

IN THE SUPREME COURT OF THE UNITED STATES

No.

Xiao-Ying Yu

*Petitioner*

V.

Maryland Department of Health and

Maryland Department of Budget and Management

*Respondents*

PETITIONER'S APPLICATION FOR AN EXTENTION OF TIME WITHIN WHICH  
TO FILE AN APPLICATION TO STAY THE JUDGMENT AND PETITION FOR WRIT  
OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the  
United States:

Pursuant to 28 U.S.C. § 2101 (c), (e) (f), Rules 13.5, 22, 23, and 30 of this Court,  
Petitioner, Xiao-Ying Yu prays for a 60-day extension of time to file a Stay and  
Petition for a Writ of Certiorari in this Honorable Court, to and including August  
24, 2019. The U.S. Court of Appeals at Fourth Circuit ("Fourth Circuit" or "COA4")  
issued their denial of Petitioner's motion to recall for mandate on April 22, 2019  
(Appendix#1&2, COA4 docket#44&43). The final judgment of the Fourth Circuit  
was entered on January 24, 2019 (Appendix#3, COA4 docket#26&27), and denial of  
Petitioner's petition for initial/rehearing for en banc was on March 26, 2019  
(Appendix#4, COA4, docket#37). Unless extended, the time for filing an application  
for a stay and injunction the enforcement of the Fourth Circuit's judgment and

petition for writ of certiorari will expire on June 24, 2019. This application is being filed more than 10 days before that date. The Jurisdiction of the Court would be involved under 28. U.S.C 1254 (1).

In support of this application, Petitioner states following:

**A. The Case involves the deprivation of the Petitioner's property right without mediation and a hearing.**

Petitioner, Asian American, Xiao-Ying Yu, *pro se*, was a Maryland State employee supported by Federal CDC funding and was terminated without mediation on Nov. 3, 2014, which was within two months after she filed her second discrimination and retaliation complaints with EEOC under 42 U.S.C. §§ 2000e seq., Title VII of the Civil Rights Act of 1964 (related to racial and sex discrimination and retaliation), 29 U.S.C. § 621, e. seq., The Age Discrimination in Employment Act ("ADEA") and 42 U.S. Code § 12101, The American with Disabilities Act Law (a)&(b) ("ADA") (Appendix#5). Termination was initiated and promoted by Petitioner's former supervisor, Ms. Sara Barra. The Maryland Department of Health Union manager, Ms. Barbara Perry, also participated in the decision to terminate Petitioner's employment without informing the Petitioner. On Nov. 2, 2017, Petitioner filed for redress of violation of her civil rights (including retaliation and termination) with JS44 form and a cover letter to clerk under Title VII, ADEA, ADA, National Labor Standard and 42 U.S.C. § 1983 against MDH and Maryland Depart of Budget and Management "MDBM" in Federal District Court of Maryland by certified mail (Case number 17-cv-3260-JKB, see Appendix#6) based on EEOC's 10/16/2019 right-to-sue letter. And then she amended it with 39 exhibits

the respondents' statement on 5/31/2018 (see the District Court docket, ECF#31) rather than encompassing a facts and federal laws (based on Petittioner's exhibits) and judgment of the court itself. These false reasons are: lack of subject matter jurisdiction, failure to state the cause of claims, and State's immunity to ADA complaint. The District Court refused Petitioner's request for a second amendment of her claim on June 26, 2018 by falsely stating that Petitioner's amendment would not cure deficiencies of lack of subject matter jurisdiction and State's immunity.

The Petitioner's second amendment of her complaints (filed with the District Court on 7/24/018, within 28 days after District court issued the judgment on 6/26/2018) added evidence newly discovered from the EEOC via a FOIA request (FOIA affirmed on 7/6/2018). This evidence regarded Ms. Barra's interference with EEOC's investigation on 4/19/2017 and the providing of false information about "undue hardship" by MDH Office of Equal Opportunity Program officer, Ms. Delinda Johnson to refuse reasonable accommodations (see Appendix#9&10). The new evidence with exhibits were also included in the motion for relief by the clarification and reconsideration, (filed on 7/24/2018)). All of this new and critical evidence was returned to the Petitioner without being docketed due to the improper closure of her case. Also, Petitioner's (7/26/2018) timely filing of a notice of appeal with exhibits was returned on 7/31/2018 without being docketed even though her appealing fee was cashed on 7/30/2018. However, when Petitioner followed the District Court's instruction and filed her motion to extend time for refilling her notice of appeal on 8/2/2018, the District Court respectively transmitted Petitioner's

7/26/2018 notice of appeal to the Fourth Circuit on 8/2/2018 and 8/6/2018 without providing the Fourth Circuit with her notice of appeal-related exhibits. It hid the EEOC-FOIA newly discovered evidence and brought confusion, which prevented Petitioner's case from being comprehensively and fairly reviewed by the U.S. Court of Appeals.

