No. _____

In The

Supreme Court of the United States

LUCIO CELLI,

Petitioner,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION, ANNE BERNARD, RICHARD COLE, GRISMALDY LABOY-WILSON, COURTENAYE JACKSON-CHASE, SUSAN MANDEL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

LUCIO CELLI, *Pro Se*
2743 Seymour Avenue
Bronx, New York 10469
(646) 734-3899

QUESTIONS PRESENTED

Issue: The issue is not Fed. Rul. of Civ. Pro. 8(a); the issue is the plaintiff **was not** allowed to be the "master of the complaint" and his rights under §35 of the Judiciary Act of 1789.

1. Cole did not conduct Lucio's evaluation[1] under 8J of the CBA and the United Federation of Teacher did not process his grievance under 8J. The allegation of Cole's alleged racial animus is intertwined with the CBA and the Taylor Law.

   Hon. Cogan stated (**Appendix D**): The Taylor Law also has nothing to do with this case. Plaintiff was either discriminated against because he is white and/or disabled, or not. That is all there is to this case, and if plaintiff does not stick to the facts showing those claims and those facts only, the case is going to be dismissed. ***See*** Doc. No. 37 in the appendix and at ¶ 7.

   Hon. Cogan stated (**Appendix D**): "(There may be prohibitions in the collective bargaining agreement that prohibit these kinds of actions, but those can only be enforced by the union, and so have nothing to do with plaintiff' s case.)" ***See*** Doc. No. 37 in the appendix and at ¶3.

   Questions: 1) Is Hon. Cogan allowed to be "master of Lucio's complaint"? 2) Can a judge threat a litigant with dismissal if the litigant did not take out the facts (enactment of administrative regulations) and laws that establishes a constitutional

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[1] Mandatory subject of negotiation under the Taylor Law.

QUESTIONS PRESENTED – Continued

claim under the Contract Clause? 3) Does §1981 and Title VII prohibit impairment of contractual obligation? 4) Does §1981 and Title VII prohibit retaliation by not honoring the collective bargaining agreement? 5) Can the Petitioner use state law (such as the Taylor Law) to establish the legal obligation for the collective bargaining agreement under § 1981 and Title VII? 6) Does a state statute and a state's constitution create a property under the 14th Amendment?

2. Hon. Cogan stated: "the law does not prohibit an employer from acting unfairly," when the Respondents enacted administrative regulations to impair their legal obligations in the CBA, the Taylor Law, and New York State's Constitution Article 1, §17, which is a public-sector contract.

   Questions: 1) Does the Contract Clause continue to protect impairments of contracts by enacting administration regulations to avoid legal obligations under the Taylor Law, New York State's Constitution Article 1, §17, and the City of New York's Charter?

3. Lucio cited binding arbitration decisions that were impaired because of administrative regulations. **Example**, Lucio cited serval arbitration decisions that provided the Petitioner with more rights than what is found in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) and Respondent Bernard answered "Oh, we can't speak about that now" when Petitioner was given documents that

QUESTIONS PRESENTED – Continued

did not match what was shown to him or read to him.[2]

Questions: 1) Does a municipally impair their obligation to a binding arbitration clause found in a collective bargaining agreement when an administrative agency enacts a regulation to cause the impairment? 2) Does Contract Clause prohibit impairments of binding arbitration found in public-sector contracts?

4. According to the panel of judges' order, Hon. Cogan was providing Lucio with legal guidance and advice on how to plead facts.

   Questions: May Lucio, as the party, plead and manage his own causes personally or by assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein, as found in §35 of the Judiciary Act of 1789[3]?

5. Legislative History of "§35 of the Judiciary Act of 1789"[4] and case laws related to "Sixth Amendment" speak about a judge appearing bias when the judge provides legal advice and guidance to litigant, like being a litigant's attorney.

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[2] Audio recorded.

[3] Judiciary Act of 1789 and Sixth Amendment were written during the same timeframe.

[4] Debates on the Federal Judiciary: A Documentary History (Vol. I: 1787-1875).

QUESTIONS PRESENTED – Continued

Questions: 1) Does the "Sixth Amendment" and "§35 of the Judiciary Act of 1789" continue to prohibit judges to appear as a litigant's attorney or provide legal guidance or legal advice? 2) Do litigants need to hire an attorney anymore if judges can appear as pro se litigants' attorney?

6. Petitioner has had only one lawsuit in federal court with only appeal in the court of appeals. The Court of Appeals for the Second Circuit has set a standard for sanctions as being someone with 15 lawsuits in district court and in the court of appeals as a person who needs only a warning, which is per curiam.

   Questions: 1) Are per curiam decisions with the standards found in them still needed to be followed by the court? 2) Are sanctions meant to be imposed unevenly?

7. Legislative History of "§35 of the Judiciary Act of 1789"[5] and case laws related to "Sixth Amendment" speak about a judge appearing bias when the judge provides legal advice and guidance to litigant, like being a litigant's attorney.

   Questions: 1) Does the "Sixth Amendment" and "§35 of the Judiciary Act of 1789" continue to prohibit judges to appear as a litigant's attorney or provide legal guidance or legal advice? 2) Do litigant need to hire an attorney anymore if judges can appear as pro se litigants' attorney?

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[5] Debates on the Federal Judiciary: A Documentary History (Vol. I: 1787-1875).

