No. 20-484

In the

Supreme Court of the United States

PATRICIA WOODS,

Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, (PERB) and the CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILIATIONS (CDCR), et al,

Respondents.

On Petition For Writ Of Certiorari To the United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Appellant Petitions for a WRIT OF CERTIORARI from denial of an appeal before the U.S. Court of Appeal for the Ninth Circuit.

This is a case of government corruption where the Plaintiff/Appellant was denied her federal due process rights because of unlawful acts by state attorneys and others preventing a fair administrative hearing under her contract with Service Employees International Union, (SEIU-Local 1000), and under the Ralph C. Dills Act, (Dills Act), Government Code section 3512 et seq.

Petitioner seeks review because the Ninth Circuit committed a reversible error by affirming the district court's decision dismissing the *Pro Se* Petitioner's complaint with prejudice, after refusing to grant leave to amend the complaint to allege new evidence in support of equitable tolling defenses to the applicable statutes of limitations, thereby violating proper standards for *de novo* review while failing to apply the liberal pleading standards of Rule 12(b)(6) for *pro se* claimants, treating the statutes of limitations applicable to her federal statutory claims as *jurisdictional* rather than *procedural* bars that could be tolled and/or waived by equitable defenses.

Petitioner seeks a remand to the U.S. District Court, to address the circuit split between the Ninth Circuit Court and other circuits related to equitable

estoppel, equitable tolling, illegal inferences, wrongful and corrupt acts by its state attorneys and others.

QUESTIONS PRESENTED

1. Whether the Ninth Circuit decision should be reversed and remanded because the panel erred by failing to conduct *de novo* review affirming the final judgment of the District Court dismissing with prejudice the *Pro Se* Petitioner's complaint, without granting leave to amend to bolster her equitable tolling, estoppel and fraudulent concealment defenses to the applicable statutes of limitation upon which the district court based its final judgment;

2. Did the Ninth Circuit err when contrary to the holding in *14 Penn Plaza* requiring the Petitioner/Appellant to exhaust her administrative remedies under California law and her union contract, it affirmed the District Court's decision applying the law in a manner that foreclosed application of equitable tolling and equitable estoppel rendering Petitioner/Appellant's federal claims untimely?

3. When determining that Petitioner/Appellant was barred by the statutes of limitation that applied to her federal claims, did the Ninth Circuit err when it affirmed the District Court's decision that failed to weigh the actions of state actors contributing to the "untimely filing" ?

PARTIES TO THE PROCEEDING

Petitioner, Patricia Woods, is the Plaintiff in the District Court for the Eastern District of California proceedings and the Appellant in the Ninth Circuit Court of Appeals proceedings (referred to alternatively as "underlying federal actions").

The Respondents, the State of California, California Public Employment Relations Board and the individually named defendants, Eileen Potter and Wendi L. Ross, who work for PERB (collectively referred to herein as "PERB"), as well as the California Department of Corrections and Rehabilitations ("CDCR"), and the individually named defendants, Robert Storms and Larry Norris, each of whom at all relevant times worked as employees of CDCR (collectively referred to herein as "CDCR"), are the defendants in the underlying federal actions.

RELATED CASES

- Woods v. State of California, No: 2:17-cv-00793. U.S. District Court, Eastern District of California. Judgment entered August 27, 2018
- Woods v. State of California, No: 18-16816, Order Denying Rehearing, United States Court of Appeals for the Ninth Circuit, entered May 11, 2020.
- Woods v. State of California, No: 18-16816, U.S. Court of Appeals for the Ninth Circuit, Judgment entered February 7, 2020.

TABLE OF CONTENTS

TABLE OF CONTENTS Con't

APPENDIX

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES Con't

Page

Cases

TABLE OF AUTHORITIES Con't

Page

Cases

TABLE OF AUTHORITIES Con't

Page

Cases

TABLE OF AUTHORITIES Con't

Page

Statutes

Rules

Other

PETITION FOR A WRIT OF CERTIORARI

Patricia Woods petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported as *Woods v. Storms*, 793 Fed. Appx. 542 (9th Cir. 02/07/20), and Case No. 18-16816 and it is reproduced at App.1, (affirming decision of District Court). The Ninth Circuit's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at App 2. The opinions from the District Court for the Eastern District of California are reported as: *Woods v. California,* No. No. 2:17-cv-0793-TLN-AC PS, 2018 WL 9986806 (E.D. Cal., Aug. 27, 2018), reproduced as App. 4 and 5, adopting *Woods v. California*, No. 2:17-cv-0793 TLN AC PS, 2018 WL 1071183 (E.D. Cal. Feb. 26, 2018)), and reproduced as App.6 (Order and Findings and Recommendations of U.S. Magistrate Judge).(App. 6).

JURISDICTION

The Court of Appeals entered judgment on February 7, 2020. App, 1 . The Court denied a timely petition for rehearing and *en banc* review, filed on March 23, 2020, on May 11, 2020. This Court extended the time for filing petitions for writs of

certiorari, due to the Coronavirus pandemic, from 90 days to 150 days after the entry of judgment by the U.S. Court of Appeals denying a timely motion for rehearing. *See* Supreme Court Rule 13 and Guidance Concerning Clerk's Office Operations (April 17, 2020), on the U.S. Supreme Court's website. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves interpretation of Federal Rule of Civil Procedure ("Rule") 12 (b)(6), as applied to *pro se* complainants seeking to file an amended complaint alleging new evidence in support of her equitable defenses to toll applicable federal statutes of limitation, estop the defendants from asserting the statutes of limitation as an affirmative defense, and provide evidence of fraudulent concealment sufficient to satisfy the pleading requirements in cases where fraud is alleged.

The *de novo* standard of review for dismissal pursuant to Rule 12(b)(6) on statute of limitations grounds also requires clarification where, as here, the lower federal courts state that they understand this standard to apply, on the one hand, but then give short-shrift (or no written consideration or explanation at all) to the record or to their duty to calculate the accrual of applicable statute of limitations and deduct time properly tolled (e.g., from pending state court appeals).

