No. 21-1353

In The

Supreme Court of the United States

ISABELLA NARTEY,

Petitioner, PRO SE,

v.

FRANCISCAN ALLIANCE d/b/a FRANCISCAN HEALTH HOSPITAL OF OLYMPIA FIELDS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR REHEARING

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PARTIES TO THE PROCEEDING

The Petitioner is Isabella Nartey, a non-attorney who was Plaintiff-Appellant PRO SE below ("Nartey"). Nartey asserts claims on behalf of herself via her standing as a private individual with statutorily protected traits damaged by undisputed adverse acts of exclusion, delay, and substandard transfer accommodations alleged to violate Title VI of the Civil Rights Act of 1964 and The Emergency Treatment and Active Labor Act.

The Respondent is corporation Franciscan Alliance d/b/a Franciscan Health Hospital of Olympia Fields, who was Defendant-Appellee below ("Franciscan"). Franciscan receives Medicare funds; maintains at least one written transfer agreement with guaranteed beds; and gains additional federal dollars for stroke care based on Franciscan's licensing under 210 ILCS 50/3.117 as an acute stroke ready hospital in Cook County, Illinois.

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PREAMBLE

"In a free government the security for civil rights must be the same as that for religious rights." (James Madison, *Federalist No. 51*, 1788). Believing in that founding principle and in Rule 44.2 of the Supreme Court of the United States ("This Court"), non-attorney Petitioner Isabella Nartey ("Nartey") respectfully requests rehearing of the order filed May 31, 2022, denying certiorari to review the judgment of the Seventh Circuit Court of Appeals ("Seventh Circuit").

Unchecked, the Seventh Circuit sets dangerous precedent that "choice" overrides statutory duty and that case management supersedes procedural due process. Yet, This Court's latest decisions create "intervening circumstances of a substantial or controlling effect" to invoke Rule 44.2 for this discrimination case:

(1) *Hughes v. Northwestern Univ.*, 595 U.S. ___ (2022) (9-0, No.19-1401 U.S. Jan. 24, 2022).

(2) *Boechler v. Commissioner of Internal Rev.*, 596 U.S. ___ (2022) (9-0, No.20-1472 U.S. Apr. 21, 2022).

(2) *Kemp v. United States*, 596 U.S. ___ (2022) (8-1, No.21-5726 U.S. June 13, 2022).

Though their publication dates prevented inclusion in the original Petition, these three cases further justice now. *Hughes* controls plausibility determinations while *Kemp* and *Boechler* ensure due process when litigants seek discretionary relief.

Relevant Procedural History

The U.S. District Court of Northern Illinois ("District Court") maintained jurisdiction over Nartey's timely civil action *with jury demand* under 42-U.S.C.-§-2000d, 42-U.S.C.-§-1395dd, and 28-U.S.C.-§-1367. The District Court granted Franciscan's *first* motion to dismiss (App.p.16-25) and terminated the case to sanction Nartey over mistakes made while amending claims. (App.p.14-15). Nartey renewed her motion for leave to amend using Rules 60(b), 60(d), 15, and 52 within 28 days of judgment; yet the District Court ordered Nartey appeal for any relief. (App.p.12-[order]; App.p.37-42-[transcript]).

The Seventh Circuit affirmed. (App.1-11).

REASONS FOR REHEARING

This Petition maintains national importance though filed pro se: "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with-and in some cases even necessary to-the orderly enforcement of the statute." *Cannon v. University of Chicago*, 441 U.S. 677, 705-06, 99 S.Ct. 1946 (1979) (on civil rights litigation). In the interests of justice, Nartey submits substantial adjudicative facts, reviewable under FRCP 201(b)(c)(d), alongside the binding and intervening authorities which invoke Rule 44.2 for rehearing.

