No. 19-5621

In The

Supreme Court of the United States

David Green Jr.,

Petitioner,

v.

William P. Barr, United States Attorney General,

U.S. Department of Justice, et al.

Respondent(s).

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the

Fourth Circuit

Petition for Writ of Certiorari

David Green Jr.
3145 Valley Lane
Falls Church VA 22044
(703) 879-6603
(Pro Se)

QUESTION(S) PRESENTED

1. Whether the court of appeals erred when it upheld a district court opinion that conflicted with decided Supreme Court case law for EEO retaliation and "Cat's Paw" negligence under Title VII Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e–3(a), and failed to consider Petitioner's request to apply "Cat's Paw" negligence liability, and upheld a dismissal of his Title VII Civil Rights Act EEO discrimination case by the District Court for failure to state a claim pursuant to Federal Rule of Civil P. 58, and violated his constitutional due process rights.

2. Whether the alternative review process offered by the Merit Systems Protection Board (MSPB), as an emergency option due to the lack of a functioning quorum, negatively influence and impact a Petitioner's due process rights when processing Title VII EEO mixed cases.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

William P. Barr, Attorney General, U.S. Department of Justice, Katherine H. Reilly, Acting Deputy Director, Executive Office for Immigration Review, Terryne Murphy, CIO, Executive Office for Immigration Review, Ana Kocur, Deputy Director, Executive Office for Immigration Review, Merit Systems Protection Board (MSPB).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES Page Number

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States Fourth Circuit Court of Appeals appears at Appendix A to the petition and is

[ ] reported at _____ ; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division appears at Appendix B to the petition and is

[x] reported at Green v. Sessions et al, No. 1:2017cv01365 - Document 33 (E.D. Va. 2018) ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

The United States Court of Appeals, Fourth Circuit entered judgment on December 6, 2018. (Appendix A). The Petitioner filed a timely petition for rehearing on January 18, 2019. The timely petition for rehearing was denied by the U. S. Court of Appeals for the Fourth Circuit, and entered on February 19, 2019 (Appendix C). The Petitioner filed a timely petition to the Supreme Court for an extension of time to file a writ of certiorari which was granted (Appendix D). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). The U.S. District Court for the Eastern District of Virginia issued its judgment on May 1, 2018 (attached as Appendix B). The initial decision of the Merit Systems Protection Board is attached as Appendix E). The Petitioner files a motion for leave to proceed in forma pauperis seeking review of judgment in this case under Supreme Court Rule 12.2.

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals, Fourth Circuit decided petitioner's case was December 6, 2018.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals, Fourth Circuit on the following date: February 19, 2019, and a copy of the order denying rehearing appears at Appendix C.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including July 19, 2019 on May 13, 2019 in Application No. 18A1167.(Appendix D)

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

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.

STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964: Equal Employment Opportunity

Other Unlawful Employment Practices

§ 2000e–2. Unlawful employment practices

(a) Employer practices

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 any 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 employees 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.

Title VII Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e–3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, 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 subchapter.

Section 503 of the ADA, 42 U.S.C. § 12203, provides:

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures.

The remedies and procedures available under sections 12117, 12133, and 12188 of this title [sections 107, 203 and 308] shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III, respectively, of this chapter [title I, title II and title III].

EEOC Compliance Manual Enforcement Guidance on Retaliation and Related Issues N-915.004

29 CFR § 1614.302 - Mixed Case Complaints and Appeals

(a)Definitions

(1)Mixed case complaint. A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2)Mixed case appeals. A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information.

(b)Election

An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to

file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c)Dismissal

(1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(a) (4) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that § 1614.107(a) (4) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the

matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d)Procedures for agency processing of mixed case complaints. When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

Fed. R. Civ. P. Rule 8. General Rules of Pleading

(a) Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials.

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good

faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

§ 7703(b)(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

29 C.F.R. § 1614.105 - Pre-complaint processing

28 U.S.C. § 1254(1)

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Fed. R. Civ. P. 12(b) (6)

> (b) How to Present Defenses. 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 defenses by motion:
>
> (6) failure to state a claim upon which relief can be granted;

STATEMENT OF THE CASE

Petitioner David Green, an African-American male, was employed as a Supervisory IT Specialist, Deputy Chief Information Officer by the Respondent, the United States Department of Justice, Executive Office for Immigration Review (EOIR), where he worked in its Information Resource Management (IRM) department as a Deputy Chief Information Officer (GS-15), and was the 2nd highest-ranking African-American employee in the IRM department.