This case also involves interpretation of 28 U.S.C. §1658, the four-year statute of limitations applicable to claim alleged pursuant to 42 U.S.C. § 1981, and application of California's two-year statute of limitations alleged pursuant to 42 U.S.C. §§ 1985(3) and 1986, and whether those procedural bars are subject to common law doctrines of equitable tolling, equitable estoppel and/or fraudulent concealment, pursuant to this Court's holding in *Menominee Indian Tribes of Wisconsin v. United States*,136 S. Ct. 750,(2016); 193 L.Ed.2d 652 (2016).

Additionally, this case involves reconciling interpretations of California law (e.g., the Dills Act) and union contracts requiring exhaustion of state administrative remedies through PERB with this Court's decision in *14 Penn Plaza.*

The Petitioner, a union employee, was required by the Dills act and her union contract to exhaust state administrative remedies as a jurisdictional prerequisite to further suit on federal causes of action that were inextricably intertwined with the union's cause actions before PERB. This case involves deprivation of federal constitutional rights of due process when the state administrative proceedings were marred by material conflicts of interest among the Administrative Law Judge and the defense counsel for the named Defendants hired by PERB. (App. 7 and 8).

The claimant was not provided with due process during her PERB hearing, as required by the Fourteenth Amendment to the United States Constitution. Claimant was denied her federal statutory claims of racial discrimination resulting

in interference and conspiracy to interfere with Petitioner/Appellant's SEIU contract. (Amended Plaintiff's Opposition to Dismiss the First Amended Complaint Against PERB, Eastern Dist. Dkt. No. 45).

INTRODUCTION AND STATEMENT OF THE CASE

Over eleven (11) years ago, the U.S. Supreme Court decided 14 Penn Plaza, (No.07-581), (2009), and the Honorable Associate Justice Clarence Thomas wrote the decision for the Court, requiring that which "binds the employees to the agreement of their union and subjects the employee's statutory and other union rights to binding labor arbitration so long as the CBA/MOU clearly and requires arbitration of these claims. That was precisely the circumstance in Appellant's case. The Ninth Circuit held "the plaintiffs ... [are] entitled to equitable tolling" during the pendency of a state law claim submitted to a state entity. *Lucchesi v. Bar-O Boys Ranch,* 353 F.3d 691, 693, 696 (9th Cir.2003).

In Petitioner/Appellants case, the Ninth Circuit Court ignored the holding in 14 Penn Plaza and ruled against this Petitioner, denying her equitable tolling and ruled that her federal claims were untimely.

Here, Petitioner/Appellant seeks granting of the Writ to clarify the meaning of the 14 Penn Plaza case requiring district courts to weigh the corrupt actions of state actors contributing to the late filing of claims and applying the doctrines of

equitable estoppel and equitable tolling in appropriate circumstances before foreclosing Petitioner/Appellant's federal claims as untimely filed. (Amended Plaintiff's Motion in Opposition to Dismiss, Eastern Dist. Dkt. No. 45).

In this case, the SEIU contract required exhaustion of administrative remedies in all disputes. The Plaintiff spent over four years appealing through the PERB's hearing system; two and a half years appealing through the state's appellate court system, and two years appealing through the U.S. Supreme Court system from the state-side of this case. (Amended Plaintiff's Motion in Opposition to Dismiss, Eastern Dist. Dkt. No. 45, pp. 46-48).

The Petitioner's case against the State of California, Public Employment Relations Board, PERB, was dismissed by the Ninth Circuit Court of Appeals as untimely, and that Court did not address PERB's wrongdoing and corruption throughout the process and PERB's role in facilitating the late filing due to the PERB's wrongdoing, professional misconduct, and overall corruption effecting the statute of limitation, equitable estoppel and equitable tolling. (App 7 and 8).

The Petitioner has been forced into filing unnecessary appeals and motions and was subject to unfair treatment throughout her PERB proceedings. All of these allegations are well documented during her U.S. District Court proceedings against PERB.(Eastern Dis. Dkt No 41 and 45).

Petitioner filed timely motions with the Third District of Appeals of California and the California Supreme Court asking them to take notice of the wrongdoing and corruption at PERB. She also asked the court to make a factual-finding of these wrongdoings. This too was denied and both appellate courts decided to look the other way regarding PERB's wrongdoings. (App.7-8). (Amended Plaintiff's Motion in Opposition to Dismiss, Eastern Dist. Dkt. No. 45).

Had the justices at the Third District Court of Appeal and the California Supreme Court enforced the Courts' judicial standards against PERB, the Petitioner case would have been resolved years ago. (App. 7-8). (Amended Plaintiff's Motion in Opposition to Dismiss, Eastern Dist. Dkt. No. 45). (Dkt. No. 41).

The issues presented in this case involve important questions of whether procedural time bars can be asserted to defeat the application of equity in cases where federal statutory rights and remedies are delayed by jurisdictional pre-requisites contained in state law and union contracts regarding exhaustion of administrative remedies and arbitration clauses.

This includes evidence in the District Court's records showing government corruption and interference with the case at PERB. The Petitioner has evidence proving that the Administrative Law Judge and others at PERB, including the former legal counsel for the CDCR, interfered with her right to receive a fair hearing due to material conflicts of interest, unlawful activity (i.e., price-fixing, for

fees and other documents that delayed her ability to seek relief). (Judicial Notice, Patricia Woods, Vol. II, CDCR, Dk., 09/28/17, U.S. District Court, Exhibit A: "Unsealed Confidential Correspondence to PERB"). As an example, the Defendant's defense counsel in this case was hired by PERB and allowed to work under the PERB's Board member who was ruling and deciding the Petitioner's case decisions. (App.7 and 8). The Petitioner claims that her federal statutory rights pursuant to 42 U.S.C. § 1981, 1985(3) and 1986 were violated by and through these administrative hearings, giving rise to new claims based on her union contract related to conspiracy to interfere with her contract, based on her race.

These evolving federal claims *were not discovered* by Petitioner *until after her administrative proceedings were* finalized. Only then did she realize that she was left REMEDILESS unless the federal courts granted her leave to proceed with her federal statutory civil rights (race discrimination and interference with contract) claims and deprivation of her constitutional due process claims.

