No. 21-1560

In The

Supreme Court of the United States

BERNICE CURRY-MALCOLM,

Petitioner,

v.

ROCHESTER CITY SCHOOL DISTRICT AND ROCHESTER CITY SCHOOL DISTRICT BOARD OF EDUCATION,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

BERNICE CURRY-MALCOLM, *pro se*
6 Gingerwood Way
West Henrietta, NY 14586

Pro se Petitioner

Originally filed: May 3, 2022
Refiled: June 10, 2022

QUESTIONS PRESENTED

The Questions Presented are:

1. Rule 2.11 of the Code of Conduct and as pursuant to 28 U.S.C. § 455 and Cannon 3C(1) of the Code of United States Judges applies that a judge shall disqualify or recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, This Court ruled that "Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," should this Court overrule its standing in *Rippo v. Baker*?

2. A federal judge should recuse himself if "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." 28 U.S.C. § 144; 28 U.S.C. § 455; *Yagman v. Republic Insurance*, 987?

3. The district court prefiling sanction against *pro se* Curry-Malcolm was improperly imposed and conflicts with other circuits, including the Ninth Circuit, See *Ringgold-Lockhart v. Cnty. of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (quoting *De Long v. Hennessey*, 912 F.2d 1144, 1147–48 (9th Cir. 1990)). Whether prefiling sanctions ordered and entered without notice and opportunity to be heard are unconstitutional and should they be used as a mechanism to deprive *pro se* litigants of their rights to due process? See *Moates v. Barkley*, 147 F.3d 207, 208 (2d Cir. 1998); *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 388 F. Supp. 3d 242 (W.D.N.Y. 2019), *aff'd in part,*

QUESTIONS PRESENTED – Continued

vacated in part, remanded, 831 F. App'x 1 (2d Cir. 2020) ("*Malcolm I*"); *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992).

4. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., New York State Human Rights Law, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Age Discrimination in Employment Act of 1967 prohibits discrimination, whether an employer's continuing wrongful conduct and actions in an employment discrimination case precludes the plaintiff from bringing subsequent actions against the employer? The Court of Appeals stance on appellant's claims of continuing wrong and continuing violation of unlawful discrimination and retaliation against her by her employer, including post-employment discrimination and retaliation, contradicts this Court ruling in *Lucky Brand Dungarees, Inc. v. Marcel Fashions* (2020).

5. Whether *pro se* litigant established a contractual employer-employee relationship when the plaintiff-appellant factually stated that she was employed with the Rochester City School District and there was a binding employment contract?

6. Whether it was congressional intent to allow employers to skirt the constitution and human rights laws where the employer defends, condones, participates in and chooses the same "similar conduct" method of unlawful discriminatory and retaliatory and/or performed by the employer, its

QUESTIONS PRESENTED – Continued

employees, officers and/or agents on different days and occurring at different times, by the same and/or different actors, and subsequent to the first, second, third . . . , and so on in violation of Title VII, ADEA, New York State Human Rights Law, 42 U.S.C. § 1981, 42 U.S.C. § 1983, the Age Discrimination Act of 1967?

7. The Second Circuit overreached in its affirmation when it exceeded in its jurisdiction by per se ruling on a remand by another panel within the Court. See *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 388 F. Supp. 3d 242 (W.D.N.Y. 2019), *aff'd in part, vacated in part, remanded*, 831 F. App'x 1 (2d Cir. 2020) (*Malcolm I*). The panel's ruling in this instant appeal is in direct contradiction to the remand and sets up confusion on a combined case that is now pending in its jurisdiction that has not been briefed. Whether by doing so the panel improperly overreached in its power to determine an appeal not before the panel, and whether the panel actions violate the *pro se* litigant's rights to due process?

8. The Supreme Court in Twombly reaffirmed its statement from *Swierkiewicz* that an employment discrimination plaintiff need not establish a prima facie case at the pleading stage. *Trachtenberg v. The Dept. of Education of the City of New York*, 937 F. Supp. 2d at 465; citing *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. See also *Ndremizara v. Swiss Re America Holding Corp.*, 2014 WL 941951, *8 (S.D.N.Y. March 11, 2014). Whether in the *pro se* litigant case, there was an unduly high pleading

QUESTIONS PRESENTED – Continued

standard applied when held that the proposed complaint failed to state a cause of action against the defendants, and where the Appeals court ruling was in direct conflict with a prior panel ruling of the Court? Does the complaint satisfy the pleading requirement under Rule 8(a)(2), when it contains sufficient factual matters, accepted as true, to state a claim of relief that is plausible on its face in an employment discrimination case (*Ashcroft v. Iqbal, Swierkiewicz v. Sorema, McDonnell Douglas v. Green*)? Whether an Appellant claims, are barred by issue preclusion? Should this Court overrule *Degan v. United States*, 517 U.S. 820 (1996); *Tagath*, 710 F.2d at 95, and rule that fundamental to one's ability to litigate is "not" the ability to obtain discovery of the opposing party's evidence, thereby removing a necessary tool to effective litigant as afforded to those represented by counsel?

