18-9840

No. 18A1015

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN FERNANDEZ,
Petitioner,

-vs.-

THE STATE OF NEVADA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KEVIN FERNANDEZ
Counsel of Record, Pro Se

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P.O. Box 14
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QUESTIONS PRESENTED

1. Whether a settlement agreement entered into by an inmate and a State, which incorporates the mandatory language of the Interstate Corrections Compact, Interstate Cotract between the recieving and sending States, and those States' laws and regulations create a liberty interest and/or property interest sufficient to warrant the protections of the Fourteenth Amendment?

2. Whether the Federal Rules of Civil Procedure 8(a),(d) require a heightened factual pleading requirement for the allegations that the plaintiff is similiarly situated with other persons for the purpose of stating a plausible Equal Protection claim? And if so, does a claim that alleges that an inmate is similiarly situated with all other inmates seeking minimum custody status and otherwise eligible therefore state the required factual allefations to plead "similiarly situated" in a plausible Equal Protection claim?

3. Whether a District Court in screening a complaint pursuant to 28 U.S.C. §1915A, is required toconsider all the allegations in a pro se incarcerated litigant's pleadings combined, alleging the he suffered an adverse action by prison officials in retaliation for Free Speech activities to determine if the adverse actions were more than de minis? And if so, do the pleadings of a pro se incarcerated litigant that allege that he suffered adverse actions of denial of minimum custody, threat of transfer toan out of state prison, and loss of settlement agreement benefits allege more than de minimus adverse actions either individually or combined?

4. Does a claim that alleges that the loss of an inmate's legal documents by prison officials suffered actual injury through the denial of parole, an appeal for the denial of parole, and an inability to file

a state court challenge to the denial of parole, state the required factual allegations necessary to plead "actual injury" in a First Amendment interference with the access to the courts action?

5. Whether a District Court is required to allow an incarcerated pro se litigant to attempt to amend a complaint that it deems to be factually insuffieient during the screening pursuant to28 U.S.C. §1915A, when additional facts could be alleged to state a plausible claim?

6. Whether an incarcerated pro se litigant has a right to amend a complaint pursuant to FRCP 15(a) when a magistrate has issued a Report and Recommendation, recommendingthe dismissal of the complaint pursuant to 28 U.S.C. §1915A for failure to state a claim, but prior to the dismissal and adoption of the report? And if so, whether an amended complaint so filed is the controlling complaint requiring the magistrate to withdrawal the original Report and Recommendation and/or screen the amended complaint?

LIST OF PARTIES

All parties to the proceedings in this Court do not appear in the caption of the case on the cover page. A list of all the parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

The Petitioner is Kevin Fernandez, an inmate incarcerated in New Hampshire via the Interstate Corrections Compact through a sentence imposed by the State of Nevada.

The Respondents are States of the United States of America and State employees as follows: The State of Nevada and its employees with the Nevada Department of Corrections, James Maxey, Nancy Flores, FNU Deal. The State of New Hampshire and its employees with the New Hampshire Department of Corrections, C. Domenea, FNU Fetter, FNU Fouts, Chris Kouch, Kimberly LaCasse, Ryan Landry,FNU Liette, Paula Mattis, FNU McDonough, R. McGrath, William L. Wrenn.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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The Petitioner,KEVIN FERNANDEZ, appearing in properia persona, respectfully prays that a writ of cerrtiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on January 17, 2019.

OPINIONS BELOW

The Opinion of the Court of Appeals for the First Circuit is not reported and is reprinted in the appendix hereto, p. 1, infra.

The Report and Recommendation and memorandum of decision of the United States District Court for New Hampshire is not reported, but is listed on LEXIS at Fernandez v. Nevada, 2017 U.S. Dist. LEXIS 216587 (12/04/17), adopted at 2018 U.S. Dist. LEXIS 16297 (D.N.H. 1/31/18). It is reprinted in the appendix hereto, p. 3, and 37, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the Petitioner brought this suit in the District of New Hampshire. On December 04,

2017, the Magistrate, Andrea K. Johnstone issued a Report and Recommendation recommending that the Complaint be dismissed for failure to state a claim. See p. 3, appendix, infra. The District Court adopted and approved the Report and Recommendation on January 31, 2018. See p. 37, appendix, infra.

On Petitioner's appeal, the First Circuit on January 17, 2019, entered a judgment affirming the District of New Hampshire's orders for the reasons cited in the Report and Recommendation. See p.1, appedix, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following are the statutes, constitutional provisions, and regulations involved in this action. Because these provisions are lengthy, they are provided in the Appendix B.

United States Constitution, Fourteenth Amendment;

United States Constitution, First Amendment;

Federal Rules of Civil Procedure, Rule 8(a), (d);

Federal Rules of Civil Procedure, Rule 15(a);

Local Rule 4.3(d)(1);

28 U.S.C. §1915A;

N.R.S. 176A.780;

N.R.S. 209.481;

N.R.S. 215A.202;

R.S.A. 622-B;

R.S.A. 491:7;

N.H. Admin. Rule Corr. 401;

N.H. Admin. Rule Corr. 404;

NHDOC P.P.D. 7.14, N.H.D.O.C. Handbook (Classification).

STATEMENT OF THE CASE

On July 16,2014, the Petitioner, Kevin Fernandez, herein referred to as Fernandez, entered into a settlement agreement ("Agreement") with the State of Nevada. The Agreement incorporated the language in the Interstate Corrections Compact ("Compact") and Interstate Contract between Nevada and New Hampshire ("Conctract") for the exchange of transfering prisoners. See Appendix C for copy of the Agreement and Contract. As part of the Agreement, Fernandez was transferred to New Hampshire on November 09,2015, where he remains today. Part of the Contract and Compact mandates that Fernandez must be treated equally with those inmates in New Hampshire, as New Hampshire being the "recieving" state. Further, the Compact and Contract mandate that any rights and/or benefits that Fernandez may have had in Nevada, he is entitled to while in New Hampshire. The Contract mandates that the final decision concerning classification is made by New Hampshire.

On December 09, 2015, Fernandez was classified at NHSP as a medium custody inmate. At the end of February 2016, Fernandez was reclassified to minimum custody, but was denied because he would not paroled to New Hampshire. Nothing in the administrative rules, however, requires an inmate to be paroling to New Hampshire in order to be eligible for minimum custody in New Hampshire. P.P.D. 7.14; N.H. Admin. Reg., Cor. 401.03; NHDOC Class. Man. Fernandez appealled the decision, towhich it was responded by NHSP Classification Supervisor LaCasse by stating verbaslly and in writing, that if Fernandez did not like the decision, he could back to Nevada. On April 01, 2016, LaCasse directed that Fernandez be returned to Nevada. Fernandez,however, was ultimately not returned to Nevada.

On August 05, 2016, Fernandez was again evaluated for minimum custody status at NHSP. Fernandez was approved for minimum custody by NHSP officials who sought Nevada's consent. After awaiting Nevada's consent with no answer, Fernandez wrote to NDOC officials and stated that if approval was notforthcoming, he sould bring legal action against the State of Nevada. On October 04, 2016, the NDOC denied minimum custody citing NRS 176A.780 and NRS 209.481. NRS 209.481 prohibits the NDOC Director from assigning inmates imprisoned in Nevada institutions convicted of certain offenses to minimum security facilities within Nevada. See Appendix B for the full text. NRS 176A.780 deals with probation and is inapplicable under these circumjstances. The administrative rules governing classification in New Hampshire mandate that once an inmate qualifies for minimum custody eligibility, that he must be transferred to minimum custody. See Appendix B, P.P.D. 7.14; N.H. Admin. Reg.,Corr. 401.03; NHDOC Class. Man. Fernandez remains in medimum custody at NHSP even though NHSP has sought consent to transfer him to minimum custody every six months thereafter.

