in the judicial process.”²⁵⁶ The background paragraph describes existing approaches to access, including court forms that have been “rewritten in an effort to make them clearer and simpler to use,” and the adoption in some districts of “electronic tools to assist pro se filers in generating civil complaints.”²⁵⁷ One of the stated goals under this strategy is to “[d]evelop best practices for handling claims of pro se litigants in civil and bankruptcy cases.”²⁵⁸ Nothing further is written about the challenge of pro se litigation, pro se law clerks, or the Supreme Court.

Much greater detail regarding courts’ efforts to address the pro se challenge is presented in the FJC’s 2016 publication entitled *Pro Se Case Management for Nonprisoner Civil Litigation (Pro Se Case Management)*.²⁵⁹ This comprehensive manual covers the waterfront of pro se case management in the lower federal courts. In it, the Supreme Court is not mentioned in the context of the pro se

²⁵¹ *Id.* at 30.

²⁵² *See supra* notes 63, 82 discussion and accompanying text.

²⁵³ JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (2015), https://www.uscourts.gov/sites/default/files/federaljudiciary_2015strategicplan.pdf.

²⁵⁴ *Id.* at 3.

²⁵⁵ *Id.* at 6.

²⁵⁶ *Id.* at 14.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ JEFRI WOOD, FED. JUDICIAL CTR., PRO SE CASE MANAGEMENT FOR NONPRISONER CIVIL LITIGATION (2016), https://www.fjc.gov/sites/default/files/2017/Pro_Se_Case_Management_for_Nonprisoner_Civil_Litigation.pdf.

challenge and how to address it. Instead, the author discusses the Court only in so far as its rulings on interpretation of PSL pleadings.²⁶⁰

Before describing the extant pro se case management techniques, the manual reviews the principles of “procedural fairness”:

The goal of procedural fairness is for all litigants, whether represented or not, to feel that they:

1. have a voice in the process, are given the opportunity to be heard, are listened to, and have genuine input into the decision-making process;
2. understand what is happening and what they are supposed to do through each stage of the litigation;
3. are treated with respect and on an equal footing with attorneys and represented parties; and,
4. are treated fairly by the judge (and the judicial system in general) in a neutral, unbiased fashion.²⁶¹

Taking these useful concepts in order, point 1—on giving voice to the PSL—is, like the remainder of the manual, addressed to federal trial judges. Giving PSLs an opportunity to speak, and patiently listening to them, is not something a Supreme Court Justice can do. Providing clear explanations of the process and the PSL’s obligations (point 2) is discussed under two subheadings: (a) avoiding legalese, and (b) explaining the process.²⁶² Judges should avoid legalese orally and in written materials, including decisions and orders.²⁶³

²⁶⁰ See *id.* at 103–05. The report reviewed the evolution of the Court’s opinions regarding pleadings rules, from *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (holding that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”), to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (announcing a stricter “plausibility” standard that requires “enough facts to state a claim to relief that is plausible on its face”), followed by *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (holding that the rule in *Twombly* is not limited to antitrust cases, but applies to all civil cases). The report notes that none of these were PSL cases, but that in subsequent cases, the Court held that PSLs’ complaints were still entitled to liberal construction. WOOD, *supra* note 259, at 103–04 (first citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); then citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (acknowledging, in nonprisoner case, that “pro se litigants are held to a lesser pleading standard than other parties”).

²⁶¹ *Id.* at 3–4. On the last point, a footnote cautions:

These concerns apply mainly to what some have termed “good faith” pro se litigants—those who have a genuine complaint, whether ultimately successful or not, and who look to the courts to provide a fair venue for airing it. Those who engage in vexatious or harassing litigation, or seek to make a political statement, are likely less interested in the fairness of the process than in winning, making a point, or carrying on a grudge.

Id. at 3 n.19.

²⁶² *Id.* at 9–14.

²⁶³ *Id.* at 10. Prof. Rabeea Assy, however, argues:

[T]he Plain English movement has idealized and exaggerated the potential benefits of plain language, propagating a mistaken belief that the law can speak *directly* to its subjects merely by simplifying its language. . . . Litigation is the paradigmatic example of a setting where using the law effectively requires skills and expertise far beyond understanding the words used to communicate it. Simplifying the language used to convey procedural and substantive laws has not made and cannot

While it is judges who should explain the trial process, the order of presentation of proof, and evidentiary rulings to PSLs (usually at pretrial conferences), much information can be provided by other means listed. In addition to forms and instructional guides, these include: self-help kiosks, legal advice at a pro se clinic, and pro bono assistance programs.²⁶⁴ A court clerk can educate a PSL and give him or her a greater understanding of the process, which the book states “can start [PSLs] off on a positive note.”²⁶⁵ As we have seen, the Supreme Court’s Clerk of Court at present merely provides a set of instructions for IFP filers, and nothing more.²⁶⁶

Points 3 (treat all litigants with equal respect) and 4 (provide neutral, unbiased treatment) would appear to be irrelevant to the Supreme Court because of the lack of Justices’ personal interaction with PSLs. However, many PSLs probably feel they are not treated as well as represented petitioners given the paucity of legal assistance programs established for them.²⁶⁷ For the same reason many probably feel they are not treated in a neutral, unbiased manner; they no doubt perceive the adversarial system to be biased in favor of represented parties, which we know it is.²⁶⁸ So, the Supreme Court should, like other federal courts, take steps to reduce these perceptions of an uneven playing field on the part of pro se petitioners, as it continues to grant only a small portion of the certiorari petitions it receives.

