No. 21-1178

IN THE
Supreme Court of the United States

SUBHADRA GUNAWARDANA and DAVID SEELY,

Petitioners,

v.

AMERICAN VETERINARY MEDICAL ASSOCIATION, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Subhadra Gunawardana
David Seely
4308 Marion Garden Ln
Florissant, MO 63034
314-764-1520; 615-423-8851
subhadra.gunawardana@wustl.edu
david-seely@live.com
Petitioners

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QUESTIONS PRESENTED

1. This Court has clarified that waiver is the intentional relinquishment/abandonment of a known right. No federal rule specifies deadlines to object to procedurally defective dispositive motions. In their timely response, Plaintiffs moved to strike Defendants' motion to dismiss filed five months late without Court's leave. **As the Seventh Circuit held, in direct conflict with this Court's definition of waivers and greatly departing from the consensus on timeliness, are objections to an untimely dispositive motion "waived" if not presented orally prior to the response deadline?**

2. Circuits are sharply divided on how they apply the same standards to dismissals without leave to amend non-futile claims [Federal rules 8, 12(b)(6), 15(a)(2), and 16(b)4; and the Supreme Court's standards from *Foman v Davis* and *Twombly/Iqbal*]. The Seventh and Eighth circuits routinely affirm dismissal without leave to amend non-futile claims, even under circumstances beyond plaintiffs' control. Whereas the Third and Ninth circuits affirm dismissal with prejudice only in extreme circumstances, routinely allowing amendment with or without request. Therefore, the outcome of the same case would drastically differ based on the circuit. **Are some circuits interpreting the standards incorrectly and/or using an incorrect test, and if not, should this Court create a more precise standard for dismissal without leave to amend non-futile claims, to protect litigants with meritorious claims or defenses?**

3.The Supreme Court's long-held standard, followed by other circuits and state supreme courts, is that a release cannot protect its creator against willful or wanton acts. Further, a release cannot bar constitutional claims without specifying, and providing consideration/compensation for, the barred claims. **Did the Seventh Circuit err in enforcing a release that bars constitutional claims without forewarning or compensation, and meets all exceptions to enforcement under contract law, despite undisputed evidence of willful misconduct?**

PARTIES TO THE PROCEEDINGS

Petitioners Subhadra Gunawardana and David Seely were plaintiffs-appellants below.

Respondents American Veterinary Medical Association (AVMA), Educational Commission for Foreign Veterinary Graduates (ECFVG) and Council on Education (COE) were defendants-appellees below.

RELATED PROCEEDINGS

Gunawardana et al. v. AVMA et al. No. 19-cv-96-NJR. U.S. District Court for the Southern District of Illinois. Judgment entered January 28, 2021.

Gunawardana et al. v. AVMA et al. No. 21-1330. U.S. Court of Appeals for the Seventh Circuit. Judgment entered October 25, 2021. Petition for *en banc* Rehearing denied November 24, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Subhadra Gunawardana and David Seely respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the Seventh Circuit is reported at *Gunawardana v. Am. Veterinary Med. Ass'n*, 21-1330 (7th Cir. Oct. 25, 2021) and reproduced at 1a-9a. The Order of the District Court for the Southern District of Illinois is reported at *Gunawardana v. Am. Veterinary Med. Ass'n*, 515 F. Supp. 3d 892 (S.D. Ill. 2021) and reproduced at 10a-42a. The Seventh Circuit's denial of Petitioner's motion for rehearing is reproduced at 43a.

JURISDICTION

The court of appeals entered judgment on October 25, 2021 [1a-9a], and denied a timely petition for rehearing on November 24, 2021[43a]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rules of Civil Procedure

8(a)(2): A pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief.

8(d)(1): Each allegation must be simple, concise, and direct. No technical form is required.

8(d)(2): A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either

in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

8(d)(3): A party may state as many separate claims or defenses as it has, regardless of consistency.

8(e): Pleadings must be construed so as to do justice.

12(b): How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

15(a)(2): Other Amendments. 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.

15(a)(3): Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

16(b)(4): Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

Constitutional Provisions

U.S. Const. amend. XIV: No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Petitioners request clarification of three fundamental matters of law, each of which is outcome-determinative and of national impact. All relevant facts are undisputed and corroborated by a complete record. Both lower court decisions are final and published. The Seventh Circuit has greatly departed from established standards, creating both inter-circuit and intra-circuit conflicts on several issues.

Procedurally defective dispositive motions, and objections thereto, are matters that come up frequently in all forums. Whether objections are "waived" if not presented orally prior to the response deadline, is a question presented before this Court for the first time. While the Seventh Circuit expressly decided this question, its holding conflicts with federal rules, with its own prior rulings on waiver of objections, and with this Court' definition of waivers.

Proper application of the standards for dismissal and/or amendment of claims is required in almost every case in every forum. Due to the distinct circuit split in how these standards are applied, similar cases reach different outcomes. Many significant questions on pleading standards, motions to dismiss, and leave to amend have been presented to this Court before, demonstrating the recurring and important nature of

these issues. Despite numerous occasions where this Court reversed lower courts' dismissals with prejudice, this Court has not set up a precise standard on leave to amend for all circuits to follow. The instant Petition is a perfect opportunity for this Court to clarify the standard because a) it presents a focused question on dismissals without leave to amend non-futile claims; and b) this case is emblematic of lower courts' misapplication of a legal standard when facts are undisputed. Such clarification is critical considering that, under the current standards for dismissal and amendment, the same case would reach drastically different outcomes based solely on the circuit. Absent such clarification, the circuit split will continue, and these questions will keep coming up.

