No. 21-132

ORIGINAL

In the Supreme Court of the United States

ROBERT PILCHMAN,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

ROBERT PILCHMAN,

Petitioner,

v.

BROOKLYN PUBLIC LIBRARY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ROBERT PILCHMAN
Pro Se
3030 Ocean Avenue, Apt 3F
Brooklyn, New York 11235
(646) 318-6466
r_pilchman@msn.com

PREFACE

Petitioner is Robert Pilchman (Pro Se); I reside in the Eastern District of New York. ---------- ---------- ---------- ---------- ---------- I am requesting reasonable accommodation from the Court; in or around January 2013, I was diagnosed as having bipolar disorder – prior to that I was diagnosed as having Obsessive Compulsive Disorder with panic attacks. I am including medical documentation (-Appendix F; please also see Appendix E).

QUESTIONS PRESENTED

1. Whether a government agency like the National Labor Relations Board has absolute discretion in all of its non-enforcement decisions and thus such decisions are never subject to judicial review (as the 2nd Circuit has just affirmed in my situation) or that there is not absolute discretion in every non-enforcement decision and thus it is possible that there would be exceptions, such as in my situation, in which there is judicial review, as the

9th Circuit held in *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753 (9th Cir. 1990 and in *International Association of Machinists and Aerospace Workers v. A Lubbers*, 681 F.2d 598 (9th Cir. 1982) – in accordance with the U.S. Supreme Court in *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143 (1939), and *Heckler v. Chaney*, 470 U.S. 821 (1985).

2. In *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), the Second Circuit held of the applicability of the First Amendment with regard to the Port of New York Authority (Note: "cert. denied 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968)") stating that "the Terminal is dedicated to the public use, to no less a degree than the streets of a company owned town, Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946)" and yet, in my situation, the Second Circuit affirmed the U.S. District Court not applying the First Amendment with regard to the Brooklyn Public Library - in contradiction to the U.S. Supreme Court decision of *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

3. The U.S. District Court (EDNY) and the Second Circuit never provided me with an opportunity to amend or supplement any of my complaints even

though I am a pro se litigant diagnosed as disabled; is the refusal to grant me such an opportunity acceptable?

4. After U.S. District Court Judge Townes passed away, my cases were assigned to U.S. District Court Judge Kuntz; unlike Judge Townes, when Judge Kuntz granted my adversaries dismissals of the remaining complaints, Judge Kuntz wrote "**NOT FOR PUBLICATION**" [Emphasis in the original]. In addition, when the Second Circuit affirmed the dismissals via Summary Order it stated "RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT" [Emphasis in the original]. Does this sound like the Second Circuit followed the law, did not follow the law, and/or even knows what the law is – as Justice Marshall warned in *Heckler*?

PARTIES TO THE PROCEEDING(S)

Petitioner is Robert Pilchman (Pro Se); I reside in the EDNY.

Respondents are National Labor Relations Board ("NLRB"); New York State Public Employment Relations Board ("NYSPERB"); New York State Division of Human Rughts ("NYSDHR"); Brooklyn Public Library ("BPL"/ "the Library"); Brooklyn Library Guild Local 1482 of the American Federation of State, County, and Municipal Employees, AFL-CIO ("the Union"); District Council 37 of the American Federation of State, County, and Municipal Employees, AFL-CIO ("the Union").

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals (Second Circuit) is included in Appendix A. The opinions of the U.S. District Court (EDNY) are included in Appendix B (Note: After U.S. District Court Judge Townes passed away, the cases were assigned to U.S. District Court Judge Kuntz; thus, the first opinion is from Judge Townes and the remaining two opinions are from Judge Kuntz. The U.S. Court of Appeals consolidated my appeals). I asked an attorney to check if any of the opinions have been published / reported. Apparently, the opinion (granting my adversaries dismissal of my case 14-CV-7083) issued by the late U.S. District Judge Townes (EDNY) was published but not reported, the opinions (granting my adversaries/adversary dismissal of my cases 15-CV-3176 and 15-CV-3641)) issued by the U.S. District Judge Kuntz (EDNY) was not published and was not reported, and the opinion of the Second Circuit affirming all three of the dismissals was both published and reported. To quote from the response that I received

> "I found two case decisions that have been published and available on West Law. The EDNY decision is not "reported," meaning published in one of the federal reporters, but it is published on West Law ... The 2nd Circuit decision appears to have been published and reported in a federal reporter. The citations for the two decisions are...
>
> Pilchman v. NLRB, 14-cv-7083 (SLT) (SMG), 2017 WL 1750300 (E.D.N.Y. May 3, 2017)
>
> Pilchman v. NLRB, 831 Fed. Appx. 46 (Mem) (2d Cir. 2020)"

BASIS FOR JURISDICTION

The Second Circuit Court of Appeals denied my timely request for rehearing on March 5, 2021 (Appendix C) (and issued a statement of costs against me on March 19, 2021 (Appendix D)).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment (due process clause): "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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."

NYS (i.e. New York State) Constitution Article I, §8 : ""Freedom of Speech and Press; Criminal Prosecutions for Libel Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all

criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

National Labor Relations Act (NLRA) – See Appendix P

(NYS) The Taylor Law (Public Employees' Fair Employment Act) – See Appendix Q

(NYS) The State Employment Relations Act (SERA) – See Appendix R

Administrative Procedure Act (APA) - See Appendix S

Freedom of Information Act (FOIA) – See Appendix T

(NYS) Freedom of Information Law (FOIL) - See Appendix U

Americans with Disabilities Act (ADA) – See Appendix V

(NYS) Human Rights Law – See Appendix W

STATEMENT OF THE CASE

On or around December 4, 2014, I filed the complaint of 14-CV-7083 (EDNY). On or around June 2, 2015, after there were subsequent violations, I filed the complaint of 15-CV-3176 (EDNY). On or around June 23, 2015, after I learned that the First Amendment also apparently applies to the Brooklyn Public Library, I filed the complaint of 15-CV-3641 (EDNY). On or around May 24, 2017, I filed the Notice of Appeal for 14-CV-7083 (EDNY) (2nd Cir: 17-1697 (L)). In or around January 2018,

the (fully briefed) motions to dismiss were submitted in 15-CV-3176 (EDNY) and 15-CV-3641 (EDNY). On or around February 21, 2018, the cases (14-CV-7083 (EDNY), 15-CV-3176 (EDNY), and 15-CV-3641 (EDNY)) were assigned to Judge Kuntz (after Judge Townes passed away). On or around January 3, 2020, I filed the Notice of Appeal for 15-CV-3176 (EDNY) (2nd Cir: 20-52(Con)) and the Notice of Appeal for 15-CV-3641 (EDNY) (2nd Cir: 20-66(Con)) The Second Circuit dismissed 17-1697(L) (20-52 (Con)) and 20-66(Con) on December 18, 2020 and denied my timely request for rehearing on March 5, 2021.

