

No. ____

IN THE
SUPREME COURT OF THE
UNITED STATES

Leslie Moore Mira,

Petitioner,

v.

John Kingston, Beth Harder (Evans), Richard
Rubin, Kevin Saville, Platts/McGraw Hill
Financial Inc.,

Respondents.

On Petition For Writ Of Certiorari To United
States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Pro se litigants annually account for at least 50 percent of all appeals filed in US Courts of Appeals, according to US Courts' judicial data.

Questions presented:

1. Whether courts are improperly curbing liberal construction of self-represented litigants' filings and impeding in error pro se's from amending complaints.
2. Whether the Second Circuit prematurely and erroneously deemed a pro se litigant's request to amend a complaint "futile" when material facts and allegations were yet to be introduced and others were not recognized by the district court; and whether it denied due process by foreclosing opportunity to amend.

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PETITION FOR WRIT OF CERTIORARI

Leslie Moore Mira, proceeding pro se, respectfully petitions for a writ of certiorari to review the order of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The unpublished order and “judgment mandate” from the U.S. Court of Appeals for the Second Circuit in 16-4080-cv filed on January 19, 2018. App. 1. The denial of Respondent’s petition for rehearing appears in the App. 30. The order of the U.S. District Court for the Southern District of New York dismissing Moore Mira’s complaint is in App. 8.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. Petitioner timely filed a petition for rehearing en banc, which was denied on January 12, 2018. Petitioner timely requested an extension to file her petition for a writ of certiorari from the Honorable Justice Ruth Bader Ginsburg, who kindly granted an extension up to and including June 1, 2018. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND
RULE INVOLVED

Federal Rule of Civil Procedure 15 provides,
in relevant part:

- (a) Amendments Before Trial.
 - (1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:
 - (A) 21 days after serving it; or
 - (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
 - (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.
 - (3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later. FED. R. CIV. P. 15(a).

INTRODUCTION

This case is about recurring instances of reprisal by Respondents against the pro se Petitioner in retaliation for a sexual harassment complaint. Textbook employer retaliation escalated into the retaining of private investigators and other parties to conduct improper eavesdropping and surveillance of the petitioner's private communications, including personal emails, phone texts, conversations at home and elsewhere, including those with lawyers. She was threatened in the workplace.

Respondents conspired with other parties to take intimate images of the Petitioner and post them on social media. They attempted to plant negative stories about her with media, contest her naturalized US citizenship with federal authorities and arranged for parties to follow her in multiple states.¹ They organized a broad campaign to ostracize and discredit her. Respondents inveigled law enforcement authorities to investigate her on manufactured pretenses. More than five years after her departure, Petitioner remains a target of organized methods to harass. Supporting evidence has been removed from her home. She has endured substantial emotional distress and other harms.

¹ Petitioner understands that authorities investigated her, though at no time have they directly contacted her.

The Petitioner initially brought forward Title VII and New York State and New York City Human Rights Law claims—claims listed on a US District Court Southern District of New York “complaint” form pertaining to employment discrimination. Her pro se pleadings over four months requested leave to amend her complaint and permission, per court rules, to file an amended opposition brief longer than that court’s prescribed length to include additional factual allegations.² She later made U.S.C. Section 1981 and U.S.C. Section 1985(3) claims, with a four-year statute of limitations.³

Without providing notice of intent to dismiss, the district court dismissed her case, citing Title VII’s 300-day statute of limitations. The dismissal did not address multiple requests to amend pleadings or acknowledge federal claims with years-long statute of limitations. It did not

² See *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d. Cir. 2014) and *Walker v. Schult*, 717 F.3d 119 (2d. Cir. 2013). “A district court deciding a motion to dismiss may consider factual allegations made by a pro se party in his papers opposing the motion,” *Walker*.

³ U.S.C. Section 1981 claims are not listed on SDNY’s form given to pro se employment discrimination plaintiffs. Had this pertinent claim with years-long statute of limitations been listed, the first-time pro se plaintiff would have included them.

acknowledge a third party affidavit attesting to evident stalking of the Petitioner in 2016, even though it referenced Respondents' affidavits. It rejected Petitioner's argument of related continuing violations.

The district court's steadfast silence in the face of requests to amend pleadings unjustly precluded the Petitioner from amending. The Second Circuit concurred that the district court erred yet it provided no corrective remedy. It erred in applying a summary judgment standard at a pleading stage, saying her amended complaint would have been futile. App. 5.

