

ORIGINAL

No. 22-452

---

In The  
**Supreme Court of the United States**

---

FILED  
NOV 10 2022  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

BERNICE CURRY-MALCOLM,

*Petitioner,*

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS  
AND ROCHESTER CITY SCHOOL DISTRICT,

*Respondents.*

---

**On Petition For A Writ Of Certiorari  
To The State Of New York Court Of Appeals**

---

**PETITION FOR WRIT OF CERTIORARI**

---

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

November 10, 2022      *Pro se Petitioner*

---

## QUESTIONS PRESENTED

The Questions Presented are:

1. The word “substantial” is not found in the governing statute, CPLR 5601(a), or the New York State Constitution provision that provides for appeals as of right on constitutional grounds. N.Y. Const. art. VI, § 3(b)(1)-(2). There is a conflict in the circuits as to what the word “substantial” means, and whether dismissal of appeals as of right *sua sponte* deprives an aggrieved party of his or her due process rights under the N.Y. Const. Article I, § 11, Fifth and Fourteenth Amendments. The Court of Appeals’ *sua sponte* dismissal of the complaint was an abuse of discretion and conflicts with this Court and other circuits and whether the Due Process Clause of the Fourteenth Amendment prohibits a state supreme court from advocating in the interest of the state where the relevant time limitation to response in an action has expired and whether petitioner was provided adequate process.
2. Whether Section 298 of the New York State Division of Human Rights is unconstitutional and in violation of equal protection and due process under the Fifth and Fourteenth Amendments of the United States Constitution where the transfer of the proceeding is automatic by the lower court to the appellate division without any participation by the agency, who was a necessary named party in the lawsuit before the lower court, and under what circumstances

**QUESTIONS PRESENTED—Continued**

does non-participation equates to constitutional equal protection under the law and due process where a party did not timely appear, move to dismiss, and/or answer and whether the lower court and Appellate Division November 12 Order made based on a record that did not exist below and/or on appeal, and/or in the alternative, the November 12 Order made based on an incomplete record transcript and where the record was not settled as pursuant to CPLR § 5532 AND R. 1000.4(A)(2) [53-55]. See *Weeden v. Ark*, 2 A.D.3d 1280, 768 N.Y.S.2d 891 (4th Dept.2003); *Matter of Lavar C.*, 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept.1992).

3. The Court of Appeals' *sua sponte* dismissal conflicts with the Courts own guidance regarding "Rubber Stamping" an agency's decision. *Matter of New York City Tr. Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54, 577 N.E.2d 40, 45 (1991); *Matter of Reape v. Adduci*, 151 A.D.2d 290, 293, 542 N.Y.S.2d 562, 564 (1st Dept.1989). Did the Appellate Division, Fourth Judicial Department abuse and exceed its discretion in confirming the New York State Division of Human Rights final determination where the court lacked jurisdiction to do so thereby acting as an advocate for the agency and whether the New York State Division of Human Rights final determination was arbitrary, capricious, done in bad faith, error of law, and was not rationally based.

**QUESTIONS PRESENTED—Continued**

4. Whether the actions of the Respondents-Defendants New York State Division of Human Rights and Rochester City School District's Stipulation of Discontinuance filed with the New York State Supreme Court and the Monroe County Clerk's Office dated September 10, 2020 caused the lower court to lose its jurisdictional power to make an Order to transfer a matter to the Appellate Division, Fourth Judicial Department by Order dated October 27, 2020 where defendants-respondents' discontinued the action without serving the Petitioner-Appellant, and under which state, federal and/or constitutional amendment are the attorneys for the respondents allowed to stipulate to and discontinue an action with prejudice without the knowledge and consent of as her the prose litigant and under what circumstance would that be considered a deprivation due process rights under the Fifth and Fourteenth Amendments, and whether the matter should have been remanded to the Division for further proceedings.
5. Under what circumstances should an appellate court "rubber stamp" an agency determination by overlooking the abuse of discretion of the lower court which overstepped in its jurisdiction and was the school district's actions in violation Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), 42 U.S.C. § 1981, the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. ("NYSHRL") and the New York State Constitution.

