Supreme Court, U.S.
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No. 21-140

In The

SUPREME COURT OF THE UNITED STATES

ROSEMARY GARITY

Petitioner

v

APWU

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

The questions presented show conflict with Precedent of this Court and all Circuit Courts. The significant practical consequence is promotion of discrimination.

1. Is "But for" the standard for ADA discrimination claims as determined here?

2. Did the Ninth Circuit err, in contrast to all other Courts of Appeal and the Supreme Court, when affirming summary judgment despite disputed material facts and credibility issues being determined in favor of the moving party, APWU?

3. Did the Ninth Circuit err in determining union liability contrary to most Circuit Courts and the Supreme Court?

4. Did the Ninth Circuit err in pro se consideration as to issues raised, i.e. failing to act, technicalities and determination on the merits in conflict with other Circuits and the Supreme Court?

5. Did the Ninth Circuit err in refusing to follow doctrines on law of the case and issues not raised on appeal not available, removing the liability standard set forth in the case?

LIST OF ALL PARTIES TO THE PROCEEDING

APWU National

APWU State (Local successor)

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SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment.

LIST OF ALL PROCEEDINGS IN TRIAL AND APPELLATE COURTS

Garity v APWU US District Court of Nevada 2:11-cv-01109-APG-CWH

A. Order denying dismissal and setting law of the case. (ECF 76) 06/18/2012 at Appendix D

B. Dismissal (ECF 126) 01/14/2013

C. Grant of Summary judgment (ECF 209 03/14/2018, ECF 210 03/15/2018) at Appendix B

Garity v APWU Ninth Circuit Court of Appeals

A. Garity v APWU Ninth Circuit Court of Appeals 13-15195 828 F. 3d 848 Remand 07/05/2016

B. *GARITY v. APWU NATIONAL LABOR ORGANIZATION*, No. 18-15633 (9th Cir. Dec. 24, 2020). Unpublished

1. Order affirming 12/24/2020 at Appendix A

2. Deny rehearing 02/24/2021 at Appendix C

BASIS OF JURISDICTION

This Court has jurisdiction by the timely filing of this Writ within the prescribed 150 days (Supreme Court Order) from the order denying rehearing.

Date of Judgment: December 24, 2020.

Order denying Rehearing: February 24, 2021.

The statutory provision that confers U.S. Supreme Court Jurisdiction is 28 U.S.C. § 1254(1)

Basis for jurisdiction in Federal District Court is pursuant to ADA of 1973 as amended (P.L. 110-325). The basis for Federal Jurisdiction in the Ninth Circuit was as of right from the dismissal from the District Court as 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Amendment VII to the United States Constitution: Right to jury trial

American with Disabilities Act, as amended P.L. 110-325

ADA Technical Assistance manual **Actions which Constitute Discrimination**

2. Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects employment opportunities for the applicant or employee because of his or her disability.

House Report on the ADA Amendments Act of 2008, H.R. Rep. 110-730(I) "Discrimination on the Basis of Disability" (2008). Congressional notes on ADA

Fed. R. Civ. P. 8(b)(5) When a defendant is responding to an allegation in a complaint, response must fall within one of three categories: admit, deny, or say that the defendant "lacks knowledge or information sufficient to form a belief about the truth of an allegation")

CONCISE STATEMENT OF THE CASE WITH MATERIAL FACTS

APWU refused to file any grievance related to the found disability discrimination by USPS relating to denial of work, severely cut hours and multiple unfounded suspensions and National refused to process those grievances already sent to

National. National was notified of the discrimination by NLRB-January onward, Union discrimination charges-February to May, EEOC-March-May and over 60 notifications by petitioner and others. The local President then wrote a statement, in her official position, supporting petitioner's found wrongful termination and National was notified of the action. National Business Agent Scoggins sided with management in denying Weingarten rights to petitioner. APWU was ordered forward in this suit on discrimination and retaliation. This included both National and Local. Local was later erroneously dismissed and Garity appealed to the Ninth Circuit. A pro bono attorney was appointed and did not include the local dismissal in the replacement appeal. APWU National did not cross appeal the Court Order setting out National liability standard and in fact argued the Local case on appeal. The case was remanded. Subsequently National was granted summary judgment while material facts were disputed and credibility issues abounded. National APWU took over Petitioner's grievances particularly those on discrimination and retaliation and did not process them. National regularly advised the local on Petitioner's grievances and was even involved in determining a 6 day work week while she had a 5 day work restriction. National was notified of the discrimination and was, according to the APWU Constitution, to hear the discrimination charges but never did. National was notified in detail of the discrimination of the Local and National Agents on July 6, 2011 by this lawsuit. No action was taken to address the discrimination and local union officials then signed a letter calling petitioner mentally unstable, accusing of inclination to murder and requesting her removal.

