

Original

No. _____

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

BERNICE CURRY MALCOLM

Applicant,

v.

**ROCHESTER CITY SCHOOL DISTRICT, BARBARA DEANE-WILLIAMS
former SUPERINTENDENT OF SCHOOLS, AND
THE ASSOCIATION OF SUPERVISORS AND ADMINISTRATORS OF
ROCHESTER (ASAR), TIMOTHY CLIBY, former ASAR President, and
JOHN ROWE, former ASAR First Vice President,**

Respondents.

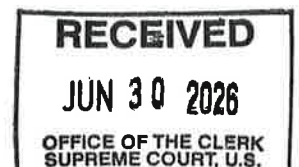
**On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit**

Civil: 18-cv-6450, U.S.C.A. Docket No.: 24-2838 (Lead)
Civil: 17-cv-6878, U.S.C.A. Docket No.: 24-2873 (Con.)

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR WRIT OF CERTIORARI**

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BERNICE CURRY MALCOLM, PRO SE APPLICANT



APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

In accordance with Rule 13.5 of the Supreme Court of the United States Rules, Bernice Curry Malcolm, appearing before the Court as an unrepresented *pro se* litigant, who was the *pro se* plaintiff in the lower United States District Court, Western District of New York (Rochester) and *pro se* appellant before in the lower appellate before the United States Court of Appeals for the Second Circuit makes respectful request for a sixty-day extension of time, up to and including September 2, 2026, within which to file a petition for a writ of certiorari in this case. The petition for a writ of certiorari is currently due on July 4, 2026. In support of this application, *pro se* Appellant states:

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court improperly dismissed plaintiff-appellant complaint/claims for failure to state a cause of action.
2. Whether the district court abused its discretion when it held that plaintiff-appellant complaint/claims or the action should be dismissed with prejudice against the defendants-appellees Rochester City School District pursuant to local rule 41(b), Fed. R. Civ. P. 41(b).
3. Whether plaintiff-appellant states a cause of action for breach of contract.
4. Whether Plaintiff-Appellant sufficiently established an adverse employment action.

5. Whether the association of supervisors and administrators breached its fair duty of representation.
6. Plaintiff-Appellant exhausted her administrative and contractual remedies.
7. Whether the district court improperly held that plaintiff-appellant did not state a cause of action of disparate treatment in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII"), and the Age Discrimination in Employment Act ("ADEA").
8. Plaintiff-Appellant's claims against the defendants-appellees were not barred by collateral estoppel/*res judicata*/issue preclusion.
9. Whether the District Court improperly held that plaintiff-appellant failed to state a cause of action under § 301 of the Labor Management Relation Act, 29 U.S.C. § 185 where the school district breached the Collective Bargaining Agreement ("CBA") and the union breached its fair duty of representation, and whether the District Court improperly held that plaintiff-appellant's state law cause of action for breach of contract was preempted and/or subsumed under § 301.
10. Plaintiff-Appellant sufficiently established a *prima facie* case of race-based discrimination.
11. Plaintiff-Appellant sufficiently established a *prima facie* case of age-based discrimination
12. Plaintiff-Appellant complaint sufficiently state a cause of action of retaliation under the Civil rights act of 1964, 42 U.S.C. §2000e ("Title VII"), the Age

Discrimination in Employment Act, 29 U.S.C. §621 et seq. ("ADEA"), and New York State Human Rights Law, N.Y. EXEC. Law §290 et. seq. (NYSHRL").

13. Defendants-Appellees Rochester City School District unlawfully terminated plaintiff-appellant's employment.

14. Plaintiff-Appellant was tenured.

15. The defendants-appellees Rochester City School District actions were part of a continuing violation and continuing wrong in retaliation against plaintiff-appellant for engaging in protective activity.

16. The Rochester City School District failed to raise exhaustion as an affirmative defense against plaintiff-appellant retaliation claims arising after November 2017. The District Court abused its discretion when it improperly dismissed her claims with prejudice arising prior to her recall employment with the District in or around November 2017 as barred by *res judicata* and/or collateral estoppel.

17. Whether the defendants-appellees acted under color of law in violation of 42 U.S.C. § 1983, Equal Protection.

18. The District Court properly declined to re-impose leave-to-file sanctions against plaintiff-appellant.

Whether the United States Court of Appeals, for the Second Circuit abused its discretion regarding (1) *res judicate* barred certain claims, (2) Appellant failed to

state a claim with respect to others, and (3) she failed to prosecute her remaining claims.

Whether the United States Court of Appeals for the Second Circuit abused its discretion when it dismissed Appellant's action for failure to prosecute under Fed. R. Civ. P. 41 (b) based on *res judicata* and failure to state a claim posed as a sanction.

Whether the United States Court of Appeals for the Second Circuit's affirmation of the lower district court's dismissal for failure to prosecute a harsh punishment where no willful conduct was found, where the Defendants-Appellees did not timely respond to the Magistrate Judge's Recommendations, where the defendants-appellees failed to brief Appellant's claims against them, where the Court did not consider the district court's denial of Appellant's request to meet in-person.

