No. ____

IN THE
Supreme Court of the United States

ERIC CLOPPER,
Petitioner,

v.

PRESIDENT & FELLOWS OF HARVARD COLLEGE;
THE HARVARD CRIMSON, INC.
Respondents,

JOHN DOES 1-10,
Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The District Court dismissed with prejudice Plaintiff-Appellant Eric Clopper's Complaint on the 15th day after service of a Federal Rule of Civil Procedure ("Rule") 12(b) Motion. Rule 15(a)(1)(B) provides Clopper with an absolute right to file an amended Complaint within 21 days of service of the 12(b) motion. The lower courts did not directly address Clopper's due process right under Rule 15(a) to amend his Complaint once as a matter of course. Instead, the en banc Panel noted that Clopper did not "demonstrate that, had he been allowed to amend his complaint . . . he would have been able to set out one or more valid causes of action."

More important, the record demonstrates that:

- Clopper presented the 7 viable amendments acknowledged by the District Court to the First Circuit Panel;
- The First Circuit recognized 7 additional viable amendments, while dismissing the appeal for failing to raise a substantial question of law;
- After Clopper presented all 14 separate viable amendments, the 4-judge en banc Panel held that Clopper did not show how he could have amended his Complaint to state a claim.

This legal error and factual inconsistency begs the following question:

1. Did the District Court, the First Circuit Panel and the en banc Panel violate the procedural due process guaranteed by the Fifth Amendment to the U.S. Constitution embodied in Rule 15(a) when it deprived Clopper his right to one amendment within 21 days of the service of the Rule 12(b) Motion?

RELATED PROCEEDINGS

Clopper v. President & Fellows of Harvard University, et al., No. 20-cv-11363-RGS (D. Mass.):

1. Oct. 14, 2020 order grants Harvard's Sep. 29, 2020 12(b) motion without leave to amend (one day after Clopper's Opposition was due under a local rule, but 6 days before his Rule 15(a) right to file an amended Complaint expired).

2. Oct. 19, 2020 order denies Clopper's Oct. 16 and Oct. 19, 2020 motions to set aside the dismissal of his claims against Harvard with prejudice.

3. Nov. 5, 2020 order grants The Harvard Crimson's motion to dismiss without leave to amend.

Clopper v. President & Fellows of Harvard University, et al., No.20-2140 (1st Cir.):

1. Aug. 1, 2022 (i) order grants Harvard's April 20, 2021 motion to summarily dismiss Clopper's appeal against Harvard as frivolous for failing to raise a substantial question of law; and (ii) *sua sponte* order dismisses Clopper's appeal against The Harvard Crimson as frivolous without explanation.

2. Mar. 22, 2023 order (i) converts Clopper's Aug. 15, 2022 en banc rehearing petition into a rehearing before the original panel plus an additional judge; (ii) grants Doctors Opposing Circumcision's amicus brief; and (iii) affirms the panel's dismissal without addressing the deprivation of Clopper's right to amend his Complaint once under Rule 15(a).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

Rules

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Clopper respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the First Circuit is unreported and included in Petitioner's Appendix ("App.") at App. 1a-5a. The en banc Panel's order and the District Court's electronic orders and judgment are also unreported and available at App. 6a-18a.

JURISDICTION

The court of appeals entered its judgment on August 1, 2022. App. 1a. The court denied a timely petition for rehearing on March 22, 2023. *Id.* at 16a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment reads:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Federal Rule of Civil Procedure 15(a)(1)(B) reads:

> A party may amend its pleading once as a matter of course no later than: . . . 21 days after service of a motion under Rule 12(b)[.]

Unabridged versions of The Fifth Amendment, Federal Rule of Civil Procedure 15(a), and Local Rules 7.1(b)(1-2) and 7.1(f) of the United States District Court for the District of Massachusetts are reproduced in their entirety at App. 19a-22a.

