21-7001

No. _____

In the
Supreme Court of the United States

ADAM J. TENSER,

Petitioner,

v.

BETH SILVERMAN, TANNAZ MOKAYEF, WILLIAM COTTER; ROBERT MARTINDALE; MAURICE JOLLIF; ELIZABETH DUMAIS MILLER, IN THEIR PERSONAL AND OFFICIAL CAPACITIES FOR THE COUNTY OF LOS ANGELES,

Respondents.

On Appeal to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's articulation of the *pro se* liberal construction rule in *Haines v. Kerner*, 404 U.S. 529 (1972) implies a general withdrawal of the *pro se* solicitude from lawyers representing themselves in civil rights suits.

PARTIES TO THE PROCEEDINGS

Petitioner Adam J. Tenser an individual proceeding *pro se* was the plaintiff-appellant below.

Respondent Beth Silverman in her personal and official capacity as Los Angeles County deputy district attorney was the defendant-appellee below.

Respondent Tannaz Mokayef in her personal and official capacity as Los Angeles County deputy district attorney was the defendant-appellee below.

Respondent William Cotter in his personal and official capacity as Los Angeles Sherriff's Department homicide detective was the defendant-appellee below.

Respondent Robert Martindale in his personal and official capacity as Los Angeles Sherriff's Department homicide detective was the defendant-appellee below.

Respondent Maurice Jollif in his personal and official capacity as Los Angeles Sherriff's Department officer at Twin Towers Correctional Facility was the defendant-appellee below.

Respondent Elizabeth Dumais Miller in her personal and official capacity as counsel for Los Angeles County was the defendant-appellee below.

Robert Joshua Ryan is an individual defendant in the state cause of action in Los Angeles Superior Court.

The County of Los Angeles is an unnamed Doe defendant in the action and a named defendant in the state cause of action in Los Angeles Superior Court.

Does 1-10 are individuals in their official capacity as Los Angeles Sheriff's officers at Twin Towers Correctional Facility.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

DIRECTLY RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit:

ADAM J. TENSER v. BETH SILVERMAN, et al., No. 20-56176 (9th Cir. October 26, 2021)(unpublished opinion)(dismissal with prejudice affirmed, motion to strike denied as moot) (App. xviii).

U.S. District Court for the Central District of California:

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. October 7, 2020) (order accepting R&R) (App. xix).

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. May 26, 2020) (U.S. magistrate judge report and recommendations) (App. xx).

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. February 21, 2020)(order striking opposition with leave to file opposition; directing parties to meet and confer on pending motions; setting briefing schedule and continuing hearing on pending motions) (App. xxi).

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. January 6, 2020)(order granting special anti-slapp motion to strike and motion to dismiss and strike portions of the complaint with leave to amend) (App. xxii).

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. November 14, 2019)(order withdrawing report and recommendation; directing plaintiff to file application for permission for electronic filing pro se; and extending time to serve defendant Jollif) (App. xxiii).

Superior Court of California, County of Los Angeles:

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al, No. 20SMCV01690 (July 7, 2021)(order entry of default against Beth Silverman; Tannaz Mokayef; William Cotter; Robert Martindale; Maurice Jollif; Elizabeth Dumais Miller) (App. xxiv).

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al, No. 20SMCV01690 (July 8, 2021)(order entry of default against Robert Joshua Ryan) (App. xxv).

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al, No. 20SMCV01690, (July 12, 2021)(opinion: granting defendant the County of Los Angeles'

motion to strike the second amended complaint; granting in part the special motion to strike the second amended complaint) (App. xxvi).

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690, (July, 16 2021)(opinion: sustaining defendant the County of Los Angeles' demurrer to the first amended complaint) (App. xxvii).

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690 (September, 3 2021)(opinion: motion for reconsideration of demurrer denied) (App. xxviii).

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690 (September, 10 2021)(opinion: motion for reconsideration of special motion to strike denied) (App. xxix).

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690 (October 12, 2021)(Order Fee Waiver) (App. xxx).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner is not a trained or experienced litigator. Unpacking his First Amendment retaliation stigma plus claim without counsel and resources has been challenging. If Petitioner can state a civil rights claim, it would be manifestly unjust to deny Petitioner the opportunity to amend the operative complaint under the *pro se* liberal construction rule solely because Petitioner is a licenced attorney.