On December 15, 2015, several weeks after Fernandez was transferred to the NHDOC, the NDOC mailed Fernandez's fifteen boxes of legal materials to him at the NHDOC. Those materials contained documents concerning Fernandez's criminal history, parole records, research materials, and court filing records in 42 U.S.C. §1983 actions Fernandez had filed against the NDOC for conditions of confinment that either active or the subject of settlment agreements.

Shortly after the legal materials arrived at NHSP, NHSP officials advised Fernandez that the materials would need to be shipped out as they could not be stored at NHSP. In response, Fernandez wrote back and requested that the materials be maintained in NHSP property

and stating that any attempt to destroy, remove, or deny him his legal boxes would be construed as a violation of his First and Fourteenth Amendment rights. During this time, Fernandez appealed the decision. In response, NHDOC officials stated that if he did resolve the legal material issue, they would be seeking the return of Fernandez back to Nevada, and in fact did seek his return to Nevada.

Eventually, the NHDOC and Fernandez enterred into a contract whereby Fernandez agreed to destroy eleven of the boxes of legal materials, send two boxes home, and keep other materials in a tote provide by NHDOC officials in exchange for their promise not to transfer Fernandez back to Nevada. On June 23, 2016, Fernandez updated NHDOC officials on his progress. On July 28, 2016, Fernandez had shredded eleven boxes of documents, mailed two boxes, and placed four cubic feet of documents in the tote. On July 27, 2016, NHDOC officials sent an email to NDOC rescinding their request to have Fernandez picked up by Nevada.

On October 13, 2016, however, NHDOC officials ordered Fernandez to further reduce his legal files to two cubic feet. Fernandez attempted to persuade NHDOC officials to honor the contract without success. On October 20, 2016, NHDOC officials responded that the "agreement" was null and void because of a policy change that took place on January 26, 2016. Further, they stated that exceptions to the policy could not be granted. However, on December 14, 2016, the NHSP Warden testified in the federal district court that he had instructed his staff that exceptions could be madeto that policy. Nevertheless, Fernandez was ordered to reduce his legal materials to two cubic feet.

On April 20, 2017, Fernandez had a parole hearing. The denial of Fernandez to maintain all of his documents prevented him from

presenting relevant evidence and presenting a non-frivolous argument for the granting of parole and the challenge of this decision. Fernandez was further impeded from properly litigating his current civil actions pursuant to 42 U.S.C. §1983 by the inablility to maintain a full set of all documents to those cases.

In June 2017, Fernandez filed his Compalint alleging that the Settlement Agreement, Interstate Corrections Compact, Interstate Contract Implementing the ICC between Nevada and New Hampshire, and Nevada and New Hampshire law and regulations implicated a liberty interest in Fernandez recieving minimum custody at NHSP, sufficient to afford him procedural due process protections guaranteed by the Fourteenth Amendment and the right to be treated equally with those inmates that are similiarly situated at NHSP and Nevada. He further alleged that the denial of his minimum custody, threat to transfer him back to Nevada, and loss of his benefits of the Settlement Agreement where in retaliation for his Free Speech activities.

The Complaint further alleged that denial of Fernandez to maintain his legal materials at NHSP impeded his ability to obtain a parole, challenge the denial of parole, and was done in retaliation for his Free Speech activities. He alleged that the threat to transfer him back to Nevada if he did not reduce his legal materials, loss of the benefits of his settlement agreement chilled his Free Speech and served no logical penological purpose.

On December 04, 2017, the federal District Court of New Hampshire screened the Complaint pursuant to 28 U.S.C. §1915A(a) and LR 4.3(d)(1). The Magistrate recommended the dismissal of the Complaint for failure to state claim. The Magistrate concluded that Fernandez's Equal Protection claims failed to demonstrate that he was similiarly

situated to all such inmates in all relevant respects. In Fernandez's due process claim, the Magistrate concluded that Fernandez had no liberty interest in his classification, that the ICC does not create a liberty interest, that the violation of prison policies and regulations do not implicate a liberty interest, and the violation of a settlement agreement fails to demonstrate that the court had subject matter jurisdiction, but failed to resolve Fernandez's claim that the Settlement Agreement implicated a liberty interest.

In resolving Fernandez's retaliation claims, the Magistrate concluded that Fernandez's claim that prison officials threaten to transfer him back to Nevada was a de minimis adverse reaction and thus could not state a claim. The Magistrate further concluded that Fernandez since Fernandez was actually transferred the threat was de minis. The Court concluded that even if Fernandez had been transferred, Fernandez had failed to allege any hardship that the transfer would cause, and thus his allegations could not state a claim. In resolving the access to court claims, the Court concluded that the impedment of his parole hearing and challenges to parole denial do not satisfy the actual injury requirement of Lewis v.Casey, 518 U.S. 343 (1996), thus Fernandez's claims were not viable. The Court further concluded that Fernandez's allegations of the deprivation of his legal materials impeded his ability to litagate his condition of confinement actions were too vague to statisfy the pleading requirements and recommend dismissal.

Fernandez timely filed his objections to the Magistrate's R&R and filed a First Amended Complaint adding allegations to the areas that the Magistrate held were deficient in their allegations of fact. The District Court adopted the R&R and ignored the First Amended

Complaint and enterred judgment without considering the First Amended Complaint. Fernandez timely appealled. The First Circuit Court of Appeals affirmed the District Court's dismissal based on failure to state a claim in a one page unpublished opinion. They stated, "... we conclude, essentially for the reasons stated in the Magistrate's December 4, 2017 Report and Recommendation ... that the allegations in the operative complaint fail to state a plausible claim for relief under any of theories appellant presses." The Court went on to state that, "morover, the proposed amended complaint plaintiff tendered along with his objections did not cure the deficiencies previously identified in the Report and Recommendation." The State of Nevada filed a response brief, the State of New Hampshire did not file any response. Fernandez did not file a request for rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST CIRCUIT'S DISMISSAL OF PETITIONER'S DUE PROCESS CLAIM FOR FAILURE TO STATE A CLAIM CONFLICTS WITH DECISIONS OF THIS COURT, THE FIRST CIRCUIT, OTHER CIRCUITS, AND THERE EXISTS A SPLIT AMOUNG THE CIRCUITS THAT HAVE DECIDED THE ISSUE.

Almost half a century ago, this Court established the concept that a contract between a person and the government may create a liberrty/property interest in the entitlement to a benefit. While this Court has never specifically applied this holding in the prison context, some circuits, including the First Circuit, have with approval, while other courts have declined to do so. The First Circuit's affirmation of the District Court's holding that the Petitioner's Due Process claim does not state a valid claim, is in direct conflict with this Court's prior holdings and the First Circuit's own holdings. Further, the Circuit Courts that have decided theissue are split. Because the vast majority of inmate

litigation results in settlement, this Court's review of the lower courts' decisions is of national importance. Therefore, this Court's supervisory power should be exercised to bring uniformity amoung the federal courts and to correct the lower courts' erroneous ruling.

A. The First Circuit's Decision Conflicts With Decisions By This Court, The First Circuit, And Other Circuits.

The holding by the Courts below that a contract between a citizen and the government can not create a liberty/property interest is directly contrary to this Court's holding in Perry v. Sindermann, 408 U.S. 593, 601 (1972) and Brd. of Regents v. Roth, 408 U.S. 564, 572, 576-78 (1972). In those cases, this Court held that a contractural relationship between a citizen and the government can create a liberty/property interest, the deprivation of such requiring due process. Ibid.

