

MANDATING JUSTICE: *NARANJO V. THOMPSON* AS A SOLUTION FOR UNEQUAL ACCESS TO REPRESENTATION

Sarah B. Schnorrenberg*

TABLE OF CONTENTS

Introduction	262
I. A Background on Compelling Representation	265
A. 28 U.S.C. § 1915(e) and <i>Mallard</i>	265
B. Inherent Authority to Compel Representation	267
1. The Scope of a Court’s Inherent Authority	268
2. <i>Colbert v. Rickmon</i> : Against the Use of Inherent Authority to Compel Counsel	270
3. <i>Bothwell v. Republic Tobacco Co.</i> : Recognizing the Court’s Inherent Authority.....	271
4. Other Jurisdictions on the Question of Compelled Representation.....	273
C. The Case of <i>Naranjo v. Thompson</i>	274
1. Exceptional Circumstances Calling for Appointment of Counsel in the Fifth Circuit.....	274
2. Mario Naranjo’s Case	275
3. The Fifth Circuit’s Recognition of Inherent Authority	277
II. <i>Naranjo</i> as a Solution to the Justice Gap	279

* J.D. Candidate 2019, Columbia Law School. The author would like to thank Professor Philip Genty for his guidance in writing this Note, and to the staff of the Columbia Human Rights Law Review for all their feedback and editing.

A. Potential Strengths to a Broad Adoption of <i>Naranjo</i>	279
B. Potential Obstacles to <i>Naranjo</i> 's Usefulness.....	283
1. Precedential and Constitutional Problems	283
2. Explicit Narrow Applicability.....	285
3. Difficulty of Proving Exceptional Circumstances in the Fifth Circuit	287
C. Judicial Interpretation of <i>Naranjo</i>	290
III. Evaluating <i>Naranjo</i> as a Solution	292
A. <i>Naranjo</i> Could Help Bridge the Justice Gap.....	292
1. Using <i>Naranjo</i> , Courts Could Supplement Other Programs in Providing Legal Representation.....	293
2. <i>Naranjo</i> May be Especially Beneficial for Prisoners .	295
B. <i>Naranjo</i> 's Usefulness Outweighs Potential Problems...	297
1. Challenges to Inherent Authority	297
2. Constitutional Challenges	298
3. Dependence on Judicial Discretion	301
4. The Importance of Ensuring Justice in Applying <i>Naranjo</i>	302
C. <i>Naranjo</i> May be More Effective at Supplying Legal Representation to Indigent Parties if the Fifth Circuit Rejects the Exceptional Circumstances Test	303
Conclusion	306
Appendix.....	308

INTRODUCTION

Many Americans today are unable to access legal representation. Like their higher income counterparts, low-income Americans require legal services in a range of areas.¹ Yet, low-income Americans only seek legal help for 20% of the legal problems they face,² and they likely will be unable to find a lawyer to represent them in the vast majority of cases for which they do seek help.³ After all, over half of all private attorneys tend to take on far less pro bono work than recommended by the American Bar Association and state bar associations.⁴ Legal service providers lack the resources to help over half of the individuals that approach them with requests for assistance.⁵ Further, federal funding through the Legal Services Corporation (“LSC”) is neither sufficient or reliable, and LSC’s budget has fluctuated since it was created in the 1980s.⁶

1. 71% of low-income households have experienced at least one civil legal problem in the past year. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans Executive Summary*, LEGAL SERVS. CORP. (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf> [<https://perma.cc/W6KH-7F4V>].

2. *Id.* at 2.

3. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 541 (1994).

4. See STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, AM. BAR ASS’N, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 6 (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf [<https://perma.cc/P4NL-6XM2>] (noting that 48% of attorneys surveyed did no pro bono work in 2016, while approximately 16% completed less than twenty hours and one in five attorneys had never participated in any pro bono service) [hereinafter SUPPORTING JUSTICE]. The ABA recommends attorneys complete at least fifty hours of pro bono work annually. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 1980). State bar associations make similar recommendations. THE STATE BAR OF CALIFORNIA, Pro Bono Resolution (1989), <http://www.calbar.ca.gov/portals/0/documents/accessJustice/2003-Pro-Bono-Res.pdf> [<https://perma.cc/GV2E-NWCB>].

5. LSC funding recipients could not fully aid 1.1 million out of 1.7 million requests for aid in 2017; they cited budget restrictions as the reason for turning away 85–97% of those cases. LEGAL SERVS. CORP., *supra* note 1.

6. LSC’s budget has been subject to various congressional cuts over the year, and the amount of funding has varied significantly. LSC’s funding peaked at \$771 million in the early 1980s, but it has not received nearly that much recently. Rachel M. Zahorsky, *Everything on the Table: LSC Looks to ABA to Help Meet Legal Needs of the Poor*, ABA JOURNAL (Jan. 2012) http://www.abajournal.com/magazine/article/everything_on_the_table_lsc_looks_to_aba_to_help_meet_legal_needs

Because there is no constitutional guarantee to legal assistance in civil matters, low-income individuals who do not qualify for or cannot otherwise access the limited avenues for legal assistance fall into a justice gap.⁷ Incarceration exacerbates this gap, because prisoners are barred from receiving help from many legal aid services⁸ and are often unable to retain private attorneys.⁹

[<https://perma.cc/XXT3-UCWW>]. LSC often receives far less funding than requested—it asked for \$502,700,000 for fiscal year 2017, but only received \$385,000,000. See *Fiscal Year 2017 Budget Request*, LEGAL SERVS. CORP., <https://www.lsc.gov/media-center/publications/fy-2017-budget-request> [<https://perma.cc/KD69-MSM5>]; *Fiscal Year 2018 Budget Request*, LEGAL SERVS. CORP. app. at B-1 (May 2017), <https://www.lsc.gov/media-center/publications/fiscal-year-2018-budget-request> [<https://perma.cc/A2P6-UR76>]. LSC was recently subject to two serious budget cuts during Obama’s second term in office. See *House Spending Bill Cuts LSC Budget by 20%*, LEGAL SERVS. CORP. (June 3, 2015), <https://www.lsc.gov/media-center/press-releases/2015/house-spending-bill-cuts-lsc-budget-20> [<https://perma.cc/WQ57-4NP3>]; *Funding Cuts Expected to Result in Nearly 750 Fewer Staff Positions at LSC-funded Programs*, LEGAL SERVS. CORP. (Aug. 15, 2012), <https://www.lsc.gov/media-center/press-releases/2012/funding-cuts-expected-result-nearly-750-fewer-staff-positions-lsc> [<https://perma.cc/7ZT4-8T2G>]. It seems that LSC will not fare any better under the Trump administration. Trump has proposed giving LSC only \$33 million for fiscal year 2018. See Deborah L. Rhode, *Legal Services Corporation: One of the Worst Cuts in Trump’s Budget*, STANFORD LAW SCHOOL BLOGS (May 31, 2017), <https://law.stanford.edu/2017/05/31/six-of-the-worst-cuts-in-trumps-budget/> [<https://perma.cc/J8FS-LWCQ>]. While Congress has not subscribed to Trump’s proposed cuts, an appropriations bill proposed in spring of 2017 would cut LSC’s budget by 24%. See Lee Rawles, *Proposed ‘18 budget would cut LSC by 24%, increase funds for law enforcement and immigration court*, ABA JOURNAL (June 30, 2017), http://www.abajournal.com/news/article/proposed_budget_would_increase_funds_for_law_enforcement_and_immigration_bu [<https://perma.cc/CS6W-Q2P8>].

7. See Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/> [<https://perma.cc/M4QR-JBYG>].

8. LSC, for one, has prohibited any of the organizations it funds from representing prisoners in any matter. LSC Representation of Prisoners, 45 C.F.R. § 1637.1 (1997). LSC funds 25% of all civil legal aid services in the country, so prisoners cannot seek help from a large number of legal assistance services. *Civil Legal Aid 101*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/atj/civil-legal-aid-101> [<https://perma.cc/6RL6-57KE>].

9. See Jennifer Gerarda Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117, 1140–45 (1992); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003); Lynn S Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act’s Disparate Restrictions on Attorney’s Fees*, 89 CAL. L. REV. 999 (2001).

One prisoner in Texas recently found himself in such a position. While incarcerated at Reeves County Detention Center in Pecos, Texas, Mario Naranjo sued prison management for a host of constitutional violations, including overcrowding the prison and failing to keep sanitary conditions.¹⁰ The case turned on prison schematics, which were filed under seal, such that Naranjo was unable to access them.¹¹ The district court judge ruled that, because Naranjo could not access the documents to review them, and would therefore be unable to properly cross-examine witnesses on those documents, he merited assistance from an attorney.¹² However, the court could not find any attorney or legal aid service in the area who was willing and able to take the case, and thus ultimately denied Naranjo's motion for the appointment of counsel.¹³ On appeal, the Fifth Circuit vacated this denial. According to the Fifth Circuit, if a court has found exceptional circumstances meriting appointment of counsel and cannot find a willing lawyer to take the case pro bono, the court has the inherent power to compel counsel to accept an uncompensated appointment.¹⁴

This Note discusses the potential impact of the Fifth Circuit's decision in *Naranjo* and evaluates whether it could be an effective means of reducing the justice gap that low-income Americans face. Part I provides a background to the federal case law on mandated appointments and courts' inherent authority, in addition to detailing the Fifth Circuit's decision in *Naranjo*. Part II weighs potential strengths and weaknesses of using *Naranjo* to provide lawyers for indigent parties. It also examines recent cases in the Fifth Circuit that cite *Naranjo* to determine if a trajectory to the case law surrounding *Naranjo* has emerged. Finally, in Part III, this Note argues that *Naranjo* could play an important role in addressing gaps to traditional methods of providing counsel to indigent parties. It also argues that *Naranjo* could be more effective at ensuring justice if the Fifth Circuit slightly revises its approach to granting counsel under 28 U.S.C. § 1915(e).

10. *Naranjo v. Thompson*, 809 F.3d 793, 795–96 (5th Cir. 2015).

11. *Id.* at 796–97.

12. *Naranjo v. Thompson*, No. PE:11-CV-00105-RAJ, 2013 WL 11299564, at *2 (W.D. Tex. Jun. 5, 2013).

13. *Id.* at *2–3.

14. *Naranjo*, 809 F.3d at 801–04.

I. A BACKGROUND ON COMPELLING REPRESENTATION

Since 1989, the Supreme Court has foreclosed courts from statutorily compelling counsel to represent an indigent plaintiff under 28 U.S.C. § 1915(e), which states that the court “may request” that an attorney represent a party who is unable to afford counsel.¹⁵ Thus, the only viable option for courts to compel representation has been the use of inherent authority. The question of whether courts may use their inherent authority to mandate an attorney represent an indigent party has seldom been raised in federal court, and the courts that have addressed the question have reached conflicting conclusions.¹⁶ In deciding *Naranjo*, the Fifth Circuit became the first circuit court to find that courts can compel representation via inherent authority. The decision stems, in part, from the peculiar circumstances of Mario Naranjo’s case. The Fifth Circuit limited the holding of *Naranjo* to extreme cases where both exceptional circumstances and no other option for obtaining counsel exist.¹⁷ This section provides an overview of 28 U.S.C. § 1915(e), the split on inherent authority’s applicability, and the Fifth Circuit’s holding in *Naranjo*.

A. 28 U.S.C. § 1915(e) and *Mallard*

In 1892, Congress passed a statute entitled, “An act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court.”¹⁸ This act was meant to provide poor Americans access to the judiciary, as evidenced in the House Report, which asked, “Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of

15. See *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 301 (1989).

16. See *Colbert v. Rickmon*, 747 F. Supp. 518, 527–28 (W.D. Ark. 1990) (denying Colbert’s motion for appointment of counsel because the court found it lacked the authority to mandate representation); *but see Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1229, 1236 (D. Neb. 1995) (finding that courts possess inherent power to mandate representation and granting the attorney’s motion to withdraw because “plaintiff’s failure to obtain private counsel was not the result of his indigency,” but due to a lack of strength of his claims).

17. *Naranjo*, 809 F.3d at 804.

18. James J. Vinch, *Mallard v. United States District Court: Section 1915(D) and the Appointment of Counsel in Civil Cases*, 51 OHIO ST. L.J. 1001, 1003 (1990) (citing 27 Stat. 252, ch. 209 (1892) (codified as amended at 28 U.S.C. § 1915 (1982))).

justice?”¹⁹ Today, 28 U.S.C. § 1915 provides the federal rules for proceeding *in forma pauperis*. In particular, § 1915(e) provides that “[t]he court may request an attorney to represent any person unable to afford counsel.”²⁰

Until 1989, it was unclear whether § 1915(e) allowed a court to mandate an attorney to represent an indigent party,²¹ or if it merely permitted courts to ask attorneys to represent the client.²² In *Mallard v. United States District Court for Southern District of Iowa*, the Supreme Court found § 1915(e) only allowed the latter.²³ Mallard was a bankruptcy lawyer, newly admitted to the bar in the Southern District of Iowa in January 1987. In June 1987, he was asked to represent two current inmates and one former inmate in a § 1983 suit.²⁴ Mallard filed a motion to withdraw after reviewing the case, claiming that he had no familiarity with the legal issues and did not have expertise in deposing and cross-examining witnesses—which would be necessary to the case—but the magistrate judge denied his motion.²⁵ At the district court level, Mallard argued that the court’s decision to force him to work as a litigator would cause Mallard to violate his ethical obligation to only accept cases he could handle competently.²⁶ The district court judge upheld the magistrate’s decision to deny the motion to withdraw and the Eighth Circuit denied the petition without an opinion.²⁷

19. Stephen M. Feldman, *Indigents in the Federal Courts*, 54 *FORDHAM L. REV.* 413, 413–14 (1985) (citing H.R. Rep. 1079, 52d Cong. (1st Sess. 1892)).