**B. The Courts' decisions involves validity the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution**

*1. Petitioner requested the Fourth Circuit's intervention within 30 days of filing her notice of appeal.*

Because the Petitioner's motion for relief (via clarification and reconsideration) and motion for leave to file a second amendment under Fed. Civil P. 60 and 15 (within 28 days from the District court's 6/26/2018 judgment) were returned by the District court, the Petitioner filed a motion for leave and requested the Fourth Circuit to intervene and correct the mistakes in the docket records and the prejudicial actions of the District Court as described above. Yet, the inconsistent, incorrect and incomplete COA4 docket records influenced by the District Court's biased actions were not corrected. The Petitioner received a letter from the chief clerk of the COA4 addressing the denial of newly discovered evidence (affirmed by EEOC-FOIA on 7/6/2018) regarding Ms. Barra's interference with EEOC's investigation and MDH Ms. Johnson's unlawful rejection of accommodation, which Petitioner requested to amend since 11/2/2017 when she filed her initial complaint.

*2. Petitioner requested oral argument but never received COA4's notification of oral argument under Fed. R App. P. 34 (b).*

The Petitioner requested oral argument in her “Informal Brief” on October 1, 2018, but she never received the Fourth Circuit’s notification of the oral argument which was required by Fed. R App. P. 34 (b). Because respondents submitted the motion for extension of time to file their response to Petitioner’s informal brief (10/1/2018) requesting removal of oral argument on 10/11/2018 (which was on 11<sup>th</sup> day after Petitioner’s informal brief), Petitioner objected to it and re-emphasized the reasons for the necessity of the oral argument on 10/15/2018 (COA4 docket#14). Consequently, the Fourth Circuit case manager, Ms. Cathi Bennett, permitted the District Court to re-transmit supplemental records on 10/16/2018, and made alterations and deletions of COA4 docket records on 10/18/2018 (COA4 docket#4 and #15) in favor of the respondents and supported the biased actions made by the District Court. To such unlawful alteration and deletion of the Court’s docket records on 18<sup>th</sup> day after Plaintiff’s filing her informal brief, Plaintiff filed a motion with concerns about the docket records, and addressed this issue in her an informal reply brief and a supplement to the informal brief. These filings were in addition to her initial request for Fourth Circuit’s intervention regarding mistakes and biased actions on the part of the District court (COA4, docket #7, 14, 23&25).

*3. Petitioner’s oral argument chance was dispensed, and motion for concerns about COA4 docket records was mooted and appeal was denied.*

Nevertheless, the Court’s unpublished opinion, directed by the panel-leading judge Diana Jane Gribbon Motz, hid the original major cause of the lawsuits: the respondents’ blatant retaliation for Petitioner’s protected activities and unlawful termination without mediation. The opinion also hid the District court’s biased

actions.<sup>1</sup> This opinion indicates corruption and abuse of the judge's discretion to deny reversible errors that existed in the District Court's decision. This unpublished opinion dispensed with oral argument by using a statement of local rule 34(a)(2)(c) as an excuse<sup>2</sup> to refuse to provide Petitioner an initial hearing which would allow her to fully argue those reversible errors which the panel judge ignored. Judge Motz further abused her discretion, and made moot Plaintiff's motion for concerns about the docket records in the Curium opinion concealing the evidence of interference with an EEOC investigation by Maryland Department of Health employee Ms. Sara Barra and the evidence of Maryland Department of Health Office of Equal Opportunity Program Ms. Delinda Johnson's lies regarding "undue hardship" in

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<sup>1</sup> Judge Motz has worked for 14 years in Assistant Maryland State Attorney General with responsibilities similar to those of Mr. James Nelson Lewis, who represents employers' interests in the position of Assistant State Attorney General for Maryland Department of Health; is accustomed to representing Maryland government employers' interests; and led a panel to create biased opinions including this case which directed the Court's (1/24/2019) denial of the Petitioner's appeal and denial of (3/26/2019) petition for rehearing en banc in favor of respondents, (please see Petitioner's petition for rehearing and rehearing en banc, COA4 docket#26, 27, 29&37; her motion for concerns about docket records, COA4 docket #17; and Petitioner's application for suspension and motion to recuse, COA4, docket#38), and deprived the Petitioner's property and equal protection rights under Fourteenth Amendment.