Pro Se Case Management has a few additional points that are relevant to pro se litigation in the Supreme Court. Suggestions for managing such cases before docketing include standardized forms, pro se guides or manuals, and early

make the law sufficiently intelligible for laypeople to litigate their cases effectively, because a good deal of complexity inherent in the law cannot be reduced to questions of language and style. Analysing the difficulties that litigation poses for laypeople reveals complexities that cannot be eliminated by simplification of language. Understanding these complexities requires specialised skills other than an ability to penetrate technical language, such as the ability to identify the pertinent legal rules, principles and doctrines, to recognise relevant facts and classify them into the pertinent legal categories, and to engage in a particular type of interpretation and reasoning.

RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* 74 (2015) (proposing mandatory representation for all civil litigants except for the simplest of cases).

²⁶⁴ WOOD, *supra* note 259, at 11–13.

²⁶⁵ *Id.* at 6.

²⁶⁶ *See supra* note 235 and accompanying text.

²⁶⁷ The report describes numerous approaches to pro se case management, but, as to legal assistance, it notes that only “several” federal courts provide legal assistance or coaching to PSLs. “Generally, such programs offer an initial consultation with an attorney or paralegal in the courthouse but vary in how much further assistance may be provided.” WOOD, *supra* note 259, at 34; *see also*, Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants: Federal Court Programs Provide Models for Helping Pro Se Parties—and the Justice System*, *DISP. RESOL. MAG.*, Spring 2016, at 6, 8–10 (describing the four district courts with pro se clinics in which pro bono attorneys provide legal advice and limited representation).

²⁶⁸ *See* Stephan Landsman, *Pro Se Litigation*, 8 *ANN. REV. L. & SOC. SCI.* 231 (2012).

Over the course of the three or four centuries of the adversary system’s expansion, first in England and then in the United States, lawyers have come to seem indispensable in the mounting of litigation. Although not mandated by adversary theory, counsel has come to be seen as an essential component of the system.

Id. at 232.

screening.²⁶⁹ The last of these is most relevant, because forms and manuals may themselves be difficult to understand by a pro se petitioner. Early screening in the district courts is accomplished in some courts by pro se law clerks. They screen complaints to check on the appropriateness of subject-matter jurisdiction, personal jurisdiction, and venue; they also provide procedural advice to the Court, suggesting amendments to avoid termination, and looking for frivolousness.²⁷⁰ If pro bono lawyers can be recruited, they can perform the early screening to do these things, but they can go even further: they can advise PSLs with frivolous claims “not to file at all.”²⁷¹ As one federal judge stated at a pro se conference:

Having a walk-in clinic means that these people who are adrift and angry very often, and fearful always, are able to talk with a human being who can provide support, or at least guidance, and treat them with a sense of dignity and respect, which they often seldom encounter. That makes them more receptive to the principles, the rules, the filing requirements, the technicalities, because they’ve been given a chance to be heard and to be considered.²⁷²

Needing even more “dignity and respect” are those PSLs who have mental challenges, delusions, and the like.²⁷³ These, no doubt, are the vast majority of PSLs who sue the Supreme Court. *Pro Se Case Management* notes that these individuals may or may not have a valid claim, but they are nevertheless entitled to “respectful treatment.”²⁷⁴

Some PSLs may also be characterized as “abusive litigants,” who may or may not have mental challenges, but who file repeated frivolous or vexatious papers, deliberately delay proceedings, or fail to prosecute.²⁷⁵ It is impossible to generalize about these litigants. Some are indeed malicious filers who have a lot of time on their hands. The various suggested approaches to manage them include imposing sanctions, providing firm, fair, and clear warnings, or “expressing sympathy with the intensity of the emotion [which] may reduce the litigant’s alienation.”²⁷⁶

²⁶⁹ WOOD, *supra* note 259, at 26–36.

²⁷⁰ *Id.* at 32–33.

²⁷¹ *Id.* at 35.

²⁷² *Id.* at 36.

²⁷³ *See id.* at 95–96 (“While these cases may be at the extreme end of the pro se spectrum, federal judges are all too familiar with frivolous or delusional claims of one variety or another.”).

²⁷⁴ *Id.* at 97–98. Quoting an article on ethical opinion writing:

Judges must be careful to treat distraught litigants, including mentally challenged or even delusional litigants, with respect. Delusional litigants are, regrettably, common enough that law-review articles have been written about them. The issue for the opinion writer—recalling that how a judge writes counts as much ethically as what a judge decides—is how to resolve these claims A judge should treat the court system and the litigants with dignity. In doing so, the judge will gain the readers’ trust and assure them that all litigants will be treated equally.

Id. at 98 (alteration in original) (citing Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 280 (2008)).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 98–99.

Whether the pro se certiorari petitioners are mentally or emotionally challenged, abusive, or incompetent, they may simply be upset about how they have been treated in the lower courts.

