ORIGINAL

No. 19-186

IN THE

SUPREME COURT OF THE UNITED STATES

Leslie Moore Mira,

Petitioner,

v.

Argus Media, John Demopoulos, Ian Michael Stewart, Miles Wiegel,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An estimated 10 million or 4% of US internet users have been threatened with or experienced the posting of explicit intimate images without their consent. The consequences for the subject can devastate and create extreme emotional distress.

Forty-five states and Washington, DC, have enacted or proposed laws penalizing the nonconsensual dissemination of sexually graphic images.

Questions presented are:

Does such misconduct by an employer constitute a Title VII violation and create a prima facie hostile and discriminatory workplace?

Did the Second Circuit and district court err in case dismissal?

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http://mgaleg.maryland.gov/2014RS/bills/hb/hb0043E.pdf

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http://www.legislature.mi.gov/documents/2015-2016/billenrolled/Senate/pdf/2015-SNB-0508.pdf

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https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB188/Enrolled

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http://lims.dccouncil.us/Download/32304/B20-0903-Engrossment.pdf

For updates, please see:

https://www.cybercivilrights.org/revenge-porn-laws/

(Links last visited May 21, 2019)

PETITION FOR WRIT OF CERTIORARI

Leslie Moore Mira, proceeding pro se, respectfully petitions for a writ of certiorari to review the order of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The mandate from the U.S. Court of Appeals for the Second Circuit in 17-1929-cv was entered January 25, 2019. App. 1. The petitioner filed a timely en banc motion for reconsideration. The motion was denied. A May 16, 2017 order of the US Southern District Court of New York closed the case without granting discovery. The order was entered May 25, 2017. App. 2.

JURISDICTION

Petitioner timely requested an extension to file her petition for a writ of certiorari from this Court, which granted an extension up to and including May 23, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This case concerns the nonconsensual internet dissemination and taking of sexually explicit images and other extreme invasions of privacy to harass and humiliate. Respondents

(collectively, Argus) conspired with and abetted other parties to take and access highly intimate images of the Petitioner and illicitly eavesdrop on her personal communications. In a textbook case of retaliation, Argus terminated her less than a week after she objected to sexual misconduct.

In contravention of this Court's commitment to privacy in the digital era and accumulating federal and state court rulings against cyberharassment, the Second Circuit affirmed the district court's dismissal of *Mira v. Argus Media*, as it did in the inextricably linked *Leslie Moore Mira v. John Kingston, et. al.*, No. 17-1640, which shares overlapping facts.[1] The Second Circuit thus has twice dismissed allegations of hostile cybersexual acts even as other courts recognize such malicious acts.

Rather than extend liberal construction to pro se pleadings, per this Court's long-standing instruction, the district court's opinions showed solicitude to professionally counseled

[1] Petitioner submitted a petition for writ for certiorari before this Court on June 1, 2018 in *Mira v. Kingston*. On October 1, 2018 the Court denied it. The SDNY earlier denied Plaintiff's request to consolidate the two cases.

Defendants. It overlooked facts and full context that supported Petitioner's claims of a hostile and discriminatory work environment and retaliatory dismissal. It barred her from submitting evidence in a proposed amended complaint while applying a higher summary judgment standard for evidence at a pleading stage, then concluded claims were "entirely conclusory." It foreclosed opportunity for discovery.

The Second Circuit upheld the district court's dismissal in a ruling conspicuously absent of reasoned argument specific to facts and allegations in *Mira v. Argus Media*. The circuit's sole case citation was *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), a case centered on the federal in forma pauperis statute. Unlike the party in *Williams*, this Petitioner paid all related court fees.[2]

The circuit's ruling is incompatible with clear opposition from courts and swaths of society to nonconsensual dissemination of

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[2] Petitioner's motion for reconsideration to the Second Circuit stated she was not an IFP litigant. Petitioner paid court fees, per a court docket No. 3 on December 23, 2015. (An erroneous court note of January 16, 2016 suggested she did not pay the court fee.

explicit private images. The ruling signals permission for other employers in this circuit to engage in similar misconduct. While this civil action does not involve allegations of police searches, a reasonable comparison exists between it and this Court's holdings on intrusive extremes. As Justice Scalia stated in *Kyllo v. US*, 533 US 27, 2001, which found that thermal imaging of a home was unlawful, "there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable." The Justice Scalia-written majority opinion held that this Court draws a line at the inside of a home that is "not only firm but also bright."