Note: Subsequent to at least one of the defendants apparently questioning whether or not the U.S. District Court would be an appropriate place to initiate review of the NLRB, I also filed a petition for review in the Second Circuit (15-1799) which was dismissed. To elucidate, BPL in its reply (in support of its Motion to Dismiss) (i.e. Docket # 65 (of 14-CV-7083 (EDNY))) objected "Moreover, as noted above, the procedural path by which the Hawkins County case arrived at the Supreme Court did not involve a stop at a federal district court. Therefore, Hawkins County does not support Plaintiff's argument that this Court has subject matter jurisdiction over his claims." Clearly, BPL seems to have objected to initiation in the District Court. Thus, after I sustained subsequent injuries, given my concern for timeliness and the question of initiation at the District level and/or the Circuit level, I filed (on or around June 2, 2015) the subsequent action (15-CV-3176-SLT-SMG) in the District Court (EDNY) and the petition for review (15-1799) in the Circuit Court (2nd Cir.).

REASONS FOR GRANTING WRIT

A. Background.

1. I began my employment with the Brooklyn Public Library on or around June 8, 1998 and was a member of the Union (Brooklyn Library Guild and DC 37) throughout my employment. As part of campaign literature (for a Union election) in the autumn of 2011, I paid for the DC 37's composition and mailing of postcards to more than 900 people (listed in DC 37 as members of the Brooklyn Library Guild). The postcard stated:

> Dear Union Colleagues,
>
> I am a candidate for a couple of positions in the Brooklyn Library Guild. In the event, that you wish to contact me, I may be reached at r_pilchman@msn.com In addition, the wiki, bpl-rebel at wikispaces.com may be of interest; hopefully some useful information (less suppressed and more accessible) will be available (- http://bpl-rebel.wikispaces.com/). In short, I believe that it is essential that (1) we have opportunity for communication (without fear of reprisal) and (2) our rights (under the Collective Bargaining Agreement(s) etc.) are upheld.

Sincerely,

Robert Pilchman (Union member since June 1998)

2. Starting on or around July 17, 2012, the Brooklyn Public Library ('BPL'/ 'the Library'), ordered me to remove 'inappropriate' postings from the website mentioned in my Union postcard to my coworkers (- http://bpl-rebel.wikispaces.com/) – based on its belief that I posted and could remove postings. (Note: (1) Wikispaces was a website that allowed groups to engage in concerted communication (- including in somewhat private and anonymous communication); (2) BPL never gave me any power (administrator or otherwise) to post / remove postings on Wikispaces.)

3. Even if I had any power (obtained NOT by way of my being a Library employee) to post or remove postings from the Wikispaces website, I didn't see anything posted that was not protected communication. In any event, after the postings were not removed, a hearing took place, and the hearing officer (Larry Jennings (i.e. BPL's Director of Human Resources)) issued a decision that I must remove any 'inappropriate' postings within a certain number of days and that I was to receive a 10 day suspension without pay.

4. On "Tuesday, November 20, 2012 10:39 PM" (i.e. on my own time (i.e. NOT on employee time)), I sent an email (from my personal (i.e. NOT employee) email account) in which I appealed the decision of the hearing officer to Richard Reyes-Gavilan (i.e. the Director of the Library and Chief Librarian) (Please note "ARTICLE XIV: GRIEVANCE PROCEDURE" (Section C) of the working

conditions contract (– accessible at http://www.local1482.org/working-conditions-contract.html#article%2014 -) (which is one of the Collective Bargaining Agreements between the BPL and the Union) provides employees (which included me when I was employed by the Library) the right to appeal (on my own time (i.e. NOT employee time)) (as part of the grievance procedure)).

5. My email appealing the 10 day suspension was deemed by the Library to be inappropriate and I was terminated on April 26, 2013. In particular the Library objected to the email because

(i) The email stated "Thus, although a substantial number of the trustees are appointed by the Mayor of New York and the Borough President of Brooklyn, the question remains to what extent the Brooklyn Public Library is nevertheless an "out of control train wreck" (- to use the expression of Ed Jelen)?".

(ii) The email stated "even Richard Reyes-Gavilan (Director of the Library and Chief Librarian), who is relatively new at the Brooklyn Public Library, clearly appears to have demonstrated ruthless incompetence (and possibly worse)".

(iii) I not only sent the email to the Chief Librarian (Richard Reyes-Gavilan) but I also sent it to other recipients such as "Michael Bloomberg (Mayor of New York City), Marty Markowitz (Brooklyn Borough President), Christine Quinn (New York City Council Speaker), John Liu (New York City Comptroller), and Jonathan Lippman (Chief Judge of the State of New York))")" (By the way, I also had sent the email to Union leadership, various employees of the Library (such as my supervisors), members of the NLRB (i.e. National Labor Relations Board), NYSPERB (i.e. New

York State Public Employment Relations Board), NYSDHR (i.e. New York State Division of Human Rights), NYSED (i.e. New York State Education Department), and my attorneys.)

6. Prior to my being terminated, I was placed on medical leave (under the FMLA) - to quote from the Union (as represented by Fausto E. Zapata, Jr. (Esq.)) in its arbitration "CLOSING BRIEF IN SUPPORT OF LOCAL 1482, DC37, AFSCME, AFL-CIO, GRIEVANCE CHALLENGING THE BROOKLYN PUBLIC LIBRARY'S ACTIONS IN WRONGFULLY SUSPENDING AND WRONGFULLY TERMINATING THE GRIEVANT, ROBERT PILCHMAN" (page 11) "On or around January 15, 2013, the Grievant was diagnosed as having bipolar disorder, and was granted medical leave for almost 12 weeks. See, UNION # 5; Testimony of Larry Jennings and Grievant. Effective on April 3, 2013, the Grievant was placed back on "suspension with pay". See, BPL # 14, Page 21-22.". Indeed, (prior to my being terminated) I provided BPL with medical notes from the treating physicians – the primary care physician (a licensed and board certified Internist (Hal J. Kazdin, M.D.)) and the licensed and board certified psychiatrist (Nasser Sedaghatpour, M.D.) that I am able to return to work at full duty; in April 2013 (prior to my being terminated) I provided a medical note to the BPL from Dr. Sedaghatpour that states "The above patient is under psychiatric treatment. He has made significant progress and it is reasonable to believe that he will not have any further misconduct in his job and he is able to follow direction from his supervisor" and that states "As an option for progressive discipline I recommend that he be placed on probation".

7. I filed charges with the NLRB against BPL under the NLRA for violating my right to engage in concerted activity and also with NYSPERB under the Taylor Law (New York State State) and The State Employment Relations Act (SERA) (New York State State) (Note: The Taylor Law is for the public sector and SERA is for the private sector). (Note: I also included charges against the Union for failing to provide fair representation under NLRA and the Taylor law – but not under SERA because SERA does NOT offer this option)

8. NLRB's General Counsel concluded that it would not pursue my charges (with the only explicit reason offered because of lack of jurisdiction because NLRB holds that BPL is a political subdivision and thus NLRA doesn't apply to BPL) but the NYSPERB dismissed my public sector charges against the BPL (taking the apparent contradictory rationale that BPL is private sector) (and thus there were no charges at all remaining against the UNION).

