19-5040 ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JENNIFER LU,

Petitioner,

vs.

STANFORD UNIVERSITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A district court granted a pro se litigant leave to amend her complaint without notice of complaint deficiencies. Unable to identify the deficiencies herself, the pro se litigant repeated previous errors and the district court denied her further leave to amend.

The question presented is:

Whether when granting a pro se litigant leave to amend the complaint, a district court must identify the complaint deficiencies so that the pro se litigant can use the opportunity to amend effectively as held by the Second, Seventh, Eights, and Ninth Circuits.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The opinion of the Court of Appeals for the Ninth Circuit appears at Appendix A to the petition and is unpublished. The opinion of the District Court for the Northern District of California appears at Appendix B to the petition and is unpublished.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered judgment on February 21, 2019. A timely petition for rehearing was denied by the Court of Appeals for the Ninth Circuit on May 23, 2019, and the order denying rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

RELEVANT FEDERAL RULE OF CIVIL PROCEDURE

This case concerns the pleading deficiencies a district court must identify when granting pro se litigants leave to amend their complaint. Federal Rule of Civil Procedure 15(a)(2) addresses amendments not made as a matter of course, and provides that:

> In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a)(2).

INTRODUCTION

Petitioner complained with the EEOC discrimination and retaliation during her employment with Respondent. First Amended Complaint ("FAC"), App. D ¶¶ 7-8. Upon completion of the EEOC investigation, Respondent laid off her due to "budget cut" in 2007. *Id.* After refusing to consider her for any of 2,000 reemployment applications she submitted from 2007 to 2013, Respondent considered and interviewed her for over 25 positions from 2014 to 2017, but refused to offer her a position, citing her engaging in "disruptive behavior" in applying for Stanford jobs in 2008.[1] *Id.* ¶¶ 9-25, 29-33. In 2015, Respondent rehired Petitioner's former coworker Kari Costa ("Costa") against its own policy "An individual who was terminated for gross misconduct is not eligible for rehire."[2] For purposes of her retaliation and race discrimination claims, Petitioner used Costa as a comparator in this action. Unable to afford counsel, Petitioner was at all times proceeding pro se. *See Lu v. Stanford University*, No. 17-cv-07034-VC and No. 18-16150 (Civil Docket).

This case raises fundamental issues concerning whether pro se litigants have meaningful access to federal court. Some circuits have required that a district court must identify the pleading deficiencies when granting a pro se litigant leave to

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[1] Upon her layoff in 2007, Respondent designated three University officials to "assist" her getting another job at Stanford. Not receiving any response for over 100 applications she submitted in a period of ten months, Petitioner made a personal inquiry to one hiring department about her application status. Accusing her engaging in "disruptive behavior," Respondent declared that she no longer be eligible for consideration for any Stanford position, and secretly changed her termination status from "layoff due to budget cut" to "termination for misconduct." App. D ¶¶ 9-12; fn 4, 5.

[2] Costa had subjected Stanford Continuing Medical Education Program to 2006-2008 probation and was terminated for gross misconduct in 2008, which she never challenged nor did she complain any discrimination during her employment with Stanford. *Id.* ¶¶ 26-28.

amend. This requirement is especially important because the majority of pro se litigants bring claims seeking remedies for violations of the U.S. Constitution and federal civil rights statutes. *See infra* p. 12. These litigants – who are predominantly women, minorities, and the poor – are four times more likely than represented parties to have their cases dismissed under Federal Rule of Civil Procedure 12(b)(6). *See infra* p. 9. Serious due process concerns arise when courts grant pro se litigants leave to amend the complaint without notice of complaint deficiencies because without representation, they cannot identify themselves how to successfully amend their complaints.