The question requires resolution of a conflict of authorities between the Second Circuit that mandate a contextual showing of relevant training and experience before denying *pro se* status to attorneys representing themselves; and, the Fifth, Seventh and Tenth Circuits, which have embraced a bright line rule denying lawyers the *pro se* solicitude as a class of litigants.

The Ninth Circuit has not directly addressed the narrow issue of withdrawing the solicitude of *pro se* status solely on the basis of license. The Ninth Circuit requires an additional procedural step before dismissing *pro se* civil rights claims with prejudice. Notice of deficiencies must be provided with an opportunity to file an amended complaint. Petitioner was denied the opportunity to amend effectively.

DECISIONS BELOW

Adam J. Tenser v. Beth Silverman, et al., No. 20-56176 (9th Cir. October 26, 2021)(unpublished opinion)(dismissal with prejudice affirmed, motion to strike denied as moot) (App. xviii)

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JURISDICTION

The Ninth Circuited filed its decision on October 26, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. 1291. The Central District of California had jurisdiction pursuant to 28 U.S.C. §1331; 28 U.S.C. §1343; and, supplemental jurisdiction pursuant to 28 U.S.C §1367(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The U.S. Const. amend. I; U.S. Const. amend. IV; U.S. Const. Amend. VI; U.S. Const. Amend. XIV § I; and 42 U.S.C. § 1983 are reproduced in the appendix. (App. iii).

California Penal code §§ 825; 646.9; California Civil Code §§ 46; 1798.24; California Code of Civil Procedure §§ 124; 177.5; 284; 1211; 2015.5; California Business and Professional Code § 6068; California evidence code §§ 1200; 1401; California Rules of Court Rule 3.1204; and, Superior Court of California, Los Angeles Local Rule 3.11 are reproduced in the appendix. (App. iv - xiv).

California Rules of Professional Conduct are reproduced Rule 5-120 (A) (Trial publicity); Rule 5-200 (B) (Trial conduct); Rule 5-200 (E) (Lawyer as witness); and, Rule 5-320 (B) (Contact with jurors) are reproduced in the appendix. (App. xv-xvi).

STATEMENT OF THE CASE

A. Circuit Conflict Based on an Issue Not Considered

This Court's decision in *Haines v. Kerner*, 404 U.S. 529, 520-521 (1972)(Per Curiam) reads "[w]e cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Second Circuit has found a general withdrawal of the solicitude offered *pro se* litigants is inappropriate absent a showing that the particular litigant has acquired the experience necessary to deal generally with all aspects of the case. *Tracy v. Freshwater,* 623 F.3d 90, 101-104 (2nd Cir. 2010).

The Fifth, Seventh and Tenth circuits have declined to extend the benefits of the liberal construction rule to lawyers who choose to represent themselves as a class of litigant. *Olivares v. Martin*, 555 F.2d 1192, 1194 n.1 (5th Cir. 1977); accord *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001); accord *Godlove v. Bamberge, Foreman, Oswald, and Hahn*, 903 F.2d 1145, 1145, 1148 (7th Cir. 1990). The Tenth Circuit goes so far as to sanction attorneys that ghost write for a *pro se* litigant or who fail to disclose they are licensed. *Comm. on the Conduct of Attorneys v. Oliver,* 510 F.3d 1219, 1223 (10th Cir. 2007).

The law in the Ninth Circuit is settled, however, that it is an error for the district court to grant a motion to dismiss with prejudice without providing a statement of the deficiencies beforehand, particularly in *pro se* plaintiff civil rights cases. *Akhtar*

v. Mesa, 698 F.3d 1202, 1212-1214 (9th Cir. 2012) c.f. *Garmon v. County of Los Angeles,* 828 F.3d 837, 846 (9th Cir. 2016).

Eliminating the *Conley v. Gibson* "beyond a doubt" limitation of the standard by elevating the words "formal pleadings of lawyers" over the remainder of the conjunctive sentence in the opinion distorts the decision based on an issue not considered.

