No: 19- 19-380

In The

Supreme Court of the United State

Alfred Lam; Paula Leiato, *et al.*,

Petitioners-Plaintiffs,

v.

City & County of San Francisco; *et al.*,
San Francisco Juvenile Probation Department,

Respondents-Defendants,

On Petition for Certiorari to the United States Supreme Court from the Court of Appeals for the Ninth Circuit

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Ninth Circuit Court No: 16-15596
U.S.D.C. No: 4:10-cv-04641 PJH
Northern District of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case poses multiple questions due to on-going and continuous instances of conduct rising to a level of discrimination, harassment, intimidation, and retaliation litigation proceedings back to 2005 throughout 2019. Petitioners have originally filed a legal action in U.S. District Court in October 10, 2008 (*see related case*).

1. May a federal court ever grant a motion for relief from judgment under Federal Rule of Civil procedure 60(b) in a case involving legal error?

2. Whether the district court erred in denying pro se plaintiffs' "motion for leave to amend" arising from "newly discovered evidence" and "continuous and on-going" instances of discrimination, harassment, intimidation, and retaliation?

3. Whether the Ninth Circuit's decision conflicts with its own and this Court's precedents?

4. Whether petitioners have satisfied discrimination, harassment, intimidation, and retaliation aspects giving rise to a "hostile work environment claim"?

5. Is statistical data produced by petitioners-plaintiffs clearly supporting "disparate treatment" or "selective treatment" by opposing party admissible in federal court?

6. Does this case provide a direct opportunity to settle an issue of public interest and matter of public concern?

PARTIES TO THE PROCEEDING

1) Alfred Lam, Paula Leiato, *et al.,*
Petitioners-Plaintiffs,

2) City & County of San Francisco, *et al.,*
San Francisco Juvenile Probation Department,
Respondent-Defendants,

In addition to the parties identified in the caption, respondent-defendants also include Toni Ratcliff-Powell, individually and in her official capacity as Director of SF Juvenile Hall; Dennis Doyle, individually and in his official capacity as Assistant Director of SF Juvenile Hall; John Radogno, Timothy Diestel, Tamara Ratcliff, Alfred Fleck, Mildred Singh, Robert Taylor, Charles Lewis, individually and in their official capacities as a "Supervisory Employees" of SF Juvenile Hall of San Francisco Juvenile Probation Department.

RELATED CASES

1) Alfred Lam, Paula Leiato, *et al.,* v. City & County of San Francisco, *et al;* San Francisco Juvenile Probation Department; No: 17-15208 Ninth Circuit Court of Appeal, currently pending writ of certiorari.

2) Alfred Lam, Paula Leiato, *et al.,* v. City & County of San Francisco, *et al.,* San Francisco Juvenile Probation Department; No: 16-16559 Ninth Circuit Court of Appeal, currently pending writ of certiorari.

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PETITION FOR WRIT OF CERTTIORARI

This petition maybe unprecedent for this Court and even the various Circuits. The is an untypical claim of discrimination, harassment, intimidation, and retaliation in federal court resulting from the petitioners being fired, terminated or constructively discharged, suspended, denied promotional opportunities, and benefits of employment. Notwithstanding, the remaining petitioners are still working for a muscling through adverse employment actions by the respondents (City & County of San Francisco) even though they were litigants since 2008 (*see* related cases) and the false allegations against petitioners began in 2005 through and including 2019.

On appeal, the Ninth Circuit did not properly examine nor give proper weigh to petitioners' evidence and totality of circumstances amounting to a judgment rendered hastily against them. It appears the Courts' ruled these circumstances were unimportant and would not have any impact upon their judgment. This great Court should hold otherwise.

OPINIONS BELOW

The opinion of the United States District Court was rendered on March 7, 2016. The 9th Circuit affirmed on March 18, 2019; Rehearing was denied on April 19, 2019.

JURISDICTION

The Supreme Court has Article 3 Section 2 jurisdiction to review the decisions of the 9th Circuit

and federal district courts. The Ninth Circuit had jurisdiction pursuant to 28 USC §1291.

STATEMENT OF THE CASE

A. Statutory Background

The Court explained, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id,* at 66. In *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993), and *Oncale v. Sundoener Offshore Services,* 523 U.S. 75 (1998), the Court laid out the principle requirements for a hostile work environment claim: (1) that the race- or gender- based harassment be "severe or pervasive"; (2) that a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) that the plaintiff perceived it as such. *Harris,* 510 U.S. at 21-22.

1. Introduction

Both petitioners are Asian Pacific Americans ("APA") and pro se civil rights plaintiffs, working as Juvenile Hall Counselors for the San Francisco Juvenile Probation Department, City and County of San Francisco.

Petitioners advanced discrimination, harassment, intimidation, and retaliation claims based upon direct and circumstantial evidence of disparate treatment and its impact. The statistical data provided supports petitioners' claims. The racial composition at the CCSF's Juvenile Justice Center ("JJC") or Juvenile Hall ("JH"), where petitioners worked from 2008-2013

is as follows: the Director is African American; approximately 2/3 of the senior or mid-level supervisor jobs are held by African Americans, approximately 2/3 of the low-level supervisor jobs are held by African Americans, the majority of entry level counselors similar like petitioners are African Americans, while approximately 10% of these positions are held by APA individuals. There have been no APAs in any of the above supervisory *positions for over the entire sixty (60) year history of JJC*[1].

During this long litigation process since 2008, involving the related cases, the individual respondents' agents including multiple named individual defendants (*petitioner's supervisor*), who are all non-APA. Their primary duties include: (1) controlling petitioner's daily work assignment; (2) reporting disciplinary incidents to "management employees" either disparate treatment or selective treatment; (3) suggesting or recommending their chosen employees to "management employees" for "special assignment or promotional" purposes; (4) discretionally granting overtime shift to selective employees especially African American; (5) filling the vacant shift for those employee requesting "time-off";

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[1] According to 2010 census data, the Bay Area's race demographics were as follows: White 52.5%, Black or African American 6.7%, Asian 23.3%. San Francisco's demographics were, similarly, White 48.5%, Black or African American 6.1%, andAsian33.3%,http://www.bayareacensus.ca.gov/bayarea.htm. The Asian population in San Francisco has risen slightly since that time.

(6) evaluating "employee's performance" annually for potential future promotional purposes, etc.