20. 28 U.S.C. § 1915(e) (2012).

21. The Eighth and Seventh Circuits held that § 1915(e) allowed courts to mandate representation. *See Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971); *McKeever v. Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982).

22. The Sixth and Ninth Circuits found courts only had the power to ask counsel to assist an indigent party. *See Reid v. Charney*, 235 F.2d 47, 47 (6th Cir. 1956); *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986).

23. *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296 (1989).

24. *Id.* at 299.

25. *Id.*

26. *Id.* at 300; *see also* MODEL RULES OF PROF’L CONDUCT r. 6.2 (AM. BAR ASS’N, 1980) (stating that a lawyer shall not seek to avoid appointment by a tribunal to represent a person, except for good cause). Mallard stated, “I do not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity. Because of my reluctance to become involved in these activities, I do not feel confident that I would be effective in litigating a case such as the instant case.” *Mallard*, 490 U.S. at 300. Mallard did, however, feel confident enough to argue this motion up to the Supreme Court.

27. *Mallard*, 490 U.S. at 300.

The Supreme Court, reviewing this denial, found that courts may not compel attorneys to accept a case, as the language of § 1915(e) clearly says “request.”²⁸ The Court explained that “request” is generally synonymous with words like “ask” and not words like “require” or “demand.”²⁹ The Court also pointed to § 1915(d), which specifically states that “court officers shall serve” and “witnesses shall attend,” and stated that Congress could have used stronger language if they intended to compel representation, but chose not to do so.³⁰ Finally, the Court stated that the existing state statutes that authorized courts to appoint counsel at the time § 1915 was passed specifically used language like “appoint” and “assign,” so the use of “request” in § 1915(e) should be read as a conscious congressional choice.³¹ Justice Brennan, writing for the Court, concluded that § 1915(e) “does not authorize coercive appointments of counsel.”³² Thus, the Supreme Court foreclosed § 1915(e) as an avenue for courts to solve problems faced in cases like *Naranjo*, forcing courts to turn to other forms of authority in order to compel representation.

B. Inherent Authority to Compel Representation

The Supreme Court explicitly left open the question of whether inherent authority could be used to compel representation.³³ While inherent authority has not been clearly defined, the Third Circuit has provided some guidance regarding the limits of inherent authority in *Eash v. Riggins Trucking Inc.*³⁴ At the time the Fifth Circuit decided *Naranjo*, only two courts—both district courts—had tackled the question of whether inherent authority allowed courts to compel counsel, and, if so, whether it was appropriate for a court to exercise its inherent authority for such a purpose. However, those courts did not agree. While in *Colbert v. Rickmon*, the Western District of Arkansas found that courts do not have the inherent authority to compel representation,³⁵ in *Bothwell v. Republic Tobacco Co.*, the

28. *Id.* at 301 (“There is little reason to think that Congress did not intend ‘request’ to bear its most common meaning.”).

29. *Id.*

30. *Id.* at 301–02 (citing 28 U.S.C. § 1915(d) (1996)).

31. *Id.* at 302–03.

32. *Id.* at 309.

33. *Mallard*, 490 U.S. at 310 (“Nor do we express an opinion on the question whether the federal courts possess inherent authority to require lawyers to serve.”).

34. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985).

35. *Colbert v. Rickmon*, 747 F. Supp. 518, 528 (W.D. Ark. 1990).

District of Nebraska found that courts did in fact have the inherent authority to compel representation.³⁶

1. The Scope of a Court's Inherent Authority

Inherent powers are the powers a "court can call upon to aid in the exercise of its jurisdiction, the administration of justice, and the preservation of its independence and integrity."³⁷ Inherent powers are most often used in criminal cases,³⁸ but these powers may also be used in certain civil contexts, like regulating the bar³⁹ or subpoenaing witnesses for an indigent civil litigant.⁴⁰ Academics have described inherent authority as "nebulous" and "its bounds as 'shadowy.'"⁴¹ As inherent powers are primarily used to aid courts as the need arises, the doctrine has been left without clear limits.⁴² The one limit that courts have generally agreed upon is that inherent powers are only to be used in rare circumstances when courts have no other recourse.⁴³

36. Bothwell v. Republic Tobacco Co., 912 F. Supp. 1221, 1239 (D. Neb. 1995).

37. Vinch, *supra* note 18, at 1026 n.161.

38. See United States v. Dillon, 346 F.2d 633, 638 (9th Cir. 1965) (holding that the court had power to order an attorney to represent an indigent criminal defendant and that this was not a taking under the Fifth Amendment); David Moore, *Invoking the Inherent Powers Doctrine to Compel Representation of Indigent Civil Litigants in Federal Court*, 10 REV. LITIG. 769, 782 (1991) (stating courts can use inherent powers to supervise grand juries and dismiss actions for lack of prosecution in criminal cases).

39. Vinch, *supra* note 18, at 1026.

40. Other examples of inherent authority used in a civil context include appointing technical advisors, preventing unethical conduct by attorneys, disqualifying counsel from a case, ordering an employer to continue paying an employee her full salary during a trial, and protecting a trade secret in an *ex parte* trial. Moore, *supra* note 38, at 782.

41. Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985) (citing ROBERT E. RODES, JR. ET AL., SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE 179 n.466 (July 1981) and Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 485 (1958)).

42. The Supreme Court has defined inherent powers as those "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R. Co., 370 U.S. 626, 630-631 (1962). By leaving the bounds of inherent powers open and unlimited by "rule or statute," courts are able to use inherent powers as necessary to fulfill the role of the courts.

43. See *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."). See also *ITT Cmty. Dev. Corp. v. Barton*,

In *Eash v. Riggins Trucking Inc.*,⁴⁴ the Third Circuit described inherent authority in detail and categorized inherent powers into three main types. The first category is inherent power given to courts by Article III of the Constitution. These constitutional powers allow the court to act against legislative directive and “are grounded in the separation of powers concept, because to deny this power ‘and yet conceive of courts is a self-contradiction.’”⁴⁵ An example of this power is the court’s ability to “void legislation that would virtually prohibit functioning of courts.”⁴⁶ The boundaries for this type of power are “not possible to locate with exactitude,” so the *Eash* court recommended exercising the power with caution.⁴⁷

The second—and most commonly used—category of inherent power *Eash* identifies encompasses the powers that are “necessary to the exercise of all others.”⁴⁸ This language comes from one of the earliest Supreme Court cases on inherent powers, *United States v. Hudson*, which held that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.”⁴⁹ This is the type of inherent power a court uses when it sanctions an individual for contempt.⁵⁰ According to the *Eash* court, this power may be regulated to some extent but it cannot be “abrogated nor rendered practically inoperative.”⁵¹

The final type of a court’s inherent power stems from the court’s equitable powers. These powers are not necessary for performing the duties of the court but are used by courts to achieve a

569 F.2d 1351, 1360 n.20 (5th Cir. 1978) (“Although inherent powers are often referred to as ‘incidental’ powers, they are not sources for mere orders of convenience. Action taken by a federal court in reliance on its inherent powers must somehow be indispensable to reach a disposition of the case.”); *Soo Line R. Co. v. Escanaba & Lake Superior R. Co.*, 840 F.2d 546, 551 (7th Cir. 1988) (finding that inherent powers refer to the ability of the court to create common law concerning a particular subject area in the absence of statutes and rules). *See also* Moore, *supra* note 38, at 780–81 (“Courts have recognized that they should invoke these powers only in the course of performing essential legal matters”).

44. 757 F.2d 557, 561–64 (3d Cir. 1985).

45. *Id.* at 562 (quoting Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in ‘Inferior’ Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1023 (1924)).

46. Moore, *supra* note 38, at 781.

47. *Eash*, 757 F.2d at 562.

48. *Id.* (citation omitted).

49. 11 U.S. 32, 34 (1812).

50. Moore, *supra* note 38, at 781.

51. *Eash*, 757 F.2d at 563 (citation omitted).

“just result.”⁵² According to the *Eash* court, this power is only available to courts when Congress has not provided contrary legislation.⁵³ If courts were to compel attorneys to accept judicial appointments, they would need to use this type of inherent power because appointed counsel is not “necessary” in civil cases.⁵⁴ Accordingly, proponents of the power to mandate representation would have to argue that appointing counsel is necessary to provide a just and fair result for indigent civil plaintiffs.⁵⁵

2. *Colbert v. Rickmon*: Against the Use of Inherent Authority to Compel Counsel

A year after *Mallard*, the Western District of Arkansas found that federal courts do not have the inherent authority to compel attorney representation of indigent civil litigants in the case of *Colbert v. Rickmon*.⁵⁶ After reviewing the background of compelled representation and the use of inherent powers to compel representation of indigent civil litigants, the court decided that federal courts do not possess this power because if they did, § 1915(e) would be superfluous. According to the court, if Congress believed courts had the power to inherently appoint counsel, Congress would have had no reason to pass a statute allowing courts to “request” counsel.⁵⁷ The court also stated that any inherent powers federal courts possess must

52. *Id.*

53. *Id.*

54. Courts have not found that counsel is necessary in civil cases and there is no right to be represented. *See Lassiter v. Dep’t of Soc. Servs. of Durham Cty, N.C.*, 452 U.S. 18, 25 (1981) (finding that the constitutional right to counsel “has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation”). *See also DiAngelo v. Ill. Dep’t of Public Aid*, 891 F.2d 1260, 1262 (7th Cir. 1989) (“Indigent civil litigants have no constitutional right to counsel. . . .”); *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986) (stating that although indigents must have “meaningful access” to the courts, no court has found that meaningful access requires that “indigents must always be supplied with counsel in civil as well as criminal cases”).

55. Moore, *supra* note 38, at 782.

56. 747 F. Supp. 518, 526–27 (W.D. Ark. 1990).

57. *Id.* at 520. It should be noted that the court in *Mallard* suggested that § 1915(d) “may simply codify existing rights or powers.” *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 307 (1989). In *Naranjo*, the Fifth Circuit relied on this suggestion by the *Mallard* court when it dismissed respondent’s argument that inherent authority would be duplicative of the authority given to courts by § 1915(e). *Naranjo v. Thompson*, 809 F.3d 793, 804 (5th Cir. 2015).

come from Article III of the Constitution,⁵⁸ but declined to find the power to appoint counsel to incarcerated civil litigants within Article III's reach.⁵⁹ Furthermore, even if the court had the inherent authority, the court suggested that the Fifth Amendment's Due Process, Takings, and Equal Protection Clauses would limit this power.⁶⁰ Ultimately, the court found it could do no more than request the services of attorneys.⁶¹

The *Colbert* court was very opposed to appointing counsel in this particular case, and censured appointing counsel in general. In part, the court did not want to impose on attorneys by compelling them to represent indigent plaintiffs.⁶² However, the court also emphasized the implementation problems that arise from compelling representation. It suggested that courts would have to spend time and resources that they do not have on either "strong arming" attorneys into serving, or calling attorneys until one accepted the position.⁶³ The court refused to take this route, stating that it was "not equipped with the machinery or the manpower to act as a telephonic lawyer-referral service."⁶⁴ Unsurprisingly, the court opted not to request counsel in *Colbert*.⁶⁵

3. *Bothwell v. Republic Tobacco Co.*: Recognizing the Court's Inherent Authority

*Bothwell v. Republic Tobacco Co.*⁶⁶ also addressed a court's inherent authority to appoint counsel in civil cases. In *Bothwell*, the court was "convinced that a federal district court does possess the inherent power to compel an unwilling attorney to accept a civil

58. *Colbert*, 747 F. Supp. at 526 ("This court, after all, may assert no more power than conferred or allowed by Article III."). Unlike *Eash*, the *Colbert* court failed to consider other sources of inherent powers. See *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561–65 (3d Cir. 1985).

59. *Colbert*, 747 F. Supp. at 527 ("The court, quite simply, does not believe such power is essential to the judicial function or is within its sphere of responsibility.").

60. *Id.*

61. *Id.*

62. *Id.* ("It is unfair to single out a class defined as including the legal profession and as a sub-class, the relatively few litigation attorneys qualified and able to represent the poor, to bear a burden that belongs to society as a whole . . .").

63. *Id.*

64. *Colbert*, 747 F. Supp. at 527.

65. *Id.*

66. 912 F. Supp. 1221, 1225–30 (D. Neb. 1995).

appointment.”⁶⁷ Unlike in *Colbert*, *Bothwell* addressed all three categories of inherent power and found that this power falls under the penumbra of the third category, a court’s equitable powers.⁶⁸ Specifically, the court explained that the third category of inherent power exists for two purposes: ensuring a “fair and just” process, and maintaining the integrity of the judiciary.⁶⁹ The inherent authority to compel representation of indigent civil litigants would further both purposes. First, the court stated that the adversarial system may not be effective when one side cannot access representation, and the inability of a party to get counsel because of their indigency “clearly offends the principle of ‘equality before the law’ underlying our system.”⁷⁰ Second, the court suggested that the court’s integrity is eroded when it is not fully accessible by all groups.⁷¹ Because both purposes of the third category of inherent power were at play, the court concluded that federal courts do have the inherent authority to mandate an attorney to represent an indigent civil litigant.

Like *Colbert*, *Bothwell* considered the implementation of this inherent power. However, while the *Colbert* court did not want to impose on attorneys at all, the *Bothwell* court took a more pragmatic perspective, suggesting that courts should take into account attorneys’ ethical obligations and actually enforce bar associations’ “platitudes” about pro bono goals.⁷² According to the court, “if these aspirational ‘goals’ are to be achieved and to have any meaning in fact, there must be some mechanism for gaining compliance.”⁷³

Courts could serve as the mechanism for achieving compliance with bar association goals, but at least in *Bothwell*, the District of Nebraska court refrained from doing so. Rather, it stated that courts must exercise inherent powers with restraint.⁷⁴ The court suggested counsel should be appointed in marketable cases in which a private attorney might consider taking a case but the plaintiff is unable to obtain a lawyer because he is indigent.⁷⁵ In this case, since the plaintiff was unable to obtain counsel not because he was indigent but because

67. *Id.* at 1225.