Enforcement of releases, and exceptions thereto, directly affect public policy nationwide. Not only does the Seventh Circuit's holding depart from the consensus of other circuits, but it directly conflicts with State Appellate and Supreme Courts in its own circuit [*Spears v. Ass'n of Ill. Elec. Cooperatives,* 369 Ill. Dec. 267, 277 (Ill. App. Ct. 2013); *Roberts v. T.H.E. Ins. Co.,* 2016 WI 20 (Mar. 30, 2016)]. Thus, similar cases reach different forum-based outcomes in the same circuit.

The underlying case is also of national importance. It addresses ongoing violations of equal protections, civil rights and antitrust by the AVMA, which affect the entire profession of veterinary medicine and consequently the public. The inequities etched in AVMA's policies are undisputed, as is the disparate impact on the profession. The medical profession corrected similar problems decades ago. The persistence of discriminatory practices in the veterinary profession has a national impact. Its far-reaching regulatory powers make the AVMA distinct from any other medical

board, professional association, or private corporation. The application of the 14th amendment to this type of organization, or their right to use a release to deprive the signees of their constitutional rights, have never been reviewed by a High Court before.

The facts in this case commonly happen to many foreign/minority veterinarians, and the procedural issues presented here repeatedly come up in all courts. The Supreme Court's review is necessary to resolve circuit splits; clarify the standards; prevent forum-based outcomes; and correct injustice.

STATEMENT

I. FACTUAL BACKGROUND

The following facts are described with evidence in the first and second amended complaints.

A. The AVMA and its functions.

The AVMA's principle stated function is professional advocacy. It is also the gatekeeper to the US veterinary profession, with a monopoly on the accreditation of veterinary education programs/institutions and the certification of graduates from non-accredited programs/institutions. Per current federal and state regulations, any veterinarian wishing to practice in the USA is required to either graduate from [or complete a specific program in] an AVMA-accredited institution, or obtain certification through the ECFVG program administered by the AVMA.

AVMA's certification arm, the Educational Commission for Foreign Veterinary Graduates [ECFVG], was created at the behest of state veterinary regulatory boards. AVMA's accreditation arm is the

Council on Education [COE]. The United States Department of Education [USDE] recognizes the COE as the sole accrediting authority for veterinary education, and tapped them for additional responsibilities previously held by a USDE subcommittee. AVMA is a gatekeeper for Title IV and Title VII federal funding, and administers/distributes federal grants.

AVMA is unlike any other corporation, medical board, accrediting body, or certification organization. AVMA is unique due to its performance of multiple functions of conflicting interests, some at the behest of the state; pervasive entwinement with government agencies; and far-reaching decision-making power over the entire profession.

B. AVMA's policies discriminate against certain groups.

It is undisputed that AVMA holds ECFVG candidates to stricter standards than their professional counterparts, including US veterinary graduates and both foreign and US medical graduates. Such standards are etched in AVMA/ECFVG's stated policies.

Unlike in the medical field where all applicants take the same exams for US licensure [regardless of their country of origin or institution of graduation], the AVMA requires foreign veterinary graduates to take several additional exams not required of their domestic counterparts. These include an English language test, a written exam, and a clinical proficiency exam [CPE].[1] The ECFVG application form contains an exculpatory clause prohibiting signee from suing for any reason.

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[1] In Canada which has the same prerequisites to veterinary licensure and the AVMA is tasked with accrediting veterinary schools, a High Court ruled that an English proficiency requirement only for foreign veterinarians was a human rights violation. *Brar and others v. B.C. Veterinary Medical Association and Osborne* (No. 22), 2015 BCHRT 151.

Candidates cannot proceed without signing this release. The CPE, a 3-day 7-section practical exam, is required only of ECFVG candidates. The CPE policies are not fully compliant with Americans with Disabilities Act [ADA]. Candidates cannot reschedule an exam without forfeiting all fees, even in case of medical or family emergency. Exams are non-transparent, and candidates cannot obtain any exam records. The appeal process is internal only, non-transparent, and non-compliant with the Administrative Procedures Act [APA].

C. Adverse impact on the public

Disparate impact on the profession: The percentage of foreign veterinarians practicing in the US is much smaller than that of foreign physicians or other health professionals [Under 6% compared to over 25% in human medicine], and the veterinary profession is over 93% white.[2]

Injury to consumers: The AVMA-COE had accredited several vocational/distributive model veterinary schools which were substandard, against their own accreditation criteria. Such actions restrict the field against graduates from traditional science-based institutions, causing a marked decrease in the quality of the profession, leading to inadequate care for patients and inflated prices to clients.

D. Adverse impact on the Plaintiffs

Dr. Gunawardana is amply qualified to practice veterinary medicine, as demonstrated by her excellent

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[2] While Defendant argues that the ECFVG policies are geared towards "graduates from non-accredited institutions" rather than "foreign" and/or "non-white" candidates, ECFVG candidates are mostly foreign nationals, and the institutions AVMA chooses to accredit are overwhelmingly white.

academic and professional records.[3] She suffered adverse actions in the ECFVG program, barring her from entering veterinary practice in the USA. Said adverse actions include denial of disability accommodations during the CPE in 2016; erroneous failure of the CPE Anesthesia section in 2017; and AVMA's denial of her appeals without evidence to support their position. Said adverse actions were a direct result of discriminatory policies and procedures.