The questions presented for this Court's review are framed in terms of the procedural errors that prevented Petitioner from having her day in court on the merits. The substantive merits of her claims also ***underscore how*** courts are expected ***to apply the proper standards of review*** for motions to dismiss pursuant to Rule 12(b)(6), especially in cases involving pro se plaintiffs and appellants.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision exposes the fault lines running within this Court's decision in *14 Penn Plaza.* These fault lines create chasms that damage claimants, like the Petitioner, in cases arising under 42 U.S.C. § 1981, 1985(3), and 1986. These fault lines exist in two ways.

The first fault line is manifests when *14 Penn Plaza* requires state union employees, bound by arbitration provisions in their contracts, to exhaust administrative remedies and forgo federal judicial forums for federal statutory rights that exist at the time their grievances are filed.

The second fault line is manifest when, during the state administrative proceedings, a claimant's federal constitutional and other federal statutory rights are violated *by the administrative process itself.* Here, the Petitioner raised federal statutory claims against defendants within the administrative agency including conspiring with her union and CDCR violating her union contract rights anew by interfering in the enforcement of her contract during the administrative proceedings and interfering with her right to file her federal statutory claims within the applicable limitations periods. The conspirators engaged in misconduct, including perpetuating conflicts of interest, violating price-fixing statutes, hiring of the Defendants' attorney at PERB, **within one month** of her concluding the

administrative hearings at PERB against the Plaintiff, and then allowing for this same attorney to work under the PERB's Board member hearing the Plaintiff case ruling on each motion against the Plaintiff without disqualifying themselves from the Plaintiff's proceedings. This obvious conflict of interest contributed to Petitioner's default on statute of limitation issues. (App. 7 and 8). (Amended Plaintiff Opp., Eastern Dist. Dkt. No. 45).

Granting Certiorari is necessary for three reasons:

1. To secure and maintain uniformity of this Court's decisions, pursuant to Fed. R. App. P. 35(a)(1).

2. To clarify and reconcile how this Court's prior decisions are to be applied by the lower circuit courts in situations involving state union employees, like Petitioner, who are caught between state exhaustion requirements imposed by California law *(e.g.,* the Ralph C. Dills Act), union contract, and the overarching mandate of 14 Penn Plaza, and applicable limitations periods imposed by 28 U.S.C. § 16—(four-year period for section 1981 claims), state law (two-year limitations period applicable to section 1985 and 1986 claims).

3. To do justice, by exercising the Court's equitable powers to grant the for a Writ of Certiorari and provide a procedural map for future litigants who are precluded from timely filing, thereby vindicating their federal statutory civil rights

claims for employment discrimination based on race, and obtaining their constitutional due process rights to a fair day in court.

Petitioner is seeking a Writ that clarifies how state union employees, who are required by state law and union agreements to exhaust all available administrative remedies, in the first instance, as a jurisdictional pre-requisite to filing a lawsuit in state or federal court. These administrative remedies take so long to reach finality that applicable statutes of limitation preclude vindication of federal statutory rights that are coterminous with the union grievances and rights that arise from administrative proceedings where conflicts of interest create due process violations that rob claimants of a full and fair hearing to enforce their union contracts.

Additionally, and *specifically*, where (as here) state union employees assert claims of unlawful contract interference and conspiracy by state actors that arise out of and *during state agency proceedings*, this Court is asked to clarify that equity should not be prematurely and procedurally barred, unless and until, in the exercise of equity, a claimant is given a fair opportunity to have their day in federal court. The essence of due process requires permitting pro se claimants an opportunity to demonstrate why their claim(s) should be heard and considered as a matter of law. At a minimum, lower federal courts need to be instructed to liberally construe pleadings by claimants who have sought to exhaust administrative remedies and then seek to vindicate their federal statutory rights, without the benefit of trained

counsel to guide them through the procedural maze of *14 Penn Plaza* and the various statutes of limitation and equitable tolling doctrines.

Evidence of wrongdoing by state administrative agency officials acting under color of law is not easy to discover under the best of circumstances, even with a trained lawyer as an advocate and second set of eyes. Federal courts should take seriously the liberal pleading requirements when a pro se claimant seeks leave to amend the complaint and when assessing whether the allegations of a complaint are sufficient to make out a claim, especially when equitable tolling doctrines are asserted as defense to a statute of limitations bar. First and second requests for leave to amend are not burdensome to the court or opposing parties and are regularly granted for claimants represented by counsel. Decisions asserting the futility of a pro se claimant's allegations and the lack of merit for equitable tolling defenses are simply not good form.

For these reasons, and the others argued below, the Court should reverse the decision of the Ninth Circuit, affirming the district court's dismissal of her section 1981, 1985 and 1986 claims, by exercising its equitable powers to toll the four year statute of limitations applicable to her section 1981 claim, and the two-year statute of limitations for her section 1985(3) and 1986 claims. Only by tolling these procedural limitations periods can the Court ensure that Petitioner has her jurisdictional right to a day in federal court to vindicate her federal rights. This is

especially important where claimants could go REMEDILESS without intervention by this Court, in situations such as the one existing in California where state employees often find that they have no remedies at the end of the exhaustion process, due to the futility engendered by unconstitutional, unlawful conflicts of interest that deprive claimants of a neutral forum and a full and fair hearing.

Only through the exercise of equitable power will Petitioner be provided with the remedies she needs to vindicate her federal statutory rights. Only through the doctrines of equitable tolling, equitable estoppel, and fraudulent concealment, will the accrual period toll for the statutes of limitations used to bar her suit, as argued in both the District Court and Ninth Circuit Court of Appeals.

These equitable remedies also support reversal of the Ninth Circuit decision affirming the denial of her *first* request for leave to amend, notwithstanding the liberal standards of review for amendments in the federal rules of civil procedure and the "Ninth Circuit's general policy of extreme liberality regarding amendment" (02/26/18 Opinion of Magistrate Judge Claire, at 13), which are even more forgiving for claimants, like Petitioner, who proceed without counsel.