INTRODUCTION

Plaintiff-Appellant Eric Clopper ("Clopper") was deprived his right to constitutional due process embodied in Rule 15(a) on three separate occasions:

A. The District Court dismissed Clopper's Complaint 6 days before his constitutional right to amend expired under Rule 15(a). App. 6a-7a; *see also* App. 42a-43a, 46a, 48a, 50a, 54a, 58a-59a, 72a, 85a-87a, 215a. Despite recognizing 7 viable amendments, App. 44a-45a, the District Court dismissed the Complaint with prejudice. App. 6a-7a.

B. The First Circuit dismissed Clopper's Appeal for failing to raise a substantial question of law, App. 1a-5a, without addressing Clopper's unexpired constitutional right to amend his Complaint once under Rule 15(a). App. 41a, 49a. Significantly, the Panel recognized an additional 7 viable amendments, App. 2a-5a.

C. The en banc Panel treated Clopper's petition setting forth 14 viable amendments as a petition for rehearing, then incorrectly stated that Clopper "did not demonstrate that, had he been allowed to amend his complaint . . . he would have been able to set out one or more valid causes of action." App. 16a-17a; *but see* 44a-46a.

This Court has already unanimously held constitutional due process demands strict compliance with Rule 15(a). *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465–467 (2000); *see also Foman v. Davis*, 371 U.S.

178, 182 (1962) (affirming that "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded.")

Here, the District Court and four First Circuit judges[1] deprived Clopper of his constitutional due process right to amend his Complaint. Rule 15(a) mandates that Clopper must have a minimum of 21 days after service of a Rule 12(b) motion to file a first amended complaint. Here, Clopper's Complaint was dismissed with prejudice on the 15th day – when he should have had 6 more days to file his amended Complaint.

Moreover, the First Circuit's imposition of a requirement that Clopper demonstrate a viable amendment is not rooted in Rule 15(a). Worse, after Clopper presented 14 viable amendments, the Panel—in contradiction to the record—concluded that Clopper failed to demonstrate a viable amendment. Thus, the en banc Panel avoided the core question on appeal:

> Did the District Court, the First Circuit Panel and the en banc Panel violate the procedural due process guaranteed by the Fifth Amendment to the U.S. Constitution embodied in Rule 15(a) when it deprived Clopper of his right to one amendment within 21 days of the service of the Rule 12(b) Motion?

Since the lower courts refused to address the question presented, this Court's commitment to

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[1] Harvard Law Professor and Chief Judge of the First Circuit David J. Barron recused himself from the en banc Panel.

upholding minimum due process requires *a remand to the District Court with instructions to give Clopper 6 days to file his First Amended Complaint.*

See Beer v. United States, 564 U.S. 1050 (2011) (granting the writ of certiorari and vacating the lower judgment because the lower court failed to address the question on appeal).

STATEMENT OF THE CASE

The District Court's, the Panel's, and the en banc Panel's procedural handling of this case violated Clopper's constitutional right to a fair hearing.

Specifically, the District Court:

- granted Harvard's motion to dismiss *without leave to amend* before: (i) Clopper filed an Opposition, and (ii) the expiration of Clopper's 21-days to amend once by right under Rule 15(a).[2] App. 6a-7a; *see also* App. 42a-43a, 46a, 48a, 50a, 54a, 58a-59a, 72a, 85a-87a, 215a.

- denied Clopper's timely filed Rule 60(b) motion to reconsider its judgment, App. 10a-12a, which is a prerequisite to filing an amended Complaint in the First Circuit.[3]

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[2] The District Court granted all Defendants' assented-to extensions for time, giving Harvard a total of 71 days to respond to Clopper's Complaint. App. 60a.

[3] App. 43a (citing *Acevedo-Villalobos v. Hernandez,* 22 F.3d 384, 389 (1st Cir. 1994)); *see also* App. 59a (citing *Ondis v. Barrows*, 538 F.2d 904, 909 (1st Cir. 1976) ("[O]nce a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or 60.")).

- refused to read the medical reasons submitted under seal to understand why Clopper's counsel missed the 12(b) Opposition filing deadline by a single day during the Covid pandemic.[4] App. 87a, 149a; *see also* App 10a-11a.