Additionally, certain discriminatory actions were committed specifically against Gunawardana, in violation of AVMA's stated procedures. [Second Amended Complaint [SAC] p7,19,20-23; Response to second motion to dismiss]. Confidential documents produced by Defendant after the filing of the first amended complaint [FAC] demonstrate that the failing grade in question is non-compliant with the CPE Examiner Training and the 2017 Anesthesia Manual of Administration; and that ECFVG officials took intentional steps to uphold the failing grade and conceal critical facts from Gunawardana on several occasions [SAC p20-23]. These documents also showed that the ECFVG was created at the request of the state boards, to perform the certification function previously done exclusively by state boards.

AVMA's policies and practices place restrictions on several groups including foreign graduates, minorities, and graduates from traditional veterinary colleges. Being part of all aforementioned groups, Dr. Gunawardana was adversely affected as a professional, through unfair denial of her entry into veterinary

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[3] Professional degree in Veterinary Medicine from the University of Peradeniya, Sri Lanka; Graduate degrees from Iowa State University and Cornell University Colleges of Veterinary Medicine; [All with honors]; Productive career in medical research at Vanderbilt University School of Medicine and Washington University School of Medicine.

practice. Defendants' policies and practices adversely affected Mr. Seely as a patient and consumer, through increased cost of veterinary and medical services, and through lack of access to services from a diverse group of qualified professionals. In addition, his disability rights were violated as a family member of an ECVFG candidate.

II. PROCEEDINGS BELOW

Federal jurisdiction was under U.S.C. §1331, federal question. The record corroborates the following facts, stated in detail in the Appellants' Brief, Appellee's Brief, and Reply Brief.

A. District Court Proceedings

Plaintiffs filed suit in District Court alleging violations of the Sherman Antitrust Act; Contract laws; the Civil Rights Act of 1964; 14th Amendment of the US Constitution; 42 U.S.C. §1981; 42 U.S.C. §1985(3); and the ADA including its amendments. The suit was filed on 2/1/2019, and dismissed on 1/28/2021. During these two years, Defendant did not file an Answer or a timely dispositive motion.

35 days after the initial deadline for responsive pleadings, Defendant requested and received an extension, to which Plaintiffs objected due to a critical factual misrepresentation in the motion for extension. The Court granted the extension. Plaintiffs responded to the first motion to dismiss, and amended the complaint with Court's permission. Defendant did not file a timely response to the first amended complaint, or request an extension to respond.

Defendants withheld critical documents for 11 months, disregarding deadlines and several discovery orders issued by the Court. Defendants filed their second motion to dismiss five months after the deadline, without Court's leave, without stating cause for delay. Plaintiffs moved for extra time to respond to said motion, where they stated the untimeliness of said motion and the resulting prejudice to them. Plaintiffs simultaneously requested to extend all trial deadlines due to the discovery problems.

At the status conference on July 22, 2020, the Court asked Defendants the reasons for untimeliness, and granted Plaintiffs additional time to respond. In the subsequent orders the Court extended trial deadlines and ordered Defendants to produce the long-withheld discovery documents under threat of sanctions. As the record shows, the Court did not ask Plaintiffs if they object to Defendants' motion; did not mention any deadline to object or move to strike; and never stated that the untimely motion to dismiss was accepted [Transcript of status conference, Orders on 7/22/20 and 8/12/2020]. Relying on the applicable rules and existing court orders, Plaintiffs presented detailed objections and moved to strike with authority in their response. The Court did not rule on the motion for several more months.

Following the Court's order on discovery, Defendants produced the withheld documents by October 30, 2020. Based on the new evidence, Plaintiffs moved to amend the complaint for the second time. [Had Defendants produced the requested documents by the initial deadline, the same amendment would have been proposed within the original trial schedule]. The Court denied leave to amend, citing deadlines from the expired scheduling order, and citing but not specifying prejudice

to Defendant. The Court did not cite bad faith or futility, and did not consider or mention the proposed second amended complaint.

In the final Order on January 28, 2021, the Court accepted AVMA's second motion to dismiss. The Court denied Plaintiffs' motion to strike, holding that Plaintiffs had waived their objections to the motion by not presenting them orally at the status conference. The Court also denied Plaintiffs' request for default judgment due to AVMA's failure to defend and a pattern of repeated misconduct [Appellant's Reply Brief p 15-16].

In substantively dismissing the complaint, the Court held that the release barred the contract claims and most constitutional claims, and that the AVMA was not a state actor. It did not analyze specific facts that rendered the release unenforceable and made the AVMA a state actor. The Court denied leave to amend a non-futile complaint, without considering Defendant's discovery misconduct that obstructed access to critical evidence.

B. Seventh Circuit Proceedings.

Appellants had requested judicial notice of the second amended complaint, which showed, among other things, late-discovered evidence on wanton and willful misconduct by Defendant and additional evidence showing that the AVMA was a state actor. The Seventh Circuit did not acknowledge the request or take judicial notice of the document.