Petitioner was constructively discharged due to the detrimental effect on her heart condition, cancer, anxiety and depression. Union liability was determined contrary to Circuit Courts and the Supreme Court. Law of the case, retaliation and application of pro se and the merits were ignored. The District and Ninth Circuit Courts misstated relevant facts that would alone alter the decision, including that National Business Agents are not National when the record evidence proves they are and the issue was not even raised. Decision is against this Court and all Appellate Court Law on summary judgment and liability, contrary to the factual evidence, and involved technicalities used against a pro se preventing a decision on the merits by a jury of Petitioner's peers.

REASONS FOR GRANTING PETITION/CONTENTIONS IN SUPPORT

The determination is contrary to the facts, evidence, law, other Circuit Court and Supreme Court decisions and the Petition is the only avenue to justice.

Question 1: "But for" is not determined as ADA standard. The arguments in the cases below show that motivating factor should be the standard.

> ADA was amended by Congress in 2008 with the specific purpose of broadening the scope...after the Supreme Court had interpreted it narrowly. ADA Amendments Act of 2008, Pub.L. No. 110- 325, § 2(a), 122 Stat. 3553. This amendment changed the causation language for ADA discrimination from "because of" to "on the basis of." id. at § 5(a), therefore, making the ADA discrimination claim less similar to a Title VII retaliation...in the House Report on the ADA Amendments Act of 2008, a section is dedicated to explaining the new "on the basis of" language. H.R. Rep. 110-730(I) "Discrimination on the Basis of Disability" (2008). This section describes Congress's purpose for the changed language, particularly noting that "indirect evidence" and "mixed motive" cases should be permitted under the ADA discrimination causes of action. *Id.* The House Report also notes that Section 102 of the ADA is meant to "mirror the structure of nondiscrimination protection in Title VII of the Civil Rights Act." *Id.*

> Examining the statutory text and legislative history, as the Supreme Court did in Nassar, the ADA discrimination provision is substantially more similar to Title VII's status-based discrimination provision than to Title VII's retaliation provision. *Siring v. STATE BD. OF HIGHER EDUC. EX REL EOU*, 977 F. Supp. 2d 1058 (D. Or. 2013).
>
> It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning. *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) ("`[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'" (quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122, 12 L.Ed. 1009 (1849))) See also *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343, 174,175 L. Ed. 2d 119 (2009); Federal Express Corp. v. Holowecki, 552 U.S. 389, 393 (2008).

Gross instructs statutory interpretation is an individualized inquiry. ADA incorporates the powers, remedies, and procedures of Title VII, see 42 U.S.C. § 12117(a), and thus the motivating factor language which the ADEA does not. Disability is a status based claim like race and gender as discussed in *Univ. of Tex. Southwestern Med. v. Nassar*, 133 S. Ct. 2517, 570 U.S. 338, 186 L. Ed. 2d 503 (2013). ADA plaintiffs are entitled to relief from status based discrimination on a showing of motivating factor causation based on all the above.

To state a prima facie case of retaliation under the ADA and section 504, an individual must show that (1) she engaged in a protected activity, (2) she suffered an adverse action, and (3) there was a causal link between the two. *T.B. v. San Diego Unified Sch. Dist., 806 F.3d 451, 472 (9th Cir. 2015)* The evidence clearly showed the protected activity of union discrimination charges, EEOC discrimination charges, NLRB discrimination charges and a detailed outline of discrimination on July 6, 2011.