The relevant portion of the decision in *Haines v. Kerner* has subsequently been repeated by this Court in *Estelle v. Gable,* 429 U.S. 97, 106 (1976) and *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (Per Curiam). All of these decisions precede this Court's plausibility pleading standard articulated in *Bell Atlantic Corp. v Twombly,* 550 U.S. 554 (2007) and *Ashcroft v Iqbal,* 556 U.S. 662 (2009).

B. Notice of Deficiency in the Ninth Circuit

Implementing the Ninth Circuit procedural step requiring notice of deficiencies provides *pro se* litigants with an opportunity to amend with the information necessary to avoid making the same mistake twice. *Akhtar v. Mesa, supra.*

> "The requirement that courts provide a *pro se* litigant with notice of the deficiencies in his or her complaint helps ensure that the *pro se* litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the *pro se* litigant will likely repeat previous errors. This is equally true for the *pro se* litigant who amend his complaint at his own instance without any guidance from the court. Amendments that are made without an understanding of

underlying deficiencies are rarely sufficient to cure inadequate pleadings."

Noll v. Carson, 809 F.2d 1446, 1448-1449 (9th Cir. 1987).

The Federal Rules reject the approach "that pleading is a game of skill in which one misstep may be decisive to the outcome, and accepts the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson, supra at 48.* "The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.'" *Foman v. Davis,* 371 U.S. 178, 181-182 (1962) citing F.R.Civ.P. Rule 1. In *Foman,* this Court instructed that courts may decline to grant leave to amend only if there is strong evidence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment, etc." *Ibid.*

The Ninth Circuit has regularly stressed applying F.R.Civ.P. Rule 15 (a)(2) and freely granting leave to amend whenever "justice so requires" and leave should be granted with "extreme liberality." *Moss v. Secret Service,* 572 F.3d 962, 972 (9th Cir 2009) (internal citations omitted). In exercising this discretion, a court must be guided by the underlying purpose of F.R.Civ.P. Rule 15 (a)(2) — to facilitate decision on the merits, rather than on the pleadings or technicalities. *Conley v. Gibson, supra.* The *pro se* liberal construction rule should be extended to Petitioner in this circumstance.

C. Traditional Notions of Fairness.

Petitioner was denied the solicitude afforded other *pro se* plaintiffs in the Ninth Circuit. The district court failed to provide Petitioner with a description of the deficiencies so that Petitioner could amend effectively. It constituted a procedural error. Petitioner had a reasonable expectation the district court would provide notice of deficiencies, based on *stare decisis*.

Applying the Second Circuit's test, Petitioner would be afforded an opportunity to amend. The record clearly indicates that Petitioner has shown a lack of experience and training at each step of the process and was admitted to the federal courts *pro se*. (App. xxiii). That does not suggest Petitioner is incapable. His prolixity does not make him an unworthy litigant. Petitioner drew an erroneous conclusion of law from the evidence and characterized hearsay statements as testimony – a mistake no experienced litigator would make.

The facts in this First Amendment 42 U.S.C § 1983 retaliation stigma plus case were difficult to unpack. The acts that caused the injuries were not simultaneous with each individual constitutional injury and formed a course of conduct. Petitioner is doing everything for the first time without any assistance. Without litigation experience, regardless of licensing status, the learning curve is steep. Making a detached evaluation of the facts and evidence when it is your life that hangs in the balance is difficult. It is easy to mistake conduct that creates liability for evidence of liability. But, F.R.Civ.P. Rule 12 (b)(6) and F.R.Civ.P. Rule 8 (e) are meant to be applied in harmony so that that pleadings are interpreted to do substantial justice.

Conely v. Gibson, supra. The amended complaint, however inartful, puts forth sufficient facts if construed liberally to put Respondents and the district court on notice of retaliation, defamation, equal protection and due process claims. It would be manifestly unjust to hold Petitioner to a higher standard by denying him the solicitude of a *pro se* complainant where the possibility of success exists.