9. I filed a complaint in U.S. district court (14-CV-7083 (EDNY)) that BPL is private - NOT a political subdivision, and as such the NLRB should be reversed or else the EDNY –via supplemental jurisdiction - should reverse NYSPERB dismissing my public sector charges. (By the way, NYSPERB would be preempted by NLRB)

10. While the prior complaint (14-CV-7083 (EDNY)) was still pending, after additional charges were dismissed by NLRB, I filed another complaint in U.S. district court (15-CV-3176 (EDNY)). In addition, in this complaint, I asked "that the Court please require appropriate continued processing by the NYSDHR (- 'Mandamus to Compel')". I also asked "that the Court please require NLRB, PERB, NYSDHR, and

(if applicable) BPL to adhere to its obligation(s) under FOIA/FOIL". (Note: For example, it is especially important to receive information from the investigation(s) of the Office of the Inspector General of NLRB to find evidence showing to what extent discrimination based on race, religion, creed, disability, perceived orientation, retaliation for opposition to discrimination, protected communication (whether political or otherwise) significantly impacted the NLRB's dismissals.)

11. After learning that the Brooklyn Public Library is obligated (even if BPL is a private entity) to adhere the First Amendment of the U.S. Constitution and while the prior complaints (14-CV-7083 (EDNY) and 15-CV-3176 (EDNY)) were still pending, I filed another complaint in U.S. district court (15-CV-3641 (EDNY)) - "a complaint under 42 U.S.C. §1983 alleging that the Brooklyn Public Library retaliated against me in violation of the First Amendment of the U.S. Constitution and Article I, §8 of the New York State Constitution ... and the Fourteenth Amendment of the U.S. Constitution ..." (Note: The Fourteenth Amendment made the First Amendment also applicable to state and local governments.). I also included an EEOC right to sue letter but stated "I am NOT currently bringing this lawsuit in federal court against the Brooklyn Public Library (to any extent) on the basis of any BPL violation of discrimination* of a protected class such as disability etc. and the reason that I mentioned about the EEOC's right to sue letter (Exhibit # 9) is purely for informational purposes – not as any type of prerequisite for any existing lawsuit" – because "I also received an email from Aracely Ruiz (of NYSDHR) that stated "Your

correspondence has been deemed a reopening request and will be forwarded to the General Counsel's office for further review.""

12. In U.S. District Court, to counter the Motions to Dismiss of my adversaries I submitted Memos of Oppositions with (Cross) Motion(s) (Appendix M, Appendix N, and Appendix O). In particular:

In 14-CV-7083 (EDNY) (Appendix M) I requested to be allowed to amend the complaint/summons "[i]f there is any fatal deficiency in my complaint/summons".

In 15-CV-3176 (EDNY) (Appendix N) I requested (i) to be allowed to file an amended complaint if the Court "finds any fatal deficiency in my Complaint" or if the "if there is not permission granted to file an amended complaint in 15-CV-3641" (ii) "that as many of the actions as possible be merged if merging would decrease my vulnerability to "claim splitting" (or to anything else)." (iii) regarding my pursuit of information under the FOIA to address any failure on my part to exhaust my administrative remedies "permission to file a supplemental complaint (and if this would materialize then any issue of failure to exhaust administrative remedies would appear to become moot). (Thus, I am also opposed to the NLRB's Motion for Summary Judgment.)"

In 15-CV-3641 (EDNY) (Appendix O) I requested (i) "permission to file an amended complaint in this instant action" explaining that I "am seeking permission to amend such that I may seek redress for BPL violating my rights under the ADA (Americans with Disabilities Act)" (ii) "request that as many of the actions as possible be merged if merging would decrease my vulnerability to "claim splitting" (or to

anything else)." (iii) "permission to supplement" if a subsequent action "could be vulnerable to "claim splitting""

13. The U.S. District Court dismissed all three of my complaints and did not grant me any of my (cross) motions.

Regarding 14-CV-7083 (EDNY): The late U.S. District court Judge Townes held that (A) my "claims against the NLRB must be dismissed" because "Plaintiff has not and cannot meet his burden to establish subject matter jurisdiction over the NLRB General Counsel's decisions" "not to prosecute"(B) my "claims against the remaining Defendants must also be dismissed" "because the Court "cannot exercise supplemental jurisdiction unless there is first a proper basis for original federal jurisdiction"" (C) "leave to amend is denied" because "leave need not be granted where it would be futile". I appealed to the Second Circuit (17-1697 (2nd Cir.)).

Regarding 15-CV-3176 (EDNY): U.S. District court Judge Kuntz granted the Defendants' Motions to Dismiss and did NOT grant my (cross) motions stating that "the Court finds the Complaint fails to state a claim upon which relief can be granted". I appealed to the Second Circuit (20-52 (2nd Cir.)).

Regarding 15-CV-3641 (EDNY): U.S. District court Judge Kuntz granted the Defendants' Motions to Dismiss and did NOT grant my (cross) motions stating that "the Court finds the Complaint fails to state a claim upon which relief can be granted". I appealed to the Second Circuit (20-66 (2nd Cir.)).

14. The Second Circuit consolidated the appeals (17-1697 (LEAD) 20-52 (CON) 20-66 (CON)) and affirmed the opinions issued in district court dismissing my complaints and not granting me any of my (cross) motions.

B. Judicial Review of non-enforcement decisions of NLRB

The U.S. District Court (EDNY), affirmed by the Second Circuit, were egregiously wrong to dismiss opining that my "claims against the NLRB must be dismissed" because "Plaintiff has not and cannot meet his burden to establish subject matter jurisdiction over the NLRB General Counsel's decisions" "not to prosecute" – this opinion is in contradiction to Michael C. McClintock's persuasive elucidation of the NRLA – this opinion is clearly in contradiction to the case law of other Circuits and apparently the U.S. Supreme Court – this opinion seems to assume that all of the NLRB decisions were made via a real General Counsel in contradiction to other Circuit(s).

1. McClintock's elucidation of the NRLA:

("Assistant Professor of Law, Gonzaga University") Michael C. McClintock in *Enterprise Labor and the Developing Law of Employee Job Rights-Part Two* ("A chapter from M. McClintock, NLRB General Counsel: "Unreviewable Power" to Refuse to Issue an Unfair Labor Practice Complaint, 1973 (S.J.D. dissertation, in preparation, SMU Law School)") (Gonzaga Law Rev. (Vol. 8; p. 217-91 (1973)))

(retrieved via https://www.law.gonzaga.edu/law-review/files/2011/11/gonlr8.22.pdf) persuasively argues against current case law stating (in p. 288-9 (located in Appendix G)):

> "The revision of section 3 (d) [of the NLRA] was meant by Congress to effect a bipartite separation of NLRB functions. The General Counsel was to be primarily an investigator and prosecutor, freed from any adjudicatory influence of the five-member Board and its corps of independent trial examiners. He was to be solely responsible for the issuance and prosecution of unfair labor practice complaints. The *authority* of the General Counsel on these matters was to be *final*; that is, the Board had absolutely no right to review. In other words, the decision of the General Counsel to dismiss an unfair labor practice charge for lack of merit is *administratively final*. The Board cannot second guess that determination. His decision amounts to final agency action on the issue. This, in effect, means that dismissals may properly be viewed as a *final Board orde*r appealable under section 10(f) [626] since it is the final act of the Agency itself.
>
> Further, there is a judicially construed presumption favoring review of final agency actions under section 10 of the Administrative Procedure Act (APA). [627] The Supreme Court has held[628] that the Congressional purpose to cut off review must be *persuasive*; that is the Congressional intent must be shown by *clear and convincing evidence*. Otherwise, the APA presumption of reviewability comes into play and supplies the evidence of intent *for review* and must be honored by the courts. Section 3(d) falls squarely within this category. There is no clear and convincing evidence at all that Congress intended the decisions of the General Counsel concerning refusals to issue complaints not to be appealable under the terms and conditions enumerated by the APA.[629] Consequently, the APA mandates review."