2. Misconduct Perpetrated by Respondents (City & County of San Francisco and Their Agents)

In 2015, Petitioners eventually discovered during the litigation process that the respondents' defense strategy to these actions was riddled with misconduct up to and including the entry of judgment on March 7, 2016.

a. This misconduct started with accepting Service of Process well into the deposition process in 2015. The respondents produced ten (10) witnesses of the current case, including those individual defendants listed in related case [USDC cv08-04702], [John Radogno, Dennis Doyle and Toni Ratcliff-Powell], who also produced the declarations or depositions to the court back on 2011. The respondents' agents during the deposition process, denied they ever made the declarations consisting of false allegations against petitioners and fraudulent reports to support respondents' position. They consistently gave deposition answers to prevent admission of facts and further investigation into the matters questioned or purposely gave false and misleading information and testimonies.

b. In all adversarial proceedings, litigants have a duty of full disclosure and honesty with the court. [Model Rules of Prof'. Conduct r. 3.3 (AM. BAR Ass'n 1983)]. During the entire discovery process the respondents refused to provide *any* relevant documents and answers to questions requested by

petitioners unfairly leaving petitioners with almost no relevant material facts to properly research viable questioning before ten (10) scheduled depositions of defendants/respondents on November, 2015.

c. Petitioners confirmed from the depositions of respondents' produced witnesses, the majority of them (petitioners' supervisors) testified that they had admitted using such "inappropriate language" themselves or heard such language in petitioners' worksite without enforcing the respondents' policy. This clearly shows respondents filed false allegations in using the same or similar inappropriate language against only petitioner Leiato in retaliation for her participating in "protected activities" on several occasions, resulting in a total of more than thirty days suspension without pay.

d. Petitioners confirmed that respondents, including their attorneys of record, in related cases [USDC cv08-04702] concealed, tolerated, and covered-up incidents from the district court judge regarding use of excessive force, child abuse and neglect, and child sexual abuse incidents inside San Francisco Juvenile Hall which petitioners previously reported.

e. Petitioners confirmed from the depositions of respondents' produced witnesses that petitioner's supervisor Radogno instructed petitioner Lam to clean-up human feces in a detainee's room instead of using the trained professional. Such directive was way outside of petitioner Lam's job description and contravened CCSF and SEIU policies. This was done for the sole purpose to belittle and humiliate Lam, as well as, set an example to any other employees that engage in protected activities.

f. During 2015-2016, Petitioners confirmed, based upon at least four (4) witnesses, who had first-hand knowledge and provided admissible written evidence of declarations and depositions to the district court, clearly showing the misconduct of "unclean hands" of respondents (petitioners' supervisors), such as selective or disparate treatment and making fraudulent allegations against petitioners.

g. During 2015-2016, petitioners confirmed that nine out of ten witnesses produced by respondents, all considered "public employees" and "Sworn CA Peace Officers", all denied the "code of silence" existed inside the SF Juvenile Hall. They also denied "disparate or selective treatment via discrimination, harassment, intimidation, and retaliation towards APA (including petitioners). However, all the material facts say otherwise based upon "statistical data", media articles, credible public information, and petitioners' four (4) produced witnesses.

h. Petitioners have filed numerous written complaints (exercising their rights to engage in protected activities) regarding discrimination, harassment, intimidation, and retaliation between 2008 including the present to respondents' relevant agencies. However, no appropriate action was ever taken other than Respondents' conduct giving rise to a level showing retaliation. (*See* Appendix F)

3. The Facts of Discrimination, Harassment, Intimidation, and Retaliation from Petitioners' Supervisor

Petitioners have meet and satisfied the standard for disparate treatment (discrimination) as follows: (1) Petitioners are a member of a protected category

(APA); (2) Petitioners have suffered adverse employment actions, not to mention, the stress, aggravation, and uncertainty being subjected to such actions; (3) Petitioners have suffered an array of adverse employment actions because of his or her membership in a protected classification.

Petitioners have met the standard to establish a complaint of harassment as follows: (1) Petitioners are subjected to physical, verbal, or visual conduct of the petitioner's membership in a protected classification; (2) the conduct is unwelcomed; and, (3) the conduct is sufficiently severe or pervasive as to alter the condition of the petitioners' employment putting them in bad light within the workforce thus creating and maintaining an abusive work environment.

Petitioners have meet the standard to establish a complaint of retaliation as follows: (1) Petitioners engaged in a protected activity; (2) Petitioners suffered an array of adverse employment actions; and, (3) there was a causal link between the protected activity and the adverse employment action. (*See* Appendix F of timeline.)

In *Vance v. Ball State University,* 133 S. Ct. 2434 (2013), this Court held that an employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was negligent in failing to prevent harassment from taking place. Also relevant is evidence that an employer did not properly monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints

from being filed through retaliation or by other methods. (*See* Appendix F)

4. **Multiple Errors by the District Court**
During the litigation process, the district court erred in this case as follows:

A. By limiting the alleged conduct from February 22, 2010 to March 16, 2012 *only*, even though the "newly discovered" evidence" clearly indicated additional allegations of discrimination, harassment, intimidation, and retaliation for participating in "protected activities" occurring before, during and after the above cut-off date improperly barred by the district court. The district court also denied petitioners' request to amend the following "protected classification" on or about May 11, 2015 [see Appendix E].

B. My condoning the following alleged mixed motives of discrimination, harassment, intimidation, and retaliation which occurred based upon "newly discovered evidence" either before and during the period from February 22, 2010 to March 16, 2012, and numerous evidences of post-filing incidents which were improperly barred to litigate, such as follows: **(1)** On or about March 11, 2010, Petitioner Lam's supervisor Luis Recinos, Lewis and Ratcliff-Powell intentionally placed Lam in a "high risk and unreasonably tough" assignment without providing timely and necessary trained staff