PARTIES TO THE PROCEEDINGS

Respondents are Richard Cole, Anne Bernard, New York City Department of Education, Courtenaye Jackson-Chase[6], Susan Mandel, and Grismaldy Laboy-Wilson.

All parties that do not appear in the caption of the case on the cover page: A list of all parties to proceeding the court whose judgment is the subject of the petition is as follows: subordinates of Courtenaye Jackson-Chase[7], the Panel for Educational Policy, the United Federation of Teachers with their subordinates.[8] ALJ Angela Blassman of NYS PERB.

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[6] Jackson-Chase was a member of the Panel on Education Policy (PEP) and the PEP is the legislative body for the Respondent and it is a quasi-judiciary body, as well.

[7] Marcel Kshensky, Alan Lichtenstein, Pedro Crespo, Susan Mandel, Esq., Patricia Lavin, Grismaldy Laboy-Wilson and Todd Drantch, Esq.

[8] Catherine Battle, Esq. and Susan Sedlmeyer.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

Lucio Celli ("**Petitioner**") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that judges can give legal guidance and advice, like an attorney by ordering the plaintiff what facts to plead. The legal guidance and advice was for the Petitioner not to plead facts that the Department of Education ("**Respondent**") unilaterally enacted administrative regulations that impaired their obligations of a public-sector collective bargaining agreement ("**CBA**"), which the CBA was made and agreed upon by the City of New York ("**City**") and the United Federation of Teachers ("**UFT**") pursuant to New York State's Constitution Article 1, §17 ("**NYS Con.**"), Civil Servant Law Article 14 ("**Taylor Law**"), and the City of New York's Charter ("**Charter**").

OPINIONS BELOW

The opinion of the Court of Appeals for the 2nd Cir. Appendix, App. 1 appears Appendix A to the petition and it is unpublished. The order of the United States District Court for the Eastern District of New York dismissing Petitioner's complaint is found at App. B & C. The district court's legal guidance on **how** to plead facts in Hon. Cogan's view and ordering Petitioner to take of New York State Public Employee Act ("Taylor Law") with UFT and how defendants issued unilateral changes to the CBA or face dismissal App. D.

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Second Circuit entered on November 1, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the Appendix (Pet. App. E).

STATEMENT OF THE CASE

This Petition shows that the United States District Court and the United States Court of Appeals entered decisions in conflict with this Court on matter of giving legal guidance and advice to *pro se* litigants, which contradicts §35 of the Judiciary Act of 1798 and the Sixth Amendment. The legal guidance and advice by the District Court was to take out any administrative regulations enacted by the Respondents to impair legal obligations of a public-sector CBA, which were retaliatory under §1981 and Title VII because the Respondents only enacted administrative regulations after Petitioner complained and did not consult the UFT, as required by the Taylor Law.

Facts of the Case: 1) District Court wanted Petitioner to edit out all facts of how the Respondents and

the UFT impaired the CBA by the union not processing grievances and the Respondents enacting administrative regulations to harm petitioner. ***See*** App B; **2)** All of Petitioner's racial and discrimination and ADA discrimination claims were based upon the CBA between the Respondents and the UFT because Cole and Bernard provided the African-American teachers with their CBA rights and not Lucio; **3)** The CBA between the Respondents and the UFT is a public-sector contract that falls under the purview of the Contract Clause and the 14th Amendment. **4)** The CBA was negotiated pursuant to New York State's Con Art. 1, §17, the Taylor Law, New York City's Charter, "Executive Order 38" and then amended by "Executive Order 13."; **5)** Under the Taylor Law, "Teacher Evaluations," "Forms for Evaluations," "Procedures for hiring" "Job Postings," "Grievance Hearing," "Work Rules," and "Seniority" are all mandatory subjects of negotiation. Lucio pleaded facts that were mandatory subjects that Respondent Cole, Respondent Bernard impeded petitioner's CBA rights with DoE Legal to help them and Audio Recording; **6)** There is a binding arbitration clause in the CBA; **7)** All mandatory subjection of negotiation was unilaterally changed by the Respondents through the Panel on Educational Policy ("**PEP**"),[9] according to Respondents; **8)** Cole conducted an evaluation not found in the collective bargaining agreement;

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[9] Legislative body of the DoE, which also has quasi-Judicial functions.

9) Lucio's Loudermill[10] hearing did not have the extra protection found in binding arbitration decisions, which are to speak and present evidence, no notice, and no explanation, as required; **10)** Respondents enacted administrative regulations to impair their legal obligations in the CBA and under the state's constitution and the Taylor Law; **11)** Lucio claimed property rights to the Taylor Law[11] and to the state's constitution; **12)** The UFT did not want to process grievances for administrative regulations that unilaterally altered the CBA, illegally, because the federal court would take care of it; **13)** Petitioner's ADA claim arose from being sent down for medical exam pursuant to Ed. Law §2568 and CBA 21K. Lucio was sent down to medical based on assumption made about Lucio's medication[12]. Once Lucio was cleared from medical exam, Grismaldy Laboy-Wilson retaliated against Lucio by not honoring Lucio's CBA rights for rotation and for the jobs that he applied for at the school; **14)** Petitioner's claims are "inextricably intertwined" with the provisions of CBA and cannot be separated; **15)** According to the Catherine Battle, Esq.[13], the Union was not going to pursue any grievances because Lucio had a pending lawsuit against the DOE and his claims were better suited for federal court because of DOE's conduct at grievance

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[10] Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

[11] Citied in master complaint.

