No. 18-634

In The
Supreme Court of the United States

AED EL-SABA,

Petitioner,

v.

UNIVERSITY OF SOUTH ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Eleventh Circuit depart so far from the accepted and usual course of judicial proceedings in its assessment of the facts and application of well-settled Title VII retaliation law, or sanction such a departure by the District Court, as to call for the exercise of this Court's supervisory power over the Eleventh Circuit's affirmance of summary judgment in favor of the University of South Alabama?

PARTIES TO THE PROCEEDINGS AND DISCLOSURE STATEMENT

The parties to the proceedings below were Petitioner Aed El-Saba and Respondent University of South Alabama. The University of South Alabama is an instrumentality of the State of Alabama. It has no parent corporations or subsidiaries and does not issue stock.

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INTRODUCTION

El-Saba has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted, and it should be denied. *See* Sup. Ct. R. 10. El-Saba does not argue that the Eleventh Circuit's affirmance of summary judgment in favor of the University of South Alabama on his retaliation claim is in conflict with a decision of another court of appeals or that the Eleventh Circuit decided an important federal question in a way that conflicts with a decision by a state court of last resort. El-Saba simply asks this Court to re-examine the record evidence because he believes the Eleventh Circuit Court of Appeals, and the District Court, erred in applying the law to the facts. The decisions below, however, reveal a fact-intensive application of law, and this is not the type of case contemplated by this Court's "so far departed" test. Being a notably fact-bound case, this is "the type of case which [this Court is] most inclined to deny certiorari." *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting).

STATEMENT OF THE CASE

Aed El-Saba was born in Lebanon, came to the United States in 1980 to attend college, and became a naturalized citizen in 1991. Pet. App. 27a. El-Saba was hired by the University of South Alabama in 1999 as a tenure-track assistant professor in the Electrical and Computer Engineering ("ECE") Department of the College of Engineering. Pet. App. 2a. El-Saba was

awarded tenure and promoted to associate professor in 2005, and was approved for raises throughout his time at the University. Pet. App. 2a.

El-Saba made various complaints of discrimination between 2007 and 2012. In 2007, he complained of salary discrimination against non-native professors in the College of Engineering. Pet. App. 2a. According to El-Saba, the Dean of the College of Engineering, John Steadman, said during an ECE search committee meeting that he wanted to change the demographics of the ECE department, and that he preferred native-born, natural English-speakers. Pet. App. 3a. Steadman did not remember making such statements, but recalled encouraging the hiring of underrepresented minorities and women. Pet. App. 29a. Since at least 2005, most professors in the ECE department have been foreign born. Pet. App. 29a-30a. El-Saba complained again in 2008, including calling Steadman a racist. Pet. App. 30a.

In 2008, El-Saba took a medical leave of absence, and complained that his evaluation was negatively affected by his leave; the evaluation had no impact on his salary. Pet. App. 30a. In 2010, El-Saba complained to Steadman that he should have received a research award and accused Steadman of punishing him for his previous accusations; Steadman had no influence over the award. Pet. App. 3a-4a. According to El-Saba's department chair, Mohammad Alam, Steadman told Alam that it seemed like El-Saba was unhappy at the University and hoped he would find something else. Pet. App. 4a. Alam told El-Saba that Steadman would

make it so hard on El-Saba that he would resign. Pet. App. 4a.

In 2011, El-Saba gave an interview to an EEOC investigator concerning a claim made by a colleague, during which El-Saba accused Steadman of racism and suggested salary discrepancies and restrictions on hiring applicants with H-1B visas. Pet. App. 4a. El-Saba also met with the Vice President of Research in fall 2011 and later with the University's attorney in early 2012 to complain about Steadman. Pet. App. 4a. There was no evidence that Steadman knew of these meetings or what was said during them. Pet App. 4a.

During the 2011 fall semester, El-Saba was granted intermittent FMLA leave to care for his wife. Pet. App. 4a-5a. In spring 2012, El-Saba requested a one-year unpaid leave of absence for both his own and his wife's medical care, encompassing the fall of 2012 and spring of 2013 semesters. Pet. App. 5a, 33a. El-Saba claims that Steadman objected to Alam's approval of this leave, but regardless Steadman recommended approval of the leave and it was granted. Pet. App. 16a n.11, 33a. El-Saba was to return for the fall 2013 semester. In July 2013, El-Saba suffered a heart attack while overseas. Pet. App. 5a. El-Saba was initially told that he would need open-heart surgery, but a second opinion offered the option of placing six stents in lieu of the open-heart surgery. Pet. App. 33a. El-Saba elected the stent procedure, which was performed in Dubai on July 16, 2013. Pet. App. 33a. El-Saba was released from the hospital on July 18, 2013. Pet. App. 33a.