In Rodi v. Ventelvolo, 941 F.2d 22, 26-28 (1st Cir. 1991), the First Circuit, relying upon prior First Circuit precedent and this Court's holding in Kentucky DOC v. Thompson, 490 U.S. 456 (1989) held that a contract between an inmate and prison authorities created a liberty/property interest sufficient to warrant due process protections under the Fourteenth Amendment. This holding survived this Court's due process analysis mandated in Sandin v. Conners, 515 U.S. 472, 501 (1995) where the Supreme Court specifically identified Rodi, as surviving Sandin's ruling. See Sandin, at 501. The Rodi methodology is still good law and continues to be relied upon, and has been cited with approval by other Circuits finding a liberty/property interest. See for example Murphy v. Otter, 584 Fed. Appx. 453 (9th Cir. 2014) on remand at 2015 U.S. Dist. LEXIS 183234 (D. ID 7/13/15). The Circuits that have approved Rodi, are Slezak v. Evatt, 21 F.3d 590, 595 (4th Cir.1994); Kindred v. Duckworth, 9 F.3d 638, 642 (7th Cir.1993); DeGidio v. Pung, 920 F.2d 525, 539 (8th Cir. 1990); Murphy, at 454;

Lepiscopo v. Tansy, 1993 U.S. App. LEXIS 33548, 6-7 (10th Cir. 1993); and see Dozier v. Hilton, 507 F.Supp. 1299, 1310-11 (D. NJ 1981); Korkala v. NYDOC, 1986 U.S Dist. LEXIS 20820 (SDNY 1986).

B. There Is A Split Amoung The Circuit Courts That Have Decided The Issue.

Since the Rodi, Court announced its holding, other Circuits have considered whether a contract between an inmate and prison authorities may create a liberty/property interest, with the Circuits splitting on the issue. The majority of the Circuits have decided that such a contract can create a liberty/property interest. See caes cited above. Only three Circiuts have held that such a contract can not create a liberty/property interest. See Reynolds v. Roberts, 207 F.3d 1288, 1298 (11th Cir. 2000); Virgil v. Gilbert, 272 F.3d 391, 395 (6th Cir. 2001); Beo v. District of Columbia, 310 U.S. App. D.C. 137, 44 F.3d 1026, 1028-29 (D. DC 1995). This Court had an occassion to decide the issue, but passed on it for reasons not related to this petition. Thompson, at 465n.5.

C. The Question Presented Implicates Issues of National Importance Warranting This Court's Review.

This case presents a fundamental question of the application of this Court's decision in Perry and Roth, in the prison context. The question presented is of great public impartance as it affects the operations of the prison systems in all 50 states, the District of Columbia, each of the territories of the United States, and thousands of city and county jails. In view of the large amount of litigation by prisoners that result in settlements, guidance on the question is also of great importance to prisoners because it affects their ability to motivate governmental entities to fufill their obligations under such contracts, which usually effect the conditions of confinement,

and was the result of foregoing other rights in the negotiation for such contracts. The Court's resolution of the question will help reduce prisoner litigation by settling the issue once and for all and sending a strong message to governmental bodies that they must adhere to the contracts they enter into.

The issue's importance is enhanced by the fact that the lower courts' decision is in direct conflict with this Court's ruling in Perry and Roth, supra., and prior precedent in the First Circuit. In Perry, and Roth, this Court held that a contract between a person and the government which bestows a benefit on the person and restricts descretion on the government it would have had otherwise, create a liberty/property interest. Perry, at 600-02; Roth, at 571-78.

Likewise, in Rodi, supra., and the progeny of precedent cited therein, the First Circuit came to the same conslusion citing it's precedent of Collins v. Marina-Martinez, 894 F.2d 474, 476-78 (1st Cir. 1990), amoung others, in which it specifically cited to Perry and Roth in its analysis of the due process liberty/property interests created through a contract between the state and a inmate. In Rodi, the First Circuit specifically held that "an ordinary agreement or contract between the state and an inmate can create a protectible liberty interest." Rodi, at 28. This decision was not overruled by the holding in Sandin. Sandin, at 501(Breyer, Souter, Ginsberg, Stevens dissenting).

Furthermore, there is a split between the Circuits, with the majority of the Circuits recognizing that a contract between an inmate and prison authorities can create a liberty/property interest sufficient to warrant the procedural due process protections afforded by the Fourteenth Amendment. See cases cited above. The issue has even

greater signifigance because this Court, having the opportunity to resolve the specific issue, ie., whether a contract between an inmate and prison officials can create a liberty/property interest, passed on resolving it. See Thompson, at 465n.5. Thus, this Court's intervention is impartant to bring uniformity to the lower Courts' decsisions. McElory v. United States, 455 U.S. 642, 643 (1982) (granting certiorari to bring uniformity amoung circuit decisions); Mack v. United States, 430 U.S. 188, 189 (1977)(same).

D. The Lower Court's Decisions Were Contrary To Law.

Finally, the First Circuit's decision is contrary to law. The principles laid out by this Court in Roth and Perry, and utilized by the First Circuit in its ruling to find that a contract between an inmate and the government can create a liberty and property interest, govern the outcome of this case. In these cases, the courts have held that where the government enters a contract which provides for a specific benefit or liberty outcome by limiting the State's descretion based upon substantive predicates, it creates a liberty/property interest sufficient for protection by due process. Roth, at 571-78; Perry, at 600-02; Rodi, at 26-28.

In the case at bar, the Plaintiff's Complaint alleged that he enterred into a contract with Nevada prison officials which entitled him to certain benefits, including minimum custody status and transfer to a minimum custody prison once he met the substantive predicates to obtain such status, and that he met such substantive qualifying predicates and should have been transferred, but nonetheless was denied such status without due process. See Complaint, at 12-18; First Amended Complaint, at 12-18. Thus, the lower courts' decisions that the compliant/amended complaint did not state a claim was

contrary to law and this Court's review of that decision is necessary to correct it.

II.

THE FIRST CIRCUIT's DISMISSAL OF THE PETITIONER'S EQUAL PROTECTION CLAIM FOR FAILURE TO STATE A CLAIM CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, IS PART OF A SPLIT AMOUNG THE CIRCUITS, AND IS CONTRARY TO LAW.

For over 100 years, this Court has recognized an equal protection claim based upon a "class of one." Willowbrook v. Olech, 528 U.S. 562, 564 (2000)(citing to cases dating back to 1918). In 2000, this Court reaffirmed the elements necessary to plead a clalim for equal protection based upon a class of one, and has never required a specific factual heightened pleading for the allegation that a claimant is similarly situated with his comparators. Id. The First Circuit's holding joins a group of Circuit courts which now requires a specific set of facts and heightened pleading standard for pleading "similarly situated" in a class of one claim relying on this Court's holding in Ashcroft v. Iqbal, 556 U.S. 662 (2009), even in pro se litigation.

These courts' decisions are contrary to this Court's holding in Willowbrook, and the cases cited therein, and other Circuits that have followed this Court's ruling therein, which only requires a generalized pleading of the facts necessary to plead "similarly situated" in the class of one claims. Therefore, this case raises important fundamental Constitutional questions that literally effects every person in the United States and those claiming protection under the Constitution. It is especially important to pro se litigants seeking redress from governmental discrimination. The Court's supervisory power should be exercised to bring the Circuits in uniformity with this Court's holding in Willowbrook and to correct the lower court's erroneous decision.

