No._____

In the Supreme Court of the United States

ANICA ASHBOURNE, PETITIONER
v.
DONNA HANSBERRY, DIRECTOR, GLOBAL HIGH WEALTH, RESPONDENT,

DONNA PRESTIA, ASSISTANT DIRECTOR, GLOBAL HIGH WEALTH, RESPONDENT,

THOMAS COLLINS, TERRITORY MANAGER, GLOBAL HIGH WEALTH, RESPONDENT, and

Timothy Geithner, Secretary, U.S. Department of the Treasury, Respondent

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 1, 2018

QUESTIONS PRESENTED

I. The Privacy Act requires an agency to verify the accuracy of its information against *the factual records of independent and objective third parties.* 5 U.S.C. §552a(e)(5);, *Doe v. U.S.*, 821 F.2d 694, 699-701 (D.C. Cir. 1987) (*en banc*).

A. Whether the D.C. Circuit erred when it decided that Respondents Donna Hansberry, Donna Prestia, and Thomas Collins were not required to verify the accuracy of their Notice of Proposed Termination against the factual records of independent and objective third parties?

II. *Before* an agency can deprive a person of life, liberty, or property, an agency must provide the person with a "meaningful opportunity to be heard". A "meaningful opportunity to be heard" occurs when an agency has provided the person with notice of its charges, notice of the evidence against him, and notice of its intent to meet with him. *Codd v. Velger*, 429 U.S. 624, 626-27 (1977); *Arnett v. Kennedy*, 416 U. S. 134 (1974); *Doe v. Dept. of Justice*, 753 F.2d 1092 (D.C. Cir. 1985).

Whether the D.C. Circuit erred when it determined that Donna Hansberry, Donna Prestia, and Thomas Collins were only

required to provide Petitioner Anica Ashbourne with their Notice of Proposed Termination and with an opportunity to refute it?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the petition. Petitioner in this Court, Anica Ashbourne, is the Petitioner-Appellant below. Respondents in this petition are Donna Hansberry, Donna Prestia, Thomas Collins, and Timothy Geithner (in his official capacity), Secretary of the U.S. Department of the Treasury.

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PETITION FOR A WRIT OF CERTORARI

Anica Ashbourne respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit as well as the opinions below.

OPINIONS BELOW

The November 24, 2015 decision of the U.S. District Court. The decision is published and is reproduced in the appendix at Appx. 9-44.

The November 3, 2017 Judgment of the U.S. Court of Appeals for the District of Columbia Circuit. The judgment is unpublished and is reproduced in the appendix at Appx. 4-8.

The February 14, 2018 Order denying a panel rehearing and a rehearing en banc is unpublished and is reproduced in the appendix at Appx. 2-3.

JURISDICTION

On May 14, 2018, Petitioner filed a request for an extension of time in the U.S. District Court of Appeals for the District of Columbia Circuit with Chief Justice John G. Roberts. Her request to file her petition for writ of certiorari was granted up to and including October 1, 2018.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional amendments and statutory provisions are reproduced in the appendix at Appx. 70-72.

FACTUAL BACKGROUND

1. Petitioner Anica Ashbourne is a Tax Attorney, CPA, and former government Chief Audit Executive. Appx. 51. In October 2009, Petitioner Anica Ashbourne submitted e-QIP (Electronic Questionnaires for Investigative Purposes) for a Secret Security Clearance position with the Dept. of the Treasury. USCA 15-5351, Document #1688016, p. 36.

2. In November 2009, the U.S. Department of the Treasury hired her as an Auditor-in-Charge in its Office of the Inspector General. USCA 15-5351, Document #1688016, p. 38.

3. In January 2010, after it had verified her work experience and dual credentials, the U.S. Department of the Treasury designated her a candidate with "Superior Qualifications." USCA 15-5351, Document #1688016, p. 39.

4. On January 27, 2010, Jeffrey Dye, called her into an unscheduled meeting, accused her of being unprofessional, and terminated her position. USCA 15-5351, Document #1688016, p. 40-45.

5. On May 21, 2010, Donna Hansberry, Donna Prestia, and Thomas Collins, all IRS employees, offered her a position as an

Auditor-in-Charge. Document USCA 15-5351, Document #1688016, p. 71.

6. Although theirs was a public trust position, and she already held a secret security clearance position, they instructed her to resubmit her e-QIP. USCA 15-5351, Document #1688016, p. 72-73.

