

In The  
Supreme Court of the United States

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VIDYA SAGAR, PH.D.,

*Petitioner,*

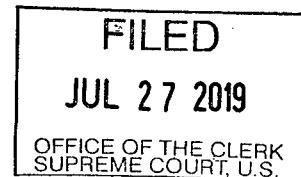
v.

STEVEN T. MNUCHIN,  
SECRETARY OF THE TREASURY,

*Respondent.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit



**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether the Petitioner can be terminated by committing acts of perjury?

The amended complaint is for wrongful termination on account of statutory prohibited discriminations: Retaliation (42 USC §2000e-3, 42 USC §2000e-16), Age Discrimination in Employment Act (29 USC §633a), Harassment, and for Whistle blowing of wasteful expenses (5 USC §2302(b)(8)).

2. Whether this is a “mixed” case under 29 CFR § 1614.302 (a)1 Mixed Case Complaints, for the Probationary Petitioner?

## **LIST OF PARTIES**

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Vidya Sagar, Plaintiff and Petitioner;
2. Steven T. Mnuchin, Secretary of the Treasury, Defendant and Respondent.

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## OPINIONS BELOW

The ORDER of the United States Court of Appeals for the District of Columbia Circuit was issued on January 29, 2019. App. 1. The District of Columbia Circuit granted appellee's motion for summary affirmance. Appellant's petition for rehearing was denied on April 26, 2019. App. 5. Appellant's petition for rehearing en banc was denied on April 26, 2019. App. 6. The grant of summary affirmance, affirmed the decision of the United States District Court for the District of Columbia ("District Court") dated September 30, 2016, document number 89 in the District Court's docketed matter number 1:14-cv-01058 (RDM). App. 8. It affirmed the District Court's Minute Order dated March 31, 2018 modified on 4/2/2018 denying appellant's motion for summary judgment. App. 23. It affirmed the District Court's memorandum opinion dated April 12, 2018, document number 127 in the District Court's docket, granting appellee's motion for summary judgment. App. 25.

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## STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its Order affirming the decisions of the District Court on January 29, 2019. App. 1. The appellant's petition for rehearing and rehearing En Banc were denied on April 26, 2019, App. 5, 6. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

18 USC § 1001. Statements or entries generally.

App. 72.

18 USC § 1621. Perjury generally. App. 72.

18 USC § 1622, Subornation of perjury. App. 73.

18 USC § 1623. False declarations before grand jury or court. App. 73.

29 CFR § 1614.302 Mixed case complaints. App. 84.

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## STATEMENT OF THE CASE

United States Court of Appeals for the District of Columbia Circuit erroneously granted summary affirmance.

### I. Factual Background

Plaintiff/Petitioner Vidya Sagar (“Sagar”), applied for an IT Specialist position, GS-15, in August/September 2010. App. 91. Duties included:

As a senior expert and consultant to top agency management officials, the employee advises on integrating IT programs with other business programs of equivalent complexity within the IRS. Work includes the development of new theories, concepts, principles, standards, and methods in IT systems analysis, and advising other IT

experts throughout Treasury and the IRS, and in other agencies, on a variety of situations and issues that involve applying or adapting new theories, concepts, principles, standards, methods, or practices, that are developed by the employee or result from the employee's leadership.

Representing the agency on interagency work groups established to develop government-wide IT systems analysis initiatives and solutions to critical issues; negotiating for the acceptance of agency positions on key government-wide systems analysis initiatives; developing guidelines for implementing broad government-wide directives; and aligning agency internal business practices with government-wide regulations and policies.

Leading the evaluation of agency missions, goals, plans, programs, and business processes to develop an enterprise IT architecture plan for the agency; conducting continuing evaluations of agency business needs to ensure that IT architecture plans are aligned with those needs and that the current and planned IT infrastructure supports the architecture plan; developing plans and strategies to modify the IT infrastructure to support short and long-range agency goals, objectives, and plans; and evaluate, select, and advise others on the application of architecture modeling tool sets used to document, maintain, and enhance the architectural planning process.

Sagar had earned Ph.D. from the Catholic University of America (“CUA”). App. 96. He was Project Management Professional (“PMP”) affiliated with the Project Management Institute (“PMI”) and Oracle Certified Professional (“OCP”). App. 95. Sagar had planned, directed and managed large scale Information Technology projects for the CUA, PeopleSoft and Oracle clients. These included high availability and business continuity engagements at HSBC, Citigroup, Radian Guaranty, FEMA, Sprint Nextel, Verizon Wireless, Goldman Sachs, JP Morgan Chase, (App. 98), Harris Corporation, Lexington Fayette Urban County Government (“LFUCG”), MetLife, MTA NY, Societe Generale Group (Paris France), Carrefour (Paris France) and others. App. 99. Sagar managed the North American Strategic Accounts – Technology (“NASA-Tech”) for Oracle Corporation. App. 100. Sagar was professor of Project Management (adjunct) at the University of Maryland University College (“UMUC”). UMUC recognized twenty years of Academic Leadership and Service with Commitment to Excellence certificate dated September 29, 2012. App. 103.

Sagar’s graduate school students prepared Enterprise Lifecycle documents. There were multiple student teams in PMAN 634 class. Team management plan prepared by PMAN 634 students, September 30, 2011, show serious learning experience. App. 107. Students rightly observe, “Conflicts are not necessarily destructive and if the right approach is taken it can lead to new and innovative ideas. However, if it is not dealt with properly, it can lead to reduced productivity and lowers the morale of the group.” App. 108.

Sagar was teaching PMP certification preparation boot camps. Students included IRS managers. Ercel E Potter a.k.a. Butch Potter, IRS Cybersecurity Policy and Programs Strategic Planning, Investments and Governance manager was one of them. He attended, took the exam. and got certified as PMP. App. 104-106.

