# Mitchell v. Mulligan - Example Pro se Appeal Case

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# UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 97-1737

ROSS E. MITCHELL,
Plaintiff - Appellant,

v.

ROBERT A. MULLIGAN,
in his Official Capacity as Chief Justice
of the Massachusetts Superior Courts,
Defendant - Appellee

ON APPEAL FROM AN ORDER OF DISMISSAL OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Brief of Plaintiff - Appellant.

Ross E. Mitchell, pro se

## Table of Contents

I. Statement of Subject Matter and Appellate Jurisdiction

II. Statement of Issues

III. Statement of the Case

IV. Summary of Argument

V. Statement of Standard of Review

VI. Argument

a. Burden of Denial of Remote Access Is Not "De Minimus"
b. The Denial of Remote Access to Pro Se Litigants Is Not Rationally Related to the Advancement of a Legitimate State Interest
c. The Denial of Remote Access Privileges Places Plaintiff on an Unequal Footing With His Opponent in State Court
d. The Right of Self-Representation in a Civil Case is a Fundamental Right Under the U.S. Constitution

VII. Conclusion And Prayer For Relief

## Tables of Authority

### Table of Cases

*Andrews v. Bechtel* Power Corp., 780 F.2d 124, 137 (1st Cir. 1985)
*Baxtrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760
*Bounds v. Smith*, 430 U.S. 817, 825 (1977)
*Bowers v. Hardwick*, 478 U.S. 186, 201 (1986)
*City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985).
*Conley v. Gibson*, 355 U.S. 41
*Dugar v. Coughlin*, 613 F.Supp. 849 (S.D.N.Y. 1985)
*Eitel v. Holland*, 787 F.2d 995,998 (5th Cir. 1986)
*Ex parte Virginia*, 100 U.S. 339
*Faretta v. California*,(422 U.S. 806)
*Foman v. Davis*, 371 U.S. 178
*Haines v. Kerner et al.*, 404 U.S. 519
*Johnson v. Atkins*, 999 F.2d 99
*Los Angeles Country Bar Association v. Eu*, 979 F.2d 697, 706-707 (9th Cir. 1992)
*Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755
*Murphy v. Com'r of Dept. of Indus. Acc.*, 612 N.E. 2d 1149 (Mass. 1993)
*O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982)
*Oliver v. Marks*, 587 F.Supp. 884 (E.D. Pa. 1984)
*Richard v. Hinson*, 70 F.3d 415 (5th Cir. 1995)
*Rinaldi v. Yeager*, 384 U.S. 305, 36 S.Ct. 1497
*Sanner v. Chicago Bd. of Trade*, 62 F.3d 918 (7th Cir. 1995)
*Scheuer v. Rhodes*, 416 U.S. 232
*Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836
*Singer v. United States*, 380 U.S. 24
*Tassian v People*, 696 P.2d 825 (Colo-App. 1984).
*Tassian v. People*, 731 P.2d 672 (Colo.1987)
*Taylor v. Coughlin*, 29 F.3d 39 (2d Cir. 1994)

*Toll v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir., 1992)
*Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994)
*Virginia v. Rives*, 100 U.S. 313 14

**Statutes**

28 U.S.C. § 1291
28 U.S.C. § 1331
28 U.S.C. § 1654
42 U.S.C. § 1983
Judiciary Act of 1789
M.G.L. c 152 § 11A

**Rules**

F.R.A.P. Rule 3(a)
Local Rule 45.2 (1st Cir)
Rule 12(b)(6)

**Treatises**

Massachusetts Body of Liberties (1641)

**Constitutional Provisions**

U.S. Constitution, Amendment I
U.S. Constitution, Amendment VI 2, 6,
U.S. Constitution, Amendment XIV
Massachusetts Constitution, Article XII

**Other Writings**

Thomas Paine on a Bill of Rights, 1777
P. Kauper, The Higher Law and the Rights of Man in a Revolutionary Society, a Lecture in the American Enterprise Institute for Public Policy Research Series on the American Revolution, Nov. 7, 1973, extracted in 18 U. of Mich. Law School Law Quadrangle Notes, No. 2, p.9 (1974)

## Statement of Subject Matter and Appellate Jurisdiction

This case raises federal questions under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Specifically, this case deals with official actions of the Chief Justice of the Massachusetts Superior Court. Plaintiff-Appellant Ross Mitchell contends that, as a result of these actions, he has been deprived, inter alia, of his rights under the fourteenth amendment of the U.S. Constitution.

This appeal was filed pursuant to F.R.A.P. Rule 3(a) within 30 days after entry of the district court's entry of its order dismissing the Action. This court, therefore, has appellate jurisdiction under 28 U.S.C. § 1291.

## Statement of Issues

1. Whether the District Court erred in dismissing the Complaint for failure to state a claim upon which relief can be granted.
2. Whether the District Court erred in denying Mitchell's Motion for Reconsideration of its Order Dismissing the Complaint or, in the Alternative, for Leave to Amend the Complaint.
3. Whether the Chief Justice's actions in denying Mitchell remote access to the Superior Court's computer system while permitting such access to any attorney requesting it creates more than a "de minimus" burden on Mitchell's ability to prosecute his state court case.
4. Whether the Chief Justice's aforementioned actions are rationally related to the advancement of a legitimate state interest.
5. Whether the Chief Justice's aforementioned actions place Mitchell on an unequal footing with his opponent in his state court litigation.
6. Whether, contrary to previous dicta of this Court, the right of self-representation in a civil case is a fundamental right under the U.S. Constitution.