B. Supreme Court's Pro Se Assistance

i. Filing Instructions

In an effort to determine whether the Supreme Court assists or accommodates PSLs in any way, I emailed its Public Information Office and asked the following questions:

1. Does the Court employ "pro se law clerks" which are employed by various district and circuit courts? If so, please advise as to their duties, how many are so employed, and other relevant information about how they are used.
2. Does the Court provide pro se litigants with forms to assist them in filing their petitions for certiorari, motions, or their briefs if their cases are accepted for review?
3. Does the Court appoint or request counsel to represent pro se petitioners in all cases that are accepted for review?
4. Which, if any, technical requirements in the Court's rules for submission of petitions for certiorari, motions, or briefs are ever (or routinely) waived for pro se petitioners?²⁷⁷

I received the following unresponsive response from that office:

We are responding to your email to the Supreme Court of the United States. The Court's Public Information Office is unable to assist in the matter that you present. The Public Information Office cannot perform research for its correspondents. You may wish to view information on filing and rules on the Court's website, which may go a long way in answering your general questions: <https://www.supremecourt.gov/filingandrules/>. To further your inquiry, you may find helpful sites such as www.findlaw.com and www.law.cornell.edu, or you may wish to visit a library.²⁷⁸

A visit to the website to which I was referred eventually led me to the only document that had anything to do with PSLs, namely, the Court's *Guide for Prospective Indigent Petitioners for Writs of Certiorari*.²⁷⁹ The *Guide* contains a six-page explanation of the process for filing petitions for certiorari, appended to which are (1) a model Motion for Leave to Proceed *In Forma Pauperis*, (2) a five-page

²⁷⁷ Email from Jona Goldschmidt, Professor of Criminal Justice & Criminology, Loyola Univ. Chi, to Supreme Court Pub. Info. Office (Oct. 1, 2018) (via PIO internal inquiry system) (on file with author).

²⁷⁸ Email from Supreme Court Pub. Info. Office to author, Professor of Criminal Justice & Criminology (Oct. 3, 2018, 01:41 CST) (on file with author).

²⁷⁹ *Guide*, *supra* note 239.

blank affidavit in support of the motion which requires a petitioner and his or her spouse to declare all of their assets and liabilities, and (3) a twelve-page blank Petition for Writ of Certiorari.²⁸⁰

The Introduction to the *Guide* explains that it is “designed to assist petitioners who are proceeding *in forma pauperis* and without assistance of counsel,”²⁸¹ but does not explain the meaning of this first Latin term. The *Guide* explains that the writ of certiorari “is not a matter of right, but of judicial discretion. The primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved,”²⁸² but it never defines this second Latin term, either. It warns the reader that the Court grants petitions for certiorari “in only about 1% of the cases that are filed,” and that the vast majority of cases “are simply denied by the Court without comment or explanation.”²⁸³

Additional sections of the first part of the *Guide* explain the time for filing, what to file, the page limitation, redaction of personal information, and the method of filing.²⁸⁴ The *Guide* provides detailed instructions for completing the appended forms, that is, the motion for leave to proceed *in forma pauperis*, and the affidavit in support, and the certiorari petition.²⁸⁵ The contents of the petition itself are the same for any litigant: the cover page, the question(s) presented, a list of parties, a table of contents, an index of appendices, the table of authorities, the opinions below, jurisdiction, constitutional and statutory provisions involved, a statement of the case, the reasons for granting the writ, the conclusion, and the proof of service.

Needless to say, the warning given to prospective petition filers about the low probability of relief, coupled with the complex procedures described in the *Guide*—with cross-references to the Court’s rules—would be disheartening to any PSL, and it is questionable whether most of the PSLs are even able to understand and comply with these procedures.²⁸⁶ It is telling, too, that the Court Public Information Office had no answers to my inquiries regarding whether the Court employs pro se law clerks, whether it provides assistance beyond the *Guide*, whether it appoints counsel for PSLs whose cases are accepted for review, or whether it waives the technical requirements of the certiorari procedures. The Court apparently provides no assistance to PSLs beyond the *Guide*.

ii. Pro Se Law Clerks

Some of the strategies described in the Judicial Conference and Federal Judicial Center reports have the potential of being implemented by the Supreme

²⁸⁰ *Id.* at 8–25.

²⁸¹ *Id.* at 1.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 1–3.

²⁸⁵ *Id.* at 3–6.

²⁸⁶ This is evidenced by some of the cases cited *supra* notes 173–180 and accompanying text, involving unintelligible pleadings.

Court. As a matter of fairness, consistency, and justice, the Supreme Court should adopt those strategies to help pro se petitioners navigate the certiorari process which other federal courts have found to be effective in educating and guiding PSLs regarding the federal rules of procedure and evidence, and rules of courtroom decorum.²⁸⁷ One of these is the use of pro se law clerks, who are utilized in almost all federal district courts. It should be noted that the titles given these individuals who are assigned pro se cases vary from court to court, from “pro se law clerk” (used in district courts) to “staff attorney” or “pro se staff attorney” (used in circuit courts).²⁸⁸

Pro se law clerks and staff attorneys are distinguishable from judicial (or “elbow”) clerks.²⁸⁹ Staff attorneys have been critically described as a “predominantly recently-graduated corps of . . . attorneys, to whom the federal appellate bench *de facto* delegates a significant majority of its Article III judicial power, and over whom it does not exercise meaningful supervision.”²⁹⁰ Within the subset of staff attorneys, who do not work directly with individual judges like judicial clerks, many are assigned to primarily review new PSL pleadings.²⁹¹

Judge Posner’s recent book explores the ways many district and circuit courts have used pro se staff attorneys since the late 1970s to assist them with PSLs.²⁹² In this book, Judge Posner not only criticizes his former Seventh Circuit staff attorneys for their poor grammar used in proposed orders, and their “verbosity and mindless repetition.”²⁹³ He bemoans the fact that his court often provides no “articulate, intelligible explanation” for turning down a PSL’s appeal, leaving the PSL “in the dark, without guidance to what if any future course of action he may be able to pursue . . . [and] in short may leave him disillusioned about the federal

²⁸⁷ 2011 SURVEYS, *supra* note 242, at 12 (“[O]nly 4 of the 90 responding districts reported that they did not have such staff.”).