**QUESTIONS PRESENTED—Continued**

6. Whether the Petitioner sufficiently established a *prima facie* case of discrimination where the Respondent Rochester City School District proffered reasons was false? Title VII prohibits an employer from discriminating “against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1), whether Petitioner showed that the motive to discriminate was one of the employer’s motives and was in fact motivated at least in part by the prohibited discriminatory animus, and whether Petitioner established a *prima facie* case of race-based discrimination and whether Petitioner sufficiently established a *prima facie* case of discrimination and retaliation under NYSHRL and Title VII and whether the Petitioner sufficiently established a *prima facie* case of race-based and age-based discrimination under NYSHRL and Title VII.

## **RULE 29.6 STATEMENT**

Petitioner, 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. Respondents' New York State Division of Human Rights and Rochester City School District are all a corporation and public school district and subsidiary of the State of New York. Petitioner has no knowledge of the Respondents 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.

Petitioner Bernice Curry-Malcolm ("Curry-Malcolm" or "Petitioner, Curry-Malcolm") was the sole *pro se* plaintiff-petitioner in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4925 (Honorable Ann Marie Taddeo, J.S.C.), and sole *pro se* plaintiff-petitioner in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, Docket No. TP 21-00785, and sole *pro se* plaintiff-petitioner before the State of New York Court of Appeals, Docket No. APL-2021-00193).

**PARTIES TO THE PROCEEDINGS—Continued****Respondents**

---

- Created in 1945 (1968), the New York State Division of Human Rights, an agency created to enforce the state's Human Rights Law.

Respondent New York State Division of Human Rights was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4925 (Honorable Ann Marie Taddeo, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, Docket No. TP 21-00785, and before the State of New York Court of Appeals, No. APL-2021-00193).

- Rochester City School District, a Public School District and Municipal Corporation.

Respondent Rochester City School District was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Ann Marie Taddeo, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, combined Docket No. TP 21-00785, and in the appeal before the State of New York Court of Appeals, Docket No. APL-2021-00193).

## **LIST OF RELATED PROCEEDINGS**

New York State Supreme Court, Appellate Division,  
Fourth Judicial Department

Appeal Docket No. TP 21-00785

Bernice Curry-Malcolm, *Petitioner* v. New York State Division of Human Rights and Rochester City School District, a unit of the New York State Executive Department under New York Executive Law section 293, a Public-School Districts, *Respondents*

Date of Final Order: November 12, 2021, Entered November 12, 2021

The State of New York Court of Appeals

Appeal (TP 21-00785) No. APL-2021-00193, Honorable Janet DiFiore, *Chief Judge, presiding, Judge Troutman* took no part

Bernice Curry-Malcolm, *Petitioner* v. New York State Division of Human Rights and Rochester City School District, a unit of the New York State Executive Department under New York Executive Law section 293, a Public-School Districts, *Respondents*

Date of Final Order: SSD 19 dated June 14, 2022, Entered June 14, 2022

In-Person Oral Argument: October 22, 2021

Date of Motion for Leave to Appeal to Court of Appeals  
Denied: March 11, 2022

**LIST OF RELATED PROCEEDINGS—Continued**

New York State Supreme Court

Originating Monroe County Clerks' Index No. 2019/4925, Honorable Ann Marie Taddeo, J.S.C.

Bernice Curry-Malcolm, *Petitioner* v. New York State Division of Human Rights and Rochester City School District, a unit of the New York State Executive Department under New York Executive Law section 293, a Public-School Districts, *Respondents*