The Second Circuit's order is incompatible with civil procedure: It cannot know that a future amended complaint with facts, allegations, and evidence yet to be introduced, and without the benefit of discovery, is destined to be futile. Its order marked an *illiberal* construction of pro se pleadings, latching onto "futility" as a pretext. It erred in finding a "futility" determination of a *future* amended complaint, not on the allegations in the complaint itself.

In not permitting the pro se Petitioner to amend her complaint even once the Second Circuit throws settled national precedent into disarray. Its order expressly rejects this Court's instruction to generally allow pro se litigants the right to

amend complaints at least once in the pleading stage and to liberally construe pro se filings.

As self-represented plaintiffs continue to stream into US courts in pursuit of justice, *Mira v. Kingston* presents ripe opportunity for this Court to stem courts' inequities when adjudicating pro se litigation (see below).⁴

Threshold issues are whether due process was denied in not addressing and permitting a pro se plaintiff to amend her complaint—in contradiction of this Court and circuits—and whether they overlook an employer's indelible act of posting intimate images of an employee on the internet. The series of actions continued after her constructive discharge and thwarted her relationship with her successive employer Argus Media. An amended complaint would not be "futile" but rather it would provide facts and allegations of continued harassment that have stymied her professionally and personally, years after leaving Platts, and present supporting affidavits. In instance of nascent circuit discord, the Second Circuit waves off cybersexual and other serious misconduct as "frivolous"

⁴ Pro se's made up 52 percent of 2016 US Courts of Appeals filings, an 18 percent increase to 31,609 cases, see <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2016>

even as other circuits have begun to recognize similar deeds as malicious acts.⁵

Certiorari is essential to restore uniformity among the circuits and to remind all courts that established decisions of this Court concerning liberal construction of pro se pleadings are and remain the law. Certiorari would communicate that courts are obliged to spare the nation's less privileged litigants from arbitrary orders that deny fairness by denying the right to amend complaints on pretextual grounds.

STATEMENT OF THE CASE

Controlling law in this Court and the circuits holds that courts in general are to liberally permit amendments to complaints at least once, particularly to pro se litigants inexperienced in court procedure and drafting complaints. Yet in some instances (see *infra*) lower courts improperly curb that right, undermining pro se plaintiffs' ability to litigate grievances.

The Second Circuit in the instant case glossed over the crux on appeal: Remand to amend her complaint and introduce additional supporting facts, allegations and claims. Like the district

⁵ See *US v. Osinger*, 753 F. 3d 939 (9th Cir.)

court, it misapprehends Petitioner's court submissions. It acknowledges the district court's error but provides no remedy and failed to view the totality of circumstances, impermissibly prejudging the case. The order ignores settled law on generally allowing pro se litigants the right to amend a complaint at least once, holding without merit that to do so would have been "futile."

A. Factual Background

Petitioner Leslie Moore Mira worked full-time at Respondent Platts in the New York, NY, bureau from August 2007 until January 2013. She reported for the company's energy news service and daily publication.

In retaliation for a sexual harassment complaint, Respondents embarked on an extreme quest to devastate Petitioner's professional and personal life (see above).

Respondents dispatched third parties to follow her and stream images of her on the internet. Respondents posted images of Petitioner having to relieve herself in an improvised manner on an upstate New York vacation in 2012 and openly discussed them when she was in the office. Petitioner in 2013 in two instances saw photographic activity aimed at a narrow window opening in her bedroom when she was partly undressed. She has been followed in multiple states.

Attempts to degrade continued after constructive termination. At successive employer Argus Media, Petitioner observed a coworker looking at images that bore an identical resemblance to the Petitioner's bedroom. Argus staff returning from a meeting with Platts joked about seeing unclothed bodies.⁶ Respondents' continued to disparage years later. A Platts Respondent in January 2015 affirmed in an email predilection to broadly disparage employees with "both alumni and newcomers." To infer that Argus and Platts officials discussed if not shared images of the Petitioner is naturally inferred from the facts, which are supportive of conspiracy between the companies. The totality of the circumstances raise triable issues.