The digital era and popularity of social media do not undo fundamental expectations of privacy and what Supreme Court Justice Louis Brandeis called the "right to be let alone." This apparent case of first impression[3] provides this Court with the "special justification" to remand *Mira v. Argus Media* and join other circuits, multiple state courts and legislatures that

[3] Petitioner is unaware of another case that concerns Title VII, employers and the nonconsensual dissemination of explicit images.

condemn parties who engage in the nonconsensual dissemination of explicit private images and recording of a subject.

Procedural threshold issues are whether the two courts unjustly overlooked evidence supportive of the Petitioner's pleadings and whether the circuit court overlooked a plausible conflict of interest between the district court and a party related to the proceeding. The circuit's silence on a district court's barring a pro se Plaintiff from submitting evidence in a proposed amended complaint permits a future court to foreclose due process. Such restriction further contradicts this Court's liberal allowance for pro se pleadings.

This case involves substantial questions of misconduct. Certiorari is essential to reverse lower courts' decisions that, if allowed to stand, would permit adverse acts to prevail and assent to future ones.

STATEMENT OF THE CASE

Leslie Moore Mira worked full-time as a reporter at oil price reporting agency Argus Media. Her previous employment at fellow oil price agency and co-conspirator Platts ended in constructive discharge after a series of adverse

employer actions including illicit eavesdropping on her personal communications, the taking and dissemination of intimate images of her, and the inveigling of federal and local authorities to investigate her on manufactured pretenses.[4] Calculated acts of slander, cyberharassment and interference by Platts in her business relations with Argus overlapped with adverse acts at Argus.[5] (See *Mira v. Kingston* petition.)

Argus Respondents were complicit in acts of voyeurism and nonconsensual image-taking and dissemination. They made explicit taunting remarks to her about her personal and intimate life. An Argus co-worker's work computer screen bore interior images of the Petitioner's bedroom. Job evaluations of Petitioner's work were erratic throughout her employment there. She was terminated by Argus less than a week after engaging in Title VII protected activity of objecting to sexual misconduct against her.

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[4] The two companies have held US and other government contracts and are dominant in price reporting of oil and other commodities. They periodically confer to discuss business.

[5] *Kingston* defendants affirmed their efforts in arranging parties to have Petitioner photographed in her private life without her consent starting in 2012 if not prior.

PROCEEDINGS BELOW

1. Petitioner filed suit December 22, 2015 in the Southern District Court of New York as a pro se litigant after receiving a notice of right to sue from the US EEOC. Petitioner's pro se claims included violations of Title VII and the New York State and New York City Human Rights Laws.

Pursuant to SDNY practice that permits mediation, Petitioner asked the district court that parties be permitted to mediate. She presented evidence that Argus earlier expressed desire for settlement and conciliation. It did not respond to the request.

2. In a March 29, 2017 opinion, the district court stated that it would permit Petitioner to submit a proposed amended complaint, though without attachments or affidavits. Petitioner complied. A May 16, 2017 district court order signed by the court clerk on May 25, 2017 denied Petitioner's proposed amended complaint and closed the case.

3. On appeal, the Second Circuit Court of Appeals affirmed the district court's order. The circuit court denied Petitioner's motion for en banc reconsideration on January 25, 2019.

REASONS FOR GRANTING THE PETITION

A. This Case Presents Opening for This Court to Recognize Employer's Malicious Use of Social Media

This petition may comprise a case of first impression for this Court: Respondents' complicity in outrageous acts of off-site voyeurism and aggressive deployment of internet use and other methods to humiliate and intimidate an employee. Such acts can indelibly harm. The nonconsensual dissemination of graphic images, colloquially called "revenge porn," may "haunt victims throughout their lives," *Vermont v. Van Buren* (Vermont Supreme Court, No. 2016-253).