Date of Final Order: October 27, 2020, Entered October 27, 2020

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
RULE 29.6 STATEMENT .....	v
PARTIES TO THE PROCEEDINGS .....	v
LIST OF RELATED PROCEEDINGS .....	vii
TABLE OF CONTENTS .....	ix
TABLE OF AUTHORITIES .....	xiii
PETITION FOR A WRIT OF CERTIORARI .....	1
PARTIES TO THE PROCEEDINGS .....	1
OPINIONS BELOW .....	2
JURISDICTION .....	3
CONSTITUTIONAL, STATUTES, RULES, AND REGULATORY PROVISIONS INVOLVED .....	3
INTRODUCTION .....	5
STATEMENT OF THE CASE .....	8
LOWER COURT RULING .....	9
APPELLATE DIVISION RULING .....	9
STATE OF NEW YORK COURT OF APPEALS RULING .....	10
REASONS FOR GRANTING THE PETITION ...	10
I. THE NEW YORK STATE COURT OF AP- PEALS SUA SPONTE DISMISSAL WAS UNCONSTITUTIONAL .....	11

## TABLE OF CONTENTS—Continued

	Page
II. WHETHER PORTIONS OF SECTION 298 OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS LAW AUTOMATIC TRANSFER IS UNCONSTITUTIONAL.....	13
III. THE RUBBER STAMPING OF THE COURTS DECISION CONFLICTS WITH OTHER CIRCUITS.....	15
IV. WHETHER THE DIVISION AND THE ROCHESTER CITY SCHOOL DISTRICT DISCONTINUANCE OF THE ACTION CAUSE .....	16
CONCLUSION.....	18

## APPENDIX

**OPINIONS AND ORDERS**

Order, Appellate Division, Fourth Judicial Department, Bernice Curry-Malcolm v New York State Division of Human Rights and Rochester City School District, Appeals Docket Nos. TP 21-00785 (November 12, 2021) .....App. 1

Order, Appellate Division, Fourth Judicial Department, Bernice Curry-Malcolm v New York State Division of Human Rights and Rochester City School District, TP 21-00785 (May 27, 2021), Entered (May 27, 2021) .....App. 3

## TABLE OF CONTENTS—Continued

	Page
Decision Order and Judgment, State of New York Supreme Court, Bernice Curry-Malcolm v New York State Division of Human Rights and Rochester City School District, Monroe County Clerks' Index No. 2019/4925 (October 27, 2020, Entered October 27, 2020, Ann Marie Taddeo, J.S.C.).....	App. 5
Denial of Motion for Leave to Appeal to State of New York Court of Appeals, Appellate Division, Fourth Judicial Department, Bernice Curry-Malcolm v New York State Division of Human Rights and Rochester City School District, Appeal Docket No. TP 21-00785 (March 11, 2022), Entered (March 11, 2022) .....	App. 8
Order, Dismissal of Appeal, State of New York Court of Appeals, Bernice Curry-Malcolm v New York State Division of Human Rights and Rochester City School District, State of New York Court of Appeals Docket No. APL-2021-00193 (June 14, 2022), Entered (June 14, 2022) .....	App. 10
Constitutional, Statutory, and Regulatory Provisions.....	App. 11
New York State Const., Art. I, §11.....	App. 11
Title VII of the Civil Rights Act of 1964 – Disparate Treatment.....	App. 17
42 U.S.C. §1981.....	App. 18
42 U.S.C. §1983.....	App. 18
28 U.S.C. §1257(a) .....	App. 19

TABLE OF CONTENTS—Continued

	Page
Collective Bargaining Agreement: The Contractual Agreement Between The City School District of Rochester, New York and The Association of Supervisors and Administrators of Rochester (July 1, 2009 – June 30, 2014) (July 1, 2014 through June 30, 2018, with a negotiated extension to June 30, 2019) .....	App. 21