A. The First Circuit's Decision Conflicts With Decisions By This Court and Other Circuits.

The lower Court's decision that the Petitioner failed to state a claim for a class of one equal protection claim because he failed to plead specific facts that "he was similarly situated to such inmate in all relevant respects" and requiring a heightened pleading standard, is in conflict with this Court's holding in Willowbrook and other Circuits following its precedent and this Court's holding in Ashcroft v. Iqbal, 556 U.S. 662 (2009). In Willowbrook, this Court held that the Plaintiff (Olech) stated a claim for relief because she alleged that the other home owners in Willowbrook were only required to provide a 15 foot easement. Willowbrook, at 565. The Court held that the allegation that "other home owners who sought and recieved water link up" was sufficient of an allegation to plead that Olech was "similarly situated" to her comparators for the purpose of stating a valid claim. Id.; and see Olech v. Willowbrook, 160 F.3d 386, 387-88 (7th Cir. 1998)(stating specific allegations in complaint); Olech v. Village of Willowbrook, 1998 U.S. Dist. LEXIS 5494, 2-9 (ND Ill. 4/13/98) (same). Other Circuit Courts that came to the same conclusion that only general allegations pleading that they are similarly situated to their comparators is necessary include the Third Circuit, Fourth Circuit, Sixth Circuit, Ninth Circuit. See Chavarriage v. NJDOC, 806 F.3d 210 (3rd Cir. 2015); King v. Rubenstien, 825 F.3d 206, 220-21 (4th Cir. 2010); Davis v. Prison Health Services, 679 F.3d 433, 438-39 (6th Cir. 2012); Cooper v. Clark County, 519 Fed. Appx. 479, 482 (9th Cir. 2013). Therefore, this Court's intervention is needed to bring the First Circuit's decision in conformity with this Court's holding. Under Willowbrook, only generalized allegations reagrding the similarity of comparators is necessary to to state a class of one equal protection

claim. The Court's superviosry power should be exercised to bring the First Circuit's decision in conformity with this holding.

B. There Is A Split Amoung The Circuit Courts With The Circuits Requiring A Varied Standard For Pleading "Similarly Situated".

As stated above, the Third, Fourth, Sixth, and Ninth Circuits have all followed the Willowbrook holding of only requiring generalized factual allegations as to being similarly situated. The other Circuits have all required varied degrees of specificity and heightened factual allegations concerning being similarly situated to the comparators to state a valid equal protection claim based on a class of one. See Freeman v. Town of Hudson, 714 F.3d 29, 38 (1st Cir. 2013); Ruston v. Town Board for Town of Skaneatetes, 610 F.3d 55, 59 (2nd Cir. 2010); Clark v. Owens, 371 Fed. Appx. 553, 554 (5th Cir. 2010); D.S. v. E. Porter County Sch. Corp., 799 F.3d 793 (7th Cir. 2012); Higgins Elec. Inc. v. O'Fallon Fire Protection Dist., 813 F.3d 1124 (8th Cir. 2016); Kan. Penn. Gaming, LLC v. Collins, 656 F.3d 1210, 1217-18 (10th Cir. 2011) Alveraz v. Sec., Fla. DOC, 646 Fed. Appx. 858, 863-64 (11th Cir. 2016); and Lillemoe v. USDA, 344 F.Supp. 3d 288 (D.DC 2018). These courts, each relying on the holding in Iqbal, supra., held there was a heightened pleading requiment to allege that a claimant was similarly situated with his comparators. However, these courts have applied varying degrees of specificity that is required with the First Circuit, D.C., Seventh Circuit, and Eighth Circuits requiring a "extremely high" degree of similarity needed to be plead; the Second and Fifth Circuits requiring specific allegations; the Tenth Circuit requiring a substantial similarity in all material respects; and the Eleventh Circuit requiring a prima facie case with specific allegations. Ibid. Therefore, this Court's supervisory power is needed to create a

uniform standard for the pleading requirements for pleading the element of being similarly situated throughout the Circuits, and to bring the Circuits into conformity with this Court's hoding in Willowbrook and Iqbal, supra. McElory, 455 U.S. at 643; Mack, 430 U.S. at 189.

C. The Question Presented Implicates Issues of National Importance Warranting This Court's Review.

This claim presents a fundamental question of the pleading requirements for "similarly situated" in class of one Equal Protection actions as required by Willowbrook, supra., and Iqbal, supra. The question presented is of great public importance as it effects every person claiming protection from the United States Constitution and making a "class of one" Equal Protection claim. The question is important because the lower courts all have varied levels of pleading requirements of the specifictiy that is required. The Equal Protection Clause of the United States Consitution is one of the fundamental rights afforded to persons in the United States. As argued above, only four circuit courts, the Third, Fourth, Sixth, and Ninth Circuits, have followed the holding by this Court in Willowbrook, and require only a generalized factual pleading requirment when pleading "similiarly situated." See Chavarriage, at 233-34; King, at 220-21; Davis, at 439-38; Cooper, at 482.

The other circuits all require varied levels of pleading, with some circuits requiring "extremely high" levels of specificity; specific allegations of similarly situated in all relevant aspects; "substantial similarity;" and a "prima facie case of specific allegations. See cases cited in subsection "B" above. This varied level of pleading requirement, in all cases cited above, have misapplied this Court's pleading requirement announced in Iqbal.

Iqbal, supra., never required a heightened level of pleading. Iqbal 556 U.S. at 678; see also Bell Atlantic Corp. v. Twombly, 550 U.S 544, 555 (2007). In fact, these cases specifically held that "detailed allegations were not required." Ibid. Rather, Iqbal, required factual pleading sufficient to state a plausible claim to show that a party was entitled to relief. Ibid. While mere naked assertions were insufficient to state a claim, such assertions with further factual enhancement was sufficient. Ibid. These Circuits' requirement of a heightened factual pleading for "similarily situated" even in pro se cases is in further conflict with this Court's holding that pro se cases are to be liberally construed. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). Thus, this Court's intervention is even more important because not only is the First Circuit's decision contrary to law and in conflict with this Court's prior pleading holdings, but the other Circuits, enumerated above, are in direct conflict with this Court's pleading standards. Therefore, this Court's supervisory power should be exercised to bring conformity amoung the various Circuits and to correct the lower court's erroneous ruling in this case. McElory, 455 U.S. at 643; Mack, 430 U.S. at 189.

D. The Lower Court's Decision Was Contrary To Law.

Finally, the First Circuit's decision was contrary to law. As argued above, this Court has never required a heightened pleading standard for alleging "similarly situated" in class of one Equal Protection cases. Willowbrook, at 564-65. The Petitioner's Complaint alleged that he similarly situated to other inmates applying for minimum custody status and otherwise qualified therefore. Appdx.C, Compl., ¶33-4. His Amended Complaint alleged that he was similarly

situated "... to all C-3 [medium custody] inmates seeking C-2 [minimum custody] status without family in New Hampshire;" "all Nevada inmates who were transfered out of state via the ICC and seeking minimum custody at a recieving state;" and "all New Hampshire inmates here [located in New Hampshire] via the ICC who sought C-2 status." Appdx. C, Amnd Cmplt., 180-81. These allegations, liberally construed, are sufficient to plead that the Petitioner was plausibly similarly situated to his comparators. Willowbrook, at 564-65; Iqbal, at 678; Erickson, at 93-94. Therefore, this Court should intervene in this case to correct the lower court's erroneous decision.

III.

THE FIRST CIRCUIT'S DISMISSAL OF PETITIONER'S FIRST AMENDMENT RETALIATION CLAIM FOR FAILURE TO STATE A CLAIM CONFLICTS WITH DECISIONS OF THIS COURT, IMPLICATES A FUNDAMENTAL QUESTION OF NATIONAL IMPORTANCE, AND IS CONTRARY TO LAW.