Whether pro se litigants are entitled to the complaint deficiencies when they are granted leave to amend presents an issue of national importance that impacts nearly one third of all federal civil litigants. *See infra* p. 8. This problem will only worsen as the cost of counsel continues to rise, forcing even more ordinary citizens to seek legal protections without the aid of counsel. *See Id.*

Neutral stakeholders, including the federal judiciary, have voiced concerns about the serious obstacles pro se litigants face and their inability to successfully plead otherwise meritorious claims on their first attempt. The Honorable Lois Bloom has observed that "the legally untrained face special difficulties in navigating and carrying out the arcane requirements of pleading." Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 475, 483 (2002). The Second Circuit Task Force on Gender, Racial and Ethnic Fairness similarly acknowledged that "fundamental notions of justice

require that the circuit adopt practices to assist such litigants in presenting their claims as clearly as possible and in using the required court procedures properly." John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts,* 1997 Ann. Surv. Am. L. 117, 300. The American Bar Association similarly recognizes that pro se litigants may require "reasonable accommodations" from the district courts hearing their cases in order "to ensure pro se litigants the opportunity to have their matters fairly heard." Am. Bar Ass'n, *Model Code of Judicial Conduct* R. 2.2 cmt. 4 (2014).

Requiring district courts to identify complaint deficiencies when granting pro se litigants leave to amend is a logical accommodation. It will visit minimal burden upon the district courts after the courts have fully invested in pro se's complaints; it will make the grant of leave to amend less formalistic but more transparent and thus more accessible; and it can make the difference between a pro se litigant having a meritorious case heard and that same litigant – who typically is a vulnerable individual bringing a core constitutional or civil rights claim being – blocked from the court at the pleading stage. This Court should hear this case and determine whether district courts must identify the pleading deficiencies when granting pro se litigants leave to amend. The outcome of a case should not depend on pro se's inability to identify themselves deficiencies in the complaint.

STATEMENT OF THE CASE

I. THE DISTRICT COURT GRANTS PETITIONER LEAVE TO AMEND WITHOUT IDENTIFYING ANY DEFICIENCY IN HER COMPLAINT.

On December 11, 2017, Petitioner filed a complaint in the United States District Court for the Northern District of California that her former employer violated her civil rights under Title VII, among other things. *See generally* Compl. at 1, *Lu v. Stanford University*, No. 17-cv-07034-VC, ECF No. 1. Petitioner's grievance stems from a denial of over 2,000 reemployment applications she submitted with Respondent after she was laid off due to "budget cut" in 2007, with 286 rejections taking place from 2014 to 2017. *See generally id.* ¶¶ 5-11. For purposes of her retaliation and race discrimination claims, Petitioner used her former coworker as a comparator.[3] *See supra* p. 2, fn 2.

On March 26, 2018, the district court granted Respondent's Motion to Dismiss the Complaint (the "MTD Order") under Federal Rule of Civil Procedure 12(b)(6) or by the doctrine of issue preclusion [4] without prejudice, and granted Petitioner leave to amend the complaint without identifying what new facts are needed in order to state a plausible claim. *See Lu v. Stanford University*, No. 17-cv-07034-VC, ECF No. 34 (App. E).

Not understanding the nature of the MTD Order, Petitioner sought help from the Federal Pro Bono Project Office located in Oakland, California. The attorney in

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[3] The district court blatantly disregarded the facts about the comparator Petitioner used.

[4] Petitioner appealed but the panel did not address the doctrine of issue preclusion.

the office informed Petitioner that she had never seen such a harsh warning from judges in the Northern District Court of California and advised Petitioner voluntarily dismiss her case immediately. She warned that "If you voluntarily dismiss your case now, the judge may sanction you to pay only Defendant's filing fee; if the judge dismisses your case later, he will sanction you to pay thousands of dollar attorneys' fees plus the filing fee." She did not have time to read Petitioner's complaint, so she could not advise on how to amend the complaint. She did offer to help drafting the motion to voluntarily dismiss the complaint, which Petitioner did not take.

II. THE DISTRICT COURT DISMISSES PETITIONER'S FAC WITHOUT FURTHER LEAVE TO AMEND.

On April 6, 2018, Petitioner filed the First Amended Complaint ("FAC"), which was more or less similar to the original one because Petitioner was unable to identify herself the deficiencies in her original complaint, and requested further leave to amend, if needed. FAC, *Lu v. Stanford University*, No. 17-cv-07034-VC, ECF No. 35. (App. D). Respondent refiled the original motion to dismiss (the "Second Motion to Dismiss"). *Id.* ECF No. 36.