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>300 Gramatan Ave. Assocs. v. State Div. of Human Rights</i> , 45 N.Y.2d 176 (1978) .....	16
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989) .....	7
<i>Green v. Town of E. Haven</i> , 952 F.3d 394 (2d Cir. 2020) .....	4
<i>Matter of Colton v. Berman</i> , 27 A.D.2d 298 (N.Y. App. Div. 1967) .....	15
<i>Matter of Lavar C.</i> , 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept. 1992) .....	13, 14
<i>Matter of New York City Tr. Auth. v. State Div. of Human Rights</i> , 78 N.Y.2d 207, 573 N.Y.S.2d 49, 577 N.E.2d 40 (1991) .....	12, 16
<i>Matter of Reape v. Adduci</i> , 151 A.D.2d 290, 542 N.Y.S.2d 562 (1st Dept. 1989) .....	12, 16
<i>Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.</i> , 77 N.Y.2d 753, 573 N.E.2d 562, 570 N.Y.S.2d 474 (1991) .....	15
<i>McDonald v. Santa Fe 18 Trail Transp. Co.</i> , 427 U.S. 273 (1976) .....	5
<i>McLee v. Chrysler Corp.</i> , 109 F.3d 130 (2d Cir. 1997) .....	18
<i>Quarantino v. Tiffany &amp; Co.</i> , 71 F.3d 58 (2d Cir. 1995) .....	18
<i>Ramseur v. Chase Manhattan Bank</i> , 865 F.2d 460 (2d Cir. 1989) .....	18

## TABLE OF AUTHORITIES—Continued

	Page
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).....	15
<i>Robertson v. Chambers</i> , 341 U.S. 37, 71 S.Ct. 547, 95 L.Ed.2d 726, 1951 U.S. LEXIS 2107 .....	18
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976) .....	5
<i>Weeden v. Ark</i> , 2 A.D.3d 1280, 768 N.Y.S.2d 891 (4th Dept.2003) .....	13, 14
CONSTITUTIONAL PROVISIONS	
United States Const., amend. V .....	<i>passim</i>
United States Const., amend. XIV, § 1.....	<i>passim</i>
New York State Constitution, Article I, § 11 .....	8
STATUTES	
28 U.S.C. § 1254 .....	3
28 U.S.C. § 1257(a).....	3, 10
29 U.S.C. § 623(a)(1) .....	4, 8
42 U.S.C. § 1981 .....	<i>passim</i>
42 U.S.C. § 1983 .....	5, 6, 8, 9
42 U.S.C. § 2000e et seq.....	8, 9
42 U.S.C. § 2000e-2(a) .....	4, 8
42 U.S.C. § 2000e-3(a) .....	4
1NY Jur., Administrative Law .....	7, 15
Age Discrimination in Employment Act .....	4, 6, 8, 9

## TABLE OF AUTHORITIES—Continued

	Page
Title VII of the Civil Rights Act of 1964 .....	<i>passim</i>
New York State Human Rights Law.....	<i>passim</i>
REGULATIONS	
22 NYCRR § 202.57 .....	9
CPLR 5601 .....	10, 12, 19
CPLR 5532 .....	14
CPLR 7803 .....	15, 16
CPLR § 7804 .....	9
R. 1000.4(A)(2) .....	14

## **PETITION FOR A WRIT OF CERTIORARI**

Pro *se* Petitioner, Bernice Curry-Malcolm respectfully petitions for a writ of certiorari to review the *sua sponte* decision of the New York State Court of Appeals in this case. This case presents the Court with an opportunity to continue providing coherence and clarity to the statutory framework applicable to state and federal-sector discrimination and retaliation claims. Both state and federal laws prohibit unlawful discrimination in employment.

---

## **PARTIES TO THE PROCEEDINGS**

Petitioner Bernice Curry-Malcolm (“Curry-Malcolm” or “Petitioner, Curry-Malcolm”) was the sole *pro se* plaintiff-petitioner in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4925 (Honorable Ann Marie Taddeo, J.S.C.), and sole *pro se* plaintiff-petitioner in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, Docket No. TP 21-00785, and sole *pro se* plaintiff-petitioner before the State of New York Court of Appeals, Docket No. APL-2021-00193).

Respondent New York State Division of Human Rights was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4925 (Honorable Ann Marie Taddeo, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, Docket No. TP 21-00785, and

before the State of New York Court of Appeals, No. APL-2021-00193).

Respondent Rochester City School District was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Ann Marie Taddeo, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, combined Docket No. TP 21-00785, and in the appeal before the State of New York Court of Appeals, Docket No. APL-2021-00193).

---

### **OPINIONS BELOW**

The decision of the State of New York Court of Appeals *sua sponte* dismissal can be found at and is available in (Pet., at App., *infra*, *App. 10*).