²⁸⁸ Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L. 121, 148–49 (2015).

²⁸⁹ Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 47–48 (2007). Pether notes judicial clerks were institutionalized in the face of a crisis in judicial workload, while staff attorney institutionalization was a response to the crisis of the extension of the right to counsel and the growth of prisoner litigation. *Id.* at 47 (citing Donald P. Ubell, *Report on Central Staff Attorneys’ Offices in the United States Courts of Appeals*, 87 F.R.D. 253, 255 (1980)).

²⁹⁰ *Id.* at 10.

²⁹¹ FED. JUDICIAL CTR., LAW CLERK HANDBOOK § 7.8 (3d ed. 2017) [hereinafter LAW CLERK HANDBOOK], https://www.fjc.gov/sites/default/files/materials/26/Law_Clerk_Handbook_Revised_3d_Ed_2017.pdf (first reciting the duties of a pro se law clerk: “assist[ing] the [district] court by screening the complaints and petitions for substance, analyzing their merits, and preparing recommendations and orders for judicial action, including orders of dismissal. Many pro se law clerks also work on nonprisoner pro se cases”; then the duties of staff attorneys in each circuit: “[w]orking on pro se prisoner and other pro se cases, including reviewing correspondence from pro se litigants in order to determine whether any communications are legally sufficient to constitute an appeal or a request for mandamus”).

²⁹² POSNER, *supra* note 84.

²⁹³ *Id.* at 39–40. For this, he blames “law-school writing programs and the general culture of today’s America.” *Id.* at 122.

courts and with no clue as to how he might continue and improve his efforts to alleviate his situation.”²⁹⁴

Judge Posner’s book includes a spreadsheet of information about all circuits’ staff attorney programs.²⁹⁵ The spreadsheet provides a wide range of information about the staff attorney programs for federal circuit courts, including their various functions. It also shows that none of the circuit courts’ staff attorneys have any direct communication with pro se appellants.²⁹⁶

Many of the cases filed against the Supreme Court are brought by unhappy and angry (but not always vexatious) PSLs. These litigants believe justice was not done in their case at the Supreme Court level, or previously in lower courts. The question is, what models of pro se assistance programs will not only reduce the “burden” on court clerks and judges, but also ameliorate the anger and frustration of PSLs who feel that justice was not done in their case? The multitude of out-of-court assistance programs described above adopted by many federal district and circuit courts purport to educate and guide PSLs, but they do not address this problem.

PSLs obviously require instruction and guidance in order to navigate the justice system. In addition, they should be afforded limited-scope representation, coaching, or ghostwriting services to help level the playing field when litigating against a represented party.²⁹⁷ But, absent pro bono legal services external to the court, and excluding the rare case in which the Court appoints counsel for a PSL whose certiorari petition is granted,²⁹⁸ what can the Supreme Court do to address the problem of anger and frustration on the part of PSLs that prompts them to become vexatious litigants or plaintiff in suits against the Court?

One approach might be to employ pro se law clerks. Currently used in district and circuit courts, these clerks primarily draft proposed orders ruling on IFP petitions, addressing the sufficiency of pleadings filed by PSLs, and other preliminary matters. The FJC’s *Law Clerk Handbook* contains a section on pro se law clerks, indicating that their general duties are complaint screening, analyzing their merits, and preparing recommendations and orders for judicial action. It notes that, on occasion, PSLs will send letters to the court. “If the correspondence . . . does

²⁹⁴ *Id.* at 41. Judge Posner would like courts to “explain what if any alternative route to relief that a pro se may have, thus enabling him, if there is such a route, to file a new proceeding in federal district court with a well-founded belief that this time he *may* (not that he is certain to) prevail.” *Id.* at 124. The PSL “may have alternatives; he may have sued under the wrong statute; he may have sued the wrong people; he may have been ignorant of the most basic rudiments of litigation. We owe it to him to explain what his alternatives may be—how the next time he may prevail.” *Id.* at 139.

²⁹⁵ *Id.* at 161–67. The number of staff attorneys ranges from a low of eighteen in the First Circuit to a high of eighty in the Ninth Circuit. *Id.* at 162–63.

²⁹⁶ *Cf.* 2011 SURVEYS, *supra* note 242, at 1 n.5 (indicating that only one district court chief judge surveyed reported a pro se assistance program permitting pro se clerks to communicate directly with PSLs).

²⁹⁷ As for ghostwriting, they should be able to do so without having to fear charges of unethical conduct. *See* Jona Goldschmidt, *Ghosting: It’s Time to Find Uniformity on Ghostwriting*, 102 JUDICATURE 37, 48 (2018).