[12] Lucio did not want to disclose this HIV status to Laboy-Wilson.

[13] Lawyers for the UFT.

hearings. Battle's statements (audio recorded) were said in front of the ALJ Blassman and Drantch for the DOE; **16)** Teachers' evaluation system is governed by 8J[14] of the CBA between the UFT and the DOE, who are the only signatory of the agreement. **As a result**, Lucio had an expectation to be evaluated pursuant to Article 8J of the CBA, only.

Cole and audio recorded	Danielson[15]
6 components and one page, on May 28, 2014	23 components and over 50 pages
Model as the only word in the criteria for all level	Each level has detailed criteria to meet.
On May 4, 2015, Lucio was showed two pages and the first page was different from May 28th 16 components	Danielson's rubric/CBA Still 23 components
No pre-observation conducted, but post was observation done	Pre-observation[16] is a requirement as is post observation

[14] 8J are the evaluations provisions for GED teachers and 8J1 are based on scores. As a GED teacher, Lucio needed to be evaluated under 8J for S or U. As a Special Education or Social Studies teacher, Lucio received a scores because the final score is based on classroom observations and students' exams scores.

[15] Danielson's Framework and rubric is found in Article 8J(2), but Cole needed to use the procedures in Article 8J(1) because Lucio was a GED teacher under his supervision. Under Laboy-Wilson supervision, Lucio was observed using Article 8J(2) because he is a Special Education Teacher that teaches Global History Regents.

[16] Pre-observation is an explanation of what the supervisor wants to be seen taught during the evaluation and this is the time

No evidence	Samples of student work, Pictures or any other evidence to support the rating/ score
Submission of artifacts was not an opinion.	Teachers can submit artifacts to improve the score of the evaluation

ARGUMENT

The issue is not the order (App. B) of Fed. Rul. of Civ. Pro. 8(a), **the issue is the District Court did not allow Petitioner to be the master of his complaint** and **ignored Petitioner's rights under §35 of the Judiciary Act of 1789**. The 2nd Cir. entered a decision that conflicts and departs from its own decisions, those of Court of Appeals, and, most importantly, those from the Supreme Court because the panel of judges said the district court can be the petitioner's lawyer give legal advice/guidance to edit out statements from the Respondents where they enacted regulations to impair their legal obligation in a CBA.

The legislative history for §35 of Judiciary Act and case law for 6th Amendment shows that when a judge provides legal advice and guidance, the judge is

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that the supervisor expresses what he/she expects as outcomes for the lesson. This is also the time the supervisor reviews the lesson plan and expresses concerns about the lesson or points out the problems in the lesson or possible problems during the lesson.

perceived as being biasness and it is not a judicial act. In fact, the §35 provided clear roles for litigants and their attorney or to meet with a lawyer of the court, as way to maintain impartially of the judge.

No judge could maintain a public view of impartially if they are providing legal advice and guidance to parties. There is no justification under the Judiciary Act, 6th Amendment, or in case law that allows a judge to take control of a lawsuit and pleadings. In a constitutional government based on separation of powers, most importantly, the non-judicial duties of judges gave rise to public debates on the appropriate relationship between the judiciary and the other two branches of government review the applications in their capacity as commissioners appointed by the act rather than as federal judges.[17]

I. Hon. Cogan does not have the right to tell Petitioners what facts to plead and laws to rely on in a Complaint because it is limiting

District Court did not have the statutory/cont. right to provide legal advice with guidance to limit petitioner's pleadings because the framers of the 6th Amendment and the Judiciary Act of 1789 warned against it because it would lead to view of partially. The

[17] In the Minutes of the U.S. Circuit Court for the District of New York, April 5, 1792, it states: "That neither the Legislative nor the executive branches, can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in a judicial manner." Debates on the Federal Judiciary: A Documentary History (Vol. I: 1787-1875).

panel of the judges were ok with the district court acting as Petitioner's attorney. *§35 of the Judiciary Act* states, "**may plead and manage their own causes personally or by assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.**"[18]

Panel of judges saw district court's statement of "The Taylor Law also has nothing to do with this case. Plaintiff was either discriminated against because he is white and/or disabled, or not. That is all there is to this case, and if plaintiff does not stick to the facts showing those claims and those facts only, the case is going to be dismissed," as his legal guidance and advise, but this is not justice.[19] Lucio was discriminated via his CBA rights, which was created under the Taylor Law.

District Court had the power to express his opinion without a threat of dismissal in App. D because it is constitutional for a federal judge, in the course of trial, to express his opinion upon the facts, provided all questions of fact are ultimately submitted to the jury.[20]

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[18] And in no place, does the act or legislative history provides a judge with role of being the litigants' lawyer because the public would question the court's ability to be impartial.

[19] Justice Felix Frankfurter wrote in Offutt v. United States 348 U.S. 11, 13 (1954) that "justice must satisfy the appearance of justice."

[20] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886); United States v. Philadelphia & Reading R.R., 123 U.S. 113, 114 (1887).

However, the District Court carried the threat of App. D in App. B and App. C.

It is well-settled that Congress "has power to prescribe what must be pleaded to state the claim, just as it has the power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of – including the pleading and proof requirements for . . . private actions.' "[21] According to the panel of judges, District Court was providing legal guidance versus a threat, which the panel acknowledged that Hon. Cogan was not acting as a judge in App. D because pleadings is the role of Congress and it is a right Congress has given only to litigants to control.