The opportunity to represent one's self for vindication of constitutionally protected liberties should be generous and available to lawyers of varying skill and experience in light of First Amendment principles. The decision to stand up and check an abuse of government power is an enormous commitment in the first place. Three of the county Respondents are lawyers practicing in their own field. Lawyers representing the County of Los Angeles are experienced in their field. This weighted advantage is sufficiently chilling that, without *pro se* status, only the most resolute of attorneys (without means) would be discouraged from asserting a valid claim.

Transactional attorneys are a modern-day reality for business people. In the event a solicitor without barrister experience is drawn into a messy situation in the line of duty, the judicial system should grant the attorney the benefit of doubt and provide the direction required to effectively amend like any other *pro se* claimant under the controlling *pro se* liberal construction rule in the Ninth Circuit. A contrary finding offends traditional notions of fairness.

D. Amendment Would Not Be Futile.

The County of Los Angeles sought to deny Petitioner's client of his counsel. The investigation was improperly initiated without a warrant. To accomplish this end,

Petitioner was denied access to the jail and the courthouse in violation of California laws. At the jail denial of counsel was accomplished by a policy of arbitrary classification and prior restraint on speech. At the courthouse Petitioner was denied access by the prosecutor's encouragement of a series of *ex parte* heckler's *veto* complaints; extra-judicial slander to the jury and press; a warrantless search calculated to deny Petitioner notice; and, denial of due process by smuggling hearsay statements into the record as a means of qualifying trial misconduct and encouraging the continuance of an indirect contempt citation in excess jurisdiction.

Respondent's unconstitutional conduct was collateral to the underlying criminal prosecution; violated State laws; and, the acts were without cognizable legal function or judicial check. It would be manifestly unjust to find this conduct "quasi-judicial advocacy" and absolutely immune.

I. PROTECTED CONDUCT

Petitioner endeavored to secure his entertainment client criminal counsel under written power of attorney; to complete the transactions to finance the defense; to respond to statements in the press issued by the Los Angeles Sheriff's Department ("LASD"); to bring a motion for substitution of criminal counsel California Code of Civil Procedure § 284; to attend the criminal trial as member of the public in the Superior Court of California; and, to petition the government for abuse of the judicial process.

II. DENIAL OF CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS

LASD defendants at the Twin Towers Correctional Facility ("TTCF") implemented a policy requiring civil attorneys to obtain a court order as a prerequisite to confidential attorney-client visitation. TTCF legal team officer Jollif ratified this policy. The policy was further ratified by Los Angeles County counsel Miller. California Penal Code § 825 subdivision (b) applies to all California attorneys. The *selective enforcement distinction* embraced by the county policy is arbitrary and irrational and not attenuated to any legitimate state interest or goal. The nature of the county policy classification – i.e., what line Jollif and Miller drew – is at the center of the dispute. The policy is an improper execution of the statute's express terms through duly constituted agents in a discriminatory manner that imposes different burdens on different classes of people and violated the Equal Protection Clause of the Fourteenth Amendment. It is obvious that the alleged rational basis for TTCF's *distinction* is pretext for an impermissible motive – denial of confidential communication.

Requiring a solicitor to seek a court order is an additional procedural step that is sufficiently chilling for a transactional lawyer to prevent future attempts at visitation. Any court appearance involves a much higher threshold of government involvement than negotiating a private loan agreement.

Video conference as an alternative channel was not a viable method of communication during the investigative phase of Petitioner's client's incarceration. California attorneys are under an affirmative duty to maintain inviolate the

III. EXTRA-JUDICIAL SLANDER

Respondents Silverman and Mokayef were prosecutors and detectives Cotter and Martindale were witnesses for LASD at the trial. During a break they were loudly discussing their opinions of the case with the victim's mother in proximity to members of the jury and the press. Petitioner stood to hear what the nearest juror heard. Petitioner told Cotter their conduct was inappropriate in the presence of the jury. Extra-judicial interactions with the jury press violated the rules of profession conduct. California Rules of Professional Conduct Rule 5-320 (B) (Contact with jurors); Rule 5-120 (A) (Trial publicity).