9. The Age Discrimination in Employment Act ("ADEA") was enacted in 1967 to protect persons age 40 and older from age discrimination in the private workplace. Whether *pro se* litigant established a *prima facie* case of age-based discrimination and retaliation based on her age? Does the *pro se* appellant establish a *prima facie* case of discrimination and retaliation under Title VII, the ADEA, and New York Human Rights Law where she meets all the prongs and where an employer offered reasons for taking the discriminatory and retaliatory actions are false and pretextual to discrimination?

QUESTIONS PRESENTED – Continued

10. Whether parties represented by counsel are 100% entitled to dismissal even where they are not entitled just because the other party was a layperson *pro se* litigant, and was it congressional intent for the layperson pro se litigants that are unrepresented to have less voice, individual rights, and access to the judicial system than those represented by counsel?

11. What is the level of responsibility and supervisory duties that an employer, including as here, the Rochester City School District and the Rochester City School District Board of Education must take to provide its employees, including petitioner, with a workplace environment that is free of unlawful harassment, discrimination and retaliation under these statutory provisions and laws to ensure a workplace environment free of the same?

12. Where a plaintiff files a lawsuit as a result of receiving a right to sue letter from the EEOC, should a district court impose a prefiling sanction against a pro se litigant for exercising his or her due process right, under the relevant portion of § 1601.28 then states, "(b) Issuance of notice of right to sue following Commission disposition of charge. . . . (3) Where the Commission has dismissed a charge pursuant to § 1601.18, it shall issue a notice of right to sue as described in § 1601.28(e) to: (I) The person claiming to be aggrieved. . . ." 29 C.F.R. § 1601.28(b)(3)? See 42 U.S.C. § 2000e-(a); *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015), 42 U.S.C. § 2000e-5(e)(1), (f)(1); *Peeples*, 891 F.3d at 633.

RULE 29.6 STATEMENT

Petitioner-Appellant Bernice Curry-Malcolm appears as a natural person and individual *pro se* unrepresented litigant and is not a corporation. Petitioner, Bernice Curry-Malcolm, in this Writ of Certiorari is an individual. Respondent Rochester City School District and Rochester City School District Board of Education is a corporation and public school district and subsidiary of the State of New York. Petitioner has no knowledge of the Respondent's parent companies, subsidiaries, partners, insurances, limited liability entity members and managers, trustees, affiliates, or similar entities.

PARTIES TO THE PROCEEDINGS

Petitioner

- Bernice Curry-Malcolm, Petitioner Pro se

Respondents

- Rochester City School District, a Public School District and Municipal Corporation
- Rochester City School District Board of Education, a Governing Board of Education of the Rochester City School District, a Public School District and Municipal Corporation

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit

No. 20-2808

Bernice Curry-Malcolm, *Plaintiff-Appellant* v. Rochester City School District and Rochester City School District Board of Education, a Public School District and Municipal Corporation, *Defendants-Appellees*

Date of Final Order: December 6, 2021

Date of Motion For Stay: March 11, 2022

United States District Court, Western District New York

No. 20-cv-6537, Honorable David G. Larimer, J.

Bernice Curry-Malcolm, *Plaintiff-Appellant* v. Rochester City School District, Rochester City School District Board of Education, a Public School District and Municipal Corporation, *Defendants-Appellees*

Date of Final Judgment: July 24, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bernice Curry-Malcolm ("Petitioner, Curry-Malcolm"), appears before the Court as an unrepresented *pro se* litigant, but not by choice, and respectfully makes request that this court grants her petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, in the action of *Bernice Curry-Malcolm v. Rochester City School District and Rochester City School District Board of Education*, U.S.C.A., Docket # 20-2808cv *(Honorable Michael H. Park, Honorable William J. Nardini, Honorable Steven J. Menashi, Circuit Judges).*

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bernice Curry-Malcolm ("Mrs. Curry-Malcolm" or "Petitioner, Curry-Malcolm") was the sole *pro se* plaintiff -appellant in the United States District Court, Western District of New York (W.D.N.Y., Docket No. 20-cv-6537, Honorable David G. Larimer, J.), and sole *pro se* petitioner-appellant in the United States Court of Appeals for the Second Circuit (U.S.C.A., Docket No. 20-2808cv).