²⁹⁸ *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

not present an issue that may be considered by the court, the staff attorney may be authorized to so advise the author.”²⁹⁹

According to the *2011 Surveys*, 25 district courts permit direct communication between pro se law clerks and PSLs.³⁰⁰ An examination of recent pro se law clerk position announcements by federal courts reveal a wide range of duties, indicating more or less contact with PSLs. For example, one announcement lists duties that do not include any contact with PSLs.³⁰¹ Another states that the pro se law clerks work for the district court’s Office of Pro Se Litigation, but their duties do not include direct contact with PSLs.³⁰² One states that the clerk will have a variety of duties involving contacts with PSLs:

The pro se law clerk provides objective advice to judges, chambers, and court staff and provides information to litigants and attorneys . . . This position does not involve representing clients or providing advice to pro se litigants [The clerk] [p]rovides procedural *information to pro se litigants* or counsel by responding to questions. . . . [The clerk] [m]aintains liaison between the court and *litigants* . . . [and] [m]aintains communication with other courts, state and federal agencies, counsel, *litigants*, and court staff regarding court rules and procedural issues, calendaring and other litigation matters.³⁰³

Then, another court notes in its position announcement that “[t]he law clerk will perform legal research, draft reports, recommendations, and proposed orders. Additionally, the law clerk *will help plan and implement a federal pro se program aimed at developing and coordinating assistance to pro se litigants.*”³⁰⁴

Pro se law clerks’ and staff attorneys’ duties could be expanded to include direct contact with PSLs for the purposes of explaining to them the deficiencies, if

²⁹⁹ LAW CLERK HANDBOOK, *supra* note 291, at 126.

³⁰⁰ 2011 SURVEYS, *supra* note 242, at 2 tbl.1.

³⁰¹ [The clerk’s] duties may include, but are not limited to, initial review, screening and analysis of prisoner and other pro se cases and drafting of appropriate legal documents; legal research and drafting of proposed Orders or Reports and Recommendations; preparing legal memoranda for the supervising judge’s review and consideration; and such other duties as may be assigned by the designated supervising judge or the Chief Judge.

Position Announcement for Pro Se Law Clerk, U.S. Dist. Court for D.S.C. (Aug. 17, 2017) (on file with author).

³⁰² The Office of Pro Se Litigation serves the District and Magistrate Judges of the Court in the handling of all cases filed by individuals who are representing themselves in court. It provides legal support to the Court’s judges to assist them in managing their pro se docket (which accounts for approximately 25% of the Court’s civil filings). Pro se law clerks review initial pro se filings and draft legal memoranda and proposed orders and decisions for judicial officers. Pro se law clerks report directly to the Chief Counsel of the Office of Pro Se Litigation.

Pro Se Law Clerk Position Announcement, S.D.N.Y. (Feb. 11, 2015) (on file with author).

³⁰³ *Pro Se Law Clerk Vacancy Announcement*, N.D. FLA. (emphasis added), <http://www.flnd.uscourts.gov/sites/default/files/17%20NDFL%20PT%20Pro%20Se%20Law%20Clerk.pdf> [<https://perma.cc/4F6Y-Y9A7>].

³⁰⁴ *Pro Se/Term Law Clerk Position Description Announcement*, D. ALASKA (July 12, 2018) (emphasis added), <https://www.akd.uscourts.gov/sites/akd/files/Pro%20Se%20Term%20Law%20Clerk%20Position.pdf> [<https://perma.cc/9EEL-JQKA>].

any, of their filed pleadings, briefs, etc. Alternatively, a new ombudsman-like position could be created by the courts to carry out that function. A personal contact with the PSLs by a court official would satisfy the need for giving PSLs their “voice” and may, in many cases, de-escalate the anger and frustration many PSLs exhibit when courts dismiss their claims on various technical grounds (which they may or may not understand).

The Supreme Court currently has no pro se law clerks. The Court should establish these positions as the Judicial Conference has authorized for district and circuit courts. These clerks could explain, if contacted by PSLs, why their certiorari petitions were either rejected or denied. Communication about these matters may be made through the mail, email, telephone contact, or via two-way video conferencing; contact via telephone or video-conferencing would add a personal touch and would be a more effective form of communication by enhancing a PSL’s voice in the process. Arrangements could be made with prisons, both state and federal, for these kinds of direct communications with PSLs. While some commentators decry the use of staff attorneys or pro se clerks as “shadow judges,”³⁰⁵ expansion of their duties or hiring of new staff to communicate directly with PSLs as I suggest, will reduce the likelihood of the filing (or promote early termination of) suits against the Court its Justices, and the Clerk of Court.³⁰⁶

Budgetary issues will certainly arise in considering this proposal. As an alternative to hiring additional court staff to directly communicate with PSLs in the district courts, circuit courts, or Supreme Court, law students could be recruited to explain to PSLs in plain English the reasons for dismissal of their cases or the denial of their certiorari petitions. Under supervision, these students could also provide them with available options, as Judge Posner would want done. The proposal would obviously require the adoption of rules governing the scope of information provided and addressing ethical issues, such as avoiding unauthorized practice and permitting distribution of alternative legal remedies information (without advisement as to which is the best approach for the PSL). Some law schools already have appellate and Supreme Court practice clinics that represent parties who might otherwise be PSLs.³⁰⁷

³⁰⁵ See Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97 (2016) (arguing that federal judges have abdicated their Art. III powers to staff attorneys).