The Seventh Circuit affirmed the District Court's order in its entirety, reasoning that: Plaintiffs waived their objections; their motion to strike was belated; they should not get a second chance to amend because "we do not require infinite opportunities to amend"; and the

release bars the contract and most constitutional claims. It did not address key arguments presented in the Appellants' Brief, including but not limited to: There was no deadline to object set by rule or order; the timing of the second amendment was beyond Plaintiffs' control due to Defendants' discovery abuse; the release met specific exceptions to enforcement, including willful and wanton misconduct; and both complaints included additional facts making the AVMA a state actor. The Seventh Circuit subsequently denied Appellants' petition for re-hearing and their motion to stay mandate.

REASONS FOR GRANTING THE PETITION

Petitioners request clarification of three fundamental matters of law, each of which are outcome-dispositive and of national impact. All relevant facts are undisputed and corroborated by a complete record. Both lower court decisions are final and published. The Seventh Circuit has greatly departed from established standards, creating both intra-circuit and inter-circuit conflicts on several issues.

I. SEVENTH CIRCUIT'S HOLDING GREATLY DEPARTS FROM ESTABLISHED STANDARDS, AND DIRECTLY CONTRADICTS THIS COURT'S CLARIFICATION OF TERMS.

A. This Court has defined and re-affirmed the term "waiver".

Waiver is an intentional relinquishment or abandonment of a known right:

As this Court reaffirmed in *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13 (2017): "The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous.

"[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.' " United States v. Olano, 507 U. S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U. S. 458, 464 (1938))."

"The Supreme Court made clear a quarter-century ago that "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a *known* right.' " *Id.* at 733, 113 S.Ct. 1770 (emphasis added) (quoting *Johnson v. Zerbst* , 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938))" *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019).

B. Circuits follow this Court's precedent when determining whether a litigant has intentionally relinquished, i.e. waived, a right.

Courts customarily provide specific notice of objection requirements beforehand. *Farber v. Crestwood Midstream Partners L.P.*, 863 F.3d 410, 417 (5th Cir. 2017). They provide such notice even when deadlines to object are set by rules, such as FRCP 72. *Equal Emp't Opportunity Comm'n v. City of Long Branch*, 866 F.3d 93 (3d Cir. 2017). Courts often review as plain error, not waiver, when a litigant fails to 'timely assert' a right. Further, courts decline to apply the waiver rule to pro se litigants' failure to object when the pro se litigants are not informed of the consequences of such failure. *Leyva v. Williams*, 504 F.3d 357 (3d Cir. 2007); *Haney v. Addison*, 175 F.3d 1217, 1219 (10th Cir. 1999). Here, the Seventh Circuit deviated from the norm.

C. Seventh Circuit's holding is erroneous, and directly conflicts with this Court's precedent.

Defendant's second motion to dismiss was filed five months late, without leave, with no showing of cause for delay. Plaintiffs moved to strike, with authority, in their response. While FRCP 12(b) and 15(a)(3) set deadlines for motions to dismiss, there is no rule dictating a deadline to move to strike an untimely 12(b) motion. Similarly, there is no rule stating that objections not presented orally prior to the response deadline are waived. When the timeliness of objection matters, rules clearly state when and how to present such objections.[4]

Absent a court order specifying a different deadline, objections presented on or before the response deadline are timely. The District Court's ruling that Plaintiffs waived their objections, and the Seventh Circuit's opinion that Plaintiffs' motion to strike was belated, are supported by no rule, and directly contradict all precedent.

As the record shows, there was no intentional relinquishment or abandonment here. Relying on the existing rules and court orders, Plaintiffs presented detailed objections in their response and motion to strike. Contrary to what the Seventh Circuit opinion states [4a], the District Court never "clarified that the plaintiffs did not object". [Transcript of status conference]. Plaintiffs had no knowledge or notice that they were giving up the right to object. "In Moore v. United States, 950 F.2d 656 (10th Cir. 1991), we declined to apply the waiver rule to a pro se litigant's failure to

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[4] For example: FRCP 72 sets forth clear deadlines to file objections to magistrate judges' recommendations; Supreme Court Rule 15 states "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

object when the magistrate's order did not apprise the pro se litigant of the consequences of a failure to object to the magistrate's findings and recommendations." *Haney v. Addison*, 175 F.3d 1217, 1219 (10th Cir. 1999).

The only case the Seventh Circuit cited in support of its holding is *Hamer*, where it held that "Rights under nonjurisdictional rules, we therefore hold, can be waived in docketing statements." [5] and "Because defendants actively asserted that the appeal was timely, they cannot now argue otherwise." In *Hamer*, the District Court had explicitly granted an extension to file an untimely appeal, and the Defendant had waived their objections through **express written admission**, not by omission. In the instant case, Defendant was not granted an extension to file the motion in question out of time; there was no deadline to object set by any rule or court order; and there was no waiver by admission.

The Seventh Circuit did not cite their only other relevant ruling on waivers: "There was no waiver here. As soon as plaintiffs filed their Rule 15(b) motion to amend in November 2018, Publix and Target/ICCO signaled their opposition...." *Bell v. Publix Super Mkts.*, 982 F.3d 468 (7th Cir. 2020).

Similarly, there was no waiver in the instant case. First, there was no deadline for objection. Second, Plaintiffs more than "signaled" their objection. They consistently stated that Defendant's motion was untimely [as the Court acknowledged at the status conference], and objected with detailed authority in their response. [Appellants' Brief ¶¶86,87,105, Reply Brief p14]. The District Court's order immediately following the status conference mentions nothing about accepting

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[5] The Supreme Court held that the Seventh Circuit's erred in considering the deadline jurisdictional.

