No. 19-262

In The

Supreme Court of the United States

Xiao-Ying Yu,

Petitioner,

v.

Maryland Department of Health, Secretary Robert Neall and Maryland Department of Budget and Management, Secretary David Brinkley

Respondents.

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

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PETITION FOR WRIT OF CERTIORARI

Volume I

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Pro Se. Petitioner

August 23, 2019

QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts' refusal to consider EEOC's right-to-sue letter (attached to Petitioner's response) and her statements as part of pleadings, and her request and leave for amendment with this letter and new evidence, thereby affirming district courts' dismissal for genuine reason "lack of subject-matter jurisdiction" without jury and hearing, impacts this Court's jurisdiction to decide this case.

2. Does the application of Congress' abrogation of 11th Amendment immunity and Section 504 of Rehabilitation Act, 29 U.S.C.§794 have limits on federal funding-supported public service employees' civil actions in response to termination of their employment without mitigation as retaliation against their pre-EEOC's ADA, Title VII and ADEA charges and seniority system in the U.S. district and appellate courts?

3. Whether damages can be awarded under Title VII, ADA, 42 U.S. Code §12202&12203, 29 U.S.C.§794 when there is failure to prove employers' prior-mitigation of termination of employment under 14th Amendment U.S.C., and if so, whether there is an exception to federal diversity jurisdiction.

4. Whether the U.S. court of appeals' denial of Petitioner's right to dispute genuine facts by using local rules amounts to a violation of Petitioner's rights to the two clauses of 14th Amendment to U.S.CONST., and can be supervised by this Court.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption. Petitioner has no corporate affiliations. To the best of Petitioner's knowledge, Respondents Maryland Department of Health ("MDH") and Maryland Department of Budget and Management ("MDBM") are Maryland State Government. Mr. Robert R. Neall, (who is Secretary of MDH), and Mr. David Brinkley, (who is Secretary of the MDBM) are held in this action due to their official capacity. MDH did not and does not have an authority for approval of reclassfying an Epidemiologist III Position Identification Number for Petitioner except the MDBM, and an appeal against MDH's rejection of her request to use employee's leave was directed to file with the MDBM. MDBM has exerted control over Petitioner's employment.

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INTRODUCTION PRAYER

Petitioner, Xiao-Ying Yu, ("plaintiff" in lower courts dockets) prays to GOD that this Honorable Court grant her petition and reverse the Judgment and orders below in the United States Court of Appeals for Fourth Circuit.

OPINIONS BELOW

The U.S. Court of Appeals for Fourth Circuit ("Fourth Circuit" or "CA4") unpublished the Curiam opinion (Appendix-Exhibit#1 "E1" App.1) and affirmed the reasons stated by the District Court to dismiss Petitioner's appeal, mooted her motion for concerns about the docket records, and dispensed her request for oral argument. The U.S. District Court of Maryland at Baltimore issued memorandum and order granting Respondents' motion to dismiss in the absence of a evidentiary proof of prior-mitigation of termination of Petitioner's employment. The District Court dismissed Petitioner's Title VII, ADA and ADEA claims due to "lack of subject matter of jurisdiction, State's immunity to her many claims, and her failure to state claim" and immediately closed her case without jury and pre-direction despite cognizing genuine disputes and outside pleadings (E-2, App.4).

Fourth Circuit made subsequent decisions and denied Petitioner's right (E2b&3a, App.23&79) to dispute genuine factors regarding the deprivation of her property right without mitigation or a hearing by using local rules 35(b) (E3b, App.97) and 40(d) (E5a, App.124). Fourth Circuit issued mandate in the absence of prior-denial of her timely motion to stay (E6a&b, App.140&142), and denied Petitioner's motion for recall mandate (E6c&7a. App.143&155). In addition, they also denied her motion for reconsideration of recalling the mandate after Petitioner re-submitted her application for stay and injunctive relief to Honorable Justice Alito (E7b,c,&8, App.156-186).

JURISDICTION

The judgment of Fourth Circuit directed by unpublished curiam opinion was entered on January 24, 2019. A timely petition for rehearing en banc (2/6/2019) was denied on March 26, 2019. The mandate of Court of Appeals was entered on April 15, 2019 without prior-denying Petitioner's timely motion for stay. The Fourth Circuit denied Petitioner's application to recall the mandate on April 22, 2019, and again denied her (5/6/2019) motion for reconsideration of recalling the mandate (which was pending) in the late afternoon of July 29,

2019 after Petitioner resubmitted her application for stay and injunctive relief to this Court Justice Alito. On June 12, 2019, the Chief Justice Roberts Jr. extended the time for filing this petition for certiorari to and including August 23, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

The present Petition is timely filed pursuant to 2101(c), Rule 10(a-c) and Rule 30(1) of the Rules for the Honorable Court.

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STATUTES INVOLVED

STATUES PROVISIONS AND REGULATIONS:

Eleventh Amendment- U.S.CONST:

" The judicial power of the Unites States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Fourteenth Amendment-U.S. CONST.:

Section 1.

"...All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

28 U.S.C. § 1291(1982): Final decision of district court

" ...the courts of appeals... shall have jurisdiction of appeals from all final decisions... of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment determination..."

28 U.S.C. § 46(c). Assignment of judges; panels; hearing; quorum:

"(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panel of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

29 U.S.C. § 1601.12-Contents of charge; amendment of charge:

"(b)...A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify

allegations made therein. Such amendments and amendments alleging additional acts when constitute unlawful employment practices related to or going out of the subject matter of the original charge will relate back to the date the charge was first received."

29 U.S.C. § 621, e. seq: Prohibition of age discrimination ("ADEA")

§ 623 (a).Employer practice:

(1) to fail or to refuse to hire or to discharge any individual or otherwise discriminate against individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(d). Opposition to unlawful practice; participate in investigations, proceedings, or litigation. It shall be unlawful for an employer...discriminate against any individual.., because such individual has opposed any practice made

unlawful by this section, ...or because such individual ...made a charge,..."

29 U.S.C. § 794(a) Section 504 of the Rehabilitation Act:

"No otherwise qualified individual with a disability in the United States as defined in section 705(20) of this title shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. Chapter 126-Equal opportunity for individual with disability § 12101 et seq., ("ADA"):

42 U.S.C. Chapter 126, Subchapter I, Employment
§ 12112 Discrimination:
"(a) No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application peocedure, the hirring, advancement, or discharge of employees, employee compensation, job training, and othere terms, conditions, and privileges of employment."

§ 12117 Enforcement
"(a) Power, remedies, and procedures
The power, remedies, and procedures set for forth in sections ....provides to ... or to any person allerging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment."

42 U.S.C. Chapter 126, Subchapter IV-Miscellaneous Provisions

§12202. State Immunity
"A State shall not be immune under the eleventh amendment to the constitution of the United State from an action in Federal or State court of competent jurisdiction for a violation of this chapter , remedies (including remeedies both at law and in equity) are available for such a violation to the same extent as such remmedies are available for such a violation in an action against any publix or private entity other than a state."

§12203. Prohibition against retaliation and coercion
"(a) Retaliation:
No person shall discriminate against any individual because such individual has opposed

an act or practice made unlawful by this charpter or because such individual made a charge, testified, or participate in any manner in an investigation, proceeding, or hearing under this charpter."

(c) Remedies and procedures: The remedies and procedures avaiable under section 12117, 12133 and 12188 of this title shall be avalable to aggreved persons for violation of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively."

42 U.S.C. §§ 2000e et seq. Title VII of the civil rights Act of 1964 law: ("Title VII"):

§2000e-2. Unlawful employment practices

"(a) Employer practice: It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual , or otherwise to discriminate against individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employment or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin.