When a state union claimant is required to exhaust administrative remedies for all claims arising under the union contract, including claims based on federal statutory rights, the practical effect of *14 Penn* is that it locks these claimants into administrative proceedings without a way to seek help in the federal courts for

violations of federal law occurring within the administrative proceedings. (Amended Plaintiff Opp., Eastern Dist. Dkt. No. 45, pp. 46-48).

Unless this Court grants this Petition for *Certiorari,* the federal civil rights that belong to Petitioner under 42 U.S.C. §§ 1981, 1985, and 1986, will be lost; and, she will be REMEDILESS, having first exhausted what ultimately proved to be futile administrative processes with PERB.

NINTH CIRCUIT DECISION

There are a number of substantive and procedural reasons to reverse the decision of the Ninth Circuit in this case, including that: (1) it did not actually demonstrate that it made a *de novo* review of the entire record; and (2) it affirmed a district court dismissal that did not, in fact, apply the liberal pleading standards required by Fed. R. Civ. P. 12 or the Ninth Circuit's own precedent.

NO DE NOVO REVIEW IS CLEAR ERROR REQUIRING REVERSAL

The Ninth Circuit recognized that when a federal circuit court is asked to review a district court's dismissal of a claim based on applicable statute of limitations grounds, that review is "de novo"; but, beyond citing one of its own older cases to support that written statement, the Ninth Circuit's decision does not reflect that it did not "defer" to the district court's ruling, but, instead, "freely consider[ed]

the matter anew, as if no decision had been rendered below." *Dawson v. Marshall,* 555 F.3d 798 799 (9th Cir. 2009).

Indeed, a *de novo* review would not have been difficult to do since the district court's order dismissing Petitioner's case was less than one page long and made no substantive findings of its own; but, instead, despite noting that Petitioner filed objections, simply adopted the findings and recommendations of the Magistrate Judge in full and dismissed the case with prejudice, as recommended. Article III of the U.S. Constitution, which gives authority to federal courts and the judges appointed to them to decide cases, "requires de novo review of a Magistrate Judge's Report and Recommendations where a party timely objects" because a Magistrate Judge is not authorized by Article III to render final determinations on the merits unless both parties mutually consent. *See Nara v. Frank*, 488 F.3d 187, 194 (3rd Cir.) and *Jackson v. Rohm Haas Co.*, 2010 WL 935650, at 3 (2010). By failing to conduct a de novo review of the record and well-written, substantially justified briefs submitted by Petitioner in support of her claims, the district court committed reversible error.

The Ninth Circuit, however, did not recognize this error, nor did it conduct its own de novo review of the record, a fact that is manifest by its statement that the district court's dismissal of the section 1981 claim as untimely was proper because Petitioner failed to file these claims within the applicable four-year statute of

limitations. Without identifying or calculating the time when this limitations period began to accrue, but simply citing Jones, 541 U.S. at 382 for the rule that a four-year "catch-all" limitations period applies to section 1981 claims, and *Lukovsky v. City & County of San Francisco,* 535 F.3d 1044, 1048 (9th Cir. 2008), for the proposition that the a claim accrues based on the discovery rule, the Ninth Circuit affirmed the district court's dismissal, which itself was one that failed to demonstrate de novo review.

Even if *de novo* review of the record, including Petitioner's written objections to the Magistrate Judge's findings, had not been required by both the district court and the Ninth Circuit panel, the rationale offered in the Magistrate Judge's Order for her finding that the section 1981 claim was time barred leaves much to be desired. That rationale relied on an assumed argument that Petitioner's section 1981 claim "accrued as to all defendants when the termination of her employment with CDCR became final on the date of PERB'S final decision affirming it (10/12/10). This assumption missed the point of Petitioner's section 1981 claim altogether, because it tied the accrual to her wrongful termination and union grievances without weighing the wrongful actions and omissions of PERB officials, including the ALJ and other Board Members with conflicts of interest that interfered with Petitioner's right to enforce her union contract and obtain relief for its breach.

The Magistrate Judge's findings that the section 1985(3) and 1986 claims were also time-barred and not entitled to the benefit of equitable tolling were similarly flawed, because – as the Magistrate Judge noted – in the employment context, "the claim accrues upon awareness of the actual injury" not "when the plaintiff suspects a legal wrong." *Lukovsky,* 535 F.3d at 1049 (citing multiple sister circuits in agreement that notice of the legal wrong causing harm, not notice of a discriminatory effect or motivation, starts the clock). *See also Kub*rick, 444 U.S. at 123 (statute of limitations begins to run only when plaintiff is "armed with the facts about the harm done"). As this Court found in Kubrick, questioning whether one has been harmed and knowing one has been harmed are not the same. A plaintiff must be in "possession of the critical facts that he has been hurt and who has inflicted the injury" because "the facts about causation may be in control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122. See also *Davis v. United States*, 642 F.2d 328, 331-32 (9th Cir. 1981).

In her memorandum of law in opposition to defendants' motion to dismiss, as well as in her written objections to the Magistrate Judge's order, findings and recommendations to the district court, the Petitioner clearly alleged and argued that she did not discover the harm from defendants' unlawful interference with her contract during the administrative process (i.e., the existence of federal statutory

claims that she had not filed within the statute of limitations) until *after she completed her state court appeals and filed her petition for Certiorari, in this Court,* which was denied. These allegations, and others, established the basis for excusable delay based on fraudulent concealment, but the Magistrate Judge simply cited the legal standards without analyzing any of the facts.

Given this flawed set of findings, the failure of the district court to conduct a *de novo* review of the record resulted in clear error and required reversal. By failing to conduct de novo review of the district court's adoption of the Magistrate's findings, the Ninth Circuit compounded the errors made in the district court, committing its own clear error.