68. *Id.* at 1227.

69. *Id.*

70. *Id.* at 1228.

71. *Bothwell*, 912 F. Supp. at 1230.

72. *Id.* at 1234.

73. *Id.*

74. *Id.* at 1235.

75. *Id.* at 1236.

his case was unmarketable to attorneys, the court concluded it was not reasonably necessary to the administration of justice to compel an attorney to represent him.⁷⁶

4. Other Jurisdictions on the Question of Compelled Representation

No other courts have explicitly addressed whether inherent authority allows federal courts to compel attorneys to represent indigent civil litigants. However, various circuits have concluded that courts cannot compel attorneys as a general matter without addressing inherent authority. For instance, the Third Circuit has stated that “courts have no authority to compel counsel to represent an indigent civil litigant[,]” but did not discuss inherent authority.⁷⁷ Courts in the Second⁷⁸ and Sixth⁷⁹ Circuits have similarly failed to address their potential inherent authority to appoint counsel when stating that they could not compel counsel. In concluding that they have no authority to compel attorneys, these courts have implicitly suggested they have no inherent authority to compel representation of indigent civil litigants.

Nevertheless, courts may be more open to this use of inherent powers if a circuit court were to explicitly allow such action. A decision from the Middle District of North Carolina found that “[i]n the absence of controlling authority recognizing any . . . inherent authority,” the court could only request attorney services.⁸⁰ This may mean that, were an appellate court decision to permit using inherent authority to

76. *Id.* at 1239.

77. *Tabron v. Grace*, 6 F.3d 147, 157 n.7 (3d Cir. 1993).

78. Chief Judge Colleen McMahon of the Southern District of New York has stated in numerous cases that “[b]ecause this Court does not have a panel of attorneys who can be compelled to take on civil cases pro bono, and does not have the resources to pay counsel in civil matters, the appointment of counsel is a rare event.” According to a search on Westlaw, this stance, indeed this sentence, has been used in 24 different decisions written by Chief Judge McMahon. *See, e.g.*, *Colon-Reyes v. Fegs Health and Human Serv. Sys.*, 12 Civ. 2223, 2012 WL 2353732, at *1 (S.D.N.Y. June 13, 2012); *Diggs v. Roberson*, 16 Civ. 312, 2016, WL 2856007, at *1 (S.D.N.Y. May 10, 2016); *Miranda v. City of New York*, 14 Civ. 210, 2016 WL 1317952, at *1 (S.D.N.Y. Apr. 1, 2016); *Trahan v. City of New York*, 15 Civ. 4129, WL 4469559, at *1 (S.D.N.Y. July 15, 2015); *Paulini v. City of New York*, 15 Civ. 7059, WL 5946189, at *1 (S.D.N.Y. Oct. 7, 2016).

79. *Jackson v. Stoddard*, No. 1:13-cv-1297, 2014 WL 2862614, at *3 (W.D. Mich. June 24, 2014).

80. *United States v. Flores*, No. 1:10CR332-2, 2012 WL 1463602, at *7 n.9 (M.D.N.C. Apr. 27, 2012).

appoint counsel to indigent litigants, district courts would be willing to use this power. However, with little precedent concerning inherent authority, courts may be reticent to do so.⁸¹

C. The Case of *Naranjo v. Thompson*

1. Exceptional Circumstances Calling for Appointment of Counsel in the Fifth Circuit

Like many circuits,⁸² the Fifth Circuit requires courts to find that a litigant's case presents exceptional circumstances before the court may decide whether to appoint counsel to represent an indigent civil litigant under § 1915(e).⁸³ In *Branch v. Cole*, the Fifth Circuit held that if exceptional circumstances exist, the court must appoint counsel.⁸⁴ Yet, the court in *Branch* declined to enumerate factors to be considered in determining whether exceptional circumstances exist because “[n]o comprehensive definition of exceptional circumstances is practical.”⁸⁵ Instead, the court stated that the existence of exceptional circumstances would depend on the type and complexity of the case and the abilities of the individual bringing the case.⁸⁶

Less than two months later, the Fifth Circuit held in *Ulmer v. Chancellor* that if exceptional circumstances are found, a district court abuses its discretion by failing to appoint counsel.⁸⁷ In *Ulmer*, the court elaborated on the factors to be considered when ruling on requests for

81. The district court in *Naranjo* recognized its decision was not desirable, but did not try to solve this problem on its own. Instead, the court urged *Naranjo* to appeal so that the Fifth Circuit could “provide guidance on the appointment of counsel” in this case. *Naranjo v. Thompson*, 809 F.3d 793, 798 (5th Cir. 2015). Other district courts in a similar position may feel more comfortable following such a model.

82. The First, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits all require that exceptional circumstances exist before a court can appoint counsel for an indigent civil litigant. Kimberly A. Owens, *Right to Counsel – The Third Circuit Delivers Indigent Civil Litigants from Exceptional Circumstances*, 39 VILL. L. REV. 1163, 1165 n.9 (1994).

83. *Branch v. Cole*, 686 F.2d 264, 265 (5th Cir. 1982).

84. *Id.* (“A trial court is not required to appoint counsel for an indigent plaintiff asserting an action under 42 U.S.C. § 1983 unless the case presents exceptional circumstances.”).

85. *Id.* at 266.

86. *Id.*

87. *See Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982).

counsel.⁸⁸ These factors included the type and complexity of the case, whether the indigent is capable of adequately presenting their case, whether the indigent is in a position to investigate their case adequately, and whether the evidence will mostly consist of conflicting testimony that will require skill in presenting evidence and cross-examination.⁸⁹ By the time *Naranjo* was decided, the Fifth Circuit further required district courts to consider the “likelihood that appointment will benefit the petitioner, the court, and the defendants by ‘shortening the trial and assisting in just determination.’”⁹⁰ Courts can also consider the extent of the plaintiff’s independent efforts to obtain private counsel.⁹¹ Using these factors, the district court in *Naranjo* found that exceptional circumstances existed, warranting the appointment of counsel to Naranjo’s case.⁹²

2. Mario Naranjo’s Suit

Naranjo, while incarcerated at Reeves County Detention Center (“Reeves III”) in Pecos, Texas, brought a variety of claims against the company managing the prison and several of its directors and employees.⁹³ He alleged that prison officials had violated his Fifth Amendment Due Process rights by responding with indifference to his grievances; that they violated his Eighth Amendment right to be free from cruel and unusual punishment by maintaining the prison at 166% of its capacity; that they did not maintain proper fire safety procedures; that they failed to maintain sufficient sanitary conditions; that they provided insufficient medical care to inmates; that they forced Naranjo to perform labor on their behalf; and that they denied him equal protection by transferring him to Reeves III because he is Hispanic.⁹⁴ The case was referred to a magistrate judge, and Naranjo moved for appointment of counsel under § 1915(e)(1). The magistrate judge denied this motion.⁹⁵ Naranjo proceeded to file requests for documents relevant to his claims from the defendants, who objected to all three discovery requests on prison security grounds. In response, the

88. *Ulmer*, 691 F.2d at 213.

89. *Id.*

90. *Parker v. Carpenter*, 978 F.2d 190, 193 (5th Cir. 1992) (citing *Murphy v. Kellar*, 950 F.2d 290, 293 n.14 (5th Cir. 1992)).

91. *Jackson v. Cain*, 864 F.2d 1235, 1242 (5th Cir. 1989).

92. *Naranjo v. Thompson*, 809 F.3d 793, 798 (5th Cir. 2015).

93. *Id.* at 795–96.

94. *Id.* at 796.

95. *Id.*

magistrate judge ordered that the documents all be filed under seal, meaning Naranjo could not see them himself.⁹⁶

The magistrate judge recommended that the district court grant summary judgment on all of Naranjo's claims, but the district court judge denied summary judgment on three of Naranjo's claims.⁹⁷ The magistrate judge proceeded to schedule an evidentiary hearing on the remaining claims. Naranjo moved again for appointment of counsel, writing that he could not "participate because to do so properly would require more legal skills than the Plaintiff has or can develop [sic]."⁹⁸ At the evidentiary hearing, Naranjo repeatedly expressed that he was unqualified, as he was not a trained attorney. When the magistrate judge asked if Naranjo had any evidence he wanted to produce, Naranjo responded,

Your Honor, with all due respect, I'm going to be standing by my declaration, the sworn pleadings that I've also put in throughout the hearing—proceedings, and that's as far as I'm going to—I have no other evidence. I have been denied access to any reports, I do not—I'm not a trained attorney, I do not know how to conduct an evidentiary hearing, so I have to stand by my sworn declaration and my verified pleadings.⁹⁹

Similarly, when asked whether he wanted to cross examine the warden, he said, "Your Honor, I have no questions for Warden Thompson. I'm certainly not an attorney; I wouldn't know where to begin[.]" and when asked if he had objections to a set of exhibits, he replied, "Your Honor, I—I don't have a clue as to what they mean, to be honest with you."¹⁰⁰ Finally, when the magistrate judge asked Naranjo if he had any outstanding discovery issues, Naranjo said he did not know, as he was not a professional lawyer, and "these discovery issues are just very confusing to [him]."¹⁰¹

96. *Id.* at 796–97.

97. The district court declined to grant summary judgment on the claims regarding Eighth Amendment overcrowding, fire safety, and sanitation. *Naranjo*, 809 F.3d at 797.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 797–98.

The district court, when reviewing Naranjo's second motion to appoint counsel, found that exceptional circumstances were present. The district court found that Naranjo's inability to view the documents and participate in discovery impeded his ability to investigate the case and that his claims would likely involve conflicting testimony that would require cross-examination skills that Naranjo did not possess.¹⁰² The district court also "agree[d] that the appointment of counsel [would] expedite the lawsuit, promote judicial economy, and [was] ultimately justified under the circumstances."¹⁰³

However, the district court ultimately denied the motion to appoint counsel. The district court stated that it had no funding to compensate an attorney, and it could find "no attorneys in the area willing or able to take the case pro bono."¹⁰⁴ The Western District of Texas provided no special budget for appointing counsel under 42 U.S.C. § 1983 and the court's discretionary budget was limited, so the district court could not fund counsel.¹⁰⁵ In addition, the court had reached out to all seven of the licensed attorneys practicing in Pecos and all three of the attorneys admitted in the Western District of Texas who practiced in Reeves County, as well as legal aid organizations including the Texas Civil Rights Project. None of the lawyers or organizations were able to take the case pro bono.¹⁰⁶ Since the court understood *Mallard* as preventing federal courts from compelling attorneys to take cases pro bono, the district court held that it had no way of appointing counsel for Naranjo.¹⁰⁷ In its holding, the district court urged Naranjo to appeal so that "the Fifth Circuit [could] provide guidance on the appointment of counsel" in this situation.¹⁰⁸

3. The Fifth Circuit's Recognition of Inherent Authority

On appeal, the Fifth Circuit found that the district court did not clearly err in finding that the sealed discovery and likelihood of conflicting testimony provided exceptional circumstances weighing in

102. *Naranjo*, 809 F.3d at 798.

103. *Id.*

104. *Id.* at 798, 800 (quoting *Naranjo*, 2013 WL 11299564, at *2, *vacated*, 809 F.3d 793 (5th Cir. 2015)).

105. *Id.* at 798.

106. *Id.*

107. *Naranjo*, 809 F.3d at 798 (quoting *Naranjo*, 2013 WL 11299564, at *3, *vacated*, 809 F.3d 793 (5th Cir. 2015)).

108. *Id.*

favor of appointing counsel.¹⁰⁹ Since the district court properly found exceptional circumstances, the Fifth Circuit found that the district court had erred in declining to appoint counsel.¹¹⁰ The Fifth Circuit stated that when the conventional methods of finding counsel fail, courts may use their “inherent power to compel counsel to accept an uncompensated appointment.”¹¹¹

The Fifth Circuit stated that while *Mallard* refused to answer whether federal courts have the inherent authority to mandate uncompensated representation, “[w]e hold that they do, and that the district court abused its discretion by not considering that option.”¹¹² The court stated that the inherent authority to compel attorneys stems from necessity and the courts’ duty to maintain a functioning system of civil justice.¹¹³ This power was indispensable because the appointment of counsel in this case was necessary to provide the plaintiff with a meaningful hearing.¹¹⁴ Furthermore, by exercising this power, the court upheld its duty to maintain a functioning civil justice system because it enforced the ethical obligations attorneys gain when they receive their licenses.¹¹⁵

However, this was not a broad ruling. The opinion “emphasize[s] that this is a power of last resort.”¹¹⁶ The court first pointed to the case law requiring inherent powers to be used with “great restraint and caution.”¹¹⁷ The Fifth Circuit also predicted district courts would very rarely appoint counsel via inherent powers, as exceptional circumstances “are, by their very definition, exceptional,” and courts should exhaust all other remedies before using such authority.¹¹⁸ Only in the “rarest of cases” should a district court need to use its inherent powers.¹¹⁹ Furthermore, the Fifth Circuit allowed district courts to consider additional factors when deciding

109. *Id.* at 800–01.

110. *Id.* at 801 (“Having identified [a plaintiff demonstrating exceptional circumstances], a district court cannot then send him off on his own consistent with its duty to advance the proper administration of justice.”).

111. *Id.*

112. *Naranjo*, 809 F.3d at 802.

113. *Id.* at 803.

114. *Id.*

115. *Id.*

116. *Id.* at 804.

117. *Naranjo*, 809 F.3d at 804 (quoting *Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996)).

118. *Id.* at 804.