In 2007, and again in 2009, this Court reaffirmed this Court's long held rule of law that district courts must consider all the allegations on file with the court to determine whether a pro se plaintiff has alleged sufficient facts to state an element of a claim that is plausible. see Iqbal, 556 U.S. at 698 (courts must consider the complaint as a whole) citing Twombly, 550 U.S. at 555, 556 n.14(same); Erickson v. Pardus, 551 U.S. 89, 94-95 (2007)(holding that district courts must consider all facts on file with the court). The lower court's decision is in conflict with this Court's holding in those cases.

The issue presented here implicates a fundamental question of national importance because it effects the pleading requirements in all federal district courts and implicates the operations of the prison and jail systems in the country. The lower court's decision deviates so far from this court's established rule of law

that the Court's supervisory power is needed to correct the injustice manifested by it.

A. The First Circuit's Affirmance Is In Conflict With Decisions By This Court.

In Twombly, this Court reaffirmed it's rule of law that a district court must consider the complaint as a whole in deciding whether a complaint states a plausible claim for relief. Twombly, at 569 n.14. Two weeks later, the Court in Erickson, supra., held that a district court must consider any documents attached to the complaint and on file in the court when deciding plausibility in pro se cases. Erickson, 551 U.S. at 94. The Court reaffirmed these holdings in Iqbal, supra., just two years later. Iqbal, at 698. The lower court held that the Petitoner failed to state a plausible claim for retaliation, holding that his allegation that a threat of an out of state transfer was not an adverse action sufficient to state a plausible claim. This is in direct conflict with this Court's rule of law because the lower court failed to consider the complaint as a whole or the other documents on file with the court. Appx. A, pg. 28. While the court recognized its responsibility to do so, in application it failed to consider multiple factual allegations concerning adverse actions. Id., and at pg. 7, n.2.

B. The First Circuit's Decision Implicates A Question of National Importance Warranting This Court's Review.

The First Circuit's decision presents a fundamental question on how district court's are required to determine whether a pro se litigant has stated a plausible claim. Twombly, at 569 n.14; Erickson, at 94; Iqbal, at 698. This issue implicates a fundamental question of great national importance because it implicates the public's access to the courts. How a district court reviews a complaint

to determine whether it states a plausible claim effectively determines whether a litigant can gain access to the courts. Further, it implicates the pleading requirements for stating a First Amendment Free Speech retaliation claim. The First Amendment's Free Speech Clause is of national importance because it effects every person claiming protection under the Constitution. It is of national importance because it further implicates the operations of every prison, jail, and correctional facility in the country. correctional officials need to be aware that certain actions, when done in retaliation for Free Speech, are unconstitutional.

This case presents additional issues of importance due to the confussion brought on by the pleading requirements in Twombly and Iqbal. See Jeffery A. Parness, 2 Moore's Federal Practice-Civil § 8.10, [2] and n.3.1 (2019)(and cases cited therein). The plausibility stanadard has infused great confussion on exactly what standard of factual specificity is required to state a claim. Id. Finally, this case is important because the lower court's decision deviates so far from this Court's stated rule of law. The Court's supervisory power should be invoked to bring the decision in line with this Court's stated rule of law.

C. The Lower Court's Decision Is Contrary To Law.

The lower court held that the Petitioner's retaliation claim was not plausibile. The lower court held that the Petitioner's allegations that prison officials threatened to transfer him back to Nevada from New hampshire was insufficient to state a plausible claim for retaliation because it wasnot an adverse action. Appx. A, pg. 28. the lower court's decision was contrary to law, because it failed to consider all of the allegations Petitioner made as to

adverse actions. Id., and see Twombly, at 569 n.14; Erickson, 551 U.S. at 94; Iqbal, at 698.

In the Petitioner's complaint, Amended Complaint, and Motion For Injunction (3), he alleged that he suffered adverse actions of a threat to transfer him back to Nevada from New Hmapshire, revocation of his minimum custody status, refusal to transfer him to a minimum custody prison, and loss of his benefits in his settlement agreement. Appx. C, at pg. 131-134; 178-181. He further alleged that these actions were advers because it resulted in "loss of privileges and quality of life; loss of liberty enjoyed by prisoners in C-2 status; loss of living outside the medimum prison walls and community; loss of privileges towork and live within the community and public at large; loss of priviliege to eat meals from resturants; loss of increased opportunity for parole; that transfer back to Nevada would result in further retaliation and abuse by Nevada guards and transfer to a maximum security unit/prison." Ibid. The district court should have considered these allegations. Twombly, at 569 n.14; Erickson, at 94; Iqbal, at 698.

In his Motion for Injunction, he alleged that if he was returned to Nevada, he would "face further retaliatory actions, and loss of his bargained consideration from his settlement agreement." See Motion (3), at 5-6. In addition, even though the district court took judicial notice of the various lawsuits Petitioner had filed, including one in which he defeated the defendant's motion for summary judgment and alleged that officers had drugged his food, the district court court below failed to consider these allegations and infer that if the Petitioner was transferred, he would face additional retaliation and abuse. Appx. A, pg. 7 n.2. Therefore, this Court's supervisory

power is needed to correct this error because the Petitioner's allegations actually state a plausible retaliation claim. See Hannon v. Beard, 645 F.3d 45, 48 (1st Cir. 2011).

IV.

THE FIRST CIRCUIT'S DISMISSAL OF PETITIONER'S ACCESS TO THE COURTS CLAIM FOR FAILURE TO STATE A CLAIM CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, CREATES A SPLIT AMOUNG THE CIRCUITS, IMPLICATES A FUNDAMENTAL QUESTION OF NATIONAL IMPORTANCE, AND AND IS CONTRARY TO LAW.

Over four decades ago, this Court reaffirmed the holding that prisoners retain the right to petition the government for redress of grievances which,includes access to the courts for the purpose of presenting their complaints, including, but not limited to, the right to file other civil actions in court that have no bearing on the prisoner's sentence. The First Circuit's decision affirming the District Court's holding that the Petitioner's access to the court's claim does not state a plausible claim is in direct conflict with this Court's, and other courts', holdings that prison officials may not interfer with a prisonser's attempt to petition the government.

It also creates a split amoung the circuits, joining the Fifth Circuit, whom do not recognize a prisoner's right to access the courts beyound that which involves a direct or colleateral attack to one's sentence and civil rights actions. The Fisrt Circuit's decision is also in direct conflict with this Court's holdings that challenges to a parole hearing is a direct or collateral attack on a sentence and thus is implicated in this Court's holding in Lewis v. Casey, 518 U.S. 343 (1996).

This case raises important fundamental constitutional questions that effect every prisoner incarcerated within this country's prisons, jails, and other facilities and effects the operations of those

facilities. Therefore, this Court's supervisory power should be exercised to bring the First Circuit into uniformity with this Court's holdings and those of the other Circuits, and to correct its erroneous rulings.

A. The First Circuit's Decison Conflicts With Decisions By This Court and Other Circuits.

The holding by the courts below that a prisoner's right to access the courts does not encompass the right to apply for parole and/or challenge a decision of the parole board is in conflict with this Court's decisions and those of other Circuits. In the lower court's decision they hold that the denial of parole, loss of an appeal of the parole denial, and inability to file a court challenge to the denial of parole simply is not an actual injury for the purpose of an access to the courts claim. Appx. A., pg. 30-31. The lower court's holdings are in conflict with two distinct theories of claims created by this Court.