³⁰⁶ This proposed specialized set of pro se law clerks has some precedent in the “cert pool” process utilized by the Court to screen certiorari petitions. In that process the Chief Justice divides up the Court’s task of screening the over 7,000 petitions for certiorari across the Justices’ chambers, except for Justices Alito and Gorsuch who decline to participate, preferring their clerks read all the petitions. See, e.g., Kenton J. Skarin, *An Insider’s Look Within The U.S. Supreme Court: A U.S. Supreme Court Clerk’s Revelations*, 30 DCBA BRIEF, Apr. 2018, at 8, 8, https://cdn.ymaws.com/www.dcba.org/resource/resmgr/brief_pdf/brief_april_2018-2.pdf (“Regardless of the type of petition, the goal of every clerk writing for the cert. pool is to provide the Justices a concise summary of the parties’ arguments and a recommendation regarding certiorari as quickly as possible.”).

³⁰⁷ See *Supreme Court Litigation Clinic*, HARV. L. SCH., <https://hls.harvard.edu/dept/clinical/clinics/supreme-court-litigation-clinic/> (last visited May 15, 2020); *Appellate & Supreme Court Clinic*, WM & MARY L. SCH., <https://law.wm.edu/academics/programs/jd/electives/clinics/appellate/index.php> (last visited May 15, 2020); *Supreme Court Litigation Clinic*, U. VA. SCH. L., <https://www.law.virginia.edu/academics/clinic/supreme->

Consistency in procedural and substantive justice demands that the long-standing use of pro se law clerks in the district courts and staff attorneys in circuit courts be expanded to the Supreme Court. There is no reason to limit their use in the lower courts, especially given the number of certiorari petitions filed in and denied by the Supreme Court. Such clerks in the district courts who provide direct explanations to PSLs about the lack of merit in their cases may also reduce the number of suits against the Supreme Court. They can explain that the justice system requires finality, and that collateral attacks on prior dismissals or certiorari petitions are not permitted, but that there may be alternatives available to them. These may include refileing using intelligible pleadings, filing under a different statute, filing with a state or federal administrative agency, mediation, or other solutions.

Concurrent with this approach, the Supreme Court should accept more cases involving management of PSLs, either brought by them or on their behalf from circuit court decisions if they are fortunate to have had counsel appointed on appeal. The judiciary needs greater guidance regarding the extent to which judges provide required, permissible, or impermissible forms of guidance, accommodations, and other forms of assistance, while maintaining their impartiality, given the Court's mixed messages on this subject.³⁰⁸

C. Amendment to Supreme Court's Jurisdictional Rule to Include Miscarriages of Justice

Article III, Section 1, of the Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court." That power extends "to all Cases, in Law and Equity, arising under this Constitution."³⁰⁹ Article III further provides that, except for cases affecting ambassadors, public ministers, consuls, and those in which a state is a party, "the [S]upreme Court shall have appellate Jurisdiction, both as to *Law and Fact*, with such Exceptions, and under such Regulations as the Congress shall make."³¹⁰ The italicized words plainly state that both legal issues and factual issues are within the Court's jurisdiction. The Court's own jurisdictional rule, however, restricts its review of "fact-based" appeals.³¹¹

court-litigation-clinic (last visited May 15, 2020). Inmate legal assistance clinics, like the one at the Indiana University Maurer School of Law, can also play a significant role in pro se certiorari petitioner advisement. See *Inmate Legal Assistance Project*, IND. U. MAURER SCH. L., <https://www.law.indiana.edu/academics/experiential-education/projects/inmate.shtml> (last visited May 15, 2020).

³⁰⁸ See *supra* Part III. I have argued elsewhere that ultimately the Court should establish a judicial duty of reasonable assistance to PSLs, see Jona Goldschmidt, *Required, Permissible, And Impermissible Forms of Judicial Assistance to Self-Represented Litigants: Toward Establishment of a Judicial Duty of Reasonable Assistance*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 217 (2019), as exists in Canada, see Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. J. INT'L L. 601 (2008-09).

³⁰⁹ U.S. CONST. art. III, § 2.

³¹⁰ *Id.* (emphasis added).

³¹¹ SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

The certiorari process is one of the “regulations” Congress established pursuant to Article III. Federal law provides that “[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree”; similar provisions apply to the review of state and other courts’ decisions.³¹² PSLs are most likely to seek review of their cases either under the “arising under” clause, in appeals of civil rights or employment cases, or by raising constitutional issues in criminal cases via the Court’s certiorari jurisdiction.³¹³ Or, they may complain of adverse case outcomes due to lower state and federal courts’ erroneous factual conclusions, which the court disfavors.³¹⁴

The Court’s Rule 10 further clarifies the categories of cases which it hears.³¹⁵ These well-known categories are cases in which there is a split between circuit courts’ decisions, where a state supreme court’s decision is contrary to federal precedent, or where a federal circuit court of appeals has “so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power.”³¹⁶

Noteworthy is the limitation on the “departure” provision to circuit courts, omitting any reference to state courts. The last sentence in Rule 10 goes further to clarify the Court’s policy disfavoring cases involving matters of “fact,” despite the

³¹² 28 U.S.C. § 1254.