## Statement of the Case

### Procedural Background

The case on which this appeal is taken is an action for declaratory and injunctive relief relating to defendant Chief Justice Robert A. Mulligan's actions in denying plaintiff Ross Mitchell remote dial-up access to Massachusetts Superior Court records, where said records are available by dial-up to any attorney requesting such access. Mitchell contends that this denial constitutes a violation of his civil rights by, inter alia, impeding his right of due process under the Fourteenth Amendment of the United States Constitution.

On the same day as he filed his Complaint, Mitchell also filed a Motion for Preliminary Injunction to compel the Chief Justice to grant him dial-up access to the court's online docket system pending adjudication of the case on the merits, wherein Mitchell additionally requested that oral arguments be heard.

The Chief Justice responded by filing a Motion to Dismiss the Complaint and an Opposition to Mitchell's Motion for Preliminary Injunction. The affidavit of Court Administrator, James Klein , was included in support of the Opposition to Mitchell's

Motion for Preliminary Injunction.

The District Court then denied Mitchell's Motion for Preliminary Injunction, without oral argument, indicating that "[Mitchell] has failed to show either a likelihood of success on the merits or irreparable injury."

Mitchell next filed his Opposition to the Motion to Dismiss.

The District Court subsequently granted the Chief Justice's Motion to Dismiss, without oral argument, without opinion, and without leave to amend.

An Order dismissing the Action was then entered on May 12, 1997.

Mitchell next filed a "Motion for Reconsideration of the Order Dismissing the Complaint or, in the Alternative, for Leave to Amend the Complaint." This Motion was denied by the District Court on May 28, 1997.

Appeal was taken from the Order of Dismissal entered in this case on May 12, 1997, and from the Order Denying Plaintiff's Motion for Reconsideration of the Order of Dismissal or in the Alternative, for Leave to Amend the Complaint, entered on May 28, 1997.

**Statement of Facts**

The plaintiff, Ross E. Mitchell, is a resident of Newton, Massachusetts and a pro se defendant in a civil contract case pending in Middlesex Superior Court in Cambridge, Massachusetts.

In November of 1996, Mitchell read in the October 21, 1996 issue of Massachusetts Lawyers Weekly of a free dial-up system for accessing Superior Court dockets and calendars known as SCRIB (Superior Court Remote Inquiry for the Bar), which provides remote access to the Court's Forecourt system.

The article stated that the "main function of the SCRIB system is to give practitioners access to docketing information as if they were using computer terminals located at the courts."

The article further stated that "[a]ny Massachusetts lawyer with a computer and a modem can access the service free of charge, establishing a direct link to all docketing information available at the courts." The article gave the name of a court official whom attorneys wishing to use SCRIB should contact to be connected to the system.

Mitchell, who had been making extensive use of the computer terminals at the courthouse in prosecuting his case, decided to request remote access to the system to facilitate the conduct of his litigation. He contacted the court official and asked to be hooked up to SCRIB. Mitchell asserted that although he was not an attorney his "ability to prosecute litigation in the Massachusetts courts would be prejudiced against [him]

should [he] be denied access to the SCRIB system by dial-in while [his] opponent's counsel is permitted such access without needing to travel to the courthouse." Mitchell's request was denied on the ground that, by order of the Chief Justice, remote dial-up access was available only to attorneys.

At the court official's suggestion, Mitchell next contacted James Klein, Administrator of the Superior Court. In a telephone conversation, Mr. Klein confirmed that dial-up access to the system was only available to attorneys and that pro se litigants were required to use the terminals provided at the courthouse. He suggested that Mitchell should write to the Chief Justice if he wished to pursue the matter further.

On February 22, 1997 Mitchell wrote the Chief Justice to request that the policy of denying dial-up access to non-attorneys be changed and that he be granted immediate access to the system. Mitchell gave numerous reasons as to why he should be accorded access, including his need to check his case's status, to consult the court's calendar and to research case dockets to assist him in the prosecution of his case.

Mitchell stated that he recognized that system resources might be insufficient to permit unrestricted access to any member of the public; however, he suggested that "people involved in adversarial proceedings must be offered access on an equal basis with their opponents. Consequently, a requirement that an individual be presently engaged in litigation or contemplating litigation would not be unreasonable. Access by libraries, journalists, etc. could remain restricted since they would not meet this criteria."

The Chief Justice replied that the Superior Court's computer system was not designed for broad public dial-up access to court records. Rather, he wrote, "The Forecourt system was designed expressly for the purpose of enabling attorneys with heavy caseloads before the Superior Court to synchronize, from their offices and without burdening the Court's staff, their own appearance calendars with the Court's calendars. Such efficient communication between the Court and those attorneys who appear regularly before it decreases the frequency of missed appearance dates and disruptions in the Court's calendar, thereby allowing judges to better manage their caseloads."

