NO. 21-_____

In the Supreme Court of the United States

VICKI STEFANINI,

Petitioner,

v.

HEWLETT PACKARD ENTERPRISE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a technical application of appellate rules should bar a review of the merits of an appellate case, when substantial compliance with the rules is evident in the record.

2. Whether, as a matter of law, the lower appellate court should have granted rehearing in light of the appellant having corrected any defects in her brief and because the prior defects did not warrant dismissal.

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner

- Vicki Stefanini

  An educated and highly experienced saleswoman, who alleged she suffered gender discrimination while employed at Hewlett Packard Enterprise Company in Santa Clara, California, resulting in her unjust termination. As plaintiff, she filed suit before the United States District Court of the Northern District of California, which the court terminated in summary judgment on January 22, 2020. As appellant, Vicki Stefanini filed a timely appeal on February 14, 2020 in the United States Court of Appeals for the Ninth Circuit.

Respondent

- The Hewlett Packard Enterprise Company ("HPE")

  A Delaware Corporation with its executive office and principal business address in Santa Clara County, California, and

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-15240

Vicki Stefanini, *Plaintiff-Appellant v.* Hewlett Packard Enterprise Company, *Defendant-Appellee,* and Stephen Carlock, *Defendant.*

Date of Final Opinion: August 2, 2021

Date of Rehearing Denial: September 8, 2021

United States District Court,
Northern District of California

Case No. 18-cv-07051-NC

Vicki Stefanini, *Plaintiff v.*
Hewlett Packard Enterprise Company, *Defendant.*

Date of Final Order: January 22, 2020

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays a writ of certiorari issue for review of the judgment below.

OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit, which dismissed the Petitioner's appeal, is unpublished and the court did not review the merits of the appellate case. (*See* Aug. 2, 2021, Memo, *attached hereto* at Appendix ("App."), at App.2a.) The Order issued by the United States Court of Appeals for the Ninth Circuit denying rehearing also did not review the merits of the case. (*See* Sep. 8, 2021, Order, *attached hereto* at App.4a.)

The appeal the Ninth Circuit Court of Appeals dismissed had been taken from the United States District Court, for the Northern District of California, to which the Petitioner's case had been removed from the California Superior Court for the County of Santa Clara on November 20, 2018. (*See* Nov. 20, 2018, Notice of Removal of Action.) The January 22, 2020, U.S. District Court Order Granting HPE's Motion For Summary Judgment appears *attached hereto* at App.4a, and the Judgment of the District Court issued the same day.

JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit dismissing the appeal was issued on August 2, 2021. A timely Petition for Panel Rehearing was filed in the Ninth Circuit on August 12, 2021. The order of the United States Court of Appeals for the Ninth Circuit denying rehearing of the appellate case was issued on September 8, 2021. (App.21a).

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

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV

The Amendments of the Constitution of the United States provide in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

It cannot be a truism that cases are to be removed to federal court from the state courts merely to be terminated with prejudice against the plaintiffs without an adequate consideration of the merits of each case. A careful review of these cases by the United States Courts of Appeals would safeguard against such an injustice and would ensure due process through an examination of the merits of appellate cases brought to challenge summary judgment entered in a district court.

Justice and fairness are not well-served on appellate review by a technical application of the Federal Rules of Appellate Procedure that sidesteps an examination of the merits of the case and dismisses the appellate action without an evaluation of the issues in controversy. The course of proceedings below has worked to abrogate reasonably expected due process and denied the Petitioner her right to proceed to an evidentiary trial on meritorious claims.

As Plaintiff-Appellant before the United States Court of Appeals for the Ninth Circuit, Petitioner Vicki Stefanini petitioned for panel rehearing of her appeal, which the court had dismissed on August 2, 2021, on the grounds of a failure to comply with Federal Rule of Appellate Procedure (Fed. R. App. P.) 28(a)(6).[1]

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[1] "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (*see* Rule 28(e))." Fed. R. App. P. 28(a)(6).