members to assist Lam; **(2)** On or about April 5, 2010, Lam's supervisor denied Lam's earned "sick pay" without merit or justification; **(3)** On or about June 3, 2010, Lam was assigned by his supervisors Lewis and Ratcliff-Powell to a "tough and hazardous assignment" in a posted position while Lam was recovering from a work-related injury; **(4)** On or about February, 2011, Lam submitted a request for earned time-off in a timely manner for family matters. However, the request was ignored without cause by his supervisor including Ratcliff-Powell; **(5)** On or about December 24, 2011, Lam was harassed by his supervisor Fleck regarding Fleck demanding a medical note from Lam's sick day leave even though Lam had no such restriction; **(6)** On or about January 30, 2012, Lam received a written notification of "sick leave restriction" without merit from his supervisor, which negatively impacted his future leave requests and placed him in bad standing within his workplace; **(7)** On or about October 11, 2012, Lam requested a flexible working schedule due to FMLA reasons which was denied by his supervisor Ratcliff-Powell; **(8)** On or about December 27, 2012, Lam was granted only four hours of overtime shift instead of eight hours. However, his non-APA co-workers were getting multiple overtime shifts between 12/21/2012 to 12/27/2012; **(9)** On several occasions, Petitioner Lam's supervisor Radogno directed Lam to clean-up human feces which were way outside of petitioner's job description both contrary to Respondent CCSF's own guidelines and SEIU policies; **(10)** Petitioners' supervisors produced a plainly fraudulent

original-and-cause report to blame both petitioners included in alleged incident, which constituted "child abuse and neglect" and "use of excessive force" upon detainee minors by their supervisors; **(11)** Petitioner Lam's supervisors frequently assigned "high risk assignments" to Lam such as, assigning him to solely guard a "known MS-13 gangster", who was alleged of an attempted murder of a police officer in a unsecured public setting (a hospital). Also on another occasion Lam was given the assignment of posting in the entrance area by himself, at about the same time the department just posted an alert based upon credible sources and information that "a hit" might be targeting some of the youth inside juvenile hall by a perpetrator pretending to be a visitor; **(12)** Respondents continuously are concealing, protecting, encouraging, and tolerating multiple respondents' employees' misconduct inside the petitioners' worksite at SF Juvenile Hall. However, retaliation was inevitable whenever the petitioners reported it.

(13) On or about July 20, 2010, during her working hours, petitioner Leiato felt she was having a heart attack or an anxiety attack. When she requested "emergency leave" time-off, it was denied by her supervisors Taylor and Ratcliff-Powell. At around the same time, another Leiato's co-worker, Ms. B who was an African-American, was treated much better and quickly allowed transport to the local hospital by another employee. Petitioner Leiato was later suspended for three days with multiple charger including being AWOL; **(14)** Throughout 2009,

petitioner Leiato's requests for earned time-off for vacation or sick leave were also denied by Ratcliff-Powell without merit or justification; **(15)** In retaliation for Leiato participating in "protected activities", on or about December 2, 2010, Leiato received fraudulent charges through a formal written reprimand of being both "AWOL" and "insubordination" for making her "medical appointment" which Leiato had previous notified her employer about; **(16)** On or about April 15, 2011, Leiato was denied "overtime shift" opportunities, but not the other similar situated non-APA co-workers with less seniority; **(17)** On or about May 16, 2011, Leiato called her Supervisor Y for permission to come to work late due to her medical issue. Her request was denied without merit and justification; **(18)** On or about May 24, 2011, Leiato was told by her Sup. Ratcliff-Powell that her further request of "work-in-lieu" would be immediately denied without merit or justification, while her non-APA co-workers were treated more favorably regarding the same issue; **(19)** On or about June 1, 2011, Leiato submitted a "leave request" for "two hours" in timely manner to her immediate supervisor for her relevant medical appointment. However, the request was denied by Sup. Ratcliff-Powell without merit or justification while Leiato's non-APA co-workers were treated more favorably regarding the same issue; **(20)** On or about June 8, 2011, Leiato came to work in a timely manner at 6:00 a.m. At around 10:17 a.m. Leiato experienced a severe migraine headache and immediately notified Sup. Radogno and Singh. Her shift relief was

delayed until 11:34 a.m. In between her relief arriving, Leiato contacted internal medical clinic for medical attention, but was denied. Almost at the same time, leiato's non-APA male co-worker S were treated more favorably regarding the same issue; **(21)** On or about June 28, 2011, Leiato submitted to Sup. Radogno a request for time-off on July 8, 2011 to attend her two twin niece's graduations, which her attendance was essential to her ethnic culture and family value. However, on or about July 7, 2011, Leiato's request was denied by Sup. Ratcliff-Powell with the excuse of never receiving such request while other non-APA co-workers were treated more favorably regarding the same issue; **(22)** On or about October 28, 2011, Leiato was offered to work an "overtime shift", a few hours into her OT shift, Leiato was instructed by Sups. Taylor and Ratcliff-Powell to leave before her shift ended, while other non-APA co-workers were treated more favorably regarding the same issue; **(23)** On or about November 18, 2011, Leiato was re-assigned out of her regular shift post for the past six month without change, other non-APA co-workers were treated more favorably regarding the same issue; **(24)** On or about December 20, 2011, Sup. Ratcliff-Powell denied Leiato's earned "sick time" pay for three (3) days, even though Leiato had provided the proper medical certification necessary in a timely manner; **(25)** On or about March 5, 2012, Sups. Radogno and Ratcliff-Powell re-assigned Leiato from her regular Unit-4 to Unit-5, which was consider a much "tougher assignment" while other non-APA co-workers were treated more favorably

regarding the same issue; **(26)** Additionally, between 2012 to 2015, petitioner Leiato's supervisors including Ratcliff-Powell, Taylor, and Recinos have filed several false allegations against petitioner Leiato, which resulted in Leiato's suspension up to 20 days and placing her in bad standing within the workplace.

B. District Court Proceedings

Armed with significant confirmed evidence of all the respondents' misconduct, petitioners in April 4, 2016 moved to set aside the summary judgment (final summary judgment that resulted in an improper dismissal) of the current case under Rule 60(b) alleging "multiple errors from the district court".

On or about April 7, 2016, the district court denied petitioners' "motion for reconsideration".

Also, on December 29, 2014, petitioners filed a "motion for leave to file fourth amended complaint" in a timely manner on May 11, 2015. The district court denied petitioners' "motion to amend complaint" suggesting it would be futile to do so (see Appendix E). Petitioners would have provided a proposed version of the 4th amended complaint had the court granted leave to amend in order to draft the document. The court never notified Petitioners of this defect and their ability to correct the defect.