The Appellate Division, Fourth Judicial Department Order denying petitioner's motion for leave to appeal to the Court of Appeals can be found and is available in (Pet. at App., *infra*, *App. 8*).

The Appellate Division, Fourth Judicial Department Order dated and entered November 12, 2021 [TP 21-00785] can be found at *2021 NY Slip Op. 06280*, and is available in (Pet. at App., *infra*, *App. 1*).

The decision order and judgment of the State of New York Supreme Court (Honorable Ann Marie

Taddeo, J.S.C.) dated October 27, 2020 can be found at is available in (Pet. at App., *infra*, App. 5).

---

## **JURISDICTION**

The State of New York Court of Appeals *sua sponte* order was decided and entered on June 14, 2022 (APL 2021-00193) and received by petitioner by United States Postal mail. The State of New York Court of Appeals *sua sponte* decision order and judgment is available in the (Pet. at App., *infra*, App. 10). The jurisdiction of this Court to review the Judgment of the State of New York Court of Appeals is invoked under 28 U.S.C. § 1257(a) and 28 U.S.C. § 1254. The final order of the Appellate Division, Fourth Judicial Department order dated November 12, 2021 (TP 21-00785) and entered November 12, 2021.

---

## **CONSTITUTIONAL, STATUTES, RULES, AND REGULATORY PROVISIONS INVOLVED**

Pertinent statutory provisions are reprinted in the appendix to this petition. (Pet. at App., *infra*, App. 11-App. 21).

The United States Const., amend. V, in pertinent part, states that no person shall be deprived of life, liberty, or property, without due process of law.

The United States Const., amend. XIV, § 1, in pertinent part, states that all persons born or naturalized

in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Rights Act of 1964 forbids disparate treatment as well as 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.”

42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts. It prohibits racial discrimination against whites as well as nonwhites. See *McDonald v. Santa Fe 18 Trail Transp. Co.*, 427 U.S. 273, 295 (1976) (Section 1981 was intended to “proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race”). In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court held that Section 1981 regulated private conduct as well as governmental action.

---

## INTRODUCTION

Discrimination should not be tolerated and/neither should it be ignored. This case presents the Court with an opportunity to continue providing coherence and clarity to the statutory framework applicable to state and federal-sector discrimination and retaliation claims. State employees under both state and federal laws should be made free of any discrimination based on race, color, age, disability, sex/gender, sex orientation, religion, housing, or national origin. The New York State Division of Human Rights have jurisdiction

over discrimination complaints filed by public school district employees under New York State Human Rights Law. The New York State Division of Human Rights is a New York State agency created to enforce the state's Human Rights Law. The Division is a unit of the New York State Executive Department under New York Executive Law section 293. The Division was created in 1968, with responsibility to enforce the New York State Human Rights Law, which is codified at New York Executive Law sections 290-301. From 1945 to 1968, the Division was called the State Commission on Discrimination and the Human Rights Law was called the Law Against Discrimination. The Human Rights Law prohibits discrimination in the provision of housing, employment, credit, and access to certain public places based on specified protected characteristics, which include age, race, gender, sexual orientation, and disability. The agency is responsible for investigating, prosecuting, and adjudicating complaints of discrimination brought under New York's Human Rights Law. The Rochester City School District is a an employer under the jurisdiction of the Division under New York Executive Law section 296.

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.

The arbitrary or capricious test chiefly “relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact.” (1NY Jur., Administrative Law, § 184, p. 609).

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).

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.

In the Petitioner’s case the New York State Supreme Court, the New York State Appellate Division,

Fourth Judicial Department and New York State Court of Appeals simply placed a rubber stamp on unlawful employment discrimination and retaliation in violation of New York State Human Rights Law, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act (“ADEA”), 42 U.S.C. § 1983, 42 U.S.C. § 1981, Fifth and Fourteenth Amendments, and in violation of the New York State Constitution, Article I, § 11.