"Forecourt was not developed to enable research of the kind described in your letter. While it may have that secondary benefit for some persons, they may freely take advantage of such potential through public terminals in the courthouses. To permit persons to dial-up for research would interfere with attorneys who dial up Forecourt for its intended purpose."

"Finally, there is no evidence that not giving you dial-up access to Forecourt in any way prejudices your ability to prosecute your case. The other parties in your case, and their attorneys, are not subscribers to Forecourt and, therefore, stand with you on an equal footing before the Court."

Mitchell then filed this suit, alleging that the Superior Court's remote dial-up access policy violated his Fourteenth Amendment rights of, inter alia, due process and "equal access."

## Summary of Argument

I respectfully submit that the District Court erred when it dismissed my Section 1983 Action for failure to state a claim upon which relief can be granted. I will argue herein that the Chief Justice's denial to me of remote access to the Superior Court's docket and calendar system (while this access is available to any attorney who requests it) violates my right to equal protection of the laws and due process under the Fourteenth Amendment of the U.S. Constitution.

I will show that this denial of access represents a substantial burden to me in the prosecution of my case in state court, where I am currently a defendant in a civil contract dispute.

The Chief Justice's policy of denying access to pro se litigants such as myself does not even rationally relate to the advancement of a legitimate state interest in that it is arbitrary and does not further the stated goal of reducing the burden on Court staff; in fact, it has precisely the opposite effect.

Further, this policy places me before the court on an unequal footing with my opponent, a due process violation. My opponent has the benefits of the availability of remote access because he is represented by counsel. I do not because I am representing myself.

I will also argue that the right of self-representation in a civil case is a fundamental right under the Constitution. I recognize that this argument is contrary to dicta of this circuit; however, I respectfully submit that, upon careful analysis of *Faretta v. California*,(422 U.S. 806) and the history on which that decision is based, it will become apparent that the fundamental right of self-representation extends to all matters, civil as well as criminal. I will demonstrate that this right is substantially burdened by the court's policy.

Finally, I will argue that, while I believe the Complaint fairly states a cause of action, if it is deficient in any curable fashion, the District Court erred in denying me leave to amend the Complaint.

## Statement of Standard of Review

The appropriate standard of review over a district court's dismissal of a claim under Rule 12(b)(6) is de novo or plenary. *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994). This standard also applies to the district court's denial to grant leave to amend the complaint.

The allegations of the complaint are to be taken as true, and the court is to determine

whether, under any theory, the allegations are sufficient to state a cause of action in accordance with the law. Conversely, the court may also affirm the district court's dismissal order under any independently sufficient grounds. Id.

## Argument

The Complaint that is the subject of this appeal was dismissed by the District Court pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

In addition to dismissing the complaint, which it did without granting the opportunity for oral argument and without stating its reasons, the District Court also denied, without comment, a motion for reconsideration of its order dismissing the Complaint, and further, refused to grant leave to amend.

Under Rule 12(b)(6), the "complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the *court* is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bowers v. Hardwick*, 478 U.S. 186, 201 (1986) (emphasis supplied)

It is not even necessary that a plaintiff request appropriate relief, properly categorize legal theories, or point to any legal theory at all. *Toll v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir., 1992) (complaint need not point to appropriate status or law to raise a claim for relief; complaint sufficiently states a claim even if it points to no legal theory or even if it points to wrong legal theory, as long as "relief is possible under any set of facts that *could be established* consistent with the allegations") (emphasis supplied)

The party moving for dismissal must show "*beyond doubt* that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46. (emphasis supplied)

Moreover, the likelihood that a plaintiff will ultimately prevail on his claims has no place in determining whether or not to grant a motion to dismiss. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (issue is not whether plaintiff will prevail but whether claimant is entitled to offer evidence to support claims)

Additionally, when making a determination as to the sufficiency of a complaint, initial pleadings must be construed liberally. *United States v. Uvalde Consol.* Indep. Sch. Dist., 625 F.2d 547, 549 (5th Cir. 1890). This is especially true for a pro se Complaint under *Haines v. Kerner et al.*, 404 U.S. 519.

With respect to this Action, I contend that the District Court erred in determining that there is no theory of law under which relief can be granted. I ask this court to review the Complaint, de novo, to perform again the examination referred to in Bowers, and to reverse the District Court's Order dismissing the Complaint.

The arguments advanced herein constitute my reasons for contenting that my Complaint ought not to have been dismissed; however, if this court finds other reasons as a result of its examination, it should use its authority to reverse the dismissal on those grounds.

**Burden Of Denial Of Remote Access Is Not "De Minimus"**

I am a self-employed computer systems and management consultant. After being named as a co-defendant in a lawsuit brought by a former salesman of one of my clients, I elected to represent myself in Massachusetts Superior Court. I did this, knowing that it would take substantial time from my consulting practice but believing that the importance of fully defending against a frivolous attack was worth the effort.

When I became aware of the availability of remote access to the court's computer system, I immediately sought to be validated for it because I knew it would lessen the burden on me as I prosecute my case in state court. I was indeed surprised when that access was denied.