B. District Court Proceedings

Petitioner in the instant case has proceeded pro se from the outset. The plaintiff received a notice of right to sue from the EEOC in September 2015 after the New York State Division of Human Rights dismissed her case without adjudication. She timely filed a complaint with the US District Court of the Southern District of New York and

⁶ The presiding judge in *Mira v. Kingston* denied Petitioner's request to consolidate with the inextricable *Mira v. Argus Media*, a decision the Second Circuit upheld. Petitioner was terminated from Argus Media in May 2014 days after objecting to adverse acts against her. An appeal in *Mira v. Argus Media* is pending.

timely served it. The case was reassigned to the Honorable Colleen McMahon⁷ from a magistrate judge without explanation. Respondents filed a motion to dismiss.

On six separate occasions over four months, the pro se Petitioner variously requested leave to amend her complaint and brought forward new federal claims, U.S.C. Section 1981 and U.S.C. Section 1985(3). Pursuant to that court's rules, Petitioner requested permission to file an amended opposition brief that exceeded in length court guidelines.

The district court did not respond. Good-faith effort to heed court rules—requesting permission to submit an amended opposition brief exceeding court guidelines—was unfairly penalized by subsequent non-response.

In contrast, the district court responded with alacrity to Respondents' counsel. The court replied on August 23, 2016 to Respondents' August 17, 2016 letter opposing Petitioner's move to consolidate this civil action with the inextricably linked action against Argus Media. The Petitioner was not accorded similar prompt response.

The district court recited standard court practice then failed to apply it. It acknowledged "it

⁷ Judge McMahon became SDNY Chief Judge in June 2016.

would ordinarily be this Court's practice to ask Plaintiff to explain to the court why equitable tolling might be available to her." APP. 26. Yet rather than comply with court practice, the district court withheld it: "However, in this case, it is obvious from the record that Plaintiff has no basis to assert that her time to file a charge should be equitably tolled." App. 26. Such leaps of defendant-friendly presumption impeded procedural justice. Dismissal with prejudice foreclosed opportunity to permit Petitioner to build on factually valid arguments appropriate for a jury to decide.

The district court in multiple instances misapprehended Petitioner's pleadings and, contrary to a liberal construction of pro se pleadings, extended solicitude to counseled Respondents and overlooked material facts supportive of Moore Mira's case. It selectively read Petitioner's submissions related to case consolidation, a decision that strained Petitioner's effort to litigate. For example, the district court said the Petitioner "does not allege any business relationship between the SPGI [S&P] Defendants and the Argus Defendants and acknowledges that they are, in fact, competitors." In fact Petitioner asserted the two are *both* business collaborators with shared market interests and competitors and included company evidence of Platts-Argus union to set "self-regulatory codes" in assessing spot oil prices. Petitioner identified a

Platts-Argus meeting in New York, evidence of overlapping business interests.

On November 3, 2016, without providing prior notice of intent to dismiss or opportunity to amend, the district court dismissed Petitioner's complaint with prejudice.⁸ The court's order, citing Title VII's 300-day statute of limitations, failed to acknowledge Petitioner's requests to amend her complaint and the U.S.C. Section 1981 and U.S.C. Section 1985(3) claims.

Premature dismissal and failure to acknowledge requests to amend contradict law from this Court mandating liberal construction of a pro se Petitioners' pleadings and allowance to pro se litigants to amend at least once.

The district court denied hearing of addition facts and allegations and overlooked federal claims well within the statute of limitations. In fair hearing, an amended complaint would have cured perceived deficiencies and met the circuit's bar for continuing violations under Title VII.

Petitioner appealed.

C. The Second Circuit's Decision

⁸ It dismissed New York City and New York State Human Rights Law claims without prejudice.

The Second Circuit upheld the district court's dismissal, repeating the district court's significant error of reciting standard court practice, only to fail to apply it. *Mira v. Kingston* was once more impermissibly prejudged before Petitioner presented crucial facts or even once amended her complaint.