Petitioner began his career EOIR in March 2011, as the Chief of Operational Services (GS-14). Over a span of four and a half years, Petitioner was consistently one of the top performing employees in the IRM department. All of his official performance evaluations were fully successful and outstanding, and he received numerous time off awards, annual performance based step increases, a Special Act Cash Award, and multiple monetary awards for outstanding performance. Petitioner was an exemplary career employee at EOIR.

During his time at EOIR, Petitioner was subjected to continual hostile harassment from a white male co-worker, Mr. Mike Barylski. Petitioner continually complained to EOIR management of the harassment, however, they refused to address the situation.

On October 21, 2012, Petitioner received a promotion to the position of Supervisory IT Specialist, Deputy Chief Information Officer (GS-15), based on his outstanding work performance, leadership, and customer reviews. After Petitioner's promotion to Deputy CIO in October, 2012, the harassment by the white co-worker became extremely severe and occurred almost daily.

On May 23, 2013, Ms. Terryne Murphy became the new Chief Information Officer for EOIR, and Petitioner's immediate supervisor. Petitioner immediately raised the on-going issue of harassment by Mr. Barylski to his supervisor, and requested that she take immediate and appropriate action to address his concerns. Her response was that Petitioner should simply invite the white co-worker out to have a beer.

From 2013-2015, Petitioner continued to complain to his supervisor regarding the white co-worker's ongoing harassment, and of the hostile work environment created as a result, but she continually refused to address to issue. In August 2014, after another request to address the hostile environment, the Petitioner's supervisor changed his position from Deputy CIO to Director of Operational Support, significantly re-organized and reduced his staff, and changed his duties to daily operational support only.

Petitioner's supervisor then began to make the Petitioner's daily work environment so intolerable that a reasonable person would not be able to stay. Petitioner's supervisor continually treated Petitioner differently from similarly situated employees in her department, and continually changed his work tasks in an almost daily attempt to induce failure. In September, 2014, the Petitioner's supervisor cancelled all weekly one on one meetings with the Petitioner, which had been used to discuss open issues and status.

The on-going harassment and open hostility began to critically impact Petitioner's health, causing severe stage 3 hypertension. Petitioner continually experienced migraine

headaches, blurred vision, dizziness and random nosebleeds, which worsened as his supervisor and the white co-worker's harassment became more aggressive each day. Petitioner continually provided his supervisor with copies of medical notices for each officially approved sick leave absence from his own personal doctor and from the Social Security Administration's onsite Nurse, located in the lobby of EOIR's main office. Each doctor independently stated the severity of Petitioner's condition, and continually advised him not to return to the office until he had stabilized.

Petitioner began to fear retaliation by his supervisor, who in an October 2014 staff meeting, stated that she felt that IRM was a family and that if anyone took any issues or complaints outside of IRM, she would work to remove them. Petitioner's supervisor then began to fabricate incidents and increased her hostility. Starting in October, 2014 and continuing through November, 2014, Petitioner had continuing discussions with the Acting EEO Director of the Executive Office for Immigration Review, Mr. Andrew Press, regarding the hostile working environment that he was being subjected to by his supervisor and the white co-worker. In his first meeting in October 2014 with the EEO Director, Petitioner informed him that Ms. Murphy was planning to place Petitioner on a performance improvement plan (PIP), since he would not halt his continuing complaints of harassment as she had directed him to, and that he believed that he would be removed from the Federal Service by Ms. Murphy. The EEO director's response was that he did not believe that she would do that.

Petitioner was placed on a PIP on December 15, 2014, after his performance was officially rated as successful on October 21, 2014. On December 15, 2014, Petitioner again met with the EEO director and requested to file an EEO discrimination, harassment, and hostile working environment complaint. The EEO director informed Ms. Murphy's supervisor, Ms. Ana Kocur, of the complaint filed by Petitioner.