C. Ninth Circuit Proceedings

The Ninth Circuit affirmed the judgment concluding that the district court properly determined that, (1) Petitioners "failed to raise a genuine dispute of material facts as to whether defendants took adverse action against plaintiffs, and whether

defendants had legitimate, non-discriminatory motives for their actions"; (2) Petitioners "contend that the district court ignored relevant evidence or was bias against them are unsupported by the record"; (3) Petitioners "contend that reversal is required, this contention is without merit"; (4) "The district court did not abuse its discretion in awarding costs to defendants because Lam and Leiato failed to establish why the defendants were not entitled to costs." Once again it seems as if the courts have again improperly shifted the burden of production upon the improper party. Additional, case-law clearly holds that a Constitutional Rights party should never be assessed costs of the prevailing party. To do so would inappropriately chill all potential Constitutional Rights litigation. This is especially improper where the prevailing party has both unclean hands and conduct arising to a level of fraud upon the court. Such litigants should not be rewarded for their so called "zealous representation." In reaching that conclusion, the Ninth Circuit never properly considered the totality of circumstances and material facts and combination of the material facts provided by petitioners; fraud upon the court from the respondents and multiple errors by the district court would have sufficed in order to reverse the judgment. Thus, it is logical to assume these circumstances would have, and should have, significantly changed the outcome of the case.

On or about April 19, 2019, the Ninth Circuit denied petitioners timely petition for rehearing.

REASONS FOR GRANTING PETITION

I. May a Federal Court Ever Grant a Motion for Relief from Judgment under Federal Rule of Civil procedure 60(b) in a Case Involving Legal Errors?

During the discovery process, petitioners made multiple requests for interrogatories, special interrogatories, admissions, production of relevant documents and things, initial disclosures, etc.. The respondents' counsels failed to answer any questions and admissions and produced zero requested documents, resulting in petitioners being deprived of properly relating answers and documents to deposition questioning prior to the scheduled ten (10) depositions in November, 2015. When petitioners filed a motion "claims of respondents' counsel discovery abuse in bad faith" to the district court in seeking the above discovery material, the district court denied the motion upon timing grounds. However, granted respondents for their requests for "discovery extensions" near the same point of time. Thus, Petitioners received no discovery from Respondents due to uncooperative behavior and spoliation while the courts ensured Respondents received sufficient discovery from the Petitioners.

Fed.R.Civ.P. 60(b)(3), on multiple occasions, respondents' produced witnesses, also the individual defendants knowingly filed false allegations or declarations against petitioners, which all fall in the purview of "fraud and misconduct" by opposing parties. In *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir.1995) (non-disclosure of existence of videotape containing unfavorable results amounted

to fraud upon the court, thereby justifying new trial). The Ninth Circuit held that a federal court may amend a judgment or order under its inherent power when the original judgment or order was obtained through fraud upon the court.

Although the petitioners did establish "a prima facie case" of disparate treatment discrimination under Title VII, Petitioners met the standard of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), (1) Both petitioners belong to protected class as APAs; (2) both were performing according to his/her employer's legitimate expectations; (3) both suffered adverse employment action, such as false allegations without merit or justification leading to unjust suspensions; (4) that other employees (of a different classification as African American) with less seniority and alleged significant misconduct were treated more favorably or promoted while the employer had discriminatory motives and retaliation due to petitioners' participating in relevant "protected activities" between 2005 to 2019 of complaining about their supervisors' misconduct, inter alia, involving discrimination, harassment, intimidation, and retaliation, as well as, use of excessive force and child abuse and neglect and sexual abuse of resident minors in CCSF's Juvenile Hall. [*see* petitioners' "protected activities" in Appendix F and statistical data about employees' misconduct.]

II. Whether the District Court Erred by Denying Pro Se Plaintiffs' "Motion for Leave To Amend" Arising from "Newly Discovered Evidence" and "Continuous and On-going" Discrimination, Harassment, Intimidation, and Retaliation?

The district court erred by denying petitioners' "motion for leave to amend" on May 11, 2015 [*See* Appendix E] without giving notification to and opportunity for petitioners to correct deficiencies if any. Prior to petitioners' motion filed on December 29, 2014, petitioner Lam asked the district court in person on October 30, 2014 during the CMC meeting regarding the necessity of filing an "amended complaint" due to "newly discovered evidence" and "on-going and continuous" instances. Nothing was said regarding the proper steps to take or if any steps were needed. No further requirements were given to the Petitioners.

The district court erred in limiting petitioners' alleged complaint to "two years" only within the period from February 22, 2010 to March 16, 2012 and denying petitioners' "motion for leave to amend" arising from "newly discovered evidence" and "continuous on-going retaliation" and relevant occurrences of discrimination, harassment, and intimidation on May 11, 2015. In *Johnson v. Lucent Technologies Inc.* (9th Cir. 2011), Ninth Circuit held that Johnson's 42 U.S.C. §1981 retaliation claims are subject to the four-year statute of limitation in §1658, and not the two-year statute of limitations applicable to personal injury actions pursuant to Cal. Code Civ. Pro. Section 335.1. Johnson's claim was therefore timely.

The district court erred in denying petitioners' "motion for leave to amend" arising from "newly discovered evidence" and continuous on-going retaliation. *Id.* In *Douglas v. CA Dept of Youth Authority*, 271 F.3d 812 (9th Cir. 2001), Ninth Circuit

held that Douglas claims were timely under the continuing violation doctrine. Thus, as with the instant case, Petitioners' claims are also timely.

The district court erred because many courts accord pro se litigants a certain degree of leniency, particularly with respect to procedural elements. See,e.g., *GJR Invs., Inc. v. City of Escambia,* 132 F.3d 1359, 1369 (11th Cir.1998), stating that "[c]ourts do and should show a leniency to pro se litigants not enjoyed by those with the benefit of a legal education". Thus, a presumption exists to hold pro se litigants to less stringent requirements and with as much counsel by the court to identify and correct technical deficiencies. This recognized leniency was never rightfully afforded the Petitioners in the instant case.

The district court also erred in that the U.S. Supreme Court determined that "[i]n the absence of ...undue delay, bad faith or dilatory motive...undue prejudice...futility of amendment, etc.· the leave sought should ... be 'freely given'", *Forman v. Davis,* 371 U.S. 178, 182 (1962). Petitioners in the instant case were not give this opportunity.