In passing, it must be emphasized that the Circuit Court imposed its sanction of dismissal based on Fed. R. App. P. 28(a)(6), and did not reference any violation of Fed. R. App. P. 28(a)(8)(A).[2] The necessary implication of this distinction made by the lower appellate court is that the Ninth Circuit panel found sufficient material citations to the record within the argument section of Petitioner's briefing, as required by Fed. R. App. P. 28(a)(8)(A), but found the references to the record in the statement of the case to be too imprecise, and contrary to Fed. R. App. P. 28(a)(6). The panel did not evaluate whether the citations it determined were missed in the statement of the case were otherwise present in the argument section of the briefing.

Petitioner timely petitioned for panel rehearing pursuant to Fed. R. App. P. 40,[3] bringing to the appellate court's attention the apparently overlooked or misapprehended facts and law that had been cited in Stefanini's opening brief on appeal. Petitioner further clarified the record citations the appellate court found inadequate by providing more specific citations.

Nonetheless, on September 8, 2021, the United States Court of Appeals for the Ninth Circuit denied

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[2] "The argument, which must contain:

> (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."

Fed. R. App. P. 28(a)(8)(A).

[3] In relevant part, "Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted." Fed. R. App. P. 40(a)(2).

the request to restore the case to the calendar for resubmission and/or argument or to issue any other appropriate order, and in a split panel decision maintained the panel's decision to summarily dismiss the appeal without considering the merits of the case.

A. Specific Background of the Case.

No evidentiary trial was ever held in this case. As summarized by the United States District Court for the Northern District of California, "Vicki Stefanini worked in sales at HPE for about one and a half years." (Jan. 22, 2020, U.S. District Court Order at App.4a.) Although evidence was presented in the District Court regarding Petitioner's extensive employment prior to working at HPE, and requisite education and experience qualifying for the job according to HPE's job description, the District Court failed to consider these issues when adjudicating HPE's motion for summary judgment.

The District Court noted that during her tenure at PHE, Ms. Stefanini "was transferred to a new combined HP-Aruba sales team led by Aruba salesperson Stephen Carlock." (Jan. 22, 2020, U.S. District Court Order at App.5a.) However, the District Court failed to consider that Ms. Stefanini was the only woman employed on this sales team and did not evaluate the legal consequence of evidence presented showing that Ms. Stefanini's supervisor Stephen Carlock made disparaging remarks about her because of her gender, told her she needed permission from male members of the sales team to attend a sales meeting, and that a high-profile customer was a "good ole boys" group who preferred to work with men.

The District Court did note that Respondent Stephen Carlock (Defendant below), during a punitive performance review meeting, "informed Stefanini that he was transferring one of her accounts, Comcast, to another team member." (Jan. 22, 2020, U.S. District Court Order at App.6a) However, the District Court did not evaluate the presented evidence that this transfer of accounts constituted intentional interference with Ms. Stefanini's ability to make critical sales numbers, and that Stephen Carlock provided additional resources and funds to male coworkers while explicitly excluding Ms. Member from such supportive services.

The District Court knew HPE conceded Ms. Stefanini alleged she "complained to Defendant Carlock on April 28, 2016 about the alleged misreporting of her sales numbers in her "MyComp Portal," which would result in the non-payment of allegedly earned compensation," (Aug. 27, 2018, Notice of Removal of Action), yet the District Court did not consider that Stephen Carlock corrected errors in the MyCOMP portal for the male salespeople but failed to correct the errors for Ms. Stefanini. HPE's faulty MyCOMP payment system and Mr. Carlock's refusal to address its errors resulted in financial loss to Ms. Stefanini and reflected poorly on her work performance through no fault of her own.