Respondents Rochester City School District and Rochester City School District Board of Education were the defendants-respondents in the United States District Court, Western District of New York (W.D.N.Y., Docket No. 20-cv-6537, Honorable David G. Larimer, J.), but did not appear below but were the

defendants-appellees in the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit affirming the district court decision is available in the Petition at (Pet., App., *infra, 12a-20a*).

The decision and order of judgment of United States District Court, Western District of New York can be found at, *Curry-Malcolm v. Rochester City Sch. Dist. and Rochester City Sch. Dist. Board of Education*, ("*Malcolm IV*"), No. 20-cv-6537 (W.D.N.Y. 2020), at Dkt. #3, and is reported at *In re Curry-Malcolm* ("*Malcolm IV*"), 2020 U.S. Dist. LEXIS 131548 (W.D.N.Y. 2020) and is available in (Pet. at App., *infra, 31a-51a*).

JURISDICTION

The United States Court of Appeals Summary Order of judgment was entered on December 6, 2021 and received by petitioner by United States Postal mail. The Summary Order is available in the (Pet. at App., *infra, 12a-20a*). The Petitioner filed a timely motion for stay before the Second Circuit on December 20, 2021, pending the resolution of a petition for writ of certiorari in this case to the Supreme Court of the United States, which was denied by the Second Circuit

(*Michael H. Park, William J. Nardini, Steven J. Menashi, Circuit Judges*) on March 11, 2022, a mandate order was issued on the same day. The Second Circuit order denying Petitioner's motion for stay of the mandate is available in the (Pet. at App., *infra, 21a-29a*).

Petitioner filed a timely application for an extension of time to file a petition for writ of certiorari on February 25, 2022 (*Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Court Justice for the United States Court of Appeals for the Second Circuit*). This Court granted the application on March 2, 2022 and extended the time to file this petition to and including May 5, 2022. The Order on the application is available at (Pet. at App., *infra, 3a–4a*). The jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition (Pet. at App., *infra, 52a-59a*).

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), and its anti-retaliation provision forbids "discriminat[ion] against" an employee or job applicant who, inter alia, has "made a charge, testified, assisted, or participated

in" a Title VII proceeding or investigation, § 2000e-3(a).

The ADEA provides that "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "In order to establish a prima facie case of age discrimination, the plaintiff must show (1) that [the plaintiff] was within the protected age group, (2) that [the plaintiff] was qualified for the position, (3) that [the plaintiff] experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination." *Green v. Town of E. Haven*, 952 F.3d 394, 403 (2d Cir. 2020).

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable.

INTRODUCTION

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings

of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The case is of significance and national importance and impacts all people of all races, ages, color, gender/sex, and national origin because Petitioner engaged in conduct that was protected by Title VII of the Civil Rights Acts of 1964, New York Human Rights Law, the Age Discrimination in Employment Act, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the United States Constitution.

This case is the kind of important, *pro se* individual-rights dispute that this Court should not hesitate to resolve the dispute because it was congressional intent that laypersons' unrepresented *pro se* litigants should have the same civil, human, equal protection, and constitutional rights as the majority. Do the rights of the many outweigh the rights of the individual's access to judicial review, including before the highest Court in the land, the Supreme Court of the United States? If so, then how would the unrepresented layperson *pro se* litigant ever achieve justice without the opportunity of ever being heard just because of their *pro se* status? Why would it have been congressional intent to only protect those represented by counsel, but deny the same equal rights and protections, and opportunities to unrepresented individuals who find themselves through no fault of their own in a position to have to self-represent before the court, including as here? Was it congressional intent to not give access and opportunity for a layperson *pro se* litigant to be heard?

If so, why would congress give access and opportunity to the respondents, such as the Rochester City School District and Rochester City School District Board of Education the access and opportunity to file a waiver of rights to respond to a petition for writ of certiorari at such a premature stage, while at the same time the layperson *pro se* litigant is denied the rights to be heard prior to dismissal of the same?