III. Whether the Ninth Circuit's Decision Conflicts with Its Own and This Court's Precedents?

The Ninth Circuit affirmed the judgment. Nonetheless, the Ninth Circuit concluded that the district court properly determined that, (1) Petitioners "failed to raise a genuine dispute of material facts as to whether defendants took adverse action against plaintiffs, and whether defendants had legitimate, non-discriminatory motives for their actions" [This

unfairly shifted the burden upon the Petitioners where the burden of going forward with the evidence should have rested upon the Respondents showing they had legitimate nondiscriminatory motives for their actions. They could not although they tried to "cover their tracks" with retaliatory action resulting in adverse employment actions against the Petitioners; **(2)** Petitioners "contentions that the district court ignored relevant evidence or was biased against them are unsupported by the record"; **(3)** Petitioners "content that reversal is required, this contention is without merit." However, where the record would have been properly observed, such intent by Respondents would have come to light; **(4)** "The district court did not abuse its discretion in awarding costs to defendants because Lam and Leiato failed to establish why the defendants were not entitled to costs." Case law supports the idea that Constitutional litigants will be accountable for their own costs.

By confirming the district court's judgment or decision, the Ninth Circuit has conflicted its own and this Court's precedents of follows:

In *McGinest v. GTE Service Corp.*, 360 F.3d 1106, 1119 n.13 (9th Cir. 2004), the court held that "the authority to demand obedience from employee" makes a harasser a supervisor under *Faragher/Ellerth.* Relying on *McGinest*, the court in *Dawson v. Entek International,* 630 F.3d 928, 937 (9th Cir. 2011), held that a "trainer and immediate manager" of the victim could be a supervisor, even if the employer did not vest him with authority over the victim's formal employment status. See *id.* A t 940.

As these courts have also recognized, their interpretation is consistent with that of the EEOC, the agency vested with significant responsibility for enforcing Title VII, educating employers about their statutory obligations, investigating Title VII complaints, and promoting their consensual resolution. In this capacity, the EEOC issues guidelines interpreting Title VII, which are "entitled to great deference." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973). These "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Indeed, this Court expressly relied on the EEOC Guidelines in holding on *Moritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986), that harassment is a prohibited form of discrimination.

The Court has long recognized that Title VII should be construed with "common sense," *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006), and eye towards workplace reality. Thus, there is more to Title VII's coverage than the "terms and conditions" of employment "in the narrow contractual sense," *Faragher*, 524 U.S. at 786, for "the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale*, 523 U.S. at 81-82. In light of these considerations, the Court has repeatedly rejected unrealistic and mechanical bright-line tests for standards phrased "in general terms"

where the "[c]ontext matters...," *Burlington Northern*, 548 U.S. at 69; *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (recognizing that employers may not unlawfully retaliate against former as well as current employees); *National R.R. Passenger Corp. V. Morgan*, 536 U.S. 101 (2002) (recognizing that acts occurring outside the statutory time period may nevertheless contribute to a hostile work environment that existed within the statutory time period.)

Burlington Northern is especially instructive because, in dealing with the problem of retaliation- a central concern motivating the *Faragher* and *Ellerth* rule – the Court rejected rigid rules limiting application of the Title VII anti-retaliation provision to "ultimate employment decision," 547 U.S. at 67, and instead adopted a standard reaching those actions "a reasonable employee" would have found to be "materially adverse." Id. At 68. As the Court observed, "[c]ommon sense" indicates that abusing the authority to direct daily work activities – such as by "insist[ing] that [the victim employee] spend more time performing the more arduous and less time performing those that are easier or more agreeable" – is "one good way to discourage an employee *** from bringing discrimination charges." *Id.* At 70-71. That same power can prevent a victim from effectively responding to her supervisor's harassment, just as it can be wielded to retaliate against a victim who has already reported discrimination.

In *Vance v. Ball State University,* 133 S. Ct. 2434 (2013), this Court held that an employee is a supervisor, if the employer has empowered that employee to take tangible employment actions against

the victim. Petitioners did raise a genuine issue of material fact that respondents-defendants' multiple named supervisors had ongoing and continuous discriminatory, harassment, intimidation, and retaliatory motives for their action as follows: **(1)** Petitioners actively engaged in "protected activities" prior to their supervisor's adverse actions; **(2)** When petitioners complained of their unfair treatment of harassment and retaliation to employer (respondents), their complaints were ignored and no actions were taken by respondents either to rectify or prevent the conduct; [*see* Appendix F of the above petitioners' partial "protected activities" and allegations.] **(3)** The district court ignored and did not properly consider the material facts and circumstances provided by petitioners or even worse in the instant case, the courts discounted these facts as unimportant to the Petitioners' position; **(4)** The district court abused its discretion by awarding costs to the defendants without considering respondents-defendants' "unclean hands" and fraud upon the court *id.* In the instant case, the courts not only failed to consider Respondents' unclean hands and fraud upon the court but overlooked the maxim that Constitutional litigants bear their own costs unless the prevailing party is the party exercising its Constitutional rights

In *Levander v. Prober,* 180 F.3d 1114, 1120 (9th Cir. 1999), the Ninth Circuit held that perjury committed by a single non-party witness was so detrimental to the entire bankruptcy proceeding that it was held to be fraud on the court.

In the instant case, multiple perjuries occurred by multiple Respondents' witnesses which both have individually and collectively persuaded the court's judgment rendered in favor of the offending party. Respondents should not have been rewarded for its misconduct.

IV. Whether Petitioners have satisfied the Discrimination, Harassment, Intimidation, and Retaliation of a "Hostile Work Environment Claim"?

Petitioners have satisfied the discrimination, harassment, intimidation, and retaliation of a "hostile work environment claim" based upon the following material facts as follows: **(1)** Both petitioners are APA employees; **(2)** There were no (zero) permanent supervisory positions of any APA between 2008 to 2018; **(3)** Petitioners did in fact file at least twenty (20) written complaints or reports *alone* between February 22, 2010 to March 16, 2012, of discrimination, harassment, intimidation, and retaliation creating a "hostile work environment claim" to respondents' agencies and relevant State and Federal agencies. While petitioners participated in these "protected activities", they were subjected to additional adverse employment actions; **(4)** Respondents did not properly monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, effectively discouraged complaints from being filed reinforced by retaliatory action, and failed to provide a non-hostile work environment; **(5)** Petitioners repeatedly requested for "acting supervisor and special" assignment positions. These requests were either

ignored or denied, even though petitioners had more working experience and were competent and more qualified than those selected; **(6)** Respondents have harassed and retaliated petitioners by issuing "written warnings or notices" without merit or justification constituting a "written form of harassment" negatively impacting their reputations and thus making them suitable for promotion; **(7)** Respondents filed false allegations resulting in inclusion into petitioners' permanent personnel records of discipline and suspensions especially to Leiato [*see* statistical data.]