³¹³ These cases originate in district courts, so, in the absence of similar data from the Supreme Court, filing data from those courts reflect the extent of pro se litigation by prisoners and non-prisoners. See *Table C-13: U.S. District Courts—Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2019*, U.S. COURTS, <https://www.uscourts.gov/statistics/table/c-13/judicial-business/2019/09/30> (last visited May 19, 2020) (noting about 26% of all civil filings were by PSLs: 17% filed by prisoners and 9% filed by non-prisoners). As to the types of pro se filings, the AO only collects these for prisoner PSLs. For 2019, their civil case data show that federal and state motions to vacate sentence, habeas, death penalty, mandamus cases, alien habeas petitions, prison conditions, and prisoner civil rights cases comprise about 19% of the total civil filings. See *Table C-2, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending December 31, 2019*, U.S. COURTS, <https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2019/12/31> (last visited May 19, 2020). For the period 1998 to 2017, PSLs brought 32 percent of all civil rights cases, and 19 percent of all employment discrimination cases. Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1841 tbl.2D (2018); see also ELLEN BERRY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 58 (2017) (noting that the sample of 1,788 “employment civil rights” cases during 1988 to 2003 drawn for study from seven district courts included 23% filed pro se). Researchers have found that the data showed “a system that dismisses or summarily terminates a significant portion of cases or that offers small settlements without authoritative determinations of the validity of claims.” *Id.* at 55.

As to criminal cases:

Appeals by pro se litigants . . . constituted 49 percent of filings . . . [at] 23,728 cases. Forty-five percent of all filings by pro se litigants were prisoner petitions. Eighty-seven percent of the 12,365 prisoner petitions received were filed pro se, as were 86 percent of the 4,985 original proceedings and miscellaneous applications.

U.S. Courts of Appeals – Judicial Business (2019), U.S. COURTS, <https://www.uscourts.gov/us-courts-appeals-judicial-business-2019> (last visited May 19, 2020).

³¹⁴ See Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 278–83 (2006).

³¹⁵ SUP. CT. R. 10.

³¹⁶ *Id.*

authorization to do so in Article III: “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”³¹⁷

One must assume that the Court’s position disfavoring review of decisions involving “erroneous factual findings or misapplication of a properly stated rules of law” is because of its heavy caseload and limited time and resources. We have no data on the extent to which PSLs (or, for that matter, represented litigants) bring certiorari petitions involving this form of appeal. It is unlikely that a PSL will be able to conduct the necessary research to establish that the issue presented is one involving a split in circuit court decisions. Nor is it likely that a PSL can establish that his or her case involves a conflict between a state supreme court decision and a Supreme Court precedent; making this determination would require access to—and the skill to utilize—computer-aided legal research.³¹⁸ Even if computers and computer-based legal research software is available in a prison, many older convicts without technological skills may prefer law books in print, despite the limitations of this “old school” research method.³¹⁹ This, coupled with the Court’s policy disfavoring appeals based on erroneous factual findings, means the likelihood of a PSL being able to persuade the Court to grant certiorari in this category of case is slim to none.

Therefore, one (albeit radical) proposal for reducing the number of suits against the Court and filings by vexatious litigants is to amend the Court’s Rule 10 to make it more consistent with the Article III grant of “appellate Jurisdiction, both as to Law and Fact.” In other words, eliminate the policy disfavoring cases raising factual-dispute claims, which could be subsumed under a new “miscarriage of justice” category. As noted above, the “departure” provision, now applicable only to federal circuit courts, should be expanded in Rule 10 to include state court decisions, from which undoubtedly most PSL petitions arise. This expansion of

³¹⁷ *Id.*

³¹⁸ For a survey of states’ movement from print to electronic databases, see Camilla Tubbs, *Electronic Research in State Prisons*, 25 LEGAL REF. SERVS. Q., no. 1, 2006, at 13. According to the Prison Insight Blog, “Computers are also available in the library, especially in the law library because LexisNexis is just about the only way inmates can do research for their appeals. However, the quality and number of computers varies by location, and the computer resources available to inmates can be extremely outdated.” Natalie [surname withheld], *Can You Use Computers in Prison?*, PRISON INSIGHT, <https://prisoninsight.com/can-you-use-computers-in-prison/> (last visited May 15, 2020).

³¹⁹ See Russell Smith, *Old-School Prisoner Wants Books, Not Westlaw*, N.Y.L. SCH.: LEGAL AS SHE IS SPOKE (Sept. 20, 2011), <https://www.lasisblog.com/2011/09/20/old-school-inmate-sues-prison-for-providing-him-with-westlaw/>. Reporting on the filing of a prisoner’s denial of access to courts claim:

[H]e is “computer-illiterate” and that even if he could use the computers, seven computers for 2,500 inmates are inadequate for him to conduct his needed research. These gripes do not seem patently unreasonable. Mr. Harris is probably uncomfortable using computers—he has been incarcerated since 1989 and has had likely had little or no experience with them. And if his estimates are accurate, he only has access to a computer once every 30 days, making adjusting to electronic research potentially impossible for the 47-year-old. While prison officials say that the computers are “supervised at all times,” Mr. Harris may prefer to research his legal claims (possibly about violations by prison staff) more discreetly. From Mr. Harris’s perspective, the prison library may indeed be inadequate.