Even if McClintock's position (regarding having an option for judicial review) would not be accepted by the judiciary (in normal situations), my situation is exceptional. Indeed, in BPL's Memo of Law in Support of Its Motion to Dismiss (p. 11) (i.e. Docket Number 63 (of 14-CV-7083 (SLT) (SMG))), BPL alleges "there does not appear to be any authority directly addressing whether a federal district court may exercise subject matter jurisdiction over a claim to review the NLRB's General Counsel's decision not to issue an unfair labor practice complaint on jurisdictional grounds" [Emphasis Added]. If someone was raped and a prosecutor refused to prosecute the suspected rapist(s) "based solely on the belief that it lacks jurisdiction" (and that "turns on a mistake of law") (or "based solely on the" the race/religion of the victim (/suspected perpetrator(s))) and the victim complained to the judiciary to remand to the prosecutor for further processing then would the judiciary be able to review despite prosecutorial discretion? Apparently, that is included in what was raised (but unanswered) by the D.C. Circuit in the fourth footnote of *Hourihan v. National Labor Relations Board et al*, 201 F.2d 187 (D.C. Cir. 1953) (http://law.justia.com/cases/federal/appellate-courts/F2/201/187/88194/#fn4_ref) (and also in Footnote # 1 (http://openjurist.org/298/f2d/330#fn1) of *Retail Store Employees Union Local Retail Clerks International Association v. Rothman*, 298 F.2d 330 (D.C. Cir 1962))

2. The Second Circuit's Affirmation of the U.S. District Court (EDNY) refusing to recognize that there is judicial review when the NLRB's General Counsel's decision not to issue an unfair labor practice complaint is on

jurisdictional grounds, means that the Second Circuit is clearly in conflict with other Circuits and apparently the U.S. Supreme Court.

Exceptions to "non-reviewability of the General Counsel's prosecutorial decisions" are clearly enumerated in Section "III" of *International Association of Machinists and Aerospace Workers v. A Lubbers*, 681 F.2d 598 (9th Cir. 1982) (http://openjurist.org/681/f2d/598/international-association-of-machinists-and-aerospace-workers-v-a-lubbers) (Note: In a case against the General Counsel of the NLRB, the 4th Circuit similar (to the 9th Circuit of *Lubbers*) stated "But, in Panama Canal Co., the Court indicated that judicial relief is sometimes available where the agency's failure to act turns on a mistake of law" [Emphasis Added] (*Associated Builders and Contractors Inc v. Irving*, 610 F. 2d 1221 (4th Cir. 1979) (http://openjurist.org/610/f2d/1221/associated-builders-and-contractors-inc-baltimore-metropolitan-chapter-v-r-irving)).

Moreover, the U.S. Supreme Court of *Heckler v. Chaney*, 470 U.S. 821 (1985) refrained from reversing the U.S. Supreme Court of *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143 (1939) in the exceptional cases specified in the footnote ; the footnote of *Heckler v. Chaney*, 470 U.S. 821 (1985) states:

> "[Footnote 4] We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. See, e. g., Adams v. Richardson, 156

U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."" [Emphasis Added]

(http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=470&invol=821)

(Note: Indeed, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Supreme Court elucidated "in *Heckler v. Chaney*, 470 U. S. 821 (1985), we held that an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review." [Emphasis Added] (https://supreme.justia.com/cases/federal/us/549/497/opinion.html). (By the way, in *Massachusetts v. EPA*, 549 U.S. 497 (2007) the U.S. Supreme Court held of standing and subject matter jurisdiction "to challenge the EPA's denial of their rulemaking petition".).)

Thus, given the reasoning for the exceptions to the "non-reviewability of the General Counsel's prosecutorial decisions" clearly enumerated in the Ninth Circuit's prior decision in *Lubbers* and the footnote of *Chaney* (which limited the reversal of *Rochester*), the Ninth Circuit (as reasonable as 1+1=2) in *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753 (9th Cir. 1990) subsequently stated:

"The Supreme Court in Chaney, however, suggested that discretionary nonenforcement decisions may be reviewable when "a refusal by the agency to institute proceedings [is] based solely on the belief that it lacks jurisdiction" or "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an

abdication of its statutory responsibilities." 470 U.S. at 833 n. 4, 105 S.Ct. at 1656 n. 4. Similarly, the D.C. Circuit has recognized two exceptions to the general rule of unreviewability of agency nonenforcement decisions: 1) agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction, International Longshoremen's Ass'n v. National Mediation Bd., 785 F.2d 1098, 1100 (D.C.Cir.1986); and 2) an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable, International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Brock, 783 F.2d 237, 245 (D.C.Cir.1986). We find the exceptions suggested by the Supreme Court in Chaney and by the D.C. Circuit in Longshoremen and International Union apply in the present case. The General Counsel's opinion letters strongly indicate that his decision was based solely on the belief that he did not have jurisdiction to issue an unfair labor practice complaint. We also find that the General Counsel promulgated a new interpretation of a statute and of FLRA regulations in the course of his decision."

(http://openjurist.org/898/f2d/753/montana-air-chapter-no-association-of-civilian-technicians-inc-v-federal-labor-relations-authority) (Note: In BPL's Memo of Law in Support of Its Motion to Dismiss (p. 11) (i.e. Docket Number 63 (of 14-CV-7083-SLT-SMG (EDNY))) it states "See Clark v. Mark, 590 F. Supp. 1, 6 (N.D.N.Y. 1980)("[t]he committee intends that the [FLRA's] role in Federal sector-labor-management relations be analogous to that of the National Labor Relations Board in the private sector.")(internal citations omitted)".)

Also in *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 US 600 (1971), Supreme Court ruled against NLRB regarding whether or not an

employer is a political subdivision (https://supreme.justia.com/cases/federal/us/402/600/):

> "While the NLRB's construction of the statutory term is entitled to great respect, there is no "warrant in the record" and "no reasonable basis in law" for the NLRB's conclusion that respondent was not a political subdivision. In the light of all the factors present here, including the fact that the District is administered by individuals who are responsible to public officials (thus meeting even one of the tests used by the NLRB), respondent comes within the coverage of that statutory exemption.""

Furthermore, this Circuit, in *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2nd Cir. 1987) stated: "In the final analysis, it is for the courts, not the NLRB, to determine what Congress intended the scope of NLRB jurisdiction to be." (http://openjurist.org/815/f2d/219/christ-the-king-regional-high-school-v-r-culvert-j). To be clear, we observe in *Christ* the judiciary determining the jurisdiction of NLRB (contrary (i.e. not deferring) to NLRB) in order to rule on preemption – and so apparently we may have the judiciary determining that NLRB has jurisdiction (in a preemption case) despite an NLRB General Counsel who dismissed / refused to issue a complaint(s) "based solely on the belief that it lacks jurisdiction". To say that the judiciary may determine jurisdiction contrary to the (General Counsel of) NLRB (in a preemption case) but may not review the refusal of the (General Counsel of) NLRB to issue a complaint "based solely on the belief that it lacks jurisdiction" would clearly seem to say that the (General Counsel of) NLRB is above the law. If one would object, that the refusal of the (General Counsel of) NLRB to issue a complaint is inaction such

an objection would be refuted by *Rochester* (which survived to the extent that *Chaney* refrained from reversing *Rochester* (including "based solely on the belief that it lacks jurisdiction")). In *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143 (1939) the Supreme Court held:

> "We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding. The order of the Communications Commission in this case was therefore reviewable."