In this context of selective parsing of the evidence before the court, the District Court dismissed (Plaintiff below) Petitioner Stefanini's claims for Gender Discrimination, Failure to Prevent Discrimination, and Wrongful Termination. (Jan. 22, 2020, U.S. District Court Order at App.20a)

The District Court in similar fashion gave short shrift to Petitioner Stefanini's claims of Retaliation

for Exercising CFRA Rights, (Jan. 22, 2020, U.S. District Court Order at App.13a-14a), Interference with FMLA Rights, (App.14a-15a), Retaliation, (App.15a-16a), Failure to Pay Agreed-Upon Wages and Wages Due Upon Termination, (App.16a-18a), Breach of Contract, (App.19a), and Unfair Competition, (App.19a-20a). Among other omitted facts, the District Court's cursory treatment of these claims does not evaluate Ms. Stefanini's medical conditions, of which HPE was aware, and her need for ongoing cancer treatments and her need to take medical leave associated with those treatments. As another example, the District Court acknowledged that evidence was submitted that Ms. Stefanini had made a complaint regarding her ill-treatment to HPE's Human Resources department, (*see, e.g.,* Jan. 22, 2020, U.S. District Court Order at App.7a), but overlooks the temporal relation between the HR department's stated conclusion that the complaint was unsubstantiated and Ms. Stefanini's termination by HPE a few days after the HR department's conclusion, on October 17, 2016.

The District Court's error in not evaluating pertinent evidence put before the Court by Ms. Stefanini likely resulted from the trial court arbitrarily disregarding Ms. Stefanini testimony and documentary evidence, while instead crediting HPE's documentary evidence. Governing legal authority does not permit this arbitrary dismissal of presented evidence.

In this context, upon the District Court entering summary judgment against Petitioner Stefanini on January 22, 2020, (Jan. 22, 2020, U.S. District Court Order at App.4a-20a), Ms. Stefanini filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. Following briefing, a panel of the

Ninth Circuit Court of Appeals summarily dismissed the appeal "for failure to comply with Federal Rule of Appellate Procedure 28(a)(6)." (Aug. 2, 2021, Memorandum at App.2a-3a.) A timely Petition for Panel Rehearing was filed seeking to correct what was identified as lacking in the appellate briefing, distinguishing the caselaw relief upon by the panel to warrant the dismissal, and requesting reinstatement of the case; however, in a split decision the panel denied the petition for rehearing and declined to "address the merits of the appeal." (Sep. 8, 2021, Order at App.22a.)

B. Prior Law that was Overlooked to Reach the Outcome Below.

Federal law statutorily guarantees a litigant who loses in federal court an appeal as of right. 28 U.S.C. § 1291;[4] Fed. R. App. P. 3(1).[5] This statutory guarantee is rendered meaningless if the appellate court decides not to allow the appeal to proceed based on an arbitrary

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[4] "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title." 28 U.S.C. § 1291.

[5] "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)." Fed. R. App. P. 3(1).

determination that Fed. R. App. P. 28 has not been satisfied.

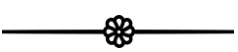
Further, while "[i]t cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation" *Thomas v. Arn*, 474 U.S. 140, 146 (1985), those powers are not without limit and whether the use of such power to dismiss a case can be upheld depends "on whether it was within the permissible range of the court's discretion." *Link v. Wabash Railroad Company*, 370 U.S. 626, 631 (1962). Two main principles govern any court's exercise of inherent power: "an inherent power must be a reasonable response to a specific problem and the power cannot contradict any express rule or statute." *Dietz v. Bouldin*, 579 U.S. ___, 136 S.Ct. 1885, 1892 (2016).

While the dismissal of Petitioner's case before the United States Court of Appeals for the Ninth Circuit may not clearly contradict any express rule or statute, the fact the petition for rehearing was denied by a split panel is at least some indication that the dismissal (in light of the corrective citations appearing in the August 12, 2021 Petition for Panel Rehearing) was not a reasonable response to a specific problem. The dismissal on the grounds of a rule governing briefing standards, without examining the merits of the appellate case, impinges upon the constitutional rights of the Petitioner, and particularly effectively denies the right to direct appeal.

In *Mitchel v. General Electric Co.*, 689 F.2d 877 (9th Cir. 1982), a different panel of the Ninth Circuit dismissed an appeal; yet, the egregious violations of the briefing rules in the *Mitchel* case cannot compare with the substantial compliance of the Petitioner in

the present case. Further, even given the extensive and recalcitrant violations appearing in the *Mitchel* case, the panel tempered "the apparent harshness to Mitchel of [ ] refusal to consider the merits of this appeal because [ ] counsel failed to comply with the rules," *Mitchel*, 689 F.2d at 879, by proceeding to consider the merits of the case and finding that the "unsubstantiated and conclusory allegations would be insufficient to oppose defendants' evidentiary showing under Fed. R. Civ. P. 56(e)," *Id*. No such consideration of the merits by the Ninth Circuit panel occurred in the present case.