Title VI-covered hospitals have fiduciary duties:

- While "determining the type of disposition, services, financial aid, benefits, or facilities to be provided under any such program." 28-C.F.R.-§-42.104(b)(2).
- When identifying "individuals to whom, or the situations in which, such will be provided, . . . an opportunity to participate in any such program." (*Id.*)
- During interactions with "providers," "observers," "advisors," or "volunteers."[2]

Like in *Hughes*, the Seventh Circuit's analysis of Respondent's fiduciary duty and liability turned on choice. Citing no precedent, the Seventh Circuit relied on choice to dismiss liability despite medical statistics showing Franciscan's adverse acts mirrored race-based exclusion. (App.p.9). Race-based service creates legal injury regardless of similarities between offerings. (*Brown v. Board of Education*, 347 U.S. 483, 493-494 (1954)).

Considering *Brown*, disparate treatment claims require *Hughes*' context-specific inquiry. Statutory violations occur when covered entities rely in part on one's protected trait when committing an adverse act.

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[2] National Library of Medicine Letter and materials about hospital compliance with Title VI of the Civil Rights Act of 1964 Explanation of the HEW FORM NO. 441, Assurance of Compliance with the Department of Health, Education, and Welfare Regulation Under Title VI of the Civil Rights Act of 1964. March 4, 1966. https://www.nlm.nih.gov/exhibition/forallthepeople/img/2615.pdf.

and tangible way to the hospital's claims for reimbursement under Medicare and Medicaid."

Contrary to the Seventh Circuit's blind faith (App.p.9-10), the Eleventh Circuit recognizes "inconsistencies, incoherencies, or contradictions" reveal proffered reasons for adverse acts as "pretext." *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005). Similarly, the Third Circuit recognizes "proffered nondiscriminatory reasons" may be "a post hoc fabrication" or factors which "otherwise did not actually motivate" the prohibited act. *Fuentes v. Perskie*, 32 F.3d 759, 767 (3d Cir. 1994).

Given these splits, the Seventh Circuit sets dangerous precedent for federally-funded hospitals[3] to execute prohibited exclusion, delay, denial, and inequality with impunity. The medical community admits race influences individual care decisions.[4] For example,

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[3] The American Hospital Association reports "94% of hospitals have 50% of their inpatient days paid by Medicare and Medicaid." https://www.aha.org/fact-sheets/2022-05-25-fact-sheet-majority-hospital-payments-dependent-medicare-or-medicaid#:~:text=In%20fact%2C%2094%25%20of%20hospitals,Medicare%20and%20Medicaid%20inpatient%20days.

[4] American Heart Association News. Medical Xpress. "Legacy of discrimination reflected in health inequality." February 2020. https://medicalxpress.com/news/2020-02-legacy-discrimination-health-inequality.html.

of medical needs despite existing policies. Such racial disparity fuels:

- $102.4 – $165.7 Billion federal dollars wasted annually by "failure of care" delivery.[11]
- $75.7 – $101.2 Billion wasted annually by "Low-Value" or other non-standard care.[11]

Nartey shows authorized advocates[12] seeking care at federally-funded entities face the same intentional discrimination patients often endure alone. Given statutory protections, advocates need not wait for attorneys to find discrimination suits profitable.[13] 42-U.S.C.-§-1395dd(d)(2)(A); 42-U.S.C.-§-2000d; 28-C.F.R.-§-42.107(e). (*Alexander v. Sandoval*, 532 U.S. 275, 280-281 (2001)). Nor must advocates wait as patients[14] overcome challenges[15] in realizing claims.

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[11] William H. Shrank, MD, MSHS, et al., *Waste in the US Health Care System Estimated Costs and Potential for Savings JAMA.* 2019;322(15):1501-1509. doi:10.1001/jama.2019.13978.

[12] Institute for Healthcare Improvement. Role of the Patient Advocate. https://npsf.site-ym.com/page/patientadvocate.

[13] 96% of civil rights cases are prosecuted pro se according to: Federal Judicial Center Integrated Database. January 1, 2000-December 31, 2019 filing counts *Figure 6.* https://www.uscourts.gov/news/2021/02/11just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map.