Appellant did not ignore and/or flout the lower district court orders and provided reasonable and adequate excusable reasons and also answered the orders to show cause where the defendants-appellees did not respond timely to any the Recommendations. Whether the defendants-appellee were prejudiced where they neither timely responded to the Magistrate Judge's Recommendations. Whether a *pro se* should be held at a significantly higher standard than those represented by counsel. Whether district court abused its discretion in dismissing Appellant's action against the Defendants-Appellees. Whether, denying Appellant request to meet in-person considered a lesser sanction.

Appellant did not at any time intentionally ignore the Court orders. Appellant appears as *pro se* and was also trying to meet other court's obligations and deadlines as well. Appellant is one person. She does not have a team of paralegals and/or well-trained veterans, sophisticated lawyers and/or attorneys. Whether the reasons Appellant provided unexcused, unexplained where the Appellant had to Court appearances on the same day and was out of State and could not make a phone call. Whether the lower district court denying Appellant's request for in-person considered flouting and/or ignoring Court orders where the Appellant was trying to make every attempt to follow the Court's order.

The United States Court of Appeals for the Second Circuit's Summary Order and Judgement was entered on April 6, 2026 (Appendix a "App. A" hereto), affirming the dismissal of Applicant's discrimination and retaliation complaint pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. Appellant filed a timely motion to stay the mandate on April 23, 2026.

The United States Court of Appeals issued the mandate of its Summary Order on April 27, 2026.

Appellant made respectful second timely motion that the Court stay/recall its mandate to avoid a manifest injustice on May 5, 2026, that motion is pending.

Under Rule 13.5, a Supreme Court Justice may extend the time for seeking certiorari for up to sixty additional days.

The Supreme Court has certiorari jurisdiction over this case under 28 U.S.C. §1254 (1).

Reasons for Granting an Extension of Time

1. *Pro se* Applicant's need for additional time is heightened by the fact that she appears *pro se* and currently appears as *pro se* on other matters that are currently pending before the United States Court of Appeals for the Second Circuit.
2. Applicant request for an additional thirty days to properly prepare and file her petition for a writ of certiorari, and that this Court grants her additional time pending the outcome of the stay/recall of the mandate that is pending before the Second Circuit.
3. Thus, granting an additional thirty days will ensure that these important issues to be raised are properly, rather than hurriedly, presented to the Court.
4. The certiorari petition will raise threshold questions of substantial questions that warrants review by the United States Supreme Court. Both federal and state anti-discrimination laws and anti-retaliation statues prohibit unlawful discrimination and retaliation of any kind in the workplace, and post-employment based on race/color (Black/African American), age (Appellant was fifty eight years of age when the discriminatory acts against her began, she is now sixty-eight years of age) and/or sex (female, excludes sexual harassment and sexual violence) and/or gender (female, a woman).
5. Those same anti-discrimination and anti-retaliation statues prohibit retaliation while engaging in a protected activity. This case presents issues of

national importance concerning employment discrimination, breach of binding employer-employee contractual relationship, rights of tenured employees to protected property rights without due process of law and post-employment retaliation.

6. The Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII"), the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. ("ADEA"), and New York State Human Rights Law, N.Y. EXEC. Law §290 et. seq. (NYSHRL"), and New York State Human Rights Law Section 296, 42 U.S.C. § 1981, 42 U.S.C. § 1983, all prohibits unlawful discrimination and retaliation in the workplace and post-employment.
7. Whether dismissal under Fed. R. Civ. Procedure 41 (b) for failure to prosecute a harsh punishment.
8. Whether dismissal under Fed. R. Civ. P. pursuant to Rule 41 (b) an adjudication of the merits.

The United States Court of Appeals for the Second Circuit ruling conflicts with not only its own panel rulings, but other circuits as well as the United States Supreme Court, including the first, sixth, and ninth regarding Rule 41 (b) failure to prosecute as a sanction. Other circuits including this one have consistently ruled that the conduct is one that is extreme and this was not an extreme situation and neither did plaintiff-appellant ignore the Court. " This Court reviews Rule 41(b) dismissals for abuse of discretion. *Baptiste v. Sommers*, 768 F.3d 212, 216 (2d Cir. 2014). Although review abuse of discretion "suggests

great deference," this Court recognizes that "dismissal is a harsh remedy and is appropriate only in extreme situations." *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996).

Under Fed. R. App. P. 41(d)(2)(A), a motion to stay the mandate pending a petition for a writ of certiorari "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Appellant has met that burden.

Further, even if the stay was denied and/or mandate issued, Appellant may renew her request before the Supreme Court pursuant to Supreme Court Rule 23, whether she filed for panel rehearing and/or rehearing en banc or not. See Fed. R. App. P. 41(d)(2)(A); see also Supreme Court Rule 13. This application includes a request that should the United States Court of Appeals for the Second Circuit deny Applicant's pending motion for stay/recall of the mandate to stay its April 6, 2026 final Summary Order, Appellant makes respectful request that this Court issue a stay of the mandate pending the outcome and/or finality pending a timely filing of a petition for writ of certiorari.