The standard for employer liability for hostile work environment harassment depends typically on whether or not harasser is the victim's supervisor. An employer is vicariously liable for a hostile work environment created by a supervisor. In *Vance v. Ball State University,* 133 S. Ct. 2434 (2013), the Supreme Court rejected in part the EEOC's definition of supervisor. The Court held that an employee is a supervisor, if the employer has empowered that employee to take tangible employment actions against the victim, *i.e.,* to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significant different responsibilities, or a decision causing a significant change in benefits. The Court stated that an employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was negligent in failing to prevent the harassment from taking place. In assessing such negligence, the court explained, the nature and degree of authority wielded by the harasser is an important factor to be

considered in determining whether the employer was negligent.

In the instant case, petitioners reported multiple instances of their various supervisors' misconduct including, but not limited to, discrimination, harassment, intimidation, and retaliation numerous times, but were all ignored by respondents; however, Petitioners always experienced inevitable retaliation from their actions or were placed in constant fear of when the next harassment or retaliation situation would arise.

V. Does Statistical Data Produced by Petitioners-Plaintiffs Clearly Indicate "Disparate Treatment" or "Selective Treatment" Admissible in Federal Court?

Respondents and their agents in SFJPD have a pattern and practice of "concealing, protecting, encouraging, and tolerating" their employees' misconduct" throughout the years while the petitioners worked in SFJH. Respondents have good faith reasonable believe such conduct may constitute criminal activities meriting prosecution, conviction, and sentencing. When petitioners produced the statistical data based upon their first- hand knowledge and through their co-workers', as well as, written statistical data which petitioners filed and provided hundreds of pages of alleged incidents to the district court in detail, they were neither acknowledged, confirmed, nor denied by respondents. All allegations not denied by Respondents should have been regard as facts by the courts.

Due to limited word and page requirements of these writ, petitioners are listing just a few actual samples of hundreds of statistical data, which occurred in petitioners' worksite (SFJPD) as follows: **(1)** A male high ranking supervisory employee, who solicited a minor female resident inside SF Juvenile Hall with intent to have sexual contact was exposed by a female employee. The offending employee was placed on leave due to a disability and allowed to retired without further investigation of other potential victims claims and facing potential penalty; **(2)** On multiple occasions, petitioners reported use of excessive force and conduct constituting "child abuse and neglect", as well as, child sexual abuse. Such claims were always ignored by respondents other than retaliation to the Petitioners ; **(3)** One minor youth successfully escaped from SF Juvenile Hall due to employees' neglect of duty, only two out of three employee (same position as petitioners) actually served a three days suspension, and one of them was later promoted; **(4)** A low level male supervisory employee alleged of sexual harassment of at least five Asian Pacific American female employees within a short period of time, received a three days suspension and granted three days of overtime shifts that followed to compensate for his wage loss; **(5)** A low level supervisory employee alleged of workplace violence and dishonesty received ten days suspension, and later promoted; **(6)** An employee (same position as petitioners) alleged unlawfully transported multiple aliens across from the Mexico border into California, was allowed to retired without penalty; **(7)** An employee (same position as petitioners) allegedly neglected his duty and violated the Dept's rule of detouring the outside transport detail resulting in a

successful escape of a minor youth. Said above employee received no suspension, only a written warning; **(8)** An employee (same position as petitioners) alleged possession of cocaine and loaded weapon inside the Disneyland hotel, the above employee was allowed to take retirement without penalty; **(9)** A low level supervisory employee allegedly involved in bank robbery, said employee was allowed to take an early retirement without any suspension; **(10)** Two minor youths successfully escaped from SF Juvenile Hall due to at least four employees' neglect of duty, no one received any penalty; **(11)** An employee (same position as petitioners) alleged using profanity or "inappropriate language" towards other co-workers, including "N" words on several occasion. The victim's co-workers reported or complained to their supervisors. The above aggressor employee received verbal mediation only, and latter promoted to supervisor; **(12)** An employee, who works inside SF Juvenile Hall (petitioners' worksite) alleged was caught in of possession and distributing "child pornography" material on the Internet, resulting in a conviction and being confined to jail in federal court, the above employee received no internal penalty; **(13)** An employee (same position as petitioners) allegedly called-in sick and then proceeded to a football season opening game, which was reported by his co-worker of violating the Dept's policy of being "AWOL", said employee received only a written admonishment and was later promoted; **(14)** An employee (same position as petitioners) knowingly used the Dept's "Chevron gas card" for his personal vehicle, resulting in a "written admonishment" without suspension; **(15)** It was well known to Dept's employees that a male

employee had a sexual act within the worksite with one of the minor detainees' mothers (while a visitor), it was covered-up, ignored or denied by respondents' supervisor; *[All the above alleged respondent's employees including "supervisory employees" were all non-APA employees].* **(16)** Petitioner Leiato was alleged of using "inappropriate language" during the working hours to control the rowdy youths, when such language is commonly used by her co-workers on a daily basis inside SF Juvenile Hall. Leiato was suspended up to twenty days; **(17)** Petitioner Lam received a written reprimand regarding his co-operation in and reporting of Respondents' "concealing and covering-up" instances of using "excessive force" and child abuse and neglect, as well as child sexual abuse" in petitioners' worksite; **(18)** Petitioner Lam was suspended up to five days in reporting an incident to Respondents of an alleged supervisor using "inappropriate language" including "N" words on a FCC approved radio, based on multiple witnesses, the written report was ignored by Respondents. Just these few incidents alone tend to prove the Petitioners' point.