A. § 35 of the Judiciary Act Only Allows A litigant or Litigant's Lawyer with the Right to Plead, Manage, and Plan Legal Strategy

Legislative Intent: Representative John Vining of Delaware, August 31, 1789 said, "see Justice so equally distributed as that every citizen of the United States should be fairly dealt by, and so impartially administered."[22] **Response**: Petitioner is saying that

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[21] A "heightened pleading rule simply 'prescribes the means of making an issue,' and . . . , when '[t]he issue [is] made as prescribed, the right of trial by jury accrues. Tellabs, Inc. v. Makor Issues & Rights, Ltd. 551 U.S. at 328 (quoting Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902)).

[22] To sum up his argument a fair and uniform system of justice.

there is no uniformity or impartially if a judge can advise/threaten plaintiff with dismissal because the plaintiff will not plead facts in Hon. Cogan's view and he did not plaintiff to show facts of impairment of public-sector contract because of non-process of grievances by the union – **who was of counsel for the UFT for 17 years**.[23]

Representative Fisher Ames of Massachusetts, August 29, 1789 said, "A government which may make, but not enforce laws, cannot last long, nor do much good. The administration of justice is the very performance of the social bargain on the part of government." **Response**: Panel of judges were supposed to enforce §35 of Judiciary Act and master of complaint doctrine because Congressional authorization of the Rules (like Rule 8) expressly provided that "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 48 Stat. 1064. *See* 28 U.S.C. § 2072. Hon. Cogan took his rights to plead facts away in Doc. No. 37 (App. D).

Representative James Jackson of Georgia, August 29, 1789 said, "I hold that the harmony of the people, their liberties and properties will be more secure under the legal paths of their ancestors." **Response**: Petitioner was denied of liberties and properties rights found in §35 of the Judiciary Act because the district

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[23] Representative Thomas Sumter of South Carolina, August 31, 1789 said, judges will exercise their jurisdiction without oppression. **Response:** A threat of dismissal if plaintiff did not take out the Taylor Law or the fact that the UFT did not process grievances is the type of oppression framers wanted to avoid.

court wanted the plaintiff to edit out any facts that showed enactment of administrative regulation to impair obligation of a CBA because Lucio complained of discrimination, rights under the Liberty of Contract Doctrine, and how the UFT helped the Respondents by not processing grievances.

Representative Samuel Livermore of New Hampshire, August 24, 1789 said, " . . . I do not doubt but the most impartial administration of justice will take place, . . . People in general do not view the necessity of courts of justice with the eye of a civilian, they look upon laws rather as intended for punishment than protection, they will think we are endeavoring to irritate them rather than to establish a government to set easy upon them. **Response**: Petitioner feels punished because he was not given his rights under §35 of the Judiciary Act or 48 Stat. 1064. *See* 28 U.S.C. § 2072. because **Lucio had to plead facts according to by Hon. Cogan's view. See Doc. 37.**

Representative James Bayard of Delaware, February 19, 1802 said, "But let their existence depend upon the support of the power of a certain set of men, and they cannot be impartial. Justice will be trodden under foot. Your courts will lose all public confidence and respect" **Response**: Shows what the framers were concerned about public confidence and impartially, which was the reason to write §35.

1) Case Laws

Case laws shows that a judge is not a proper party to provide legal guidance and advice to litigants because of the perception of biasness, as decisions concur with the intentions of the framers under § 35 of the Judiciary Act of 1789 and the 6th Amendment. Therefore, the case laws support Petitioner's view that Hon. Cogan did not to have the right to be Petitioner's lawyer or abridge his rights under 48 Stat. 1064. *See* 28 U.S.C. § 2072.

The district court was not even advocating in Petitioner's interest because the district court wanted Petitioner to edit out all facts of the contractual relationship and the laws meant to create the CBA – the Taylor Law. The judge was not aiding, as the panel said in App. A but aiding the other side.[24]

In McKaskle v. Wiggins, 465 U.S. 168 (1984), the Court held that "the use of standby counsel preserves the jury's perception that the pro se litigant is conducting his own case." This did not happened in petitioner's case. Hon. Cogan took on the role as Lucio's lawyer by

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[24] The judge who unduly aids the pro se litigant in his defense is, it is argued and reasoned by the Court, wrongfully acting as an advocate for one side of the dispute. See Jacobsen, 790 F.2d at 1365-66; Pinkey, 548 F.2d at 311 ("[T]he trial court is under no obligation to become an 'advocate' for or to assist and guide the pro se layman through the trial thicket"); United States ex rel. Smith v. Pavich, 568 F.2d 33, 40 (7th Cir. 1978) (same). See also Robbins and Herman, 42 Brooklyn L.Rev. at 681-82 (cited in note 9) (judge not proper party to represent the pro se litigant); Westling and Rasmussen, 16 Loy.U.Chi.L.J. at 310 (cited in note 25) (same). United States v. Pinkey.

telling the Petitioner what he could plead in Doc. No 37. In fact, judicial impartiality was one of the original justifications for the sixth amendment right to counsel. Powell v. Alabama, 287 U.S. 45, 61 (1932). The judge who unduly aids the pro se litigant in his case is wrongfully acting as an advocate for one side of the dispute. **But**, judge was not acting as Petitioner's advocate, as he was advocating against the plaintiff to edit out the contractual relationship and the laws that created the CBA – the Taylor Law and NYS' Cont.[25]