The right to appear *pro se* in a civil case in federal court is defined by statute 28 U.S.C. § 1654. The decision below reached the remarkable conclusion that lower courts should not follow applicable standards regarding dismissals for failure to state a claim under Fed. R. Civ. P. 12(b)(6), prefiling sanctions, recusal, and also concludes that the constitutional guarantees of due process of law and access to the courts, and U.S. Const. amend. XIV, § 1, and dismissal as it relates to Title VII, NYSDHR Laws, ADEA, § 1981 and § 1983, but not limited to. These rights are longstanding and of fundamental importance in our legal system. The Supreme Court has explained that the particular constitutional protection afforded by access to the courts is "the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

The prefiling sanction was vacated, yet in this instant appeal, the Second Circuit treats this action as if there was and is a prefiling sanction against the petitioner, when there is not, and as such oversteps in its judiciary powers and makes a ruling full well knowing that *Malcolm I*, which includes parts of *Malcolm II*,

and *Malcolm III* were reversed in part, and remanded in part, and that the matter is pending on appeal before the Court, in which the Court acknowledged, "Malcolm's appeal from that decision is pending in this Court." This presents a question as to whether the district court's decision denying petitioner's motion for leave to file the complaint, which was designated as proposed complaint, was in violation of her due process rights where the pro se plaintiff received right to sue letters from the Equal Employment Opportunity Commission? Whether the district court dismissal of the complaint through a prefiling sanction was constitutional? The panel in this instant appeal ignored the panel's remand in *Malcolm I*, *Malcolm II*, and *Malcolm III*, and overstepped in its judiciary bounds by agreeing with the appellees that the court should still affirm the district court's dismissal because all the claims asserted in the proposed complaint were barred by the doctrine of claim preclusion. The panel standings in this instant appeal are in direct conflict and are in contradiction with three different panels in *Malcolm I*, *Malcolm II* (certain claims were added to *Malcolm I*), and *Malcolm III* who reversed and remanded because those panels reversed and remand on the grounds that the district court did not provide Curry-Malcolm notice and opportunity to be heard prior to imposing and entering a prefiling sanction against her, that Curry-Malcolm should have been allowed to amend her complaint, Fed. R. Civ. P. 15(1)(a), and did not agree with the district court dismissing all of the petitioner's claims with prejudice. Petitioner Curry-Malcolm was also allowed to add defendants in *Malcolm II* to

Malcolm I as part of the remand. Review is needed by this Court to resolve the confusion regarding judiciary boundaries.

Requiring district courts to provide notice and opportunity to be heard to *pro se* litigants prior to imposing a prefiling sanction is a logical accommodation that would visit minimal burden upon the district courts while making them more transparent and thus more accessible and would protect one of the most fundamental and civil rights, the rights to constitutional due process. This Court should hear this case and resolve whether district courts must follow well-established applicable laws and provide a *pro se* litigant notice and opportunity to be heard prior to imposing and entering a prefiling sanction.

The Rochester City School District's egregious and ongoing unlawful discrimination and retaliation against Petitioner Curry-Malcolm has been beyond pervasive, severe, and unconscionable, and has gone unchecked by not holding the respondents accountable for their continued discriminatory and retaliatory actions. It is Petitioner, Bernice Curry-Malcolm prayer of relief, that this Court grant the petition for writ of certiorari, and in the words of the late Supreme Court Justice, Ruth Bader Ginsburg, "Justices continue to think and can change. I am ever hopeful that if the court has a blind spot today, its eyes will be open tomorrow." Petitioner, Bernice Curry-Malcolm prayer of relief is that "tomorrow" has come because, "[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of

democratic society." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment).

STATEMENT OF THE CASE

Petitioner Bernice Curry-Malcolm was a Coordinating Administrator of Special Education ("CASE") Chairperson on the school district's Committee of Special Education ("CSE") at the Rochester City School District's Central Office who lost her job after complaining of and opposing unlawful discrimination, disparate treatment, and retaliation for engaging in a protected activity based on her race (Black/African American), color (Black/African American), age (petitioner was fifty-eight years old when the discriminatory events began), sex (female, excludes sexual harassment and sexual violence), and gender (female).

Petitioner Bernice Curry-Malcolm filed this case in 2020. Petitioner was a tenured former employee when this action was filed. The district court did not apply the proper test in determining whether the petitioner was tenured at the time of her termination in July 2017 and in April 2018. The Rochester City School District and its Board of Education has not been held accountable for any unlawful discriminatory and retaliatory actions against the petitioner, including intentional unlawful post employment discriminatory and retaliatory actions based on petitioner's race and age, and for the sole purpose of petitioner's race and age.

Termination is an adverse employment action, and so was demoting petitioner, not paying her salary thereby causing hardship, demotion in petitioner's supervisory duties, and providing false information post employment. The impact of the respondent's continued unlawful discrimination and retaliation has caused great harm to petitioner's good moral character and professional reputation and has essentially rendered her unemployable. After firing the petitioner, the respondents even conducted an interview with the local newspaper and essentially informed the public that the petitioner had been fired from the school district.