Defendants' untimely motion or Plaintiffs waiving objections. It was six months after the status conference that the Court retroactively accepted the untimely motion.

Matters deemed waived by not raising in trial court are unreviewable. *United States v. Musquiz*, 45 F.3d 927, 931-32 (5th Cir. 1995). Here, the Seventh Circuit reviewed the issue.

Finally, expecting a party to present their objections orally during a status conference [without notice of such requirement] conflicts with the widely held principle that arguments should be fully developed when presented.

D. This holding promotes a double standard.

As the record shows in the instant case, Defendant repeatedly made untimely filings, violated rules and orders, obstructed discovery ultimately leading to the threat of sanctions, and made factual misrepresentations [Reply Brief p11-13,15-16]. Such actions usually earn serious sanctions including dismissal/default, which are upheld in all circuits. Here the District Court tolerated all such misconduct from Defendant, then dismissed non-futile claims without any error or misconduct by Plaintiffs [imposing sanctions on the wrong party]. The Seventh Circuit's affirmation conflicts with precedent.

Appellate courts have consistently imposed or upheld sanctions on litigants flouting rules/orders: Dismissal for repeated failure to follow deadlines [*Krivak v. Home Depot U.S.A.*, Inc., No. 20-1276 (7th Cir. June 17, 2021), *Flint v. City of Belvidere,* 791 F.3d 764 (7th Cir. 2015)]; Holding that untimely defense "allows a defendant to

ambush a plaintiff, distorting the process contemplated by the Rules and impairing plaintiff's ability to confront untimely defenses." [*Burton v. Ghosh*, 961 F.3d 960 (7th Cir. 2020)]; Holding that district court abused its discretion in granting without explanation a one day extension where the appellant's only excuse was a miscalculation of the time to appeal [*Marquez v. Mineta*, 424 F.3d 539 (7th Cir. 2005)]. See also: *Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 320 (3d Cir. 2015), *Nottingham v. Warden, Bill Clements Unit*, 837 F.3d 438 (5th Cir. 2016). *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004). *Barnes v. Dalton*, 158 F.3d 1212, 1214 (11th Cir. 1998). *Eagle Hospital Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1306 (11th Cir. 2009). *Southern New England Telephone v. Global Naps*, 624 F.3d 123, 144 (2d Cir. 2010). *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1159 (10th Cir. 2013). *Grange v. Mack*, 270 F. App'x 372, 376 (6th Cir. 2008). In the instant case, the non-offending party was sanctioned with no justification or explanation.

As described in detail in Section II, the Seventh Circuit affirmed dismissal with prejudice without considering the non-futile amendment, deepening the inter-circuit divide on dismissals without leave to amend, and conflicting with the Supreme Court's standard set in *Foman v. Davis*, 371 U.S. 178; 83 S.Ct. 227; 9 L.Ed.2d 222 (1962).

By creating a non-existent rule solely to affirm dismissal of a non-futile complaint, the Seventh Circuit upheld a double standard that would promote injustice to many future litigants.

II. SOME CIRCUITS ARE MISINTERPRETING OR MISAPPLYING THE TEST FOR DISMISSAL WITHOUT LEAVE TO AMEND NON-FUTILE CLAIMS.

A. Circuits are sharply divided in their application of the same set of standards

Dismissals and amendments are guided by Federal Rules 15(a)(2) and 12(b)(6), and 16(b)4 when applicable; and the Supreme Court's standards set in *Foman v Davis*, 371 U.S. 178 (1962); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). However, circuits are split on their application of the same standards to dismissals without leave to amend. The Seventh and Eighth Circuits routinely affirm dismissal of non-futile complaints without leave to amend, even under circumstances beyond plaintiffs' control, thus prejudicing plaintiffs. Whereas the Third and Ninth Circuits affirm dismissal without leave only in extreme circumstances, routinely granting leave to amend with or without request, even on multiple occasions, sometimes prejudicing defendants. Thus, the outcome of the same case would differ based on the circuit.

As this Court stated in *Foman*: "Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), §§ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment,

futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given.""

Accordingly, the Third and Ninth circuits apply a presumption in favor of leave to amend. They have repeatedly reversed dismissals without leave to amend, placing emphasis on the lack of futility. For example:

"The Foman factors weigh decidedly against denying leave to amend. There is no indication that allowing the amendment would prejudice Defendants, and Defendants do not contend that they would be prejudiced. There is also no indication of undue delay, bad faith, or dilatory motive by Brown: she filed her motion for leave to amend just two days after a deposition revealed new evidence of direct marketing to released inmates. Likewise, Brown has not repeatedly failed to cure deficiencies. Rather, Brown sought leave to amend based on newly discovered evidence." *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567 (9th Cir. 2020)

United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1183 (9th Cir. 2016) [reversing denial of leave to amend even though the plaintiff had previously amended his pleading three times]; *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) [noting that although the complaint was amended multiple times, "it is not accurate to imply that plaintiffs had filed multiple pleadings in an attempt to cure pre-existing deficiencies"]. "Additionally, "[u]nder futility analysis, '[d]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

See also: *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 871 (9th Cir. 2016); *Roney v. Miller*, No. 16-55717, 3-4 (9th Cir. Dec. 11, 2017); *Powell v. Wells Fargo Home Mortg.*, No. 14-cv-04248-MEJ, at *6 (N.D. Cal. Mar. 3, 2017).