FAILURE TO APPLY LIBERAL PLEADING STANDARDS TO ALLEGATIONS OF THE COMPLAINT AND/OR PERMIT LEAVE TO AMEND TO ESTABLISH BASIS FOR EQUITABLE TOLLING OF THE STATUTE OF LIMIATIONS

The *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (*"Twombly"*) "facial plausibility" pleading requirement applies to all civil suits in the federal courts. After *Ashcroft v. Iqbal*, 556, U.S. 662, 670 (2009) (*"Iqbal"*), it is clear that conclusory or "bare-bones" allegations will no longer survive a motion to dismiss: "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal* 129 S.Ct. at 1949. To prevent dismissal, all civil complaints must now set out "sufficient factual

matter" to show that the claim is facially plausible. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at1948. The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See Id.* at 1949-50; *see also Twombly*, 550 U.S. at 555, n. 3, 127 S.Ct. 1955. *Iqbal* additionally provides the final nail-in-the-coffin for the "no set of facts" standard that applied to federal complaints before *Twombly. See also Phillips*, 515 F.3d at 232-33. Before the Supreme Court's decision in *Twombly*, and our own in Phillips, the test as set out in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80(1957), permitted district courts to dismiss a complaint for failure to state a claim only if "it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

A pleading offering only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955; *Phillips*, 515 F.3d at 232. "Courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips*, 515 F.3d at 233. The Supreme Court's opinion in Iqbal extends the reach of *Twombly*, instructing that all civil complaints must

contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct. at 1949.

Thus, in this case, the district court, in deciding a motion under FED.R.CIV.P. 12(b)(6), was required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to the Petitioner. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3rd Cir. 2003). This is especially true since the Petitioner was unrepresented by counsel. Moreover, in the event Petitioner's complaint failed to state a claim, unless amendment would be futile, the district court was required to give Petitioner the opportunity to amend her complaint. *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000). The District Court's failure to grant leave to amend was a clear error, because its futility analysis is unsupported by reference to factual evidence in the record.

The Ninth Circuit, like the district court before it, failed to reconcile and correctly apply the liberal pleading standards required by Rule 12 and by the Circuit's own time-worn practice of liberally construing the allegations of pleadings, especially when claimants appeal without the aid of counsel and seek equitable relief from a limitations bar. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In dismissing the Petitioner's case, the Ninth Circuit broke not only from this settled law, but also, contrary to its own precedent, failed to apply the liberal pleading

standards called for by the federal rules of civil procedure to the allegations of Petitioner's complaint and requests to toll the applicable statutes of limitation on equitable grounds.

Ninth Circuit precedent shows that dismissal on statute of limitation grounds can be granted "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1991). Similarly, in *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 969 (9th Cir. 2010), the Ninth Circuit reasoned that a claim cannot be dismissed under Rule 12(b)(6) on statute of limitations grounds unless "the running of the statute is apparent on the face of the complaint and it appears beyond doubt that the plaintiff can prove no set of facts that would establish that the complaint is timely." *See also Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993) (determination of whether equitable tolling applies is generally not amendable to resolution on a Rule 12(b)(6) motion because the decision requires "necessary resort to the specific circumstances of the prior claim; parties' involved; issues raised; evidence considered; and discovery conducted.").

In *Giles v. Felker*, No. 2:11-CV-1825-EFB (E.D. Cal., March 4, 2014), a Magistrate Judge made findings and recommendations to the district court to reject a statute of limitations argument by defendants, citing the decision by the Ninth

Circuit in *Von Saher*, because they could not show why the date of accrual should not be determined to be later than the date of the ALJ's final determination, "due to plaintiff's administrative appeals" and application of the discovery rule and/or continuing violation doctrine.

The Magistrate Judge found that the limitations periods should be tolled in equity because it was not apparent on the face of the complaint what the "potential impact of plaintiff's administrative exhaustion" efforts had on the failure to file within the limitations period. Thus, it did not appear "beyond doubt" – at least to that Magistrate Judge – that the plaintiff could not prove any set of facts sufficient to establish either timeliness of the federal statutory claims and/or to support equitable tolling or estoppel based on the discovery rule. In *Giles*, the Magistrate Judge recommended denial of the defendant's motion to dismiss without prejudice, rejecting the statute of limitations bar, with leave to renew the argument on a motion for summary judgment after discovery, since any dispute over facts surrounding the date the statute of limitations began to run would, by itself, warrant denial of the motion for summary judgment. *See Marshall v. Kimberly-Clark Corp.*, 625 F.2d 1300, 1302 (5th Cir. 1980). Thus, rather than guess about whether there was "any doubt", the Magistrate Judge recommended that liberal construction of the allegations required allowing some discovery to find out whether, in fact, any doubt or factual dispute existed.

NINTH CIRCUIT DID NOT APPLY CORRECT STANDARD OF REVIEW FOR REJECTION OF EQUITABLE TOLLING DOCTRINE

A district court's refusal to apply the doctrine of equitable tolling is reviewed by the court of appeals for abuse of discretion, but the underlying legal determinations used to make that decision must be reviewed *de novo* and any findings of fact are reviewed for clear error. *See, e.g., Granite State Ins. v. Smart Modular Tech.,* 76 F.3d 1023, 1027 (9th Cir. 1996).

Although the Ninth Circuit correctly indicated that review of the district court's decision not to apply equitable tolling to defeat the statute of limitations bar was based on an abuse of discretion standard, it did not follow the rule it stated. In its written decision, the Panel does not indicate that it reviewed the elements necessary to establish equitable tolling or the allegations made to support it *de* novo. Instead, it simply dismissed the case on statute of limitations grounds, pursuant to Rule 12(b)(6) – treating this *procedural* bar, subject to waiver and the defense of equity, as *jurisdictional,* almost as if dismissal could be based on Rule 12(b)(1) for lack of subject matter jurisdiction. This was an error.

Indeed, the Ninth Circuit's rejection of the equitable tolling doctrine is contained in only one sentence, where the Panel concludes that the district court did not abuse its discretion because section 1981 claims do not require a claimant to exhaust administrative remedies before filing a federal lawsuit (citing *Johnson v.*

Lucent Technologies, Inc., 653 F.3d 1000, 1009 (9th Cir. 2011)). In affirming the district court's dismissal for the same reason, the Ninth Circuit approved the Magistrate Judge's finding that section 1981 claims were barred by the limitations period because "the pendency of a grievance or some other method of collateral review" does not toll the statute of limitations period for a §1981 claim" (citing *Delaware State Coll. V. Ricks,* 449 U.S. 250, 261 (1980) and *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976). This is simply not true in many other contexts where administrative exhaustion proceedings toll the statute of limitations, as do mandatory state court appeals from those final decisions.