The order appeared to misunderstand the entirety of Petitioner's appeal, stating that "[i]n the main" Petitioner's appeal argued the district court's ruling against consolidating the two cases.⁹ In fact, the basis of Petitioner's appeal was the lower court's failure to grant leave to amend pleadings, though she did request reversal of its denial to consolidate.¹⁰

The Second Circuit correctly held that "[t]he district court should have addressed Mira's requests to amend her complaint," citing *In re Sims*, 534 F.3d 117, 133 (2d Cir. 2008) (holding that pro se litigants should be allowed amendment more

⁹ In affirming denial to consolidate, the Second Circuit cites *In re Repetitive Stress Injury Litig*, 11 F. 3d. This circuit in *RSI* "emphasize[s]...we see nothing wrong with assigning all *RSI* cases in a district to a single district judge who may order that particular proceedings or certain discovery requests relate to defined groups of *RSI* cases or, when appropriate, all the *RSI* cases in the district." Thus *RSI* affirms consolidation of *Mira v. Kingston* with *Mira v. Argus Media*.

¹⁰ Like the district court, the Second Circuit overlooked factual specificity in support of consolidation.

freely than counsel and that their rights should not be impaired by 'harsh application of technical rules' (internal citation omitted))." But then it contradicts, saying an amended complaint would not have withstood a motion to dismiss and that "[l]eave to amend may be denied when amendment would be futile." App. 5.

The Second Circuit cannot know that an amended complaint in this case is destined to be "futile." It deprived due process by failing to reverse the district court's errors that affected Moore Mira's substantial rights and the fairness of the proceedings. Its order skimps on the merits of the Petitioner's argument, overlooking that an amended complaint would add facts and allegations satisfying elements of Title VII, U.S.C. Section 1981 and U.S.C. 1985(3) claims.

The Second Circuit incorrectly asserts the "only allegation of race-based animus was that a supervisor implied that she was involved with illegal drug activity in Mexico. This comment is insufficient to demonstrate a hostile work environment leading to Mira's constructive termination." That factual and legal finding mischaracterizes the complaint. Respondents retaliated against her by making specious statements about her to federal authorities alleging drug-related activity, an act that meets elements of U.S.C. Section 1981's anti-

retaliation *and* hostile work environment analysis. Efforts to contest her naturalized citizenship marked another U.S.C. Section 1981 violation.¹¹

The circuit's errant analysis, like the district court's, extended ample solicitude to counseled Respondents rather than the pro se Petitioner. In the absence of effective discovery and in miscasting the record, the circuit abuses discretion by concluding Petitioner failed to "demonstrate" a U.S.C. 1981 violation, a standard she did not need to meet at the pleading stage.¹²

Taking all her pleadings "as a whole" as it must (*Ashcroft v. Iqbal*, 556 US 662 (Supreme Court, 2009)) and *Nielsen*, Moore Mira's albeit inartful complaint identified parties, places and dates—details sufficient at a pleading stage and meritorious of adding other facts and allegations in an amended complaint. She requested numerous times to amend pleadings. The Second Circuit overlooks the totality of circumstances of her U.S.C. 1985(3) claim, failing to cite factual specificity of Platts and Argus union. It omits the viewing by an Argus co-worker on or about March 2014

¹¹ Petitioner is a woman of Mexican heritage.

¹² A fact-based undertaking as to whether she "demonstrate[d]" a U.S.C. 1981 violation is premature in a motion for dismissal. The circuit incorrectly applied a summary judgment standard at an initial pre-discovery pleading stage, see Federal Rule of Civil Procedure, Rule 56.

of images that bore an identical resemblance to Petitioner's bedroom and minimizes taunting comments by Argus employees about images of the Petitioner.

Unlike the district court before it, the Second Circuit attempts to characterize her case as "frivolous." It compared the instant case of employer retaliation¹³ to *Gallop v. Cheney* 642 F.3d 364 (2011), a case that posits grand-scale conspiracy by former Vice President Richard Cheney to detonate the Pentagon, an inapt analogy that seems far-reaching.¹⁴

The two courts also overlook pertinence of a Respondent's widely distributed January 2015 email stating disparagement of former employees, in violation of this Court's precedent and EEOC anti-retaliation guidelines. Taking in "the whole"

¹³ Courts and the public do not regard allegations similar to those in *Mira v. Kingston* as "frivolous." See *Crowley v. LL Bean, Inc.* 303 F. 3d 387 (1st Circuit 2002) in which a circuit upheld, finding on-site and off-site stalking and other misconduct impermissible and violative of Title VII. Moore Mira cited on appeal multiple cases with facts similar to her own. Separately, a tide of sexual harassment reports in late 2017 revealed the use of private investigators to discredit and infiltrate the lives of alleged sexual harassment victims; see "Harvey Weinstein's Army of Spies," Ronan Farrow, *New Yorker*, November 6, 2017. News accounts hold that alleged harassment victims can be blacklisted.