There are a number of reasons why I need remote access to the court's system and a number of reasons why denial of that access substantially burdens my ability to prosecute and manage my case. These include:

1. The terminals at the court are only available during business hours, while dial-up systems are usually available at most hours of the day and night. Requiring me to conduct my litigation-related access only during the court's business hours places an unnecessary burden on me.
2. The Court charges 50 cents per page to print documents. There is no charge to attorneys, either for access, or for printing on their own computers.
3. Remote access permits downloading of docket information into my computer, thereby enabling me to electronically forward information to others with whom I am working on my case, as well as to incorporate information into letters and other case-related documents. This is not possible when accessing the system using the terminals at the courthouse.
4. Remote access to the Court's calendar would permit me to verify scheduled events concerning my own case. It also would enable me to see when motion hearings and trials for analogous cases to my own might be taking place. I could then plan my time to permit me to attend these hearings.
5. I travel frequently for business yet desire to keep track of my case's status on a frequent basis. (Where a response is often due within just 10 days, having even one day's advantage can be significant.) I require remote access in order to be able to view my own case's status and docket information regarding papers recently filed by other parties. Respect for the limited time of courthouse clerks prevents me from calling for status updates as often as I would if I were able to do it myself, at any

time, and from any location.

In addition to burdening the management of my case, denial of remote access has already hindered me in the actual prosecution of my case.

On May 22, 1997, my co-defendant's counsel and I were deposing the plaintiff in the state civil Action. Based on the responses of the plaintiff in that deposition, it immediately became apparent that having access to the docket from a prior Superior Court case would be useful in continuing the questioning.

My co-defendant's counsel is not adept at using computer technology, and, as such, does not take advantage of his right to remote access. Had I been authorized, I would have dialed into the system and immediately downloaded the desired data. Instead, the line of questioning that would have been pursued had to be abandoned.

The utility of access to the kinds of information provided by the Superior Court's Forecourt system is well known in the federal judiciary. There, the PACER system provides case information to all persons on an equal basis.

The PACER News describes the service as follows:

"Now you can have access to an electronic history of a case of interest, without having to even leave your office. This service is offered virtually around the clock."

"All recent cases are yours for the asking, without having to make repeated trips to the court to review paper records."

"You can search for a case by participant name or case number. Once you find the case you want, you can have the case and docket information transmitted to you, ready to print on your own printer."

"If you are tracking the progress of a case, the PACER system allows you to quickly check if there have been any updates. This means that you can get the latest docket entries and case information when something happens; if there have been no updates, you can confirm this fact in seconds."

The Superior Court's remote access system provides all of the above features. In addition, it provides the court's calendar, which even PACER does not provide. And it does this at no cost whatsoever to its attorney subscribers.

As to the usefulness of the system, one need only consult the Massachusetts Lawyers Weekly article that first alerted me to its existence:

"It's tremendously useful," noted Boston lawyer Thomas P. Billings. "For anything from figuring out the status of my case...to marketing efforts to find out where clients are sending their litigation business."

Catherine Deyo, a litigation paralegal at the Boston law firm of Bingham, Dana & Gould, said that the system is "extremely useful."

"It's widely used here," she remarked. "It's something that the entire firm uses. And I love the fact that it's free." Deyo said.

Similar services connecting to federal courts can be accessed only through paying a fee, Deyo noted.

Deyo said that "an enormous amount of time" is saved because she uses the system lieu of making a trip to clerks' offices, where computer terminals are often tied up, anyway.

25 M.L.W. 329. The Chief Justice has argued that his denial of remote access to me constitutes a "slight inconvenience." I respectfully disagree. Requiring me to interrupt my other business to travel to the courthouse in order to review docket information places a substantial burden on me by unnecessarily preventing me from engaging in my normal business. The time lost from income-producing activities has been and continues to be substantial.

As users of the remote access feature of the system have indicated above, the remote access capability of the court's computer system is "tremendously" useful and an "enormous" time saver. The denial to me of access represents far more than the "de minimus" burden that the Chief Justice has alleged. The state must, therefore, justify denying access to me as a pro se litigant under the appropriate standard of review, whichever one that might be.

**The Denial of Remote Access to Pro se Litigants is not Rationally Related to the Advancement of a Legitimate State Interest**

As I argued to the District Court , I contend that the Chief Justice's denial of remote access to me burdens a fundamental right under the U.S. Constitution. However, I will first endeavor to show that this policy cannot even survive the minimal "rational basis" standard of review.

As the court is well aware, when evaluating an equal protection claim where no fundamental right is infringed and where the claimant is not a member of a suspect (or quasi-suspect) class, the legislation or policy challenged must only be rationally related to a legitimate state interest. City of Cleburne, *Tex. v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985). While an equal protection challenge generally arises in the context of statutory enactments, it applies equally to judicial action. E.g. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836; *Virginia v. Rives*, 100 U.S. 313; *Ex parte Virginia*, 100 U.S. 339.

As a pro se litigant, I am neither a member of a suspect nor quasi-suspect class. Absent

infringement of a fundamental right, which I have yet to demonstrate in this brief, the Chief Justice's unequal treatment of me is to be subjected only to a rational basis review.

This standard, however, is not a "toothless" one. *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755.