The Magistrate Judge was wrong when she stated that Petitioner made an "initial choice" of a state forum for judicial review"; to the contrary, the state administrative process was a compelled, jurisdictional prerequisite under California Law (*e.g.,* Ralph C. Dills Act), and her union contract. The Magistrate Judge's findings, the district court order, and the Ninth Circuit's decision affirming both reflect the basest form of judicial decision-making that lacks the particular analysis that each case, which turns on its own facts, deserves. If conclusory allegations are not sufficient to save a complaint from dismissal, *Conley,* 355 U.S. at 46, then conclusory findings in a federal court's decision should not be sufficient to save it from reversal.

CIRCUIT SPLITS

Equitable Tolling Standards Are Not Uniformly Applied in the Ninth Circuit and Other Circuit Courts of Appeals

The statutory purpose of civil rights law is to assure neutral rules of decision available to enforce independent federal substantive rights. Wilson v. Garcia, *471 U.S.261.* The administrative exhaustion requirements in California's Ralph C. Dills Act and Petitioner's union contract impaired the enforcement of her contractual rights under section 1981(c), just as the conspiracies inherent in the PERB proceedings did, because they operated to delay the Petitioner's adjudication of federal rights in a timely manner. The equitable doctrines to tolling, estoppel and fraudulent concealment can remedy this problem. See *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 232-33, 79 S. Ct. 760, 761-62, __L.Ed.2d 770 (1959) (defendants should not escape liability by engaging in misconduct that prevents plaintiff from filing claim on time).

Equitable Tolling

This Court has long held that common law equitable tolling principles operate to suspend the statute of limitations during the period in which a plaintiff is legally barred from bringing suit. *Hanger v. Abott,* 73 U.S. 532, 539-40 (1867). In *Burnett v. NY Cent. R.R. Co.*, 380 U.S. 424, 434-35 (1965), this Court affirmed application of the tolling rule by the circuit court's during the pendency of a state suit until the state order became final, writing that "a uniform rule tolling the

federal statute for the period of the pendency of the state court action and until the state court dismissal order becomes final is fair to both plaintiff and defendant, . . . and best serves the policies of uniformity and certainty underlying the federal limitations provision. *Cada,* 920 F.3d at 450 , (distinguishing between equitable tolling, for which "reasonable time" was rejected as too uncertain in Hanger, and the discovery rule, for which the Seventh Circuit applied the reasonableness test").

The majority of the circuit courts following this common law tolling rule, including the Ninth Circuit, have held that the determination of the applicability of equitable tolling is generally not amenable to resolution on a Rule 12(b) (6) motion, because it requires resort to the specific facts and circumstances of the case, "the parties involved, issues raised, evidence considered, and discovery conducted." *Cervantes v. City of San Diego,* 5 F.3d 1273, 1276 (9th Cir. 1993). The Ninth Circuit has held that, in cases where the plaintiff is not represented by legal counsel the doctrine of equitable tolling is an equitable exception to the exhaustion requirement and focuses on a plaintiff's excusable ignorance and lack of prejudice to the defendant. If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations until the plaintiff can gather what information he needs." *Leorna v. U.S. Dept. of State,* 105 F.3d 548, 551 (9th Cir. 1997); *Johnson v. Henderson,* 314 F.3d 409, 414 (9th Cir. 2002).

Equitable tolling is available only where "despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the exercise of [a] claim." *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011). Equitable tolling is available in equity to toll the period during which plaintiff, "acting reasonably, had neither actual nor constructive knowledge of the facts giving rise to [the] claim despite [her] diligence in trying to uncover those facts. *See Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012). Examples of situations that justify the application of equitable tolling are situations where defendants hide evidence, *Cada,* 920 F.3d at 450 *citing Speer v. Rand McNally & Co.*, 123 F.3d 658, 663 (7th Cir. 1997), or by deliberate or otherwise blameworthy conduct cause plaintiff to miss the statutory deadline for filing a claim. *Shropshear v. Corp. Counsel of City of Chicago,* 275 F.3d 593, 597 (7th Cir. 2001).

Notwithstanding the Ninth Circuit's failure to review the equitable tolling defenses raised by Petitioner, there exists an emergent split in the Circuits regarding whether the two-part test in *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 (2016), to determine application of equitable tolling to relieve a plaintiff from the assertion of a statutory limitations bar to suit, applies to any civil suit alleging a violation of federal laws, or whether it is confined to cases involving federal *habeas corpus*. At least four federal circuit courts cases,

written within months of *Menominee,* applied the two-part test in various kinds of civil cases, to define application of equitable tolling, refusing to limit it to the habeas context. *See, e.g, Knauf Insulation, Inc. v Brands, Inc.*, 820 F.3d 904, 908 (7th Cir. 2016); *Sneed v. McDon*ald, 819 F. Supp. 1347, 1351 (Fed. Cir. 2016); *Haygood v. ACM Med. Lab., Inc.*, 2016 WL 944420, at *1 (2d Cir. Marc. 14, 2016); *Farmer v. D & O Contract Inc.,* 2016 WL 672565, at *4 *5th Cir. Feb. 18, 2016).

But there is confusion in the Ninth Circuit regarding what standard should be applied. In this case, the Ninth Circuit, rather than applying *Menominee*'s two part test, cited to *Johnson v. Lucent Techs., Inc.,* 653 F.3d 1000, 1009 (9th Cir. 2011), a case brought by a pro se plaintiff, alleging a section 1981 claim where the Ninth Circuit rejected a request for leave to amend and dismissed the case, finding that the complaint did not satisfy the California test for fraudulent concealment. Equitable tolling standards were not discussed.

Given this vague and apparently inapplicable citation to a Ninth Circuit case, in which it states the case sets "forth standard of review" for the single sentence by the Panel stating that the district court did not abuse its discretion in finding that equitable tolling did not apply to Petitioner's section 1981 claims, it appears that there may be a serious misapprehension of how the equitable tolling doctrine should be defined (*i.e.,* whether *Menominee's* two-part test, a stricter test than *Menominee* (as alluded to in *Holland v. Florida,* 560 U.S. 63 (2010)) or some variation of the

myriad forms of the equitable tolling doctrine used by the Ninth Circuit. Indeed, it is difficult to know what test the Ninth Circuit applied in Petitioner's case, which alone is reason to reverse and remand this case.