El-Saba emailed Alam on July 22, 2013, informing him that he had a heart attack and needed open-heart surgery and requesting an additional one-year leave of absence. Pet. App. 33a. (El-Saba failed to mention that the stent procedure had already been performed and that he'd been released from the hospital four days earlier. Pet. App. 46a-47a.) Alam recommended that El-Saba's request for additional leave be granted because El-Saba needed open-heart surgery. Pet. App. 33a. When Alam turned the leave request over to Steadman, Steadman emailed El-Saba stating they could not approve that length of time, and that he needed to know whether El-Saba would be returning to the University by August 15, 2013, the start of the fall semester. Pet. App. 34a. El-Saba responded on August 5 that he would be unable to return to the University until after November 11. Pet. App. 34a. David Johnson, Senior Vice President for Academic Affairs, responded while Steadman was out of town and told El-Saba that the University would not grant a one-year absence, and to consider a one-semester leave, El-Saba needed to provide a statement from his physician that he would be able to return to work on January 2, 2014. Pet. App. 34a-35a. (Johnson had never before granted more than a one-year leave of absence. Pet. App. 36a. El-Saba's request in August 2013 for a second one-year leave was unprecedented. Johnson testified that the reasons to support such leave would need to be extraordinary, and he concluded El-Saba's were not.)

On August 13, 2013, El-Saba emailed Johnson a "Sick Leave Certificate," which said he was "fit to work from 01-01-2014." Pet. App. 6a. The email also stated that a more detailed report would follow. Pet. App. 35a. On August 15, El-Saba emailed Johnson a more detailed medical report, which stated that El-Saba was under no travel restrictions and was "fit to resume his routine work." Pet. App. 35a. Johnson, who had no knowledge of El-Saba's prior complaints, reviewed the documentation and consulted with Steadman, and determined that a leave of absence was medically unnecessary. Pet. App. 35a.

On August 20, 2013, Steadman emailed El-Saba and said that because El-Saba was fit to work and under no travel restrictions, a leave of absence was unnecessary and therefore unreasonable. Pet. App. 36a. Steadman further stated:

> In your email of August 5 . . . you stated you would not be at work on August 15, 2013, the required start date. . . . Because that date has now passed, and your request for leave is not granted, it is understood that you will not be performing your faculty duties, and therefore you are deemed to have resigned. . . ." Pet. 4-5.

El-Saba cites a provision in the Faculty Handbook for faculty absences *without notice*, arguing it was the basis for Steadman's "deemed resignation" communication rather than the medical certificate providing that El-Saba was fit to return to work and was under no travel restrictions. *See* Pet. 5, 12. But the

handbook provision El-Saba cites was not applicable since El-Saba gave notice by August 5 that he would not be returning to the University on the required start date, and the handbook provision was never referenced in any communications with El-Saba. The handbook provision El-Saba cites came up only when Steadman testified during deposition that he recalled a provision addressing a faculty member's absence at the semester's beginning, but Steadman could not recall the exact wording. Even so, Steadman's testimony was not before the District Court in the summary judgment record.

El-Saba also argues that he demonstrated pretext because another professor, Dr. Hyunchul Ko, was treated better when he was permitted to resign after his leave extension request was denied. *See* Pet. 16. But the Eleventh Circuit and District Court cited undisputed evidence that during Steadman's tenure as Dean, El-Saba was granted more leave of absence time than any other Engineering faculty member had ever been given and there was no evidence that any other faculty member failed to return to work on the faculty reporting date without preapproval. Pet. App. 15a, 36a-37a. In fact, Ko's request to extend his one semester leave by an additional semester was denied in contrast to El-Saba's approved one-year leave. Pet. App. 36a-37a. Additionally, Ko chose to resign before the beginning of the semester, while El-Saba elected not to report to work despite being medically fit to do so.