B. Litigants have Rights under the "Master of the Complaint Doctrine"

The panel of judges' order has departed from this Court's "master of the complaint doctrine." The rule, policy in every Court in our nation, and principle is," It has been the law for decades that "the party who brings a suit is master to decide what law he will rely upon. . . ." The Fair v. Kohler Die Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716 (1913). See Travelers Indem. Co. v. Sarkisian 794 F.d 754 (2d Cir. 1986). The facts and law Hon. Cogan told Lucio to take out in Doc. No. 37 were needed to establish Contract Clause claim and 1981/Title VII claim because the facts centered on how Lucio was discriminated in terms of his CBA rights. Hon. Cogan failed to honor Lucio's rights under the master doctrine.

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[25] See App. D.

C. State Created Property of Mandatory Subjects of negotiation with NYS Constitution

The 14th Amendment has the Liberty of the Contract Doctrine and Due Process Clause, which Hon. Cogan wanted plaintiff to edit out the facts that dealt with mandatory subjects. **Example**: evaluation are mandatory subject under the Taylor Law with the fact that DoE and the UFT negotiated pursuant to NYS' Constitution Art. 1, §17. Cole deprived Lucio of what was written in the CBA for evaluations. The leading case, and the starting point for analysis of the doctrine protecting state-created property, is Board of Regents v. Roth, 408 U.S. 564 (1972). Petitioner is claiming protected rights found in the Taylor Law and NYS' Con. Art. 1, §17.

II. A Subdivision of a Municipality Cannot Impair Contractual Obligation in a CBA by Enacting Administrative Regulations

The Contracts Clause of the US Constitution is one of the only protections against city's interference with contractual obligations. Petitioner brought a discrimination action and contract enforcement action against the DoE, Cole, and Bernard on allegations that Cole and Bernard did not perform legal obligations of the CBA – CBA was created under the Taylor Law, and New York State Constitution Article 1, §17 with the Charter §1170 to §1177 – of a public-sector CBA negotiated by DoE and the UFT.

Notwithstanding Hon. Cogan's and panel of judges' conclusion that judges can ignore: only Congress has the right to tell plaintiff what to plead,[26] but the Respondents did not have the right to enact administrative regulation to impair their obligation, as it also harms Petitioner's right under liberty of the contract doctrine under the 14th Amendment. It is also well established that contracts between individuals and municipal corporations receive Contract Clause protection.[27]

A. Administrative Agency Enacted Regulation to Impair the CBA

1) The Respondents enacted administrative regulations to impair their legal obligations of a public-sector CBA, they violate the Contract Clause[28] because the impairment caused Lucio to incur economic losses.

2) According to the Respondents, they could change the terms, conditions, and privileges of

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[26] 48 Stat. 1064. *See* 28 U.S.C. § 2072.

[27] Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942).

[28] A contractual obligation is defined by municipal ordinances and/or administrative regulations having the force and operation of statutes. Id. See also Grand Trunk Ry. v. Indiana R.R. Comm'n, 221 U.S. 400 (1911); Appleby v. Delaney, 271 U.S. 403 (1926). New Orleans WaterWorks Co. v. Rivers, 115 U.S. 674 (1885); City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898); City of Vicksburg v. Waterworks Co., 202 U.S. 453 (1906); Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914); Cuyahoga Power Co. v. City of Akron, 240 U.S. 462 (1916).

> any CBA and without notice to the union through Courtenaye Jackson-Chase on **PEP**, which contradicts the Taylor Law and NYS' Con.

The Court *did not* acknowledge how the CBA formed. "The obligations of a contract," said Chief Justice Hughes, for the Court in *Home Building & Loan Ass'n v. Blaisdell*,[29] "Not only are existing laws read into contracts in order to fix obligations as between the parties. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile, – a government which retains adequate authority to secure the peace and good order of society."

According to Chief Hughes, the law from which the obligation stems must be understood to include constitutional law and, moreover a "progressive" constitutional law.[30] The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency."[31] District Court caused Congress to impotent by telling plaintiff

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[29] 290 U.S. at 435. *And see* City of El Paso v. Simmons, 379 U.S. 497 (1965). "This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

[30] Id.

[31] Id.

what not to plead in App. D. *See* 48 Stat. 1064. *See* 28 U.S.C. § 2072.

B. Judicial Review

Court has always held that judicial review requires some deference to contour of the preexisting statutes to the collective bargaining framework where the bargaining statute was silent as to the effect of preexisting legislation. See 54 Negotiability questions may arise in the context of suits for a declaration of authority to negotiate.[32]

1. The Petitioner is arguing that the district knew & understood that Taylor Law existed prior to the administrative regulation was enacted to impair CBA obligations. District Court did not have any right to tell petition to plead facts in his view or his complaint would be dismissed: *The judge said*, "The Taylor Law also has nothing to do with this case. Plaintiff was either discriminated against because he is white and/or disabled, or not. That is all there is to this case, and if plaintiff does not stick to the facts showing those claims and those facts only, the case is going to be dismissed." ***See*** App D ¶ 7, which is not

[32] *E.g.*, Board of Educ. v. Associated Teachers of Huntington, 30 N.Y.2d 122, 282 N.E.2d 109, 331 N.Y.S.2d 17 (1972); suits to compel grievance arbitration, *e.g.*, Dunellen Board of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973); suits to enforce or vacate arbitration awards, *e.g.*, Boston Teachers Union v. School Committee, 1976 Mass. Adv. Sh. 1515, 350 N.E.2d 707.

what Congress stated in 48 Stat. 1064. *See* 28 U.S.C. § 2072.