Another confusing ruling by the Ninth Circuit was issued in *Merritt v. Countrywide Financial Corp.*, 759 F.3d 1023 (9th Cir. 2014). In *Merritt* the Ninth Circuit addressed equitable tolling specifically in a RESPA context, yet it nonetheless suggests that equitable tolling can apply even absent the element of diligence and/or extraordinary circumstances. Instead, the court held that the limitations period was not jurisdictional and stated that it could be tolled "until the [plaintiff" discovered or had reasonable opportunity to discover the violation. See 759 F.3d at 1036, 1040. This language closely tracks the standard for tolling under the separate doctrine of fraudulent concealment, sometimes called equitable estoppel, both of which are considered forms of equitable tolling.

As this Court knows, there is tremendous fluidity in the way these equitable doctrines are identified by the lower courts, but one fact remains clear: equitable tolling is distinct from the discovery rule. Tolling suspends the time that has begun to accrue under a statute of limitations and does not require or assume that the defendants have endeavored by actions or omissions to prevent the plaintiff from suing; instead, it credits time based on legitimate factors such as efforts to exhaust administrative remedies for a coterminous claim being adjudicated in collateral

proceedings. Equitable estoppel and fraudulent concealment, on the other hand, postpone the date of accrual because the defendants by actions or omissions prevent the plaintiff from discovering that she is a victim of fraud. *See Jensen v. Snellings*, 841 F.2d at 606-07; *Holmberg v. Armbrect*, 327 U.S. 392, 396097 (1946).

The discovery rule, on the other hand, precedes the accrual date for the limitations period and provides evidence for starting the clock after the point of actual injury, because the plaintiff has not yet discovered the injury and therefore is not held accountable for filing a claim for relief, as a result. *See, e.g., Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990).

The two-part test used in *Menominee* reflected the "general doctrine of equitable tolling" when it found that a plaintiff must sufficiently plead facts to show that (1) they diligently pursued their rights; and (2) an extraordinary circumstance prevented them from timely filing. See 136 S. Ct. at 756. The *Menominee* decision relied upon a similar decision in *Holland v. Florida,* 560 U.S. 63 (2010).

In Menominee, the Court does not appear to have decided whether the two-part test for equitable tolling applies to any civil suit, and although there is general agreement about the types of considerations that must be made when making equitable decisions, there is not a single, uniform national standard for the application of the equitable tolling doctrine, nor whether equitable tolling is an overarching doctrine that includes theories of equitable estoppel and fraudulent

concealment, or whether it is its own, unique form of equity, set apart from equitable estoppel and fraudulent concealment, both of which also have the effect of tolling the limitations period, but which also require a showing that defendants prevented the plaintiff from filing her lawsuit on time.

This case is ripe for review on the issue of whether equitable tolling applies to save the case from statutes of limitation bars and, if so, which doctrine applies. This Court should grant the Petition to clarify whether the Ninth Circuit's *ad hoc* approach to assessing pro se plaintiff's equitable tolling claims (as reflected in the underlying decision), and resolve the emergent split in the circuits regarding whether *Menominee's* two-part test is now a national standard to be applied to any civil case where application of the equitable tolling doctrine is at issue; or, whether there is some other standard that should be used.

EQUITABLE ESTOPPEL AND FRAUDULENT CONCEALMENT DOCTRINES ARE ALSO APPLICABLE IN THIS CASE AND WERE NEVER CONSIDERED BY THE NINTH CIRCUIT OR THE DISTRICT COURT TO TOLL THE LIMITATIONS PERIOD FOR PETITIONER'S FEDERAL CLAIMS

Equitable Estoppel

"Equitable estoppel is an age-old principle of equity." *First Nat'l Bank of Portland v. Dudley,* 231 F.2d 396 (9th Cir. 1956). It stands for "the basic precepts of common honesty, ordinary fairness, and good conscience in dealing with the rights

of those whose conduct has been prompted by reasonable good faith reliance upon the knowing acts or omissions of another." *Id.* (internal quotations omitted). It "springs from the need to give relief where the strict enforcement of the rules of law would be inadequate", *Greenwich Firm Prods., S.A. v. DRG Records, Inc.,* 1995 WL 312477, at *1 (S.D.N.Y., May 22, 1995); and, it is "a weapon in [the] court's arsenal of inherent equitable powers." *Cann v. Carpenters' Pension Trust for S. Cal.*, 662 F. Supp. 501, 505 (C.D. Cal. 1987) (citing *Dudley,* 231 F.2d at 400).

Petitioner's status as an unrepresented person does shift the equities in her favor such that her estoppel arguments should carry more weight. See *Farfan v. Quality Pontiac-GMC-Buick, Inc.,* No. CIV 05-952 LCS/LAM, at *4 (D.N.M. Nov. 8, 2005).The Ninth Circuit gave short-shrift to Petitioner's assertion of estoppel in a single sentence stating only and conclusively that it did not apply by citing *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1051-52 (9th Cir. 2008), a case it said explained the doctrine of equitable estoppel under California and federal law. While *Lukovsky* does just that, this statement did not help Petitioner, or anyone else for that matter, understand what about equitable estoppel did or did not apply to this case or how the Court performed its *de novo* review. This was reversible error.

Tolling doctrines stop the statute of limitations from running even if the accrual date has passed . . . . [A] general equitable principle not limited to statute of

limitations context is equitable estoppel, which comes into play if the defendant takes active stopes to prevent the plaintiff from suing in time." *See, e.g., Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990). Fraudulent concealment is another related but distinct extension of the equitable tolling and estoppel doctrines.