Sagar was selected from around 100 resumes. App. 170. Sagar joined Internal Revenue Service (“IRS”) on 12/20/10 and worked from day 1 in support of the Patient Protection and Affordable Care Act (“PPACA” or “ACA”) aka Obamacare. The project was Premium Tax Credit (“PTC”).

There were 21 federal employees. App. 171. Sagar proposed in-house development using federal employees who had little work. However, discriminating officials [Matthew B. Brady (“Brady”) and Peter Gianakos (“Gianakos”)] wanted to waste taxpayer funds on outside consulting assistance. App. 171. They did not adhere to the requirement that federal work force should be used efficiently and effectively. 5 USC 2301(b)(5). App. 76.

The director Compliance and Document Matching, Gregory Michael Barry (“Barry”), had reserved around fifty million U.S. dollars for outside consulting to implement the Premium Tax Credit project, previously known as Premium Assistance Tax Credit. App. 171.

Sagar was most aged and experienced

member of the PTC project. With individual original work saved the agency around half a million U.S. dollars in outside consulting fees, App. 171.

Sagar took the initiative to create a strategic team at PTC. As per job description duties (App. 93), Sagar worked with the stakeholders to define the PTC project architecture.

Complaint (Amended) is Document No. 41 in the District Court's docket. Extracts from Document No. 42 (Answer) in the District Court's docket follow:

12. Admit only that Gianakos and Brady held bachelor degrees with no professional certification and that Brady graduated in computer studies from UMUC in 1999. [At that time, Sagar was adjunct professor at UMUC] The Agency lacks knowledge and information sufficient to form a belief as to the remainder of Paragraph 12 and therefore denies the same.

16. Admit that Plaintiff took [the] initiative in the creation of the strategic team at PTC; that the team included two GS-15s: Plaintiff and Matthew Sikowitz; that Matthew Brady later joined the team; and that Mizan Rahman was added to the team at Matthew Brady's request. Deny the remainder of the allegations in Paragraph 16.

19. Admit only that Plaintiff worked with Mitre Corporation and IRS engineering teams to define the PTC architecture.

There had been extensive waste of taxpayer money. After Sagar's wrongful termination outside consulting services increased exorbitantly. Consulting services then for PTC were approximately \$1.6 million (for 2011). [Agency withheld information on PTC project beyond 2011] The ACA expenditures were more than \$168 million for 2011 and \$ 488 million in total between 2010 and 2012. App. 172.

Sagar did not fit well with excessive outside consulting help policy of young discriminating officials. They [Brady and Gianakos] harassed Sagar. With multiple discriminating decisions and events; created a hostile work environment. Sagar wanted to get out of this harassing environment. Met director's representative, Mr. Jerry Lynch, in January 2011; Sagar offered to be transferred against a detail [temporary] assignment to Coverage Data Repository ("CDR") project but FLMs did not agree. During Barry's (Director) deposition he lamented why they didn't transfer. Brady himself was on detail to PTC project Sagar was waiting to complete the one year probation to apply for other positions. Less than two months were left. App. 174.

Brady and Gianakos retaliated with vengeance. Used their influence with subordinates to concoct events; influenced fellow managers in Labor Relations/Employee Relations ("LR/ER"); used false statements in form 11396(Rev.3-02), discussed later; suppressed evidence (Sagar's representations to discriminating officials and director Mr. Barry) to get LR/ER approval to unlawfully terminate Sagar on November 2, 2011. App. 172.

### A. Managers of PTC Project

On 12/20/2010, Barry was Sagar's supervisor. Barry and his executive officer Katrina L. Henry ("Henry") supervised the PTC staff. Henry worked with GS-15 officials, Matthew David Sikowitz ("Sikowitz") and Vidya Sagar and signed as the rating official. App. 145, 151,180.

Sagar took the initiative to create a strategic team at PTC. As per job description duties (App. 93), Sagar worked with the stakeholders to define the PTC architecture. *See*, p. 6.

Peter Gianakos a.k.a. Pete Gianakos ("Gianakos") became project supervisor on 3/27/2011. He was on probation (one year trial period) for his new position. App. 180, 181.

Matthew B Brady ("Brady") a GS-15 official was promoted on 3/27/2011 as Supervisory IT Specialist IR-03 with \$ 13,000 raise. (Def.'s response to Interrogatory no. 3). He was allowed to skip IR-04 position. He was not available until July 19, 2011 for PTC project. App.111,180. Gianakos was Brady's rating official around November 30, 2010. App. 140. PTC Director Barry did not hire Brady. At Brady's deposition (Document No. 62-7 at 8:7-20 in District Court's Docket) Brady confirmed, "I was promoted as a manager from my manager [previous manager] For PTC." Violation of 5 USC 2301 (b)(1).

Sagar requested agency on Dec. 21, 2014 to produce Brady's hiring documents. Interrogatory No. 3 and Document Request No. 3. Instead, agency filed motion to vacate discovery schedule on 12/12/2014.

Document No. 15 in District Court's docket. The agency did not comply.

Brady had no management experience. He was planning to take *some* training in Project Management and Requirements Management by 9/30/2011. App. 139. His summary evaluation rating was "Outstanding". App.141. For unlawfully terminating Sagar, Brady was rewarded with promotion to IR-01 senior manager. Gianakos deposition, "It's the manager of that position was Greg Barry. So I reported directly to Greg, and when I left on a detail, they backfilled that position. So they filled it with Matt. [Brady]" Document No. 62-6 in District Court's docket (Tr. at 31:19-22).

In Brady's promotion and selection for PTC, agency violated 5 USC 2301 Merit System Principles, (b)(1). The selection was not based on relative ability, knowledge, and skills, after fair and open competition to assure that all receive equal opportunity. App. 75.