7. On May 9, 2011, Donna Hansberry, Donna Prestia, and Thomas Collins called her into an unscheduled meeting. When she entered, Lauren Benedict, their labor relations specialist, laughed when she told her that she would be terminated the next day if she did not resign. USCA 15-5351, Document #1688016, pp. 60, 75.

8. Ms. Benedict explained that they intended to terminate her because, in e-QIP, she did not "confess" that her former employer, Tom G. Johnson, had terminated her in 2001. USCA 15-5351, Document #1688016, p. 75. In e-QIP, she reported that she had resigned but that Tom G. Johnson would claim otherwise. USCA 15-5351, Document #1688016, p. 74.

9. On May 10, they handed her their Notice of Proposed Termination. USCA 15-5351, Document #1688016, p. 61-63.

10. In their Notice of Proposed Termination, they said that she lied on her

résumé about Ashbourne & Company. They said that Ashbourne & Company did not exist because she was self-employed. USCA 15-5351, Document #1688016, p. 61-63.

11. In their notice, they also said that she lied about resigning from C.J. Johnson, Inc. because Tom G. Johnson said he had terminated her. USCA 15-5351, Document #1688016, pp. 61-63.

12. On May 19, 2011, she responded to their Notice of Proposed Termination. USCA 15-5351, Document #1688016, pp. 63-67.

13. On May 28, 2011, they terminated her employment.

PROCEDURAL BACKGROUND

14. On October 29, 2013, she filed a consolidated complaint in this Circuit. She complained that they had deliberately falsified her personnel records, deprived her of her property interest in Ashbourne & Company and a liberty interest in her reputation, and had improperly disclosed personal information about her. USCA 15-5351 Document #1688016, pp. 70-79. She said that their Notice of Proposed Termination was based on their subjective judgments and opinions, rather than on any verified evidence. USCA 15-5351 Document #1688016, pp. 70-79.

15. She also complained that they had unnecessarily reinitiated a background investigation, even though she had already undergone a secret security clearance background investigation. USCA 15-5351 Document #1688015, p. 13.

16. In March 2015, when they filed their motion for summary judgment, Donna Hansberry, Donna Prestia, and Thomas Collins publicly disclosed her *entire* (unredacted) personnel records on PACER. USCA 15-5351 Document #1688016, pp. 114-119.

17. On March 24, 2015, the U.S. District Court denied plaintiff's motion to seal her personnel files and to impose sanctions for the unauthorized disclosures. Appx. 45-47.

18. On November 24, 2015, the District Court denied her motion for summary judgment and instead granted Donna Hansberry, Donna Prestia, and Thomas Collins' motion. Appx. 9-55.

19. On November 3, 2017, the D.C. Circuit affirmed the District Court's decision. Appx. 4-8.

20. On February 14, 2018, the D.C. Circuit denied her petition for rehearing. Appx. 2-3.

REASONS FOR GRANTING THE WRIT

A. This is a Case of first impression and one that presents this Court with a recurring issue of national importance— i.e. The verification process required by the standard of accuracy found in 5 U.S.C. §552a(e)(5).

This Court's intervention is critical regarding the interpretation of the Privacy because the Privacy Act required Donna Hansberry, Donna Prestia, and Thomas Collins to verify the accuracy of their Notice of Proposed Termination against the factual records of independent and objective third parties before disseminating it. *Doe v. United States*, 821 F.2d 694, 699-701 (D.C. Cir. 1987) *(en banc)*.

Petitioner Anica Ashbourne seeks this Court's review because Donna Hansberry, Donna Prestia, and Thomas Collins deliberately falsified her personnel records when they maintained in her records a Notice of Proposed Termination that is based on their subjective judgments and opinions about her, USCA 15-5351 Document #1676771, p. 17, rather than on documentary evidence; USCA 15-5351 Document #1688016, p. 46. They even admitted that their notice was not based on the results of an objective investigation. USCA 15-5351 Document #1676771, p. 18.

Both the courts below and Donna Hansberry, Donna Prestia, and Thomas

Collins ignored the Privacy Act, even though the law is clear.

In *Doe v. U.S.*, Judge Ruth Bader Ginsburg, in writing for the majority, stated that the Privacy Act requires an agency to verify the accuracy of its determinations against the factual records of independent and objective third parties. *Doe v. U.S.*, 821 F.2d 694, 699, 700 no. 20, 701, 704 (D.C. Cir. 1987) (en banc). Since 1987, this Circuit has held that as long as information in the agency's records is capable of being verified, the agency must take affirmative steps to check the information against the factual records of independent and objective third parties. *McCready v. Nicholson*, 465 F.3d 1, 19 (D.C. Cir. 2006); *Sellers v. BOP*, 959 F.2d 307 (D.C. Cir. 1992); *Deters v. U.S. Parole Comm.*, 85 F.3d 655, 658 (D.C. Cir. 1996).