Grayson v. Mayview State Hosp, 293 F.3d 103 (3d Cir. 2002): Holding that a district court should not dismiss an IFP complaint without granting leave to amend unless "amendment would be inequitable or futile". "Our precedent supports the notion that in civil rights cases district courts must offer amendment — irrespective of whether it is requested — when dismissing a case for failure to state a claim unless doing so would be inequitable or futile. This "amendment rule" emerged in reaction to our requirement that civil rights cases be pled with heightened particularity, thus giving rise to pleading errors in otherwise colorable cases — particularly those with pro se plaintiffs."

The Third Circuit holds that district courts must strictly abide by "Thus, when "a claim is vulnerable to dismissal under Rule 12(b)(6), but the plaintiff moves to amend," as occurred here, "leave to amend generally must be granted unless the amendment would not cure the deficiency." *Talley v. Wetzel*, No. 19-3055, at *20 n.6 (3d Cir. Sep. 27, 2021. See also*: Palakovic v. Wetzel*, 854 F.3d 209, 234 (3d Cir. 2017); *United States ex rel. Customs Fraud Investigations, Llc. v. Victaulic Co.*, 839 F.3d 242 (3d Cir. 2016).

In contrast, Seventh and Eighth circuits interpret the standard strictly against amendment, and routinely affirm dismissals without leave to amend. Placing emphasis on scheduling deadlines and prejudice to defendants, they disallow new claims and limit the time for amendment. *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674 (7th Cir. 2014) [Affirming denial, under Rule 15, of leave to amend counterclaims six months after original counterclaims had been dismissed]. *Johnson v. Cypress Hill*, 641 F.3d 867 (7th Cir. 2011) [affirming denial of amendment based on addition of claims]. *Divane v. Nw. Univ.*, 953 F.3d 980, 993 (7th Cir. 2020) [Affirming denial of amendment based on undue

delay and not adding new or additional claims]. "We regularly affirm district courts' decisions to deny unduly delayed requests to amend pleadings." *Empress Casino Joliet Corp. v. Balmoral Racing Club*, Inc., 831 F.3d 815, 832 (7th Cir. 2016).

The Eighth Circuit disfavors post-dismissal motions to amend [*United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir.2009)]. It routinely affirms denials of leave to amend after scheduling deadlines. *Hammer v. City of Osage*, 318 F.3d 832, 844-45 (8th Cir. 2003 [affirming denial of a motion to amend filed after discovery had closed]; *Deutsche Fin. Servs. Corp. v. BCS Ins. Co.*, 299 F.3d 692, 700 (8th Cir. 2002) [upholding denial in part because discovery had closed and time for amending pleadings had passed over a year ago]; *Kinkead v. Southwestern Bell Telephone Co.*, 49 F.3d 454, 457 (8th Cir. 1995) [upholding denial due to two-year delay in amending]; *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994) [affirming denial of motion to amend made fourteen months after complaint was filed and six days after discovery cut-off]; *Dennis v. Dillard Dep't Stores, Inc.*, 207 F.3d 523, 526 (8th Cir. 2000) [considering the time remaining before trial as an important factor in denying a motion to amend]. The Eighth Circuit does not extend the schedule to allow amendment of non-futile claims, deeming that any request to amend after close of discovery prejudicial to defendants. ".... after close of discovery will unduly prejudice defendants as it will have less than one month to gather all the relevant information, prepare an answer, develop a new trial strategy, and prepare its pretrial materials." *Dover Elevator Co. v. Arkanas State Univ.*, 64 F.3d 442, 448 (8th Cir. 1995).

In the few occasions the Seventh Circuit reversed dismissals, it has adhered to a one-amendment-policy, reversing only when the District Court dismissed

without a single chance to amend [*Runnion v.Girl Scouts of Greater Chi.*, 786 F.3d 510 (7th Cir. 2015); *Swanson v. Citibank, N.A.*, 614 F.3d 400,404 (7th Cir. 2010); *Bausch v. Stryker Corp.*, 630 F.3d 546, 18 559–62 (7th Cir.2010)]. All these cases still apply a far stricter standard on plaintiffs [i.e. not considering circumstances beyond their control or other good cause], significantly departing from the standard of Third and Ninth circuits.

Thus, different circuits apply the same standard differently. By placing weight on some factors over others, they skew the outcomes towards either merits resolution or quick disposition. This is an obvious split, leading to opposite outcomes in the same case based solely on the circuit.

B. The correct application should favor amendment.

This Court has repeatedly reversed denials of leave to amend where courts of appeals has applied the standard too strictly. For example: "In considering the defendants' motion to dismiss, the District Court was required to interpret the pro se complaint liberally, and when the complaint is read that way, it may be understood to state Fourth Amendment claims that could not properly be dismissed for failure to state a claim." *Sause v. Bauer*, 138 S. Ct. 2561 (2018)

"For clarification and to ward off further insistence on a punctiliously stated "theory of the pleadings," petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983. See 5 Wright & Miller, supra, § 1219, at 277–278 ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief." (footnotes omitted)); Fed. Rule Civ. Proc. 15(a)(2) ("The court should freely give leave [to amend a

pleading] when justice so requires.")" *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014)

"The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed pro se is "to be liberally construed," Estelle, 429 U.S., at 106, 97 S. Ct. 285, 50 L. Ed. 2d 251, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid. (internal quotation marks omitted). Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice")." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

"Accordingly, I dissent from the denial of Johnson's petition for a writ of certiorari. I would grant Johnson's petition, vacate the judgment below, and remand with instructions that Johnson be given leave to amend." JUSTICE BREYER, dissenting from the denial of certiorari. *Johnson v. Precythe*, 141 S. Ct. 1622 (2021).