VI. Does this Case Provides a Direct Opportunity to Settle an Issue of Public Interest and Matter of Public Concern?

"We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented." Elie Wiesel, Nobel Peace Prize 1986. Also, *George Orwell's quote: "In times of universal deceit, telling the truth is a revolutionary act".*

This case presents an issue of "public interest" and "matter of public concern." The petitioners as pro

se "civil right litigants" for the past eleven (11) years with very limited resources brought actions against one of the most powerful and resourceful cities in the United States. The petitioners risked retribution from the respondents-defendants' on filing numerous complaints of discrimination, harassment, intimidation, and retaliation over the past eleven (11) years since filing the related case on October 10, 2008. Petitioners spoke-up, reported, and complained against their employer and their agents regarding the APAs unfair treatment, sexual harassment of female employees, various unsafe and unhealthy relevant issues in respondents' worksite, employees' misconduct such as, using excessive force towards youths inside petitioners' worksite, conduct constituting "child abuse and neglect", "child sexual abuse", etc. [*see* Appendix F petitioners' "protected activities"]

It is extremely rare if not unprecedented for a "Peace Officer" similar to the petitioners to file the multiple misconduct allegations against multiple supervisors in the law enforcement field. The "code of silence" or the "Big Blue Wall" is the reason, nine out of ten respondents' produced witnesses, who are all "supervisory and management employee", all say "no" to the existence of such a "code" inside SFJH. However, due to mainstream media and Internet coverage, many people are now becoming aware this is a nationwide problem in both adult and juvenile detention facilities.

Additionally, the recent "me too" movement in Hollywood and in areas through-out the nation; sexual harassment and assault in the military; sexual abuse in University of Southern California for many

years, Olympic gymnast sexual abuse, church allegations of sexual abuse; sexual abuse inside the nationwide detention facilities; Bill Crosby's sexual battery conviction; the "black lives matter" movement, the "code of silence" by those who knew the abuser chose to remain silent either because of fear for their lives or professions. Presently, this great Court has the discretion to encourage citizens (victims) and those individuals who have the knowledge of abuse to speak-up or seek relief or justice, regardless of unrealistic lapses of time that would bar their right to provide relevant information about matters of public importance and interest and matters of public concern. Thus, for the reasons set for above this great Court should now review this case.

Consequently, this issue is now ripe for review. There are mixed motives carried out by the supervisors' (non-APA) conduct of discrimination, harassment, intimidation, and retaliation against the APA subordinates (petitioners). Unfortunately, their co-workers chose to remain silent in fear of retaliation. Such silence only benefits the tormentor, never the tormented which are subjected to suffering even more. Therefore, resolution by this Court is warranted.

ADDITIONAL CONSIDERATIONS

FAILURE TO APPLY

The district court improperly held the fact that Plaintiffs did not apply for the promotions precluded them from establishing a prima facie case of discrimination as to the March 2010 promotion, citing as an example *Ratti v. City and County of San Francisco, 1992 WL 281386 (N.D. Cal. 1992)*

("[A]pplication to the position is a necessary element of raising a claim for discrimination by disparate treatment."; *Ratti* in turn rests on *Ibarbia v. Regents of University of California 1987 191 Cal.App.3d 1318,1329*; in that case, however, the court concluded that the plaintiff's claims were 'purely speculative and unsupported by the evidence.' While the court regarded *Ratti* as an example of the legal proposition cited, Petitioners have found only a few cases supporting this proposition, including *Johnson v. Gen. Bd. of Pension & Health Benefits of United Methodist Church, 733 F.3d 722, 728 (7th Cir. 2013)*, (granting summary judgment on a Title VII failure to promote claim where plaintiff did not apply for higher position) *Jaburek v. Foxx (7th Cir. 2016) 813 F3d 626, 631,* (same) and *Garofalo v. Vill. of Hazel Crest, 754 F.3d 428, 439 (7th Cir.2014)*, which actually makes failure to promote an element of a Title VII claim.

The vast bulk of the case law is diametrically opposed to this statement of the law. See in particular *International Brotherhood of Teamsters v. United States, 431 U.S. 324, 327 (1977)* "the company's assertion that a person who has not actually applied for a job can never be awarded seniority relief cannot prevail, for a consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection...However, a non-applicant must still show that he was a potential victim of unlawful discrimination and that he would have applied for a line-driver job but for the company's discriminatory practices."

Teamsters is described as articulating an "intelligent principle" in *Reno v. Catholic Social Services, Inc. (1993) 509 U.S. 43, 85*, and the above point of law is specifically cited in, e.g., *Abed v. Western Dental Services, Inc. 2018 23 Cal.App.5th 726, 740, Tabor v. Hilti, Inc. (10th Circuit 2013) 703 F.3d 1206 Kolpakchi v. Principi, (5th Cir. 2004) 113 Fed.Appx. 633, Wynn v. National Broadcasting Co., Inc. (C.D. Cal. 2002) 234 F.Supp.2d 1067, 1098, O'Neil v. AT & T Corp, (5th Cir. 2000) 208 F.3d 1007 Fox v. Baltimore City Police Dept. (4th Circuit 2000) 201 F.3d 526.* Moreover, the general reasoning is accepted in many more cases; see, e.g. *Perez v. Wells Fargo Bank, N.A. (N.D. Cal. 2018) 2018 WL 3872793*, "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection."

A court abuses its discretion when it makes an error of law, *Cooter & Gell v. Hartmarx Corp. (1990) 496 U.S. 384, 405.*

The rule articulated in *Johnson*, *Jaburek* and *Garofalo,* and at least implicitly endorsed by the 9th Circuit in this case, amounts to a modification of the rule of law announced in *McDonald*, reducing the number of potential discrimination plaintiffs, at the cost of the general idea that the precise requirements of a discrimination case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).* In *Furnco* Justice Rehnquist noted that the McDonnell holding "*of course*, was not intended to be an inflexible rule,

(emphasis added) as the Court went on to note that '[t]he facts necessarily will vary in Title VII cases'", *id.* The Court should take the opportunity to remind the lower courts of the many ways that Title VII discrimination can be shown.

In the summary judgment, the court then stated that "plaintiff Lam must also present evidence that other employees with qualifications similar to his own were treated more favorably, or that the employer had a discriminatory motive", Appx. B, and found that Petitioner had not met this burden.

However Petitioner sought to prove the 4th prong of McDonnell by reciting the following facts: 1. In June 2013, at least ten `permanent position' counselors were appointed or promoted, the majority of whom were African Americans, and 2. In December 2014, four African American acting supervisors were promoted to permanent supervisor positions. The court dismissed these statements, as they "relate only to the promotion to permanent positions, not to the appointment to acting positions." There is no difference in the responsibilities attendant to each position.