119. *Id.*

whether to make a mandatory appointment, beyond those considered when determining whether exceptional circumstances exist.¹²⁰ These factors may include the attorney's assessment of whether the plaintiff's claims are meritless and whether an attorney has "good cause" to decline an appointment.¹²¹

II. NARANJO AS A SOLUTION TO THE JUSTICE GAP

As *Naranjo* has limited applicability, few district court decisions have cited the case in the two and a half years following the Fifth Circuit's decision. Yet, *Naranjo* could help to close the justice gap and provide a new tool for courts to appoint counsel for indigent parties. This section discusses the potential benefits of applying *Naranjo* and the reasons why courts may not exercise *Naranjo* to its greatest potential. This section also considers recent district court decisions that discuss *Naranjo* and the varying manner in which *Naranjo* is applied in those cases.

A. Potential Strengths to a Broad Adoption of *Naranjo*

The most obvious benefit that *Naranjo* confers is that it could allow more representation for pro se plaintiffs with potentially meritorious claims, and therefore provide for more meaningful court proceedings. The Supreme Court stated in *Penson v. Ohio* that the adversarial process is key to procedural fairness, as truth is "best discovered by powerful statements on both sides of the question."¹²² The Fifth Circuit emphasized this goal in *Naranjo*. When an indigent plaintiff lacks access to representation, the court stated a district court "cannot carry out its duties without ordering an attorney to take the case" because "[e]ven the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary

120. *Id.* at 805.

121. *Id.* at 805–06.

122. *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)). Procedural fairness has the added benefit of giving participants the sense, if not the reality, that they are "being treated with dignity and respect by the authorities with whom they deal. . . . [Which prompts] their feelings of obligation of responsibility and obligation to obey the law [to] increase." Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, CRIME AND JUST. 283, 298, 306–07 (2003).

presentation.”¹²³ The option to use inherent powers allows courts to appoint counsel and thereby better serve the interests of justice.

Exercising inherent authority to appoint counsel may provide an option when other methods of providing counsel fail. As legal aid organizations have continued to be underfunded relative to the need for their services,¹²⁴ and the private bar has largely failed to fill the remaining gap via volunteering or donating money,¹²⁵ compelling private attorneys to take cases may be one of the few solutions that can provide indigent parties with legal representation. Furthermore, inherent authority is a very ambiguous power¹²⁶ and therefore may be used to fill interstitial gaps that other legal aid programs may not be able to fill. After all, legal aid organizations are typically funded to only provide assistance in certain areas of law, and even within those areas, they cannot take every potential client, and often must remain selective when taking clients.¹²⁷ These external and internal policies on selecting clients can leave certain pro se parties without any viable option for representation, regardless of their need.

Naranjo provides a perfect example of such a situation—the district court contacted legal aid organizations, like the Texas Civil Rights Project, but none could—or would—accept *Naranjo* as a client.¹²⁸ Exercising the inherent authority of the court to appoint

123. *Naranjo*, 809 F.3d at 803 (quoting *Bounds v. Smith*, 430 U.S. 817, 826 (1977)).

124. LEGAL SERVS. CORP., *supra* note 1; *see also* *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1229 (D. Neb. 1995) (describing historical cuts in funding for legal aid organizations).

125. *See* SUPPORTING JUSTICE, *supra* note 4, at 6 (summarizing how almost half of all attorneys surveyed did no pro bono work in the last year).

126. Inherent authority has been referred to as “nebulous” with “shadowy” bounds. *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (quoting Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 485 (1958)).

127. *See generally*, Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) (discussing the ethics of how legal services should prioritize clients when they cannot serve all potential clients); Cramton, *supra* note 3, at 590–91 (considering ways in which lawyers triage cases when demand for services is too high).

128. *Naranjo v. Thompson*, 809 F.3d 793, 798 (5th Cir. 2015). Texas in particular has a problem with access to legal aid attorneys. It ranks 47 out of all 40 states, the District of Columbia and Puerto Rico for access to civil legal aid attorneys, and only has 0.30 legal aid attorneys for every 10,000 Texans living in poverty. The Justice Index, Number of Attorneys for People in Poverty, <https://justiceindex.org/2016-findings/attorney-access/> [<https://perma.cc/MG8P-JZTJ>].

counsel became the only way to provide counsel to Naranjo, a deserving pro se plaintiff with a meritorious case. Unlike other external programs for providing counsel to indigent parties, a court's option to use inherent authority does not depend on the generosity of private lawyers, access to funding, or the political popularity of the case.

Similarly, the use of inherent authority to compel representation may alleviate some supply and demand problems that alternative solutions may face. First, there is not an even distribution of lawyers across the country. While plaintiffs in large cities like New York may find more lawyers to contact, those in rural areas are at a disadvantage.¹²⁹ In Naranjo's case, the court only contacted ten lawyers because there were a total of ten lawyers practicing in either the town of Pecos or in Reeves County.¹³⁰ Compounding this, past studies have found that fewer than 40% of Texan lawyers participate in voluntary pro bono at all.¹³¹ Fewer attorneys than that may be available to provide pro bono assistance in less populated areas of Texas, like Pecos and Reeves. But even if 100% of lawyers met the fifty-hour aspirational pro bono goal set by the Texas Bar,¹³² the ten lawyers available in a smaller town would be likely to rapidly hit that limit and may refuse to serve additional pro bono clients, to say nothing of the potential for conflicts of interest.

In addition, private lawyers are often inaccessible for indigent plaintiffs. Most low-income Americans do not think to approach lawyers with many of their legal problems; LSC found that low-income Americans only seek professional help for 20% percent of their civil legal problems.¹³³ One of the top-cited reasons for not seeking help is not knowing where to look for it.¹³⁴ It is no surprise that low-income Americans do not know where to seek help, as most do not interact

129. Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. Rev. 466, 468 (2014).

130. *Naranjo*, 809 F.3d at 798.

131. See STATE BAR OF TEXAS, 2017 TEXAS ATTORNEY SURVEY: PRO BONO REPORT, SEPTEMBER 2018, https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=43251, [https://perma.cc/YR74-W4CE].

132. See STATE BAR OF TEXAS BOARD OF DIRECTORS, PRO BONO POLICY, SEPT. 22, 2000, <https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoResolution.pdf> [https://perma.cc/PB79-QDXN].

133. Legal Services Corporation, *supra* note 1.

134. *Id.*

with lawyers on a regular basis.¹³⁵ Most private lawyers work for wealthier individuals and businesses, and fewer than one percent of lawyers represent poor people full-time.¹³⁶ Therefore, many indigent plaintiffs may find it hard to find a lawyer who will take their case without help from a court.

The opportunity for the lawyer to be paid through a contingency fee does not alleviate the issue, at least for the types of cases where need exists.¹³⁷ Individual lawsuits usually only recover small amounts relative to their costs.¹³⁸ Lawyers typically do not take cases on contingency basis that are likely to recover less than the costs required to bring the case, leaving the potential plaintiffs in these cases in limbo.¹³⁹ Class actions, then, become the major source of legal representation, outside of direct legal services, for low-income Americans.¹⁴⁰ Class action litigation can provide remedies in situations low-income plaintiffs commonly face, such as predatory lending, excessive student loans, and abusive workplace practices.¹⁴¹ However, the use of class action litigation to vindicate the rights of low-income Americans has declined in recent years as more consumer financial and employment contracts include arbitration clauses and class action bans.¹⁴² Further, any remedy may come too late for a given plaintiff. Overall then, as opportunities for class action suits decrease, so do opportunities for many low-income Americans to obtain representation for some of their more pressing legal issues.

The struggle to access the limited supply of lawyers is only exacerbated for incarcerated plaintiffs. The free market system for indigent plaintiffs, which Judge Richard Posner has advocated for, where private attorneys will take meritorious cases on a contingency basis,¹⁴³ falls apart when faced with prisoners' limited abilities to

135. See Cramton, *supra* note 3, at 541.

136. *Id.* at 543–44.

137. For instance, compare personal injury cases against cases where a landlord has failed to make necessary repairs.

138. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1535 (2016).

139. *Id.* at 1554 & n.119 (discussing the significance of class actions in attracting counsel to represent clients on a contingent basis).

140. *Id.* at 1535–36.

141. *Id.* at 1540–41, 1545.

142. *Id.* at 1553–54, 1555–56.

143. See *Hughes v. Joliet Corr. Ctr.*, 931 F.2d 425, 429–30 (7th Cir. 1991); *Merritt v. Faulkner*, 823 F.2d 1150, 1155 (7th Cir. 1987) (Posner, J., concurring); *McKeever v. Israel*, 689 F.2d 1315, 1323–25 (7th Cir. 1982) (Posner, J., dissenting).

obtain representation. Inmates typically receive low damages due to legislation like the Prison Litigation Reform Act.¹⁴⁴ Even when their claims are successful, they can only recover a limited amount of damages for attorneys' fees.¹⁴⁵ Ethical limits on contingency fees discourage attorneys from litigating inmates' cases that will only produce measly rewards.¹⁴⁶

Even if lawyers were willing to take on such cases pro bono, the odds that an inmate could contact those lawyers and successfully convince them to take his or her case are low. Inmates often face limits on sending mail, accessing telephones, and the number of lawyers with whom they can keep confidential contact.¹⁴⁷ Realistically, an inmate can only ask a small number of lawyers for assistance. Because such requests cannot be made in person and inmates frequently lack the legal knowledge and literacy skills to fully convey their case, it can often be hard for inmates to convince a lawyer to take their case.¹⁴⁸ Without additional help, many incarcerated pro se plaintiffs with viable cases may be unable to obtain counsel. However, a court does not face the same problems in contacting and obtaining counsel for an incarcerated pro se party with a meritorious case.

B. Potential Obstacles to *Naranjo's* Usefulness

1. Precedential and Constitutional Problems

The most immediate obstacle to using inherent authority to appoint counsel is that there is no clear precedent for doing so outside of *Naranjo*. Since the Supreme Court declined to address the issue of inherent authority with regards to appointing counsel in *Mallard* in 1989,¹⁴⁹ the Court has not elaborated at all on the topic. Only the two previously noted lower-court decisions have analyzed case law on a court's inherent authority to determine whether the court could compel

144. Schlanger, *supra* note 9, at 1622 (explaining how ordinary rules of tort damages limit compensation for inmates because they cannot claim lost wages or medical damage).

145. Branham, *supra* note 9, at 1006; Schlanger, *supra* note 9, at 1654. See also 42 U.S.C. § 1997e(d) (2012) (placing strict limits on attorneys' fees in lawsuits awarded under the Prison Litigation Reform Act).

146. Brown, *supra* note 9, at 1145.

147. *Id.* at 1140–41.

148. *Id.* at 1143.

149. *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 310 (1989).

representation of an indigent plaintiff.¹⁵⁰ In *Colbert v. Rickmon*, the district court judge explicitly stated that courts do not have the power to compel counsel—the very power that the Fifth Circuit, in *Naranjo*, instructed the district court to use.¹⁵¹ In *Bothwell v. Republic Tobacco Co.*, while the magistrate judge acknowledged courts could use inherent powers to appoint counsel, he declined to do so as it was not reasonably necessary in that case.¹⁵² Thus, apart from *Naranjo* itself, there is neither clear law guiding courts to compel representation for indigent parties nor guidance for determining which cases merit doing so.

A recent decision from the District of Idaho illustrates how courts may be skeptical of using inherent authority even in light of *Naranjo*. The court “considered *Naranjo* and found it unpersuasive,” disagreed with *Naranjo*’s reasoning, and “concluded that federal courts do not have the inherent authority to compel an attorney to provide pro bono representation in a civil case.”¹⁵³ Had more cases beyond *Naranjo* exercised inherent powers, maybe the District of Idaho court would have been more amenable to the idea. As it stands, however, courts in other circuits are unlikely to produce decisions similar to *Naranjo* given the dearth of precedent.

In addition, many lawyers will likely claim that mandated pro bono is unconstitutional, similar to the mandated pro bono at issue in *Mallard*. In the past, lawyers have challenged mandated pro bono on various constitutional grounds. Such mandates are frequently challenged under the Fifth Amendment as a taking of attorneys’ property without compensation.¹⁵⁴ Lawyers have also challenged

150. See *Colbert v. Rickmon*, 747 F. Supp. 518 (W.D. Ark. 1990); *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995).

151. *Colbert*, 747 F. Supp. at 527.

152. *Bothwell*, 912 F. Supp. at 1235–36.

153. *Veenstra v. Idaho State Bd. of Corr.*, No. 1:15-cv-00270, 2017 WL 4820353, at *2 (D. Idaho, Oct. 24, 2017).

154. Beth M. Coleman, *The Constitutionality of Compulsory Attorney Service: the Void Left by Mallard*, 68 N.C. L. REV. 575, 584 (1990); David L. Shapiro, *The Enigma of the Lawyer’s Duty to Serve*, 55 N.Y.U. L. REV. 735, 771 (1980). See also *Bedford v. Salt Lake Cty.*, 447 P.2d 193 (Utah 1968) (holding that a statute providing that a court shall appoint counsel to represent an alleged insane person was invalid in absence of compensation); *Dillon v. United States*, 230 F. Supp. 487 (D. Or. 1964) (stating that an order of the court appointing counsel constituted a taking under the Fifth Amendment and, therefore, warranted just compensation), *rev’d*, 346 F.2d 633 (9th Cir. 1965); *Tyler v. Lark*, 472 F.2d 1077 (8th Cir. 1973)

mandated activity as a violation of the Fifth and Fourteenth Amendments' requirement of due process¹⁵⁵ and the Thirteenth Amendment's prohibition of involuntary servitude.¹⁵⁶ If courts were to begin regularly compelling counsel to represent indigent plaintiffs because they could not afford to pay counsel, the courts could face even more expensive lawsuits from compelled attorneys. Both the lack of precedent and potential constitutional challenges could dissuade judges from using their inherent authority as was done in *Naranjo*.