...

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practice:

Except as otherwise proved in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

§2000e-3. Other unlawful employment practices

"(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."

42 U.S.Code §1983:

"Every person who, under color of any statute..., any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress..."

42 U.S.Code §2000d-4a.

" For the purpose of this subchapter, the term "program or activity" and the term "program" mean all of the operations of -

(A) department, agency, special purpose district, or other instrumentality of a State or a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government."

RULES:

Federal Rule Appellate Procedure 34. Oral argument: [1]

"(a)(1) "Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted."

(2) Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of argument;–Postponement. The clerk must advise all parties whether oral argument will be scheduled,...."

[1] The Fourth Circuit's local Rule 34(e): "As soon as possible upon completion of the briefing schedule, or within 10 days of tentative notification of oral argument, whichever is earlier, any party may file a motion to submit the case on the briefs without the necessity of oral argument."

Federal Rule Appellate Procedure 35. En Banc Determination: [2]

"(a) When Hearing Or Rehearing En Banc May Be Ordered. Majority of the circuit judges who are in regular service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarity will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

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[2] local Rule 35(b): "Decision to Hear or Rehear a Case En Banc. ...A poll on whether to rehear a case en banc may be requested, with or without a petition, by an active judge of the court or by a senior or visiting judge who sat on the panel that decided the case originally. Unless a judge requests that a poll be taken on the petition, none will be taken. If no poll is requested, the panel's order on petition for rehearing will bear the notation that no member of the Court requested a poll. If a poll is requested and hearing or rehearing en banc is denied, the order will reflect the vote of each participating judge. A judge who joins the Court after a petition has been submitted to the court, and before an order has been entered, will be eligible to vote on the decision to hear or rehear a case en banc."

(f) Call for a vote: A vote need not to be takento determine whether the case will be heard or reheard en banc unless a judge calls for a vote."

Federal Rule Appellate Procedure Rule 41, Mandate: Contents: Issuance and Effective Date; Stay.

"(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expire, or 7 days after entry of an order denying a timely petition for penal rehearing, petitioner for rehearing en banc, or motion for stay of mandate, whichever is late."

Federal Rule of Civil Procedure Rule 12:

(b) How to present defense: Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defense by motion:

(1) lack of subject-matter jurisdiction;...

(6) failure to state a claim upon which relief can be granted; .....

(d) Result of presenting matter outside the pleadings: if, on a motion under 12 (b)(6) or 12(c), matters outside the pleadings are

presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Federal Rule of Civil Procedure Rule 15 Amended and Supplemental Pleadings:

"[S]UPPLEMENTAL PLEADINGS.(d) On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense."

Federal Rule Civil Procedure 54(b). Judgment; Cost

"When an action presents more than one claim for relief..., the court may direct the entry of a final judgment only if the court expressly determine that there is no just reason for delay. Otherwise, any order or decision,... may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

Federal Rule Civil Procedure 56. Summary Judgment:

"(a) ...The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Federal Rule Civil Procedure 60. Relief from a Judgment:

"a) Corrections based on clerical mistakes; oversights and omissions. The court may correct a clerical mistake or a mistakes arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a final judgment, order, or proceeding. On motion and just terms, the court may relief a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistakes, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have discovered in time to move foe a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic) misrepresentation, or misconduct by an opposing party;

(4) judgment is void;

(5)...

Federal Rule Civil Procedure 7. Pleadings allowed; form of motions and other papers:

"(a) Pleadings. Only these pleadings are

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a count

(4) an answer to a crossclaim;..."

Federal Rule Civil Procedure 8. General Rules of Pleading:

"(a) Claim for Relief. Pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court' jurisdiction, unless the court already has jurisdiction and claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and...

(c) Affirmative defense.

(1) In general. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

accord and satisfaction;
arbitration and award;
assumption of risk;
contributory negligence; ...
failure of consideration;
fraud; illegality..."

(d) Pleading to be concise and direct; alternative statements; inconsistency.

(1) In general. Each allegation must be simple, concise, and direct. No technical form is required.

(2) Alternative statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statemnts, the pleading is sufficient if any one of them is sufficient...."

OTHER AUTHORITIES

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship:

"33. An employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment."

Undue Hardship Issues[3]

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability."

H.R. Rep. No. 101-485 (II), at 37 (1990)

"Inconsistent treatment of people with

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[3] **29 CFR§1630.15-Defense. (d) Charges of not making reasonable accommodation.** It may be a defense to a charge of discrimination, as described in § 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

29 **CFR§1630.9-Not making reasonable accommodation. (a)** It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. (b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

disability by state or local government agencies is both inequitable and illogical".

Congressional Enforcement Power

"2. In constitutional, the name for a provision that expressly authorizes congress to enforce a constitutional amendment through appropriate legislation."

Fair Labor Standards Act:
29 U.S. Code §218c Protections for employees (Fair Labor Standard Act)

"(a) Prohibition. No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has-

...

(2)provided, caused to be provided to the employer.... Information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of , any provision of this title (or an amendment made by this title);..."

29 U.S. Code Labor Subchapter II National Labor Relations § 151e. seq.

§158. Unfair labor practices:

"(a) Unfair labor practice by employer It shall be an unfair labor practice for an employer-

(1)to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(4) to discharge or otherwise discriminate against an employee because he has charged or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title...."

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STATEMENT OF THE CASE

I. Factual Background

Petitioner, *pro se.* utilized a template form of complaint (Rev. 12/2000) to prepare her complaint. The initial and Amended Complaint ("Complaint"E9&10, App.191&194) consists of 3 parts numbered 1. Jurisdiction, 2. The facts of this case (causes and damages) and 3. The relief I want the court to order.

1. *Petitioner is in a protected class*: (Asian American, over 60, and with disability) and worked

as an epidemiologist for 5 years (11//4/2009-11/3/2014) in the Center of Chronic Disease Prevention and Control ("CCDPC") of MDH (notably, Petitioner worked well and got along with her co-workers or customers without any complaints). [4]

2. *Petitioner engaged in protected activities*: she opposed unlawful and discriminatory employment practices (such as discriminatory deprivation of the reclassification of her job position as Epidemiologist III, and the position identification number was given to Ms. Barra, who is Caucasian and about 25 years younger than Petitioner), causing underpayment, and subsequent depriving her of job responsibilities under seniority system as retaliation against her filing reports to managers and appeals with both MDH and MDBM. Ms. Barra accused her protected activities as "disruptive behavior". She filed charges of age, racial discrimination and retaliation with EEOC on Nov. 12, 2013(E11-14, App.229-241).

3. Petitioner received Respondents' adverse actions: such as unwarranted disciplinary action on

[4] Formal CCDPC Director, Dr. Audrey Regan highly evaluated Petitioner' work and applied for reclassification of Epidemiologist III in 2010, which was approved by MDH and MDBM in March 2011. Petitioner received satisfactory or outstanding performance evaluations during 5 years of her service in MDH except June 9, 2014 when Ms. Barra generated "unsatisfactory" evaluation with false reasons.

the day immediately after she reported managers via email and two months from the date of her filing of charges under Title VII and ADEA with EEOC (E13-20, App.237-298) between Dec. 2013 and August 2014.