Although both courts below cite *McCready,* both misquoted the law and facts in that case. In *McCready*, this Circuit specifically rejected the argument that an agency can verify its records and make conclusions based solely on a review of its own records. In *McCready,* this Circuit found that the agency had failed to verify the accuracy of its conclusion that McCready had falsified her timesheets. This Circuit found that the court had failed to verify its conclusions about McCready's records against the factual records of independent and objective third parties, *McCready*, 465 F.3d at

19, and McCready, like Petitioner Anica Ashbourne, USCA 15-5351 Document #1688016 pp. 70-79, maintained that there were no discrepancies in her records. *McCready v. Principi*, 297 F. Supp. 2d 178, 192, 199-200 (D.D.C. 2003). McCready successfully argued that the agency made conclusions about her timesheets and her telephone records without verifying their conclusions against the factual records of independent and objective third parties. *McCready*, 465 F.3d at 19. The agency admitted that it had based its conclusions solely on McCready's records, but argued that McCready had not provided it with any evidence to disprove its conclusion that she had falsified her timesheets. *McCready v. Principi*, 297 F. Supp. 2d 178, 192-193 (D.D.C. 2003). The D.C. Circuit disagreed with the District Court's holding that McCready was required to challenge the factual accuracy of her own records, only the agency's *subjective conclusions* about them. *McCready v. Principi*, 297 F. Supp. 2d 178, 192 (D.D.C. 2003).

The District Court failed to explain why McCready would ever file a Privacy Act complaint against herself or argue that the records she herself had submitted to the agency were factually inaccurate. The D.C. Circuit concluded that the Privacy Act did not apply to subjective judgments and opinions, such as those found in fitness reports,

performance evaluations, *Mueller v. Winter,* 485 F.3d 1191, 1197-98 (D.C. Cir. 2007), or to personnel decisions regarding an employee's job reclassification requests. *Kleiman v. DOE*, 956 F.2d 335, 337-338 (D.C. Cir. 1992). However, in reversing the District Court, the D.C. Circuit found that the agency's *conclusions* about McCready's timesheets and telephone records involved objective facts that the agency had failed to investigate. *McCready v. Nicholson*, 465 F.3d 1, 4, 19 (D.C. Cir. 2006). More specifically, the D.C. Circuit concluded that the agency had failed to take affirmative steps to verify whether McCready had attended a staff meeting on a particular date, since it found that her attendance at this meeting was an objective fact that was easily capable of verification. *McCready v. Nicholson*, 465 F.3d 1, 4, 19 (D.C. Cir. 2006).

Even though this Case is factually similar to *McCready v. Nicholson*, the D.C. Circuit did not rely on it. In fact, this Case now conflicts with *McCready v. Nicholson, Doe v. U.S.*, Federal Circuit precedent, decisions issued by the Merit Systems Protection Board, and with the legislative history of the Privacy Act.

Since 1987, this Circuit has required an agency to verify the accuracy of its records against the factual records of independent and objective third parties. And, the agency's verification process must result in

preponderant evidence. *Doe*, 821 F.2d 699-701, 711.

Like the Privacy Act, the Federal Circuit requires an agency to prove its charges by a preponderance of the evidence. *Naekel v. Dept. of Transp.,* 782 F.2d 975, 977 (Fed.Cir.1986). Here, however, the D.C. Circuit erroneously shifted the burden of proof to Petitioner Anica Ashbourne. It held the Petitioner Anica Ashbourne had not stated a Privacy Act claim because she did not challenge the factual accuracy of her own records or her supervisor's affidavit. Appx. 5-6. But, like the Federal Circuit, the Merit Systems Protection Board has consistently held that it is not an individual's responsibility to disprove an agency's charges. *Hawes v. Office of Personnel Management,* 122 M.S.P.R. 341 (2015). It was Donna Hansberry, Donna Prestia, and Thomas Collins who were required to substantiate their Notice of Proposed Termination with preponderant evidence, and Congress required them to do so *before* they had issued it. Source Book, p. 297, House Report No. 93-1416, p. 4-5 U.S.C. §552a(e)(6); *McCready,* 465 F.3d at 19; *Deters*, 85 F.3d at 660; OMB Guidelines, 40 Fed. Reg. 28,948, 28,964 (July 9, 1975).