That court characterized nonconsensual dissemination of intimate images as "widespread," citing a poll that estimates about 4% of US internet users, or about 10.4 million users, "have been threatened with or experienced the posting of explicit images without their consent," while 2% of internet users have had a sexually explicit image of themselves posted online, citing *Vermont.*[6] "The

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[6] That court cites Data & Society, "New Report Shows That 4% of U.S. Internet Users Have Been a Victim of 'Revenge Porn,' " (Dec. 13, 2016),

personal consequences of such profound personal violation and humiliation generally include, at a minimum, extreme emotional distress...the posted images can lead employers to fire victims," *Vermont,* which notes documented cases of suicide related to "revenge porn." Legal experts on nonconsensual sexually graphic images argue that "cyberspace enables the amplification and aggregation of harm," citing University of Miami law school professor Mary Anne Franks, *The Banality of Cyberdiscrimination, or, the Eternal Recurrence of September*, Denver Law Review Online, Vol. 87, 2010.[7] Forty-five states and Washington, DC, have either enacted or proposed laws penalizing the nonconsensual dissemination of sexually graphic images. (A proposed bill is pending in the state of New York.)

Other circuits have ruled on the egregiously wrong act of nonconsensual

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https://datasociety.net/blog/2016/12/13/nonconsensual-image-sharing/ Data & Society polled 3,002 US internet users and cites a 2% margin of error.

[7] To Franks' point, a waiter in a restaurant near Petitioner's home in December 2015 told Petitioner "you look good in the pictures," with apparent aim of discomfiting. Identifying information can be provided upon remand.

dissemination of graphic images. The Ninth Circuit in *US v. Osinger*, 753 F. 3d 939 (2014) upheld a defendant's sentence, finding that his threatening messages and the "sexually explicit photographs [he sent] to V.B.'s co-workers and friends unquestionably evinced [his] intent to harass and intimidate V.B. and to cause substantial emotional distress." The Eighth Circuit did likewise in *US v. Sayer* 748 F. 3d 425 (2014) in which acts included cyberstalking and nonconsensual graphic image-posting and *US v. Petrovic, 701 F. 3d 849,* affirming the conviction of a defendant who web-posted sexually explicit images of a woman whom he had dated.

States and cities have passed laws banning such acts but cases can be difficult to litigate without effective discovery. "For victims, fighting against such attacks can take years and prove costly. In [one] case, the ordeal came to an end of sorts when she reached a legal settlement last summer, more than six years after it began," Niraj Chokshi, The New York Times, "*How to Fight Back Against Revenge Porn,*" May 18, 2017. Related laws "vary in their effectiveness and many are not particularly helpful for victims who find themselves in wholly different circumstances than...rare, clear-cut cases,"

Lauren Evans, Jezebel, "*Why it's so Hard to Make Revenge Porn Laws Effective*," November 16, 2017.

Harassment is violative of Title VII and is "unwelcome conduct" based on sex, race, color, and national origin, according to the US EEOC. It becomes "unlawful where 1.) enduring the offensive conduct becomes a condition of continued employment or 2.) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive," citing the EEOC.[8]

The novelty of the legal issues here---employer complicity in nonconsensual posting of sexually explicit images---"counsels unconstricted review," *City of Newport v. Fact Concerts*, 453 (US 247-S. Ct. 1981), still binding and *Carson v. Hudson*, No. 09-3514 (6th Cir. 2011). While direct comparison of this civil complaint with *US v. Osinger*, *Sayer* and *Petrovic* is imperfect, nonconsensual graphic image dissemination without consent unites them. The Second Circuit's terse dismissal of such misconduct in a civil action, which entails

[8] https://www.eeoc.gov/laws/types/harassment.cfm

less onerous evidentiary demands than a criminal case, diminishes the harms that other circuits and state courts recognize. If remanded, this case would proceed to discovery and depositions. It would face an evidentiary bar well below that of criminal cases successfully prosecuted elsewhere.