(http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=307&invol=125) In addition, in *Rochester*, the Supreme Court elucidates:

> "'Negative' has really been an obfuscating adjective in that it implied a search for a distinction-non-action as against action-which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability. 26 'Negative' [307 U.S. 125, 142] and 'affirmative,' in the context of these problems, is as unilluminating and mischief-making a distinction as the out-moded line between 'nonfeasance' and 'misfeasance'.27" and "An order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same."

(By the way, BPL has not waived any option for judicial review (including not waiving the argument for preemption) if it would be unhappy with any decision issued by NYSPERB (under the Taylor Law/SERA) (Note: (1) Regarding the "New York State Labor Relations Act" "[t]he statute was renamed the New York State Employment Relations Act in 1991" and "[e]ffective July 22, 2010, the New York State Employment Relations Board was abolished, and the Public Employment Relations Board became responsible for administering the provisions of Article 20 of the Labor Law" (http://www.perb.ny.gov/SERARule.asp). (2) My charges filed with NYSPERB (against BPL/Union) are currently on hold with NYSPERB (Note: Docket # 44 of 14-CV-7083-SLT-SMG (EDNY)).).) Also in *New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995), the Second Circuit stated

> "Preliminarily, we must consider whether we have jurisdiction to hear NYCERS's claim that the no-action letter violated the APA's notice and comment procedures. It is true that agency decisions not to prosecute are not reviewable because they are "generally committed to an agency's absolute discretion." Heckler v. Chaney , 470 U.S. 821, 831 (1985). But it is equally true that "[a] person ... adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702."
>
> [(http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/2nd/946072.html, Docket No. 94-6072]

Furthermore, in *Leedom v. Kyne*, 358 U.S. 184 (1958) we see a situation of district court jurisdiction over the NLRB in an exceptional situation (Note: *Goethe House*

N.Y., German Cultural Ctr. v. NLRB, 869 F.2d 75, 77-78, 80 (2d Cir. 1989)). In addition, even the NLRB apparently admits (page 12 of Docket No. 30 (15-1799 (2nd Cir.))) (Appendix H) that *Montana Air* "recognizes a jurisdictional exception" which "supplies" "district courts with initial jurisdiction". Also, (in the NLRB's Reply to Opposition (Docket No. 55 of 15-1799 (2nd Cir.))) (Appendix I) NLRB said that "the exceptions discussed in *Lubbers*, like the *Montana Air* exception … can only supply initial jurisdiction to district courts, not courts of appeals" and NLRB said that *Lubbers* (or some of *Lubbers*) is "derived from the Supreme Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958)" . However, NLRB attacked *Montana Air* (9th Cir) (pg 14 of Docket No. 30 (15-1799 (2nd Cir.))) (Appendix H):

> "For this very reason, the exception recognized by *Montana Air* was flatly rejected by the D.C. Circuit. *See Patent Office Prof'l Ass'n v. FLRA,* 128 F.3d 751, 753 (D.C. Cir. 1997) ("*POPA*"). In *POPA*, the D.C. Circuit explained that *Montana Air*'s holding was based on a faulty interpretation of the Supreme Court's footnote in *Heckler*."

and continued by quoting from the D.C. circuit that

> "it remains the law of this circuit [NOT like *Montana Air* (9th Cir)] that a decision of the General Counsel of FLRA not to file a complaint is not judicially reviewable … Nothing in *Heckler* – and especially not the Association's favored footnote-affects the reviewability of decisions of the General Counsel under the Labor-Management Relations Act …"

So the Second Circuit (who changed from *Christ* to *Pilchman*) and the D.C. Circuit (who changed from *Longshoremen's* to *POPA*) are in disagreement with Fourth Circuit

(*Irving*), the Ninth Circuit (*Lubbers* and *Montana Air*), and the U.S. Supreme Court of *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143 (1939) (which survives to the extent that it was not reversed by the U.S. Supreme Court in the exceptional cases of the fourth footnote of *Heckler v. Chaney*, 470 U.S. 821 (1985)). Also, in *Heckler*, Justice Marshall warned (https://supreme.justia.com/cases/federal/us/470/821/):

> "Easy cases at times produce bad law, for in the rush to reach a clearly ordained result, courts may offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding of their implications in concrete settings, would eschew. In my view, the "presumption of unreviewability" announced today is a product of that lack of discipline that easy cases make all too easy. The majority, eager to reverse what it goes out of its way to label as an "implausible result," ante at 470 U. S. 827, not only does reverse, as I agree it should, but along the way creates out of whole cloth the notion that agency decisions not to take "enforcement action" are unreviewable unless Congress has rather specifically indicated otherwise. Because this "presumption of unreviewability" is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood."

Thus, in my situation, it clearly seems that there is judicial reviewability

In short, under certain exceptional cases (such as "when "a refusal by the agency to institute proceedings [is] based solely on the belief that it lacks jurisdiction" or "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."") the refusal of the General Counsel of NLRB to issue a complaint is subject to judicial review in federal court (as indicated in *Montana Air Chapter No. 29 v. FLRA*, 898 F.2d 753 (9th Cir. 1990). In addition, the Court may exercise supplemental jurisdiction, regarding the denial(s)/dismissal(s) of NYSPERB (Note: The Taylor Law (aka Public Employees' Fair Employment Act) (http://www.perb.ny.gov/stat.asp) – especially NY Civil Service Law § 209-a.4 **(c)** (http://codes.lp.findlaw.com/nycode/CVS/14/209-a)). (Clarification: In all of my dismissed charges with NLRB against both BPL and the Union that are part of the Complaint seeking judicial review in 14-CV-7083 (EDNY) (17-1697 (L) (2nd Circ.)), the only reason ever offered by NLRB for the dismissal was on jurisdictional grounds. Similarly, in terms of the Complaint seeking judicial review in 15-CV-3176 (EDNY) (20-52 (CON) (2nd Circ.)), of subsequent charges denied by the NLRB, regarding BPL the only reason ever offered for a denial was on jurisdictional grounds, but regarding my last charge against the Union – and only regarding that one charge - an additional reason was offered – to quote from the Complaint [of 15-CV-3176 (EDNY)]:

> "In a letter dated May 15, 2015, from Richard F. Griffin, Jr. (General Counsel, NLRB) (By: Deborah M.P. Yaffe (Director, Office of Appeals)) it states "we

deny your motion and this matter remains closed" (Exhibit # 4). However, in this letter it states "With respect to the charge against the Union, in addition to the lack of Board jurisdiction over the matter, there was no evidence that the Union failed to challenge the arbitration award with respect to the modification you seek based on unlawful considerations" (Exhibit # 4). Even if this would mean that with respect to the Union charge (29-CB-142385), the Motion for Reconsideration was not denied "based solely on the belief that it lacks jurisdiction", the documentation indicates that the Regional Director's dismissal (Exhibit # 2) and the denial of my appeal from the NLRB's General Counsel (by the Director of the Office of Appeals) (Exhibit # 3) was "on the belief that it lacks jurisdiction" – and no other basis is indicated. Indeed, with respect to charge (29-CB-142385), regardless of whether or not this Court would hold that there is no longer "based solely on the belief that it lacks jurisdiction", I object that there is a failure of due process because the allegation that "there was no evidence that the Union failed to challenge the arbitration award with respect to the modification you seek based on unlawful considerations" was never raised when the charge was dismissed at the Regional level or even during denial of my appeal from the NLRB's General Counsel (by the Director of the Office of Appeals). If such an allegation was never raised during the dismissal and during the denial of my appeal then what type of opportunity was I provided to address it? (Note: Rules and Regulations of the NLRB (Section 102.19) (http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf)). Moreover, at http://www.nlrb.gov/who-we-are/general-counsel/richard-f-griffin-jr it states that "Mr. Griffin previously served as General Counsel for International Union of Operating Engineers (IUOE). He also served on the board of directors for the AFL-CIO Lawyers Coordinating Committee, a position he held since 1994"; at http://www.iuoe.org/about-iuoe, it states "IUOE is the 10th largest union in the AFL-CIO". In any event, any dismissal and denial regarding the charge of 29-

CA-142419 (as well as regarding every other charge that I filed (except for the one charge (29-CB-142385))) have been clearly (at least purportedly) "based solely on the belief that it lacks jurisdiction"."

Thus, there is an extreme need for the U.S. Supreme Court to please reverse both the dismissal of the complaint of 14-CV-7083 (EDNY) (17-1697 (L) (2nd Circ.)) and the dismissal of the complaint of 15-CV-3176 (EDNY) (20-52 (CON) (2nd Circ.)) Furthermore, I emailed the Inspector General of the NLRB on January 8, 2014 "Is the NLRB (Richard Griffin? Deborah Yaffe? ...) retaliating against me (for my communication below ...)? It goes without saying that retaliatory/discriminatory behavior should not be tolerated." (Appendix K). However, when I tried to find out what happened I was not successful; in the letter that I received from James E. Tatum, Jr. (Counsel to the Inspector General, NLRB) (in response to my FOIA request(s)), the NLRB seems to neither confirm nor deny the existence of the Office of Inspector General records that I requested (and that if they do exist they are refusing to provide me with them) (Exhibit # 2 of Docket # 14 of 15-CV-3176-SLT-SMG (EDNY)) (Appendix J). Also, in Document # 168 (10/22/2020) of 15-1799 (2nd Cir.) when the NLRB submitted what purports to be a certified administrative record – it did not include from the Inspector General! Shockingly in response to my question "If a General Counsel would admit to refusing to issue a complaint on the basis of my race/religion then would the defendants still maintain that the General Counsel's decision would be unreviewable?" (i.e. Docket Number 57 (of 14-CV-7083-SLT-SMG (EDNY))), the BPL in its Reply Memorandum of Law in Further Support of its

Motion to Dismiss (i.e. Docket Number 65 of 14-CV-7083-SLT-SMG (EDNY)) (in footnote # 8) explicitly stated "the answer to the question would be yes". (Note: Although less blatant, NLRB in page 4 of its "REPLY TO OPPOSITION [48]" (dated July 24, 2015) (i.e. Docket No. 55 (of 15-1799 (2nd Cir.))), seems to agree with BPL's shocking answer. Yet the Second Circuit in its affirmation of the EDNY district court dismissals states that "Pilchman does not allege any constitutional violations by the NLRB"; however, it is known that I am a pro se (diagnosed with mental disability) and pro se litigants are not expected to be as artful. Furthermore, I was never given any opportunity to amend any of my Complaints. It is also noteworthy that the Circuit in its affirmation to dismiss my U.S. district court complaints highlighted that the APA provides for judicial review initiated at the Circuit level; however, the Second Circuit also dismissed my petition for review (15-1799 (2nd Cir.)) (Appendix L) initiated at the Second Circuit level seeking judicial review of the same charges dismissed by NLRB as my Complaint of 15-CV-3176 (EDNY). Indeed, according to my recollection I filed my Complaint of 15-CV-3176 (EDNY) on the same day as my petition for review of 15-1799 (2nd Cir.). In addition, I was never offered any option to transfer from the District Court to the Circuit Court; in contrast in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962) it states

> "When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case, and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If, by reason of the uncertainties of proper venue, a mistake is made, Congress, by the enactment of

§ 1406(a), recognized that "the interest of justice" may require that the complaint not be dismissed, but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as "time-consuming and justice-defeating technicalities.""
(--- https://supreme.justia.com/cases/federal/us/369/463/)

3. Even if there would never be judicial review of the NLRB's General Counsel dismissal of a charge / refusal to issue a complaint; what if there would be an invalidly appointed General Counsel? This opinion seems to assume that all of the NLRB decisions were made via a real General Counsel in contradiction to other Circuit(s). However, some of my charges with the NLRB were dismissed by Lafe Solomon who the judiciary (in the Ninth Circuit) opined was not a valid General Counsel.

At "http://www.littler.com/labor-relations-counsel/federal-judge-rules-nlrb-acting-general-counsel-lafe-solomon%E2%80%99s-appointment-i" it states that "a federal court has determined that National Labor Relations Board Acting General Counsel (GC) Lafe Solomon was not properly appointed to his position. *Hooks v. Kitsap Tenant Support Services Inc.,* Case No. CV-13-5470BHS (W.D. Wash. Aug. 15, 2013)" and "Judge Settle also ruled that Solomon's appointment was invalid. Accordingly, Solomon could not have lawfully delegated authority to Regional Director" and that "the Board lacked a properly appointed quorum of at least three members." Indeed, the United States Supreme Court in *National Labor Relations Board v. Noel Canning,* 573 U.S. ___ (2014) unanimously ruled as unconstitutional the appointments of Sharon Block, Richard Griffin, and Terence Flynn to the National Labor Relations Board (http://en.wikipedia.org/wiki/NLRB_v._Noel_Canning). (Note:

(1) Many of my charges filed in the NLRB were 'dismissed' etc. during the time that Lafe Solomon was 'Acting General Counsel'. At "http://www.nlrb.gov/who-we-are/general-counsel/lafe-solomon" it stated "Lafe Solomon, a career NLRB attorney, was named Acting General Counsel by President Obama as of June 21, 2010, and served in this capacity until November 4, 2013." (2) In 5 U.S. Code § 706 (https://www.law.cornell.edu/uscode/text/5/706) it states "The reviewing court shall …compel agency action unlawfully withheld or unreasonably delayed") Also, even if there would be "any potential ripeness issues in this case" that would not seem relevant to subject matter jurisdiction; in *Amador County v. Kenneth Lee Salazar* (2011), the U.S. Court of Appeals (D.C. Circuit) stated "*with Oryszak v. Sullivan*, 576 F.3d 522, 524–26 (D.C. Cir. 2009) (clarifying that the committed to agency discretion limitation and the final agency action requirement are "not . . . jurisdictional bar[s]")" (http://www.cadc.uscourts.gov/internet/opinions.nsf/48B9B671A97E1A1E85257888004E2303/$file/10-5240-1306587.pdf). In addition, in (http://openjurist.org/759/f2d/905) *Eagle-Picher Industries Inc v. United States Environmental Protection Agency* (1985) (759 F. 2d 905) the U.S. Court of Appeals (D.C. Circuit) stated "the primary focus of the ripeness doctrine as it concerns judicial review of agency action has been a prudential attempt to time review in a way that balances the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." In

(http://openjurist.org/387/us/136) *Abbott Laboratories v. John W. Gardner* (1967) (387 U.S. 136) the U.S. Supreme Court stated:

> "Without undertaking to survey the intricacies of the ripeness doctrine[15] it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. ... The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way. ... Two more recent cases have taken a similarly flexible view of finality."