After initiating contact with the EEO director, and a failed EEO mediation at which Ms. Murphy was extremely irate at the Petitioner, Petitioner suffered numerous forms of retaliation at the hands of his supervisor during the performance improvement plan period on an almost daily basis,. She began to fabricate incidents and increased her hostility, including charging Petitioner with AWOL for meeting with an EEO investigator, permanently removing him from the office before a final decision had been reached by the deciding official, and continually reassigning staff resources and changing his tasks with minimal notice without offering any assistance, and holding the Petitioner accountable for activities that were not his.

Petitioner's supervisor did not document any verifiable measures against which to assess his performance. At the conclusion of the PIP period, she simply stated that Petitioner had failed the PIP and that all of his duties were going to be removed. She then created a proposal for removal for her manager, who was the deciding official. Even though the deciding official was informed in January, 2015, that Petitioner had filed an EEO complaint against his supervisor, and was made aware of the failed EEO mediation in March 2015, she did not independently investigate nor confirm any of Ms. Murphy's allegations regarding the Petitioner, nor did she question the severity of the removal proposal based on Petitioner's overall excellent performance history. The deciding official based her decision solely on the

supervisor's proposal for removal, which contained misleading, fabricated, and nonexistent examples. Petitioner answered his supervisor's allegations in writing through an attorney, who stated that based on federal employment law and the agency's own performance standards, it was legally impossible for Petitioner to reach the level of unacceptable. The deciding official never requested an in person meeting with Petitioner to afford him an opportunity to answer the allegations in person.

Petitioner received a 5 CFR § 4303 termination from Federal service on July 10, 2015, during his in-progress EEO investigation. His EEO discrimination and hostile work environment complaint was amended twice, to include wrongful termination and EEO retaliation. When Petitioner elected to amend his EEO complaint to include an action that is otherwise appealable to the Merit Systems Protection Board his case became a mixed case complaint.

Pursuant to 29 CFR 1614, 302 (d), upon the completion of the EEO investigation, Petitioner's EEO complaint went to the Department of Justice, Complaint Adjudication Office (CAO) for the issuance of a final agency decision (FAD). On June 27, 2016, the CAO issued a final agency decision in Petitioner's EEO claim finding that the record did not support a claim of discrimination or hostile work environment. Petitioner was notified of his right to a file an appeal of the FAD with the MSPB within 30 days. On July 11, 2016 Petitioner filed an instant appeal with the MSPB. His EEO complaint was never forwarded outside of the agency due to its "mixed case" status, and did not receive fair and impartial treatment as it was decided by the agency only.

II. Proceedings in the MSPB

The initial decision by the MSPB on the Petitioner's mixed EEO/PPP case became final on November 3, 2017. The MSPB did not adjudicate the Petitioner's EEO component of his mixed case, but instead only the PPP component. The administrative judge refused to hear the EEO component of the mixed case, or to review the final agency decision from the agency regarding Petitioner's EEO complaint. Petitioner was denied by the MSPB administrative judge, the opportunity to ask any EEO related questions of his witnesses. Petitioner was directed to only ask questions regarding the activities related to his PIP, and was continually threatened with contempt if he attempted to ask an EEO question. Per instructions outlined in the MSPB final decision, the Petitioner had the option to file a civil action against the agency on both his discrimination claims and his other claims in an appropriate United States district court no later than 30 calendar days after the date the initial MSPB decision became final. Due to the lack of a quorum and the petitioner's severe financial and personal family situation, the Petitioner timely filed his civil action with the United States District Court on November 30, 2017, to have his EEO and PPP components both fully litigated.

II. Proceedings in the District Court

Petitioner's civil action was dismissed for failure to state a claim and a motion to dismiss for lack of jurisdiction under Fed R. Civ. P 12 (b) (6) with prejudice, by the United States District Court, who stated that Petitioner does not have a meritorious claim of being the victim of discrimination or retaliation. Petitioner was not allowed an opportunity to have a pre-hearing for his case, nor permitted to amend his complaint to correct any pleading deficiencies. Petitioner was denied the opportunity to perform discovery to obtain additional evidence as part of the discovery process, and denied a right to provide all of his evidence and witness testimony before a fair and impartial jury. The Petitioner's records contains multiple allegations of discrimination and retaliation, which are detailed in Petitioner's extensive EEO Report of Investigation, however it was continually ignored throughout.