---

### **STATEMENT OF THE CASE**

Petitioner Bernice Curry-Malcolm lost her job as a Central Office Committee on Special Education (“CSE”) Chairperson in the school district’s job title of Coordinating Administrator of Special Education (“CASE”) at the Rochester City School District because she complained of and opposed unlawful discrimination because of her race (Black/African American), color (Black/African American), age (petitioner was fifty-eight (58) years old when the discriminatory and retaliatory events begin), sex (female, excludes sexual harassment and sexual violence, and gender (female, and minority), and because she engaged in conduct that was protected by New York State Human Rights Laws, Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e-2(a)2, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1), 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Fifth and Fourteenth amendments, due process and equal protection clauses. To redress these unlawful

actions against her, petitioner filed charges of discrimination with the New York State Division of Human Rights (“NYSDHR”) with dual filing with the United States Equal Employment Opportunity Commission (“EEOC”). This appeal is being brought for a proper purpose to redress actual discrimination and retaliation, 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 unlawful discrimination and unlawful retaliation.

### **LOWER COURT RULING**

The lower court transferred the proceeding to the Fourth Appellate for disposition of the case without resolving all the issues. The lower court found that it lacked jurisdiction over the case and transferred the case for disposition (22 NYCRR § 202.57, CPLR § 7804).

### **APPELLATE DIVISION RULING**

The Appellate Division, Fourth Judicial Department dismissed the petition without articulating the reason for the dismissal. The agency did not submit a record on appeal and neither did the agency appear and/or submit a record below.

**STATE OF NEW YORK  
COURT OF APPEALS RULING**

The New York Court of Appeals *sua sponte* dismissed the appeal on the grounds that no appeal as of right lies absent direct involvement of a substantial judicial question (See CPLR 5601).

---

**REASONS FOR GRANTING THE PETITION**

The Supreme Court is authorized to review state court decisions holding state laws violative of the Constitution. Specifically, under 1257(a), final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by writ of certiorari. The Supreme Court decides only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Agencies dismissals are so common and rubber-stamped just because they made one. If an agency decision is rubber stamped over 80% of the time by Courts, how is that due process and/or equal protection under the law where it is so common to the fact that after a complainant file a complaint in Court that the agency does not have to appear in Court and/or even answer, but somehow the agency and/or the employer enjoy the rights to dismissal even where they are necessary parties in a case but failed to timely appear, move to dismiss and/or answer the complaint/petition.

This case is of significant importance because it was not congressional and/or legislature intent to create an agency to enforce Human Rights Laws to deprive a complainant of his or her rights to equal protection and due process and for that agency's actions to create further violations by not acting within the framework of its judicial powers to eliminate unlawful discrimination and retaliation. Whether portions Section 298 of the New York State Division of Human Rights is unconstitutional where the transfer of the proceeding after a hearing is automatically transferred from the New York State Supreme Court to the Appellate Division for automatic dismissal just because the agency made the decision. Whether where there is no participation by the agency in the proceeding below under what circumstances does non-participation by the agency equates to constitutional due process. Whether, and in what circumstance, courts should excuse Respondents where a party did not timely appear, move to dismiss, and/or file an answer to the complaint/petition as required under CPLR and the Fed. R. Civ. Proc. Whether state and federal law requires a defendant or respondent to timely appear, move to dismiss and/or answer a complaint/petition.

**I. THE NEW YORK STATE COURT OF APPEALS SUA SPONTE DISMISSAL WAS UNCONSTITUTIONAL**

The New York State Court of Appeals is the highest state court in New York that a petitioner can presents its claims to after the dismissal by the lower and

appellate courts. The New York State Court of Appeals had jurisdiction over this cause and its *sua sponte* dismissal under CPLR 5601 was nothing more than a “rubber stamp” of the agency, lower court, and appellate division’s decision. The New York State Court of Appeals *sua sponte* dismissal on the grounds that no appeal lies as of right from the unanimous orders of the Appellate Division absent direct involvement of a substantial constitutional question was unconstitutional. The Appeals Court as a reviewing court failed to exercise a genuine Judicial function adequately and fairly but rather merely “rubber stamped”. The State of New York Court of Appeals had jurisdiction over the Petitioner’s appeals as of right and found a final order of the Appellate Division.