This Petition is worthy of certiorari to send a clear message that employer engagement in the taking and dissemination of nonconsensual highly graphic images is impermissible and qualifies as hostile and discriminatory conduct. Dismissal days after objecting is a clear-cut case of retaliation.

B. A Plausible Conflict of Interest May Have Hindered Fair Hearing

The circuit's cursory dismissal suggests it did not review this case at all, let alone consider its merits. The dismissal is distinct in its brevity and omission of reasoned argument compared to the mass of summary orders and decisions it typically issues. No legal argument anchored dismissal. It provides no explanation for its conclusory finding that the case lacks "an arguable basis either in law or in fact." Petitioner's timely motion for en banc reconsideration was denied.

The Honorable Richard Sullivan presided over *Mira v. Argus Media* in the district court. He joined the Second Circuit court on October 11, 2018. Petitioner appreciates whatever mild awkwardness a review of a decision by a fellow (or pending) appellate judge may have arisen for the circuit court. The circuit's chief judge has publicly spoken of the circuit's premium on collegiality and disfavor of en banc proceedings: "I think that one of the reasons that our court is so collegial is that we don't go en banc that much because there's often a lot of heat in en banc proceedings," citing Chief Judge Robert Katzmann, August 2014 C-Span interview. It is plausible that court culture implicitly deterred the Second Circuit from reversing a colleague's opinion, thus denying proper hearing. "The multi-member court is a social environment, and judges are not exempt from the pressure to conform that other human beings experience," citing the Honorable Bernice Donald, US Court of Appeals for the Sixth Circuit, *Reflections on Collegiality and Dissent in Multi-Member Courts.*[9] Yet under Rule 3 of Federal Rules of

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[9] *The University of Memphis Law Review*, Vol. 47. No date noted.
https://www.memphis.edu/law/documents/donald.pdf

Appellate Procedure, litigants are entitled by right to appeal.

Such deference can lead to "judges voting against their own 'legal consciences'" in some cases, citing Judge Donald. "It could be that this outcome is inevitable in the appellate judicial context...but it is also possible that this outcome means that the people are not always getting from judges what they have a right to expect, and what judges are best equipped to give: their judgment as to what the law says and requires," citing Judge Donald.

Separately, it is plausible that the district court has had a social relationship with a Defendant in the inextricably linked *Mira v. Kingston*. The presiding judge and the Defendant were schoolmates (classes of 1982 and 1984, respectively) at Chaminade High School in Mineola, New York, according to online biographies.[10] That Defendant, identified in pleadings before the district court, and Judge Sullivan have each remained active in alumni events at the private school, according to past school web postings. The Defendant and his family have served on Chaminade's "law

[10] The Platts/S&P Global Defendant-Respondent referred to here is Kevin Saville.

enforcement" alumni committee. Judge Sullivan was an assistant US Attorney and named Federal Law Enforcement Association's Prosecutor of the Year. It is reasonable to infer that the Defendant and his family and Judge Sullivan are socially acquainted. Defendants in the two cases, *Mira v. Kingston* and *Mira v. Argus Media*, engaged in gross if not felonious misconduct. With retaliatory motive, *Kingston* parties attempted to inveigle federal and other authorities to investigate Petitioner and other harms.

Cannon 2 of the Guide to Judiciary Policy holds that a judge "should avoid impropriety and the appearance of impropriety in all [a]ctivities...A judicial employee should not allow family, social, or other relationships to influence official conduct or judgment. A judicial employee should not lend the prestige of the office to advance or to appear to advance the private interests of others."

It is plausible that the Second Circuit's review of an opinion written by a future and now-sitting appellate judge, situated in a milieu that eschews dissent (citing Katzmann), impeded fair review. And it is plausible that the district court has had a social or past

professional acquaintanceship with a Defendant inextricably related to this case.