It appears that this Court has not announced whether a right to direct appeal is guaranteed by the Constitution. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, *passim* (2013). The posture and procedural history of the present case display the importance of a decision in this area of appellate law. "By recognizing a nondiscretionary constitutional right to appeal, the Court can ensure that liberty and property rights remain protected even in the unusual or uninviting case." Robertson, 91 N.C. L. REV. 1219 at 1223.



REASONS FOR GRANTING THE PETITION

The instant case is an unfortunate part of a nationwide trend among the federal Courts of Appeals to dispose of cases without reaching the merits of a case by declining to address matters that the appellate court deems to be inadequately briefed. As one commentator recently noted,

> As federal dockets have filled to the brim, circuit courts have sought new ways to filter issues from the briefs they read, often resulting in harsh consequences. The policy of declining to consider issues not raised at the trial court or not included in the briefs on appeal is as old as appellate practice itself. But declining to consider issues that were raised below and were raised in the initial brief-albeit perhaps without citations to the record or to case law or with a conclusory argument-is a relatively new one.

Christopher F. Edmunds, *The Judicial Sieve: A Critical Analysis of Adequate Briefing Standards in the Federal Circuit Court of Appeals*, 91 TUL. L. REV. 561, 563 (2017). This case presents an opportunity for this Court to announce that dismissals of appellate cases that result in a denial of due process cannot be used to further that trend.

Edmunds cautions are not made in isolation. As another writer noted,

> The practice of abandonment by poor presentation significantly predates the 1990s and

> occurs outside the federal circuits, but there does appear to be a connection, at least in the federal courts, between an increased caseload and increased findings of abandonment by poor presentation.
>
> Many of the canonical statements of abandonment by poor presentation appear to date from the late 1980s, when the federal courts were in the middle of a massive increase in caseload. . . . Instances of abandonment by poor presentation appear to tick steadily upwards from the late 1980s through the 2000s. From 1984 to 1990, filings per judgeship on the Federal Courts of Appeals increased from 194 to 237, or roughly 22%. They rose to 300 by 1997, an increase of over 50% in 13 years. . . . Given this "half century of unrelenting growth in judicial workload," it is natural that overworked judges would find themselves more often relying on a legally defensible method of ignoring convoluted briefs and cursory arguments.

Benjamin D. Raker, *The Ambiguity and Unfairness of Dismissing Bad Writing*, 69 CLEV. ST. L. REV. 35, 67 (2020). Reliance on Fed. R. App. P. 28 as a bar to reaching the merits of an appellate case is not in keeping with the intent leading to the enactment of the Rule, since "the federal rules were meant to lower barriers to entry for litigation, not heighten briefing standards. . . . A prominent treatise has noted that '[o]ne of the most striking achievements in the federal rules from the first has been the simplified procedures they introduced for taking appeals.' If

FRAP 28 spurred greater scrutiny of litigants' writing, that is not in keeping with the mood of the federal rules." Raker, 69 CLEV. ST. L. REV. at 49.

This Petition for a Writ of Certiorari has been filed because the opposing parties were successful in their attempts to persuade the District Court to ignore evidence presented in support of (Plaintiff below) Petitioner Stefanini's cause of action, and the panel of the United States Court of Appeals for the Ninth Circuit did not address the merits of the appellate case—resting instead on a hyper-technical application of the Federal Rules of Appellate Procedure to dismiss the appeal without evaluating the merits of the case. These events have resulted in the employer and its supervisor being insulated from any potential for liability, and have deprived the Petitioner of her constitutionally protected rights.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO ANNOUNCE THAT A TECHNICAL APPLICATION OF THE APPELLATE RULES THAT WORKS AN INJUSTICE WILL NOT BE PERMITTED.