2. The Court did not review Petitioner's complaint under *United States Trust Co. of New York v. New Jersey*, 97 S. Ct. 1505, 1518 (1977) – *Stare Decisis* because plaintiff claimed Respondents enacted administrative regulations to impair their obligations.

C. The CBA was negotiated and agreed upon pursuant to New York State's Constitution and the Taylor Law.

The issue in Lucio's case: (1) a municipality (the Respondents), acting under authority conferred by the Taylor Law and NYS' Con, has entered into a CBA with the UFT; (2) the validity of the Taylor Law has been sustained by the highest state court; (3) the PEP, DoE's legislative body, passed regulation to change obligation of the CBA, unilaterally. In such a case Court would analyze un-constitutionality because of its effect.[33]

The Court has never departed from the notion that Contract Clause looks to the state statute, like Taylor Law. In *Sturges v. Crowninshield*,[34] Marshall defined the obligation of contracts as "the law which binds the

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[33] State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854), and Ohio Life Ins. and Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1854) are the leading cases. *See also* Jefferson Branch Bank v. Skelly, 66 U.S. (1 Bl.) 436 (1862); Louisiana v. Pilsbury, 105 U.S. 278 (1882); Mobile & Ohio R.R. v. Tennessee, 153 U.S. 486 (1894).

[34] 17 U.S. 122 (1819).

parties to perform their undertaking." Whence, however, comes this law? If it comes from the State alone, which Marshall was later to deny even as to private contracts, then it is hardly possible to hold that the States' own contracts are covered by the clause, which manifestly does not create an obligation for contracts but only protects such obligation as already exists. But, if, on the other hand, the law furnishing the obligation of contracts comprises Natural Law and kindred principles.[35]

The Petitioner is arguing that Respondents are bound to the Taylor Law and NYS's Con. Art. 1, §17, which the CBA was created under, because it preserves the Natural Law and maintains public's trust in the government that will not impair their own contractual obligation.

D. Taylor Law (via the Triborough Amendment) Has A Quid Pro Quo to Continue Provisions of a CBA

The Respondents did not the right to enact an administrative regulation to impair a CBA under the Taylor Law via the Triborough Amendment.[36] Each

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[35] As well as law which springs from state authority, then, in as much as the State itself is presumably bound by such principles, the State's own obligations, so far as harmonious with them, are covered by the clause. See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 338 (1827).

[36] The implementation clause of New York State's Taylor Law (Civil Service Law §204-a(1)), and the Triborough Amendment to the Taylor Law (Civil Service Law §209-a(1)(e)). The

issue was resolved favorably to public-sector labor unions in New York State.[37] Under the implementation clause of the Taylor Law, monetary obligations under multi-year collective bargaining agreements were found to be binding on the State starting when ratified by the State and found to not be dependent on the necessary annual appropriations.[38]

State was bound in any given year during the term of the collective bargaining agreement[39] Furthermore, the court noted that under the Triborough Amendment "public employers are forbidden to refuse to continue the terms of an expired agreement while a new one is being negotiated (Civil Service Law §209-a(1)(e))." (Id.) This is the quid pro quo for prohibiting public employees from striking.[40] After its extensive analysis, the court concluded that legislative ratification of a

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Taylor Law is the colloquial name for the Public Employees' Fair Employment Act, which is codified at Civil Service Law §§200-214 (McKinney's 1983 Supp. 1992).

[37] The lag payroll was found unconstitutional under the Contract Clause. See Ass'n of Surrogates I, 940 F.2d at 775.

[38] And the terms and conditions of expired collective bargaining agreements, which in New York State are continued Ass'n of Surrogates, III, 588 N.E.2d at 54.

[39] Therefore, the court found it necessary to focus on the Taylor Law with its history. Id. at 150-151, 577 N.E.2d at 12-13, 573 N.Y.S.2d at 212.

[40] Triborough Bridge and Tunnel Auth., 5 PERB ¶4505 (Milowe 1972), conf'd, 5 PERB ¶3037 (1972).

collective bargaining agreement alone was sufficient to bind the State.[41]

E. NYS's Policy to have Parties agree to change of the CBA

District Court was wrong to ignore public policy of NYS by telling Petitioner to edit out facts of public policy. The legislature of the state of New York declares that it is the public policy of the state and the purpose of this (Taylor Law) act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, and, the orderly and uninterrupted operations and functions of government.[42]

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[41] Ass'n of Surrogates II 78 N.Y.2d at 156, 577 N.E.2d at 16, 573 N.Y.S.2d at 25; Compare, Boston Teachers Union Local 66 v. Boston School Committee, Mass., 434 N.E.2d 1258, 1266 (1982) (where the court found that once Boston funded the first year of a multi-year agreement it was bound to comply with the agreement for its full term).