Paragraph 15, page 6, of the Amended Complaint alleges that:

> "15) Ms. Yu's reports to MDH Office of Equal Employment Program ("OEEP") director triggered disciplinary action: Ms. Yu reported to OEOP director, Ms. Keneithia J. Taylor between 1/9 and 1/31/20i4 about Ms. Barra's discrimination, harassment and retaliation including frequently preventing Ms. Yu from accessing the database and training course. Then on 2/2/2014, Ms. Yu reported to her about Ms. Barra's new discriminatory behavior at National Origin because Ms. Barra sent Ms. Yu a warning email on the Chinese New Year Eve although Ms. Barra had previously approved her request to take half the day off ...." (E15, App.248)

4. Petitioner became ill due both to escalating hostility in her working environment and to retaliation by Ms. Barra; Petitioner indicated diagnoses of "workplace stress, major anxiety, major depressive disorder and posttraumatic stress disorder" which were confirmed through work ability evaluation by a State Medical Director and two other

health professional services; it made Petitioner become eligible to FMLA and accommodation. (E21, App.305)

Page 7, alleges that:

> "Ms. Yu filed her second discrimination and retaliation charge under Title VII, ADEA and ADA (Case# 531-2014-02468C) on 9/3/2014 in U.S. EEOC which was emailed to DHMH OEOP Ms. Delinda Johnson on 9/2/2014 by Ms. Yu's former lawyer. Then Ms. Yu received Ms. Johnson's rejection of her accommodation on 9/3/2014 and was terminated on 11/3/2014. Ms. Yu requested EEOC to amend these adverse events of termination into her existing retaliation charge file and also filed ADA complaint in Department of Justice, Civil Right Division, Disability Section." (E22, App.328)

5. Repondents changed the organization of the CCDPC office as a pretext that ultimately prevented Petitioner from returning to work under different supervisor in a less hostile environment. Ms. Barra intentionally motivated HR's constructive discharge (10/10/2014) which led to consequent unlawful termination without prior-mitigation or hearing and to continuous retaliation for protected activities. Ms. Barra's interference EEOC's investigation of her charge was further demonstrated by EEOC's recording file (E22-26, App.328-400).

Page 10, alleges:

"2) Refusal to respond to Ms. Yu's accommodation requests: Ms. Yu responded to Ms. Johnson's 9/3/2014 rejection on 9/29/2014 with detailed evidence about hostile working condition she had been subjected to (E32). Ms. Yu did not receive Ms. Johnson's response to consider assigning her for other epidemiologist position which she applied for and was evaluated as "Best qualified" in June 2014. Besides, although OEOP director, Ms. Taylor and Ms. Johnson received Ms. Yu's charges filed in EEOC on 11/12/2013 and 9/2/2014 and multiple reports between 1/9/2014 and 9/29/2014 with tremendous evidence of Ms. Barra's harassment, discrimination and retaliation against Ms. Yu and interfere with her job, Ms. Johnson refused to accommodate her to work in the same CDC-1305 program under seniority system with different supervisor as other co-workers who work for 1305 program; and to correct harassing working condition Ms. Barra made for Ms. Yu."

Petitioner further attached 39 exhibits in support of her claims. These allegations not only clearly stated causal connections and causes of actions by evidence of disparate-treatment and prima facially stating causes of actions due to mixed-discrimination and retaliation leading to damages against her internal complaint about Ms. Barra's intentional harassment, discrimination and retaliation and

EEOC's charges under Title VII, ADEA and ADA.(E10, App.194)

II. Proceedings In The District Court

Per EEOC's permission to sue, Petitioner filed initial Complaint and an Amended Complaint (collectively referred to as the "Complaint") alleging causes of action of willful underpayment, unequal payment, discrimination and retaliation initiated by Ms. Sara Barra and tolerated by MDH and MDBM leading to the wrongful termination of her job under seniority system without mitigation in violation of Title VII, ADEA, ADA; 29 U.S.C. §794 (a)(b), Section 504 of the Rehabilitation Act; 42 U.S.Code §1983; and Fair Labor Standard Act, etc.. Petitioner submitted letter along with her filing Complaint (11/2/2017,E-9a, App.191) and an Amended Complaint (12/8/2017, E10a, App.194) with 39 exhibits to the District Court clerk requeting to amend new evidence when she receives it from EEOC's recording file.

Respondents' motion to dismiss was on Jan. 3, 2018 by alleging that Petitioner's unequal and underpayment claim was tort claim, her claims was lack of subject-matter jurisdiction and failure to state claim and State is immune to her ADA and ADEA claims. However, Respondents failed to prove evidentiary prior-mitigation of termination, and did not provide any legitimate, non-discriminatory and

non-retaliatory reasons for disparate-treatment and adverse actions described above (CA4#4, ECF#6).

Petitioner responded (3/22/2018) to this motion to dismiss (E27a, App.411) by providing EEOC's right-to-sue letter and charge form as well as her rebuttal and evidence that Respondents' statement were pretextual (E27b,c&d, App.448). Also, she addressed Congress' abrogation of state's Eleventh Amendment immunity to ADA claim and State's waiver sovereign immunity under Section 504 of Rehabilitation Act as Respondents' receipt of federal CDC funding (CA4-doc#4, ECF#20&30). Yet, the District Court stated faulty reasons concluding that: "she has failed to properly exhaust her administrative remedies and defendants are immune from many of her claims."

The District granted the Respondents' motion to dismiss her claims, but refused to provide Petitioner of opportunities (a trial she demanded in form JS44, E9b, App.193) to dispute factual and legal issues which is outside pleadings in the motion based on Rule 12(b)(6)&(d). The District Court abused their discretion under Fed. R. Civil P. 54(b) and 12(b)(6)&(d) and lacked evidentiary reasons of the judgment and pre-direction prior to closure of her case despite knowing the receipt of EEOC's right-to-sue letter and existence of factual genuine disputes. The orders rejected her request to amend newly

discovered evidence which she requested for multiple times upon her receipt from EEOC's recording file as well as her attorney's request for second amendment via "Memorandum of law as supplemental response in opposition to defendants' motion to dismiss" (E27e, App.616) by stating "more clear and concise version of Plaintiff's amended complaint would not cure these defects". They ordered that her employment discrimination claims "arising solely from her alleged September 2, 2014 charge of discrimination, or based on claims not presented to the EEOC at all, are dismissed pursuant to Rule 8 and Rule 12(b)(1) for lack of subject-matter jurisdiction" without prejudice and the remainder of her claims "are dismissed pursuant to Rule 8 and Rule 12(b)(6) for failure to state a claim..." with prejudice (E2a, App4).

After filing the notice of appearance and her attorneys' withdraw, on July 24, 2018, Petitioner filed motion for relief under Fed. Civil P. 60 and 15 (E28b1-34, App.664-683, within 28 days from the District court's 6/26/2018 judgment, via clarification and reconsideration) with the new evidence of Ms. Barra's' interference with EEOC's investigation obtained from EEOC recording file (E23&24, App.356&373) and motion for leave to file a second amendment. But these documents were returned by the District court (ECF#36-39), and her timely notice of appeal (7/26/2018) was also returned (ECF#40). Yet, the part of it (without exhibits) was transmitted

to Fourth Circuit twice on August 2, 2018 prior to Chief Judge's approval of Petitioner's motion to extend time to re-submit her notice of appeal by 8/7/2018 and again on August 6, 2018. (ECF#48, 52, 53&54, which were not shown in CA4 docket#1-4).

III. The Court of Appeals Decisions

The District Court's series of inappropriate denials and biased actions influenced the Fourth Circuit's docket records and hampered review of Petitioner's appeal in the Fourth Circuit. Within 30 days of re-submitting her notice of appeal with the returned motion for relief and new evidence (8/7/2018, E28, App.658), Petitioner filed a motion for leave, and also wrote a letter (based on the clerk's instruction) requesting (8/30/2018) the Fourth Circuit to intervene and correct the mistakes in the docket records resulted from the District Court's prejudicial actions (E28&29a, App.658&685, CA4-doc#15&7).