¹⁴ Unlike this Petitioner, a lawyer represented the plaintiff, who was able to amend her complaint.

record, direct evidence raises a triable issue for a jury under this Court's still-binding *Robinson v. Shell Oil Co.* 519 U.S. 337 (1997), holding that Title VII's anti-retaliation protections extend to former employees.

When a circuit court finds that a district court has violated a pro se Petitioner's rights, the circuit is obliged to remand and reverse the error, not excuse it, as it did by applying summary judgment standard at a pleading stage.

The Second Circuit denied her timely petition for a rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. This Case Presents Ideal Vehicle to Explicitly Affirm Pro Se's Right To Amend Complaints Amid Recurring Abuse of Supreme Court Law

The Second Circuit's *Mira v. Kingston* order destabilizes the law on questions of national importance. District courts and circuits are improperly infringing on pro se and indigent litigants' right to amend complaints. Such deprivation contravenes this Court's instruction to liberally construe pro se pleadings and allow litigants opportunity to amend complaints, see still-binding *Foman v. Davis*, 71 US 178 (Supreme Court, 1962)

(holding that “refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.”).

Pro se litigants are poorly perceived by courts—often thought of as “pests responsible for ‘clogging’ up the court system,” Rory Schneider, “Illiberal Construction of Pro Se Pleadings,” *University of Pennsylvania Law Review*, Volume 159.

In the Fourth Circuit’s ongoing *William C. Bond v. United States*, counsel for Bond holds that the district court denied his efforts to fix what the court had specified as deficiencies in his pro se complaint. “The district court’s rejection of the amended complaints—without any explanation of why the added factual allegations were insufficient—was an abuse of discretion,” citing March 19, 2018 reply brief filed by former Seventh Circuit Judge Richard Posner and Matthew Dowd. The district court instead “chastised a pro se litigant for trying to improve his complaint,” reply brief.

“Litigants, particularly pro se litigants such as Bond, must not have the courthouse doors closed to them without a reasoned explanation,” reply brief.

This Court in *Burnside v. Walters*, 133 S. Ct. 2789 (Supreme Court, 2013), took umbrage with the Sixth Circuit's broad refusal to allow *in forma pauperis* (IFP) pro se plaintiffs to amend complaints. Supreme Court Petitioner Burnside prevailed, this Court vacated and remanded his case.

Non-IFP pro se employment plaintiffs do no better in an attempt to get a fair day in court. Pro se employment cases are seen as vexatious and prone to quick dismissal by courts eager to winnow dockets (see below).

"Many of these cases are pro se, and pro se cases are difficult to manage," the Honorable Denny Chin, of the Second Circuit, holds. "Are there judges who do not like employment cases? I have no doubt there are," Chin, "Summary Judgment in Employment Discrimination Cases: A Judge's Perspective," *New York Law School Law Review*, Volume 57, 2012–2013.

The Honorable Bernice Donald of the Sixth Circuit holds that federal courts are perceived as "hostile venues for employment discrimination plaintiffs," noting that many are self-represented. Courts "tend to chew plaintiffs up and spit them out with rapidity, most often before trial," see Donald and J. Eric Pardue, "Bringing Back Reasonable

Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment,” *New York Law School Law Review*, Volume 57, 2012–2013.

Statistics anchor perception. Citing Federal Judicial Center data, Donald and Pardue found that “in the early 2000s, ninety-eight percent of employment discrimination cases disposed of by pretrial motion were decided in favor of defendants, which was higher than the rates for both personal injury and insurance cases.”

US District Court Judge Mark Bennett, of the Northern District of Iowa, compares the plight of employment discrimination cases to prisoner rights cases before federal prison litigation reform in 1996. “In Yogi Berra terms, it’s déjà vu all over again: ‘Plaintiff’s claims lack merit,’ ‘Plaintiff’s claims are frivolous,’ and the newest Twombal induced mantra, ‘Plaintiff’s claims are implausible’—all incantations heard with stunning frequency in the federal district courts,” Bennett, see “From the ‘No Spittin’, No Cussin’ and No Summary Judgment’ Days of Employment Discrimination Litigation to the ‘Defendant’s Summary Judgment Affirmed Without Comment’ Days: One Judge’s Four-Decade Perspective,” *New York Law School Law Review*, Volume 57, 2012–2013.