[42] http://www.perb.ny.gov/stat.asp#org and the Policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

F. Lucio is a third-party beneficiary of the CBA

The Court's first case allowing a section 1981 suit to proceed for third-party beneficiary was *Goodman* v. *Lukens Steel*, 482 U.S. 656 (1987). District Court's decision is not in line with this Court's view in Doc. No. 37. District Court did not want Petitioner to plead the facts of his status or what the UFT told him.[43]

III. Per curiam Decision Should be Followed by the Panel of Judges

The 2nd Cir. ***per curiam*** decision in *IWACHIW v. N.Y. State Dept. of Motor Vehicles*, 396 F.3d 525 (2d. Cir. 2005), who was a *pro se* Appellant, filed over 15 lawsuits and appeals within the 2nd Circuit[44] and the Petitioner has only filed one appeal in his entire life and one law suit in federal court. **In IWACHIW**, the Appellant only received a warning from the Court and the Petitioner received, he must file a leave. The Petitioner received a hasher sanction than IWACHIW. Sanctions are meant to prevent abuse of the court system and Lucio has only sought to enforce his CBA, which is a public-sector contract. If Respondents can administratively enact regulations to impair obligations of a CBA

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[43] According to the Catherine Battle, Esq. (of counsel to the UFT), the Union was not going to pursue any grievances because Lucio had a pending lawsuit against the DOE and his claims were better suited for federal court because of DOE's conduct at grievance hearings. Battle's audio recorded statement was said in front of the ALJ Blassman and Drantch for the DOE.

[44] All similar in nature too.

and the Court not review any complaint under ***United States Trust Co. of New York v. New Jersey***, 97 S. Ct. 1505, 1518 (1977), then the court system is a useless vehicle. If a judge can dictate what facts to plead in a master complaint to avoid a constitutional claim or enforcement of contractual rights, then court is a useless vehicle. Lucio prays the Court will changes the sanction to be evenhanded.[45]

IV. Title VII Does Not Limit Plaintiff's Cause of Action

In App. D, Hon. Cogan not only wanted to be Petitioner's lawyer[46], but he wanted to limit Petitioner's claims/facts/laws that would not include a contractual relationship or show damages.

A. EXPECTATION OF CONTRACT

The Supreme Court, in *Domino's Pizza v. McDonald*, 546 U.S. 470, 476 n.3 (U.S. 2006)[47] held that "We say "under which the plaintiff has rights" . . . because we do not mean to exclude the possibility that a third-party intended beneficiary of a contract may have rights under § 1981.[48] District Court did not have the

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[45] and within ***per curiam*** decision of the 2nd Cir. for *IWACHIW*.

[46] Panel of Judge's view in App. A.

[47] Petitioner used Domino's brief as his brief because of violation of CBA.

[48] See, *e. g.*, 2 Restatement (Second) of Contracts § 304, p. 448 (1979) ("**A promise in a contract creates a duty in the**

power to tell Petitioner to edit all facts that Respondents did to impair their CBA obligation

B. Government Must Be Treated Like Any Other Defendant in Lawsuits

In Davis v. Gray, 83 U.S. 203, 232 (1873), Mr. Justice Swayne: "When a state becomes a party to a contract, . . . the same rules of law are applied to her as to private persons under like circumstances."[49] District Court treated the Respondents better by telling Petitioner to edit out all facts related to the CBA, Union, Respondents enacting administrative regulations, Taylor Law, and NYS' Con. Art. 1, §17.

C. Section 1981's Cause of Action Encompasses Claims of Retaliation for Complaints About Race Discrimination

Petitioner's claims of evaluation because Petitioner complained about racial animus) are the following:

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promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty").

[49] When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.

Adversely Affected Lucio[50] and was ordered to edited the facts	**Article of the CBA**
Special Education Position: Lucio was hired	Article 15C4& FOIL response, what is written in the CBA is the only provisions to be considered.
OACE Position	Could not be hired because of Cole's misuse/nonperformance of 8J(1)[51]

[50] In order to constitute an adverse employment action, defendants must effect a "materially adverse change" in the terms and conditions of employment. *See Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999). Such a change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Terry v. Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003) (internal citations and quotations omitted). Adverse employment actions include " . . . a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id. Sotomayor v. City of New York*, 862 F.Supp.2d 226, 253 (E.D.N.Y. 2012).

[51] While "actions such as negative employment evaluation letters may . . . be considered adverse," *e.g.*, *Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2d Cir. 2002), such appraisals must generally trigger other negative consequences to the terms and conditions of the plaintiffs employment in order to qualify as a materially adverse change, *e.g. Browne v. City Univ. of N.Y.*, 419 F.Supp.2d 315, 333-34 (E.D.N.Y.2005) ("A negative evaluation alone, absent some accompanying adverse result such as demotion, diminution of wages, or other tangible loss, does not constitute an adverse employment action.") *Sotomayor v. City of New York*, 862 F.Supp.2d 226, 254 (E.D.N.Y. 2012).

Breakfast and Lunch: Lucio met the requirements of the posting and was the senior teacher.	15(C)4 and Lucio cited an arbitration award ¶339 and ¶ 340 with Doc. No. 62-2 at Exhibits D &E.

a. Retaliation "Impairs" an Individual's Ability to "Make and Enforce Contracts" Within the Meaning of § 1981.

Claims of retaliation for complaints about race discrimination fall within the broad terms of § 1981, because an employer that retaliates against an employee who has complained about race discrimination has "impaired" that employee's ability to "make and enforce contracts."[52]

1. "In 1991, however, Congress responded to Patterson[53] by adding a new subsection to § 1981 that defines the term 'make and enforce contracts' to include the 'termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" [54]

2. It is settled that retaliation in contractual relationship is a species of discrimination. As this Court recently made clear in Jackson v. Birmingham Board

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[52] Which includes the right to "enjoy[] . . . all benefits . . . of the contractual relationship" – on an equal footing with "white citizens."