2. Explicit Narrow Applicability

Even without these considerations, a court will likely be very hesitant to exercise its inherent authority and compel representation. In *Naranjo*, the Fifth Circuit explicitly stated that inherent authority “must be used with great restraint and caution.”¹⁵⁷ This admonition echoes modern Supreme Court opinions on inherent powers. The Court has advised restraint in using such powers to appoint attorneys to prosecute contempt actions, noting courts should use “only the least possible power adequate to the end proposed.”¹⁵⁸ In 1980, Justice Powell explained the importance of courts using these powers sparingly, stating “[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”¹⁵⁹ Courts are likely to be especially reluctant to use inherent authority to appoint counsel in civil cases. The Supreme

(denying attorney's request for fees on the grounds that compelling him to represent indigents did not violate his Fifth Amendment rights).

155. Shapiro, *supra* note 154, at 770; *see also* Lathrop v. Donohue, 367 U.S. 820 (1961); Menin v. Menin, 359 N.Y.S.2d 721 (N.Y. Sup. Ct. 1974) (holding that the policy of appointing uncompensated counsel to litigants violates an attorney's constitutional rights under the due process clause of the Fourteenth Amendment).

156. Shapiro, *supra* note 154, at 767–68; *Bedford*, 447 P.2d at 195 (explaining that requiring an attorney to provide services without compensation would “impose a form of involuntary servitude on him”). *Cf. In re Nine Applications for Appointment of Counsel in Title VII Proceedings*, 475 F. Supp. 87 (N.D. Ala. 1979) (stating that the “compulsory rendition of service creates an involuntary servitude”); *Davison v. Joseph Horne & Co.*, 265 F. Supp. 750, 752 (W.D. Pa. 1967) (describing a statute that allows a court to “merely request an attorney to represent indigent persons” but does not “give the court power to compel or coerce and attorney to represent anyone”).

157. *Naranjo v. Thompson*, 809 F.3d 793, 804 (5th Cir. 2015).

158. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 (1987) (citation omitted).

159. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

Court set the precedent for this reluctance in *Lassiter v. Department of Social Services*,¹⁶⁰ finding that counsel would not have made a determinative difference in a hearing to terminate parental rights.¹⁶¹ Since that case, lower courts have been reluctant to require attorney representation in civil cases.¹⁶² At the same time though, judges exercise a great deal of discretion in determining whether to appoint counsel, and some judges may be more likely than others to make such an appointment.¹⁶³ Given this environment, relying on judges to use inherent authority to appoint counsel is likely to result in only a limited number of appointments of counsel and a very haphazard judge-dependent application of *Naranjo*.

As things stand, *Naranjo* may provide a model but not a tool for achieving a sea change in court appointed counsel. It is likely any future decisions that apply *Naranjo* will read it narrowly. The opinion itself suggests a narrow reading is suitable. The court first cautioned that any exercise of inherent powers to appoint counsel must “somehow be indispensable to reaching a disposition of the case”¹⁶⁴ and are only to be used as “a power of last resort.”¹⁶⁵ The court explicitly stated that it “expect[s] that occasions for mandatory appointments will be rare indeed.”¹⁶⁶ According to the Fifth Circuit, there should be few of these appointments because they can only happen when exceptional circumstances are present, and exceptional circumstances “are, by

160. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1981).

161. *Id.*; see also Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1798 (2001) (explaining that “[i]n *Lassiter v. Department of Social Services*, the Supreme Court interpreted the due process clause to require appointment of counsel in civil cases if the proceeding would otherwise prove fundamentally unfair”).

162. Rhode, *supra* note 161, at 1798. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1652 (2d ed. 1988) (“The states are required to subsidize the most basic civil litigation costs of indigents only when: the state has a complete monopoly on resolution of the dispute, a fundamental interest is at stake, and the resulting burden on the state treasury would be light. Because these decisions contain so many escape hatches for a judiciary not particularly familiar with the plight of the dispossessed and understandably hesitant to spend the states’ revenues, the [F]ourteenth [A]mendment provides only modest relief for poor people who seek a day in court.”).

163. Rhode, *supra* note 161, at 1805 (noting that less than 10% of courts surveyed had established policies on when to assist unrepresented parties).

164. *Naranjo v. Thompson*, 809 F.3d 793, 802 (5th Cir. 2015) (citing *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1362 n.20 (5th Cir. 1978)).

165. *Id.* at 804.

166. *Id.*

their very definition, exceptional.”¹⁶⁷ In addition, even where there are exceptional circumstances, inherent powers should not be invoked unless the district court has explored and exhausted all other options for obtaining counsel.¹⁶⁸ More recent Fifth Circuit decisions have cited *Naranjo* for the proposition that inherent powers can only be used in very limited circumstances,¹⁶⁹ illustrating the Fifth Circuit’s intent that *Naranjo* be read narrowly. Thus, courts following *Naranjo* will only use inherent powers to appoint counsel in cases presenting exceptional circumstances.

3. Difficulty of Proving Exceptional Circumstances in the Fifth Circuit

Meeting the “exceptional circumstances standard is no easy matter.”¹⁷⁰ In order to find exceptional circumstances, a court must find, among other factors, that the pro se party is unable to fully understand the case, cannot properly present the case, or cannot properly investigate the case; or that the case requires cross-examination and the pro se party is unable to properly cross-examine a witness.¹⁷¹ A pro se party need not, however, match the abilities of a lawyer to fail to present exceptional circumstances. Courts in the Fifth Circuit have often found that cases did not meet the standard for exceptional circumstances because the pro se parties have shown some modicum of ability to file motions and therefore must have the ability to adequately investigate and present their case.

For instance, in *Margin v. Social Security Administration*,¹⁷² the court stated that, while “every litigant benefits by having an attorney,” the plaintiff bears the burden of demonstrating that they will have a particular difficulty.¹⁷³ The court then proceeded to analyze Margin’s capabilities to represent himself from the limited knowledge it had. The court found:

167. *Id.*

168. *Id.*

169. *See* *United States v. Zimmerman*, 690 F. App’x 215, 216 n.1 (5th Cir. 2017) (finding that inherent powers were not indispensable to reaching the disposition of a case where defendant filed for relief under the inherent powers doctrine when the government did not file an opposition brief).

170. *See supra* Part I.C.1.

171. *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982).

172. Civ. A. No. 08-4605, 2009 WL 3673025 (E.D. La. Oct. 28, 2009).

173. *Id.* at *2.

Margin is 47-years old and has a high school education and one year of college. He is very articulate and had no difficulty presenting the circumstances of his appeal to the undersigned in the context of the telephone hearing. He was capable of filing his complaint and the *in forma pauperis* application. Moreover, the investigation appears to be complete, given that the appeal must be decided on the administrative record. As noted above, no trial is necessary here, as no presentation of evidence will be required. Plaintiff has thus failed to make the requisite showing that he is entitled to appointed counsel in this suit.¹⁷⁴

Thus, because Margin merely managed to file a complaint, the court found he was completely able to present his case and did not require assistance from an actual attorney.¹⁷⁵

The court's analysis in *Margin* is not unusual when courts in the Fifth Circuit determine the presence of exceptional circumstances. In fact, many decisions dismiss the presence of exceptional circumstances with a sentence and far less reasoning than the court provided in *Margin*. For instance, in *Gill v. State of Texas*,¹⁷⁶ the court found Gill's civil rights action was "not complex," that he was "educated and able to adequately present his case," and that "he was not incarcerated or unable to adequately investigate his claims."¹⁷⁷ The court mentioned, just paragraphs before, that Gill thought criminal statutes 18 U.S.C. §§ 241 and 242 provided a basis for civil liability.¹⁷⁸ However, despite not knowing the crucial distinction between criminal and civil law, the court still found Gill competent enough that a lawyer was not required.¹⁷⁹

Other decisions have not even paid attention to the inability of pro se parties to adequately investigate or present cases while incarcerated. For instance, when dismissing a motion for appointment of counsel in a case involving alleged Eighth Amendment violations in a prison, the Fifth Circuit provided no more reasoning than "the record reflects that he is capable of adequately presenting his claims to the

174. *Id.*

175. *Id.*

176. 153 F. App'x 261 (5th Cir. 2005).

177. *Id.* at 263.

178. *Id.* at 262.

179. *Id.* at 263.

court.”¹⁸⁰ No more information was given, so the public is left to guess what skill the plaintiff presented that led the court to find he could adequately present his claims. Presumably the court found him able to present his claim because he had filed a motion.¹⁸¹

Another case explicitly stated that the plaintiff could adequately develop the facts and present his case solely because he managed to file comprehensible motions and support papers with the court.¹⁸² This tendency to equate the ability to present and investigate a case to the filing of motions puts pro se parties in the unenviable position of having to choose between trying to represent themselves adequately in order to win their case and refusing to do so in fear that the court will deem them a sophisticated party.¹⁸³ Of course, pro se parties will have to consider that a court will likely dismiss the case as frivolous unless they try to represent their case well. Accordingly, proving that there are exceptional circumstances in the Fifth Circuit often becomes a catch-22.

Given this framework, *Naranjo* will remain extremely limited in practice. This limitation may be tightened further if courts look to *Naranjo* for guidance regarding when exceptional circumstances exist because the facts in *Naranjo* are particularly outstanding. *Naranjo* could not physically look at or gain access to documents around which the case revolved.¹⁸⁴ Furthermore, the court found that *Naranjo* “was

180. Taylor v. Jagers, 115 F. App'x 682, 684 (5th Cir. 2004).

181. Margin v. Soc. Sec. Admin., Civ. A. No. 08-4605, 2009 WL 3673025 at *1 (E.D. La. Oct. 28, 2009).

182. Jackson v. Dallas Police Dept, 811 F.2d 260, 262 (5th Cir. 1986) (“[T]he record demonstrates that Jackson had done a very credible job in presenting motions and in filing support papers on behalf of his case. Jackson has filed ten different items ranging from his original complaint to the notice of appeal that brought this matter before this court. We are convinced that Jackson can adequately develop the facts and present his case in any further proceedings.”).

183. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 444 (1993) (“Courts commonly assert that because a prisoner is ‘experienced’ or ‘sophisticated’ he should be able to plead his case sufficiently to overcome *sua sponte* dismissal or dismissal as frivolous. Particularly when dealing with repeat prisoner-plaintiffs courts sometimes seem to conclude that because an inmate has filed several previous law suits that this experience means he is sufficiently knowledgeable to draft a viable complaint or proceed without counsel, even if every one of the prior lawsuits was dismissed as frivolous. The fact that a prisoner has done something poorly ten times does not logically lead to the conclusion that he will perform the task competently on his eleventh try.”).

184. Naranjo v. Thompson, 809 F.3d 793, 798 (5th Cir. 2015).

essentially a spectator at the evidentiary hearing” because he had the foresight to repeatedly state that he had nothing to add because he was not a lawyer and could not participate.¹⁸⁵ Unlike *Naranjo*, many litigants in his position may still attempt to participate out of a desire to try and win their case. If all appointment cases are compared to *Naranjo*, many may no longer pass muster for exceptional circumstances, as the facts of *Naranjo* are hard to replicate.

However, *Naranjo* does not necessitate a higher standard for exceptional circumstances. While the court stated that basic competency can be enough to foreclose the possibility of exceptional circumstances, it noted that the record “also disclose[d] quite a few mishaps and wire-crossings resulting from Naranjo’s inexpert motions practice.”¹⁸⁶ In contrast to courts that found no exceptional circumstances simply because motions were filed, *Naranjo* suggests that a court may look further into the quality of the motions and whether they were cohesive. This interpretation may mean that plaintiffs could act in their best interest and file motions on their behalf without the risk of being found competent solely for filing a motion. However, it is unclear whether there would have to be some mishap, like a late motion. This would also depend on the depth of a court’s review of potential exceptional circumstances; if a court gives a one-sentence afterthought regarding appointing counsel, the option to engage in a more extensive inquiry on the litigant’s competency may have no practical effect.

C. Judicial Interpretation of *Naranjo*

Though the circumstances of *Naranjo* and the narrow nature of its holding suggest a limited future application, it is still uncertain how courts in the Fifth Circuit will apply *Naranjo* and whether *Naranjo* will increase the number of court-appointed lawyers. As of February 2019, there were only thirty-three reported cases that cite *Naranjo*, and few of these discuss at any length appointment of counsel under *Naranjo*.¹⁸⁷ None of these cases involve the actual appointment of lawyers. The cases that do discuss exceptional circumstances calling for appointment of counsel under *Naranjo* provide differing results.

185. *Id.* at 801.

186. *Id.* at 800–01.

187. See Appendix A for a list of all thirty-three cases.

Some cases did not find exceptional circumstances, perhaps because the court has set a high bar for exceptionality. For example, in a case arising in the Western District of Texas, *Hawbecker v. Hall*,¹⁸⁸ Judge Lamberth found that, unlike in *Naranjo*, there was no evidence that the indigent defendant needed representation in order to respond to evidence.¹⁸⁹ Hawbecker had sued Hall for libel and defamation, and Hall moved for appointment of counsel, stating that she was out of state and unable to review evidence in the trial and, therefore, unable to fully participate without a lawyer.¹⁹⁰ Judge Lamberth compared the case to *Naranjo*, and stated that counsel was found necessary in *Naranjo* because of “the security sensitive nature” of the sealed documents that Naranjo could not access.¹⁹¹ Meanwhile, even though Hall could not travel to Texas and participate in trial, Hall could still technically see and respond to the evidence.¹⁹² Judge Lamberth’s interpretation would thus further limit what qualifies as an exceptional circumstance and require “exceptional circumstances” to align more directly with the facts of *Naranjo*. While Hall could not afford to travel to Texas and see the evidence, and thus was practically prevented from seeing the evidence, the court still found she could adequately represent herself enough for a fair hearing.¹⁹³

Other cases have not set as high of a bar for exceptional circumstances, but have still required certain facts, like an inability to represent oneself, before mandating representation. In a Southern District of Texas case, *Dunn v. Davidson*, Judge Atlas found exceptional circumstances present.¹⁹⁴ She noted that Dunn “ha[d] done an admirable job representing himself,” but because the evidence consisted of conflicting testimony, he would need aid from a lawyer who could cross-examine witnesses.¹⁹⁵ This may suggest that courts will not read *Naranjo* to require especially exceptional facts, and that simply the inability to advocate for oneself as well as a lawyer would advocate may still suffice. However, the need to cross-examine may be viewed

188. *Hawbecker v. Hall*, No. 5:14-cv-1010-RCL, 2017 WL 384382 (W.D. Tex. Jan. 25, 2017).