Brady and Gianakos managed PTC project using multiple surrogates. GS-14 employees managing GS-15 was insulting conundrum. (Walter L Kirkland ("Kirkland"), Jonathan C Lin ("Lin"), Eddie Vanison ("Vanison")). App.188. Violation of 5 USC 2301(b)(2),(5) Merit System Principles. App. 75-76. Sagar, requirements manager, was not authorized to attend requirement meetings at HHS, the Agency responsible for the Affordable Care Act implementation and was footing the bill of IRS projects. Plaintiff was not even introduced to the responsible Patient Protection and Affordable Care Act implementation officials at HHS. App. 188-189.

It was severe Harassment. It violated Sagar's terms and conditions of employment. *See, pp. 2,3.*

**B. Midyear Progress Review – Brady Deleted His Electronic Signature (Violation of 18 USC 1001)**

Mandatory minimum supervisory period required for a manager to review an employee is 60 days. App. 180. Brady did progress review of GS-15 employees, Sikowitz and Sagar on April 27, 2011. App. 145, 151. On April 27, 2011 Gianakos and Brady were not eligible to do midyear progress reviews. App. 181.

At that time Brady was not the manager of record. Joined PTC project around July 19, 2011. App. 180. It was unlawful.

Out of three commitments, Sagar had completed one. Sagar participated in Enterprise Life Cycle (“ELC”) planning sessions. Sagar stressed special needs of the PTC project that included mostly in-house development with minimal contractor assistance; in-house testing; integration of PTC Determination Application (“PDA”) with multiple interfaces, Treasury/IRS current processing environment (“CPE”) on mainframe, Department of Health and Human Services (“HHS”) and Health Insurance Exchanges; consensus building for user friendly application. App.152. Sagar demonstrated extensive work done in employee satisfaction, customer satisfaction; business results; and professional expertise.

The rating was, "Per self assessment, Vidya meets expectations for his position description."

Once the employee completes self-assessment, it gets locked. Employee cannot access it. Only the supervisor had access to the application. Brady knew he was not the manager of record; the review was not factual; **deleted his signature electronically entered by the software**. He was rewarded with promotion to manager IR-01 (Gianakos deposition). *See, p. 9.* Brady committed *perjury*. App. 151. It violated 5 USC 2301(b)(4) that required Brady to maintain high standards of integrity, conduct, and concern for public interest. App. 76.

It rendered the appraisal invalid. IRM 6.430.1.5.4 Recognizing Performance. 2. A valid performance appraisal used as a rating of record contains the signatures of the rating official/rater. App. 87.

*United States v. Gaudin*, 515 US 506, 509 (1995). Section 1001 of Title 18 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

#### **C. Yearend Progress Review (Violations**

**of 18 USC 1001, 1621, 1623)**

As a new manager, Brady was welcomed by Stephen F. Bittorf, Chief Washington/Martinsburg LR/ER section on April 20, 2011. App. 120-121. The email does not give full information about what messages verbal or written were exchanged between April and September 27, 2011. Full content is missing, *deception*. On September 28, 2011 at 10:58 PM Brady seeks advice about the rating to give [Vidya Sagar for dismissal]. App. 120. On September 29, 2011 he does Sagar's annual review with responsibilities "Not Met"; Commitments "Met"; and summary evaluation rating of "Minimally Satisfactory." App. 155. Brady willfully decided to wrongfully terminate Sagar on 9/29/2011. Brady's deposition transcript, Document No. 62-7 (25:16-22) in District Court's docket, "Q Did you make that decision? A -- after we gave the assessment. I gave your evaluation on the 29th. That was when we made the decision, I believe."

Sagar had done extensive work as shown in Sagar's self-assessment. App. 156-160. Had saved the agency around half a million dollars in vendor consulting fees. App. 171. Brady and Gianakos had decided to wrongfully terminate Sagar. The review was just a formality. A willful wrong and dishonest act.

Brady was contemplating to terminate Sagar, even before coming to the PTC project. Sagar's response to Def.'s Interrogatory No. 12. App. 133-136. Brady and Gianakos went all the way including resorting to perjury to terminate Sagar.

To get LR/ER approval, they filled form 11396(Rev.3-02) Recommendation for Disciplinary/Adverse Action. On October 18, 2011 digitally signed it under oath. App. 122-124. (AD Suggestion (s): Offer Resignation.) They checked all items.

The review took place on 9/29/2011. Reasons for termination were disclosed on 11/2/2011 *seconds* before termination. *See, p. 16.* Brady and Gianakos failed to maintain high standards of integrity, conduct, and concern for the public interest required in 5 USC § 2301 (b)(4). App. 76.

**Is there evidence that the employee is guilty of the misconduct? X**

There was no misconduct. A false statement.

**Under 6.430.3.3.1.8.E Monitoring Commitments or Objectives; and IRM 6.430.3.3.3 (based on 5 CFR 293, Subpart D) App. 88-89, all performance related records should be maintained in EPF [App. 88-90]. Some of these include:**

2. Management is responsible for creating records concerning employee performance and maintaining them in accordance with the Privacy Act and Freedom of Information Act regulations.
3. At a minimum, the EPF should contain forms and documents which:
  - A. Record and support the performance appraisal and individual performance plans.

B. Are used by the supervisor to recommend a personnel action affecting an employee when the **basis for the action is performance related**.

C. **Are furnished in support of recommended actions and the agency's final decision on the matter**

Note:

Other types of documents and forms may include Individual Development Plans (IDPs), recommendations for training that are performance related, and copies of **supervisory counseling session records** resulting in performance-based personnel actions.

4. The following documents must be maintained for four years:

- The Performance Agreement (Forms 12450-A, 12450-B, or 12450-D appropriate for the employee's position).
- Progress review(s) documentation.
- Employee self-assessments.
- Documented workload reviews, case file reviews, and job visitations.
- Any other documentation that supports the performance rating.