The Supreme Court has explained that a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); accord *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 568 n.15 (1987) (under Federal Rule 8, claimant has "no duty to set out all of the relevant facts in his complaint").

As we explained in *Mitchell*, even when a court issues a notice of a possible dismissal and a plaintiff fails to comply with the court's directive, the court must still make a finding of "willfulness, bad faith, or reasonably serious fault" by evaluating those criteria. 708 F.3d at 467. Plaintiff-Appellant conduct was not willful, done in bad faith, and/or not reasonably serious fault. There was no finding of willfulness, bad faith or reasonably serious fault. Whether the denial of a request by plaintiff-appellant for an in-person conference constitute willfulness, bad faith or serious fault. Whether the lower district court's failure to notify plaintiff-appellant of a February 6, 2024, scheduled conference hearing constitutes ignoring the Court.

Whether Plaintiff-Appellant's notice to the Court that she could not get out of another Court matter hearing which occurred on the same day of February 28, 2024 meets the criteria for dismissal of her claims as pursuant to Rule 41 (b) for failure to prosecute a sanctionable action. There was no delay and neither were the Appellees prejudiced. Neither did the Appellees the Association of Supervisors and Administrators of Rochester brief the matter below in all cases and neither did the Rochester City School District brief in all appeals.

Whether Rule 41 (b) favors resolving claims on the merits, instead of a blanket sanction for failure to prosecute without determining the merits on appeal. At no time did plaintiff-appellant fail to prosecute these civil actions. And neither has she willfully, intentionally ignored the Court but rather informed the Court. "[D]ismissal should not be viewed either as a sanction of first resort or as an automatic penalty for every failure to abide by a court order." Lawes v. CSA

Architects & Eng'rs, 963 F.3d 72, 91 (1st Cir. 2020) (alteration in original) (quoting Young v. Gordon, 330 F.3d 76, 81 (1st Cir. 2003)).

This case involves substantial issues regarding (1) Whether the district court's ruling deprived plaintiff-appellant of her rights to due process, (2) whether this Court's affirmation of the district court's sanction of dismissal of all plaintiff-appellant's claims are in conflict with the § 2101(f) and/or the All Writs Act, (3) whether this Court's ruling conflicts with the United States Supreme Court ruling in in *Hollingsworth v. Perry*. The test has three prongs. *First*, whether the applicant has shown a "reasonable probability" that [the] Court will grant certiorari." *Second*, whether there is "a 'fair prospect' that the Court [would] reverse the judgment below." *Third*, whether there is a "likelihood" that there would be "irreparable harm" without a stay, (4) Whether a pro se litigant should be held to a higher standard than those represented by counsel, (5) Whether Rule 41 dismissal as a sanction without reaching determining the merits of a case considered due process of law, (6) whether a labor union breaches its fair duty of representation where it violates the CBA when it fails to keep a unit member informed, noticed, and refuses to allow them to be part of any proceedings where the unit member was not notice and did not give up and/or waive any of his or her rights to the same, "A union acts in bad faith when it acts with an improper intent, purpose, or motive," *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998), while "arbitrary conduct amounting to a breach is . . . intentional conduct by union officials [or] acts of omission which, while not calculated to harm union members, 'may be so

egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.” *N.L.R.B. v. Local 282, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 740 F.2d 141, 147 (2d Cir. 1984) (quoting *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978)), (7) whether this Court’s affirmation of the district court’s dismissal under Rule 41 (b) and 12 (b)(6) was an adjudication on the merits, (8) where on appeal the defendants-appellees speak of a September 28, 2024 order by the district court in which plaintiff-appellant was not notice of the same for the first time and do not have any knowledge of this hearing and/or briefing by the defendants-appellees, whether plaintiff-appellant was deprived of notice and due process of law, (9) whether under § 1981 and Equal Protection school districts are considered a person under §1983; and but not limited to.


Title VII prohibits a labor organization from discriminating against a member because of, inter alia, her race or sex. See 42 U.S.C. § 2000e-2(c). Section 1981 and the NYSHRL also prohibit racially motivated discrimination. See *Village of Freeport v. Barrella*, 814 F.3d 594, 604 (2d Cir. 2016); *Griffin v. Sirva Inc.*, 835 F.3d 283, 289–90 (2d Cir. 2016). “[A] stigma-plus claim . . . involves an ‘injury to one’s reputation (the stigma) coupled with the deprivation of some tangible interest or property right (the plus), without adequate process.” *Segal v. City of New York*, 459 F.3d 207, 212 (2d Cir. 2006) (quoting *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003) (internal citations omitted).

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WHEREFORE, In light of the circumstances presented and preparing an adequate petition for writ of certiorari will require an extension of time, affording good cause for a sixty-day extension to including and up to September 2, 2026.

Dated: June 26, 2026

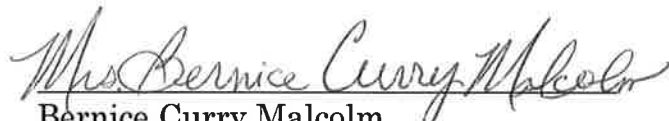
Respectfully Submitted,


Bernice Curry Malcolm, *pro se*

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