On June 12, 2018, the district court issued a one-paragraph order, granting the Second Motion to Dismiss:

> Jennifer Lu has not alleged any new facts in her amended complaint. Thus, for the reasons stated in the Court's prior order, the complaint is dismissed. *See* Dkt. No. 34. And because it would be futile to allow Lu to further amend her complaint, dismissal is with prejudice and without leave to amend. *See, e.g., Ronje v. King*, 667 Fed. Appx. 968, 969 (9th Cir. 2016). (The "Second MTD Order")

Id. ECF No. 41 (App.B).

III. THE NINTH CIRCUIT AFFIRMS THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S FAC WITHOUT FURTHER LEAVE TO AMEND.

On October 22, 2018, Petitioner filed Appellant's Informal Brief. Appellant's Informal Br., *Lu v. Stanford University*, No. 18-16150, ECF No. 5. Petitioner argued primarily that the district court failed to consider her material facts and erred in denying her further leave to amend when the initial grant of leave to amend did not identify any deficiencies for her to cure. *See Id.* at 5-2 – 5-8.

In an oral screening order, the Ninth Circuit affirmed the district court's dismissal of Petitioner's action. *See* Memorandum, *Lu v. Stanford University*, No. 18-16150, ECF No. 22-1 (App. A). In support of its affirmation of the district court's denial of Petitioner's further leave to amend, the panel relies on *Chappel v. Lab. Corp.*, 232 F.3d 719 (9th Cir. 2000) and *Chodos v. West Publ'g Co.*, 292 F.3d 992 (9th Cir. 2002), in both of which the plaintiff was represented by counsel. *Id.* at App-3.

On March 31, 2019, Petitioner filed Petition for Panel Rehearing and Rehearing En Banc based on (1) Panel Decision directly conflicts with the Ninth Circuit precedent in *Noll v. Carlson*, 809 F.2d 1446 (9th Cir. 1987) and *Lucas v. Dep't of Corr.*, 66 F.3d 245 (9th Cir. 1995) relating to pro se entitlement to notice of the complaint's deficiencies; (2) Panel Decision directly conflicts with Supreme Court precedent in *National Railroad Passenger Corp. v. Morgan* 536 U.S. 101 (2002) and *McDonnell Douglas Corp. v. Green* 411 U.S. 792 (1973) relating to *Morgan*'s holding that each refusal to rehire is a discrete act and *Green*'s holding that facts about a "comparator" is especially relevant to a showing of pretext for retaliation and

discrimination, respectively; and (3) post-*Twombly* and *Iqbal*, the Ninth Circuit has not addressed what facts and the degree of specificity affirmatively required to state a viable refusal to hire or rehire claim brought under Title VII. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Petition for Panel Rehearing and Rehearing En Banc, *Lu v. Stanford University*, No. 18-16150, ECF No. 25.

On May 23, 2019, the Ninth Circuit denied the rehearing. App. C.

REASONS FOR GRANTING THE PETITION

A district court's obligation—or lack thereof—to identify deficiencies in a complaint when granting a pro se litigant leave to amend is an important question of federal law that has not been, but should be, settled by this Court under Supreme Court Rules, Rule 10(c).

I. PRO SE LITIGANTS' MEANINGFUL ACCESS TO FEDERAL COURT IS A FUNDAMENTAL PRINCIPLE OF DUE PROCESS WORTHY OF THIS COURT'S ATTENTION

A. Pro Se Litigants Bring Nearly One-Third Of All Complaints In Federal Court.

According to U.S. Courts, nearly one-third of all complaints filed in federal court are filed by pro se litigants. *U.S. District Courts—Civil Pro Se 18 and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2017* at 1.[5] The predominant reason these litigants proceed pro se is their inability to afford counsel. *See, e.g.*, Hon. Jed S. Rakoff, Learned Hand Medal Speech (May 2, 2018).[6]

[5] http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2017.pdf.

[6] http://fingfx.thomsonreuters.com/gfx/breakingviews/1/863/1123/Hon.%20Jed%20S.%20Rakoff%20speech.pdf.