The adverse actions of refusing to hear the union charges, refusing to process grievances after taking them over, National supporting management on lack of investigation regarding Weingarten rights resulting in petitioners firing and failing to act to remedy were all evidenced in direct temporal proximity to the protected activity. (Suspending or limiting access to an internal grievance procedure also constitutes an "adverse action.") EEOC DIRECTIVES TRANSMITTAL Number 915.003 Date 5/20/98)

The union working, in unison with management, to fire petitioner and stalling and refusing to process her grievances are adverse actions likely to deter. The decision stated petitioner did not state the actions would deter others from filing when it was stated and shown in the Petition for Rehearing.

The Circuit Courts are misapplying *Nassar* as the Congressional intent is clearly stated in the Congressional notes.

The facts and evidence nonetheless did show the "but for" standard.

Question 2: Summary judgment was contrary to all case law. The disputed material fact of APWU National involvement in the local based on handling Garity's discrimination grievances, derogatory disability emails and massive written notification of the discrimination was not left for trial. The record and evidence verify the National involvement and knowledge of the discrimination and in detail on July 6, 2011 with the filing of this lawsuit. No action was taken to stop the discrimination. Credibility determination of the National Business Agents and local union officers was determined against Garity while the evidence and depositions

verify they were not credible. Restatement 2d of Agency declares that "[w]hether or not [an inference of ratification] is to be drawn is a question for the jury. Further, APWU classifies the disabled as "limited" and "rehab" contrary to law and part of this case. Ruling required direct evidence of discrimination while law is contrary. A plaintiff may prove a defendant's motive thru circumstantial evidence alone. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004); Metoyer v. Chassman, 504 F.3d 919, 931 (9th Cir. 2007); *Reynaga v. Roseburg Forest Products*, 847 F.3d 678 (9th Cir. 2017). *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. at 256; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). Rather Garity showed the inference based on the totality of the evidence. *Schiano v. Quality Payroll Sys., Inc.*, 445F.3d 597, 603 (2d Cir. 2006) ("an extra measure of caution is merited" when considering a motion for summary judgment "because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions.") The regarded as claim was not addressed despite the National email that Garity was severely disabled and National stating could not return to work. (See *Eshleman v. PATRICK INDUSTRIES, INC.*, 961 F.3d 242 (3d Cir. 2020). The totality of the evidence was not viewed in the light most favorable to Garity. The National Business Agents were stated as not National while the record evidence shows they are National. Representation was misstated as evidence proved petitioner was without representation by APWU for several months. Multiple law review journals, 2:11-cv-01109 ECF 197-75, verify that summary judgment is prohibiting meritorious cases to the benefit of those committing the actions. This affects all

discrimination claims and encourages discrimination without accountability. This is contrary to congressional intent and allows circuit courts to issue decisions contrary to law regularly without any oversight or remedy for discrimination. This Summary Judgment ruling is contrary to the following: *Hunt v. Cromartie*, 526 U.S. 541, 549 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999) (genuine issue of material fact); *Tolan v. Cotton*, 134 S. Ct. 1861, 572 U.S. 650, 188 L. Ed. 2d 895 (2014) (Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"); *Reeves v. Sanderson Plumbing Products, Inc.* 530 US 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (FRCP Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."); Burlington N. & Santa Fe Ry. Co., 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce

aggrieved employees quietly to accept substandard conditions"); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1427 (D.C. Cir. 1988) (A meticulous review of the District Court's conclusions uncovered a number of clearly erroneous factual findings and several errors of law); *Ahmed v. Johnson*, 752 F.3d 490 (1st Cir. 2014) (To determine whether a trial-worthy issue exists, we look to all of the record materials on file, including the pleadings, depositions, and affidavits. Fed.R.Civ.P. 56(c)(1)(A)... We may neither evaluate the credibility of witnesses nor weigh the evidence); *Tiffany and Company v. Costco Wholesale Corp.*, 971 F.3d 74 (2d Cir. 2020) (We review the district court's rulings on summary judgment *de novo,* resolving all ambiguities and drawing all permissible inferences in favor of the nonmoving party); *Student Doe 1 v. Lower Merion School District*, No. 10-3824 (3d Cir. Dec. 14, 2011) and *Doe ex rel. Doe v. Lower Merion School Dist.*, 665 F.3d 524 (3d Cir. 2011) (Intentional discrimination can be shown when: (1) a law or policy explicitly classifies citizens on the basis of race (as APWU National does in classifying disabled as "limited" and "rehab"); *Butt v. United Brotherhood of Carpenters & Joiners of America*, No. 12-1331 (3d Cir. Jan. 31, 2013) (the record must be viewed in the light most favorable to the non-moving party... Remand is also appropriate to address the issue of...retaliation... This standard—pertaining to direct employers—failed to account for actions that a labor organization could take —to dissuade employees from complaining or assisting in complaints about discrimination); *WIRTES v. City of Newport News*, No. 19-1780 (4th Cir. Apr. 30, 2021) (court should grant summary judgment only if, taking the facts in the best