A split in the Circuit Courts exists regarding the appropriate means to enforce the provisions of Fed. R. App. P. 28, governing briefing standards before the Circuit Courts.

Fed. R. App. P. 28(a)(6) requires briefs to include "a concise statement of the case setting out the facts relevant to the issues submitted for review . . . with appropriate references to the record." In the Fifth Circuit, a lapse in compliance with Fed. R. App. P. 28(a)(6) will not necessarily cause the court to dismiss the appeal, although the court admonishes counsel who have failed to meet the requirements of the Rule. *See,*

e.g., In re Cmty. Home Fin. Servs., Inc., 990 F.3d 422, 424 n.1 (5th Cir. 2021) ("The parties have made it difficult to construct an accurate factual and procedural history by omitting record citations, including incorrect record citations, and making slightly incorrect factual assertions. We remind counsel of their duty . . . ").

In the Federal Circuit, a failure to abide by the requirements of Fed. R. App. P. 28(a)(6) may result in the noncompliant portion of a brief being stricken; yet, the court may still proceed to a determination of the merits of the appellate case. *See, e.g., Arunachalam v. Int'l Bus. Machs. Corp.*, 989 F.3d 988, 1000-1001 (Fed. Cir. 2021). In the Second Circuit, even when a failure in briefing "to comply with Rule 28 is sufficiently serious to [exercise] discretion to summarily dismiss this appeal," the court may opt "to consider the merits of this appeal because plaintiffs' claims are substantial enough to merit a trial, and declining to consider this appeal would unfairly penalize plaintiffs for [an attorney's] failings as an advocate." *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 133 (2nd Cir. 2004).

In the Ninth Circuit, the brief content standards required by Fed. R. App. P. 28 have been summarized as "[i]n order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. Hence we have briefing rules." *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997). Yet, caution is exercised even in cases presenting a slubby mass of words as the Circuit Court notes, "Enough is enough. We strike the N/S briefs and dismiss its appeal. Even so, we would feel most uneasy if this were an other-

wise meritorious appeal, which cried out for reversal of the district court's decisions. 'We acknowledge the apparent harshness . . . of our refusal to consider the merits of this appeal because . . . counsel failed to comply with the rules.' *Mitchel*, 689 F.2d at 879. However, the appeal is not meritorious." *N/S Corp.*, 127 F.3d at 1146.

In the Seventh Circuit, evaluating compliance with "Rule 28(a)(6) of the Federal Rules of Appellate Procedure," an appellant who "has failed to cite any basis, either factual or legal, for [ ] arguments [ ] has, therefore, waived these arguments." *Dolphin v. Starkman*, 62 F.3d 1419 (7th Cir. 1995). In such instances, the Seventh Circuit will dismiss an appeal. *Id.*

Similarly, Fed. R. App. P. 28(a)(8)(A) requires briefs to include in the argument section "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." For example, in the Fourth Circuit a determination that an issue has been raised without sufficient citation to the record may lead to the court deeming the argument to be waived. *See, e.g., Projects Mgmt. Co. v. Dyncorp Int'l LLC*, 734 F.3d 366, 376 (4th Cir. 2013). Yet, other Circuit Courts may overlook a failure to include detailed citations to the record. *See, e.g., Santana-Diaz v. Metro. Life Ins. Co.*, 816 F.3d 172, 176 n.4 (1st Cir. 2016) ("We are none too pleased that Santana–Díaz's brief, indeed, lacks a separate statement of facts section and record citations, but we will not dismiss the case for these oversights"); *In re Ogden*, 314 F.3d 1190, 1197 n.4 (10th Cir. 2002) ("When an appellant is represented . . . we are reluctant to consider arguments that do not contain legal

support . . . Nevertheless, we proceed with the discussion of this issue only '[t]o avoid any appearance that we are sacrific[ing] substantive justice on the altar of administrative convenience.'").

It is not clear that case dismissal is a proportionate remedy for even blatant failure to comply with the requirements of Fed. R. App. P. 28(a)(8)(A). Alternatively, the inherent powers of the federal Courts of Appeals certainly would include ordering a litigant to provide an amended brief that corrected the identified deficiencies, and such a process is unlikely to significantly increase the workload of the courts, while "deficiencies—such as failures to cite case law or reference the record-are less substantive and often easily correctable with an amended brief." Edmunds, 91 TUL. L. REV. at 587 n.199.