Although judicial review of an agency determination appears to be limited, the Court of Appeals has made clear that a reviewing court exercises a genuine judicial function and that review is more than a “rubber stamp” of an agency’s determination. See *Matter of New York City Tr. Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54, 577 N.E.2d 40, 45 (1991); *Matter of Reape v. Adduci*, 151 A.D.2d 290, 293, 542 N.Y.S.2d 562, 564 (1st Dept. 1989).

## **II. WHETHER PORTIONS OF SECTION 298 OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS LAW AUTOMATIC TRANSFER IS UNCONSTITUTIONAL**

Portions of Section 298 of the New York State Division of Human Rights Law is unconstitutional where the agency does not have to appear before the lower court as a necessary party and the proceedings are automatically transferred to the Appellate Division for disposition and where there was no substantial record for review. Did the Petitioner have a clear right to settlement of the record? Petitioner challenges Section 298 on constitutional grounds that part of the N.Y. Executive Law is unconstitutional where the process is merely a formality of disposition of a complaint by depriving a complainant due process and equal protection of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The lower court abused its discretion by improperly transferring the action to the Appellate Division, Fourth Judicial Department for determination on all the issues without resolving Appellant's civil rights claims. There was no settlement of the record. Every appellant has a clear legal right to settlement of the record. *Weeden v. Ark*, 2 A.D.3d 1280, 768 N.Y.S.2d 891 (4th Dept.2003); *Matter of Lavar C.*, 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept.1992). There could be no substantial evidence found in the record and thereby no determination could be made to support the agency's determination because there was no certified record before the lower court and/or on appeal before the

court of the New York State Division of Human Rights' full administrative proceedings for review, and in the alternative the July 22, 2021 certified transcript was incomplete and not settled by the parties as pursuant to CPLR 5532 and R. 1000.4(A)(2) [53-55]. Under what circumstances is it okay, where an agency does not submit the record for review, and/or cherry pick documents for the record for its own self-interest and the self-interest of the employer, without having to settle the record is that constitutional and/or equal due process where the pro se Petitioner-Appellant was not allowed settlement of the record? See *Weeden v. Ark*, 2 A.D.3d 1280, 768 N.Y.S.2d 891 (4th Dept.2003); *Matter of Lavar C.*, 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept.1992).

Whether Section 298 of the New York State Division of Human Rights is unconstitutional and in violation of equal protection and due process under the Fifth and Fourteenth amendments of the United States Constitution where the transfer of the proceeding is automatic by the lower court to the appellate division without any participation by the agency, who was a necessary named party in the lawsuit before the lower court, and under what circumstances does non-participation equates to constitutional equal protection under the law and due process where a party did not timely appear, move to dismiss, and/or answer?

### III. THE RUBBER STAMPING OF THE COURTS DECISION CONFLICTS WITH OTHER CIRCUITS

The standard of review in this Article 78 proceeding is whether DHR's "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; see also *Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 573 N.E.2d 562, 570 N.Y.S.2d 474 (1991). As the United States Supreme Court recently made clear in setting out these steps for establishing a discrimination claim, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated". (*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). The arbitrary or capricious test chiefly "relates to whether a particular action should have been taken or is justified \*\*\* and whether the administrative action is without foundation in fact." (1NY Jur., Administrative Law, § 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. In the *Matter of Colton v. Berman*, 27 A.D.2d 298, 329 (N.Y. App. Div. 1967) this court (per Breitel, J.) said "the proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law." (Emphasis supplied.).