The increasing cost of counsel is problematic because, as the federal judiciary knows firsthand, successfully proving a case in federal court without representation is extraordinarily difficult. *See id.* (noting most working-class Americans would not qualify as indigent, but cannot afford lawyers); *see also* Hon. Patricia M. Wald, *Becoming A Player: A Credo for Young Lawyers in the 1990s*, 51 Md. L. Rev. 422, 428 (1992) ("In a recent ABA study, forty percent of low-income households surveyed had civil legal problems in the last twelve months but could not obtain counsel."). Moreover, for many of these litigants the potential monetary damages are too uncertain or small for attorneys to take their cases on a contingency basis. *See* Doyle et al., *supra*, at 300.

B. Pro Se Litigants Are Four Times More Likely Than Represented Parties To Have Their Cases Dismissed Under Federal Rule Of Civil Procedure 12(b)(6).

A federal court is four times more likely to grant a 12(b)(6) motion to dismiss against a pro se plaintiff than a represented plaintiff. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically*?, 59 Am. U.L. Rev. 553, 621 (2010). This is because pro se litigants face steep obstacles and unique challenges when pleading their cases in federal court. As Judge Sweet observed, "every trial judge knows" that "the task of determining the correct legal outcome is rendered almost impossible without effective counsel. Courts have neither the time nor the capacity to be both litigants and impartial judges on any issue of genuine complexity." Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 Seattle J. for Soc. Just. 609, 617 (2004) (quoting Hon. Robert W. Sweet,

Civil Gideon and Confidence in a Just Society, 17 Yale L. & Pol'y Rev. 503, 505–06 (1998)). Thus, requiring district courts to identify complaint deficiencies when granting pro se litigants leave to amend is a logical accommodation.

C. Some Circuits Have Addressed the District Courts' Obligation When Granting a Pro Se Litigant Leave to Amend.

Recognizing pro se plaintiffs are often unfamiliar with the formalities of pleading requirements, the Second Circuit instructed the district court that instead of simply dismissing the complaints for naming federal agencies as the defendants, it would have been appropriate for the district judge to "explain the correct form" to the pro se plaintiff so that he could have amended his pleadings accordingly. *See Platsky v. CIA*, 953 F. 2d 26, 29 (2nd Cir. 1991).

The Seventh Circuit has emphasized that it is "incumbent on [the court] to take appropriate measures to permit the adjudication of pro se claims on the merits." *Donald v. Cook County Sheriff's Dept*, 95 F.3d 548, 555 (7th Cir. 1996). Part of this responsibility includes assisting pro se plaintiffs in "identifying a list of defects" in the complaint. *Id.* at 556.

The Eighth Circuit makes it clear that a district court must make effort to "specifically explain the deficiencies in the complaint" and invite a pro se litigant to amend with more "particular statements" of his claims. *Munz v. Parr*, 758 F.2d 1254, 1258 (8th Cir. 1985).

The Ninth Circuit has explained that providing a pro se litigant with notice of the deficiencies in his or her complaint is not a formalistic requirement; it is substantive and intended to protect pro se litigants' rights: "The requirement that

courts provide a pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors." *Noll v. Carlson*, 809 F.2d 1446, 1448–49 (9th Cir. 1987) ("Amendments that are made without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings."), *superseded on other grounds by statute as stated in Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (en banc); *see* also *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (explaining that, "before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively").

D. This Court Has Not Addressed The District Courts' Obligation When Granting A Pro Se Litigant Leave To Amend.

This Court has not yet addressed whether district courts must identify complaint deficiencies when granting pro se litigants leave to amend. The review panel's departure from the Ninth Circuit's precedent as well as from other circuits' precedent is a clear sign that the district courts' obligation to identify complaint deficiencies when granting pro se litigants' leave to amend is not a settled issue, and this case is an excellent vehicle for this Court to address and settle the issue.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

A. Whether A District Court Must Provide A Pro Se Litigant Sufficient Notice Of Pleading Deficiencies Is An Important National Question.