Silverman called Petitioner a "stalker" for the press and jury to hear. California Penal Code § 646.9. It was a statement of fact attributing criminal behavior to Petitioner with reckless disregard as to its truth or falsity and *per se* defamatory. California Civil Code § 46. A reasonable trier of fact would believe it was a statement fact because of who made the statement and the context in which it was made. They repeated the statement in open court in an attempt to qualify it and their version of the facts, without allowing Petitioner to respond.

The prosecutors' immediate goal was to publicly discredit Petitioner for his point of view and to prevent him from attending the trial for the optics in the courtroom. Whether an act is judicial relates the *nature* and *function* of the *act itself. Stump v. Sparkman*, 435 US 349, 362 (1978). ***Actions manifestly beyond an official's line of duty ie. expressly forbidden by statute, are not absolutely immune.*** *Butz v. Economou*, 438 US 478, 489 (1978). Public statements are not protected by absolute

Silverman, Mokayef, Cotter and Martindale should have known the search required a warrant. A warrantless search that goes beyond gathering evidence for the main prosecution – ie. not the crime in the indictment being prosecuted, is a collateral investigation that is not absolutely immune. *KRL v. Moore*, 384 F. 3d 1112, 1113-1114 (9th Cir. 2004). A decision to go outside the judicial process cannot be the basis for absolute immunity. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 914 (9th Cir. 2012). The failure to train these homicide detectives is a policy of inaction that is attributable to the county. Common sense dictated that this was an unreasonable search under the circumstances.

V. DUE PROCESS

The trial judge took Petitioner by surprise citing him for contempt for an alleged violation an *ex parte* no contact order under California Code of Civil Procedure § 177.5. The citation was later *voided* on a sustained demurrer for excess jurisdiction. The prosecutors did not initiate any prosecution for contempt, but they encouraged it *ex parte,* as witnesses. After the trial they smuggled false written hearsay statements into the record, without application, to qualify their own misconduct.

When contempt is punitive, the Sixth Amendment protections afforded criminal prosecutions are invoked. There is no regularity in contempt and all presumptions are to be drawn in Petitioner's favor. California Rules of Court Rule 3.1204 requires notice of an *ex parte* application accompanied by a declaration to initiate contempt for out-of-court conduct. Contempt when not in the view of the court is a separate proceeding to the underlying cause, especially when *ex parte,* and written notice is a

her most valuable asset. *Cooter & Gell v. Hartmarx Corp., supra* at 413 (Steven J. concurring in part and dissenting in part). California has recognized a Fourteenth Amendment due process right to a full hearing against arbitrary government action that deprives a person of professional reputation. *Endler v. Schutzbank*, 68 Cal.2d 162, 170 (1968). The state may not make a person an outcast in his own profession without a full opportunity to present a defense. *Id* at 173.

It was a violation of duty, for the prosecutor's to assert personal knowledge of the facts at issue, except when testifying as a witness. California Rules of Professional Conduct Rule 5-200 (E) (Lawyer as witness). Encouraging adverse judicial action from a false motive violates California law governing attorney conduct. California Business and Professional Code § 6068 subdivision (g). It is not advocacy to mislead the judge by an artifice of fact. California Business and Professional Code § 6068 subdivision (d); accord, California Rules of Professional Conduct Rule 5-200 (B) (Trial conduct). "Tradition as well as ethics of our profession generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding". *Kalina v. Fletcher*, 22 US 118, 130 (1997). No prosecutorial decision making could affect the truth or falsity of the statements.

Acts that merely "safeguard the fairness of the criminal judicial process" do not necessarily warrant absolute immunity *Burns v. Reed*, 500 US 478, 495 (1991). "In 1871 the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *Malley v. Briggs*, 475 U.S. 335, 340-341

reputation; or, the *void* contempt citations. The particular interest and threat to that interest were not articulated along with written findings specific enough that a reviewing court can determine whether the closure order was properly entered and that alternatives were considered.

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The Court should grant petition for writ of *certiorari* in this type of case to determine a uniformity of authority between appellate circuits.

CONCLUSION

The *pro se* liberal construction rule should be extended to Petitioner under the circumstances. The petition for writ of *certiorari* should be granted and the case remanded to the district court to file an amended complaint.

Respectfully submitted,

Adam J. Tenser