[14] Sun M., et al., "Negative Patient Descriptors: Documenting Racial Bias in the Electronic Health Record. Health Affairs. 2020;41(2) Racism & Health. doi: 10.1377/hlthaff.2021.01423.

[15] Bell SK, et al., "Frequency and Types of Patient-Reported Errors in Electronic Health Record Ambulatory Care Notes." JAMA Netw Open. 2020;3(6): e205867. doi:10.1001/jamanetwork open.2020.5867.

II. Discretionary Relief Requires Due Process

This Court's inclusion of judicial mistakes in Rule 60(b)(1) invokes as substantial grounds to review the Seventh Circuit's Rule 60 judgment as reversable legal error. *Kemp v. United States* No.21-5726, 9 (U.S. June 13, 2022).

A. This Court requires reversal of blanket Rule 60 denials.

Federal rules authorize postjudgment relief "on motion and on just terms." FRCP 60(b)(1). Following *Kemp* and consistent with existing precedent not previously presented here, blanket denials of leave to amend sought in timely Rule 60 motions are clear legal errors requiring reversal:

> "the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

Forman v. Davis, 371 U.S. 178, 182 (1962).

Forman's requirement a "justifying reason" appear for Rule 60 denials does not allow reviewing courts to create reasons as the Seventh Circuit did here. (App.p.11). Decisions are arbitrary and capricious when the deciding body terminates "without providing any explanation" or without honoring its rules. (*Healthy Futures of Tex. v. Dep't of Health &*

1. Determine whether the deadline missed is nonjurisdictional. *Boechler*, No.20-1472, 8 (U.S. Apr. 21, 2022).

2. Conduct a context-specific inquiry to identify due diligence and other factors which merit deadline extension. *Boechler*, No.20-1472, 11 (U.S. Apr. 21, 2022).

Boechler applies here. First, filing deadlines in District Court orders are nonjurisdictional. Rules approved by this Court and Congress show judicial authority persists despite extensions:

A. Before Judgment

   (1) "with or without motion or notice" Rule 6(b).

   (2) on motion for "excusable neglect" Rule 6(b).

   (3) for "good cause" Rule 16(b)(4).

B. After Judgment

   (1) for "inadvertence, mistake, surprise, and excusable neglect" if done "within a year" of final judgment. Rule 60(b)(1), (c).

   (2) as justice requires under Rule 60(d).

Second, like in *Boechler*, the requested extension minimally affects "the uncertainty already present in the process." (*Boechler*, No.20-1472, 2 (U.S. Apr. 21, 2022)). Litigants moving under Rule 60(b) "need only

disputes and support her allegations, Nartey's proposed complaint includes exhibits of:

1. Disparate treatment via a white advocate's testimony of Franciscan's stroke stabilization efforts which differed drastically from Franciscan's response to Nartey's requests. (App.45-47).

2. Franciscan's protocols, as promoted on the hospital public website. (R#61-63).

Kemp controls because both the Seventh Circuit and the District Court committed legal error in omitting Petitioner's proposed complaint during Rule 60 review. (App.p.11-12). This Court upholds procedural due process recognizing "the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." *Krupski v. Costa Crociere S.P.A.*, 560 U.S. 538, 550 (2010).

Rule 60 relief is procedurally just when proposed complaints:

a. *Relate back* to the original complaint (*Id.*; FRCP 15(c), Pet.p.44);

b. *Extend litigation* time ("Equitable tolling is a traditional feature of American jurisprudence" *Boechler*, pg.8; *Rotkiske v. Klemm*, 140 S.Ct. 355, 365 (2019) applying the discovery rule when "the conduct giving rise to the claim is fraudulent or if fraud infects the manner in which the claim is presented." *Zipes v. Trans World*

CONCLUSION

For the intervening legal circumstances and substantial grounds not previously presented, this PETITION FOR REHEARING should be granted.

Respectfully submitted,

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