For example, in *Tassian v. People*, 731 P.2d 672 (Colo.1987) the petitioner challenged the state court Chief Justice's directive prohibiting only pro se litigants from paying filing fees by personal checks after the Colorado appellate court had upheld the policy under a rational basis equal protection review. The appeals court had previously ruled that:

"the lawyer/pro se litigant classification bears a rational relationship to a legitimate governmental interest--that of collecting the full fee required by statute for filing documents with the court. If the court limits payment by check to those over whom it has the most control and who, in its judgment, are less likely to issue bad checks, i.e., lawyers, it will decrease the risk of accepting bad checks and concomitantly lessen the administrative burden inherent in attempts to collect such checks."

*Tassian v People*, 696 P.2d 825 (Colo-App. 1984). The Supreme Court of Colorado, however, found a constitutional flaw in the directive. It ruled that there was:

> the lack of a rational foundation for prohibiting pro se litigants from paying the filing fee by personal check and simultaneously not prohibiting a litigant represented by counsel from paying the same filing fee by personal check. While we acknowledge that the state's interest in collecting the full statutory filing fee is certainly a legitimate one, we are convinced beyond a reasonable doubt that, with respect to the payment of a filing fee by personal check, the differences between pro se litigants and litigants represented by attorneys are so attenuated and illusory as to render the classification created by the chief judge's directive arbitrary and irrational.

*Tassian v. People*, 731 P.2d 672, supra. The Court further stated that:

When the rational basis standard has not been met, the classification must be stricken even if the invalidation results in an additional administrative inconvenience to the governmental body. Administrative convenience, by itself, does not constitute a valid basis for the imposition of disparate treatment upon persons who, with respect to the activity in question, are basically in the same position as others who are not singled out for different treatment. E.g. *Rinaldi v. Yeager*, 384 U.S. 305, 36 S.Ct. 1497; *Baxtrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 762.

Unconstitutional discrimination between pro se and represented litigants is not always prejudicial to the pro se litigant. In *Murphy v. Com'r of Dept. of Indus. Acc.*, 612 N.E. 2d 1149 (Mass. 1993), the Massachusetts Supreme Court, also applying a rational basis

standard, invalidated a provision of a law requiring Workers' Compensation claimants who were represented by counsel to submit a fee at the time of the appeal. No such fee was required of pro se claimants.

The department of Industrial Accidents had argued that the challenged classification merely "regulates economic activity" and does not infringe upon a fundamental right. They further claimed that imposing the fee only on claimants proceeding with the assistance of counsel was rationally related to the State's interest in deterring frivolous appeals, in defraying the cost of the impartial medical examination, and in exempting pro se claimants from the filing fee requirements.

The court could find no rational basis to conclude that imposing an additional financial hurdle on claimants proceeding with the assistance of counsel might deter frivolous appeals. Nor could the court find a rational basis to conclude that only represented claimants should be held responsible for the costs of the impartial medical examination. Murphy, supra, at 1156.

Turning now to my situation, the Chief Justice argues that the policy of denying access to pro se litigants "serves the valid governmental interest of preserving limited computer resources to allow attorneys with substantial business before the Superior Court to coordinate their court schedules without burdening court personnel." He argues that the extent of the burden on me is minimal. And finally, he argues that "there is no reasonable alternative for the Superior Court to achieve the same ends by less burdensome means."

While the Chief Justice claims that the system is only for use by attorneys with "heavy caseloads" the Mass. Lawyers Weekly article and the Court Administrator's affidavit suggest otherwise.

In the Lawyer's Weekly article, Court Administrator James Klein is quoted as saying, "we actually have tapped into the core of most lawyers who are actually doing business in the Superior Court on a volume basis." He is further quoted as saying, "What always surprises me is the number of smaller law firms that are not automated yet."

In fact, there is no requirement that an attorney have even one case pending before the Superior Court in order to be accorded access. And no controls are in place to ensure that the system is used by its attorney subscribers for its stated purpose.

The Chief Justice claims that the system was designed "expressly for the purpose of enabling attorneys with heavy caseloads to synchronize, from their offices and without burdening the Court's staff, their own appearance calendars with the Court's calendars."

However, according to the Lawyers Weekly article, "[the] main function of the SCRIB system is to give practitioners access to docketing information as if they were using the computer terminals located at the courts."

Also, in his Affidavit, Mr. Klein indicates that in addition to attorneys, many other people having business with the court are permitted to dial into its computer. "These include approximately seventy-two Superior Court judges as well as their law clerks (seeking access to model jury instructions, research memos, the latest appellate opinions, and other legal material); thirty judicial secretaries (who maintain certain personnel records on-line and also use the remote dial-up system to send drafts of decisions to judges who may have moved to other sessions in other locations); and legal publishers."

Since this lawsuit was filed, Mr. Klein has also acknowledged to the media that remote access to the court's computer system is also provided to reporters from various press outlets, including the Boston Globe.

It appears that the only class of individual having business with the court that is not permitted remote access is the pro se litigant.

The question here is whether, for the purpose of allowing remote access, distinguishing between a pro se litigant and a litigant represented by counsel furthers a legitimate state interest. The artificial classification of attorneys and non-attorneys advanced by the Chief Justice does not apply since it is the pro se litigant with a case before the court who is burdened by the court's policy in a manner requiring scrutiny under an equal protection claim. That other classes who have no need of access are also excluded is simply not relevant.

While a classification need not function perfectly in order to be rational, "the state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne supra.