At http://www.thecre.com/cre-litigation/00-2604_MtD_010322.html it states:

> An agency's own characterization of finality is not decisive in determining when "final agency action" has occurred for purposes of appellate review. Appalachian Power, *supra*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (rejecting EPA characterization of science policy guidance as non-final); Natural Resources Defense Council v. EPA, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994); Carter/Mondale Presidential Campaign v. Federal Election Comm'n, 711 F.2d 279, 289 & n. 17 (D.C. Cir. 1983) (citing Fidelity Television, Inc. v. FCC, 502 F.2d 443, 448 (D.C. Cir. 1974)); American Farm Bureau v. EPA, 121 F. Supp. 84, 105-106 (D.D.C. 2000) (holding EPA science policy was final agency action for purposes of surviving motion to dismiss); see also Dow Chem., U.S.A. v. Consumer Product Safety Comm'n, 459 F. Supp. 378, 384 & n.5, 385-87 (W.D. La. 1978) (holding that "interim policy statement", pursuant to

which CPSC had made "provisional classification" of perchlorethylene as Category A carcinogen, was final agency action). Whether final agency action has occurred for purposes of APA review should not depend on semantic characterizations but rather on a "realistic assessment of the nature and effect" of the agency action. Fidelity Television, *supra*, 502 F.2d at 448."

C. There is also (under the First (and Fourteenth) Amendment(s) of the U.S. Constitution (and its analogous New York State law)) subject-matter jurisdiction and the statement of a claim upon which relief can be granted in terms of the undisputed facts that the Brooklyn Public Library (BPL) suspended me without pay for 10 days for its belief that I posted and failed to remove postings on a website and BPL's termination of my employment because of my email appealing the Step II decision to suspend me without pay for 10 days.

Indeed, in "Clarifying Bounds of Protected Speech for Public Employees" New York Law Journal (Volume 253 No. 56; Wednesday, March 25, 2015) (by Martin Flumenbaum and Brad S. Karp)) it states "On Feb. 28, 2012, plaintiff, NYPD police officer Craig Matthews, filed a complaint under 42 U.S.C. §1983 alleging that the City of New York retaliated against him in violation of the First Amendment to the U.S. Constitution and Article I, §8 of the New York State Constitution; similarly I should also be able to seek redress by filing a complaint under 42 U.S.C. §1983 alleging that the Library retaliated against me in violation of the 1st Amendment to the U.S. Constitution and Article I, §8 of the New York State Constitution - in particular, as elucidated and cited, in this article, the Second Circuit decision of "Matthews v. City

of New York, No. 13-2915-cv, 2015 WL 795238 (2d Cir. Feb. 26, 2015)" (http://caselaw.findlaw.com/us-2nd-circuit/1693143.html). Should the objection be raised that (unlike the NYPD) the Brooklyn Public Library is not a public employer, this objection would not seem relevant based on the information that I received from Gene Eisner, Esq. (who has been practicing law for more than 50 years); Mr. Eisner compared the Brooklyn Public Library to the Port Authority and cited a case he successfully litigated in the SDNY and Second Circuit - *Wolin v. Port of New York Authority*. In *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (http://openjurist.org/392/f2d/83/wolin-v-port-of-new-york-authority), in which this Circuit held of the applicability of the First Amendment with regard to the Port of New York Authority (Note: "cert. denied 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968)" --- https://law.resource.org/pub/us/case/reporter/F2/436/436.F2d.618.24732_1.html). To be clear, how would a posting (which is NOT done via any power & time as an employee) on a (NOT employee) website or even private (NOT employee) email sent to email accounts of BPL / government officials (given the public's ability to also send such email) have any less protection under the First Amendment than the areas of the Port Authority that the public has access to (in which Wolin etc. was (unlawfully) given punitive treatment for distribution of literature critical of the Vietnam War)? In *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), the Second Circuit held of the applicability of the First Amendment with regard to the Port of New York Authority (Note: "cert. denied 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968)")

stating that "the Terminal is dedicated to the public use, to no less a degree than the streets of a company owned town, Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946)" and yet, in my situation, the Second Circuit affirmed the U.S. District Court not applying the First Amendment with regard to the Brooklyn Public Library - in contradiction to the U.S. Supreme Court decision of *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

D. Thus, the U.S. Supreme Court should please reverse the horrific 2nd Circuit affirmation and

(1) the wrong decision of late U.S. District Court Judge Townes (14-CV-7083 (EDNY)) that it is impossible to establish "subject matter jurisdiction over the NLRB General Counsel's decisions and" thus my "claims against NLRB must be dismissed" (and thus Judge Townes decided that my "claims against the remaining Defendants must also be dismissed").

(2) the horrific decision of the late U.S. District Court Judge Townes (14-CV-7083 (EDNY)) to not allow me (a pro se diagnosed with mental disabilities) even one opportunity to amend my complaint because "any amendment would be futile". This is not true because arguendo even if there would be lack of subject matter jurisdiction over the NLRB, I still could have amended the Complaint to seek redress for BPL's termination of my employment in violation of my rights under the First (and Fourteenth) amendment(s) of the U.S. Constitution (as well as supplementally under the NYS Constitution) in adherence to *Marsh*. Should one argue that I already had

filed the complaint (15-CV-3641 (EDNY)) against BPL seeking redress for violation of my rights under the First Amendment etc., please note that the BPL is arguing claim spitting against me and if the judiciary agrees with BPL then at least I should be granted the opportunity to amend. In addition, arguendo even if there would be lack of subject matter jurisdiction over the NLRB, I still could have amended the Complaint to seek redress for the Union's breach of the duty to provide fair representation (DFR); indeed, if I am not able to seek redress for breach of DFR via NLRB and NYSPERB, the only remaining option is apparently via the judiciary. To quote the U.S. Supreme Court "Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded." --- *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962) (https://casetext.com/case/foman-v-davis) (Citation from https://casetext.com/case/branum-v-clark)

(3) both horrific decisions of U.S. District Court Judge Kuntz to dismiss Case 15-CV-3176 (EDNY) taking the position that "the Complaint fails to state a claim upon which relief can be granted" and the order of U.S. District Court Judge Kuntz to dismiss Case 15-CV-3641 (EDNY) taking the position that "the Complaint fails to state a claim upon which relief can be granted". Although, Judge Kuntz's elucidates the concept of dismissal of a complaint under Rule 12(b)(6) I disagree with Judge Kuntz's unexplained application of Rule 12(b)(6) to my complaint:

(i) In terms of dismissal of charges by NLRB / NYSPERB for alleged lack of jurisdiction, I previously elucidated that judicial review should be granted here (in this exceptional situation).