Yet, the inconsistent, incorrect and incomplete COA4 docket records (8/6/2018, CA4doc#1) were not corrected. Instead, there were additional alteration and deletion in the Fourth Circuit docket for transmitted records from the District Court even after 17 days of entering Petitioner's an informal brief (CA4-doc #15). This action resulted in the lack of Petitioner's "Notice of Appeal" in the Fourth

Circuit's docket (8/2-8/6/2018) except the docket on October 18, 2018 (COA-doc#15) despite knowing Petitioner's concerns about alteration and deletion of the docket records via her motion and supplemental informal brief (CA4-doc#17&25).

Fourth Circuit denied Petitioner's (8/30/2018) request without instruction whether Petitioner, Pro Se. has the right to file her motion for relief and clarification with new evidence under Rule 60 with the District court (which was returned due to the closure of her case, E28b5, App.684) or Fourth Circuit (E29b, App689). Yet, this denial only addressed Petitioner's failure to file motion for leave, thereby disallowing her to amend in spite of acknowledging the biased denial of receipt of EEOC's permission to sue and rejection of her amendment of EEOC's right-to-sue letter and newly discovered evidence (affirmed by FOIA-EEOC on 7/6/2018) regarding Ms. Barra's interference with EEOC's investigation and MDH Ms. Delinda Johnson's unlawful rejection of the accommodation by pretext, which Petitioner had requested to amend since 11/2/2017 (E9a&10a, App.191&194).

Petitioner never received Fourth Circuit's notification of oral argument under Fed. R App. P. 34

(b) or local Rule 34(e). It was also alleged by Respondents (CA4-doc #12). [5]

On January 24, 2019, the Fourth Circuit issued order directed by the unpublished curiam opinion prepared by panel-leading judge Motz (E1&b, App.1-3). Judge Motz states in the opinion that Petitioner's claim as "workplace discrimination"; concluding their review "find no reversible error" (see informal brief E2b, App.23); affirming the District Court's reasons to direct the judgment of dismissal Petitioner's appeal; denying as moot Petitioner's motion for concerns about the docket records (CA4-doc#18&25) despite acknowledging that major evidence of Petitioner's claims are related to Respondents' intentional retaliation against her twice EEOC charges under Title VII, ADA and ADEA, and District Court's dismissal reasons (lack of subject-

[5] After Petitioner addressed necessity and importance to have oral argument in her (10/1/2018) informal brief, Respondents filed motion to anticipate no oral argument to be granted and stated there had not been scheduled oral argument on Oct. 11, 2018 when was prior to the panel judges' receipt of Respondents' informal response brief, Petitioner's informal reply brief and supplemental informal brief and related exhibits. Petitioner re-emphasized the need of oral argument to be permitted on Oct. 15, 2018 in response to Respondents' (10/11/2018) motion, there was no clarification regarding Respondents' allege or response to Petitioner's informal brief and motion for oral argument from the Fourth Circuit.

matter jurisdiction, failure to state claim and State's immunity to ADA suit) are lack of factual and legal grounds. Also, the panel-leading judge used Fed. R. App. P. 34(a)(2)(c) as an excuse to dispense the oral argument requested by Petitioner to dispute factual and legal issues which were omitted by Respondents (see footnote #3).

In addition, on March 26, 2019, the Fourth Circuit denied Petitioner's petition for rehearing en banc (E3a, App.79): "The Court denies the petition for rehearing and rehearing en banc. No judge required a poll under Fed. R. App. P. 35 on the petition for rehearing en banc. Entered at the direction of the panel: Judge Motz, Judge Keenan, and Judge Floyd" (E3b, App.97). The Fourth Circuit cognized that none of three of panel judges made a poll even one of them required taking a poll as a pre-condition for determination of ordering the rehearing en banc for her case under local Rule 35 (b). However, they wrongfully stated that their prejudiced denial was under Fed. R. App. P. 35. In the same way, despite acknowledging that District Court's dismissal without a trial and pre-direction was based on denial of receipt of EEOC right-to-sue letter (part of pleadings), and failure to prove Respondents' prior mitigation for termination and to provide any legitimate non-retaliatory reasons for their adverse actions under the McDonnell Douglas Scheme, the

panel judges refused to provide Petitioner a chance to be reheard.

Petitioner filed (4/1/2019) application to suspend this denial because the denial deprived her property right without a hearing and violated her rights to Due Process and Equal Protection. She requested to prevent any obstruction of equal justice by abuse of discretion and alteration and deletion of the docket records, and motion to rescue disqualifying panel-leading judge Motz (E4, App.98).

On April 12, 2019, Fourth Circuit issued "Local Rule 41(d) Notice" stating "Pursuant to the provision of Local Rule 40(d), no further action will be taken in this time by this court." and denying Petitioner's reasonable request under Fourteenth Amendment to U.S.CONST., and the Congressional power of enforcement. Petitioner responded (4/16/2019) this notice in order to receive the protection of her constitutional rights (E5, App.124).

On April 15, 2018, the Fourth Circuit issued the mandate and states: "This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure." by ignoring Petitioner's prior-motion to stay. She filed motion to recall the mandate under Rule 41(b) (E6, App.140).

On May 6, 2019, Petitioner filed motion under Rule 41(b) and Congress' power enforcement for reconsideration of the Fourth Circuit's order denying her application to recall the mandate and request for publication of their unpublished opinion which was pending until July 29, 2019 (E7, App155). Following Petitioner's resubmission of her application for stay and injunctive relief to Justice Alito, Fourth Circuit denied Petitioner's motion to reconsider recalling the mandate order and request of publication of the unpublished opinion even though they acknowledged that their mandate was contradictory to Fed. R. App. P. 41(b) in the absence of prior-denying Petitioner's timely motion to stay.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted To Resolve A Conflict Concerning The Standards, Limits and Application Of Federal Rules, Constitution, Congressional Instruction And Supreme Court Principle.

A. Dismissal due to lack of subject-matter jurisdiction by refusal to consider EEOC's right-to sue letter enclosed in Petitioner's response to motion to dismiss as part of pleading is not consistent with Fed. R.

Civil. P. 7, 15 and 29 C.F.R. 1601.12(b).

Petitioner wrote to District Court (11/2/2017) that "**I received EEOC's conclusion and letter for right to sue for my second charge (dated 10/16/2017)**" (E9a, App.191) and provided EEOC's (10/16/2017) right-to-sue letter, EEOC's charge form and her rebuttal along with her response to defendants' motion to dismiss on 3/22/2018 (E9a&27b, App191&448). The fact and related exhibits were also provided to the Fourth Circuit in Petitioner's notice of appeal and informal brief (E2b&28a, App.23&658).

Question is whether evidence of EEOC's permission to sue and her request of second amendment filed with District Court between 11/2/2017 and 5/11/2018 (as described above) should be excluded from both Courts' review as pleadings.

"[I]n the light of Rule 7(a) pleadings include only the complaint, the answer and the reply." (*Rekeweg v. Federal Mut. Ins. Co.*, 27 F.R.D. 431, 4 Fed. R. Serv. 2d 605 (N.D. Ind. 1961).

Federal Rule of Civil Procedure Rule 15 Amended and Supplemental Pleadings (d) instructs court to "permit supplementation even though the original pleading is defective in stating a claim or defense".

Ruth v. State Arknesas DWS No. 17-1457 (8th Cir. 2017) stated based on 29 C.F.R. 1601.12(b):

> "[A] change may be amended to cure technical defects, including defects or omissions, including failure to verify the changes, or to amplify allegations therein."

In addition, it instructs amendments alleging additional acts that constitute unlawful employment practices.