III. Proceedings in the Fourth Circuit of Appeals

Petitioner timely filed an appeal with the Fourth Circuit of Appeals on June 1, 2018, which was denied. In it he appealed the denial of his motion for appointment of counsel and the district court's order to dismiss his case for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The court sustained the MSPB's ruling based on Hooven-Lewis v. Caldera, 249 F.3d 259, 266 (4th Cir. 2001) and affirmed the district court's ruling without comment. Petitioner filed a petition for rehearing which was denied.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition and review the judgments contained within as they are in conflict with previous Supreme Court's decisions in settled cases, and without the guidance and oversight of this Court, can potentially erode decades of established civil rights protections for millions of law abiding U.S. Citizens. Further, this Court is needed to exercise its power of supervision for the lower federal courts and to grant review, especially in light of the impact of number of key vacancies at the Merit Systems Protection Board. The resultant administrative impasse is severely impacting the effectiveness and productivity of the United States Federal workforce, and has severely affected Petitioner's "unalienable rights" to Life, Liberty and the pursuit of Happiness, resulting in his compete financial ruin, homelessness, and severe mental depression.

I. The Fourth Circuit of appeals decision to ignore Petitioner's "Cat's Paw" Negligence liability and Retaliation claim is in conflict with the Supreme Court

The Petitioner is appealing decisions made by the U.S. Court of Appeals for the Fourth Circuit, the U.S. District Court for the Eastern District of Virginia, Alexandria Division, the Merit Systems Protection Board (MSPB), and is claiming "cat's paw" negligence and discrimination by the Department of Justice, Executive Office for Immigration Review (EOIR), for relying on misleading information from an unreliable and biased employee to remove Petitioner from the Federal Service.

The Supreme Court must resolve differences between the District Court and the Equal Employment Opportunity Commission regarding retaliation, as the District Court's interpretation of retaliation is in conflict with the EEOC. The District Court's application of Valerino v. Holder, 2013 U.S. Dist. Lexis 136545, at *32 (E.D. Va. Feb. 20, 2013) is in sharp opposition to EEOC interpretation of Title VII Civil Rights retaliation enforcement. The Equal Employment Opportunity commission is responsible for the enforcement of Title VII of the Civil Rights Act of 1964. Employees are protected from retaliation on both the bases of participation and opposition. They are read liberally to protect persons who file administrative charges of discrimination or otherwise aid Equal Employment Opportunity Commission ("EEOC") enforcement functions. The EEOC has held that retaliation occurs when an employer takes a materially adverse action because an applicant or employee asserts rights protected by the EEO laws, and that the assertion of EEO rights is called "protected activity." Section 704(a) of Title VII protects an employee from adverse action. Under the Participation Clause of Title VII of the Civil Rights Act of 1964., an employer is prohibited from terminating or disciplining an employee who has made a charge, testified, assisted, or participated in any manner in a Title VII proceeding. Similarly, contacting a federal agency employer's internal EEO Counselor under 29 C.F.R. § 1614.105 to allege discrimination is participation. Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997) (ruling that federal employee's pre-complaint contact with agency EEO Counselor is participation under Title VII)

In some situations, retaliation can occur before any "protected activity". In a case alleging that an employer took a materially adverse action because of protected activity, legal

proof of retaliation requires evidence that the Petitioner engaged in a prior protected activity, the employer took a materially adverse action, and a materially adverse action occurred. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001) (holding that causal link element in prima facie case of retaliation is construed broadly and employee need prove only that protected activity and adverse employment action were "not completely unrelated"); E.E.O.C. v. Ohio Edison Co., 7 F.3d 541, 545-46 (6th Cir. 1993) (Title VII opposition clause should be broadly construed to protect employee against retaliation); Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988) (noting that participation and opposition clauses of Title VII are to be "broadly construed to protect employees who utilize the tools provided by Congress to protect their rights").