189. *Id.* at *2.

190. *Id.* at *1–2.

191. *Id.* at *2.

192. *Id.*

193. *Hawbecker*, 2017 WL 384382, at *2.

194. *Dunn v. Davidson*, No. H–15–3767, 2017 WL 514587, at *5 (S.D. Tex. Feb. 8, 2017).

195. *Id.*

as outside the ambit of basic competency and as a more significant indicator of exceptional circumstances. Furthermore, the *Dunn* court took particular notice of the fact that prison officials had confiscated Dunn's legal materials, limiting his ability to educate and advocate for himself.¹⁹⁶ Thus, even if this case takes a potentially broader view of exceptional circumstances than *Hawbecker* did, it could still serve to limit *Naranjo*'s ruling to cases in which indigent parties are disadvantaged in a tangible way, like if legal materials are stolen or there is sealed evidence.

III. EVALUATING *NARANJO* AS A SOLUTION

Regardless of whether district courts take the approach applied in *Hawbecker* or *Dunn*, *Naranjo* provides an important pathway for district courts in the presence of exceptional circumstances to appoint lawyers in the interstitial cases where other options have failed. *Naranjo* can supplement other methods of providing counsel for indigent parties, and this section argues that the benefits of using *Naranjo* far outweigh the potential problems. *Naranjo* could also reach beyond the interstitial cases if its recognition of inherent authority were combined with a more forgiving standard than the Fifth Circuit's current standard of exceptional circumstances.

A. *Naranjo* Could Help Bridge the Justice Gap

If adopted in conjunction with, rather than in the place of, other methods of providing legal aid to indigent parties, *Naranjo* can help ensure counsel is provided in more cases with indigent plaintiffs. Given the Fifth Circuit's caution to use inherent powers sparingly and the limited applicability of exceptional circumstances, *Naranjo* will not lead to a sudden surge in court-appointed counsel. Thus, it is still important to encourage private attorneys to volunteer their services and to fund legal aid organizations, like LSC and the Volunteer Lawyers Project. However, while the actual effect may be relatively small, the solution *Naranjo* presents may help solve problems faced by other solutions to the justice gap—mainly the ability to fill other programs' gaps in coverage and the inability of prisoners to access legal aid. Several possible ways courts can utilize *Naranjo* are discussed below.

196. *Id.* at *4–5.

1. Using *Naranjo*, Courts Could Supplement Other Programs in Providing Legal Representation

There is a high demand for low-income legal services in this country, and a large number of those seeking legal aid will not be able to receive it from the traditional routes used for obtaining free or reduced legal services.¹⁹⁷ Neither private attorneys nor legal organizations can provide aid for all indigent parties. While the American Bar Association and many state bar associations encourage private lawyers to engage in pro bono work or donate money to pro bono services,¹⁹⁸ these are only aspirational goals. Attorneys donate time and money to pro bono services, but not nearly at the rate that these bar associations encourage.¹⁹⁹ In addition, ethical rules requiring lawyers to accept judicial appointments sans judicial compulsion²⁰⁰ have not been adopted in all states.²⁰¹ Those states that have adopted such a rule allow an exception for good cause,²⁰² and good cause often encompasses a situation in which “representing the client is likely to result in an unreasonable financial burden on the lawyer.”²⁰³

197. See *supra* Part II.A.

198. See MODEL RULES OF PROF'L CONDUCT r. 6.1 (Am. Bar Ass'n 2018) (“A lawyer should aspire to render at least 50 hours of pro bono public legal services per year.”); State Bar of Texas Board of Directors, Pro Bono Resolution, Sept. 22, 2000, <https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoResolution.pdf> [<https://perma.cc/PB79-QDXN>] (“[E]ach Texas attorney should aspire to render at least 50 hours to legal services to the poor each year, or make an equivalent financial contribution to an organization that provides legal services to the poor.”).

199. One study found that only 15–18% of Texas attorneys participated in pro bono work. New York, with the highest rates of pro bono participation, still had rates below 50%. This study also found that private lawyers were not substantially more generous with their money—average donations from lawyers to legal services ranged from \$82 per year in New York to \$32 per year in Florida. Rhode, *supra* note 161, at 1809–10.

200. MODEL RULES OF PROF'L CONDUCT r. 6.2 (Am. Bar Ass'n 2018) (“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause”); TEX. BAR DISCIPLINARY RULES FOR PROF'L CONDUCT r. 6.01 (2018) (“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause”).

201. Kentucky, New York, North Carolina, and Oregon, for instance, have not adopted Rule 6.2 of the ABA rules. *Variations of the ABA Model Rules of Professional Conduct, Rule 6.2: Accepting Appointments*, AM. BAR ASS'N (2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_2.authcheckdam.pdf [<https://perma.cc/PJR6-YUW6>].

202. *Id.*

203. MODEL RULES OF PROF'L CONDUCT r. 6.2(b) (Am. Bar. Ass'n 2018).

These rules presume a perfect world in which there are enough lawyers to take every case a court finds deserving of counsel. As demonstrated by the circumstances in *Naranjo*, this is not the case, and there is often a small pool of attorneys who can take a case. Lawyers cannot take an unlimited number of cases, so when the pool of attorneys is small, fewer judicial appointments can be accepted. *Naranjo* illustrates this problem; the court in *Naranjo* attempted to appoint counsel, but quickly found appointing a lawyer was impossible “[g]iven the remote location of Pecos, Texas and its dearth of legal representation.”²⁰⁴ The court had reached out to all seven licensed attorneys practicing in Pecos, as well as the three lawyers admitted in the Western District practicing in the county, but was unable to find counsel without resorting to compelling representation.²⁰⁵

Legal aid organizations suffer from similar budgetary problems, as well as other restrictions on the subject matter of cases they can take. According to their 2017 report, LSC estimated that, in 2017, LSC-funded organizations would receive requests to help in 1.7 million legal problems, but would not be able to help or would only be able to provide limited help in an estimated 1.1 million of those cases.²⁰⁶ LSC cited a lack of available resources as an explanation for 85–97% of the cases its funding recipients turned away.²⁰⁷ State operated legal aid organizations face the same problems.²⁰⁸ A large number of low-income individuals are therefore left with no aid from attorneys.

Furthermore, these gaps in coverage from legal aid services are exacerbated by congressionally- or internally-imposed rules dictating how such services spend their limited resources. LSC-funded organizations comprise roughly one-quarter of all civil legal aid providers, but LSC-funded programs can only take clients earning up to 125% of the federal poverty line.²⁰⁹ This bright line rule on financial

204. *Naranjo v. Thompson*, 809 F.3d 793, 798 (5th Cir. 2015) (alteration in original) (citation omitted).

205. *Id.*

206. Legal Services Corporation, *supra* note 1.

207. *Id.*

208. For example, while 20% of Idahoans are eligible for civil legal aid, funding restrictions mean that there are fewer than 20 legal aid attorneys in the state. Jodi Nafzger, *Bridging the Justice Gap: Judicial Promotion of Pro Bono*, 59 *ADVOCATE* 26, 26 (2016).

209. U.S. Dep’t of Justice, Civil Legal Aid 101, <https://www.justice.gov/sites/default/files/atj/legacy/2014/04/16/civil-legal-aid-101.pdf> [<https://perma.cc/V3XC-N5QP>].

eligibility means that unless they qualify for assistance under another funding source, then they cannot receive the only type of legal aid they may have been able to afford. Organizations may also impose other rules limiting the subject matter of cases they take.²¹⁰ Such internal restrictions are apart from external restrictions imposed onto the use of funds or the recipient of funds as a whole. For example, LSC prohibits organizations they fund from assisting in a large range of legal services including voter assistance and voter registration, habeas corpus actions, abortion cases, organizing labor or political activities, and proceedings about desegregation.²¹¹ Congress has also banned LSC-funded organizations from aiding non-U.S. citizens, those evicted from public housing because they face criminal drug charges, prisoners, and class actions.²¹² Other legal aid groups that do not have such restrictions may assist individuals facing these problems, but if indigent parties cannot find a willing and able legal aid organization, then they rarely have another accessible option for counsel.

Courts could utilize *Naranjo* to help fill those gaps left by private attorneys and legal aid services. Of course, courts will not appoint counsel for all 1.1 million low-income Americans that were turned away by LSC-funded organizations. As the Fifth Circuit stated, the court's inherent authority should only be used as a "last resort."²¹³ However, in the exceptional cases in which a court determines a pro se party has a case that particularly deserves counsel, as was the case with *Naranjo*, the court would have a viable option for getting that party counsel, aside from just hoping that a private attorney or legal aid organization has spare time. Since *Naranjo* charges courts with exhausting other options before using inherent powers,²¹⁴ this solution works best in tandem with other opportunities for providing representation for indigent parties.

2. *Naranjo* May be Especially Beneficial for Prisoners

Naranjo may be particularly adept at addressing the gap in legal representation for prisoners. Pro se prison litigants tend to make

210. See Tremblay, *supra* note 127, at 2492.

211. *About Statutory Restrictions on LSC-funded Programs*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs> [https://perma.cc/QTU4-S86K].

212. *Id.*

213. *Naranjo v. Thompson*, 809 F.3d 793, 804 (5th Cir. 2015).

214. *Id.*

up a large proportion of the pro se cases filed in federal courts. In part, this is due to the frequency with which prisoners file suits. One study, for instance, found that filings by prison litigants comprised almost 17% of all new civil rights filings in federal courts over the course of a year.²¹⁵ In addition, there are often fewer legal resources available to prison plaintiffs. LSC, for example, forbids all organizations it funds from aiding prisoners in civil suits.²¹⁶ Other smaller, independent legal aid programs may aid prisoners, but many do not.²¹⁷ Even if there are available programs offering aid to prisoners, prisoners may not be aware of these options.²¹⁸

As a consequence, private attorneys are the main source of assistance for prisoners filing civil suits.²¹⁹ However, federal limits on the damages prisoners may receive discourage many private attorneys from taking prisoners' civil suits on a contingency fee basis.²²⁰ There are also a limited number of attorneys willing to take cases on a pro bono basis,²²¹ and even fewer attorneys who can take pro bono cases in the rural areas where prisons tend to be located.²²² On top of a limited supply of lawyers, prison rules often make it impossible for inmates to

215. Eisenberg, *supra* note 183, at 419.

216. Legal Services Corporation, Representation of Prisoners, 45 C.F.R. § 1637.1 (1997) ("This part is intended to ensure that recipients do not participate in any civil litigation on behalf of persons incarcerated in Federal, State or local prisons.").

217. Prisoners' Rights Project, LEGAL AID SOCIETY, <http://www.legal-aid.org/en/lawreform/lawreform/prisonersrightsproject.aspx> [<https://perma.cc/B5QF-TLJX>]; PRISONERS' LEGAL SERVS. OF N.Y., <https://www.plsny.org/> [<https://perma.cc/GC4Y-CQ5J>]; *Incarcerated Mothers Law Project*, VOLUNTEERS OF LEGAL SERV., <http://www.volspobono.org/projects/incarcerated-mothers-law-project> [<https://perma.cc/7FTL-28ML>].

218. See Robert J. Rhudy, *Maryland Legal Services Corporation: Promoting Equal Access to Justice*, 7 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 267, 284 (2007) (finding that in Maryland there were over 40 separate public and nonprofit federal and state organizations that funded and provided civil legal assistance and that it was not a managed system that was easy for potential clients to understand, access, and use; the many different office locations and phone numbers alone could serve as a barrier to getting in contact with a program that could help).

219. Eisenberg, *supra* note 183, at 463.

220. Branham, *supra* note 9, at 999; Gerarda Brown, *supra* note 9, at 1144–45; Schlanger, *supra* note 9, at 1656.

221. See *supra* note 125 and accompanying text.

222. See Eisenberg, *supra* note 183, at 459–60, 477. See also *Naranjo*, 809 F.3d at 798 (stating that the district court had contacted all ten lawyers practicing in the area; there were only three lawyers admitted to the Western District and practicing in Reeves, Texas, where the prison was located).

contact multiple lawyers in the hopes of finding one lawyer willing and able to take the case.²²³ With such impediments, it remains unlikely that an incarcerated pro se litigant will, on their own, be able to locate a lawyer willing to take their case.

By providing courts with an option to appoint counsel in cases where no legal assistance could otherwise be found, *Naranjo* provides special aid to prisoners. Since prisoners are likely to run out of options for legal assistance before members of the general low-income population, it is more likely that a court will find both exceptional circumstances and that all other options have been exhausted in cases involving a prisoner. The Fifth Circuit in *Naranjo* stressed the principle of reliable access to attorneys for meritorious cases, and that “[c]ivil rights do not thin out at the city limits.”²²⁴ A prisoner should not be denied assistance solely because no lawyer volunteered to help. Thus, *Naranjo* could potentially have a large impact on some prisoners’ requests for counsel, even if the impact is not widespread.