- While the FRCP control over conflicting local rules, the District Court followed LR, D. Mass. 7.1(b)(2)'s 14-day time window rather than Rule 15's longer 21-day time window. Thus, the District Court impermissibly entered a dismissal with prejudice 6 days too early and deprived Clopper of his right to amend as a matter of course.[5]

Clopper was also denied his right to the normal appellate procedure. The First Circuit granted Harvard's Motion to Summarily Affirm the District Court finding there was "no substantial question of

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[4] Although Clopper assented-to multiple extensions for Harvard—including so its counsel could celebrate Rosh Hashanah—Harvard insisted on holding Clopper to the original Opposition deadline despite his counsel's documented illness. App. 258a-259a (Harvard's counsel denying Clopper's motion to extend deadline).

[5] Following a defendant's 12(b)(6) motion, Plaintiffs have 14 days to file an opposition under LR, D. Mass. 7.1(b)(2), App. 21a, and 21 days to amend their Complaint once under Rule 15(a)(1)(B), App. 20a, thus creating a conflict if the District Court grants the 12(b)(6) motion without leave to amend in between days 15 and 21. The United States Supreme Court has established that the Federal Rules of Civil Procedure supersede any conflicting Local Rules. FED. R. CIV. P. 83(a)(1); *see also Frazier v. Heebe*, 482 U.S. 641, 645–646 (1987); Eric Clopper, *When Federal & Local Rules Of Civil Procedure Collide: Why District Courts Should Extend Plaintiff's Time To Respond To A Motion To Dismiss To 21 Days*, NORTHWESTERN UNIVERSITY LAW REVIEW OF NOTE (Apr. 25, 2022) [https://perma.cc/5JLC-MAJD]).

law." App. 5a. Curiously, this summary process took 19 months, or 5 months longer than the median time to disposition for a fully briefed appeal.[6] Despite the extra 5 months, the Panel failed to address the violation of Rule 15(a) – the denial of Clopper's constitutional right to file an amended Complaint within 21 days of the service of a 12(b) Motion. App. 41a, 49a.

Instead, the Panel held Clopper did not raise a single "substantial question [of law]," App. 5a. Worse, the Panel reached out and dismissed the appeal against a different appellee (The Harvard Crimson) without an Opinion and *without The Harvard Crimson even having moved the Court to do so*. App. 1a-5a (omitting discussion of Clopper's appeal against The Harvard Crimson); *see also* App. 49a.

The en banc Panel, consisting of the original panel plus one additional judge:

- avoided any discussion of controlling precedent in *Nelson*, App 16a-17a, where this Court unanimously held that the protections of Rule 15(a) must be respected for all litigants as a matter of constitutional due process. 529, U.S. at 467 ("Rule 15 and the due process for which it provides demand[s] a [] reliable and orderly course.").

- misrepresented the record, stating Clopper never demonstrated how he could have

[6] USCOURTS.GOV, *Federal Court Management Statistics—Summary* at 2, June 2022, https://www.uscourts.gov/file/45294/download [https://perma.cc/TR29-62DR].

amended his Complaint, App. 17a, even though Clopper's petition quoted 14 separate viable amendments suggested by the 4 judges handling the case. App. 45a-46a.

A. The District Court Dismisses Clopper's Case Without Leave to Amend Six (6) Days Before Expiration of Clopper's Right to Amend his Complaint Once as a Matter of Course.

On July 20, 2020, Clopper filed a Complaint against Harvard and its student newspaper The Harvard Crimson ("Crimson") for wrongful termination, defamation, and other torts. App. 325a-371a. The District Court granted Harvard's two stipulated extensions to respond to the Complaint. App. 258a-259a.

On September 29, 2020, 71 days after receiving Clopper's Complaint, Harvard filed its 12(b)(6) motion ("12(b) Motion"). App. 324a.

On October 5, 2020, the Crimson filed its own 12(b) Motion. App. 263a-285a.