The Supreme Court's guidance is needed to address the question of the Title VII participation clause. The anti-retaliation clause of the Title VII Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e–3(a) states that that an employer cannot punish an applicant or employee for filing an EEO complaint, serving as a witness, or participating in any other way in an EEO matter, even if the underlying discrimination allegation is unsuccessful or untimely. In Burlington, N. & S. F. R. Co. v. White, 548 U.S. 53 (2006) at 2, the Supreme Court held that the anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' The EEOC's view is that this extends to participation in an employer's internal EEO complaint process, even if a charge of discrimination has not yet been filed with the EEOC. The Commission has long taken the position that the participation clause broadly protects EEO participation regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct. See, e.g., Brief of the EEOC as Amicus Curiae Supporting the Appellant, Risley v. Fordham Univ., No. 01-7306 (2d Cir. filed Aug. 21, 2001). Petitioner's October, November, and December 2014 workplace discrimination and harassment conversations with the Director of EEO for EOIR as an EEO counselor, qualify as prior protected EEO activity. Petitioner had both participation clause protection and opposition clause protection. The EEO has held that ethnic slurs, racial jokes, offensive or derogatory comments or other verbal or physical conduct based on an individual's race/color constitutes unlawful harassment if the conduct creates an intimidating, hostile or offensive working environment.

A retaliation claim is a separate claim and may proceed even if the underlying discrimination claim fails. In Mcdonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) the Supreme Court provided guidance for analyzing a retaliation claim and the accompanying burden-shifting of proof. To sustain a claim of retaliation, an employee must first establish a prima facie case by establishing three elements: (1) that he engaged in protected activity; (2) that the employer took an adverse employment action against him; and (3) that there was a causal connection between his engaging in protected activity and the adverse employment action. The Petitioner's request to his supervisor from 2013 through 2015, to address the harassment by a white male coworker, qualifies as a prior protected EEO activity. The petitioner's supervisor not only refused to address his concerns but she

continually ordered the petitioner to stop complaining. Petitioner provided numerous examples of his supervisor's temperament during the October through December 2014 time frame, which occurred prior to the issuance of a PIP, and included comments and actions by his supervisor that occurred during the time frame of the performance improvement, before the improvement had completed. The petitioner's supervisor was involved in a contentious EEO mediation, and after the conclusion of the mediation she canceled the ensuing PIP meeting with the petitioner because she was still extremely irate. This occurred prior to the conclusion of the whole performance improvement process. The Removal from Federal service is a materially adverse action.

The Petitioner raised "Cat's Paw" theory of liability in his complaint to the District court and court of appeals, however, both courts ignored the Petitioner's valid argument. The U.S. Supreme Court decided Staub v. Proctor Hospital (131 S.Ct. 1186), and upheld the validity of the "cat's paw" theory and held that "if a supervisor performs an act motivated by...animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." The sequence of events stated by Supreme Court Justice Antonin Scalia, to satisfy the "cat's paw" theory of liability against the employer occurred with Petitioner in this exact sequence (1) Petitioner's supervisor began fabricating negative performance reports that contradicted his actual performance records and history, singled out the petitioner and elevated his performance standards out of the entire department, randomly shifted his assignments during a performance improvement period, before and while both Petitioner and his supervisor were involved in the petitioner's previous EEO activities, and due to the petitioner's refusal to drop his complaints (2) that the Petitioner's supervisor intended to get the worker fired, instead of demoted or reassigned to another section of the agency, and (3) the petitioner's supervisor's step (her Removal Decision which contained fabricated and misleading events) is found to be the "proximate" cause of the ultimate decision, even if the executive or supervisor who actually carries out the firing or other penalty is someone else, and that person was not at all biased (the supervisor's manager, who was the deciding official). The deciding official did not perform an independent investigation to verify petitioner's supervisor allegations, even as she was aware of the EEO complaint that was filed against the supervisor. Petitioner had excellent performance reviews, awards, and no disciplinary actions in his performance history, and then suddenly began to receive negative reviews shortly after complaining, however the deciding official never considered that. The removal decision was an adverse action as a result of negligence.

In Vasquez v. Empress Ambulance, 15-3239-CV (August 29, 2016), the Second Circuit applied the "Cat's Paw" theory of liability in a Title VII retaliation case. The Second Circuit was required to: (1) determine its applicability to retaliation cases, as opposed to substantive discrimination on the basis of a specific protected category; and (2) extend the theory to situations involving co-workers, as opposed to other supervisors. The first requirement was met, and the Court held that "permitting 'cat's paw' recovery in retaliation cases accords with longstanding precedent in our Court, in the employment-discrimination context, that a Title VII plaintiff is entitled to succeed, 'even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the individual shown to have the impermissible bias played a meaningful role in the [decision-making] process.' Holcomb v. Iona Coll., 521 F.3d

130, 143 (2d Cir. 2008) (quoting Bickerstaff v. Vassar Coll., 196 F. 3d 435, 450 (2d Cir.1999)). This role is played by an employee who 'manipulates' an employer into acting as mere 'conduit' for his retaliatory intent." According to the Second Circuit, a retaliation claim can proceed when an employer "negligently" permits a co-worker harboring unlawful intent to induce the adverse employment action.