The fact is that when I need information about my case or other cases, I call the court on the telephone. The clerks assist me by looking up the information I need, be it the status of a motion, the last paper filed by a party, the date and time of a hearing or conference, or other information relevant to my case.

Since I contact the court frequently for information available in Forecourt, permitting me remote access to the system would significantly assist the court in achieving its stated goal of reducing the burden on court personnel. Denying me remote access works against the court's own purpose by forcing me to contact and occupy the time of court personnel.

The fact that I also can find other uses for the system should not disqualify me from the right of remote access to it any more than attorneys who use the system for "marketing efforts" are disqualified for that reason.

Since the actual result of the court's policy of denying remote access to pro se litigants is to increase rather than decrease the workload on court personnel, the policy is irrational

and arbitrary and, consequently, does not advance a legitimate state interest.

**The Denial of Remote Access Privileges Places Me on an Unequal Footing with My Opponent in State Court**

The Chief Justice has characterized my Complaint as alleging a violation of my First Amendment right of Access to the Courts. A major portion of his argument then is devoted to demonstrating that this right has not been violated. As I argued to the District Court, when considering a Motion to Dismiss, it is not for the defendant to refute the complaint or to present a different set of allegations. *Sanner v. Chicago Bd. of Trade*, 62 F.3d 918 (7th Cir. 1995) (court must draw all reasonable inferences in plaintiff's favor, and defendant cannot...attempt to refute the complaint or to present a different set of allegations").

The right of access to the courts provides citizens with "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

I am not claiming a Bounds violation. In fact, I contend that Bounds is wholly inapplicable to my situation.

My claim is that I have been placed before the court on an unequal footing with my opponent, and that this, in itself, is unconstitutional.

Most decisions relating to challenges to the right of access to the courts concern prisoners contending that restrictions placed on them by prison authorities have interfered with their ability to access the court. Other challenges to the right of access have been made by non-incarcerated litigants. For example, in *Richard v. Hinson*, 70 F.3d 415 (5th Cir. 1995), the petitioner was denied recovery of attorney fees and expenses under the Equal Access to Justice Act because his net worth exceeded two million dollars. The appeals court ruled that "petitioner was not denied access to court; he is merely required to pay for that access. The actual 'right' petitioner seeks to enforce is reimbursement of attorney's fees and expenses for which there is no constitutional basis." Id. at 417.

In *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993), the court ruled that the right of access to courts is not burdened by requiring a non-indigent plaintiff to pay filing fees; though plaintiff complained fees were "too high," he was able to pay them. And in *Los Angeles Country Bar Association v. Eu*, 979 F.2d 697, 706-707 (9th Cir. 1992), the court found that the right of access to the courts is not impaired by a statute limiting the number of judges and thus causing delays in civil cases; there was no showing that delays led to inaccurate decisions, ineffective relief, or deprivation of any litigant's opportunity to vindicate important rights.

The common thread in all of these cases is that what is involved is access to the court, not unequal treatment of the parties, once in court, in the conduct of their litigation.

In my case, however, I find that the state court is favoring my opponent by offering to facilitate, for his counsel, the conduct of the litigation through remote access to the court's computer system. The court is not impartial if it makes (or offers to make) litigation easier for one party in a dispute.

This is why, in my letter to the Chief Justice, I stated that "people involved in adversarial proceedings must be offered access on an equal basis with their opponents."

It is no more relevant whether my opponent's counsel takes advantage of his right of remote access than is my opponent's counsel's propensity to perform legal research relevant to my right to perform research.

This Court of Appeals recognizes and respects this principle when, in its rule concerning access to the court's library it writes:

"The law library of this court shall be open to members of the Bar, to the United States Attorneys of the Circuit and their assistants, to other law officers of the government, and persons having a case in this court..."

Is providing access to pro se litigants at the Appeals Court Libraries simply a courtesy or is it a constitutional imperative? I respectfully submit that the Court of Appeals' policy allowing library access to any person with a "case in this court" reflects its awareness of the need to treat parties before the court equally. It is this equal treatment that is absent in the Chief Justice's directive.

The Federal Judicial Conference, in creating the PACER system, has ensured that access is available to all persons on an equal basis. It is hard to imagine the fallout that would occur were PACER suddenly to be made an "attorney-only" system, but it surely wouldn't be a pretty sight. Nonetheless, using the Chief Justice's rationale, such a change presumably would be perfectly fine if he perceived it to facilitate the operation of his court.

Finally, the Chief Justice contends that "there is no evidence that not giving [me] dial-up access to Forecourt in any way prejudices [my] ability to prosecute [my] case. The other parties in [my] case, and their attorneys, are not subscribers to Forecourt and, therefore, stand with [me] on an equal footing before the Court."

Implied in this statement is an acknowledgment by the Chief Justice that, were my opponent's counsel a subscriber to Forecourt, I would indeed not be on an equal footing before the Court. The Chief Justice's logic, by extension, would further imply that if my opponent chooses not to do legal research, it would, therefore, be acceptable to deny me the right to perform research since we would then be on an "equal footing" before the

Court.

The Chief Justice simply misses the point. It is the equality of opportunity that is lacking. Whether my opponent chooses to avail himself of the services of the court is of no relevance to my right to have the same opportunity to manage my case. Because of the court's policy concerning remote access, that opportunity is being denied me and that is the reason why I do not stand on an equal footing with my opponent in state court.