The “rubber stamping” of a lower court’s and/or agency’s decision contradicts this Court’s ruling and rulings in other Appellate Departments. A party aggrieved by a final order of the Commission can obtain judicial review, but the Commission’s determination “is conclusive if supported by substantial evidence on the record considered as a whole” (id. § 8-123[e]; see CPLR 7803[4]). “Substantial evidence” exists “when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably” (*300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978)). “A court reviewing the substantiality of the evidence upon which an administrative agency has acted exercises a genuine judicial function and does not confirm a determination simply because it was made by such an agency” (id. at 181). Judicial review of the Commission’s determination is certainly limited, but is not meaningless, especially given the Commission’s broad enforcement powers. See *Matter of New York City Tr. Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54, 577 N.E.2d 40, 45 (1991); *Matter of Reape v. Aducci*, 151 A.D.2d 290, 293, 542 N.Y.S.2d 562, 564 (1st Dept. 1989).

#### **IV. WHETHER THE DIVISION AND THE ROCHESTER CITY SCHOOL DISTRICT DISCONTINUANCE OF THE ACTION CAUSE**

The lower court abused its discretion by transferring the matter to the Appellate Division, Fourth Judicial Department where the Respondents-Defendants

New York State Division of Human Rights and Rochester City School District did not timely appear, move to dismiss, and/or answer the summons, petition, and verified complaint and the time to do so had long expired as pursuant to New York Civil Practice Law and Rules (“CPLR”).

The actions of the Respondents-Defendants New York State Division of Human Rights and Rochester City School District's Stipulation of Discontinuance filed with the New York State Supreme Court and the Monroe County Clerk's Office dated September 10, 2020 caused the lower court to lose its jurisdictional power to make an Order to transfer a matter to the Appellate Division, Fourth Judicial Department by Order dated October 27, 2020 where defendants-respondents' discontinued the action without serving the Petitioner-Appellant, and under which state, federal and/or constitutional amendment are the attorneys for the respondents allowed to stipulate to and discontinue an action with prejudice without the knowledge and consent of as her the prose litigant? Under what circumstance would that ne consider a deprivation due process rights under the Fifth and Fourteenth Amendments?

Petitioner sufficiently stated a cause of action for discrimination based on her race, color, age. Gender/sex in violation of 42 U.S.C. § 1981, Title VII and NYSHRL. Plaintiff has established a *prima facie* case of retaliation. To establish a *prima facie* case of retaliation, there must be (1) a protected activity, (2) an adverse action and (3) a causal relationship between the

protected activity and the adverse action. To establish a *prima facie* case of discriminatory discharge in violation of Title VII or § 1981, a plaintiff must demonstrate that (1) he belongs to a protected class, (2) he was performing his duties satisfactorily, (3) he was discharged, and (4) his discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in the protected class. *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir.1997) (citing *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir.1995); *Robertson v. Chambers*, 341 U.S. 37, 71 S.Ct. 547, 95 L.Ed.2d 726, 1951 U.S. LEXIS 2017; and *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir.1989)).

On first impression, whether a state court's law violates a federal law effecting employees' rights to be free of discrimination in the workplace where color, race, and age are determining factors in the unlawful firing of an employee. Finally, this petition for writ of certiorari should be granted because the New York State Supreme Court, the New York State Supreme Court Appellate Division and the New York State Court of Appeals have decided an important federal question—due process and equal protection—in a way that conflicts with relevant decisions of this Court.

---

## CONCLUSION

The New York State Court of Appeals erred the dismissal of the appeal in holding that no appeal lies as of right from the unanimous judgment of the

Appellate Division absent direct involvement of a substantial constitutional question (see CPLR 5601). Circuits are in conflicts as to “absent involvement of a substantial constitutional question. The Court of Appeals *sua sponte* dismissal conflicts with at other courts of appeals, and threatens broad adverse consequences, particularly in situations involving discrimination in employment, where employees are subjected to unlawful and adverse employment actions based on their color, race, age, sex/gender, disability, and/or national origin where such prohibited acts by the employer never allows the employee to be free of discrimination and retaliation in the workplace of an employer whose culture condones, permits, promotes and participates in unlawful discrimination. This Court’s intervention is warranted.

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

Dated: November 10, 2022

Respectfully, submitted,

/s/ Bernice Curry-Malcolm  
BERNICE CURRY-MALCOLM  
6 Gingerwood Way  
West Henrietta, New York 14586

*Pro se Petitioner*

## **APPENDIX**