Edmunds raises the question of whether the inconsistent holdings of the Circuit Courts on the proper enforcement of Fed. R. App. P. 28, when viewed "[a]gainst the backdrop of the caseload crisis," gives "good reason to question whether judicial efficiency–not adversarialism–is actually the driving force behind adequate briefing standards." Edmunds, 91 TUL. L. REV. at 578. In this vein, Edmunds provides the following illustration,

> Consider again the case of *Willis v. Cleco Corp*. Although the appellant had failed to explicitly contest the district court's determination that he had not made a "prima facie" case of unlawful termination, the dissenting judge on the panel took it upon himself to comb the record and found facts that easily satisfied the prima facie burden. Specifically, he pointed to declarations that

> the supervisors who had fired Willis had been known to refer to African Americans as "gorilla[s]" and "coons," which constitutes "direct evidence" of discrimination and—contrary to the majority's holding—obviates the need to show a "similarly situated" individual. Thus, even though the record clearly showed a genuine dispute as to an issue of material fact, and the other two judges on the panel had been made aware of this, they nonetheless refused to consider the argument, commenting that the courts have no "duty to sift through the record in search of evidence." That judges have no duty to sift through the record is self-evident, but what explains their willingness to turn a blind eye towards evidence discovered by a panel member who voluntarily does the sifting?

Edmunds, 91 TUL. L. REV. at 561.

When the summary dismissal of appeals occurs without a review of the merits of the dispute, the U.S. taxpayers are bearing the cost of an appellate system that is not consistently protecting the parties' right to appeal and the exercise of appellate supervision of trial courts to correct the errors below and provide necessary guidance to the District Courts. This is not a reasonable exercise of the powers of the appellate courts.

II. THIS CASE ADDRESSES A NOVEL CONTEXT REGARDING THE FUNDAMENTAL REQUIREMENTS OF DUE PROCESS.

This Court has long recognized that matters such as a punitive damages award can be "so 'grossly excessive' as to violate the substantive component of

the Due Process Clause. *See, e.g., Txo Production Corp v. Alliance Resources Corp*, 509 U.S. 443, 458 (1993). The lodestar in such an evaluation is a general concern for reasonableness. *Id.*

The action of the United States Court of Appeals for the Ninth Circuit in this case divested Petitioner of any legal or equitable interest she had in her cause of action against her former employer and its supervisor. That Petitioner's cause of action gave rise to protectable property interests is axiomatic by reference to bankruptcy law. *See, e.g., Bauer v. Commerce Union Bank, Clarksville, Tennessee*, 859 F.2d 438, 441 (6th Cir. 1988) ("well established that 'the interests of the debtor in property' include 'causes of action.'").

Property interests are protected by the Constitution of the United States, and can be created and defined by "existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). In analyzing due process protections in a given case, as contrasted with any burden facing the government to provide due process, great weight is given to the degree of potential deprivation. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Even when the property rights in question are merely the expectation of welfare benefits, generally no government burden can outweigh the interests of benefit recipients without any opportunity to be heard before an impartial adjudicator. *Id.* at 266.

The decision of the Ninth Circuit Court of Appeals to impose in this case the draconian sanction of dismissal of the appellate case due to the lower appel-

late's court's determination that the briefing missed the mark of Fed. R. App. P. 28 should be disfavored. In this case, the Ninth Circuit panel overlooked the obligation to be fundamentally fair to a litigant faced with the deprivation of a significant property interest.

At a minimum, a hearing should have been held by the lower appellate court to resolve the many controversies related to the proper application of Fed. R. App. P. 28 to the posture of this case—at least some of which cause one of the appellate judges to split from the decision of the panel. (Sep. 8, 2021, Order, *attached hereto* at App.21a.) In short, the Petitioner should have been provided with a meaningful opportunity to be heard in a meaningful fashion.