<sup>2</sup> The decision to deprive the Petitioner the due process opportunity of oral argument was prejudicially made when the Court failed to send the Petitioner a copy of tentative notification of oral argument under Fed. R. App. P 34(b) and the respondents requested to remove the oral argument on 10/11/2018, which was occurred prior to the panel judges' review of her informal brief, informal reply brief and supplemental informal brief and related exhibits.

order to reject accommodations recommended by the State Medical Director.

4. *The panel-leading judge's opinion and directed judgment lacks factual and legal ground and are in conflict with the decisions of Fourth Circuit, another United States Court of Appeals and Supreme Court on the same important matter.*

According to Rule 15 (d) Supplemental pleadings, and Rule 29 C.F.R. 1601.12(b), the proof of Plaintiff's exhaustive administrative remedies should not be neglected. However, the Panel-leading judge's Curiam Opinion affirmed District Court's statements "Plaintiff does not allege that she received a right-to-sue letter" for dismissal of her claim under Rule 8 &12 (b)(1)&(6) and "amendment would not cure the defects of lack of subject matter jurisdiction and state's immunity" for refusal of Petitioner's request to amend the newly discovery evidence by EEOC-FOIA records to deny any of reversible errors and to prohibit Petitioner from presenting facts at a hearing including oral argument.

In addition, although the respondents failed to provide evidence of pre-termination with mediation and any legitimate non-retaliatory reason for their adverse actions under the McDonnell Douglas Scheme, the Curiam Opinion affirmed the reason "failure to state claim" made by the District Court to direct the court's dismissal of Petitioner's appeal. The Curiam Opinion and judgment conflicts with the relevant decisions by this Court for the workplace retaliation complaints under Title VII. *Godon v. North Carolina Crime Control & Public Safety, et al*, (No. 99-2509, 4<sup>th</sup> Circ. 2000); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 354-58 (4<sup>th</sup> Cir. 2000); *Cromer v. Brown*, 88 F.3d 1315, 1325-29 (4<sup>th</sup> Cir. 1996); *Strothers v. City of Laurel, Maryland* (4<sup>th</sup> Cir. 2018). *Jones v. Calvert Group Limited*. No. 07-1680. (4<sup>th</sup> Circ., 2009).

Furthermore, the Court's decision conflicts with the decisions of other federal court of appeals on same important matters: *Ruth v. State Arknesas DWS* No. 17-1457 (8<sup>th</sup> Cir. 2017); *Fowlkes v. Ironworkers Local 40*, No. 12-336-cv (2<sup>nd</sup> Cir. 2015). Based on the analyses of *Kimel* 528 U.S. 62, 120 S.Ct. 631, 145 I.Ed. 2d 522 (2000)

and others opinions for ADEA and ADA claim, the court “hold that the ADA validly abrogated 11<sup>th</sup> Amendment Immunity so that Plaintiff’s ADA claims against the defendants are not barred by the immunity”. *Cisneros v. United States of America, Intervenor*. No. 98-2215, Part II. (10<sup>th</sup> Cir. 2000).

Moreover, the decision is also conflict with the decision of that the employee’s federal rights to due process and equal protection of the law was urging revered by Supreme Court, (Logan v. Zimmerman Brush CO. et al 102 S. Ct. 1148, 455 U.S. 422, 71 L. Ed. 2d 265, 50 U.S. L.W. 4247, 1982. SCT. 40870. Supreme Court has ruled that individuals may bring actions under 42 U.S.Code. §1983 to offer a “remedy... against all forms of official violation of federally protected rights,” *Monell v. Department of Soc. Servs. Of City of New York*, 436 U.S. 658, 700 (1978).

This split among the circuit courts of appeals on a substantial question of law presents a compelling ground for a grant of certiorari. See U.S. v. Davila, 133 S. Ct. 2139, 2145 (2013) (certiorari granted to resolve a Circuit split); see also, Henderson v. U.S., 135 S. Ct. 1780, 1784 (2015) (same); U.S. v. Kwai Fun Wong, 135 S. Ct. 1625, 1630 (2015) (same). In fact, the existence of an acknowledged circuit split and conflict on this important question of law, standing alone, creates a “reasonable probability that [the Supreme] Court will grant certiorari.” Moreover, Supreme Court is likely to grant certiorari and will likely reverse this court’s opinion “if the interest of Congress is clear, that is the end of the matter”. 467 U.S. at 842-3. These facts and legal matters were stated in the amendment of Petitioner’s motion to stay mandate (COA4 docket#36), but were neglected.