The District Court granted the University's motion for summary judgment on El-Saba's claims of Title VII discrimination and retaliation. El-Saba proceeded solely on a "convincing mosaic" theory to support his discrimination claim because he had no comparator and conceded he could not make a prima facie case under the traditional *McDonnell Douglas* framework. Pet. App. 38a. The District Court found mixed evidence as to Steadman's alleged national origin bias, but found no evidence that Johnson as the decisionmaker harbored any animus against El-Saba based on his national origin, or that he would not have made the same decision based on his own independent review of the circumstances. Pet. App. 38a. Moreover, the District Court concluded that the University had a legitimate, non-discriminatory reason for terminating El-Saba's employment. Pet. App. 40a. The District Court considered El-Saba's argument that the two different medical letters were confusing; however, the District Court found that it was not unreasonable for Johnson to rely on the second medical letter stating that El-Saba was fit to work. Pet. App. 40a.

Regarding the retaliation claim, the District Court found that El-Saba failed to provide evidence that the relevant decisionmaker, Johnson, knew about El-Saba's prior complaints of discrimination, or that Steadman knew about El-Saba's 2011 and 2012 conversations with the Vice President of Research and the University attorney, and that much of his alleged protected activity was too remote to establish causation. Pet. App. 43a-44a. Even so, the District Court

found that the University articulated a legitimate, non-retaliatory reason for El-Saba's termination, and that El-Saba failed to offer sufficient evidence of pretext. Pet. App. 44a-45a.

The Eleventh Circuit panel unanimously affirmed the District Court's decision on both claims, and later denied panel rehearing and rehearing *en banc* without an opinion. The Eleventh Circuit found that it did not need to address whether or not the District Court correctly determined that Johnson was the sole decisionmaker, because it found that the District Court correctly determined that El-Saba failed to rebut the University's legitimate, nondiscriminatory reason for his termination. Pet. App. 11a-14a. The Eleventh Circuit further found that El-Saba's complaints of discrimination were too remote to bear any temporal relationship to El-Saba's termination, even if known by Steadman or Johnson. Pet. App. 13a.

El-Saba has abandoned his national origin discrimination claim; he petitions this Court to review only the retaliation claim.

SUMMARY OF THE ARGUMENT

El-Saba's Petition should be denied because it seeks review of a fact-intensive determination affirmed in a unanimous unpublished opinion, and raises no issues of broader importance justifying this Court's review. Moreover, the Petition raises issues that were not properly before the District Court or the

Eleventh Circuit. Finally, the Eleventh Circuit's finding that El-Saba failed to rebut the University's reason for terminating his employment and failed to present evidence of retaliation was well-reasoned and not in conflict with this Court's precedent.

REASONS FOR DENYING THE WRIT

I. El-Saba Presents No Compelling Reasons for the Court to Grant Certiorari.

The Court should deny the Petition because the Eleventh Circuit's non-precedential decision does not resolve any important question of federal law in a way that conflicts with relevant decisions from this Court or other courts of appeals. Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." But these are the types of errors upon which El-Saba seeks review. The Petition does not raise a substantial question that warrants the Court's review.

The principal purpose of certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 348 (1991). A writ of certiorari is not a matter of right, but of judicial discretion, and is granted only where there are "compelling reasons" for it. Sup. Ct. R. 10. Such reasons include a conflict among United States courts of appeals regarding an important question of

federal law; a conflict among state courts of last resort as to an important question of federal law; and a decision by a state court or United States court of appeals conflicting with the decisions of the United States Supreme Court concerning an important question of federal law. *See id.*; *see also*, *e.g.*, *Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969); *Egan v. City of Aurora, Ill.*, 365 U.S. 514, 515 (1961). None of these reasons is present in El-Saba's Petition. El-Saba cites no conflict among the United States courts of appeals or any important question of federal law.

El-Saba also incorrectly asserts that the Eleventh Circuit did not cite Title VII pretext law. It did. *See* Pet. App. 12a, 16a (citing *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272-73 (11th Cir. 2002); *Flowers v. Troup Cty., Ga. Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015)).

El-Saba's Petition seeks another *de novo* review of the facts, and does not argue that the lower courts misapplied the law. Therefore, El-Saba's Petition does not present the type of question that warrants discretionary review by this Court.