First, the lower courts' holding is in conflict with this Court's holdings that prisoners have a right to petition the government, which encompasses a right to access the court with any civil action that has a reasonable basis in law or fact; see Cruz v. Beto, 405 U.S. 319, 321 (1972); California Motor Transportation Company v. Trucking Unlimited, 404 U.S. 508,510 (1972); and that the right to petition extends to all branches of the government. Ibid. Every Circuit Court in the country has recognized these holdings except for the First Circuit and the Fifth Circuit, which hold that prisoners' right to access the courts is limited to those actions which attack the prisoner's sentence or civil rights. See Simmons v. Dickhart, 804 F.2d 182, 183 (1st Cir. 1986); and Clewis v. Hirsch, 700 Fed. Appx. 347, 348-49 (5th Cir. 2017).

Second, the First Circuit's affirmance conflicts with this Court's, and other Circuit's, holding that the parole process is part of a prisoner's sentence and is encompassed within the limitations of this Court's holding in Lewis v. Casey, 518 U.S. 343, 354-55 (1996) for actual injury. See Wilkinson v. Dotson, 544 U.S. 74, 81-82(005) (holding that challenges that effect the duration of confinement must be brought as habeas action, otherwise it is filed as a civil rights action); Heck v. Humphrey, 512 U.S. 477, 486-87 (2005)(same); and see for example Sinclair v. Fontenot, 2000 U.S. App. LEXIS 40591, 10-12 (5th Cir. 2000); Bass v. Singletary, 143 F.3d 1442, 1445 (11th Cir. 1998); Parks v. Samuels, 2015 U.S. Dist. LEXIS 139724, 19-21 (MD PA 2015); Taylor v. W.Va. Parole Board, 2008 U.S. Dist. LEXIS 63025, 18-20 (ND WV 2008). Challenges to a parole decision in most states is either done through a writ of habeas corpus or other writ, or is challenged through some other civil vehicle in the courts. See California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten The Rights Of Prisoners, 44 U.S.F. L. Rev. 177, 202 Tabel 1 (2009)(listing each State's parole statute and vehicle for review). Therefore, this Court's intervention is needed to clarify that the denial of parole and inablity to challenge a denial of parole decision are actual injuries encompassed within the limitations setforth in Lewis, supra. Lewis, at 354-55.

B. The First Circuit's Decision Creates A Split Amoung The Circuits' Recognition Of What Encompasses The Right To Access The Courts.

The First Circuit's affirmance of the District Court's holding creates a split amoung the Circuits in the rights which are retained by a prisoner as to access of the courts. As argued above, only two circuits now hold that prisoners only retain the right to

access the courts for actions that encompass the prisoner's sentence and or confinement. See supra., at ¶IV(A). All other Circuits recognize that a prisoner's right to access the courts encompass any other civil matter that has a reasonable basis in law or fact. See Monsky v. Moraghan, 127 F.3d 243, 246 (2nd Cir. 1997); Sanders v. Rose, 576 Fed.Appx. 91, 94 (3rd Cir. 2014); Bryant v. Lee, 1993 U.S. App. LEXIS 13048, 3-4 (4th Cir. 1993); John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992); Snyder v. Nolen, 380 F.3d 279, 290-91 (7th Cir. 2004); Cody v. Weber, 256 F.3d 764, 767-68 (8th Cir. 2001); Silva v. Di Vittoro, 658 F.3d 1090, 1102 (9th Cir. 2011); Cohen v. Longshore, 621 F.3d 1311, 1317 (10th Cir. 2010); Staub v. Monge, 815 F.2d 1467, 1470 (11th Cir. 1987).

The First Circuit's affirmance also joins several other courts that have held that the impedement of a parole hearing resulting in a denial of parole or challenge to that decison is not actual injury for the purposes of an access to the courts claim. See Brisco v. Rize, 2012 U.S. Dist. LEXIS 10001, 15-16 (EDNY 2012); Johnson v. Colson, 2014 U.S. Dist. LEXIS 52783, 14-15 (MD TN 2014). This is in contrast to other courts who says it does. See cases cited above and Sinclair v. Fontenot, 2000 U.S. App. LEXIS 40591, at 10-12; Merritt v. Fla. Parole Comm., 2009 U.S. Dist. LEXIS 111748, 9-11 (ND FL. 2009); Thurmond v. Ryals, 2018 U.S. Dist. LEXIS 117102, 10-12 (ED Ark. 2018); Johnson v. Little, 2017 U.S. Dist. LEXIS 174006, 12-13 (D. Nev. 2017). Therefore, this Court should use its supervisory power to bring clarification to its holding in Lewis and explain specifically what constitutes actual injury.

C. The First Circuit's AffirmanceImplicates A Question Of National Importance Warranting This Court's Review.

The First Circuit's affirmance presents a fundamental question on the rights retained by prisoners as it encompasses the right to access the courts. The question presented is of great public importance as it effects the operations of the prison systems in all fifty States, the District of Columbia, and each of the territories of the United States, as well as thousands of city and county jails. The Court's guidance is needed so that prison officials know exactly what legal matters are encompassed within a prisoner's right to access the courts. This question effects prison officials' ability to operate their facilities and what legal matters that they are not allowed to interfere with. The Court's guidance will assist the lower courts in their efforts to reduce inmate litigation. It will assist in clarifying those rights that are retained by prisoners in this country. Therefore, this Court should review the First Circuit's decision.

This case presents a question of fundamental rights to Free Speech and thus its importance is enhanced. It effects every prisoner in this Country, thus its importance is of a national magnitude. The issue's importance is enhanced by the fact that the First Circuit's decision is in direct conflict with the decisions of this Court in Cruz, 405 U.S. at 321, and Lewis, 518 U.S. at 354-55; and, as argued above, it creates a spilt amoung the Circuits. Further, the Court's gudiance is needed to clarify that there are two distinct causes of action for access to the courts claim. The Court's guidance is further needed to clarify what type of actual injury is encompassed within the Lewis limitations for prisoner's lawsuits. Therefore, this Court should review the First Circuit's decision and clarify what types of actions constitute actual injury.

D. The First Circuit's Decision Was Contrary To Law.

The Court's intervention is further needed because the First Circuit's affirmance was contrary to law. In the District Court's decision, it held that the Petitioner did not state a claim because the denial of parole, loss of a parole appeal, and inability to pursue a court challenge for the denial of parole, "... is neither a challenge to a prisoner's conviction or sentence nor a challenge to the constitutionality of the conditions of confinement." Appx. A, pg. 29-30. The Court went on to rule, "... a hindrance to the successful pursuit of parole proceedings is not a basis for a viable claim for denial of access to the courts." Id.

In the Magistrate's order, she cites to Perotti v. O'Boyle, 2017 U.S. Dist. LEXIS 11793, 11 (2017), affirmed at 2017 U.S. App. LEXIS 24266, 4 (6th Cir. 2017) citing to Lewis, at 351, and Thaddeus-X v. Blatter, 175 F.3d 378, 391 (6th Cir. 1999)(also relying on Lewis). and Davis v. Cox, 2015 U.S. Dist. LEXIS 77862, 11-12 (D. Nev. 2015), appeal dismissed, No. 15-16350 (9th Cir. 2015)(citing to Lewis, at 353n.3, 354-55; and Simmons v. Sacramento Cty. Sup. Crt., 318 F.3d 1156, 1159-60 (9th Cir. 2003)(citing to Lewis, at 354-55). These cases are not applicable to the Petitioner's claim for two reasons.