It is important for the court to review "[d]ocuments integral to the complaint upon which the plaintiff relied in drafting the pleadings, as well as any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Locicero v. O'Connell,* S.D.N.Y.2006, 419 F.Supp.2d 521. Similarly, once district court's subject matter jurisdiction has been questioned, it is appropriate for district court to look beyond jurisdictional allegations of complaint and to view evidence submitted by plaintiff in response to motion to dismiss. *U.S. for Use of Chicago Bldg. Restoration, Inc. v. Tazzioli Const. Co., N.D.Ill.*1992, 796 F.Supp.1130.

Therefore, the proof Petitioner provided for her exhaustive administrative remedies should not be neglected and excluded by the both Courts for their review and fact-findings.

Here, it is no merit that the lower Courts not only denied their acknowledge of EEOC's permission to sue (11/6/2017, ECF#1&CA4-doc#4,E9a, App.191) and refused to review EEOC's right-to-sue letter (ECF#20 CA4-doc#4, E27b, App.448) as part of pleadings, but also rejected her multiple requests to make a second amendment (E9a, E10a, 27a, 27e, 28, 29&30). Failure to allow a plaintiff leave to amend her complaint, pursuant to FRCP 15(a), in order to allege the issuance of a right-to-sue letter, is abuse of discretion because the plaintiff's complaint adequately alleges a basis for a claim, thus eliminating any possibility of prejudice to the defendants. *Gooding v. Warner-Lambert Co.* (3d Cir. N.J. Sept. 28, 1984), 744 F.2d 354, 35 Empl Prac Dec (CCH) P34671, 35 Fair Empl Prac Cas (BNA) 1707. There was no enough justification or reason for "lack of subject-matter jurisdiction" to derive their dismissal judgment.

B. Refusal to apply Congress' Abrogation of Eleventh Amendment immunity and Sections 504 Rehabilitation Act 29 U.S.C. §794(a)&(b) and to remedy damages to federal funding-supported employee due to the termination without mitigation as retaliation against her EEOC's ADA, Title VII and ADEA charges and seniority system is contrary to Supreme Court principle and relevant decisions of other courts of appeals.

The House report on the ADA indicated, "[i]nconsistent treatment of people with disability by state or local government agencies is both inequitable and illogical". (H.R. Rep. No. 101-485 (II), at 37 (1990)). "[T]he Court should hold that Congress' prohibition of disability discrimination by state governments as employers is within its power conferred by section 5 of the Fourteenth Amendment and that, therefore, Congress' clear abrogation of Eleventh Amendment immunity in suits under the ADA is valid" (42 U.S.C. §12202)

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 Tenth Circuit court "[h]old that the ADA validly abrogated Eleventh 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. (10th Cir. 2000).

The Fourth Circuit affirmed District Court's dismissal reason (such as "State's immunity to Petitioner's many claims") without indicating how Respondents' immunity to Petitioner's claims regarding termination without mitigation or hearing as retaliation against her EEOC's ADA, Title VII and ADEA charges and seniority system can be outside of the controlling authority of Congress' clear abrogation of State's Eleventh Amendment

Immunity in ADA suit, especially when Respondent alleged that Ms. Yu is "an individual with disability who, with a reasonable accommodation, cannot perform essential functions of the position" in their termination notes even she was never accommodated as State Medical Director recommended(E26, App.395).

In addition, Section 504 of the Rehabilitation Act provides: "[n]o otherwise qualified individual with a disability in the United States as defined in section 705(20) of this title shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The term "program or activity" is defined to mean all of the operations of "a department, agency, special purpose district, or other instrumentality of a state or of a local government," or "the entity of such state or local government that distributes such assistance and each department or agency... to which the assistance is extended". (29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a).

According to the 504 Rehabilitation Act (29 USCS § 794), State is not immune by virtue of Eleventh Amendment from suit brought against it under ADA since the Act contains express waiver of Eleventh Amendment immunity, and by accepting

federal funds, state has accepted waiver. *James Bridgewater v. Michigan Gaming Control Board* (282 F. Supp. 3d 985, 2017) *and Timothy Dugger v. Stephen F. Austin State University* (232 F. Supp. 3d 938, 2017).

In addition to *Teamsters v. United States*, 431 U.S. 324 (1977), this Court has very thoughtful analyses regarding the consideration of injunctive relief for the case involving violation of constitution in case *Firefighters v. Scotts,* 467 U.S. 561. This Court instructs: "[c]ourt can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination, but also the policy behind §706(g) of Title VII of providing make-whole relief only to such victims." Furthermore, this Court held that a well-established, closely adhered to seniority system, and instructed that employers are not required to override a seniority-based system to accommodate a disabled employee. *U.S. Airways, Inc. v. Barnett.* 535 U.S. 391 (2002) 228 F. 3d 1105. In the same way, this Court prohibits any refusal to accommodate disabled employee because who filed Title VII, ADA and ADEA charges with EEOC by pretext "undue hardship" to terminate disabled employee's employment without mitigation and to override seniority system.

In contrast to Supreme Court principle, when the Fourth Circuit refused to remedy damages under the instructions of the Congress, 29 USCS § 794, ADA and Title VII, they failed to determine whether any and all of Petitioner's exhibits from different resources related to the MDH's activities involving Federal CDC 1305 program funds did or not exist, or were invalid, or that Respondents never received CDC 1305 program funds (E10b&c, App.196; CA4-doc#4, ECF#4-linked exhibits #9, 21, 22, 26 &29). Moreover, the Forth Circuit ignored that Respondents failed to demonstrate that they had not waivered State's immunity when they received Federal CDC 1305 program funds. Finally, Fourth Circuit neglected that Respondents failed to prove why that the federal CDC 1305 program funds, (which was received and used by Respondent and many co-workers and County Health Department in Maryland, as well as received by many other States of the United States), addressed by Petitioner, does not qualify for "the certain federal funds" defined by 29 U.S.C. §794 (b), incorporating 42 U.S.C. §2000d-4a.

Therefore, Respondents is not entitled to immunity from Petitioner's ADA suit regarding the depresvation of her property right without mitigation as retaliation against her EEOC charges and seniority system. There is no merits for the panel judges to affirm the District Court's dismissal Petitioner's appeal due to State's immunity to her

ADA claim. The Courts' refusal to remedy to the damages by ADA, Title VII and ADEA discrimination and retaliation is significant contrary to Supreme Court principle as described above. It is also "congruent and proportional" to identified constitutional violations based on Congress' abrogation of State's Eleventh Amendment immunity to ADA claim and Due Process and Equal Protection two clauses of Fourteenth Amendment of U.S.

C. The Lower Court's affirmation of District Court's dismissal of Petitioner's Title VII, ADA and ADEA claims by reason "failure to state claims" and deprivation of her property right without jury and pre-direction despite the existence of genuine material facts is contradictory to instructions by Federal Rules Civil Procedures 8, 12 and 54.

A Rule 12(b)(6) motion in any civil case is analyzed under the standard announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). To survive a Rule 12(b)(6) motion, the plaintiff must state a claim that is "plausible on its face." "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556); *Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009); *Fields v. Dept of Pub.* Safety, 911 F. Supp. 2d 373, 383 (M.D.

La. 2012) (Jackson, J.)

The issue, thus, is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232 (1974).

Petitioner's pleadings established that Ms. Barra's intentional motivating termination of Petitioner's seniority job (supported by the CDC funds) and interference with EEOC's investigation are clear and convincing intentional retaliation against her Title VII, ADA and ADEA complaints (E2b,10c&23, App.23,199&356) demonstrating the "defendant is liable for the misconduct alleged."