On October 14, 2020, prior to Clopper filing an Opposition or otherwise responding to Harvard's 12(b) Motion, the District Court granted Harvard's 12(b) Motion *without leave to amend*.[7] App. 6a-7a; *see also* App. 42a-43a, 46a, 48a, 50a, 54a, 58a-59a, 72a, 85a-87a, 215a. In its Order, the District Court noted 7 ways Clopper could have amended his Complaint, but

[7] On October 13, 2020, Clopper's Opposition to Harvard's Sep. 29, 2020 12(b)(6) Motion, App. 324a, was due under LR, D. Mass. 7.1(b)(2). App. 21a.

would not be permitted the opportunity to do so. App. 7a-9a.

Namely, the District Court held that "[t]he Complaint does not, for example, allege:

1. Harvard acted under color of state law . . .

2. plausibly suggest that Harvard used threats, intimidation, or coercion . . .

3. explain how his termination . . . breached any employment agreement . . .

4. sufficiently plead the elements of promissory estoppel[; h]e does not, for example, allege . . . a clear or definite promise that he could perform nude . . .

5. adequately allege[] actual malice . . .

6. allege the existence of any personal, tangible property over which Harvard exerted dominion . . .

7. establish the existence of an underlying tort or plead any facts supporting his conclusory allegation of any common plan or scheme."

App. 7a-9a.

On October 16, 2020, Clopper filed both a:

(1) Rule 60(b) motion to set aside the dismissal with prejudice for "excusable neglect," App. 254a-260a; and

(2) an assented-to motion to submit affidavit of counsel under seal so Plaintiff's lead counsel could "provide sensitive medical information that is not appropriate for filing on the public docket" to explain the one-day delay. App. 261a-262a.

On October 19, 2020, Clopper revised his Rule 60(b) motion to attach a proposed Opposition to Harvard's 12(b)(6) motion. App. 218a-253a.

A few hours later, *still on October 19, 2020*, and still within Clopper's 21-day window to amend his Complaint once as a matter of right under Rule 15(a)(1)(B), *the District Court denied Clopper's request to set aside its final judgment, which precludes the filing of an amended Complaint.* App. 10a-12a.

On October 19, 2020, the District Court also ruled that Clopper's motion to submit reasons under seal was moot, stating that it had "reviewed plaintiff's explanation for his failure to comply with the court's deadline."[8] App. 10a-11a.

Further, filing a Rule 60(b) motion is a prerequisite to Clopper filing an amended Complaint by right under Rule 15(a).[9] However, when the District Court denied his Rule 60(b) motion to set aside its judgment,

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[8] The District Court's denial of Clopper's motion to submit reasons for the late 12(b) Opposition under seal prevented Clopper's Counsel from presenting the reasons and supporting evidence for his one-day delay. Thus, the District Court could not have made an informed determination of whether the health reasons that caused Clopper's counsel to miss the original LR, D. Mass. 7.1(b)(2)'s deadline by one day constituted "excusable neglect" in the midst of the Covid pandemic. App. 149a.

[9] *See* note 3, above.

the District Court "foreclose[ed] Clopper's opportunity to amend the Complaint" during Rule 15(a)'s statutory 21-day window. App. 149a.

On November 3, 2020, Clopper filed his Opposition to the Crimson's 12(b) Motion. App. 188a-217a. On November 5, 2020, the District Court dismissed Clopper's defamation (and derivative) claims against the Crimson without leave to amend, reasoning that if a reader parsed the allegedly defamatory headline "word" "by" "word," each word was either true or an opinion. App. 13a-15a.

On December 1, 2020, Clopper timely filed his notice of appeal.

B. The First Circuit's Panel Dismisses Clopper's Appeal as Frivolous for Failing to Raise a Substantial Question of Law Without Addressing the Deprivation of Clopper's Rule 15(a) Right to Amend his Complaint Once as a Matter of Course.

On March 24, 2021, Clopper filed his principal brief, which explained that:

> "the District Court held that Plaintiff (not given leave to amend) did not adequately allege [required elements]."
>
> The District Court's denial of his Rule 60(b) motion "foreclose[ed] [his] opportunity to amend the Complaint."

App. 180a, 149a.