B. *Naranjo*’s Usefulness Outweighs Potential Problems

Naranjo, of course, is not a flawless solution. Lawyers could foreseeably challenge appointments under *Naranjo* either as illegitimate exercises of inherent authority or as unconstitutional. These challenges would not be frivolous on their face, but the possibility of such challenges should not deter courts from adopting *Naranjo*. As explained below, courts can defeat these challenges, should any arise. Furthermore, any application of *Naranjo* depends on the generosity of the particular judge. This, however, is also a benefit to *Naranjo*, as it is a flexible standard that allows case-by-case determinations of whether a plaintiff requires representation. Finally, regardless of the flaws of this solution, courts should prioritize the provision of counsel in meritorious cases over the fear of legal challenges.

1. Challenges to Inherent Authority

While a party may challenge the use of inherent powers, such a challenge is unlikely to prevail in light of the case law supporting the Fifth Circuit’s holding in *Naranjo*. A challenging party might cite

223. See *supra* notes 144–45 and accompanying text.

224. *Naranjo v. Thompson*, 809 F.3d 793, 805 (5th Cir. 2015).

Colbert v. Rickmon,²²⁵ or a recent District of Idaho case, *Veenstra v. Idaho State Board of Correction*,²²⁶ both of which found that federal courts do not possess such inherent authority to compel attorneys to represent indigent pro se plaintiffs. However, neither of these cases is binding in the Fifth Circuit, or in any other circuit court—regardless of whether that circuit decides to adopt *Naranjo*. The Supreme Court explicitly left open the question of whether courts can use their inherent authority to compel attorneys to represent indigent parties.²²⁷ Until the Supreme Court answers this question, there is no binding authority that prevents the Fifth Circuit or any other circuit from enabling courts to use inherent authority to compel representation. In the meantime, there is ample case law suggesting that inherent powers extend beyond those granted by Article III²²⁸ and encompass the power to mandate attorneys represent indigent clients.²²⁹

2. Constitutional Challenges

A court may also be able to dismiss constitutional challenges. For instance, while a lawyer may claim that forced pro bono violates the Thirteenth Amendment because it is involuntary servitude,²³⁰ the Supreme Court has read the amendment narrowly as applying only to circumstances “akin to African slavery.”²³¹ The Court has stated that

225. 747 F. Supp. 518, 527 (W.D. Ark. 1990) (finding that inherent powers stemmed from Article III, and Article III provides no authority for compelling representation).

226. No. 1:15-cv-00270, 2017 WL 4820353 at *2 (D. Idaho Oct. 24, 2017).

227. *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 310 (1989).

228. *See Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561–62 (3d Cir. 1985).

229. *See Eisenberg, supra* note 183, at 450 (stating that courts have the inherent power both to set the compensation and terms of employment of court workers as well as determine the needs of their own physical space).

230. In *Pollock v. Williams*, 322 U.S. 4, 17 (1944), the Supreme Court held the Thirteenth Amendment was meant “not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.” Some plaintiffs and courts in the 1960s and 1970s used this language to support unsuccessful arguments against mandatory pro bono. *See In re Nine Applications for Appointment of Counsel in Title VII Proceedings*, 475 F. Supp. 87, 88–89 (N.D. Ala. 1979); *Davison v. Joseph Horne & Co.*, 265 F. Supp. 750, 752–53 (W.D. Pa. 1967); *Bedford v. Salt Lake County*, 447 P.2d 193, 194–95 (Utah 1968).

231. *See Butler v. Perry* 240 U.S. 328, 332 (1916); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (stating that it is “difficult to believe that the [Thirteenth] Amendment was intended to abrogate” the common-law innkeeper rule prohibiting discrimination in public accommodations); *Slaughter-House Cases*, 83 U.S. 36, 69 (1872) (noting that the “obvious purpose” of

the Thirteenth Amendment will apply to situations that “might have been a revival of the institution of slavery under a different and less offensive name.”²³² In the past, the Supreme Court has declared that the Thirteenth Amendment did not protect individuals from the draft,²³³ laws requiring every able-bodied man to work on county infrastructure when summoned,²³⁴ or mandated service as a witness.²³⁵ Given that precedent on this amendment has been settled for over a decade, it seems highly unlikely that a court would now invoke the Thirteenth Amendment to protect a lawyer from representing a single client.

Similarly, a court applying *Naranjo* could overcome challenges asserting a denial of due process.²³⁶ When bringing a claim for denial of substantive due process, a court requires narrow tailoring of the government action when a fundamental right is involved.²³⁷ However, when there is no fundamental right involved, the court uses a rational basis standard and only looks at whether there is a “reasonable fit” between the governmental purpose and the means of achieving that purpose.²³⁸ It is not clear whether there is a fundamental interest at play here; while the court has generally been cautious to recognize new fundamental interests,²³⁹ a lawyer bringing a claim can assert that mandated representation violates his right to liberty in seeking employment and that the court has generally sought to protect liberty rights via substantive due process.²⁴⁰

the Thirteenth Amendment “was to forbid all shades and conditions of African slavery”).

232. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897).

233. *See Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

234. *Butler*, 240 U.S. at 330–32.

235. *See Hurtado v. United States*, 410 U.S. 578, 589 n.11 (1973).

236. *See Lathrop v. Donohue*, 367 U.S. 820, 844–45 (1961); *Menin v. Menin*, 359 N.Y.S.2d 721, 723–25 (N.Y. Sup. Ct. 1974).

237. *See Reno v. Flores*, 507 U.S. 292, 301–302 (1993).

238. *See id.* at 305.

239. *See Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (“As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be members of this Court. That history counsels caution and restraint.”) (footnote omitted).

240. The right to “pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons” has generally been recognized as one of the privileges and immunities U.S. citizens possess. *Slaughter-House Cases*, 83 U.S. 36, 39 (1872).

Regardless of whether there is a fundamental interest at stake, courts' applications of *Naranjo* could pass muster when subjected to strict scrutiny. The court's purpose in mandating counsel is compelling, as the court is guaranteeing the fair administration of justice by ensuring both parties are properly represented.²⁴¹ While the lawyer may have a liberty right at stake, her client also has an established right of access to court.²⁴² A court has a compelling interest in allowing a fair trial for the indigent plaintiff and preventing unfair proceedings with uneven representation. This solution is also narrowly tailored. *Naranjo* does not call for all lawyers to be conscripted into mandatory pro bono. Instead, the Fifth Circuit cautions great restraint in applying *Naranjo* and encourages exercising all other options prior to using *Naranjo* to appoint counsel.²⁴³ As any mandated representation is only a last resort, *Naranjo* is narrowly tailored to the government interest of ensuring fair proceedings. Thus, any instance of compelled representation could overcome the strict scrutiny standard in a due process challenge.

Finally, a court applying *Naranjo* could defeat a Fifth Amendment Takings Clause claim.²⁴⁴ Generally, services have not been considered property protected by the Fifth Amendment; the Supreme Court has found that the "Fifth Amendment does not require that the government pay for the performance of a public duty it is already owed."²⁴⁵ According to the Court, the public duties owed to the government included the representation of an indigent plaintiff by a court-appointed attorney.²⁴⁶ Thus, the very rare mandated appointment under *Naranjo* will not rise to the level of taking from the

241. Courts have a duty to ensure the proper administration of justice. See *Naranjo v. Thompson*, 809 F.3d 793, 803 (5th Cir. 2015).

242. See *Corfield v. Coryell*, 6 F. Cas. 546, 552 (E.D. Pa. 1823); *Slaughter-House Cases*, 83 U.S. at 39.

243. *Naranjo*, 809 F.3d at 804.

244. See *Bedford v. Salt Lake Cty.*, 447 P.2d 193, 194–95 (Utah 1968); *Dillon v. United States*, 230 F. Supp. 487, 491–93 (D. Ore. 1964), *rev'd*, 346 F.2d 633 (9th Cir. 1965); *Tyler v. Lark*, 472 F.2d 1077, 1080 (8th Cir. 1973).

245. See *Hurtado v. United States*, 410 U.S. 578, 588 (1973).

246. *Id.* at 589 (citing *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965)).

attorney. Instead, it is a public duty that the attorney owes the state²⁴⁷ after receiving the governmental benefit of a license to practice law.²⁴⁸

3. Dependence on Judicial Discretion

As can be seen in the different results in *Hawbecker* and *Dunn*, *Naranjo*'s usefulness is constrained by the discretion of the judges applying it. Some judges are more generous than others and may be more likely to use the court's inherent power to compel representation.²⁴⁹ This may lead to an uneven application of *Naranjo*, as judges like Judge Lamberth cabin its applicability, and others apply it more freely. However, this is, in essence, the benefit of *Naranjo*.

Unlike the LSC,²⁵⁰ *Naranjo* does not depend on a congressional statute or the political popularity of funding representation of indigent parties. The benefit to *Naranjo* is that it is flexible and can be applied to those plaintiffs who are unable to receive aid from other sources. *Naranjo* relies on a discretionary determination that a particular case merits counsel where none would otherwise be provided. By definition, judicial discretion involves varying results because individual judges make varying decisions, but that is an inherent feature of the

247. The idea that a federal court can compel representation from attorneys of the state bar may raise questions of federalism. However, commandeering doctrine has largely focused on commandeering state *executive* officials and has generally made an exception for the judiciary. See *New York v. United States*, 505 U.S. 144, 179 (1992) (“[T]he power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.”); *Printz v. United States*, 521 U.S. 898, 907 (1997) (stating that there is no federalism issue in requiring state courts to enforce federal laws and it was accepted that “laws which operated elsewhere created obligations in justice that courts of the forum State would enforce”). The exception for obligations imposed on state courts may extend to obligations imposed on the state bar in general. However, if a challenge on the grounds of federalism arose in this case, federal courts could limit themselves to mandating representation by lawyers who are members of the federal bar, as opposed to the state bar.

248. See MODEL RULES OF PROF'L CONDUCT r. 6.2 (AM. BAR ASS'N 1983) (“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause.”).

249. See Rhode, *supra* note 161, at 1805–06. According to Rhode, less than 10% of judges have established policy on assisting unrepresented parties. Additionally, while some judges are more likely to assist unrepresented parties, others refrain from doing so in order to discourage more individuals from filing suit without representation or due to a fear that assisting these parties would compromise their impartiality.

250. See Zahorsky, *supra* note 6, at 197–03, and accompanying text.

American judicial system. A court should not decline to adopt or apply *Naranjo* solely because there may be uneven outcomes between indigent individuals. The outcome cannot be more uneven than when a person is before the court pro se and facing a well-represented adversary. Thus, a court should not deny parties with more generous judges access to counsel simply because other indigent parties have less generous judges.

4. The Importance of Ensuring Justice in Applying *Naranjo*

No solution to the justice gap is without obstacles, and embracing *Naranjo* is no different. Yet, courts should still apply *Naranjo* because their focus should be on ensuring truly adversarial proceedings, rather than potential challenges. Courts have a duty to provide the “proper administration of justice” and the Fifth Circuit instructs courts that they may use inherent powers when necessary to provide that proper administration.²⁵¹ Administering justice in U.S. courts has long included the adversarial system, in which two relatively evenly-matched parties can confront one another and ultimately discover the truth.²⁵² When a party is so disadvantaged that the proceedings can no longer be called adversarial, a court has a duty to provide counsel so the hearing can be adversarial and justice can be properly administered.²⁵³ A court should not be cowed by the possibility of a lawsuit when it decides how to best guarantee that justice is served. Potential challenges should not deter a court from adopting and applying the holding of *Naranjo*.

251. *Naranjo v. Thompson*, 809 F.3d 793, 803 (5th Cir. 2015).

252. In the case of *Penson v. Ohio*, the Supreme Court stated that “The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is ‘best discovered by powerful statements on both sides of the question.’” 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J., 569, 569 (1975)).

253. *Naranjo*, 809 F.3d at 803 (finding that courts have the inherent power to compel attorneys to represent indigent civil rights plaintiffs “when an indigent plaintiff has colorable claims that will not receive a meaningful hearing without counsel (i.e. exceptional circumstances exist) and when all other options for making an appointment have failed.”).

C. *Naranjo* May be More Effective at Supplying Legal Representation to Indigent Parties if the Fifth Circuit Rejects the Exceptional Circumstances Test

One of the obstacles to *Naranjo*'s utility could, however, be minimized. *Naranjo* is, of course, only intended to be applied in a narrow subset of cases,²⁵⁴ but by easing the standards for exceptional circumstances, this narrow subset of cases could encompass more meritorious cases that deserve representation under the power of inherent authority embodied by *Naranjo*.

Other circuits have declined to adopt the exceptional circumstances test. The Third Circuit, for instance, refused to limit appointments under § 1915(d) to a certain set of cases.²⁵⁵ Instead of a rigid test, the Third Circuit outlined considerations a court should make when determining whether to appoint counsel. As a threshold matter, courts must consider the merits of the plaintiff's claims. If not frivolous, courts should take into account the plaintiff's ability to present his case, the difficulty of the particular legal issues, whether the case will require skills in cross examination or testimony from experts, and any practical restraints on appointing counsel (like the lack of funding to do so).²⁵⁶ This standard, while more lenient, still closely mirrors the Fifth Circuit's "exceptional circumstances" test. Both circuits require courts to consider the complexity of the legal issues,²⁵⁷ and further require consideration of the plaintiff's ability to present and investigate the case adequately,²⁵⁸ as well as a consideration of whether the case will involve cross-examination.²⁵⁹ The Third Circuit requires consideration of merit as a threshold matter,²⁶⁰ while the Fifth Circuit allows courts to consider whether a

254. *Id.* at 804 ("We expect that occasions for mandatory appointments will be rare indeed.").

255. *Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993) ("Nothing in this clear language [of § 1915(d)] suggests that appointment is permissible only in some limited set of circumstances. Nor have we found any indication in the legislative history of the provision to support such a limitation. Accordingly, we conclude that the magistrate judge erred as a matter of law in stating that he had no discretion to appoint counsel in the absence of 'exceptional circumstances.'").

256. *Id.* at 155–57.

257. *See Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1892); *Tabron*, 6 F.3d at 156.

258. *Ulmer*, 691 F.2d at 213; *Tabron*, 6 F.3d at 156.