light for the nonmoving party, no material facts are disputed and the moving party is entitled to judgment as a matter of law); *Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017) (In reviewing a motion for summary judgment, factual inferences are viewed in the light most favorable to the nonmoving party); *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368 (6th Cir. 2017) (At the summary judgment stage, the court determines whether there are genuine disputes of material fact that should go to a jury; it does not find facts... There is a genuine dispute of material fact if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party); *Rowlands v. UNITED PARCEL SERVICE-FT. WAYNE,* 901 F.3d 792 (7th Cir. 2018) ("a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts" on summary judgment, and must "avoid[] the temptation to decide which party's version of the facts is more likely true."); *Randolph v. Ind Reg'l Council of Carpenters,* 453 F.3d 413 (7th Cir. 2006) (Plaintiff's statements must be believed at summary judgment ...Oral testimony if admissible will normally suffice to establish a genuine issue of material fact,); *Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793 (8th Cir. 2014) (All of these facts, construed in Tramp's favor, "assume greater probative value on a motion for summary judgment); *NUNIES v. HIE HOLDINGS, INC.*, 904 F.3d 837 (9th Cir. 2018) (we conclude that Nunies established a genuine issue of material fact as to whether HIE regarded him as having a disability); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir.2004) ("In evaluating motions for summary judgment in the context of employment discrimination, we have emphasized the

importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses."); *Leone v. Owsley*, 810 F.3d 1149 (10th Cir. 2015) ("Summary judgment in favor of the party with the burden of persuasion ... is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact."); *Smothers v. Solvay Chemicals, Inc.*, 740 F.3d 530 (10th Cir. 2014) ("[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe."... When evaluating an employer's motives or reasons, "motivation is itself a factual question."); Elizabeth Thornburg, (Un)Conscious Judging, 76 Wash. & Lee L. Rev. 1567(2019), https://scholarly commons.law.wlu.edu/wlulr/vol76/iss4/6 (Fact inferences made by the trial judge are the lynchpin of civil litigation. If inferences were a matter of universally held logical deductions, this would not be troubling. Inferences, however, are deeply contestable conclusions that vary from judge to judge. Non-conscious psychological phenomena can lead to flawed reasoning, implicit bias, and culturally influenced perceptions. Inferences differ significantly, and they matter. Given the homogeneous makeup of the judiciary, this is a significant concern);

> *This is because labor organizations stand as a firewall, as protection for its members, in the face of employer discrimination. Labor organizations therefore occupy a critical battle-line position in fighting discrimination and harassment*....tacitly encourage...This serves as a foundation for a finding of vicarious liability on the part of the International Union. See Berger, 843 F.2d at 1427; Abreen, 709 F.2d at 757. Consequently, there is a genuine dispute over material facts regarding this issue that will have to be resolved by the jury. *Rainey v. Town of Warren*, 80 F. Supp. 2d 5 (D.R.I. 2000).

All the above case law is inapposite to the determination here.

The "but for" standard is met as complete inaction when notified of discrimination but for the protected activity, a reasonable jury can determine that some action to end the discrimination would have occurred. Although "but for" does not require retaliation to be the only reason for the actions/inaction it would standing alone have created the actions/inactions as outlined. *This is a jury determination and clearly a material fact in dispute.* But for the protected activity the APWU, Scoggins and Poulos would not have supported Garity's suspension and removal. (Both derogatively related Garity's EEO activity 2:11-cv-01109 ECF 197 EX 54 p. 63, 103) But for the EEO activity APWU would not have fought to keep Garity's arbitration loss. The determination of APWU liability, ratification and retaliation were disputed material facts that were determined by the Judges. Credibility was determined contrary to the record evidence. The declaration of Petitioner was completely ignored. False facts were cited that were not put forth by the moving party regarding the National Business Agents not being National and then this false fact was used to affirm summary judgment. This elimination of pro se discrimination plaintiffs at Summary judgment affects each discrimination claim and the ability to acquire representation. This determination is "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

Question 3: The liability standard of Unions is in disarray among the various

Circuits, as outlined below, and this determination is contrary to ADA and liability standards. The ADA does not set different rules for discriminatory union actions.