On April 20, 2021, instead of filing an Appellee's Brief, Harvard filed a Motion to Summarily Dismiss Clopper's Appeal as frivolous for failing to raise a substantial question of fact or law. App. 92a-113a.

In response, on April 30, 2021, Clopper filed a Motion to Summarily Remand the Dismissal on the grounds that the District Court committed obvious errors. App. 67a-91a. An error warranting an immediate remand was the District Court:

> "[d]enying Clopper the opportunity to amend his Complaint once within the 21-day time period was an *obvious error*. . . . Accordingly, Clopper was deprived his due process rights."

App. 87a (emphasis in original); *see also* App. 70a, 72a.

On May 13, 2021, in response to Harvard's Opposition to Clopper's motion for summary remand, Clopper reminded the panel that:

> "Clopper had an unqualified, automatic right under Fed. R. Civ. P. 15(a)(1)(B) to file his FAC [First Amended Complaint] within 21 days of being served Harvard's 12(b)(6) motion."

App. 58a-60a.

One year later, on April 29, 2022, while still waiting for a resolution on his motion to summarily remand to the District Court's with instruction for leave to amend, Clopper filed a Federal Rule of Appellate Procedure ("FRAP") 28(j) brief of supplemental authority. In his FRAP 28(j) brief, Clopper reminded the panel that:

> "from Day 15 through 21 following a defendant's motion to dismiss, a trial court that dismisses with prejudice deprives the plaintiff the express [Rule] 15 right to amend his complaint."

App. 54a.

On August 1, 2022, the Panel granted Harvard's motion to summarily dismiss Clopper's appeal under 1st Cir. R. 27.0(c) for failing to raise a substantial question of law. App. 5a. ("[C]ourt may affirm summarily if it clearly appears no substantial question is presented.")

In its decision, the Panel identified seven viable amendments[10] that Clopper should have made—but would not be permitted to make—in his original Complaint. Namely, the Panel held that Clopper's original, unamended "Complaint failed to allege:

1. actionable economic coercion . . .

2. No such facts [of an implied contract] were alleged . . .

3. The Complaint does not allege [Harvard] terminated [Plaintiff] in order to avoid paying compensation . . .

4. The Complaint fails to allege any facts that would fall within [the public-policy] exception [to the employment-at-will doctrine] . . .

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[10] The panel's 7 viable amendments were in addition to the District Court's 7 viable amendments.

5. the Complaint failed to allege reasonable reliance ['that Harvard had given him permission to perform nude'] . . .

6. The Complaint did not set out any false accusations that allegedly interfered with his contract . . .

7. Complaint failed to allege any facts that would support substantive claims for defamation or conversion."

App. 2a-5a.

Although Clopper raised deprivation of his constitutional due process right embodied in Rule 15(a) to file an amend Complaint within 21 days of the service of the Rule 12(b) Motion 4 times before the panel, the panel omitted any discussion of Rule 15(a). Instead, the Panel held Clopper waived the legal arguments not included in his original (unamended) Complaint.

C. The En Banc Panel Misrepresents the Record to Avoid the Rule 15(a) Question.

On August 15, 2022, Clopper filed his *Petition for en banc Rehearing to Uphold Constitutional Due Process* ("*Petition*"). App. 38a-52a. In his *Petition*, Clopper explained how the District Court did not permit him to amend his Complaint once, even though: (i) the District Court listed 7 amendments Clopper could have made, while Clopper still had 6 days before expiration of his time to amend by right under Rule 15(a)(1)(B); App. 44a-45a. and (ii) the Panel listed 7 additional ways Clopper could have

amended his Complaint to state a claim. App. 45a-49a.

On March 22, 2023, the en banc Panel ruled on Clopper's *Petition*. Specifically, the en banc Panel:

(1) used an "internal operating procedure" to convert Clopper's request for an en banc review into a rehearing before the original panel plus one additional judge;

(2) granted Doctors Opposing Circumcision's motion for leave to file an *amicus* brief but did not address the points raised by the medical professionals in support of Clopper's right to impartial application of Rule 15(a) and constitutional due process;[11] and

(3) affirmed its dismissal of Clopper's appeal.