First, the district court cases cited by the Magistrate were both access to the court cases based upon a failure to assist. Ibid. The Petitioner's claim is an interference with the right to access the courts. In Lewis, this Court held that an inmate does not have a right to have prison officials ASSIST them in presenting claims other than those challenging his sentence or in civil rights actions. Lewis, at 354-55. It said nothing about whether an inmate retains a right to file any other claim and whether the interference of that claim is a constitutional violation. See Silva, 658 F.3d at 1102;

Snyder, 380 F.3d at 290-91; and cases cited above. However, in Cruz, this Court specifically held that inmates retain the right to petition the government and to access the courts to make any complaints. Cruz, 405 U.S. at 321. Therefore, it is clear that Lewis's limitation of access to the courts only encompasses failure to assist cases and not interference cases. Silva, at 1102; Snyder, at 290-91. Therefore, the District Court and the First Circuit were clearly wrong and this Court should intervene to correct the error.

However, even if the Court were to rule the Lewis, limitations were encompassed within interference cases, the lower court's decision would still be contrary to law because a denial of parole, appeal of the denial of parole, and the court challenge to the denial of parole are all actions encompassed within the Lewis Court's allowance of actual injury. Lewis, at 354-55; and see Sinclair, at 10-12; Singeltary, at 1445. A parole board decision implicates the sentence, either to reduce confinement or to the conditions of confinement so that it would need to be brought as a habeas action or a civil rights action. See Wilkinson, 544 U.S. at 81-82. Therefore, the lower court's decision was contrary to law and this Court should intervene to correct the error.

V.

THE FIRST CIRCUIT'S DISMISSAL OF PETITIONER'S COMPLAINT WITHOUT GRANTING LEAVE TO AMEND CONFLICTS WITH DECISIONS OF THIS COURT AND EVERY CIRCUIT, IMPLICATES A FUNDAMENTAL QUESTION OF NATIONAL IMPORTANCE, AND IS CONTRARY TO LAW.

In an effort to address the large number of prisoner complaints filed in federal courts, Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-71, as amended 42 U.S.C. §1997e et seq. Among other reforms, the PLRA mandates early judicial screening

of prisoner complaints. 28 U.S.C. §1915A; 42 U.S.C. §1997e(a). The First Circuit in affirming the District Court's dismissal without an opportunity to amend conflicts with the long held common law rule approved by this Court, and every other Circuit, of allowing a pro se litigant to amend his compliant prior to dismissing for failure to state a claim, dispite the enactment of the PLRA.

The First Circuit's affirmance presents a question of national importance that effects the access that every prisoner has to the courts. The Fisrt Amendment is a fundamental constitutional guarantee of access to the courts. The lower courts' decision to dismiss without an opportunity to amend runs afoul of this Court's mandate that the courts should not adopt different or more onerous pleading rules nor stray from the normal practice of the common law.

The lower courts' decision is contrary to law because the Petitioner's complaint, if it did fail to state a claim, could have been corrected by amendment. The main reason for the lower courts' dismissal for failure to state a claim was due to a lack of allegations stating specific facts necessary to state valid claims. Therefore, this Court should grant certioria to review the lower courts' decision and correct their errors.

A. The First Circuit's Decision Conflicts With Decisions By This Court and Every Circuit Court.

The holding by the lower courts that the Petitioner's complaint should be dismissed for failure to state a claim without allowing for an opportunity to amend conflicts with the decisions of this Court and every Circuit court. In 1989, this Court in Neitzke v. Williams, 490 U.S. 319, 329-30 (1989), held that prior to a sua sponte dismissal by the court, a pro se litigant should be afforded an opportunity to amend. Even after the enactment of the PLRA, every

Circuit Court has continued this practice. Chute v. Walker, 281 F.3d 314, 319 (1st Cir. 2002); Abbas v. Dixon, 480 F.3d 636, 639-40 (2nd Cir. 2007); Grayson v. Mayview State Hosp., 293 F.3d 103, 109-114 (3rd Cir. 2002); Nottingham v. Sherill, 131 Fed. Appx. 427, 427 (4th Cir.2005); Hale v. King, 642 F.3d 492, 503 (5th Cir. 2011); LaFountain v. Harry, 716 F.3d 944, 951 (6th Cir. 2013); Smith v. Knox County Jail, 666 F.3d 1037, 1039-40 (7th Cir. 2012); Hughes v. Banks, 290 Fed. Appx. 960, 962 (8th Cir. 2008); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000); Curley v. Perry, 246 F.3d 1278, 1283 (10th Cir. 2001); Brown v. Johnson, 387 F.3d 1344, 1348-49 (11th Cir. 2004); Taylor v. U.S. Prob. Office, 409 F.3d 426, 428 (DC Cir. 2005).

In fact, the decision by the lower courts is in conflict with their own precedent. Brown v. State, 511 Fed. Appx. 4, 5 (1st Cir.2013). In Brown, the First Circuit held that, "before dismissal for failure to state a claim, is ordered, some form of notice and an opportunity to cure the deficiencies in the complaint must be afforded." Id. The Court went on to hold that, "these same standards apply to dismissals under §1915(e) and §1915A." Id.

Finally, the First Circuit's decision is in conflict with this Court's holdings that the lower courts should abstain from adopting different or more onerous pleading rules nor stray from the normal practice of the common law dispite teh enactment of the PLRA. Neitzke, 490 U.S. at 329-30; Jones v. Bock, 549 U.S. 199, 212 (2007). The First Circuit's affirmance was an attempt to circumvent precedent in an effort to solve a policy problem, which this Court has held to be improper. Jones, at 212, 223-24. Therefore, this Court should exercise its supervisory power to bring the First Circuit's decision in line with the rest of the federal courts.

B. The First Circuit's Affirmance Implicates A Question Of National Importance Warranting This Court's Review.

The question presented in this case implicates a fundamental constitutional issue. The PLRA, and the in forma pauperis statutes in general, were enacted to provide the indigent litigant with access to the courts, while at the same time assist the courts in weeding out meritless complaints. Neitzke, at 326-29; Jones, at 202-04. Far too often the lower courts, in interpreting these statutes, attempt to solve policy issues through their decisions, rather than interprete and apply the statute as intended by Congress. Neitzke, at 326; Jones, at 212-13, 217, 223-24. This Court has repeatidly explained that courts should not depart from the usual practice under the FRCP on the basis of policy concerns. Ibid.

As this Court stated in Jones, supra., "whatever temptations the statesmenship of p/olicy making might wisely suggest, the judge's job is to construe the statute - not to make it better." Jones, at 216 citing Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947). Adopting different and more onerous pleading rules to deal with particular catagories of cases should be done through established rulemaking procedures, and not a on a case-by-case basis by the courts. Jones, at 224.

Congress enacted these statutes to assure equality of consideration for all litigants. Neitzke, at 329. The lower court's decision denies the indigent prisoner litigant plaintiff the practical protection against unwarranted dismissal which are provided to paying litigants. Neitzke, at 330. The Court's intervention is necessary to bring about the equal footing which Congress intended by the enactment of these statutes. Ibid.

Further, the lower court's decision raises an important question of fundamental interest to all indigent litigants in that §1915(g) bars those litigants who have on three prior occassions had cases dismissed for a failure to state a claim. Lopez, at 1129. As a result, a prisoner who's complaint is denied without an opportunity to amend would waste some or all of his strikes, not because his complaint is meritless, but because he is unskilled in the law and lacks counsel. Lopez, 203 F.3d at 1129. Thus, he would be effectively barred from the federal courts, a result that is contrary to the spirit of the federal pleading rules and the PLRA itself. Id., at 1129-30.