An “anti-plaintiff effect” hexes employment cases, with plaintiff “win rate” in jobs cases at 15 percent, lower than non-jobs cases at 51 percent, Bennett, citing a study by Cornell Law School faculty.¹⁵ The same study reported a 40 percent decline in employment cases in federal court employment discrimination filings even as the number of charges filed with the EEOC, citing Bennett. “For much of my judicial career, employment discrimination cases ‘reigned as the largest single category of federal civil cases, at nearly ten percent of that docket.’ Now, they are exceeded by personal injury, product liability, and habeas corpus petitions,” Bennett.

“As Marcellus speaks in the play, Hamlet, ‘Something is rotten in the state of Denmark.’ When litigants seeking to enforce this nation’s comprehensive employment discrimination laws feel the need to flee our federal courts—the very institution tasked by Congress to hear these cases—something is horribly amiss in our federal civil justice system,” Bennett.

Despite cognizance of solicitude to be granted to pro se litigants, the Second Circuit in

¹⁵ Kevin M. Clermont, Stewart J. Schwab, “Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?”, *Harvard Law & Policy Review*, 103, 127 (2009).

Mira v. Kingston denied it. It overlooked key material facts to excuse the district court's refusal to grant leave to amend, citing the "futility" of a future amended complaint.

In the instant pro se case, the Second Circuit agreed with Petitioner that the district court violated her right to amend her complaint, citing *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d. Cir. 2014): "A pro se complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." It acknowledged that "[g]enerally, leave to amend should be freely given, and a pro se litigant in particular should be afforded every reasonable opportunity to demonstrate that he has a valid claim." *Matima v. Celli*, 228 F.3d 68, 81 (2d. Cir. 2000) (internal quotation marks and citation omitted).

Despite concurring with Moore *Mira*, it failed to reverse error. When a circuit court finds that a lower court has violated a pro se litigant's rights, it is obliged to correct error rather than compound it. Assuming a future amended complaint not presented to the court would be futile flatly contradicts mandated liberal construction of pro se pleadings.

As in *Mira v. Kingston*, courts improperly use pretexts such as "futility," "plausibility" or

other constructs to impede the amending of pro se pleadings—and to quickly shut down pro se cases. Eleven years after *Erickson*, lower courts need explicit reaffirmation of this Court's general mandate to grant leave to amend complaints to pro se's, including to beleaguered pro se employment discrimination plaintiffs. Doing so will help curb abuse of discretion.

II. The Second Circuit's Order Violates Rule 15 and Upholds Clear Error That Denies Substantial Justice

The district court's silence in response to requests to amend pleadings, the Second Circuit's mischaracterization of her appeal and refusal to remand is a departure from this Court's instruction, per Federal Rule Civ. Proc. 8(f), that "all pleadings shall be so construed as to do substantial justice." See *Erickson v. Pardus*, 551 US 89 (Supreme Court 2007), holding that the 10th Circuit's "departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed *pro se* is "to be liberally construed," *Estelle*, 429 U.S., at 106, 97 S.Ct. 285, and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards

than formal pleadings drafted by lawyers,” *Erickson*.

However inartfully pleaded, pro se pleadings should be viewed liberally and held to a lesser standard than those drafted by attorneys, see *Haines v. Kerner*, 404 US 520-521 (Supreme Court, 1971). This Court held in the still-binding *Conley v. Gibson*, 355 US 41 (Supreme Court, 1957) that no complaint may be dismissed for failure to state a claim unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

Other circuits uphold the right to amend even when plaintiffs have not requested leave to do so. “[A] district court should grant leave to amend even if no request to amend the pleading was made,” see *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

The district court’s dismissal with prejudice represented another departure from other circuits, see *Alderson v. Concordia Parish Correctional Facility*, 848 F. 3d 415, (Court of Appeals, 5th Cir. 2017) (“When the dismissal of a pro se complaint is appropriate, it should generally be done without prejudice in order to allow the plaintiff an opportunity to file an amended complaint.” *Rodriguez v. United States*, 66 F:3d 95, 97 (5th Cir. 1995); see

also Moawad v. Childs, 673 F.2d 850, 851 (5th Cir. 1982)).