App. 16a-17a.

In affirming its previous dismissal, the en banc Panel again failed to address Clopper's absolute constitutional due process right embodied in Rule 15(a) to amend his Complaint once within 21 days of the service of the Rule 12(b) Motion.

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[11] The three unaddressed points raised by Doctors Opposing Circumcision's *amicus* brief were: (1) The handling of Mr. Clopper's case offends constitutional due process and may appear to suggest improper adjudication; (2) Mr. Clopper's position on male genital mutilation aligns with the overwhelming scientific and medical consensus; and (3) based on bioethics, Clopper's message is not offensive or anti-Semitic, but corrective and essential, and worthy of constitutional due process protection, not the procedural short shrift. App. 30a-36a.

As this Court unanimously held in *Nelson v. Adams, USA, Inc.*, while examining Rule 15(a):

> due process does not countenance such swift passage from pleading to judgment . . .

Id. at 465.

> The propriety of allowing a pleading alteration depends not only on the state of affairs prior to amendment but also on what happens afterwards. Accordingly, *Rule 15* both *conveys the circumstances under which leave to amend shall be granted* and directs how the litigation will move forward following an amendment.

Id. at 465 (emphasis added).

Rule 15(a)(1)(B) expressly provides in pertinent part:

> A party may amend its pleading once as a matter of course no later than: . . . 21 days after service of a motion under Rule 12(b)[.]

Significantly, under Rule 15(a)(1)(B), the only qualifier on a party's "absolute" right to amend its Complaint is expiration of the 21-day time limit after service of a 12(b) Motion. *Peckham v. Scanlon*, 241 F.2d 761, 764 (7th Cir. 1957) (Rule 15(a) "confer[s] an absolute right to amend"); *See also, Rogers v. Girard Trust Co.*, 159 F.2d 239, 241 (6th Cir. 1947).

> In fact, the positive language of [Rule 15(a)] appears to leave no room for interpretation or construction other than

> that it confers an *absolute* right, of which the pleader cannot be deprived.

Peckham, 241 F.2d at 764 (emphasis added).

Here, the courts in the First Circuit repeated avoidance of Rule 15(a) directly conflicts with *Nelson's* Rule 15(a) mandate. Rule 15(a)(1) explicitly states that a party is entitled to amend "*once* as a matter of course." Fed. R. Civ. P. 15(a)(1) (emphasis added); *U.S. ex rel. D'Agostino v. EV3, Inc.*, 802 F.3d 188, 192 (1st Cir. 2015). Black's Law Dictionary defines "amendment as of course" as:

> An amendment, usu. to pleadings, that a party has a statutory right to apply for without the court's permission.

Amendment as of course, Black's Law Dictionary (8th 2004).

Thus, to justify denying Clopper's absolute right to amend his Complaint under Rule 15(a), the en banc Panel erroneously imposed a new legal requirement—neither presented or argued below nor rooted in Rule 15(a)—the need for Clopper to demonstrate one or more valid causes of action:

> "Appellant [Clopper] had ample and repeated opportunities in his opening brief, his addendum, his motion for summary reversal, his Rule 28j letter, and now his petition to demonstrate that, had he been allowed to amend his complaint . . ., he would have been able to set out one or more valid causes of action."

App. 17a.

Such a requirement violates *Nelson's* command that:

> Rule 15 sets out the requirements for amended and supplemental pleadings.

529 U.S. 460, 465.

Worse, the First Circuit's rationale rings hollow in the face of 4 federal judges recognizing that 14 separate viable amendments were open to Clopper. App. 2a-5a; *see also* App. 45a-46a.

Finally, even where a complaint fails to state a cause of action and the Court believes is no possibility that a cause can be stated:

> The inescapable point is that plaintiff, the same as any other pleader [whose time has not expired] is entitled as a right to make the attempt.

Peckham, 241 F.2d at 764-765.