**The Right of Self-Representation in a Civil Case is a Fundamental Right Under the U.S. Constitution**

It is well known that defendants in a criminal case enjoy a fundamental right of self-representation. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525. However, the Supreme Court has not ruled as to whether this right extends to litigants in civil cases.

In *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 137 (1st Cir. 1985), this Circuit has stated in dicta that there is no constitutional right to self-representation in civil cases. And in *Eitel v. Holland*, 787 F.2d 995,998 (5th Cir. 1986), the Fifth Circuit considered and disposed of the question as follows:

In Faretta v. California, the Supreme Court held that a criminal defendant in state court has a federal constitutional right, under the sixth and fourteenth amendments, to represent himself. This does not, however, translate into a constitutional right to appear pro se in a civil case. Thus, in *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982), the Second Circuit noted that the right to self-representation in civil cases was conferred by Section 35 of the Judiciary Act of 1789, "although not enjoying the constitutional protection subsequently afforded to the right of self-representation in criminal cases." More recently, in Andrews v. Bechtel, the First Circuit stated, "there is no constitutional right to self-representation in civil cases."

This conclusion is supported by dicta in the Faretta opinion, for the Court there held that the right to represent oneself in a criminal case is derived from the sixth amendment, which embodies the personal right to make a defense to criminal charges. The sixth amendment applies only in "criminal prosecutions," and it, therefore, cannot be the source of the parallel right to self-representation in civil cases.

Based on these authorities, we conclude that the right to represent oneself in a civil case is not one of the fundamental rights protected by the due process clauses of the Fourteenth Amendment.

I respectfully submit that the fundamental right of self-representation applies to all matters, civil as well as criminal, and that the rationale used by the Supreme Court in deciding Faretta leads us inexorably to that conclusion. In addition, I will herein address the valid concern of the dissenters in Faretta: if a constitutional right to

self-representation exists at all, why then is the right of self-representation granted by statute rather than by explicit constitutional construction?

To begin with, unlike numerous state constitutions , the Sixth Amendment does not explicitly confer any right of self-representation in a criminal trial, merely a right to counsel. In Faretta, note 15, the Supreme Court wrote:

The inference of rights is not, of course, a mechanical exercise. In *Singer v. United States*, 380 U.S. 24, the Court held that an accused has no right to a bench trial, despite his capacity to waive his right to a jury trial. In so holding, the Court stated that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." Id. at 34-35. But that statement was made only after the Court had concluded that the constitution does not affirmatively protect any right to be tried by a judge, and concluded that these were "clear departures from the common law." Ibid.

We follow the approach of Singer here. Our concern is with an independent right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel. See supra, at 814-815. On the contrary, the right must be independently found in the structure and history of the constitutional text.

What the Court found in that history was a society where lawyers were mistrusted and where self-representation was the norm:

The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers. When the Colonies were first settled, "the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions." This prejudice gained strength in the Colonies where "distrust of lawyers became an institution." Several Colonies prohibited pleading for hire in the 17th century. The prejudice persisted into the 18th century as "the lower classes came to identify lawyers with the upper class." The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a "sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class." In the heat of these sentiments the Constitution was forged.

Faretta, at 827 (citations omitted). The right of self-representation in all matters was guaranteed, indeed assumed, in many colonial charters and declarations of rights. It was the right to counsel that needed to be granted. And where it was, the engagement of paid counsel was sometimes forbidden. For example, the Massachusetts Body of Liberties (1641) in Art. 26 provided:

"Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines..."

The right to counsel was supplemental to the primary right of self-representation. Again, in Faretta, the Court wrote:

The Founders believed that self-representation was a basic right of a free people. Underlying this belief was not only the anti-lawyer sentiment of the populace, but also the "natural law" thinking that characterized the Revolution's spokesmen. See P. Kauper, The Higher Law and the Rights of Man in a Revolutionary Society, a Lecture in the American Enterprise Institute for Public Policy Research Series on the American Revolution, Nov. 7, 1973, extracted in 18 U. of Mich. Law School Law Quadrangle Notes, No. 2, p.9 (1974). For example, Thomas Paine, arguing in support of the 1776 Pennsylvania Declaration of Rights, said:

"Either party...has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able,...therefore the civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation]...." Thomas Paine on a Bill of Rights, 1777, reprinted in 1 Schwartz 316.

Faretta, note 39. (emphasis supplied). The Supreme Court's recognition of this basic or "natural law" right of self-representation is what permits it to look at the Sixth Amendment and to find therein, in addition to a right to counsel, a fundamental right of self-representation. The Court's own words make the connection:

An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the constitution, for, in a very real sense, it is not his defense.

The Sixth Amendment, when naturally read, thus implies a right of self-representation...

Faretta, at 821 (emphasis supplied). Were the "natural law" right of self-representation not to exist, under Singer, the Court would have been compelled to find that no affirmative right to self-representation exists in the Sixth Amendment since there is no explicit wording creating it. The fundamental right to self-representation is not "found" in the Sixth Amendment; it is exposed under the Sixth Amendment. As with the right to travel, the right to plead one's own cause need not be explicitly stated; it is as natural as the right to breathe the air.