"[I]f the supervisor's biased report may remain a causal factor, ...the employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision. This is the requirement of the traditional tort-law concept of proximate cause." See, e.g., *Anza v. Ideal Steel Supply Corp.*, 547 U. S. 451, 457--458 (2006); Sosa, supra, at 703.

"Further, if the court considers evidence beyond the pleadings in a 12(b)(6) motion, the motion shall be treated as one of summary judgment and disposed of as provided in Rule 56, and summary judgment

cannot be granted unless there is no genuine issue of material fact." *Boyle v. Governor's Veterans Outreacg & Assistance Center,* 925 F. 2d 71, 18 Fed. R. Serv. 3d 1099 (3d Circ. 1991).

In addition, "...under Rule 8(a)(2), it is not necessary that plaintiff set forth the legal theory on which he relies if he sets forth sufficient factual allegations to state a claim showing that he is entitled to any relief which the court may grant. While it may impose a heavy burden on the trial court to require it to search a complaint for any claim which may be stated therein, it is a burden which must be undertaken. A district court has the duty under Rule 8(a) to read a complaint liberally and to determine ...whether the facts set forth state a claim for relief on a basis other than the statutory basis pleaded." *Rohler v. TRW. Inc.*, 576 F. 2d 1260, 25 Fed. R. Serv. 2d 581 (7th Cir. 1978).

Also, according to Rule 8. (c) (1), in responding to a pleading, "a party must affirmatively state any avoidance or affirmative defense, including: ...contributory negligence; failure of consideration; ... illegality...".

In conflict with this series of directives in Rule 12(b)(6) and 8(a), the Fourth Circuit affirmed the District Court's decision and neglected the facts following:

1. District Court's granting Respondents' motion to dismiss under Rule 8. However, Ms. Barra failed to provide as Respondents managers' request for any evidence of legitimate non-retaliatory and non-pretextual reason for her harassment, discriminatory and retaliatory behavior; managers failed to prove legitimate, non-retaliatory and non-pretextual reasons for rejection of accommodation due to "undue hardship" and evidentiary prior-mitigation of termination of her employment; and did not indicate under Rule 8(c)whether Respondents ever took any action for correction and avoidance of harassment, discrimination and retaliation after Petitioner reported to managers and filed appeals in both Departments, and EEOC charges of Title VII, ADEA and ADA discrimination and retaliation.

2. The District Court wrongfully granted Respondents' motion to dismiss her claims by failure to treat the Respondents' motion to dismiss (which Petitioner objected) based on Rule 12(b)-(6)&(d) "as one of summary judgment and disposed of as provided in Rule 56, and summary judgment cannot be granted unless there is no genuine issue of material fact" because it was outside of the Petitioner's pleadings and lack of factual bases, and Petitioner clearly objected those pretextual statements in her response filed with the District Court on March 22, 2018, her notice of appeal and informal brief and related exhibits, (E27a,28a&2b,

App.411,658&23) as well as the supplemental response in opposition to respondents' motion to dismiss (5/11/2018, E27e, App.616; v. E27h, App.634).

3. The District Court abused and failed to take the heavy burden under Rule 8 (a) to determine all of the evidence of disparate treatment and intentional discrimination and retaliation which caused Petitioner's health condition and resulted in unlawful termination without pre-mitigation, but prejudicially refused to provide Petitioner's jury or a pre-conference to allow her to dispute the materials outside pleadings and genuine issues based on Rule 12(b)(6)&(d) instructions that court must give all parties a chance to present matters outside the pleading in the motion under 12(b)(6).

The major material outside pleadings adopted from the Respondents by the District Court are:
1). Misrepresented Petitioner's claim of the cause of the willful underpayment and unequal payment as "some form of tort". [6] and deprivation of Petitioner's

[6] When CCDCP former director, Dr. Audrey Regan's application of reclassification for Petitioner to be Epidemiologist III was approved by Defendants (MDH and MDBM) in March 2011, there was no any new supervisor recruited into CCDPC. Ms. Barra did not have an authority to promote any employee. However, Dr. Maria Price denied herself initial signed (in Jan 2011) Petitioner's Epidemiologist III position-linked form MS-22

reclassification was manipulated as Ms. Barra promoted others (E2b&10c, App.23&199);
2) Omitted the evidence that Ms. Barra's intentional discriminatory and retaliatory deprivation of Petitioner's seniority rights and jobs[7] such as Ms.

(per HR's instruction) which was completed reflecting Petitioner's increased responding job to be associated and matched with the DBM office of Personnel Service and Benefits' MS-44 (Supervisory Questionnaire for Subordinate reclassification Request) and MS-2024 (Request for Position Classification Study) that MDH and DBM had approved. In Jan. 2012, Dr. Prince discriminately gave the reclassification Epidemiologist III Position Identification Number (which was approved for Petitioner) to Ms. Barra and caused willful underpayment and unequal payment. Dr. Prince left CCDCP in March 2013.

[7] HR Position (job) description form MS-22 is developed prior to the recruiting process based on the Department's specific request to hire an employee who has their required educations and experiences. If employees are transferred to new job position, or application of reclassification for higher grade rank of the position, their previous position (job) form MS-22 will be replaced with their new position form MS-22 in their personnel file per MDH and MDBM HR policy. The statement of Ms. Barra tampered MS-22 "reflect employee's background" is faulty reason to cover Ms. Barra's discriminatory and retaliatory deletion of Petitioner's job duties in form MS-22 and deprivation of Petitioner's seniority right of her job position in CDC funding program (E12&13, App235&237).

Barra's unlawful change of Petitioner's job description form MS-22;
3) Denied Dr. Robert Toney as State Medical Director[8] who made the diagnoses through work ability evaluations as MDH HR requested and recommended MDH to accommodate Petitioner to work under different supervisor (E21a, App.305);
4) Denied and twisted the Petitioner's (9/2/2014) EEOC charges under ADA, Title VII and ADEA discrimination and retaliation stated in her complaint. (E10c&27d, App.199&459)

Both 28 U.S.C. § 1291 and Rule 54(b) instructs that court must make both "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment".

Fourth Circuit erroneously rejected her request to intervene the District Court's denial of her motion for relief under Rule 60&15 with new evidence; affirmed the granting Respondents' motion to dismiss under Rule 8 and 12(b)(6) without jury or

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[8] The District Court's memorandum denied Dr. Toney was the State Medical Director when he provided MDH the workability evaluation (ECF#32, p.3, L2-3 and footnote #4). Yet, Defendants never objected that Dr. Toney was the State Medical Director and his diagnoses and evaluations along with the conclusion from independent mental health Institution even though Dr. Toney may not be the State Medical Director in 2018.

pre-direction based on the existence of genuine materials facts and outside pleadings. Also, it is prejudice for panel judges to dispense her request of oral argument to dispute genuine material facts despite acknowledging that the District Court failed to prove an Respondents' evidentiary prior-mitigation of termination and did not provide any of Respondents' legitimate and non-retaliatory and non-pretextual reasons for their adverse actions to deprive her job supported by CDC funding under seniority system (E12, 13, 15, 17, 18, 19&23, App.235, 237, 238, 248-261&275-372) and neglecting their job duties required by Rule 8(c).

II. The Lower Court's Dismissal Of Petitioner's Appeal Conflicts Relevant Decisions Made By U.S. Supreme Court And Other Courts Of Appeals For Title VII, ADA And ADEA Claims.

The Fourth Circuit's judgment affirmed the District Court's dismissal without a jury or hearing for Petitioner's claims regarding deprivation of her property right in the absence of prior-mitigation as retaliation against her EEOC Title VII, ADA and ADEA charges and seniority system is in conflict with the decision of the U.S. 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, 1982). In which, this Court urgently reversed

the lower Court's judgment which violated employee's constitutional rights to Due Process and Equal Protection of the law.