D. Even Disfavored Litigants Are Still Entitled to Procedural Due Process.

Clopper's Complaint centers on Harvard wrongfully terminating Clopper for staging an intentionally provocative play on campus that incorporated strong language, nudity, and a sex scene to publicize a political message – opposition to routine male genital mutilation, aka circumcision. App. 338a-340a. Harvard's cartoon version of Clopper as an

antisemite is as repugnant as it is false. *See, e.g.,* App. 291a, 298a, 318a-319a, 96a, 101a.

Clopper has the support of many Jewish and non-Jewish medical professionals, who also share Clopper's views. *See,* e.g., Doctors Opposing Circumcision's amicus brief at App. 23a-37a.

Unfortunately, Harvard's cartoon version of Clopper's Play—separated from its political message about the need to protect children from routine genital mutilation—was very effective. It apparently convinced the District Court and the First Circuit that instead of having sincere religious beliefs worthy of protection, Clopper merely delivered a nude anti-Semitic rant unworthy of minimum due process.

Both the District Court and the First Circuit's refused to acknowledge Clopper's rights under Rule 15(a). Dismissal of Clopper's amendable Complaint with prejudice 6 days prior to expiration of his absolute right to amend once under Rule 15(a) is not acceptable way to treat any Plaintiff, even if the Plaintiff holds minority or unpopular religious views. In fact, the purpose of due process is to protect the access of unpopular minority viewpoints to the courthouse.

In sum, although Clopper is proudly Jewish and has publicly opposed antisemitism, a party's religious beliefs are irrelevant to the application of Rule 15(a). Harvard's efforts to prejudice and inflame the judiciary must not be rewarded.

REASONS FOR GRANTING THE PETITION

I. Rule 15(a) Embodies Constitutional Due Process.

This Court may grant certiorari when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a).

The right to minimum procedural due process is "absolute." *Carey v. Piphus*, 435 U.S. 247, 266 (1978), and that is exactly what the Federal Rules of Civil Procedure were designed to protect. *Nelson*, 529 U.S. at 465. Specifically, due process ensures governmental proceedings are *fair;* and the procedural prong of due process requires every party is given the "opportunity to be heard." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Rule 15(a) protects this opportunity by "assuming an amended pleading will be filed" and granting parties the right to file that amended pleading in response to their adversaries. *Nelson*, 529 U.S. at 466.

Rule 15(a)(1)(B) expressly provides that:

> A party may amend its pleading once as a matter of course within: . . . 21 days after service of a motion under Rule 12(b).

Yet here, at every level below, Clopper was systematically denied his absolute right to amend his Complaint once "as a matter of course" within 21 days of Harvard's 12(b) motion. App. 46a-50a.

First, the District Court violated procedural due process by using a local rule to shorten by 6 days the time permitted under Rule 15(a) to file an amended Complaint.[12] App. 6a-7a; *see also* App. 42a-43a, 46a, 48a, 50a, 54a, 58a-59a, 72a, 85a-87a, 215a. Then, the court of appeals violated due process by evading the question as to whether the District Court violated due process. App. 1a-5a; *see also* 41a, 49a.

Second, instead of addressing Clopper's constitutional due process right to amend his Complaint—which Clopper raised 5 times on appeal—each Court instead focused narrowly on how Clopper's original, unamended Complaint failed to state a claim. Every court below avoided addressing Clopper's right to the minimum time required under Rule 15(a) to file an amended Complaint. App. 49a.

Third, the en banc Panel improperly imposed a requirement that Clopper first show a viable amendment before exercising his Rule 15(a) right to amend once within 21 days of service of a 12(b) Motion:

> [Clopper] . . . did not demonstrate that, had he been allowed to amend his complaint . . . he would have

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[12] As described above, Harvard filed its 12(b)(6) motion on September 29, 2020, App. 324a, and the District Court granted that motion without leave to amend on October 14, 2020, App. 6a, which is only 15 days after service of the 12(b) motion. The District Court relied on LR, D. Mass 7.1(b), App. 21a-22a, to grant Harvard's motion to dismiss. However, when following a local rule violates a constitutionally mandated federal rule, the constitutionally mandated federal rule prevails. FED. R. CIV. P. 83(a)(1); *see also Frazier v. Heebe*, 482 U.S. 641, 645–646 (1987).