The supervisor must keep performance records in the EPF as long as necessary, if **needed in connection with a grievance, appeal or judicial proceeding**.

Discriminating officials did not maintain those. *Indeed, there were none.*

**Has this employee received prior counseling or**

**discipline for similar misconduct? X**

Sagar had excellent conduct. There was no counseling. Hypothetically, if there had been, it was mandatory to be maintained in EPF. App. 148. which contained none. A false statement. *See, Gaudin* 515 US (1995).

**Was the employee provided an opportunity to present his/her X**

Concocted events were disclosed on 11/2/2011 seconds before termination. *See, p. 16.* No opportunity was provided. A false statement.

Extracts from “Declaration of Vidya Sagar Under Rule 56 Of Fed.R.Civ.P. -3/5/2015” under 28 USC §1746 follow: (Document No. 101-2 in District Court’s docket)

12. Sagar’s annual performance review meeting with Brady was brief. Brady brought printed copy of the appraisal and asked Sagar to read it. He was not prepared to listen. There was no discussion of any behavioral issue or any other event later listed in the termination letter.

13. Brady has testified that he took the decision to terminate Sagar on September 29, 2011.

14. The performance appraisal conducted by Brady was not factual; Brady made up things and was not honest in his observations. On October 3, 2011 Sagar met first with

Gianakos, second level manager at that time, and later with Brady, first level manager. The request for higher level official review was made on October 5, 2011.

15. Brady responded to the higher level officer review request on Friday October 14, 2011, 7:53 PM before going to Orlando conference. Brady stated "While your contributions have been shown, I have not seen sufficient evidence to change my decision of your rating." During that time, he was frantically working with human resources labor relations ("HR-LR") to terminate Sagar. He acted against the Agency policy, "The management official, who recommended, advised, or decided on the matter being grieved is considered to have been involved and must disqualify himself as the deciding official, unless he is the head of the agency."

\*\*\*

17. The termination letter dated October 27, 2011 was given on November 2, 2011. It contained made up events that were disclosed only on November 2, 2011, **seconds before** termination.

\*\*\*

22. Agency is required to preserve all relevant documents concerning a reduction in grade or removal which is based on unacceptable performance and make it available to the affected employee. 5 CFR § 432.107.

\*\*\*

Agency did not preserve any. It did not provide any document to Sagar. It did not add any document to the EPF. *Indeed*, there was none. It was all concocted.

**Has all the evidence been assembled and is attached to the Form 11396? X**

Sagar's written representations to discriminating officials and director were not attached (suppressed). Brady attached concocted document that Brady created on the fly "VS 11396 Narrative.doc." to get LR approval. App. 124. False statement with suppression of evidence. Brady was given outstanding year-end-review (App. 116) and was promoted to IR-01 supervisor. *See*, Gianakos Depo. Tr. at p. 9.

**Is the degree of discipline appropriate? X**

Terminating a performing Sagar is wrong. Getting termination approval based on false statements with suppression of record/evidence is criminal. The concerned officials should be prosecuted.

**Will the Guide be adhered to in this case? Why or why not? X**

Discriminating officials made false statements to get termination approval. They violated applicable rules.

**Have employees within your unit been treated the same for similar misconduct? If not, why the difference? X**

Discriminating officials checked this box. However, Sagar did extensive work in analyzing Patient Protection and Affordable Care Act single handedly. Others attended to learn. The presence of others had been treated as help to Sagar.

Extracts from Pl.'s UMF's (43 page doc.), Document No. 101-20 in District Court's docket ("DCD"); and Def.'s response (Docket No. 104-22 in DCD) follow:

Pl.'s Document No. 101-20

129. Analyzed Patient Protection and Affordable Care Act, Public Law 111-146 – 3/23/2010, around 900 pages, and put the analysis in the PTC SharePoint for the team to refer as needed. Ex. 5 (Sagar-msj Decl., ¶ 13).

Def.'s Docket No. 104-22

129. Not disputed, but not material.

Rules of Conduct for Internal Revenue Service Employees,...,involving false statements:

Proper functioning of the Revenue Service requires that the Service, the courts, other Federal agencies and the public be able to rely implicitly on the truthfulness of Revenue Service employees in matters of official interest. An employee may be subjected to severe disciplinary action and prosecution for intentionally making false or misleading verbal or written statements in matters of official interest. Some of these matters of official interest are: \* \* \* application forms

SF-57, and other forms, which serve as a basis for appointment, \* \* \*; and affidavits, transcripts of testimony, or statements to Inspection, whether or not under oath. *Williams v. United States*, 434 F. 2d 1346,1352 (Ct.Cl. 1970) (Cited in *Macklin v. Spector Freight Systems, Inc.*, 478 F. 2d 979 (D.C.Cir. 1973)).

The fact is that the "false statement" charge is a useful means of getting rid of unwanted Government employees, and is legitimate in its place. *Id.*, at 1356.

**D. Declarations by Walter Kirkland with False Statements (Violations of 18 USC 1621, 18 USC 1623)**

Plaintiff/Petitioner asked the agency to produce Walter L Kirkland for deposition at U.S. EEOC. Agency counsel told the administrative judge, Kirkland had nothing to disclose. However, he agreed Kirkland would answer interrogatories. Kirkland's responses under oath 09-2012 ("KD1"). App. 125-129.

Kirkland's, submitted declaration dated 5/1/2017 in District Court in support of Def.'s MSJ ("KD2"). App. 130-132. The willful statements in two declarations were false and conflicting. In KD1 Kirkland declared, "I do not recall that PTC management inquired or I reported on Vidya's work." App.127. However, on 5/1/2017 KD2 he declared, "I personally and repeatedly urged Dr. Sagar to schedule a requirements review meeting, so that the finalized requirements could be produced."