Regarding employer's disparate treatment claims, the Supreme Court analyzed mixed–discrimination and retaliation claims and instructed courts to avoid "misreading of the two relevant sections of Title VII: one define discrimination and one is prohibits of retaliation." Furthermore, this Court prohibits employer's retaliation against employees' protected activities under Title VII, ADA and ADEA indicated by *University of Texas Southwestern Medical Center v. Naiel Nassar* 133 S. Ct. 2517 (2013); *Burlington Northern and Santa Fe Railway Company, v. Sheila White*, 126 S. Ct. 2405, 548 U.S. 53, 165 L.Ed. 2d.345 (2006). However, the panel judges neglected Supreme Court principle, and intentionally misinterpreted the evidence stated in Petitioner's complaint and informal brief, and concluded Petitioner's claim is only about workplace discrimination instead of mixed-discrimination and retaliation.

The standard guide of the Supreme Court's decision whether to grant a petition for a writ of certiorari "is in conflict with the decision of another United States Curt of Appeals on the same important matter" Sup Ct. R. 10(a).

The Second Circuit Court reviewed the dismissal of the claims about the workplace discrimination and retaliation for lack of subject matter jurisdiction in *Fowlkes v. Ironworkers Local 40*, No. 12-336-cv (2nd Cir. 2015). The panel judges of the Second Circuit Court searched the district court records regarding the plaintiff's failure to exhaust the administrative remedies for Title VII claims and the claim of breach of the duty of fair representation under NLRA, the judges concluded that "[t]he district court erred in its determination that Fowlkes' failure to exhaust administrative remedies deprived it of subject matter jurisdiction over his Title VII claims. In addition, we concluded that Fowlkes has stated a federal claim under NLRA, 29 U.S.C. § 151, et seq. for the local's breach of its duty of fair representation. Accordingly, we vacate the judgment dismissing Fowlkes amended complaint and remand the cause to the district court."

Here, the pleadings and appeal Petitioner filed with both Courts contain the EEOC's right-to sue letter and her letter to the District Court's Clerk Cannon regarding EEOC's permission to sue dated 11/2/2017 (E9a&27b, App191&448). It is clearly not appropriate to conclude that there was no reversible error to affirm the District Court's dismissal for "lack of subject-matter jurisdiction" by alleging her failure to state if she had exhausted administrative remedy.

Also, Petitioner's complaint (E10c, App.199) and appeal demonstrated that Union manager at MDH, Ms. Barbara Perry breeched her duty of fair representation and whose action was sufficient sever to alter the termination by participating in the decision to terminate her employment in the absence of mitigation without informing Petitioner. [9] Because Petitioner provided ample evidence that both Union and Respondents' managers had failed in their alleged duty by negligently failing to address ongoing harassment, discrimination and retaliation, and to accommodate and protect Petitioner "from disability-based discrimination by a supervisor, including disability-based harassment." (EEOC Enforcement

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[9] Even though several exhibits indicated that Petitioner was a Union member (CA4-doc#4, ECF#4,&Exhibit#1, 12&20), the District Court stated "Plaintiff barely mentioned that she is in a union, it alone alleges sufficient facts to demonstrate an unfair labor practice that she was subjected to by said Union (whatever union it may be), or any other prohibited conduct falling under the umbrella of that stature" In the review of case from dismissal for failure to state claim, Court of Appeals "will consider new factual allegations raised for first time on appeal provided they are consistent with complaint." *County of McHenry v. Insurance Co. of the West*, C.A.7 (Ill.) 2006, 438 F.3d 813, id.at 439; see also *Veazey v. Communicatons &cable of Chi, Inc.*, 194 F. 3d850,853 (7th Cir. 1999) (allowing petitioner to present facts not asserted in opposition to defendant's motion to dismiss under Rule 12(b)(6)).

Guidance Accommodation and undue hardship, No. 33, 29C.F.R1630.9 et seq.) by pretext "undue hardship (E.23&24, App.356&373) Petitioner believed that her major complaints under Title VII, ADA, ADEA, Section 504 Rehabilitation Act and 42 § 1983 were also related to Fair Labor Standards Act and National Labor Relations Act and thus she made selection of available rules listing on JS 44 form and wrote some federal rules within restricted area in the JS44 form (E-9b, App.193).

"[I]f a company does not punish the harasser and the retaliating party (who might also be the harasser), it sends a signal to the workforce that retaliation is consistent with company policy and that is not safe to complain about discrimination or harassment. The plaintiff employee unreasonably failed to take advantage of available preventative or corrective opportunities or otherwise failed to avoid harm." (*Faragher v. Roton* 524 U.S. 775, 1998).

Nevertheless, that disparate treatment and discrimination and retaliation leading to the damages to Petitioner violated Fair Labor Standards Act and National Labor Relations Act should not be prejudicially neglected by the panel judges when they concluded "no reversible errors". Their affirmation of District Court's reason "lack of subject matter" to dismiss her appeal is contradictory to 42

U.S. Code §1983 as well as instructions of this Court and the decisions of the Second Circuit.

In addition, Supreme Court is likely to grant certiorari and also reverse the lower court's judgment if the interest of Congress is clear. Therefore, Fourth Circuit's decision should be reversed because the dismissal of Petitioner's claim conflicts with the clear instruction by House's report on the ADA (see Part II described above, H.R. Rep. No. 101-485 (II), at 37 (1990)) and Congress' abrogation of State's Eleventh Amendment immunity in suits under the ADA. (42 U.S.C. §12202), and also because Congressional power of enforcement is applied 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.

'[A]s the Eleventh Amendment Immunity is a critical gate for Plaintiff's complaint about harassment, discrimination and retaliation under ADA, a complaint should not be dismissed merely because a plaintiff's allegations do not state the particular legal theory. In addition, complaints in civil cases should not be dismissed unless it clearly appears that under no theory can the plaintiff be entitled to relief." *City of Fort Lauderdale v. East Coast Asphalt Corp.*, C.A.5 (Fla.) 1964, 329 F.2d 871, certiorari denied 85 S. Ct. 187, 379 U.S. 900, 13 L.Ed.2d 175.

Harrison v. Robert E. Rubin, Secretary of the Treasury, United States Department of the Treasury (No. 98-5019, D.C. Cir. 1999) is another case related to such decisions in Title VII and ADA claim. It instructs how to determine the statutory citation and amendments. Because district court denied Harrison's request to amend her complaint and to correct an erroneous statutory citation, and erred in the fact-findings of her claims, District of Columbia Circuit reviewed the district court's denial of a motion to amend (Rehabilitation Act) for abuse of discretion and reversed the dismissal of appellant's Title VII and ADA claims and remand to the district court for further proceedings. In addition, in *Ruth v. State Arknesas DWS* No. 17-1457 (8th Cir. 2017) claim under Title VII, the Judge reversed district court's reversible error, remand with the direction to allow Ruth to amend her pleadings based on 29 C.F.R. 1601.12(b).

"[P]ro se complaint alleging deprivation of rights under color of state law should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Hudspeth v. Figgins*, C.A.4 (Va.) 1978, 584 F.2d 1345, certiorari denied 99 S.Ct. 2013, 441 U.S. 913, 60 L.Ed.2d 386.