Petitioner was terminated solely based on her race, color, age, and the proffered reason given by the respondents for her termination was false and was not the real reason. The ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "In order to establish a prima facie case of age discrimination, the plaintiff must show (1) that [the plaintiff] was within the protected age group, (2) that [the plaintiff] was qualified for the position, (3) that [the plaintiff] experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination." *Green v. Town of E. Haven*, 952 F.3d 394, 403 (2d Cir. 2020). Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., New York State Human Rights Law

Section 296, 42 U.S.C. § 1981, 42 U.S.C. § 1983, prohibits discrimination, whether an employer's continuing wrongful conduct and actions in an employment discrimination case precludes the Appellant from bringing subsequent actions against the employer, and when, where, how, and under what circumstances of law whether state or federal that prohibits unlawful discrimination and under which anti-retaliation statutes and other similar statutes, regulations, and the constitution is it acceptable to discriminate, including under the ADEA, against an employee based on upon "previous similar conduct" by the employer?

LOWER COURT RULING

After receipt of rights to sue letters from the EEOC, Petitioner, Bernice Curry-Malcolm filed a discrimination complaint in federal court against the Rochester City School District and the Rochester City School District Board of Education. Petitioner was told by the Clerk's Office that the complaint needed to be reviewed before she could file. Later, petitioner was told that she needed to make motion for leave of court to file the complaint. Petitioner's complaint set forth the following claims: (1) unlawful discrimination based on race, color, age and gender in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2 et seq.; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq.; and New York Human Rights Law; (2) wrongful termination in violation of N.Y. Educ. Law 3020A; (3) denial of equal

protection in violation of the United States Constitution and the New York State Constitution; and (4) breach of contract. The Second Circuit affirmed the order of the United States District Court, Western District of New York (Honorable David G. Larimer, J.). The order dismissed Petitioner's complaint by finding that, "plaintiff's proposed Complaint fails to state a claim against the defendants, and that granting leave to file to commence a new action would thus be futile." (App. *50a*).

In its decision and order, the district court cited the filing of a prefiling sanction noted in a previous case. See *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester* ("*Malcolm I*"), No. 17-CV-6878, 388 F. Supp. 3d 242, 242 (W.D.N.Y. 2019). The district court also cited a previous case in its decision and order in which the court imposed a prefiling sanction. See *Honeoye Falls-Lima Central School District.* See *Malcolm v. Bd. of Educ. of Honeoye Falls-Lima Central Sch. Dist.*, 737 F. Supp. 2d 117 (W.D.N.Y. 2010), *aff'd*, 506 F. App'x 65 (2d Cir. 2012). There was no notice and opportunity to be heard prior to the imposing of the prefiling sanction.

We also note that before a judge issues a prefiling injunction under 28 U.S.C. § 1651(a), even a narrowly tailored one, he must afford a litigant notice and an opportunity to be heard. See, e.g., *Brow v. Farrelly*, 994 F.2d 1038 (3d Cir. 1993); *De Long v. Hennessey*, 912 F.2d 1147 (9th Cir. 1990); *In re Powell*, 851 F.2d 427, 431 (D.C. Cir. 1988); *In re Oliver*, 682 F.2d 443, 444, 446 (3d Cir. 1982); *In re Hartford Textile Corp.*, 613 F.2d 388, 390 (2d Cir. 1979).

The district court entered its judgment in July 2020 as *In re Bernice Curry-Malcolm*, No. 20-cv-6537. (App. *31a-50a*). The district court entered a *sua sponte* decision on its own and by doing so denied petitioner of her constitutional due process rights. The district court dismissed the complaint in its entirety and declined to hold the Rochester City School District and the Rochester City School District Board of Education accountable for unlawful discrimination and retaliation against the petitioner. (App. *35a-50a*). The Second Circuit affirmed. It admitted that the district court's prefiling sanction was improper but yet promoted the continuous disturbing trend by the district court and at the same time ruled on matter not before the court on the instant appeal, and also managed to cause conflict within its own circuit by dismissing petitioner's claims of wrongful termination among other claims that the circuit had remanded, "As in *Malcolm I*, however, we respectfully disagree with the district court's decision to dismiss all of these claims with prejudice. See *Malcolm v. ASAR*, No. 19-2412, slip op. at 6-7 (2d Cir. Oct. 14, 2020). We generally review a district court's denial of leave to amend for abuse of discretion, see *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012), but a pro se litigant should be "grant[ed] leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated," *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010). "Specifically, leave to amend may not be futile with respect to the following claims, insofar as they relate to events occurring after the filing of the *Malcolm I* and *Malcolm II* complaints:

(1) Ms. Malcolm's Title VII, ADEA, and NYSHRL claims against RCSD, (2) her § 1983 and NYSHRL claims against Deane-Williams, and (3) any claim that RCSD fired Ms. Malcolm in March 2018 in retaliation for her earlier complaints of discrimination under Title VII, the ADEA, and the NYSHRL." The Second Circuit seems to try to reverse this in this instant appeal under claim preclusion.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit standing on recusal conflicts with this Court's precedent in *Rippo v. Baker*

The Second Circuit takes the stance in *Liteky v. United States*, 510 U.S. 540 (1994) and *Chen v. Chen v. Qualified Settlement Fund*, 552 F.3d 218 (2d Cir. 2009) that bias claims should be ignored and dismissed because judicial remarks made by judges during the course of litigation and/or adverse ruling provides little reasonable basis for recusal. Circuits are split as to what standard should be applied even though this Court has set precedent. The Second Circuit standing contradicts this Court's precedent in *Rippo v. Baker*, 580 U.S. ___ (2017) in which this court reversed, stating that precedent dictates recusal at times where actual bias is absent. "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" Due to this, the previous judgment was vacated and Rippo's case was remanded for further

proceedings. Should this case have also been remanded?

This Court should grant certiorari to determine whether it is judicially acceptable conduct for a judge to call a *pro se* plaintiff offensive words and make untrue and offensive allegations against her that were demeaning and derogatory to her character and status as a minority woman and as a *pro* se litigant, such as describing her as a "demonstrably" abusive litigant without providing her notice and the opportunity to be heard, and in subsequent district court rulings, where the same judge makes intentionally defamatory and false allegations that the *pro se* plaintiff was abusive and disrespectful to the court and court staff when interacting with the court whether in-person and/or during telephonic interactions, where on remand the judge was directed by the appeals court to hold a hearing to give the pro se litigant an opportunity to be heard, but refused and instead made false claims against the pro se litigant, including claiming that the pro se litigant did not provide an affidavit for recusal, does the judge's actions show bias and prejudice making fair judgment impossible and is too high to be constitutionally tolerable? Whether the district court applied the correct standard when it described plaintiff as a "demonstrable", abusive litigant without providing notice and the opportunity to be heard prior to imposing and entering a prefiling sanction against her? Whether the judge's actions warranted recusal where a judge continues to commit a legal error after the mistake has been drawn to the judge's attention, does the judge commit judicial misconduct as well as legal error?

II. This Court should grant certiorari to determine whether prefiling sanctions violates constitutional due process and equal protection under the Fifth and Fourteenth Amendments, and deprives pro se litigants of notice and opportunity to be heard prior to entry

Based on new developments regarding prefiling sanction vacatur this court should grant certiorari to overrule the district court prefiling sanction against the petitioner. See *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 388 F.Supp.3d 242 (W.D.N.Y. 2019), *aff'd in part, vacated in part, remanded*, 831 F. App'x 1 (2d Cir. 2020) ("*Malcolm I*"). The right to appear *pro se* in a civil case in federal court is defined by statute 28 U.S.C. § 1654. The right to due process is defined under the Fifth and Fourteenth Amendments. A district court's obligation—or lack thereof—to provide a pro se litigant with due process before imposing a prefiling injunction is an important federal question. The current panel concedes that the leave-to-file sanction was not proper, but then to justify the district court's actions, over-reaches in its jurisdictional bounds on the remanded *Malcolm I* and *Malcolm III* cases.

The Second Circuit *de novo* review of the denial of the leave-to-file sanction on this instant appeal, see *Malcolm v. Honeoye Falls Lima Cent. Sch. Dist.*, 517 F. App'x 11, 12 (2d Cir. 2013) is troubling, wrong, and in direct conflict with the Second Circuit Order. See

Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester, 2020 U.S. App. LEXIS 32404 at *8 (citing *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998)). See also *Viola v. United States*, 481 F. App'x 30, 31 (2d Cir. 2012) (unpublished opinion). Further and specifically, see *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 2021 WL 4867006 at *3–6, 8 (W.D.N.Y. Oct. 19, 2021) is not before the Second Circuit on this instant appeal and is pending, and therefore, should not have any prejudicial effects on this petition for writ of certiorari because to do so would violate petitioner's rights to due process under the equal protection and due process clauses of the constitution. Because *Malcolm I* and *Malcolm II* were reversed in part, and remanded in part, the Second Circuit stances on *Malcolm I* and *Malcolm III* are not before the court on this instant appeal which is pending before the court.