> Consequently,...need only establish that ...engaged in a single act of discrimination to hold the Union liable...*King v. Laborers Int'l Union of N. Am.*, 443 F.2d 273, 277-78 (6th Cir.1971)...claims...based upon the actions or inactions of the Union itself,...not...underlying discriminatory acts...by World Kitchen. Compl. ¶ 12(g). ...claim may be raised when there is a single act of discrimination, a deliberate choice...not to process *a grievance* may give rise to a claim against it...where...employee affirmatively requests union intervention to remedy an act of discrimination committed by his or her employer, a deliberate refusal or failure to act on that request may subject the union to liability under Title VII. *Slater v. Susquehanna County,* 613 F.Supp.2d 653, 664 (M.D.Pa.2009) See also 14 Penn Plaza LLC v. Pyett, U.S., 129 S.Ct. 1456, 1473, 173 L.Ed.2d 398 (2009).
>
> In *Rainey,*...union's awareness of actual discrimination...inference that a decision declining to grieve...was itself attributable to a discriminatory motive. *Rainey,* 80 F.Supp.2d at 18 *Hubbell v. World Kitchen, LLC,* 688 F. Supp. 2d 401 (W.D. Pa. 2010),

Goodman v. Lukens Steel Co., 482 U.S. 56, 107 S.Ct. 2617, 2625, 96 L.Ed.2d 572 (1987) (refusing to file and process grievances and liability); *Woods v. Graphic Commc'ns,* 925 F.2d 1195, 1199 (9th Cir. 1991) (A plaintiff alleging employment discrimination "need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because the ultimate question is one that can only be resolved through a searching inquiry — one that is most appropriately conducted by a factfinder, upon a full record.") See also *Davis v. Team Elec. Co.*, 520 F.3d 1080 (9th Cir. 2008) (Same standard as USPS).

2:11-cv-01109 ECF 176 TR 163:17-20 Scoggins could have involvement in local bids. 169:8-9 A. Scoggins was involved in almost all your Step 3s. 175:1-6 don't believe all NLRB charges were handled locally. 179:2-17 NLRB charges against APWU and

threats of suing which the retired national business agent who is a member of the local is handling with the support of national APWU...211:22-25 document does show that she's (Poulos) in communication with the national attorney, Mr. Anton Hajjar; (Scoggins is National Business Agent) *Id.*ECF 182 ex l TR 251:9-252:17 "So she was in constant contact with the business agents on all the issues, so that they were just completely and totally involved in the local. National even admits an investigation should have been done by ordering one that never occurred. (ECF 197 EX 88) (*Laughon* is relevant in that Awareness of the actions is supportive of liability) NBA's are National Officers (2:11-cv-01109 ECF 197 (EX 62 p.18).

The instant case involves a National Union that negotiates the collective bargaining agreement determining the hours, wages, conditions of employment, without local input, handles the local's grievances, determines membership of the local and hears discrimination charges against the local. This is different than an International Union that has no such involvement.

This result leaves the disabled without a way to quickly report and remedy discrimination, particularly here, where National accepted responsibility for hearing union discrimination in their constitution. This is in conflict with "prompt investigation of the alleged misconduct as a hallmark of reasonable corrective action". In McGinest, for example, the Ninth Circuit found a disputed issue of material fact about the adequacy of GTE's remedial measures...no actions taken...to ensure that this recurrent problem would cease, and in fact it did not cease."...This objection to the employer's failure to engage in effective remedial efforts is consistent with the Supreme Court's insistence in Faragher that we

"recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty." *Faragher v. Boca Raton*, 524 U.S. 775, 806 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944 (7th Cir. 2005) (vicarious liability and prompt remedial action); *Folkerson v. Circus Circus Enters., Inc.*,107 F.3d 754, 756 (9th Cir. 1997) (Moreover, an employer may be liable for the retaliatory conduct of another entity "where the employer either ratifies or acquiesces" in the retaliation "by not taking immediate and/or corrective actions when it knew or should have known of the conduct."); *Tamosaitis V. Urs Inc.*, 781 F.3d 468 (9th Cir. 2014) (Same), *Dawson v. Entek Intern.*, 630 F.3d 928 (9th Cir. 2011) (Same); *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005) (Same).