(ii) In terms of the First Amendment etc., Judge Kuntz (and the 2nd Circuit) is obligated to continue to follow the U.S. Supreme Court in *Marsh* (like the 2nd Circuit did in *Wolin*).

(iii) Furthermore, Judge Kuntz did not allow me (a pro se diagnosed with mental disabilities) even one opportunity to amend my complaint in Case 15-CV-3176 (EDNY) and in Case 15-CV-3641 (EDNY); in addition, to what I previously elucidated (regarding amending to seek redress of violation of my rights under the First (and Fourteenth) Amendment of the U.S. Constitution (and its analogous NYS law) and for breach of DFR), I requested the opportunity to amend to receive redress for BPL's violation of my rights under the ADA (Americans with Disabilities Act) (Note: Although there is a subsequent case (17-CV-126 (EDNY)) (not part of this consolidated appeal) that was dismissed (by U.S. District Court Judge Kuntz) regarding the ADA (in terms of the wrongful termination of my employment), the amendment sought here deals with another violation of the ADA (i.e. the Library's demand that I be examined by one of their 'mental health professional[s]' to be reinstated (as ordered by an Arbitrator's award) despite my already providing the Library with medical documentation that I may return to work at full duty from my treating physicians including my psychiatrist (Note: Arguendo that there would be any legitimate need to determine my fitness for work such a determination must not be a requirement for reinstatement in a wrongful termination – rather it would be a requirement to go from being on medical leave to being on active full duty work. Obviously it seems totally unreasonable to refuse to accept the determination of my

treating physicians and simultaneously require that I select from one of the Library's three 'mental health professional[s]' – an unreasonable requirement that (to my knowledge) the Library only required of me)) and the amendment sought would be to amend a complaint that was originally filed within the time limit of the right to sue letter(s) (Note: The right to sue letter(s) regarding the unlawful mechanism of reinstatement were issued by the EEOC before the right to sue letter(s) regarding the unlawful termination.). To quote from Appendix O (i.e. Memo of Opposition (w/cross Motions) in 15-CV-3641)

> Arbitrator Howard C. Edelman, Esq. stated (in page 18 of his Opinion and Award) (Exhibit # 2) that "The Library did not have just cause to discharge Robert Pilchman on or about April 26, 2013" and that "Robert Pilchman shall be reinstated provided that a mental health professional, selected in accordance with the procedure set forth herein, certifies he is fit for duty"; even if arguendo Arbitrator Howard C. Edelman, Esq. allowed BPL or even required BPL to do what BPL has done, that would still NOT in any way detract from my ability to seek redress for the violation of my rights under the ADA – as evident from what I elucidated in (pages 12 - 46 and 69 – 78 of) a Post-Hearing Brief (dated December 9, 2015) (Exhibit # 3).

(Note: Exhibit # 3 of Appendix O is in Appendix N as Exhibit # 3; please see pages 12-46 and 69-78 of the Post-Hearing Brief (dated December 9, 2015) In a nutshell, I was not a party to the arbitration, the arbitration is limited to what was agreed upon to arbitrate, must be regarding the Collective Bargaining Agreement, the award may not violate or even adjudicate statutes (including the ADA), and it does limit my rights to seek redress under U.S. and New York law via the judiciary etc. – as for example the

U.S. Supreme Court elucidated in the three cases known as the Steelworkers trilogy.)

(Note: Regarding, 17-CV-126 (EDNY): After I started to litigate against NYSDHR in 15-CV-3176 (EDNY), the NYSDHR clearly seems to have retaliated against me by allowing BPL (a codefendant) to get with its termination of my employment in violation of my rights as a protected class – most blatantly disability- under the New York State Human Rights Law. I attempted to correct this situation by filing a petition for review in the NYS Supreme Court and a Complaint in the U.S. District Court (17-CV-126 (EDNY)). After the NYS Supreme Court transferred my case to the NYS Appellate Division and I waited to receive due process not realizing that I needed to provide the NYS Appellate Division with a certain number of copies of my petition; after failing to do this I eventually learned from BPL in submission to the U.S. District Court that that the NYS Appellate Division dismissed my case for failing to 'perfect' my appeal and then Judge Kuntz dismissed 17-CV-126 (EDNY) including under the ADA for what apparently is purportedly *res judicata* given the adjudication under the NYS Human Rights law. I did not appeal this decision of Judge Kuntz because I am pessimistic that the Second Circuit would provide any meaningful help and it would cost like $500 to file for appeal. In any event, the U.S. Supreme Court should allow me to amend to seek relief under the ADA for this particular claim because this is a claim that *res judicata* could not even possibly be applicable to because while the ADA offers protection against inappropriate medical inquiry, the NYS Human Rights law not only - does not offer any protection but does the opposite. To quote from the NYS Human Rights law (Appendix W) "The employee must cooperate in providing medical

or other information that is necessary to verify the existence of the disability or pregnancy-related condition, or that is necessary for consideration of the accommodation." Whereas (Sec. 12112 (d) "Medical examinations and inquiries" of) the ADA (Appendix V) provides me with robust protection "(1) In general. The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries. ..." and is against the horrific Brooklyn Public Library and Union mechanism of assessment for reinstatement 'awarded' by their arbitrator. So for the claim I want added in the amended Complaint(s) I request leave to submit, there is no deference to assume for the NYSDHR because the NYSDHR is limited to enforcing only the NYS Human Rights law – not any federal statutes (such as the ADA) and not any NY City laws – and the NYS Human Rights law does not offer the protections against medical inquiry offered by the ADA)

It goes without saying that I shouldn't be penalized for failing to follow any rule of Judge Kuntz because at the time of submission of my Memos of Opposition (and any Cross Motions) the cases (14-CV-7083 (EDNY), 15-CV-3176 (EDNY), and 15-CV-3641 (EDNY)) were still assigned to Judge Townes and it was only after Judge Townes passed away that the cases (14-CV-7083 (EDNY), 15-CV-3176 (EDNY) and 15-CV-3641 (EDNY)) were assigned to Judge Kuntz.)

(iv) Similarly, I made a cross motion but was not granted an opportunity to file any supplemental complaint to seek redress for violation of my rights under FOIA / FOIL (Note: There may have been an initial deficiency in terms of FOIA / FOIL for failure

to exhaust administrative remedies at the time of the initial complaint; however, when I requested an opportunity to file a supplemental complaint, my administrative remedies were exhausted.). I also never had discovery.

E. I addressed the Motions to Dismiss of the Defendants in my Memorandums of Opposition (and Cross Motions) (in the EDNY) (located in Appendix M, N, and O). For example, in Appendix N (i.e. pages 8-13 of my Memo of Opposition (and Cross Motions) in Case 15-CV-3176 (EDNY)) I address New York State's argument for dismissal because of sovereign immunity.

F. "We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)." --- (https://casetext.com/case/haines-v-kerner-8212-5025#p520 ; https://casetext.com/case/branum-v-clark#p705) (*Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972).)

CONCLUSION

The petition for a writ of certiorari should be granted.

Sincerely,

Robert Pilchman

Date: June 1, 2021