Sagar had prepared first requirement management plan ("RP") on 4/12/2011 and updated version was signed on 9/9/2011. Def.'s response to Interrogatory No. 17. App. 113-114. Peter Gianakos, "I've reviewed the Requirement Mgt. Plan. Looks very good. I've digitally signed the attached document." "Congrats Vidya. Excellent work on the Requirements Plan." Mariamma Cherian (Enterprise Life Cycle ("ELC") Lead). App. 182.

In KD1 Kirkland declared Vidya Sagar, was PTC project manager responsible for requirements management. In KD2, Vidya Sagar was technical advisor, subject matter expert. He acknowledges, ACA-wide requirements gathering initiative had been underway [Deloitte Consulting], but he was working with Booz Allen Hamilton ("BAH") (duplicating the work and wasting taxpayer dollars). Deloitte was sending weekly requirements documentation to stakeholders, including Kirkland. Further Kirkland admits there were seven functional requirements. App. 131. He lied in his declaration, "I personally and repeatedly urged Dr. Sagar to schedule a requirements review meeting..." that conflicts with his working with BAH and ACA working with Deloitte to define requirements. Sagar worked independently to update RP. Kirkland attended meetings hosted by Sagar. App. 137.

Kirkland's willful false declaration was material. A false statement is material if it has "a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys v. United States*,

485 U.S. 759, 770 (1988).

It has been used by defense counsel (App. 165). District Court used it to grant Def.'s MSJ. (App. 29)

Walter Kirkland, needed to ask Sagar "numerous times" when the Plan would be completed, and Kirkland eventually "asked other team members, including Matthew Sikowitz, the only other GS-15 [Technology] Specialist in PTC[,] [to assist] in completing the . . . Plan." Dkt. 104-21 at 2-3 (Def.'s SUMF ¶¶ 6,8).

Kirkland violated USC 1001; and 1623 (False declarations before grand jury or court.) Section 1623(c) allows prosecutions for making two or more statements under oath that are inconsistent to the degree that one of them is necessarily false. App. 72-74. Kirkland was promoted to GS-15. Kirkland committed perjury. App.130.

**E. Matthew David Sikowitz's Testimony with False Statements (Violations of 18 USC 1001, 18 USC 1623)**

Matthew David Sikowitz ("Sikowitz") was other GS-15 employee in PTC.

He was learning. One of his commitments was, "Become conversant with the new ELC Iterative Path and become a ELC resource for the PATC team." App. 144. Sikowitz did not prepare any ELC document. App. 188.

District court's memorandum opinion dated 4/12/2018 relied on false testimony of Sikowitz. App. 55-57.

[Formatting was convoluted, so Quote and UnQuote had been used.]

**Quote:**

Matthew Sikowitz, another Technology Specialist, confirmed Brady's account. He testified that "Sagar could not produce a final version [of the Requirements Plan] that was acceptable for signature," Dkt. 104-7 at 8 (Sikowitz Dep. 113:4-8); that "Kirkland asked [Sikowitz] to help out on getting the document finalized," *id.* (Sikowitz Dep. 113:4-8); that Sagar "sent [the draft] to [him] at Walter's request," *id.* at 11 (Sikowitz Dep. 122:5-7); and that Sikowitz "revised it," *id.* (Sikowitz Dep. 122:5-7). [Sikowitz's deposition is Document No. 101-14 in the District Court's docket.]

Sikowitz explained:

[There] was a template . . . and you had to fill in how the project was going to conduct the requirements gathering, what tools [were] going to be used, and how various things were going to be measured, like project scope and number . . . of requirements and difficulty, and some of these things needed to be finalized. And Walter [Kirkland] asked me to step in and work on some of them.

*Id.* at 8 (Sikowitz Dep. 113:12-20). Sikowitz further clarified that, for the “Requirements [P]lan, [he] assisted [Sagar] . . . before [Sagar] left” and that he “took over [the separate] requirements development after [Sagar] left.” *Id.* at 9 (Sikowitz Dep. 116:15-17).

[Text of footnote 2: Although directed principally at that separate “requirements development” project, a declaration provided by Walter Kirkland avers that he “personally and repeatedly urged . . . Sagar to schedule a requirements review meeting, so that the finalized requirements could be produced,” Dkt. 104-16 at 3 (Kirkland Decl. ¶ 5); that “Sagar organized a meeting after multiple requests from [Kirkland] and from . . . Gianakos,” *id.* (Kirkland Decl. ¶ 6); that, “[notwithstanding the meeting, [Sagar] produced no finalized requirements,” *id.* (Kirkland Decl. ¶ 6); and that he “asked . . . Sikowitz and others to help [him] complete the process,” which was ultimately “done in the fall of 2011 after... Sagar left the agency,” *Id.* (Kirkland Decl. ¶ 6).]

### **UnQuote**

The RP in revised format was signed by Gianakos on 9/9/2011.

Defense counsel admitted in 3/14/2018 status conference that RP in revised format was signed on 9/9/2011 before Sagar was terminated. App. 168. The following were present: Robert Mirkov, IRS attorney, and Stephanie Ostrosky, a paralegal in the civil division of the U.S. Attorney's Office. App. 162.

The District court's memorandum opinion relied on defense counsel's willful false statements and Def.'s MSJ pleadings based on those statements. Those were material to get summary judgment for the defendant.

#### **F. False Statements by Jonathan Chung-Shih Lin (Violation of 18 USC 1001)**

Lin (GS-14) was Sagar's surrogate manager. App. 188. Lin had high aspirations to rise up. He willfully concocted two false events dated 5/23/2011 and 5/26/2011 which were instrumental in Sagar's termination. App. 33. Lin suffered from chronic migraines. Lin Depo. Tr. at 26:10-16. Document No. 101-13 in District Court's docket.