In *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97, 66 S.Ct. 582, 584-85, 90 L.Ed. 743 (1946), the Court wrote that "[e]quitable estoppel in the limitations setting is sometimes called fraudulent concealment . . . . To the extent that such efforts succeed, they postpone the date of accrual by preventing the plaintiff from discovering that he is a victim of fraud. The discovery rule, not to be confused with equitable estoppel, is important, because the limitations period cannot begin to accrue until the plaintiff has discovered or should have discovered in the reasonable exercise of due diligence that the defendant injured her. Unlike estoppel, fraudulent concealment theories, require evidence that denotes efforts by the defendant, above and beyond the wrongdoing upon which the estoppel claim is based, to prevent the plaintiff from suing in time. *See also Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000); *Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006).

If the Ninth Circuit had attempted to look at the equities, as the liberal pleadings standards required, they would have seen that there is no automatic

accrual rule for the federal statutes of limitation applicable to Petitioner's claims because these limitations periods were merely procedural, not jurisdictional; and the discovery rule is robust enough to weed out stale claims without disregarding the imperatives of equity. Here, the defendants want to blame Petitioner, the victim of their conflicts of interest and conspiracies, for a barrier entirely of their own making.

In short, the doctrine of equitable estoppel, as well as fraudulent concealment, exist to preclude a party from enjoying the rights and benefits under a contract while at the same time avoiding its burdens and obligations. *See Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838039 (7th Cir. 1981); *Med. Air Tech. Corp. v. Marwan Inv., Inc.*, 303 F.3d 11, 18 (1st Cir. 2002) (*dictim*; collecting cases). This seems especially true when conflicts of interest that violate professional rules of ethics by attorneys seek to preclude a federal cause of action by a pro se plaintiff who has no legal representation.

To Petitioner's knowledge, no appellant has raised the issue here presented to this or any other federal court, namely: whether the statute of limitations for federal statutory civil rights claims operates as a *jurisdictional bar* to suit when a claimant appeals the lawfulness of the administrative and arbitration *proceedings* or merely a *procedural bar* that can be lifted when equity requires tolling of the limitations period in the interests of justice.

The novelty of this question is not surprising, given that the exhaustion requirements in state administrative agencies are exhausting, expensive and extraordinarily difficult to navigate – especially by claimants proceeding pro se and without counsel. This Court should grant review of this petition to eliminate confusion and discrepancies among the circuits and clarify a uniform standard of review for cases like this one.

The Petitioner does not seek to overturn *14 Penn Plaza*'s rule, requiring a state union employee to exhaust all administrative remedies and arbitrate union contract claims and grievances before seeking an appeal in state or judicial forums, when express terms in the employee-union member's contract so indicated. Rather, this petition for *certiorari* seeks to throw a spotlight on the hidden fault lines between the *14 Penn Plaza* decision and the lines that have opened up in the lower federal courts, when state union employees seek to vindicate their union contract rights, but fall into the chasm created by being forced into futile administrative proceedings to exhaust remedies that they never receive because of the inherent conflict between state administrative agencies and the states and federal courts in California.

As demonstrated by the Ninth Circuit panel, as well as by the District Judge (which adopted the findings of a U.S. Magistrate Judge), the lower courts are confusing the jurisdictional prerequisite to exhaust administrative remedies (and/or

mandatory arbitration provisions) in union contracts for union contract claims with government employers with the procedural statute of limitations defenses to maintenance of federal lawsuits concerning federal statutory and constitutional civil rights laws that guarantee appellants, like the Petitioner, freedom from breach or interference with her union contract on the basis of racial discrimination.

The Court's decision in *14 Penn Plaza*, left an *open question* regarding *whether* there is a *viable procedural path* (and, if so, what it is) for litigants to adjudicate federal statutory civil rights claims in federal court, when the administrative and arbitral forums mandated for exhaustion of the union remedies first, which are jurisdictional in nature and cannot be waived, do not, in fact, adjudicate those rights or provide a fair hearing with minimal due process rights under the Fourteenth Amendment.

In cases like this, where evidence establishing the existence of the federal civil rights claims related to interference with a union contract arose from the administrative process, but was fraudulently concealed by the administrative agency (PERB) and individually named defendants, the union and the employer (CDCR), principles of equity require the Court granting *Certiorari* of this petition and, by permitting her to brief and argue the merits of this appeal, to toll applicable statutes of limitation by estopping defendants from raising it to bar her federal appeal. (App. 7 and 8).

Petitioner seeks to adjudicate her federal claims on the merits and asks this Court to remand this case to the District Court, assign a new district judge, and permit her to amend her complaint and begin discovery. See, e.g., *Harrell v. Kellogg Co.*, 892 F. Supp.2d 716, 725 (E.D. Pa. 2012).

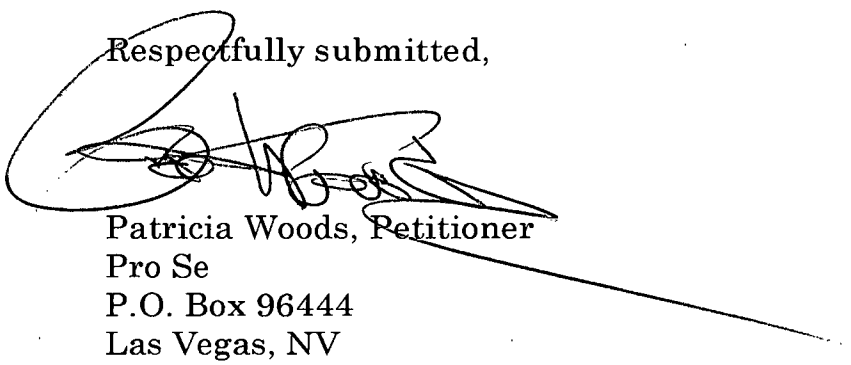
Where the court did just that, commenting that "discovery might yield another conclusion"). In so doing, this Court, will prevent a situation where Petitioner would be left REMEDILESS and without *any forum* in which to air her federal statutory claims. *See, e.g., Vaca v. Sipes,* 386 U.S. 171, 183-84 and n.9 (1967) (". . . because [the] contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant" and " leave the employee remediless in such circumstances that would . . .be a great injustice.").

CONCLUSION

For the foregoing reasons, the Court should grant a Writ of Certiorari.

Dated October 6, 2020

Respectfully submitted,



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APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM ORDER