The Seventh and Eight circuits place emphasis on the time elapsed and number of amendments at the expense of resolving cases on their merits. This appears to be the wrong test in implementing the *Foman* standard. Many non-futile claims get dismissed despite all due diligence on plaintiffs' part, as happened here.

C. The Seventh Circuit erred.

Plaintiffs' second motion to amend was summarily denied with no analysis. Seventh circuit affirmed without analysis, falling short of even the strict standards of the seventh and eighth circuits. With correct application of the proper standard, leave to amend should have been granted.

The District Court denied the motion despite that the amendment was non-futile; applied an outdated deadline from an old scheduling order; did not consider discovery abuse by Defendant [intentional withholding of specific documents for 11 months against court orders] or that no prejudice to Defendant was shown. The Seventh Circuit affirmed denial of the second amendment stating "we do not require infinite opportunities to amend" [9a] despite the record showing that the circumstances were beyond Plaintiffs' control.[6]

In a different circuit, this amendment would have been allowed. ".... there is no such repeated failure when, as here, the current motion to dismiss is "the first pleading[ ] to attack the sufficiency of [the plaintiffs'] allegations, the current decision[ ] by the district court . . . [is] the first to address the sufficiency of those allegations, and [the plaintiffs are] seeking [their] first opportunity to cure those deficiencies." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1183 (9th Cir. 2016) (reversing denial of leave to amend even though the plaintiff had previously amended his pleading three times); see also Eminence Capital, 316 F.3d at 1053 (noting that although the complaint was amended multiple times, "it is not accurate to imply that plaintiffs had filed multiple pleadings in an attempt to cure pre-existing deficiencies")." *Roney v. Miller*, No. 16-55717, 3-4 (9th Cir. Dec. 11, 2017).

When affirming dismissal, the Seventh Circuit did not take judicial notice of the second amended complaint or address the key issue that amendment was not futile.

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[6] Neither District Court nor Seventh Circuit specified which standard was used. Since Plaintiffs' motion was timely, Rule 15(a)(2) should have been used. Even if 16(b)(4) were to apply, they still met the good cause standard.

Neither did it analyze critical substantive issues presented in the Appellant's Brief, including but not limited to the following:

1. Undisputed evidence of willful misconduct, among other exceptions, make the release unenforceable [as stated in detail in Section III of this Argument]
2. The facts that a) the ECFVG was created at the behest of the state regulatory boards; b) AVMA was tapped by the USDE to accredit foreign veterinary education programs, a function previously performed by a USDE subcommittee; c) AVMA is a gatekeeper for Title IV and Title VII federal funding, and administers/distributes federal grants; and d) AVMA is deeply intertwined with state and federal agencies; make the AVMA a state actor according to the Supreme Court's well established standard, as cited in *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009).
3. The AVMA never disputed they were a labor organization.
4. The AVMA is different from any other medical board or certifying organization.
5. Both complaints show facts on AVMA's monopoly on the veterinary market, exclusion of specific groups, and the resulting injury to consumers.

Considering that the amendment was non-futile, the circumstances were beyond Plaintiffs' control, and they had committed no error or misconduct, this amendment should not have been denied even with a strict application of the good cause standard. It would have been readily granted in a different Circuit.

Overall, the Seventh Circuit promoted a double standard in the instant case. Having tolerated numerous violations, misrepresentations and misconduct from the Defendant, the District Court imposed the draconian

sanction of dismissal on the Plaintiffs who did nothing wrong. The Seventh Circuit affirmed, thus holding the pro se plaintiffs to a higher standard than the corporate defendant. This holding conflicts with the Supreme Court's well-established standard that pro se litigants should be afforded some leeway in procedural matters [*Haines v. Kerner*, 404 U.S. 519 (1972); *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Sause v. Bauer*, 138 S. Ct. 2561 (2018)].

III. IN ENFORCING THE RELEASE, THE SEVENTH CIRCUIT DEPARTED FROM ITS OWN PRIOR RULINGS, THE CONSENSUS OF OTHER CIRCUITS, AND THE SUPREME COURT'S ESTABLISHED STANDARD.

A. Releases are not enforced in the presence of exceptions.

The Supreme Court's long-held standard, followed by all circuits and state supreme courts, is that a release does not protect its creator against willful or wanton acts. *New York Cent. R.R. Co. v. Mohney*, 252 U.S. 152 (1920) Held that: A stipulation on a free pass purporting to release the carrier from all liability for negligence is ineffective where injury to the passenger results from the willful and wanton negligence of the carrier's servants.

Any release that bars constitutional claims is enforceable only if it specifies which claims are barred, and provides some consideration/compensation for the rights the signee is giving up. *Torrez v. Public Service Co. of New Mexico*, 908 F.2d 687 (10th Cir. 1990): Vacating summary judgement because the release did not specify

employment discrimination claims nor provide an opportunity to negotiate terms of release.