May 23, 2011 Incident:

The wording of the charge was sensational, as if Sagar was a mad person. There was no documentary evidence. Hypothetically, for arguendo, Lin liked to move the spider phone (microphone) by passing it from person to person, whereas Sagar did not like to disturb others, just gently toss it, if needed (rarely needed). App. 163.

May 26, 2011 Incident:

Another sensational charge from Lin. Sagar never tried to disturb thought processes of others. "usually try not to disturb anybody speaking, that is my practice. But sometimes in all these meetings one is speaking and the other starts to speak. But that is my practice." App. 164.

THE COURT: *And if I were to put you on the stand, you could testify under oath subject to the penalty of perjury that no one else was speaking when you moved?*

MR. SAGAR: *Sure, I will do it.*

THE COURT: I just want to make sure I understand what you're saying. When you were done speaking, did you move the microphone in any way?

\*\*\*

THE COURT: *Well, I try not to talk at the same time that others are talking too, but I know occasionally I will do it by mistake.*

MR. SAGAR: You're right, sir.

THE COURT: Okay.

Lin was rewarded with Outstanding annual appraisal and was recommended for an award. App. 116. After Sagar's termination, Lin applied to fill Sagar's GS-15 position.

Lin was made PTC architect that adversely changed Sagar' terms and conditions of employment. App. 125-126. With the support of Brady and Gianakos Lin misbehaved. App. 118.

#### **G. Defense Counsel Aided Perjury (18 USC 1622)**

Defense counsel knew statements were false, but presented them to the court verbally and in pleadings. These included, but not limited to: False testimony of Sikowitz, Lin, Kirkland, and Brady (discussed earlier); False statements in the open

court hearing on 3/14/2018 (App. 165-169); Representing false facts in MSJ pleadings – court had discussed some and treated those as true, but were false.

Knowing, PTC employees were making false statements, counsel failed to refer the matter to the district attorney for prosecution.

The attorney's ethical obligations when confronted by a client who wishes to testify falsely are discussed at length in *Nix v. Whiteside*, 475 U.S. 157 (1986).

Conspiracy to suborn perjury may be prosecuted irrespective of whether perjury has been committed. The two witness rule does not apply in conspiracy prosecutions. Solicitation of perjured testimony also may be prosecuted as obstruction of justice irrespective of whether the perjured testimony took place. *United States v. Silverman*, 745 F.2d 1386, 1395 (11th Cir. 1984).

## **II. The District Court's Erroneous Decision Dismissing Petitioner's Case and Erroneous Grant of Summary Judgment to Defendant**

This Hon. Court is not a trial Court. However, a few facts and abused discretions at the District Court would help the Hon. Court to understand what Sagar went through at the District Court.

The two behavior issues reported by Lin had been discussed at I.F, "False Statements by

Jonathan Chung-Shih Lin (Violation of 18 USC 1001)".

The agency had made preparation of requirements management plan ("RP") as the key performance issue. The fact was Sagar prepared RP in the Requirements and Demand Management ("RADM") approved format on April 12, 2011 that was signed by RADM. PTC management acknowledged it. App. 181, 182.

When the format got updated, Sagar again prepared it. It was signed on 9/9/2011. While signing, Gianakos commented. "I've reviewed the Requirement Mgt. Plan. Looks very good. I've digitally signed the attached document. Peter Gianakos." "Congrats Vidya. Excellent work on the Requirements Plan." Mariamma Cherian (Enterprise Life Cycle ("ELC") Lead). App. 181-182.

*District court in Memorandum Opinion and Order dated 9/30/2016 (App. 8-22) made the following rulings:*

1. Plaintiff had made a charge, waste of resources, under Title VII 42 USC 2000e-3(a). App. 83.  
District Court made it ADEA retaliation claim. App. 12. Discovery was allowed only for ADEA not Title VII. Abuse of discretion. It was later denied. Minute Order 3/31/2018. App. 23.
2. District Court clubbed Retaliation, Harassment and Age discrimination all under

ADEA and denied all. App. 23-24. Abuse of discretion.

U.S. EEOC allows harassment discrimination under Title VII and ADEA. App. 90.

3. "Sagar's probationary status means this case is not "mixed". App.16.

4. Did not adjudicate: Violation of department and federal ethical rules and processes in plaintiff's wrongful annual assessment and termination; and Illegal termination under federal rules including but not limited to 5CFR § 315.804. Court opined that Civil Services Reform Act ("CSRA") provides the exclusive remedy for an agency's failure to comply with federal personnel laws. With less than one year service, Sagar was not an employee under CSRA. CSRA was inapplicable. App. 19-20.

The opinion meant no justice for Sagar. Though there were rules, but court opined during probation those were unenforceable. Brady and Gianakos took full advantage. Willfully resorted to perjury to get LR approval to terminate Sagar and did terminate Sagar. I.B, I.C.

*District Court denied plaintiff's motion for summary judgment in Minute Order, dated 3/31/2018 as modified on 4/2/2018. App. 23-24.*

District Court made the following rulings:

Plaintiff has failed to offer uncontroverted evidence that he was terminated because of his age or in retaliation. App. 23.

Because the typical Title VII [or ADEA] discrimination or retaliation case is premised on the employer's *subjective* motivations, the critical issue concerns what was taking place in the subject individuals' minds. App. 23.

Defendant has proffered legitimate, nondiscriminatory, and nonretaliatory reasons for his termination--namely, the Plaintiff's conduct and performance--and it has supported these asserted reasons with testimony provided under penalty of perjury. App. 23.