> LIUNA breached its affirmative duty to oppose Local 496's discriminatory practices by neglecting to remedy the alleged discrimination when it learned of the plaintiffs' claims.... In this case, the district court correctly found that LIUNA is liable both vicariously and directly. *Alexander v. LOCAL 496, LABORERS'INTERN. UNION*, 177 F.3d 394 (6th Cir. 1999).

Claims here were reported multiple times starting in December 2010 and filed in Court July 6, 2011 and amended without any attempt to investigate and remedy. USPS was found to have discriminated on the basis of disability verifying the discrimination was occurring.

> We find the *Lewis* court's reasoning persuasive. The commentary to section 94 of the Restatement 2nd of Agency states that "silence under such circumstances that...*one would naturally be expected to speak if he did not consent,* is evidence from which assent can be inferred." "In the agency field," the commentary explains, "failure to object to the doing of an act has frequently been held to create authority to do future acts." Appendix, Restatement 2d, Agency § 94A jury could reasonably find that the failure to object to these repeated abuses or to intervene to stop threatened reprisals of

> which the International was aware in effect constituted support or authorization...to continue his discriminatory misconduct. Thus, the Restatement 2d of Agency declares that "[w]hether or not [an inference of ratification] is to be drawn is a question for the jury, unless the case is so clear that reasonable men could come to but one conclusion." Restatement 2d of Agency, § 94. Ultimately, the question of ...reasonableness in failing to intervene...should be considered by a jury. *Lewis v. Local Union No. 100*, 750 F.2d 1368, 1378 (7th Cir.1984); *Fuller v. City of Oakland,* 47 F.3d 1522, 1529 (9th Cir.1995)

Inaction regarding the at least 60 notifications to APWU was in direct relation to the *protected activity.* Inaction constitutes ratification. Ratification establishes vicarious liability. The above cases show the conflict in the Circuits on liability. The APWU was also aware, on their website, of the pattern and practice of disability discrimination/abusive treatment of USPS evidenced by the ongoing findings of USPS discrimination liability against the disabled. The APWU did not file one grievance related to the ongoing discrimination. (2:11-cv-01109 ECF 197 EX 50; EX 51, EX 3 #62; *Id.* ECF 176 TR 215:24 to 216:12, 220:24 to 221:7)

2:11-cv-01109 ECF 197 p. 25-30 outlined all the notification to National of the discrimination and retaliation.

Further the National APWU fought to uphold Garity's loss at arbitration, while her sole representative, because of protected activity. (2:11-cv-01109 EX 58)

The below cases are contrary to this determination:

Dixon v. International Broth. of Police Officers, 504 F.3d 73(1st Cir. 2007) (Forbids any labor organization to discriminate against any member thereof... discrimination within the union, by union members (concluding "effectively ratified the harassment" when it knew of the discrimination but took no action against the

offending...representatives); *Alexander v. Local 496, Laborers'intern. Union*, 177 F.3d 394 (6th Cir. 1999) (affirmative duty to oppose local discrimination and remedy when learned of the claims. Found vicariously and directly liable); *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944 (7th Cir. 2005) (Prompt investigation is hallmark of reasonable corrective action); *Lewis v. Local Union* No. 100, 750 F.2d 1368, 1378 (7th Cir.1984) (Citing section 94 of the Restatement 2d of Agency inference of ratification on lack of intervention is a jury question); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395 (D.C. Cir. 1988) (To the extent...constitution deal specifically with discriminatory practice...may be sufficient in themselves to raise an inference that the local is its agent).