Id.

jurisdiction (in so far as expansion of the jurisdictional language of Rule 10) will surely increase the number of petitions to be screened for merit. It should also reduce the number of frivolous and vexatious claims post-certiorari denial, as well as suits against the Court. The added burden to the Court is outweighed by the justice served thereby.

Adding pro se law clerks to the Court staff as proposed above will also aid the Court in addressing the potentially increased burden to review fact-based appeals. As noted earlier, there are thousands of indigent certiorari petitioners, but we have no data on the number of those petitions that raise disfavored fact-based claims. These data are necessary in order to determine the extent to which the Supreme Court would, in fact, be overly burdened by accepting a modest number of such claims for review. Allowing PSLs to bring such appeals would give them some hope that they will have a fighting chance that justice will prevail in their case at the Supreme Court.³²⁰

CONCLUSION

This historical examination of pro se litigation in the Supreme Court shows that PSLs do not all fall into the categories of “pests” or “kooks,” as some judges believe.³²¹ Most are well-intentioned litigants, prisoners and non-prisoners, who are unable to afford counsel but seek justice to vindicate a claim, raise a defense, or challenge a perceived conviction. In reviewing the cases for this Article, however, it is apparent that today some PSLs, such as those who file suits against the Supreme Court, its Justices, or its Clerk of Court, can be fairly described as falling into one or the other of the aforementioned categories based on the nature of their claims and their named defendants.

However, a closer examination of the nature of the cases reflects the fact that many involve requests to overturn decisions of other courts below. These PSLs understandably sought justice from the Supreme Court as the “court of last resort,” where they perceived it was denied by other lower courts. Due to their lack of counsel, their unfamiliarity with the legal process and applicable rules, and their strong feeling that justice was not served in their case, they sometimes decide out of sheer frustration to take further legal action, this time against the Supreme Court, complaining of the Court’s denial of their certiorari petitions. It is unfortunate that these types of claims are made, the merits of which courts must take time to determine.

Federal courts at all levels must, however, address these unorthodox claims because PSLs have a statutory right to represent themselves in those courts.³²²

³²⁰ Another option is for Congress to revisit previous proposals to create another level of appellate court between the circuit courts and the Supreme Court to address factually based claims.

³²¹ JONA GOLDSCHMIDT, BARRY MAHONEY, HARVEY SOLOMON & JOAN GREEN, *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* 60 (1998) (noting some surveyed judges used such characterizations to refer to PSLs who pursue a political agenda).

³²² 28 U.S.C. § 1654 (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”).

They can do so not only by dismissing the claims, but by having a court staffer (staff attorney, pro se law clerk, or a pro se ombudsman) directly contact PSLs to explain why their cases are being dismissed, and, where appropriate, provide them with information about alternatives they may have available to them. As one judge noted, “One of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone—the humblest citizen, the indigent, the convicted felon, the illegal alien.”³²³ While it seems burdensome for courts to have to entertain the types of claims described above, they are required to take the time to cull out the meritorious from the frivolous cases (or those that merely do not state a cause of action) that are presented to them in order to ensure access to justice for all litigants. The Supreme Court is no less obligated to both screen cases for frivolousness and to amend its Rule 10 to make it consistent with Article III by eliminating the policy disfavoring factually based appeals to ensure miscarriage-of-justice cases are reviewed.

The Court must not only patiently review these claims but should communicate with PSLs through pro se law clerks, recognizing that some of these litigants are extremely frustrated and angry at the lack of justice they perceive was done in their case. If we believe in equal justice, the Court must not only decide cases, it must return to its previously compassionate view of PSLs³²⁴ and explain to those who do not understand the rules, customs, and potential consequences of the legal process. That is the cost of having a legal system in which every person has the right to seek justice from the court of last resort.

³²³ NAACP v. Meese, 615 F. Supp. 200, 206 (D.D.C. 1985).

³²⁴ See, e.g., Purcell v. Miner, 71 U.S. 513 (1866).

APPENDIX**Example of Pleading in Case Against the Supreme Court and other Defendants
Dismissed for Having Unintelligible Pleadings****I****Rice v. U.S. Supreme Court³²⁵**

Rice v. The United States Supreme Court, The Federal Courthouse, Sacramento, CA, S JEWS all over the world, John Stroughair, his wife & Yedwega their daughter in Germany, Oliver Wyman NYNY, and “The United States Senate.

Systematic Murder of My family
 For breaking up AT & T
 Aiding & Abetting in Criminal Activity
 Stalking my Family & Friends via Computer & Telephone
 Denying Equal Rights Under the Law & Justice
 Bias Treatment towards Women & Children [and]
 Trying to rewrite history

I offer into evidence the following

- (1) Ford Motor Company driving their truck through the Constitution via “Brave New World” Creating a religion for profit
- (2) The Ford Modeling Agency & Clayton Ford, Clay Ferrell, and all other Clays for being profitable and using these profits to continue driving a hole in the Constitution
- (3) I offer also into evidence the relationship between Benjamin & Madeline Gilbert, their house called Greensleeves, the Song Greensleeves “Ho Zana” - Oh Susanna and all the other Gilbert family members . . . for misuse of the judicial system, aiding and abetting in criminal activities, buying judges, and manipulating judges,
- (4) S Jews for saying they are above the law . . .

³²⁵ No. C03-05582CRB, 2003 WL 22999539 *1 (N.D. Cal. Dec. 17, 2003).