### C. The case presents important constitutional questions

A fundamental right of due process is the opportunity to be heard (*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In pursuit of that right, the Petitioner timely filed her petition for rehearing en banc and a motion to stay mandate (including the amendment of the motion to stay mandate, COA4, docket #28, 29, 31&35) and a

motion for due process of initial hearing and reconsideration of the Court's unpublished opinion (COA4, docket#33). However, her petition for rehearing en banc was denied on 3/26/2019 because the panel leading judge requested a poll from other judges of the Court as a barrier and extra difficulty to prevent Petitioner from receiving a chance for a hearing even though Fed R. App. P 35(f) instructed "A vote need not be taken to determine whether the case will be heard or reheard en banc." Consequently, Petitioner had to file an application for suspension of the Court's judgment and orders, and a motion to request panel-leading judge Motz to recuse herself (COA4 docket#38, prior to the mandate) as well as a request for Fourth Circuit to prevent the Court from obstructing equal justice via prejudice and alteration and deletion of the docket records. Plaintiff also filed a civil action for Court's help to intervene with the Panel-leading judge's direction of her case under Congressional enforcement power in order to obtain equal protection for her constitutional rights (COA4, docket#41&42). Yet, Fourth Circuit wrongfully issued the mandate, which did not meet the requirement Fed. R. App. P 41(b) because Fourth Circuit has not issued denying order for Petitioner's motion to stay for the mandate. Therefore, Petitioner filed her application for recalling the mandate to review and vacate the panel-leading judge's (1/24/2019) opinion and directed judgment (COA4 docket#43) on April 19, 2019; however, this application was denied by the judge's directed court's order on April 22, 2019. The panel-leading judge intentionally and repeatedly denied the Plaintiff of the fundamental due process opportunity to be heard at oral argument, rehearing and recalling mandate and

prevented the unpublished opinion from being subjected to the Court's review and consideration of equal justice and constitutional questions. The Fourth Circuit's (4/15 and 4/22/2019) orders violated Fed. R. App. P. 41(b) and the Congressional enforcement power for depriving a person of rights or privileges "secured or protected" by the Constitution or U.S. law (Screws v. U.S. 325 U.S. 91, 98-100).

#### **D. Reason for Granting an Extension of Time**

##### *1. Significance of the impact*

On May 6, 2019, Petitioner filed motion for reconsideration of the Fourth Circuit's order denying her application to recall the mandate and publication of their unpublished opinion presenting an extraordinary important and serious issue which would show that the Court's decision was "demonstrably wrong," likely caused irreparable harm, and violated Fed. R. App. P 34(b) and 41(b), "Due Process" and "Equal Protection" of Fourteenth Amendment as described above. Petitioner requested that the Fourth Circuit was needed to review the decisions for the integrity of justice and the Constitution (COA4, docket#45). Petitioner checked with the Fourth Circuit on May 29, 2019 but has not received Fourth Circuit's answer regarding the status of their recalling of the mandate. Petitioner does not know whether the deadline to file petition for writ of Certiorari should be postponed due to that Fourth Circuit Court's adjusted judgment based on the process of recalling the mandate is pending. Nevertheless, the Plaintiff is hoping to obtain relief based on the good causes described above and may not need to file the petition for writ of Certiorari and stay with Supreme court.

## *2. Difficulties of the preparation*

Petitioner's health and life has been devastated by on-going retaliation after she reported to her next level manager about the harassment and discrimination she had encountered because of her age, racial and national origin. The past several years of judicial process brought Petitioner, who has suffered from anxiety and depression disorder, tremendous stress. Especially important has been the great difficulty for Petitioner to prepare both the petition for writ of certiorari and the application for stay, (including injunction as the court's adjusted initial judgment due to the process of recalling mandate under the Congressional enforcement power is still pending in the Fourth Circuit), while she has been preparing documents in response to the Fourth Circuit Court's orders since she received the Fourth Circuit's (1/24/2019) judgment and denying her petition for rehearing on March 26, 2019. In addition, expecting the Fourth Circuit's release of the unpublished Fourth Circuit's (1/24/2019) opinion is very important for the Petitioner to properly address the detailed questions and reasons for the panel-leading judge to direct Fourth Circuit's dismissal of Petitioner's appeal to the honorable Court. Petitioner needs additional time to search cases and review federal laws to prepare her stay and petition for writ of certiorari since Petitioner has not received the publication of Fourth Circuit's opinion.

Furthermore, Petitioner's uncle died of heart failure, and Petitioner's mother was recently sent to the emergency room twice for her high blood pressure. If

Petitioner's application for extension is granted, it would allow Petitioner time to visit her mother while she is preparing her stay and petition for writ of certiorari.

**E. Conclusion**

For these reasons, Petitioner respectfully requests that an order be entered extending her time (60 days) to have additional time to visit her mother and prepare for both appropriate stay and petition for this important matter.

Respectfully submitted,

  
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