259. *Ulmer*, 691 F.2d at 213; *Tabron*, 6 F.3d at 156.

260. *Tabron*, 6 F.3d at 155.

lawyer would decline to take a case because it is meritless.²⁶¹ As these factors are substantially similar to those that the Fifth Circuit already uses, it would not be a major upset for the Fifth Circuit to adopt the Third Circuit's approach.

The key difference with the Third Circuit's approach is that their approach is more forgiving to indigent parties and stresses a more individualized analysis. It does not hinge on the talismanic phrase "exceptional circumstances," which may persuade a judge that counsel can only be granted on the rarest occasions.²⁶² Instead, the Third Circuit emphasizes a more holistic appraisal of the pro se party's situation in *Tabron*. Unlike the perfunctory findings the Fifth Circuit makes in deeming a plaintiff is competent,²⁶³ the Third Circuit instructs courts evaluating the abilities of a party to "consider the plaintiff's education, literacy, prior work experience, and prior litigation experience" as well as the plaintiff's ability to understand English and whether the plaintiff is constrained in any way because of their status as a prisoner.²⁶⁴

In practice, it appears that circuits applying the latter test do so in a far more individualized and inquisitive manner than circuits applying the former. Take, for example, the Seventh Circuit's application of the same test used by the Third Circuit. In various cases, the Seventh Circuit has suggested counsel may be appointed when the court is presented with evidence that the indigent party lacked understanding of the law or procedural matters, even when these matters were not complex.²⁶⁵ In contrast, the Fifth Circuit has only

261. See *Naranjo v. Thompson*, 809 F.3d 793, 805–06 (5th Cir. 2015) (citing *Bradshaw v. U.S. Dist. Court for the S. Dist. of Cal.*, 742 F.2d 515, 516–18 (9th Cir. 1984)).

262. See *id.* at 804 ("[E]xceptional circumstances warranting appointment of counsel are, by their very definition, exceptional.").

263. See *Taylor v. Jagers*, 115 F. App'x 682, 684 (5th Cir. 2004) (providing no other reasoning for denying a motion to appoint counsel other than, "because the record reflects that he is capable of adequately presenting his claims to the court").

264. *Tabron*, 6 F.3d at 156.

265. See *Abdul-Wadood v. Duckworth*, 860 F.2d 280, 289 (7th Cir. 1988) (holding that the court should consider appointing counsel, even where the legal and factual issues were not complex, because they "evidently exceeded" the inmate's abilities and the inmate "seemed not to understand that to obtain damages he must specifically allege in his complaint that he is suing [the defendants] in their individual capacities"), *overruled on other grounds by* *Wallace v. Robinson*, 940 F.2d 243 (7th Cir. 1991); *Hughes v. Joliet Corr. Ctr.*, 931 F.2d 425, 429–30 (7th Cir. 1991)

found exceptional circumstances when the facts and legal issues are complex, regardless of the plaintiff's level of understanding.²⁶⁶ Another Seventh Circuit case admonished a district court for confining its discussion of the plaintiff's competence to a "boilerplate" analysis,²⁶⁷ which looked like many of the analyses produced by Fifth Circuit courts.²⁶⁸ According to the Seventh Circuit, courts must analyze the plaintiff's competence to litigate his claims, and the "failure to undertake this necessary inquiry is an abuse of discretion."²⁶⁹ Perfunctory statements are simply not enough, and the Seventh Circuit states that courts must actually engage with the facts of each case before denying counsel.²⁷⁰

If the Fifth Circuit also required more individualized analysis, it might allow more indigent plaintiffs to reap the benefits of *Naranjo*. By requiring courts to consider the facts of a case more holistically, courts may not write off a case as unexceptional based on a few irrelevant facts.²⁷¹ The standard of the Third and Seventh Circuits will not suddenly open the floodgates to more appointments of counsel, and it was not intended to do so.²⁷² The Seventh Circuit, instead, has highlighted the importance of a consistent framework for appointing

(holding that a court could appoint counsel where an inmate was unable to follow the procedures for summary judgment motions).

266. See, e.g., *Moore v. Mabus*, 976 F.2d 268, 272 (5th Cir. 1992) (holding that HIV/AIDS management in prison was a factually complex issue and merited counsel); cf. *Gill v. Texas*, 153 F. App'x 261, 263 (5th Cir. 2005) (holding that plaintiff was competent enough to deal with the issues in the case, despite the plaintiff demonstrably not understanding the process for filing an appeal).

267. *Pruitt v. Mote*, 503 F.3d 647, 660 (7th Cir. 2007).

268. The district court in *Pruitt* wrote three identical orders stating that "neither the legal issues raised in the complaint nor the evidence that might support the plaintiff's claims [is] so complex or intricate that a trained attorney is necessary." *Pruitt*, 503 F.3d at 660. Cf. *Taylor*, 115 F. App'x at 684 (stating only that "[t]he district court did not abuse its discretion in denying Taylor's motion for appointment of counsel because the record reflects that he is capable of adequately presenting his claims to the court.").

269. *Pruitt*, 503 F.3d at 660.

270. *Id.*

271. See *Woods v. Stancil*, No. 1:17-cv-00800, 2017 WL 4248108 at *2 (W.D. La. Sept. 25, 2017) ("While the Court has no specific information regarding Woods's abilities, he has demonstrated that he is capable of drafting a complaint and a motion.").

272. See *Pruitt*, 503 F.3d at 661 (stating that the court is not trying to cause judges to appoint counsel more often, but rather, wants to ensure that "requests for pro bono counsel are resolved according to a consistent framework . . .").

counsel and the need for individualized inquiry.²⁷³ The Fifth Circuit could only benefit from a more consistent application of the test for exceptional circumstances. Adopting a more lenient standard, like that of the Third and Seventh Circuits, could allow a more even application of the exceptional circumstances test, thereby promoting procedural fairness and doing justice, as is the remit of the judiciary.

CONCLUSION

While it is uncertain how future courts will rule, *Naranjo* will likely remain the very limited tool the Fifth Circuit imagined.²⁷⁴ Courts will likely remain hesitant to appoint counsel in most cases. Furthermore, the facts of *Naranjo* are very exceptional, given that *Naranjo* could not access important evidence in the case and *Naranjo* adamantly repeated his inability to participate because he was not a lawyer.²⁷⁵ It seems unlikely that a court will extend the cautious holding in a case with such extreme facts to more pedestrian cases. Thus, *Naranjo* cannot be expected to completely close the justice gap or even provide attorneys in a significant number of cases.

Even if it is a limited tool, *Naranjo* still remains an important holding because it can act as a safeguard and provide representation in exceptional cases. Due to the limited and restrained services available through private attorneys and legal services, obtaining counsel as an indigent plaintiff is not simply a matter of having a meritorious case. There are some particularly dire cases, like Mario *Naranjo*'s, where, when the conventional options fail, indigent parties have no other resources to fall back on. *Naranjo* provides an escape route—in serious cases where no help can be found, the court can provide a lawyer and ensure the adversarial system remains intact. Furthermore, *Naranjo* could potentially provide counsel in more of these cases that fall through the cracks if the Fifth Circuit were to adopt a broader interpretation of exceptional circumstances.

While it has been over three years since the ruling in *Naranjo*, the decision has been cited relatively few times—only thirty-three cases cite it. It will be interesting to see how, if at all, the case law develops and how courts from other jurisdictions treat *Naranjo*. As of publication, only one other jurisdiction has cited *Naranjo*—a court in

273. *Id.*

274. *Naranjo v. Thompson*, 809 F.3d 793, 804 (5th Cir. 2015).

275. *Id.* at 796–97.

the District of Idaho addressed *Naranjo* after prisoner pro se plaintiffs cited it as an authority in their motion for appointment of counsel.²⁷⁶ In *Veenstra v. Idaho State Board of Correction*, the District Court of Idaho decisively rejected *Naranjo*, disagreeing with the Fifth Circuit's reasoning that federal courts have the inherent authority to compel counsel.²⁷⁷ If prisoners and other indigent parties continue to cite *Naranjo* in their motions to appoint counsel, other courts may agree with the District of Idaho and decline to find the courts possess the inherent authority to compel counsel. At the same time, if *Naranjo* continues to arise in various motions to appoint counsel, other courts and circuits may eventually consider accepting *Naranjo*'s ruling, or at least embrace the concept of inherent authority at work in the case. This may, of course, take more exceptional facts than those in *Veenstra*. It took a particularly egregious set of circumstances for the Fifth Circuit to rule that courts had the inherent authority to compel representation, and it may require similarly extreme facts to open the door for other circuits to embrace *Naranjo*.

276. *Veenstra v. Idaho State Bd. of Corr.*, No. 1:15-cv-00270, 2017 WL 4820353, at *2 (D. Idaho Oct. 24, 2017). As of August 2018, an appeal is pending in the Ninth Circuit.

277. *Id.*

APPENDIX A – CASES CITING *NARANJO V. THOMPSON* AS OF FEBRUARY 8, 2019

1. Hood v. Collier, No. 3:18-cv-0295, 2019 WL 212335, at *2 (S.D. Tex., Jan. 16 2019).
2. Garcia v. Davis, No. 7:16-cv-632, 2018 WL 5921018, at *17 (S.D. Tex., Nov. 9, 2018).
3. Kirkland v. Huntington Ingalls Incorporated, No. 1:17-cv-135, 2018 WL 4343410, at *6 (S.D. Miss., Sept. 11, 2018).
4. Williams v. City of Richardson, No. 3:16-cv-2944, 2019 WL 4269088, at *3 (N.D. Tex., Sept. 7, 2018).
5. Staley v. Barnett, No. 3:17-cv-0326 2018 WL3741985, at *6 (S.D. Tex., Aug. 7, 2018).
6. Taylor v. Coller, No. 3:17-cv-0358, 2018 WL 3729571, at *3 (S.D. Tex., Aug. 6, 2018).
7. Byrd v. Lindsey, 736 Fed. App'x 465 (5th Cir. 2018).
8. Mota v. Beacon Bay Asset Management, LLC, No. 3:17-cv-1862, 2018 WL 2427148, at *1 (N.D. Tex., May 30, 2018).
9. Securities and Exchange Commission v. Stanford International Bank, Ltd., No. 3:09-cv-0298, 2018 WL 3738941, at *1 (N.D. Tex., May 10, 2018).
10. Crow v. Mbugua, No. 17-1923, 2018 WL 1135481, at *2 (S.D. Tex., Feb. 26, 2018).
11. Davis v. Maddie, 702 Fed. App'x 230 (5th Cir. 2017).
12. Byrd v. City of Bossier, No. 5:12-1956, 2017 WL 6016518, at *1 (W.D. La., Nov. 16, 2017).
13. Robinson v. Corbett, No. 3:17-cv-2931, 2017 WL 8790956, at *2 (N.D. Tex., Oct. 26, 2017).
14. Veenstra v. Idaho State Bd. of Corr., No. 1:15-cv-00270, 2017 WL 4820353, at *2 (D. Idaho, Oct. 24, 2017).
15. Woods v. Stancil, No. 1:17-cv-00800, 2017 WL 428108, at *2 (W.D. La., Sept. 25, 2017).

16. *United States v. Zimmerman*, 690 Fed. App'x 215 (5th Cir. 2017).
17. *Kruebbe v. Beevers*, 692 Fed. App'x 173 (5th Cir. 2017).
18. *Veenstra v. Idaho State Bd. of Corr.*, No. 1:15-cv-00270, 2017 WL 10777693, at *1 (D. Idaho, May 4, 2017).
19. *Cousin v. St. Tammany Parish*, No. 16-15751, 2017 WL 951952, at *2 (E.D. La., Mar. 10, 2017).
20. *Moore v. Crescent Medical Center*, No. 3:160-cv-3362, 2017 WL 635032, at *1 (N.D. Tex., Feb. 16, 2017).
21. *Dunn v. Davidson*, No. 15-3767, 2017 WL514587, at *5 (S.D. Tex., Feb. 8, 2017).
22. *Hawbecker v. Hall*, No. 5:14-d-1010, 2017 WL 384382, at *2 (W.D. Tex., Jan. 25, 2017).
23. *Capital Income and Growth Fund, LLC v. Franklin*, No. 3:15-cv-1985, 2016 WL 7732237, at *1 (N.D. Tex., Dec. 20, 2016).
24. *Rodriguez v. Wise County Jail, Sheriff Office*, No. 4:16-cv-662, 2016 WL 6905976, at *9 (N.D. Tex., Nov. 22, 2016).
25. *Simmons v. Jackson*, No. 3:15-cv-1700, 2016 WL 5073105, at *2 (E.D. La., Oct. 24, 2016).
26. *Sussman v. Financial Guards, LLC*, No. 15-02373, 2016 WL 5073105, at *2 (E.D. La., Sept. 20, 2016).
27. *Cain v. Stephens*, No. 15-1979, 2016 WL 4494437, at *6 (S.D. Tex., Aug. 26, 2016).
28. *Justice v. Stephens*, No. 15-2845, 2016 WL 3453460, at *4 (S.D. Tex., June 14, 2016).
29. *Craig v. Bolner*, No. 15-815, 2016 WL 3039829, at *3 (M.D. La., May 27, 2016).
30. *Morgan v. Stephens*, No. 15-2833, 2016 WL 10706298, at *1 (S.D. Tex., Jan 20, 2016).
31. *McGee v. Western Express, Inc.*, No. 3:15-cv-3673, 2016 WL 11372246, at *1 (N.D. Tex., Jan. 4, 2016).
32. *Mares v. Warden, F.C.I. Fort Worth, Texas*, No. 4:15-cv-694, 2015 WL 9026486, at *12 (N.D. Tex., Dec. 15, 2015).
33. *Morgan v. Stephens*, No. 15-2833, 2015 WL 13665061, at *2 (S.D. Tex., Dec. 4, 2015).