Under Federal Rule of Civil Procedure 15 leave to amend a complaint shall be “freely” given “when justice so requires.” FED. R. CIV. P. 15(a)(2). Circuits apply liberal policy of permitting amendments even when plaintiffs faces dismissal. The circuits recognize that in general, “[i]f it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend,” Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 1483 (3d ed. 2010).

Petitioner’s requests to amend pleadings went unanswered even as the district court addressed other matters in the very same submissions. Her additional federal claims, had they been acknowledged, would have made moot the basis of the district court’s dismissal.

A district court abuses its discretion “by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation.” *Quince Orchard Valley Citizens Ass’n Inv. v. Hodel*, 872 F. 2d 75 (4th Circuit, 1989).

Circuits apply clear error review to civil cases, *see Richison v. Ernest Group, Inc.* 634 F. 3d 1123 (10th Cir. 2011). They may reverse error when an appellant demonstrates that 1) there is an error; 2) which is plain 3) and affects substantial rights and 4) seriously affects the fairness, integrity, or public reputation of judicial proceedings, *see Richison and Nara v. Frank*, 488 F.3d 187 (3d. Cir. 2007) holding a Court of Appeals should reverse the lower court's decision "if it made a plain error which affects 'substantial rights.'" citing *US v. Olano* 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

In the instant case, premature dismissal denied fundamental fairness. Plain error in overlooking new claims, misapprehending material fact and repeated requests to amend pleadings affected the outcome of the proceeding.

III. This Case Presents Opening for This Court to Recognize Employer's Malicious Use of Social Media As Prohibited Continuing Violations

Elements of this petition may comprise a case of first impression for this Court. Workplace retribution devolved into off-site voyeurism and aggressive deployment of social media to sexually humiliate an employee in continuous manner, actions violative of Title VII.

This Court recognizes what it deems “novel” or “important” issues of law “currently in a state of evolving definition and uncertainty that are ‘certain’ or ‘likely’ to recur in future cases even if an aspect is not fully argued. “The very novelty of the legal issue at stake counsels unconstricted review,” *City of Newport v. Fact Concerts*, 453 (US 247 - S. Ct. 1981), still binding, and *Carson v. Hudson*, No. 09-3514 (6th Cir. 2011).

While “sexual objectification and violence are all familiar tropes from a familiar setting, namely, High School ... [w]hat is different is the form of online harassment, namely, the way that cyberspace enables the amplification and aggregation of harm,” University of Miami law school professor Mary Anne Franks holds.¹⁶

Internet revenge can indelibly humiliate. Message threads of AutoAdmit.com, an online forum about law schools, firms, and clerkships, discussed in detail students’ bodies, “their alleged sexual activities, and express[ed] what users would like to do with them sexually—all in graphic and often violent detail. The women in question were often targeted by name, while the users

¹⁶ <http://www.denverlawreview.org/cyber-civil-rights/2010/2/20/the-banality-of-cyber-discrimination-or-the-eternal-recurren.html>

posted under pseudonyms,” Franks, *Maryland Law Review*, Vol. 71-655.

Circuits have begun to recognize the egregiously wrong act of web posting intimate images of a person without that person’s consent. The Ninth Circuit’s *US v. Osinger*, 753 F. 3d 939 (2014) upheld a defendant’s sentence, holding that his “threatening messages to V.B. and his sending of sexually explicit photographs to V.B.’s co-workers and friends unquestionably evinced [his] intent to harass and intimidate V.B. and to cause substantial emotional distress.” The First Circuit did likewise in *US v. Sayer*. 748 F. 3d 425 (2014). States and cities have passed legislation banning such acts, but the nonconsensual internet posting of intimate images can be difficult to litigate without effective discovery.¹⁷

This civil case is worthy of certiorari to send a clear message that employer internet retribution is impermissible and warrants full continuing violations hearing.¹⁸

¹⁷ <https://jezebel.com/why-its-so-hard-to-make-revenge-porn-laws-effective-1820442428>

¹⁸ Petitioner reminds this Court that images of her were taken without consent. Years after leaving Platts, a waiter in a restaurant near Petitioner’s home in December 2015 told her “you look good in the pictures,” with apparent aim of discomfiting. Identifying information can be provided in an amended complaint.

CONCLUSION

For the foregoing, the Second Circuit's order should be vacated. The case should be remanded so Petitioner may amend her complaint and proceed to effective discovery.

Respectfully submitted,

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