And, not only did Donna Hansberry, Donna Prestia, and Thomas Collins fail to verify the accuracy of their Notice of Proposed Termination, but they also failed to remain

silent about it. In *Doe v. U.S.*, Judge Ruth Bader Ginsburg wrote that, when an agency is presented with conflicting information, and the truth about the matter is unknown, the agency must remain silent about whose account it believes to be true. *Doe*, 821 F.2d at 701. Instead of remaining silent, however, Donna Hansberry, Donna Prestia, and Thomas Collins publicly accused Petitioner Anica Ashbourne of lying. Then, later, they admitted that they had not investigated Tom G. Johnson, had no evidence that she had lied, or that Tom G. Johnson had told the truth. USCA 15-5351 Document #1676765 p. 46-47.

Although the D.C. Circuit determined that the Civil Service Reform Act and *Kleiman v. DOE*, 956 F.2d 335 (D.C. Cir. 1992) barred Petitioner Anica Ashbourne's Privacy Act complaint, this Circuit has repeatedly held that the Civil Service Reform Act does not bar federal probationary employees from seeking equitable relief against their agencies. *Bartel v. FAA*, 725 F.2d 1403, 1415 (D.C. Cir. 1984). In fact, this Circuit has repeatedly allowed job applicants who allege Privacy Act and constitutional violations equitable relief, including the expungement of their records. *Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986), and that the Civil Service Reform Act allows probationary employees to seek equitable relief against their supervisors, and the agency itself, for constitutional violations.

Abdelfattah v. Dept. of Homeland Security, 787 F.3d 524, 534 (D.C. Cir. 2015).

This Court's intervention is critical because Congress required Donna Hansberry, Donna Prestia, and Thomas Collins to verify the accuracy of their records, USCA 15-5351 Document #1688016 p. 46; *Doe v. U.S.*, 821 F.2d 699-701, with preponderant evidence, and because the D.C. Circuit failed to explain how they met their burden of proof under Federal Rule of Civil Procedure Rule 56 or how their subjective judgments and opinions qualify as preponderant evidence. USCA 15-5351 Document #1688015, pp. 16-33.

B. D.C. Circuit conflicts with *Arnett v. Kennedy* because Petitioner Anica Ashbourne was entitled to a notice of their documentary evidence and to a "meaningful opportunity to be heard".

This Court's intervention is critical because the D.C. Circuit erred because there was no documentary evidence for her to refute. Appx. 4-8. The central issue here is that because they had no documentary evidence to substantiate their charges, there was no documentary evidence for her to refute. This Court and the D.C. Circuit have both held that a meaningful opportunity to be heard occurs when, before an agency meets with an individual, it has given the individual notice of its charges, notice of its evidence, and notice of its intent to meet with the

person about the notices. *Arnett v. Kennedy*, 416 U.S. 134, 178 and (1974); *Doe v. Dept. of Justice,* 753 F.2d 1092, 1112-1113 (D.C. Cir. 1985). *Arnett* ensures that, before an agency deprives a person of a liberty or property interest, the person has the chance to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin,* 407 U.S. 67, 83 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). That did not happen here.

Both courts below also failed to address her complaint that she did not have a "meaningful opportunity to be heard" regarding her property interest claim in Ashbourne & Company and that Donna Hansberry, Donna Prestia, and Thomas Collins had no statutory authority to require her to respond to their subjective judgments and opinions about Ashbourne & Company. USCA 15-5351 Document #1676771 pp. 17-18.

And, though the District Court accused Petitioner Anica Ashbourne of "bickering" about her constitutional rights, Appx. 24, Petitioner Anica Ashbourne maintains that the *time* and *manner* in which Donna Hansberry, Donna Prestia, and Thomas Collins had issued her their Notice of Proposed Termination were not constitutionally "meaningful". *Arnett v. Kennedy*, 416 U.S. 134, 178 (1974); *Doe v. Dept. of Justice,* 753 F.2d 1092, 1112-1113 (D.C. Cir. 1985).

Petitioner Anica Ashbourne complained that their May 9, 2011 meeting was not scheduled at a "meaningful time" or conducted in a "meaningful manner". *Armstrong v. Manzo.* 380 U.S. 545, 552 (1965). Here, the D.C. Circuit failed to address how they had provided her with a "meaningful opportunity to be heard" when they had her called into an impromptu meeting, when Lauren Benedict, their labor relations specialist, laughed at her, when she was handed their "Resign or Be Terminated Letter", or when she was told that she would be fired the next day if she did not resign. The D.C. Circuit failed to explain how Lauren Benedict's laughter or their May 9, 2011 "Resign or Terminated Letter" afforded her a "meaningful opportunity to be heard".