III. THIS CASE INVITES THE COURT TO CLARIFY THAT, AS A MATTER OF LAW, SUBSTANTIAL COMPLIANCE WITH THE APPELLATE RULES DOES NOT WARRANT DISMISSAL OF AN APPEAL.

A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the appellate court has overlooked or misapprehended. Fed. R. App. P. 40(a)(2); *Sukhov v. Gonzales*, 403 F.3d 568, 570 (8th Cir. 2005). A petition for rehearing is denied where a party fails to assert any error of law or fact. *Id.* In light of this requirement of Fed. R. App. P. 40, in her Petition for Panel Rehearing, Petitioner detailed the laws and facts overlooked and misapprehended by the Ninth Circuit panel.

In the present case, the Ninth Circuit Court of Appeals summarily dismissed Petitioner Stefanini's appeal without any consideration of the merits of the case, pursuant to Fed. R. App. P. 28(a)(6) based on

the grounds that the panel determined that her appellate brief did not include proper citations to the record in the statement of the case of the brief filed by Ms. Stefanini. To be clear, Ms. Stefanini's appellate brief included facts from the record and arguments of law to support her appeal, but her brief was found to be deficient as to the format of citations to the record only in the statement of the case of her brief. *Compare* Fed. R. App. P. 28(a)(6) *with* Aug. 2, 2021, Memo. *attached hereto* at App.1a. Specifically, the Court noted that the brief cited only the first page of the summary judgment decision and the first pages of several district court filings. (Aug. 2, 2021, Memorandum at App.2a.)

As a result, the panel of the Ninth Circuit Court of Appeals has overlooked or misapprehended the facts and legal arguments in Ms. Stefanini's appellate brief. In the Petition for Panel Rehearing, Ms. Stefanini addressed the defect in her brief noted by the panel and provided extensive pinpoint citations to the record. (Aug. 12, 2021, Appellant's Petition for Panel Rehearing)

Especially as corrected by Ms. Stefanini, the Ninth Circuit panel erred to summarily dismiss Ms. Stefanini's appeal without consideration of the merits of the case. Simply failing to cite the specific page numbers of documents cited to in the briefing does not support summary dismissal of an appeal. *See Aguilar v. Attorney General United States*, 703 Fed.Appx. 139, 144 (3rd Cir. 2017) (unpublished, analyzing issue). It would have been appropriate, fair and beneficial to judicial economy for the United States Court of Appeals for the Ninth Circuit to restore the case to the calendar

for resubmission and/or argument and to consider the merits of the Appeal.

Petitioner does not dispute that the Court of Appeals' task on appeal is considerably lightened when parties refer to pages of the record or appendix in their statements of fact in briefs, pursuant to Fed. R. App. P. 28(a)(6). *United States v. Bell*, 500 F.2d 1287, 1290 n. 7 (2nd Cir. 1974). Fed. R. App. P. 28 requires citation to the pages of the documents referenced. *Rebuck v. Vogel*, 713 F.2d 484, 487 (8th Cir. 1983). Petitioner agrees that a lapse like simply referring to transcripts without page numbers would have been inadequate to comply with Fed. R. App. P. 28. *United States v. Hollow*, 747 F.2d 481, 483 (8th Cir. 1984).

And, Petitioner does not protest that the panel found her initial citations to the record in the statement of the case to be too inexact. Nonetheless, the sanction imposed of dismissal of her appellate case without any consideration of the merits of the case is disproportionate to the problems the Ninth Circuit noted with the briefing.

The Ninth Circuit panel cited *Mitchel v. General Electric Co.*, 689 F.2d 877, in support of the decision to summarily dismiss Ms. Stefanini's appeal on the grounds that her brief cited only to the first page of various documents appended to her appeal brief from the record, instead of pointing the court to the specific pages of those documents in her statement of the case. The *Mitchel* case does not support dismissal on the facts of the present case.