[53] Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

[54] Jones v. R.R. Donnelley & Sons Co., 541 U.S. d369, 373 (2004) (quoting 42 U.S.C. § 1981." Jones, 541 U.S. at 383 (citation and quotation marks omitted).

of Education, 544 U.S. 167, 173-74 (2005), **retaliation against a person because that person has complained about unlawful discrimination is simply "another form" of "intentional" and unlawful discrimination.**[55]

Section 1981, which speaks broadly of the right to equal treatment in all aspects of the contractual relationship and proscribes the "impairment" of that right, as discrimination during the performance of that contract as well."[56] The panel of judges and the Hon. Cogan were not in line with Supreme Court's view because in ¶7 of App. D, Hon. Cogan said Respondents can be unfair.

D. The Supreme Court's Precedents Confirm That § 1981 Embraces Claims for Retaliation and Unions were Supposed to Process Grievances.

District Court erred and exceeded his jurisdiction to tell Petitioner to edit out all facts about retaliation

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[55] While the initial discriminatory act must of course be "based on race," see Patterson, 491 U.S. at 176-77; Domino's Pizza, 546 U.S. at 474, **nothing in the text of § 1981 suggests that the concomitant act of retaliation must itself be motivated by the complainant's race**. It is sufficient that the retaliation responds to a complaint of race discrimination, and in that sense, is "based on race." This establishes a nexus between the subject matter of the complaint (race discrimination) and the retaliatory act that flows from the nature of the complaint (i.e., an act of retaliation "based on" a prior complaint about race discrimination).

[56] H.R. Rep. No. 101-644, pt. 1, at 17.

in the CBA[57] because Dis. Court's view of Respondents could be unfair and the union had nothing to do with the case. Reading § 1981 to provide redress for retaliation is further supported by two decisions of this Court. In Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), a group of black employees asserted claims of race discrimination, under § 1981 and Title VII, against both their employer and their unions as collective bargaining agents. In a portion of Justice White's opinion joined by five Members of the Court, the Court held that **the unions were liable under § 1981 for refusing to process grievances that charged the employer with race discrimination**. Id. at 668-69.[58] **In regard, Petitioner was right to include the UFT.**

E. Petitioner is not limited to Title VII, as District Court ordered in Doc. No. 37

Johnson[59] provides a paradigmatic example of the Court's repeated recognition and approval of the partially overlapping schemes of liability that the legislative branch has deliberately created. There, the Court held that "the remedies available under Title VII and

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[57] App. D.

[58] Contending that "the employer would 'get its back up' if racial bias was charged," the unions had effectively "categorized racial grievances as unworthy of pursuit and, while pursuing thousands of other legitimate grievances, ignored racial discrimination claims on behalf of blacks." Id. at 668.

[59] Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975).

§ 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent," notwithstanding the benefits of the conciliation procedure contemplated by Title VII. 421 U.S. at 461.[60]

Considerations of *Stare Decisis*: *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 4 (U.S. 2008) is the Stare Decisis for retaliation and Petitioner used the winning brief as his Appeal brief

V. §1983 Claims (Monell): Administrative Regulations that violate NYS' Con. and the Taylor Law

In *McGovern v. City of Philadelphia*, No. 08-1632 (3d Cir. Jan 8, 2009) (here) is illustrative. In McGovern, a unanimous three-judge panel wrote that "§ 1981(c) can establish equal rights for parties against private and state defendants without establishing equal remedies []." The PEP/Respondents enacted administrative regulation to impair legal obligations in the CBA and under the Taylor with NYS' Con.

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[60] As the Court explained: "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and **is not limited to Title VII in his search for relief**. Id. at 459 (citation omitted). Id. at 459 (quoting H.R. Rep. No. 92-238, at 19 (1971), 1972 U.S.C.C.A.N. 2137, 2154; see also Runyon, 427 U.S. at 175 n.11."

VI. Decisions of Gov't need to be based on facts

The District Court said that Petitioner's employer can be unfair in App. D, but Petitioner's employer is the gov't. The terms "arbitrary" and "capricious" embrace a concept which emerges from the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and operates to guarantee that the acts of government will be grounded on established legal principles and have a rational factual basis. **A decision is arbitrary or capricious when it is not supported by evidence or when there is no reasonable justification for the decision.**[61] The decisions of the Respondents were not based on the CBA, Taylor Law, and NYS' Con., which the District Court wanted edited out and aligned with Judiciary Act.

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[61] O'Boyle v. Coe, 155 F.Supp. 581, 584 (D.C.Dist.1957); East Tex. Motor Freight Lines v. United States, 96 F.Supp. 424, 427 (N.D.Tex.1951); Ford Motor Co. (Delaware) v. United States, 97 Ct.Cl. 370, 47 F.Supp. 259 (1942).

CONCLUSION

The petition for a writ of certiorari should be granted. Justice Felix Frankfurter wrote in Offutt v. United States 348 U.S. 11, 13 (1954) that "justice must satisfy the appearance of justice" and Petitioner wants to be the master of his complaint and given his rights under §35 of the Judiciary Act of 1789.

Respectfully submitted,

LUCIO CELLI on August 10, 2018