It is part of the fabric of the Constitution because it was part of the fabric of the society that crafted the Constitution.

This right applies as much to civil litigants as to criminal defendants. Surely, the civil litigant (especially, the civil defendant) "will bear the personal consequences" of a defeat, and therefore, "must be free personally to decide whether in his particular case counsel is to his advantage." Were this not so, then the historical foundation on which Faretta is built would crumble.

Which leads us to the pertinent question raised by the dissenters in Faretta. If the right of self-representation is fundamental, why then is it provided for in § 35 of the Judiciary Act of 1789 yet omitted from the Sixth Amendment? Chief Justice Burger wrote:

The text of the Sixth Amendment, which expressly provides only for a right to counsel, was proposed the day after the Judiciary Act was signed. It can hardly be suggested that the Members of the Congress of 1789, then few in number, were unfamiliar with the Amendment's carefully structured language, which had been under discussion since the 1787 Constitutional Convention. And it would be most remarkable to suggest, had the right to conduct one's own defense been considered so critical as to require constitutional protection, that it would have been left to implication. Rather, under traditional canons of construction, inclusion of the right in the Judiciary Act and its omission from the constitutional amendment drafted at the same time by many of the same men, supports the conclusion that the omission was intentional.

There is no way to reconcile the idea that the Sixth Amendment impliedly guaranteed the right of an accused to conduct his own defense with the contemporaneous action of the Congress in passing a statute explicitly giving that right.

Faretta, Burger Dissent, at 844. There is, indeed, a way to reconcile this apparent contradiction. But, it requires a paradigm shift.

The reason Section 35 of the Judiciary Act of 1789 cannot be reconciled to the implicit right of self-representation is because, contrary to previous interpretation, Section 35 was not enacted to grant a statutory right of self-representation at all. Instead, Section 35 was enacted to grant a statutory right to counsel; it made it clear that parties in Federal Court would have the right to be represented. People already had the right to appear personally; that was the norm. They didn't need the statute to accord them that right. As Thomas Paine had expressed, "Either party...has a natural right to plead his own cause." And further, "the civil right of pleading by proxy, that is, by a council, is an appendage to the natural right [of self-representation]...." Just as a statute regulating some aspect of a fundamental right does not alter the fundamental nature of that right, neither does the affirmation of such a right in a statute alter its fundamental nature.

Had there been no Section 35, it would have been unclear as to whether counsel could appear on behalf of parties, but certainly not as to whether parties could appear on their own behalf.

With a statutory right to counsel in place, the Framers determined that more than statutory protection was needed for the criminal defendant's right to counsel. They created a constitutional right to counsel in criminal prosecutions to supplement the statute and to complement the implicit natural right of self-representation, the same implicit right that the Court has relied on in Faretta.

I concur with Justice Blackmun's contention that the "[Sixth] Amendment's silence as to the right of self-representation indicates that the Framers simply did not have the subject in mind when they drafted the language." There was no reason to have it in mind, as it was such an obvious and basic right. As the Court wrote, "If anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none. In sum, there is no evidence that the colonists and the Framers ever doubted the right to self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel." Faretta, at 832.

Thus, I respectfully submit that the right to self-representation in all matters, civil and criminal, is a fundamental right under our Constitution. As such, policies that burden that right must be subjected to analysis under the doctrine of strict scrutiny.

## Conclusion and Prayer For Relief

This District Court erred when it dismissed the Complaint. The Chief Justice's directive barring pro se litigants from remotely accessing the court's computer system is an arbitrary and irrational policy that fails to advance a legitimate government interest. Additionally, the policy burdens a fundamental right, the right of self-representation.

The Complaint sufficiently states a cause of action, but if it is deficient in any way, the District Court erred in not allowing my Motion for Leave to Amend. *Foman v. Davis*, 371 U.S. 178 (leave to amend shall be given freely when justice so requires.)

Consequently, I respectfully request that this Court reverse the ruling of the District Court and remand this case for further proceedings, including the right to perform reasonable discovery. I further request that this Court instruct the District Court to consider a renewed Motion for Temporary Injunction so that, during the pendancy of this case, I may be permitted to have remote access to the Superior court's computer system.

Finally, as a pro se litigant, inexperienced in the art of drafting pleadings, I would appreciate the opportunity to offer oral argument in support of this brief.

Respectfully submitted,
Ross E. Mitchell, pro se
Plaintiff-Appellant

Dated and Filed: July 22, 1997

## Addendum

The items contained in this addendum also are included in the appendix to the brief.

1. Complaint
2. Plaintiff's Motion for Interlocutory Injunction to Compel Defendant to Grant to Plaintiff Dial-Up Access to Online Docket System Pending Adjudication of This Case on the Merits
3. Defendant's Motion to Dismiss Complaint
4. Order of Dismissal
5. Plaintiff's Motion for Reconsideration of Order Dismissing the Complaint or, in the Alternative, for Leave to Amend the Complaint.

## FOOD FOR THOUGHT

Many times the reason or purpose for events in our life initially escapes us,
but I am certain we can find reason and/or purpose in everything that happens!

It takes a short time to learn to exercise power, but a lifetime to learn how to avoid abusing it.

We are no longer a country of laws, we are a country where laws are "creatively interpreted."

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