This constitutes a division between the Ninth Circuit and the above Circuits and Supreme Court. This determination on liability allows National Unions involved in local grievances and the contract to avoid any liability for their actions affecting all union members throughout the country.

Question4: Pro se consideration (*Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004) and determination on the merits was not applied. "[W]e have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en banc).Garity raised that APWU failed to act when notified discrimination was occurring but this was not even considered under liability which would clearly, based on the facts, incur liability. This is in conflict with the following Circuit Court and Supreme Court Decisions: Pro se litigants are

afforded protection from procedural or technical injustice. See *Rand v. Rowland*, 154 F.3d 952, 957-58 (9th Cir. 1998); *Sause v. Bauer*, 138 S. Ct. 2561, 585 U.S., 201 L. Ed. 2d 982 (2018); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) ("It is well established that the submissions of a pro se litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest." (The Opening and Reply briefs are pro se and are simply supplemented); *IN RE Eric Watkins Litigation*, No. 20-10408, Non-Argument Calendar (11th Cir. Oct. 1, 2020) (liberally construe *pro se* filings to correspond between substance of claim...underlying legal basis) This treatment of pro se discrimination plaintiffs prevents Congressional intent of exposing and remedying discrimination. This case was determined on technicalities and contrary to law against a pro se.

Question 5: The law of the case was not followed as the standard of APWU National liability was set forth in 211-cv-01109 ECF 76. The outlined standard was met but was changed by the decision. *Id. 2:11-cv-01109* ECF 197 42:18 to 47:19. The liability of National was for a jury of peers to determine not Judges. *S. Atl. Ltd. P'ship of Tenn, LP v. Riese*, 356 F.3d 576, 584 (4th Cir. 2004) ("the mandate rule forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived") APWU did not appeal the Order ECF 76 on liability standard and did not raise that it was not liable. APWU was not held to the standard of the Answer must admit, deny or state cannot determine and if not the allegations are admitted. Garity was held to issues not raised in first appeal. Although Garity's Ninth Circuit informal brief cited APWU local should not have been dismissed, the Court appointed attorney did not include in the replacement brief. APWU did not argue on

first appeal that they were not liable for the actions taken and even supported the Local's actions on appeal. They then raised the issue on the second appeal. This is in conflict with the following decisions: *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993) ("The black letter rule...legal decision made at one stage of ...case, unchallenged in a subsequent appeal...becomes the law of the case for future stages of the same litigation...deemed to have forfeited any right to challenge...); Generally, an appellee waives any argument it fails to raise in its answering brief. See Clem v. Lomeli, 566 F.3d 1177, 1182 (9th Cir.2009).... See United States v. Gamboa-Cardenas, 508 F.3d 491, 502 (9th Cir.2007) (where appellees fail to raise an argument in their answering brief, "they have waived it") (citing United States v. Nunez, 223 F.3d 956, 958-59 (9th Cir.2000)).

Contrary case law on "law of the case" includes:

> Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523, 1529 (2013); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999); *Gonzalez v Arizona,* 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc); *Gallagher v. San Diego Unified Port District*, No. 14-56517 (9th Cir. Sept. 7, 2016); Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012); Stacy v. Colvin, 825 F.3d 563 (9th Cir. 2016); Pepper v. United States, 562 U.S. 476, 506, 131 S.Ct.1229, 179 L.Ed.2d 196 (2011); Musacchio v. US, 136 S. Ct. 709, 577 U.S., 193 L. Ed. 2d 639(2016)

What is missing here is that the necessary proof for vicariously liability was already determined by Court Order in this case and APWU did not appeal. Each of the questions is clearly outlined in Case: 18-15633 DktEntry: 68. This verifies the rulings are contrary to established law and justice not only for Petitioner but for all discrimination and pro se plaintiffs.

CONCLUSION

Based on the rulings contrary to law on summary judgment, law of the case, issues not raised on first appeal, incorrect facts, liability standards, "but for" and pro se treatment to allow determination on the merits, the Petition for Writ of Certiorari should be granted. This case is the perfect example of the treatment of pro se civil rights plaintiffs trying to stand against discrimination. Petitioner asks that the case be remanded for a full fair trial on the merits by a jury of her peers.

Respectfully submitted this 14th day of July, 2021,

s/Rosemary Garity
Rosemary Garity