C. District Court Overlooked Facts and Prohibited Evidence Supportive of Claims

Evidence in this case points to Petitioner's retaliatory termination from Argus: temporal proximity of less than a week after she objected in an email to misconduct against her. Such blatant timing at the least raises a triable issue for a jury. Yet in an example of illiberal construction of pro se pleadings, neither court acknowledged the compelling facts that support a *prima facie* retaliation claim. Rather, the district court conflated her termination with her other claims of discrimination: "The proposed amended complaint alleges no new facts that come close to suggesting that Mira was terminated because she is a woman or is Mexican-American." App. 28. But Petitioner's pleadings presented her termination as an adverse act of retaliation, not discrimination. It is common for courts and juries to find in favor of retaliation claims while other claims may fall short of persuasion. This district court chose to

discard all claims.[11] Pro se pleadings, however inartful, presented a compelling case of retaliation situated within a hostile and discriminatory environment.

The district court's directive to exclude evidence in a proposed amended complaint further prejudiced the Plaintiff. Evidence would have had no adverse effect on the fairness of the proceeding. Facts and allegations that Petitioner could document, such as a letter supportive of erratic job feedback, were not allowed in her proposed amended complaint.

The two courts also erred by overlooking facts and circumstances of illicit conduct against Petitioner so disturbing that she contacted the Manhattan DA's office. Despite its prosecutorial background and in sharp conflict with other courts and state legislatures, the district court here minimized acts of voyeurism and nonconsensual image-taking and dissemination of intimate images as propagation of "embarrassing video" and elsewhere as "vaguely offensive, but certainly not physically

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[11] Pro se Petitioner does not waive claims or arguments unaddressed here. She aims to distill arguments before this Court.

threatening," and conspicuously omitting Title VII implications.

Court blitheness indicates unawareness of how indelible social media images can alter a person's professional and personal life. As argued, lawmakers and numerous judges recognize the wrongs of nonconsensual dissemination (and nonconsensual photo-taking) of intimate images. Nonconsensual pornography "posted online can be a significant obstacle to getting a job," *Vermont.* "Moreover, the widespread dissemination of these images can lead to harassment, extortion, unwelcome sexual attention, and threats of violence," *Vermont*, citing Danielle Citron and Franks. In discord with this Court's view of "expectations of privacy that society recognizes as reasonable," citing *Kyllo,* the district court found Defendants' complicity of illicit surveillance and intrusiveness only "vaguely offensive."

Taking all her pro se pleadings "as a whole" as a court must (*Ashcroft v. Iqbal*, 556 US 662 (2009)), Petitioner identified parties, places and dates and strong inferences of how she came to be sexualized in the office unlike male colleagues—details sufficient to survive a motion to dismiss---and triable issues for a jury

to determine. But rather than extend solicitude to a pro se litigants' pleadings, as it is obliged to do, the district court consistently overlooked supported claims. For example, it dismissed unlikely non sequitur comments from a top Argus official directed to the Petitioner about how she planned to draw her bedroom curtains to not show New Yorkers her unclothed body as a "self-deprecating" remark (citing court's March 29, 2017 opinion).[12] Such non sequitur comments were implausible but for the dissemination of graphic images of Petitioner and the online sexualization of her. In contravention of this Court's *Desert Palace, Inc. v. Costa* (539 US 2003) that holds that direct evidence of discrimination is not required for a Title VII plaintiff to obtain a mixed-motive trial jury instruction. And it overlooked corroboration of organized methods to harass Petitioner from co-workers. The district court failed to address the very close temporal proximity between Petitioner's objection to sexual harassing conduct and her termination, stating that the "natural inference" from the complaint is that Mira "was terminated at least in part because

[12] Pleadings note that Petitioner observed photographic activity aimed at a narrow opening in her bedroom window when she was partly unclothed.

she was underperforming," court's March 29, 2017 opinion.