In contrast, in *Mitchel*, the plaintiff's opposition to summary judgment contained allegations with no citation to supporting evidence of any kind, and his

appellate brief was the same. *Id.* at 878. This conduct was considered "inexcusable" in *Mitchel* because the appellate court had already instructed the plaintiff's counsel at oral argument concerning the requirements of the appellate rules and the accepted techniques of appellate practice and had deferred submission of the case "to give Mitchel's counsel an opportunity to file a list of citations to the record in support of the numerous assertions of fact." *Id.* at 879. Mitchell's counsel then simply filed a list of "over 100 unannotated references to some 250 pages of deposition testimony, none of which referred back to any particular assertion of fact in Mitchel's brief." *Id.* It was impossible to discern which of the citations were meant to support Mitchel's various assertions and many appeared to have no relevance to anything at all. *Id.*

Here, unlike in *Mitchel*, the Petitioner's appeal brief does not follow or mirror a brief from the trial court proceedings that was devoid of any reference to facts and evidence. The Petitioner's appeal brief provided all of the relevant facts and law and included the supporting documents with her brief, but she merely cited to only the first pages of those documents instead of the precise pages themselves. Also, unlike Mitchel, as Appellant the Petitioner has not been given an opportunity to correct the mistake observed by the appellate court. Nevertheless, as Appellant the Petitioner corrected the mistake by including in her Petition for Panel Rehearing a list of the facts asserted, the arguments to which they pertained, and citations to specific page numbers in the Excerpt of Record. (*See, e.g.,* Aug. 12, 2021, Appellant's Petition for Panel Rehearing) Therefore, this case is inapposite to facts of the *Mitchel* case, and dismissal was not an appro-

priate sanction. The United States Court of Appeals for the Ninth Circuit should have restored the case to the calendar for resubmission and/or argument or issued any other appropriate order.

In *Lin Quan v. Gonzales*, 428 F.3d 883, 886 (9th Cir. 2005), the appellant's opening brief failed to cite at all to the administrative record below in violation of Fed. R. App. P. 28. However, the Ninth Circuit ruled that it was not necessary to impose sanctions in that case because the record had been lodged and the court had conducted its own independent review. *Id.* The court did not dismiss the appeal; it allowed the appeal to proceed on the merits. *Id.* at 886-90.

In *Aguilar*, the Third Circuit followed *Quan*. The appellant in *Aguilar* did not cite to the record below in his opening brief, but it was clear which facts he was referencing, the court had the entirety of the record in front of it, and Aguilar had otherwise appropriately cited to legal authority to support his arguments. *Aguilar*, 703 Fed.Appx. at 144. The court "[did] not deem his failure to provide precise record citations to be sufficient to waive his right to [appeal the decision below]." *Id.* Instead, the court stated, "we follow the example of the Ninth Circuit in *Quan v. Gonzales*, 428 F.3d 883, 886, and admonish counsel to comply with the rules of our Court in the future." *Id.*

In the present case, Ms. Stefanini's appellate briefing was more compliant with Fed. R. App. P. 28 than those at issue in both *Quan* and *Aguilar*. In those cases, the appellant's brief did not cite to the record at all. Here, Ms. Stefanini supported all of her factual assertions with citations to the record, albeit not to the precise pages internal to the referenced documents.

And, as was true in both *Quan* and *Aguilar*, the Ninth Circuit Court of Appeals had before it the record on appeal of Ms. Stefanini's case. Petitioner was not asking the Court of Appeals to "ferret out" the facts relied upon for the appeal. *Compare Mitchel*, 689 F.2d at 878. Ms. Stefanini corrected the record citations in her Petition for Panel Rehearing with references to specific pages.

As the courts chose to proceed in the *Quan* and *Aguilar* cases, the panel for United States Court of Appeals for the Ninth Circuit should have reversed the panel's order dismissing the appeal, restored the case to the calendar for resubmission and/or argument, and allowed the appeal to proceed on the merits.

CONCLUSION

The orders below have denied justice to Ms. Stefanini. The rights enumerated in the Constitution of the United States, U.S. Const. amend. XIV, and the accepted interpretation of the rules governing appeals in the United States Courts of Appeals, are in conflict with what was permitted to take place in the lower appellate court regarding the Petitioner and her cause of action. Correction of these errors is necessary to maintain public confidence in the legal system, and to equitably stem the nationwide trend of unduly prejudicial summary dismissals of appeals.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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