The U.S. Supreme Court adopted the same holding in two companion cases, Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)) deciding that employers can be held liable when the employee's conduct "is attributable to its own negligence."

II. The Merit Systems Protection Board's (MSPB) Administrative Judge abused its discretion when it rendered its initial decision against Petitioner

Petitioner is challenging the initial decision from the Administrative Judge for the Merit Systems Protection Board (MSPB). The Administrative Judge's initial decision became final, as the Petitioner chose the option of having it heard in a District Court due to the lack of a full quorum of the three member MSPB board to review the initial decision. The administrative judge did not review the EEO evidence that was submitted by the Petitioner ,ignored the testimony of the two witnesses were directly involved in the Petitioner's EEO case, severely narrowed the scope of Petitioner case to four PIP related statements, refused to allow Petitioner to ask any EEO related questions to the two witnesses with direct involvement in the EEO incidents, dismissed the fact that Petitioner proved that the agency supplied misinformation as part of its removal decision, and the judge made its ruling with extreme prejudice against the Petitioner. The MSPB abused its discretion under the applicable standards of determination, by disregarding the testimony of Petitioner's witnesses, and dismissing factual evidence that was relevant to the case and favorable. Petitioner's witnesses were deemed less credible because they were visibly nervous due to fear of retaliation from the agency for testifying.

Petitioner's supervisor resigned in September 2016. The deciding official resigned in 2017. The attorney assigned to represent the agency in this matter resigned in 2016. The Director of EOIR resigned in 2017.

1) Motion to dismiss for failure to state a claim

Civil action was dismissed for failure to state a claim in motion to dismiss for lack of jurisdiction under fed R Civ P 12 (b) (6) with prejudice by the Eastern District of Virginia United States District Court Leonie Brinkman, who stated that Mr. Green does not have a meritorious claim of being the victim of discrimination or retaliation. "The general rule in appraising the sufficiency of a complaint for failure to state a claim is that a complaint should not be dismissed, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley vs. Gibson (1957), 355 U.S. 41, 45, 46, 78 S.Ct. 99, 102, 2LEd 2d 80; Seymour vs. Union News Company, 7 Cir., 1954, 217 F.2d 168; and see rule 54c, demand for judgment, Federal Rules Of Civil Procedure, 28 USCA: "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." U.S. v. White County Bridge Commission (1960), 2 Fr Serv 2d 107, 275 F2d 529, 535

On a motion to dismiss for failure to state a claim upon which relief can be granted, the district court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. Fed. R. Civ. P. 12(b) (6). The purpose of a 12(b) (6) motion is to decide the adequacy of the complaint, not to determine the merits of the case. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990) (citation omitted). A complaint should not be dismissed "unless it appears beyond all doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46(1957). Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As held in Bell Atlantic Corp. v. Twombly (2007), "detailed factual allegations" are not required, Twombly, 550 U. S., at 555, but the rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," id., at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id., at 556.

The petitioner's case at a minimum is a text book example of Title VII discrimination, retaliation, and negligence. It presents an excellent opportunity for the Supreme Court to ensure adherence to long standing civil rights laws by overturning the decisions of the lower courts and allowing the case to be fairly adjudicated. The use of a motion to dismiss in an EEO lawsuit violates the civil rights protections of Title VII by blocking the petitioner's right to sue.

This case is also an excellent opportunity for the Supreme Court to enforce EEO mixed case adjudication within the Merit Systems Protection Board, to ensure the fair and unbiased adjudication of Title VII complaints. The petitioner has been denied a fair hearing throughout his EEO complaint, which has never been allowed to advance to be reviewed by the Equal Employment Opportunity Commission, which is the venue that the petitioner originally intended his complaint to be held. Loopholes have been created to dismiss legitimate Title VII civil rights complaints, which have severely weakened the effectiveness of the federal statute.

CONCLUSION

For all of the reasons set forth above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: July 19, 2019