There are additional exceptions to enforcing releases under contract law in states, including Illinois. Such exceptions include economic necessity to signee, arbitrary and unreasonable conduct by creator, lack of notice of the risks assumed by signee, and extreme inequality of bargaining power in an adhesion contract. *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 252 (7th Cir. 1994); *Horne v. Elec. Eel Mfg. Co.*, 987 F.3d 704 (7th Cir. 2021); *Spears v. Ass'n of Ill. Elec. Cooperatives,* 369 Ill. Dec. 267, 277 (Ill. App. Ct. 2013); *Roberts v. T.H.E. Ins. Co.,* 2016 WI 20 (Mar. 30, 2016). *Tex. Capital Bank N.A. v. Dall. Roadster, Ltd. (In re Dall. Roadster, Ltd.)*, 846 F.3d 112, 132 (5th Cir. 2017).

B. The Seventh Circuit's enforcement of a release despite the presence of all exceptions, including undisputed evidence of intentional misconduct, directly conflicts with the accepted standard.

The release in question here, quoted by both Courts [2a,11a] does not specify which federal or constitutional claims, if any, are barred, and provides no compensation/consideration for the rights given up by signee. It is an adhesion contract with grossly unequal bargaining power. The ECFVG certification is an economic necessity to foreign veterinary graduates, without which they cannot proceed towards US veterinary licensure. No applicant can enter the ECVFG program without signing the release, which is part of the initial ECFVG application.

The Seventh Circuit acknowledged the economic necessity and unequal bargaining power, but upheld the release regardless. It did not analyze the remaining

exceptions. It never addressed the willful misconduct, which should have invalidated any release.

This holding conflicts with the very case the Seventh Circuit relied on to uphold dismissal. As quoted in *Sanjuan*: "Illinois does not enforce contracts exculpating persons from the consequences of their willful and wanton acts. Downing v. United Auto Racing Association, 211 Ill.App.3d 877, 156 Ill.Dec. 352, 570 N.E.2d 828 (1st Dist.1991); cf. Scheck v. Chicago Transit Authority, 42 Ill.2d 362, 247 N.E.2d 886 (1969)." The release also violates public policy through unequal bargaining power [FAC¶¶55,57; SAC ¶¶58,60]. The opinion conflicts with *Horne v. Elec. Eel Mfg. Co.*, 987 F.3d 704 (7th Cir. 2021), which stated: "Bargaining relationships that potentially violate public policy include those between parties where there is such a disparity of bargaining power that the agreement does not represent a free choice on the part of the plaintiff, such as a monopoly or involving a plaintiff without a reasonable alternative."

The holding conflicts with other circuits and state supreme courts: *In re Abbott Lab. Derivative Shareholders*, 325 F.3d 795 (7th Cir. 2003) [Holding that liability waiver does not exempt the directors from acts of bad faith and intentional misconduct]; *Roberts v. T.H.E. Ins. Co.*, 2016 WI 20 (Mar. 30, 2016) [Holding that waiver unenforceable as a matter of law because it was overly broad and all-inclusive; It absolved the operator from any injury, from any activity, and for any reason, known or unknown, and did not offer the plaintiff any opportunity to bargain or negotiate in regard to the language.] "As part of its reasoning, the Texas Supreme Court noted that, "[g]enerally, a contractual provision 'exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds

of public policy.'" Id. at 116 (quoting Restatement (Second) of Contracts § 195(1) (1981)). The Texas Supreme Court concluded that "the same may be said of contract liability" and to hold "otherwise would incentive wrongful conduct and damage contractual relations." Id. *Tex. Capital Bank N.A. v. Dall. Roadster, Ltd. (In re Dall. Roadster, Ltd.)*, 846 F.3d 112, 132 (5th Cir. 2017).

"In sum, Torrez was in the unenviable position of having to sign the release or lose his retirement benefits. He had a high school education, the release did not specifically mention release of employment discrimination claims, and Torrez did not consult with an attorney nor have an opportunity to negotiate the terms of the release. He testified he viewed the release as releasing only those claims arising out of the termination plan. Under the totality of the circumstances, the evidence before the district court presented a material question of fact as to whether Torrez knowingly and voluntarily signed the release." *Torrez v. Public Service Company of New Mexico*, Inc., 908 F.2d 687 (10th Cir. 1990)

"Plaintiff's claim is different from a claim where she would merely have been denied access if she did not agree to the release. She was engaged in a career training class that is part of an educational curriculum, and made an economic investment in her academic degree prior to being presented with the liability release. Had she declined to sign the release, she would have lost part of this investment—the extent of which we do not know. This prior investment goes to her ability to freely walk away from the liability release." *Spears v. Ass'n of Ill. Elec. Cooperatives,* 369 Ill. Dec. 267, 277 (Ill. App. Ct. 2013).

Thus, the outcome of this case would have been different in other forums, including state courts within the Seventh Circuit.

While designated "non-precedential", the Seventh Circuit's Opinion does set a precedent counter to public policy. It enables the use of releases to conduct any act of willful harm to signees, and to take away their constitutional rights without forewarning. This is a matter of national importance warranting review by this Court.

CONCLUSION

As stated above, the Seventh Circuit has departed from this Court's established standards and created inter-circuit conflicts. Certiorari should be granted, to provide clarification and to correct injustice.

Respectfully submitted,

Subhadra Gunawardana
David Seely
4308 Marion Garden Ln
Florissant, MO 63034
314-764-1520; 615-423-8851
subhadra.gunawardana@wustl.edu
david-seely@live.com