[f]or present purposes it suffices to conclude that Defendant's submissions are more than sufficient to demonstrate that Plaintiff is not entitled to summary judgment on his termination and retaliation claims. For similar reasons, moreover, the Court concludes that Plaintiff is not entitled to summary judgment in his favor on his hostile work environment claim. App. 24.

Plaintiff had supported motion for summary judgment with admissible evidence (depositions, Def.'s response to interrogatories, documents, declarations). Document Nos. 101-20, 104-22 in District Court's docket. The Def.'s responses were mostly "not material to the issue in this case"; "Not disputed that Plaintiff had technical competence"; "Not disputed, but not material"; "129. Not disputed, but not material." [Analyzed Patient Protection and Affordable Care Act, Public Law 111-146 – 3/23/2010, around 900 pages, and put the analysis in the PTC SharePoint for the team to refer as needed.], etc.

Against all admissible evidence, the ruling was a surprise.

*District Court granted defendant's motion for summary judgment. App. 25-71.*

District court relied on Sikowitz and Kirkland's false testimonies. App. 55-56, n.2. *See, I.E.*

District court relied on Agency's false statement that Sagar could not fill in the revised RP template and needed help. App. 56, 166.

District court assumed Kirkland's statements were true. They were not. Kirkland committed perjury and was promoted to GS-15. *See, I.D.*

District court used Sikowitz testimony (false) and Kirkland declaration (false) as corroboration. Abuse of discretion. App. 55, 56.

Sagar was all along pleading adjudication based on Title VII. District Court, "Sagar, however, does not allege discrimination based on any characteristic other than age." App. 36, n.1. Abuse of discretion

Brady and Gianakos premeditation to terminate Sagar with false declarations. *See, I.C.*

District Court, "Sagar also asserted that persons known and unknown "t[a]mpered" with or "falsely completed" various forms." App. 60, n.3. The persons were Brady and Gianakos. Their sworn

signatures in the forms were missed/ignored. App. 123, 145, 151. Abuse of discretion.

District Court stated “insufficient evidence” at multiple places App. 49, but discovery was mostly denied and hampered by agency. District court was aware of it.

District Court’s observation, “Sagar’s contention that Lin concocted criticisms of Sagar at the behest of Brady and Gianakos in exchange for receiving an outstanding ranking, recommendation for a reward, and promotional consideration finds no support in the record.” App. 68, n.5.

Including, but not limited to: Sagar was replaced by Lin as PTC architect. App. 125-126. Also *See, I.F*, App. 116 (outstanding performance rating), 118 (Lin complaining and misbehaving). [Agency did not produce Lin’s email store.] Suppression of evidence. Abuse of discretion.

District court had cited extensive case law. “[t]he issue is whether the employer honestly and reasonably believe[]”. *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 496 (D.C.Cir. 2008). *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1101 (D.C. Cir. 2017). *Morris v. McCarthy*, 825 F. 3d 658, 671 (D.C.Cir. 2016) (Plaintiff “must raise a genuine dispute over the employer’s honest belief in its proffered explanation.”); *DeJesus v. WP CO. LLC*, 841 F. 3d 527, 533 (D.C.Cir. 2016) ([T]he issue is whether [] honestly and reasonably believe[d]) and others. App. 46.

As shown above, at the agency *honesty* was missing; *perjury* took its place.

Grant of summary judgment in favor of IRS did not meet established standard in D.C. Circuit. There were genuine issues. Document No. 112-4 in the District Court's docket (25 pages). Issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). *Holcomb v. Powell*, 433 F. 3d 889, 895 (D.C.Cir. 2006).

The facts in this matter were clear. IRS discriminating officials were dishonest; wanted to overspend taxpayer money; used perjury and false declarations to willfully terminate the performing appellant. They personally benefited. With disputed facts, grant of summary judgment was unlawful.

### **III. The District of Columbia Circuit's Erroneous Grant of Summary Affirmance**

The panel did not review the record *de novo*. *Holcomb v. Powell*, 433 F. 3d 889, 895 (D.C.Cir. 2006) (Our review of the grant of summary judgment is *de novo*); *Royall v. Nat'l Ass'n of Letter Carriers*, 548 F.3d 137, 143 (D.C.Cir.2008); *Potter v. District of Columbia*, 558 F.3d 542, 546 (D.C.Cir. 2009); *Juarez v. Dep't of Justice*, 518 F.3d 54, 58 (D.C.Cir. 2008); *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017); *Swanson v. Worley*, 490 F.3d 894, n. 8 (11th Cir.2007) (we review a district court's grant of summary judgment *de novo*).

Circuit ruled: Moreover, this was not a “mixed case” over which the district court had jurisdiction (App. 2), because such cases *must* include a claim appealable to the Merit Systems Protection Board (MSPB), and it is undisputed that appellant was a probationary employee who could not have appealed his termination to the MSPB.

It was deprecated law inconsistent with: 5 CFR 1614.302(a)(1). (Mixed Case Complaints) (App. 84); 5 USC 2302(b)(8) Prohibited Personnel Practices. (App. 77); Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 (Public Law 115-73) that ...expedites investigations of instances in which probationary federal employees were fired for whistleblowing (App. 80); 5 USC 2307 (b)(1) Information regarding whistleblower protections available to new employees during the probationary period (App. 81).

Circuit Court opined that appellant does not point to record evidence that presents a material issue of disputed fact as to the appellee's stated reason. App. 3. Two events provided by Lin after committing perjury had been discussed at I.F above. Draft of revised RP was available around 8/23/2011. On the same day initial draft was prepared. It was updated as and when changes were made by PS&I or EA. App. 137. There was no mandatory required entry in Sagar's performance file. App. 148. The performance events had been concocted.

Brady and Gianakos were willfully making false statements and committing perjury to get

termination approval from LR/ER. *See, I.A, I.B.* All actions supported with acts of perjury were void.