This instant appeal hedges on the federal questions as to whether the district court abused its discretion by denying Petitioner's motion for leave to file a proposed complaint against the Rochester City School District and whether the prefiling sanction that the district court constantly hangs its hat on, including where the Second Circuit is also trying to hang its hat on after conceding, "Malcolm challenges to the leave-to-file sanction that was in place at the time of the district's court's decision is moot because the court already vacated that sanction."

The Second Circuit should have reversed and remanded because a prior panel of the court had already ruled on the matter and the leave-to-file sanction was

the reason that the petitioner was sanctioned in the first place and was required to seek leave of court to file an action against the school district, "Plaintiff is therefore permanently enjoined from commencing any further pro se actions in federal court against the RCSD, any RCSD employees which arises out of her employment with the RCSD, the ASAR, or any ASAR representatives or members which arises out of her employment with the RCSD without prior leave of court." See *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester* ("*Malcolm I*"), No. 17-CV-6878, 388 F. Supp. 3d 242 (W.D.N.Y. 2019).

The prefiling sanctions were in violation of petitioner's due process rights. Whether the Second Circuits' affirmation of the district court's denial of petitioner's motion for leave to file a proposed complaint based on a prefiling sanction that has been vacated was an abuse of discretion and warrants review by this court? Whether the judge should have recused himself, and whether the Second Circuit's *sua sponte* affirmation of the district court's order in *Bernice Curry-Malcolm v. Rochester City School District* and *Rochester City School District Board of Education*, 20-2808cv, was error of law and abuse of discretion. Further, "[a] district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible

decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (footnotes omitted).

III. The Court should grant certiorari to review an employer's unchecked ongoing and continuous unlawful discrimination and retaliation actions and deprivation of rights of petitioner's due process and equal protection rights

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating against employees on the basis of race, color, national origin, sex, and religion. Under Title VII, employees are protected from retaliation for making a charge of discrimination, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII. This anti-retaliation provision of Title VII is known as the "participation clause." The purpose of the participation clause, as determined by the U.S. Supreme Court in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), is to enable employees victimized by employment discrimination to have "unfettered access" to the "remedial mechanisms" of Title VII. Under the participation clause's language of prohibiting retaliation against employees who testify in a Title VII proceeding, employees are protected from retaliation when giving testimony at a hearing, deposition, or trial in a Title VII lawsuit. This protection against retaliation extends to employees who bring a Title VII lawsuit and employees who testify as a witness in a Title VII. The Court should hear this case because this case is an

appeal within the court's jurisdiction. This case presents questions of national and exceptional importance. This case raises constitutional due process concerns and the issue of whether school district employers and their employees, officers, agents who violate Title VII of the Civil Rights Act of 1964 should be held as employees of the State of New York, with the caveat of never being held civilly responsible and/or accountable for their actions. This Court should grant certiorari and reiterate that unlawful discrimination based on any enumerated category does not have any place in the workplace including in particular race and age. The Rochester City School District was a hostile work environment and any place which locks the bathroom so that petitioner could not use it, and that at the same time unlocks the bathroom so that a younger white female can use it, is a hostile work environment. Any place that allows its supervisors to openly engage in and participate in unlawful discrimination and retaliation for sport is a hostile work environment. The Rochester City School District staged an entire layoff just to fire the petitioner, because the petitioner was the "only" employee fired and financially impacted by the layoff.

To establish a Title VII hostile-work-environment claim, a plaintiff must provide evidence of harassment that "unreasonably interfer[ed] with her work performance and creat[ed] an objectively intimidating, hostile, or offensive work environment." *Grace v. USCAR*, 521 F.3d 655, 678 (6th Cir. 2008); see also *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 362 (6th Cir. 2010). In determining whether the workplace is subjectively and

objectively hostile, a court should consider the totality of the circumstances, which may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993). "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Title 42 of the United States Code provides two avenues of relief against employment discrimination on the grounds of race. Under 42 U.S.C. § 1981 " . . . [a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . " in every state and territory. 42 U.S.C. § 1981 (1981). It is settled that the terms of § 1981 prohibit racial discrimination in the making of private sector employment contracts. *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). Similarly, 42 U.S.C. § 2000e-2(a)(1) & (2) states that it is an unlawful employment practice to " . . . fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . " or to " . . . limit, segregate or classify . . . " employees because of such individual's race. 42 U.S.C. § 2000e-2(a)(1) & (2) (1981). This court should grant certiorari to determine whether ongoing and continuous discrimination over several years can constitute a hostile workplace.