The D.C. Circuit also failed to address how she had a "meaningful opportunity to be heard" when, on May 10, 2011, they handed her a constitutionally defective Notice of Proposed Termination. Their notice was defective because it required her to address their subjective judgments and opinions about her, rather than refute any documentary evidence. *Greene v. McElroy,* 360 U.S. 474, 496-497 (1959). The Privacy Act required them, not her, to substantiate their Notice of Proposed Termination with verified records, *Doe*, 821 F.2d at 699-701, and not with subjective judgments and opinions.

Although the D.C. Circuit found that their conclusions about Ashbourne & Company were based on her "e-QIP" submissions, the D.C. Circuit failed to explain why they did not mention "e-QIP" in their notice, See also USCA 15-5351 Document #1688015, pp. 23-35, 49 (e-QIP Instructions for Self-employed Applicants), 70-79, or how Ashbourne & Company did not exist because she was self-employed. See also USCA 15-5351 Document #1688015, pp. 23-35, 49 (e-QIP Instructions for Self-employed Applicants), USCA 15-5351 Document #1688016 pp. 23-35 (Résumé), Appx. 48-65 (Complaint).

The D.C. Circuit failed to explain how Ashbourne & Company, a sole proprietorship (i.e. a business owned by a person who is self-employed) could not exist *because* she was self-employed (i.e. a sole proprietor). By definition, Ashbourne & Company *had to exist* because she *was* self-employed. USCA 15-5351 Document #1688015, pp. 80-83.

Donna Hansberry, Donna Prestia, and Thomas Collins gave her a meaningless opportunity. She was not required to refute Tom G. Johnson's unverified affidavit or their subjective judgments and opinions about her.

C. This Court's intervention is critical because the Privacy Act required the D.C. Circuit to set Donna Hansberry, Donna Prestia, and Thomas Collins's Notice of

Proposed Termination aside since it was not supported with preponderant evidence.

Congress requires a reviewing court to set aside any decision, order, opinion, or determination made by an agency that is not supported by preponderant evidence. Source Book, p. 696-697; *Doe v. U.S.* 821 F.2d at 701 no. 20, 704, 711; *Naekel v. Dept. of Transp.*, 782 F.2d 975 (Fed. Cir. 1986).

Here, the D.C. Circuit failed to set their Notice of Proposed Termination aside even though Donna Hansberry, Donna Prestia, and Thomas Collins admitted that it was not supported by preponderant evidence.

D. This Court's intervention is critical because the courts below allowed Donna Hansberry, Donna Prestia, and Thomas Collins to publicly disclose Petitioner Anica Ashbourne's *entire* personnel records (unredacted).

Although the District Court ordered them to redact certain information, it refused Petitioner Anica Ashbourne's request to seal her records finding that they were entitled to a routine use exemption. Appx. 45-47. Petitioner Anica Ashbourne argues that they were not entitled to claim the Privacy Act routine use exemption since they admitted that they did not comply with the Privacy Act. See USCA 15-5351 Document #1676771 pp. 17-19 and USCA 15-5351 Document #1688015 p. 46 (Routine Uses).

Here, Donna Hansberry, Donna Prestia, and Thomas Collins admitted that their Notice of Proposed Termination was based on their subjective judgments; that they had not conducted an objective investigation; that they had not verified the accuracy of their records, USCA 15-5351 Document #1676765 pp. 46-47; that they had not consulted with any independent and objective third parties; that they had no evidence that she had lied, USCA 15-5351 Document #1676765 pp. 46-47, or had any evidence that Tom G. Johnson had told the truth. USCA 15-5351 Document #1676765 pp. 46-47.

This Court' intervention is also critical because the District Court abused its authority. USCA 15-5351 Document #1688015 pp. 17-33 (Opening Brief). The District Court allowed Donna Hansberry, Donna Prestia, and Thomas Collins to maintain records in her file indicating that she was comparable to criminals, alcoholics, and drug addicts, Appx. 29, when the U.S. Department of the Treasury determined that Petitioner Anica Ashbourne had never been arrested, does not drink, and had never taken illegal drugs. USCA 15-5351 Document #1676765, p. 47, n. 7.

Conclusion

Petitioner Anica Ashbourne respectfully requests that this Court grant this petition for the reasons discussed herein.

Respectfully,

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October 1, 2018