### **Reasons for Granting the Petition**

- I. This Court Must Order that Dismissal of a Probationary Employee after Committing Acts of Perjury is Criminal. In this Civil Matter, Perjury is Criminal. Respondent should not be Allowed to Benefit from Acts of Perjury. The Petitioner's Wrongful Dismissal must be Reversed.*

Acts of perjury are criminal and inherently wrong. The employees who committed those acts should be prosecuted, not the honest employee Sagar who was diligently doing his job and showed courage in pointing out criminal activities at ACAPMO/PTC.

- II. The Lower Courts are using Petitioner's Probationary Status in Determining "mixed" case. This Court Must Order that Probationary Status of the Petitioner does not decide whether a case is "mixed". 29 CFR §1614-302(a)(1).*

29 CFR 1614.302(a)(1) (App. 84) refers to "[s]temming from an action that can be appealed to the Merit Systems Protection Board." Words "can be" had been wrongly treated as "must be".

Sub section, (b) Election, makes it clear that a mixed case complaint can be filed with the

agency or an appeal with MSPB, but not both.

5 USC 2307 (b)(1) information regarding whistleblower protections available to new employees during the probationary period. App. 81. Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 provides for enhanced protections and expedites investigations of instances in which probationary federal employees are fired for whistleblowing. App. 80. Probation does not limit complaints of whistleblowing.

District court opined, “Sagar’s probationary status means this case is not “mixed” *Stella v. Mineta*, 284 F.3d 135, 142 (D.C. Cir. 2002). App. 16.

Appellant approached MSPB, but on procedural grounds, MSPB did not entertain it.

(Should an employee seeking judicial review then file a petition in the Court of Appeals for the Federal Circuit, or instead bring a suit in district court under the applicable antidiscrimination law? We hold she should go to district court) *Kloeckner v. Solis*, 133 S. Ct. 596, 600, 603 (2012). Majority decision in *Perry v. Merit Systems Protection Bd.*, 137 S. Ct. 1975, 1988 (2017) ([c]omplains of serious adverse action prompted, in whole or in part, by the employing agency's violation of federal antidiscrimination laws, the district court is the proper forum for judicial review.)

Statute does not reference probation. District court itself lists alternates agency EEO or MSPB App. 17. This matter went to EEO, District court was required to allow discovery and then adjudicate.

*III. Lower Courts have used appealability to Merit Systems Protection Board, as the determining factor to grant relief on Whistle Blower Protections. It is deprecated law, not in Public Interest. In Whistle-blowing Petitioner's Probationary Status is not relevant. This Court Must Order Lower Courts to Provide Relief under 5 USC § 2302(b)(8).*

Whistle blowing is in public interest. Appealability to MSPB, which limits this activity that benefits public, is not a requirement.

*IV. The Respondent was Represented by U.S. Department of Justice Attorneys. This Court should Direct Lower Courts to Enforce Subornation of Perjury under 18 USC §1622.*

Refer to I(G) above.

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## CONCLUSION

Plaintiff had no words to express his suffering. Jeffrey Brown and Dean Baker express it in the PBS presentation, "losing one's job is like having a death in the family". App. 193.

Brady and Gianakos each had a Bachelor's degree and no professional certification. App. 171. Brady had no management experience. Brady was given \$13,000 raise. App. 111. Brady was planning to take *some* training in Project Management and Requirements Management by 9/30/2011. App. 139. However, Brady willfully and unlawfully recommended termination of professional, well qualified, certified, and experienced project manager, petitioner, Sagar on 9/29/2011 and succeeded in terminating Sagar on 11/2/2011.

Fairness, honesty and integrity are the basic requirements for managers. Brady and Gianakos violated these principles. The Supreme Court in *Withrow v. Larkin*, 421 US 46,47 (1975) has stated: Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U. S. 564, 579 (1973). Not only is a biased decision maker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison, supra*, at 136; cf. *Tumey v. Ohio*, 273 U. S. 510, 532 (1927).

It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgetment that the practice must be forbidden if the guarantee of *due process* is to be adequately implemented.

Gianakos testified in his deposition, "I was the senior level -- I was the senior manager and I did review the evaluation. The performance evaluation did not go to Greg [Director, level 3 supervisor at that time]. The frontline manager and the next level manager is the approver. So Matt [Brady] submitted it to me for approval and I approved it. It doesn't go any higher than that." App. 176. Violated IRM 6.771.1.5 4.Deciding Officer. App. 90.

Brady and Gianakos failed in their primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes... 42 U.S.C. 2000E-16 (e). App. 83-84, 177.

Discriminating officials, Brady and Gianakos, made false statements, suppressed evidence, and used their authority and acquaintances with subordinates and Labor Relations / Employee Relations to wrongfully terminate Sagar. They violated 5 USC 2301 Merit System Principles. App. 75-77. They committed perjury and obstruction of justice in completing form 11396 Recommendation for disciplinary action. App.122; I.B, I.C. They unlawfully pressed Sagar to resign in the hope Sagar's resignation would wash away their sins. It was another act of obstruction of Justice.

Lower courts had not applied "mixed" case law consistent with the statute. District court (Court concludes that Sagar's probationary status means this case is not "mixed") App. 13. D.C. Circuit Court concurred. App. 2. A ruling from this Hon. Court is urgently needed. It would help petitioners like Sagar and bring consistency across the judicial system.

As this Court has recognized, “[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The term “contemporary” refers to the time frame when the statute at issue was enacted, not when a court is interpreting it years later in litigation. *Id.* (identifying and applying relevant dictionary definitions in use at time statute at issue was enacted).

There is no reason why this Honorable Court should not discharge its duty to “say what the law is.” *Marbury v. Madison*, 5 US 137, 177 (1803).

Certiorari should be granted.

Respectfully Submitted,

/s/

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