II. The District Court and the Eleventh Circuit Correctly Found that the University was Entitled to Summary Judgment.

To overcome summary judgment on a Title VII retaliation claim, El-Saba had the initial burden of proving that he (1) engaged in statutorily protected conduct, (2) suffered an adverse employment action,

and (3) that the adverse employment action was causally related to the protected expression. Pet. App. 41a (citing *Trask v. Sec'y, Dept. of Vet. Aff.*, 822 F.3d 1179, 1193-94 (11th Cir. 2016)). If he established this prima facie case, then the University had to rebut a presumption of retaliation with a legitimate reason for the adverse action. *Id*. Once the University provided a legitimate reason, the burden shifted back to El-Saba to produce evidence of pretext. *Id.* El-Saba failed to establish a causal relationship between the protected act and the adverse action, and failed to rebut the University's reason for his termination.

El-Saba did not argue to the District Court what he argues now, that Steadman's August 20 email to El-Saba denying his leave and terminating his employment does not make sense and therefore is evidence of pretext. Pet. App. 12. El-Saba first raised this argument in his reply brief to the Eleventh Circuit. His only argument regarding pretext to the District Court was that the two medical letters provided by El-Saba in early August were confusing and the University should have resolved the confusion before deciding not to extend his leave of absence. Pet. App. 40a. The Eleventh Circuit did not consider El-Saba's new argument in its opinion, instead only addressing the confusion with the medical letters that El-Saba raised in the District Court. Pet. App. 15a-16a n.10. In the ordinary course this Court does not decide questions neither raised nor resolved below. *Glover v. United States*, 531 U.S. 198, 205 (2001). Likewise, the Eleventh Circuit does not consider arguments that are raised for the

first time on appeal, and it did not err or depart from the accepted and usual course of judicial proceedings in so doing. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

But even if the Court were to consider El-Saba's new argument, there is no basis for overturning the lower court decisions and concluding that Steadman's August 20 email was pretext for retaliation. The Eleventh Circuit accurately characterized Steadman's email when it stated: "On August 20, Steadman replied to El-Saba's August 15 email and stated that because El-Saba was fit to work and was not under any travel restrictions, a leave of absence was unnecessary and therefore unreasonable. Steadman further stated that because leave had not been granted and El-Saba did not return to work as required on August 15, he was deemed to have resigned his position at the University." Pet. App. 6a. The District Court characterized it in a similar manner, setting forth the reasons why a leave was not granted and stating that because El-Saba did not return to work as required on August 15, he was deemed to have resigned. Pet. App. 36a. El-Saba was not forthright regarding his surgery and notified the University he would not return on August 15, the faculty start date, despite being fit to do so and under no travel restrictions. There was no medical need justifying his extraordinary leave request and El-Saba could have returned to work on August 15. But he did not and termination resulted. The Faculty Handbook provision El-Saba cites did not apply, and was never

cited by the University as justification for the termination decision.

In spite of that, El-Saba argues that the timing of the leave denial, five days after El-Saba was expected to return to work, did not make sense and therefore was pretextual, and that the lower courts missed this. Pet. 12-15. El-Saba misses the point: he failed to report to work on August 15, and his absence, which was unexcused because his request for additional leave was denied, resulted in his termination. No change in verb tense changes these facts. There was no inconsistency in the University's decision, and El-Saba provides no factual or legal support for why the lower courts should have found pretext under these circumstances. It is well-established in the Eleventh Circuit, and cited in its opinion here, that when looking at pretext, "[a]n employer is free to fire its employees for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Pet. App. 16a (citing *Flowers v. Troup Cty., Ga. Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015)).

Finally, the Eleventh Circuit correctly found that there was no causal relationship between El-Saba's last complaint of discrimination in early 2012 and his termination in August 2013 because there was no evidentiary support that Steadman and/or Johnson knew about El-Saba's conversation with University counsel, but even so those conversations were too remote to bear any relationship to his termination. Pet. App. 13a (citing *Maniccia v. Brown*, 171 F.3d 1364, 1369-70 (11th

Cir. 1999) (gaps of 15 and 21 months showed no "temporal relationship"); *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) ("[I]n the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law.")). While El-Saba cites Steadman's alleged resistance to El-Saba taking leave in 2012, Steadman recommended approving that leave and it was granted. Pet. App. 16a n.11, 33a. El-Saba makes no other legal or factual argument in his Petition to dispute the lower courts' findings that El-Saba failed to prove a causal relationship between the protected activity and his termination. Therefore, El-Saba's arguments for why summary judgment was improper are without merit and do not warrant review.

In the words of Justice Ginsburg, cited in El-Saba's Petition, the lower courts "g[o]t it right." There is no compelling reason for the United States Supreme Court to review this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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