> been able to set out one or more valid causes of action." App. 17a App. 17a.

However, even if the First Circuit could impose a requirement not rooted in the text of Rule 15(a), *4* separate judges identified *14* viable amendments that Clopper could have made to state a claim. App. 2a-5a, 7a-9a; *see also* App. 7a-9a. Thus, the en banc Panel's new Rule 15(a) requirement simply cannot be squared with the fact Clopper quoted the 4 separate judges who identified the 14 viable amendments. App. 17a., App. 2a-5a, App. 44a-45a, App. 45a-46a.

In sum, the First Circuit's contortions to avoid addressing the deprivation of Clopper's constitutional right to amend his Complaint once as a matter of course under Rule 15(a) make clear the need for Supreme Court supervision. Fidelity to the Constitution and Rule 15(a) require an order:

> remanding Clopper's case to the District Court with instruction to give him time to file his First Amended Complaint.

See Beer v. United States, 564 U.S. 1050 (2011) (granting the writ of certiorari and vacating the lower judgment at the same time because the lower court failed to address the question on appeal).

II. Upholding Minimum Due Process is Necessary to Protect the Rule of Law and the Court's Appearance of Neutrality.

To date, Harvard has been successful in falsely smearing Clopper as a rabid anti-Semitic nudist, who

is unworthy of access to our nation's courts.[13] *See, e.g.*, App. 290a-300a. Clopper is actually a proud Jewish male activist whose faith requires him to seek to protect male children from genital mutilation, i.e. the removal of 40% of the skin from their genitals shortly after birth.

The fact that Clopper is not the fringe lunatic cartoon character drawn by Harvard is demonstrated by the *amicus* brief of Doctors Opposing Circumcision ("DOC"), a group of prominent Jewish and non-Jewish medical professionals. DOC's brief makes three points: (i) the handling of Clopper's case offends constitutional due process to which all litigants (disfavored or not) are entitled; (ii) Clopper's opposition to male genital mutilation aligns with the overwhelming scientific and medical consensus; and (iii) based on bioethics, Clopper's message is not offensive or anti-Semitic, but corrective and essential. App. 30a-36a.

Whether Clopper's commitment to protecting children from male genital mutilation is a minority religious viewpoint should be irrelevant to the District Court and First Circuit's mandatory duty to follow Rule 15(a) and to address substantial questions.

Since our founding, protecting minimum due process for *every person*—no matter their religion, ideas, or identities—has been this Court's North Star. Due process is the foundation of a just and organized society. As this Court knows, yesterday's disfavored

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[13] Although unlikely, Harvard should file a brief *in support of granting certiorari* to ensure Clopper receives a fair hearing and the right to be heard, which is central to Harvard's mission to promote vigorous debate in the search for truth.

viewpoints often become the majority view decades later. Due process requires that even the most reviled among us are entitled to fair access to the federal courts.

Yet, here, the District Court, the Panel, and the en banc Panel terminated Clopper's case before his *minimum* time to formulate his pleadings expired. Worse, the First Circuit and en banc Panel did not even address the constitutional question on appeal. In these rare circumstances, when judicial behavior is so outside the norm, this Court's supervision is required to maintain the integrity and impartiality of the judicial system.

Unfortunately, this is not the first time in recent memory that Harvard appears to have received preferential treatment. *See* Jeannie Suk Gerson, *The Secret Joke at the Heart of the Harvard Affirmative-Action Case: A federal official wrote a parody of Harvard's attitude toward Asian Americans and shared it with the dean of admissions. Why did a judge try to hide that from the public?*, THE NEW YORKER, (Mar. 23, 2023), https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case [https://perma.cc/L2XL-KDNF].

To honor minimum procedural due process as well as to avoid any appearance of partiality in favor of Harvard, Clopper respectfully asks this Court to grant his writ, vacate the judgment, and remand to the District Court with instructions to give Clopper his 6 days to file his First Amended Complaint as required by Rule 15(a).

CONCLUSION

For the reasons set forth above this Court should grant certiorari.

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