C. The First Circuit's Affirmance Was Contrary To Law.

The First Circuit's affirmance of the District Court's dismissal of the complaint without leave to amend because the Court ruled that the complaint was deficient beyond repair. Appx. A, at 2. This holding was contrary to law, because as the Petitioner argued above, the complaint was dismissed for failing to allege certain facts in the equal protection claims, retaliation claims, and access to the court claims. See Appx. A, at 21-33(generally). Thus, the complaint could have been saved by alleging certain gacts. Indeed, the Petitioner's amended complaint did just that. Appx. C (generally). In the amended complaint, the Petitioner alleged the facts that the District Court held the complaint was deficient in. Therefore, the First Circuit's affirmance was contrary to law, and this Court should intervene by way of review to correct the errors.

VI.

THE FIRST CIRCUIT'S AFFIRMANCE OF THE DISMISSAL OF THE PETITIONER'S COMPLAINT WITHOUT CONSIDERING THE AMENDED COMPLAINT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, IMPLICATES A FUNDAMENTAL QUESTION OF NATIONAL IMPORTANCE, AND IS CONTRARY TO LAW.

The Federal Rules of Civil Procedure clearly mandates that a plaintiff has the absolute right to amend his complaint once prior to a responsive pleading being filed. FRCP 15(a)(1). Even though the Rule is clear on its face, the district court ignored the Petitioner's Amended Complaint and dismissed the complaint without ever considering the amended complaint. Appx. A, at 2. The First Circuit's affirmance of this decision is in conflict with this Court's interpretaion of Rule 15(a)(1), and that of its own and the other Circuit's.

This case raises a fundamental question of national importance because it implicates the pleading rules and policy for amended complaints. This effects every plaintiff filing a federal lawsuit in this country. The lower court's decision was contrary to law because the petitioner filed his amend complaint timely and thus the district court should have withdrawn her report and recommendation and screened the amended complaint, prior to dismissal. Therefore, this Court should exercise its supervisory powers and correct this erroneous ruling.

A. The First Circuit's Decision Is In Conflict With Decisions By This Court And All Other Circuits

In 2005, this Court interepted FRCP 15(a)(1) as affording a plaintiff the absolute right to amend a complaint without leave of the court. Mayle v. Felix, 545 U.S. 644, 655-56(2005). Every Circuit Court in the country has interpreted the Rule the same way, and has concluded that when a plaintiff files that amended complaint, it supersedes the original complaint as the operative complaint in the case. See Acevedo-Villalobos v. Hernandez, 22 F.3d 384, 388 (1st Cir. 1994); Elfenbein v. Gulf & Western Indus., 590 F.2d 445, 448n.1 (2nd Cir. 1978); Holst v. Oxman, 290 Fed. Appx. 508, 510 (3rd Cir. 200);

Galustain v. Peter, 591 F.3d 724, 729-30 (4th Cir. 2010); Santee v. Quinian, 115 F.3d 355, 357 (5th Cir. 1997); Broyles v. Corr. Med. Srv., 2009 U.S. App. LEXIS 5494, 7-11 (6th Cir. 2009); Car Carriers Inc. v. Ford Motor Co., 745 F.2d 1101, 1111 (7th Cir. 1985) cert. denied., 470 U.S. 1054 (1985); Quartann v. Utterback, 789 F.2d 1297, 1300 (8th Cir. 1986); East Chestnut St. Corp. v. Lakefront Realty Corp., 256 F.2d 513, 517 (9th Cir. 1958) cert. denied 358 U.S 907 (1958); Czermcha v. Int'l Ass'n of Mach. & Aero Workers, 724 F.2d 1552, 1555 (11th Cir. 1984); Breuer v. Rockwell Int'l Corp., 40 F.3d 1119, 1131 (10th Cir. 1994); James V. Hurson Assoc. v. Glickman, 229 F.3d 277, 283 (DC Cir. 2000);

The right to file an amended complaint extends upto and until twenty one days past the filing of a responsive pleading by the defendant. Ibid. Once an amended complaint has been filed, it supersedes the original complaint and becomes the oprative complaint. Ibid. Thus, for the purposes of screening a complaint, even if the court already screened the original complaint, it must screen the amended complaint because it is the operative complaint and supersedes the original complaint. Ibid. Therefore, the First Circuit's affirmance of the District Court's dismissal of the complaint and action, without consideration of the amended complaint is in conflict with the precedent set by the federal courts. Ibid. This Court's supervisory power should be exercised to bring the decision back within accepted precedent.

B. **This Case Presents A Fundamental Question Of National Importance.**

Whether or not a plaintiff has the right to file an amended complaint after a magistrate recommends dismissal, but prior to actual dismissal and the filing of a responsive pleading, is a fundamental question of national importance implicating every plaintiff in the federal courts. Whether a district court judge is free to ignore a plaintiff's amended

complaint, and his right to salvage his action in federal court as mandated in Rule 15(a)(1), goes to the heart of the right to access the courts. As this Court held in Jones, supra., it is not a judge's job to further policy considerations through case by case rule making. Jones, at 224. This Court's intervention is needed to protect the plaintiff's right to amend his complaint without leave afforded by Rule 15(a)(1), and have that complaint act as the operative complaint in that case. Santee, at 357; Glickman, at 283.

As previously argued, this case is of vital iportance to prisoner litigants. The PLRA allows judges to "strike out" a prisoner who has had a case dismissed on three or more occassions, blocking all further access to the courts. 28 U.S.C. §1915A(g). If a prisoner litigant was unable to fix his defective complaint prior to dismissal, he would be barred from the courts, not because he has filed meritless cases, but because he is unskilled in the law and is without legal counsel. Lopez, at 1129. This would create a result contrary to the PLRA, and the pleading rules. Lopez, at 1129-30. Thus, this Court's intervention is necessary to protect the plaintiff's rights created by the pleading Rules and to furhter the intent of Congress in enacting thePLRA. Id.

C. **The First Circuit's Decision Was Contrary To Law.**

This Court's intervention is also necessay to correct the lower court's error. After the Petitioner filed his original complaint, the magistrate filed a Report and Recommendation indicating factual deficiencies in the complaint. Appx. A, at 5-7. Based upon the Report and Recommendation's stated deficiencies, the Petitioner filed his amended complaint, with additional facts to fix the stated deficiencies, prior to the District Court's adoption of the Report and any responsive pleading being filed. Contrary to Rule 15(a)(1),

the District Court ignored the amended complaint, adopted the Report, and dismissed the case for failure to state a claim, and thus, causing the petitioner to acquire a strike. Id.

The First Circuit acknowledged the amended complaint, but ruled the District Court did not abuse its discretion by not granting leave to amend because the amended complaint did not cure the deficiencies. Appx. A, at 2. This was contrary to law for two reasons. First, the amended complaint was filed pursuant to FRCP 15(a)(1)(B), and thus the amended complaint became the operative pleading in the case requiring the Distrct Court to screen it prior to any dismissal. Bass, 669 F.3d at 509 n.2. Secondly, as argued above, the amended complaint fixed the precieved errors stated in the Report, and stated viable claims. Also, because the lower court's decisions were contrary to law and imposed an erroneous strike upon the Petitioner, this Court's intervention is needed to correct the error.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that in the posture of this case this is the only opportunity for Petitioner to seek review of the ultimate ruling of the First Circuit that the Petitioner's §1983 complaint should be dismissed for failure to state a claim, and the imposition of a erroneous "strike" for the purposes of 28 U.S.C. §1915(g), in which can be given. If the Petitioner is correct in his urging that the First Circuit's ruling was erroneous, this matter should be remanded to the District Court for appropriate disposition.

Dated this 6th day of May, 2019.

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