The district court concluded that Petitioner did not raise claims "across the line from conceivable to plausible" while ignoring direct evidence of inconsistent job review feedback such as a pay raise about four months before her termination. Resistance to evidence suggests a predetermined outcome, with evidence and reasonable inferences discarded rather than weighed, much less liberally construed. Its opinions contradict ample case law that instruct a court to liberally construe pro se pleadings and remain "alert to any conscious bias that could affect decision-making," citing *Vega v. Hempstead Union Free School District* (801 F.3d 72 (2d Cir. 2015)). "In making the plausibility determination, the court must be mindful of the 'elusive' nature of intentional discrimination," *Vega*. That case holds that plaintiffs "usually must rely on 'bits and pieces' of information that support a "mosaic" of intentional discrimination.

"Many [employment] cases are pro se, and pro se cases are difficult to manage," citing the Honorable Denny Chin of the Second Circuit. "Are there judges who do not like employment

cases? I have no doubt there are," Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, New York Law School Law Review, Volume 57, 2012–2013. (Judge Chin presided in *Mira v. Argus Media.*)

Judge Donald, of the Sixth Circuit, holds that federal courts are perceived as "hostile venues for employment discrimination plaintiffs," noting that many are self-represented. Courts "tend to chew plaintiffs up and spit them out with rapidity, most often before trial," see Judge Donald and J. Eric Pardue, "*Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*," New York Law School Law Review, Volume 57, 2012–2013. Citing Federal Judicial Center data, they found that "in the early 2000s, ninety-eight percent of employment discrimination cases disposed of by pretrial motion were decided in favor of defendants, which was higher than the rates for both personal injury and insurance cases."

US District Court Judge Mark Bennett, of the Northern District of Iowa, compares

employment discrimination cases to prisoner rights cases before federal prison litigation reform. "In Yogi Berra terms, it's déjà vu all over again: 'Plaintiff's claims lack merit,' 'Plaintiff's claims are frivolous,' and the newest Twom-bal induced mantra, 'Plaintiff's claims are implausible'—all incantations heard with stunning frequency in the federal district courts," Judge Bennett, see "From the 'No Spittin', No Cussin' and No Summary Judgment' Days of Employment Discrimination Litigation to the 'Defendant's Summary Judgment Affirmed Without Comment' Days: One Judge's Four-Decade Perspective," *New York Law School Law Review*, Volume 57, 2012–2013.

"When litigants seeking to enforce this nation's comprehensive employment discrimination laws feel the need to flee our federal courts—the very institution tasked by Congress to hear these cases—something is horribly amiss in our federal civil justice system," citing Judge Bennett.

Courts rely on pretexts such as "futility," "plausibility" or other constructs to impede or shut down pro se cases. Twelve years after *Erickson v. Pardus*, (551 US 89 - 2007) lower courts need explicit reaffirmation of this Court's

general mandate that courts must liberally construe pro se litigants' pleadings. However inartfully pleaded, pro se pleadings should be viewed liberally and held to a lesser standard than those drafted by attorneys, see *Haines v. Kerner*, 404 US 520-521 (Supreme Court, 1971). This Court held in the still-binding *Conley v. Gibson*, 355 US 41 (Supreme Court, 1957) that no complaint may be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

A district court abuses its discretion "by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation." *Quince Orchard Valley Citizens Ass'n Inv. v. Hodel*, 872 F. 2d 75 (4th Circuit, 1989).

While the district court characterized Petitioner's claims as "far-fetched," a tide of sexual harassment reports in 2017 document the use of private investigators to discredit and infiltrate the lives of alleged sexual harassment victims; see "*Harvey Weinstein's Army of Spies*," Ronan Farrow, New Yorker, November 6, 2017,

and "*How Common are Harvey Weinstein's Investigation Tactics?*" Katie Kilkenny, Pacific Standard, November 7, 2017.

Even as the district and circuit courts in this case belittle and dismiss facts and allegations of nonconsensual dissemination of sexual images as "embarrassing video" or "far-fetched" and lacking basis, US state legislatures and appellate judges elsewhere recognize these vile 21st Century harms. They have acted and ruled accordingly.

CONCLUSION

This Court should grant certiorari as this case concerns questions of nationwide importance that merit full review. Allowing the lower courts' decisions to stand would affirm adverse acts, potentially establish precedent and lead to continued harms.

For the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

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