IV. The Second Circuit ruling contradicts this Court's ruling in *Lucky Brand Dungarees, Inc. v. Marcel Fashions* (2020)

The Second Circuit holding on claim preclusion contradicts the Supreme Court of the United States holding in *Lucky Brand Dungarees, Inc. v. Marcel Fashion Group, Inc.*, 590 U.S. ___ (2020) holding that a party is not precluded from raising defenses submitted in earlier litigation between the parties when a subsequent lawsuit between them challenges different conduct and raises different claims from earlier litigation between the same parties. Under *res judicata*, a plaintiff is barred from raising a claim or issue that was litigated and resolved in an earlier case between the parties, or a claim or issue that a plaintiff *could have raised* in an earlier case, but didn't. This rule helps promote finality in judgment and judicial efficiency by preventing relitigation of issues that are already settled. This case tests whether *res judicata* applies to *defenses* that a defendant might have raised in earlier litigation, but didn't (here, Lucky's release defense)—the so-called "defense preclusion." The respondents did not raise the defense of claim preclusion until on appeal. The respondents were fully aware that the claims that they raised a defense of claim preclusion were the same claims that the Second Circuit reversed and remanded in *Malcolm I* and *Malcolm III*. The Second Circuit should have remanded and granted discovery.

V. The Court should grant certiorari to consider overruling *Malcolm v. Bd. of Educ. of Honeoye Falls-Lima Central Sch. Dist.*, in light of the Second Circuit standing in *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 2020 U.S. App. LEXIS 32404 at *8 (citing *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998)). See also *Viola v. United States*, 481 F. App'x 30, 31 (2d Cir. 2012) (unpublished opinion).

The district court did not provide the *pro se* petitioner with notice and opportunity to be heard before imposing and entering a prefiling sanction against her and by doing so was in violation of her constitutional due process rights. Neither did the district court follow applicable standards under the law for imposing a prefiling junction, and by not following applicable law, the district court was in direct contradiction with this Court's standing and with other circuits, including the Ninth Circuit. This creates a serious due process concern regarding prefiling sanctions against litigants that have not been given notice and opportunity to be heard prior to entry of the same. This is also problematic because the majority of claims brought by pro se litigants seek remedies for violations of the U.S. Constitution and federal civil rights statutes, and most are predominantly women, minorities, and the poor—and their claims are four times more likely than represented parties to have their cases dismissed under Federal Rule of Civil Procedure 12(b)(6), and it does not help that the courts stop paying attention and listening to claims on the merits within a complaint when

it has closed its ears due to a prefiling sanction because even those claims with merit become claims that are meritless when they are not. See *Honeoye Falls-Lima Central School District.* See *Malcolm v. Bd. of Educ. of Honeoye Falls-Lima Central Sch. Dist.*, 737 F. Supp. 2d 117 (W.D.N.Y. 2010), *aff'd*, 506 F. App'x 65 (2d Cir. 2012). The Honeoye Falls-Lima Central School District continues to be the elephant in the room. At the time of imposing a prefiling sanction against the petitioner the district court full well knew that petitioner did not file all of the lawsuits as a *pro se* litigant. The petitioner had only filed two of the lawsuits pro se, and the third was filed by an attorney, whom petitioner had retained to represent her in all three federal cases. It was not until that attorney withdrew as counsel in June of 2010 that the district court imposed a prefiling sanction in 08-cv-6577. As of November 2020, the Second Circuit has ruled that such a prefiling sanction was improper because the district court did not provide notice and an opportunity to be heard prior to imposing and entering the prefiling sanction against Petitioner, Curry-Malcolm. Specifically, on appeal, *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, the Second Circuit did not agree with the district court's dismissing all of the claims in the complaint with prejudice, the prefiling sanction, and the denial to amend the complaint, and reversed and remanded. See *Malcolm v. Ass'n of Supervisors & Adm'rs of Rochester*, 2020 U.S. App. LEXIS 32404 at *8 (citing *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998)). See also *Viola v. United States*, 481 F. App'x 30, 31 (2d Cir. 2012) (unpublished opinion).

This Court should grant certiorari for all the reasons stated above and should reverse the district court's order as to recusal, and as to Petitioner Curry-Malcolm's Title VII, ADEA, 42 U.S.C. § 1981, § 1983, NYSHRL, due process and equal protection claims under the Fifth and Fourteenth Amendments, breach of contract, disparate treatment, hostile work environment and claims in retaliation. Should certiorari be granted, petitioner will discuss the merits in greater detail. The Second Circuit in this instant appeal has created confusion within its own court. In the alternative, this Court should stay the proceedings until the matters pending before the Second Circuit are resolved to avoid a manifest injustice.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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APPENDIX