The question presented implicates fundamental principles of due process worthy of this Court's attention. The majority of pro se plaintiffs bring claims seeking protection of basic rights, including constitutional and civil rights claims. Bloom & Hershkoff, *supra*, at 479–81; David Rauma & Charles P. Sutelan, *Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information*, 9 FJC Directions 5 (1996). The pool of pro se litigants disproportionately comprises women, minorities, and the poor-groups historically subject to unfavorable treatment and to whom the courts have provided legal protections and avenues of redress. *See* Doyle et al., *supra*, at 297–98.

As district court judges themselves have recognized, "federal programs to provide civil counsel are underfunded and severely restricted," resulting in "a crisis in unmet legal needs which disproportionately harms racial minorities, women, and those living in poverty." Colum. L. Sch. Hum. Rts. Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases–Response to the Fourth Periodic Report of the United States to the United Nations Human Rights Committee* 301 (Aug. 2013).[7]

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[7] ttps://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15241_E.pdf.

Requiring a district court to identify the complaint deficiencies when granting a pro se plaintiff leave to amend would ensure that the pro se plaintiff can use the opportunity to amend effectively. Without such a notice, however, vulnerable individuals with meritorious claims may be blocked from accessing the courts. Especially because the majority of pro se litigants bring claims sounding in constitutional and civil rights injuries, seeking basic protections from the federal court system, the question presented is an important one that this Court should decide.

B. The Question Presented Will Recur Absent Intervention from This Court.

Due to increasing pro se litigation, the question presented will recur absent intervention from this Court. Nearly one-third of all federal civil cases are brought by pro se litigants, and "pro se litigation shows no sign of subsiding." Rory K. Schneider, *Illiberal Construction of Pro Se Pleadings*, 159 U. Pa. L. Rev. 585, 591–93 (2011); *see also* U.S. Courts, *U.S. District Courts – Civil Pro Se and Non-Pro Se Filings, by District, during the 12-Month Period Ending September 30, 2017, supra,* at 1 – 5. This number will only increase as the cost of legal services continues to become too expensive for average individuals. *See supra* p.8.

In this case, the district court failed to identify any complaint deficiency while granting Petitioner leave to amend. Unable to identify herself the deficiencies in her original complaint, Petitioner repeated previous errors and immediately requested further leave to amend. Had she been on notice of any specific deficiencies in her complaint, Petitioner might have very well cured the deficiencies if she has required

facts available or she might have voluntarily dismissed her case if she does not have required facts to cure the deficiencies. It may take less than a minute for a district court that has fully invested in a complaint to identify deficiencies, and that time well spent by the district court may potentially reduce the enormous burden on the judiciary on a nationwide scale by pro se litigants if they do not or cannot cure the defects identified by the district courts.

III. THE QUESTION IS CLEANLY PRESENTED BY THE DECISION BELOW.

This case is an ideal vehicle to decide whether district courts must identify deficiencies in a complaint when granting a pro se litigant leave to amend. The facts and procedural posture cleanly tee up the question presented.

Petitioner was initially granted leave to amend without the benefit of a statement of deficiencies from the court. Unable to identify herself the complaint deficiencies, Petitioner repeated previous errors in her FAC and immediately requested further leave to amend, which the district court denied. On appeal Petitioner twice brought the review panel to the attention of the Ninth Circuit precedent in *Noll v. Carlson* and *Lucas v. Dep't of Corr.* relating to pro se litigant entitlement to complaint deficiencies and twice the panel affirmed the district court's ruling. Furthermore, the full court was brought to the attention of the Ninth Circuit's precedent and yet "no judge has requested a vote on whether to rehear the matter en banc." *See* App C. The decision below squarely presents the question whether a district court must be required to identify deficiencies when granting pro se litigants leave to amend their complaints.

Separately, this case also is an excellent vehicle for the question presented because application to Petitioner's case of the Ninth Circuit's precedent and several other circuits' precedent should have resulted in reversal of the district court's decision because the initial grant of leave to amend did not identify any deficiencies for Petitioner to cure.

Thus, district courts' obligation to identify deficiencies when granting a pro se litigant leave to amend the complaint is not a formalistic requirement; it is substantive and intended to protect pro se litigants' rights; and it is an important question of federal law that has not been, but should be, settled by this Court under Supreme Court Rules, Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 27, 2019