EVIDENCE PRECLUSION

The court also refused to consider plaintiff Lam's failure to promote claim arising out of conduct that occurred before February 2010, on the ground these were barred by res judicata. Res Judicata may bar recovery on these claims, though not the introduction of facts supporting the claims, at least

where such facts increase the likelihood of discriminatory intent.

The legal question here might be phrased as follows: can evidence suggestive of discrimination at t1, though insufficient to support the conclusion that discrimination was more likely than not in case 1, be utilized again to prove discrimination at t2 in case 2, where there are additional facts adduced at t2 to support the claim of discrimination? Res judicata applies to issues and claims rather than items of evidence; collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue, *Parklane Hosiery Co., Inc. v. Shore (1979) 439 U.S. 322.* The doctrine of claim preclusion prohibits "successive litigation of the very same claim" by the same parties; *Whole Woman's Health v. Hellerstedt (2016) 136 S.Ct. 2292, 2305.* Discrimination is often proven by consideration of the totality of facts. It should be obvious that facts of any probative value at all should not be ignored for the latter claim, simply because they were introduced in litigation in support of the former claim.

IDENTICALLY POSITIONED

Regarding the refusal to consider facts pertaining to permanent supervisors, the court was seemingly operating according to some unstated principle as to appropriate comparators, though in any event amounts to acceptance of the proposition that a plaintiff cannot prove discrimination for failure to promote for a specific position, by proving company-wide discrimination.

The ruling arguably comports with, e.g., the statement in *Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 656 (1989)* "[T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged." In *Wards Cove* the Court stated: held that the proper comparison is not between the racial composition of a cannery work force and the "at-issue" work force, but rather between the racial composition of the labor market for at-issue jobs and the racial composition of the at-issue work force:

"It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the non-cannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled non-cannery jobs at issue here, the cannery work force in no way reflected "the pool of qualified job applicants" or the "qualified population in the labor force." Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other "skilled" non-cannery positions found to exist by the District ...by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to

have had a "disparate impact" on nonwhites", *Wards Cove, supra, at 650-652.*

Of course this is true for the example cited, though the opinion takes the matter out of the hands of the jury. It is also possible that instances of discrimination reflect a company policy, where there may not be comparators for many specific instances of discrimination. There is no realistic chance of ending discrimination by implementing a rule of identical positioning, and thus embracing the sort of rigidity expressly rejected in other Court decisions[2].

The identification of the 'at issue' work force is not of course an interpretation of the statute. Title VII merely renders it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The rigidity explicitly rejected in *Furnco* is embraced in *Wards Cove,* as well as *Rioux v. City of Atlanta, Ga., 520 F.3d 1269, 1280 (11th Cir. 2008)* and *Lewis v. City of Union City, Ga. (11th Cir.*

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[2] These portions of the opinion appear to survive the Civil Rights Act of 1991, abrogating the holding of *Wards Cove*; see *Atonio v. Wards Cove Packing, Inc., 10 F.3d 1485, 1491 (9th Cir. 1993),* though should not be read as a per se prohibition against considering a company's discriminatory actions outside of some narrowly defined category.

2019) 918 F.3d 1213 (holding that comparators be "similarly situated in all material respects").

Even if one accepts the Court's analysis in *Wards Cove*, there are no good grounds for applying any such distinction to acting and permanent supervisors. The distinction in this case is particularly arbitrary, as there is no difference at all in the responsibilities of the supervisors, only the duration of their supervisorial authority.

EMPLOYER OPINIONS

In granting summary judgment, the court also found that defendant CCSF presented a legitimate, non-discriminatory reason for any alleged adverse action — namely, that more qualified candidates would have been appointed over plaintiff Lam. Though the reasons are quite general, "performance issues" such as his "propensity to agitate the youth detainees, for example, by having inappropriate conversations with them,"--a conclusory remark if there ever was one, as well as "the fact that he "did not have the respect of his peers," which arguably supports the discrimination claim, and the very vague determinations that Lam "demonstrated poor judgment with respect to decisions that had safety implications," he "repeatedly failed to adhere to department protocols". It is all too easy to imagine incompetent and bigoted supervisory personnel drawing conclusions about thought processes and decision-making principles they do not understand, and no reason whatsoever to simply take their word for it. The court stated "if CCSF had merely stated that there were more qualified candidates, that would

be too "nebulous" to constitute a legitimate, non-discriminatory reason. However, CCSF provided a declaration setting forth specific performance issues."

While allowing CCSF to employ such subjective, vague, and difficult to disprove opinions, the court rejected Lam's statement that his work performance was actually "better than satisfactory," stating that, if he had presented evidence to support that assertion, he could have created a triable issue of fact. No such evidentiary burdens were placed on CCSF personnel[3].

The goal is, as the Court stated in *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 8 (1981)*, "to sharpen the inquiry into the elusive factual question of intentional discrimination." Civil Rights legislation "was designed to make race irrelevant in the employment market," *Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).* The opinion is not troublesome merely because it seems unfair to plaintiffs. It is troublesome because it appears to be backed by rules of law institutionalizing unfairness.

CONCLUSION

For the above mentioned, the petition for a writ of certiorari should be granted.

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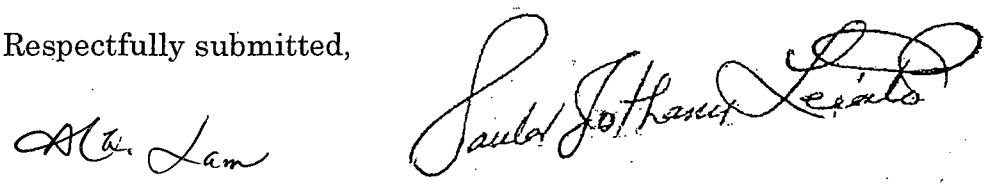
[3] The court also discounted Lam's contention that documents were destroyed, ignoring the more concrete supporting statement that the City and County produced no documents whatsoever in response to discovery and FOIA requests.

Dated: September 9, 2019.

Respectfully submitted,



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I declare under penalty of perjury that the foregoing is true and correct.

September 9, 2019

/"s"/ Alfred Lam, Paula Leiato
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