This Court emphasized (*Young v. U.P.S. Inc.* 135 S. Ct. 1338, 191 L. Ed. 2d. 279, 83 (2014)) "[I]t requires courts to consider any legitimate nondiscriminatory, nonpretextual justification for the difference in treatment. *McDonnell Douglas Corp v. Green* 411 U.S. 792, 802, 93 S. Ct. 1917, 36 L. Ed. 2d. 668 (1973). Ultimately, the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant woman shows that the employer has engaged intentional discrimination."

The district court and Fourth Circuit failed to perform their discretion. The Fourth Circuit wrongfully affirmed the District Court's false dismissal reason of "failure to state claim" and denial of her amendment even they acknowledged that Respondents failed to provide evidentiary prior-mitigation of termination against seniority system and did not prove any of legitimate non-retaliatory and non-pretextual reasons for their adverse actions and damages to Petitioner's health and property.

III. This Case is An Ideal Vehicle For Deciding Whether Denial Of Petitioner's Right To Dispute Genuine Facts Regarding Deprivation of Property Right By Using Local Rules Amounts To A Violation Of Petitioner's Duo Process And Equal Protection And Providing Guidance Regarding This Disparity.

The proceedings in both courts described above radically departed from long-settled, traditional methods of civil adjudication used by American courts for the deprivation of public service employee's property right without a proof of employer's prior-mitigation as the retaliation against employees' internal complaint and EEOC charge under Title VII, ADA and ADEA and seniority system. *Moore v. Ware*, 01-3341, pp. 7-8 (La. 2/25/2003), 839 So.2d 940 stated "[A] classified employee has a property right in his employment which he cannot be deprived of without legal cause and due process." The Third Court corrected errors for the lack of hearing in such claim in *Hewitt v. Lafayette Municipal Fire & Police Civil Service Board,* 139 So.3 d 1213 (La.App. 3 Cir. 2014).

42 U.S.Code §1983 instructs that "the deprivation of any rights, privileges, or immunities secured by the constitution and law, shall be liable to the party injured in an action at law, suit in equity".

Employees' property is protected by Due Process and Equal Protection Clauses of Fourteenth Amendment to U.S.CONST. because the requirement of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Goldberg v. Kelly*, 397 U.S. 254 indicated that government must provide a pre-termination evidentiary hearing in which an initial

determination of the validity of the dispensing agency's grounds for discontinuance of payment could be made.

"[C]ongress' power "to enforce" the Amendment include the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment text." *Garrett supra*, at 365 (quoting Kimel, supra, at 81); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Department of Human resources v. Hibbes* 123 S. Ct. 1972, 538 U.S. 721, 155 L.Ed. 2d 953(2003).

This Court has explained that the guarantee of Due Process of law ensures a course of legal proceedings to those rules and principle which have been established in our systems of jurisprudence for the protection and enforcement rights indicated above.

However, the both courts have decided "important federal questions" in a way that conflicts with the decision of other courts of appeals and also conflicts "with relevant decisions of this Court". S. Ct. R. 10(b) and (c).

Especially, Petitioner was denied her fundamental right to dispute genuine factual and legal issues in either of courts by abusing their discretions and using the local rules (such as rule 35(b)) despite cognizing that the facts were denied, omitted or twisted, and Respondents failed to prove an evidentiary prior-mitigation of termination of her employment and any legitimate non-discrimination and non-retaliation and non-pretextual reasons (not pretext) for their adverse actions to against seniority system.

To such prejudicial actions to deprive Petitioner's right to be reheard, there is the case *U.S. v. Martorano,* 620 F.2d 912, 29 Fed. R. Serv. 2d 1242 (1st Cir. 1980) stating "There was no merit to the contention that the votes of three circuit judges were required to order rehearing en banc in the First Circuit...Appellate Rule 35, and 28 U.S.C.A. §46(c), plainly require that the required majority must exist among the judges in 'regular active service,' and a judge who is yet to be appointed is not a judge in regular service. There was no merit to the suggestion that the First Circuit, comprised of only three circuit judges in active regular service, was barred from granting a rehearing en banc because one three-judges panel is not authorized to overrule another. When, as often occurs, panels contain one or more judges who are not regular members of the court, the same danger exists in the First Circuit as elsewhere

that uniformity and stability of precedent will suffer. There is no reason for the First Circuit to be excluded from the provisions of Appellate Rule 35(a) or 28 U.S.C.A. § 46(c). (en Banc)."

Also, "[t]he grant of rehearing en banc should only have been with respect of the jurisdictional issue presented, and to the merits." (Separate statement of Senior Cicuit Judge Swygert, joined by Circuit Judges Cummings and Cudahy.) *Parisie v. Greer,* 705 F. 2d 882, 36 Fed. R. Serv. 2d 535 (7th Cir. 1983).

However, in addition to denial of her rehearing, by using "Local Rule 40(d) Notice", Fourth Circuit also denied Petitioner's application for suspending Fourth Circuit's order and motion to have the panel-leading judge to recuse herself requesting her rights to Due Process and Equal Protection under Fourteenth Amendment to U.S. CONST. and Congress' power for enforcement.

Furthermore, the Fourth Circuit's mandate was issued in the absence of prior-denying Petitioner's timely motion for stay. It violates Fed. R. App. P. 41(b). Nevertheless, on July 29, following Petitioner's re-submission of her application for stay and injunctive relief to Honorable Justice Alito, the Fourth Circuit denied Petitioner's motion for reconsideration of recalling the mandate (7/29/2019) despite "Recall of the mandate is reviewed for an abuse of discretion". see *Alsamhouri v. Gonzalez,* 471

F.3d 209, 209–10 (1st Cir. 2006). This resulted in depriving Petitioner rights to Due process and Equal Protection and interfering with the review of this Court for her application for stay and injunctive relief and petitioner for certiorari.

Therefore, the issues raised in this petition are important because such decisions by using local rules are bound to continue if rulings like those at issues here are allowed to stand. In such mass litigations, courts face the temptation to adopt streamlined procedures that promise efficiencies but have the potential to jeopardize the rights of litigants to present their full case. Whether should the local rules be employed to override fundamental due process requirements for the employees' claims regarding the deprivation of their property rights without prior mitigation as the retaliation against their Title VII, ADA and ADEA charges and seniority system. The extent to which due process and equal protection principles inform the requirements for the civil adjudication related to the deprivation of employees' property right without prior-mitigation and court's jury or hearing remains unclear. There are inconsistent application specifically in various local rules associated with Fed. R. Civil P. 15 and 60; Fed. R. App. P. 8, 34, 35, 40 and 41 involving court's decision in the acceptance of the amendment; judgment without jury and pre-direction for genuine materials outside pleadings;

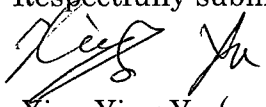
courts of appeals' intervene, oral arguments, initial and rehearing and recalling mandate. Whether the alteration and deletion of courts of appeals docket records transmitted from district court after over 17 days of plaintiff's submission of informal brief which may impact review and integrity of justice should be permitted is also a question. This Court's intervention thus promises to bring clarity to this important area of the law. Accordingly, this case presents an ideal vehicle for the Court to provide much-needed guidance on the extent to which the Due Process and Equal Protection clauses establishes minimum requirements in the context of civil action adjudication related deprivation of employee's property right without prior-mitigation or a hearing.

CONCLUSION

For all the reasons stated above, Petitioner, Ms. Xiao-Ying Yu, respectfully urges this Honorable Court to grant the Petition for Writ of Certiorari, reverse or vacate Fourth Circuit's decision, and provide guidance on the extent to which the Due Process and Equal Protection Clauses established minimum requirements in the context of civil action adjudication regarding deprivation of employees'

property right without mitigation or hearing as retaliation against employees' charges filed with EEOC under Title VII, ADA and ADEA and seniority system.

Respectfully submitted,



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