No. 19-943

IN THE

Supreme Court of the United States

ALIREZA VAZIRABADI,

Petitioner,

v.

DENVER HEALTH, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION'S BACKGROUND

Respondents refused to hire Petitioner. When Petitioner applied for a position online at Denver Health Hospital and Authority ("DHHA") in Denver, Colorado, he was asked *in what other languages he is fluent—"... able to speak... on a wide variety of topics in a fluid and almost effortless fashion"*—he entered Farsi/Persian, identifying his Iranian national origin. The two applied positions required no language fluency. Then, in midst of his online assessment testing, conducted by Respondents' contractor, CEB, without consent, he was asked: *Are you over age 40?* He was over 53, so he selected the "Yes" button.

Without considering Petitioner's direct evidence and arguments for: (1) his national origin discrimination cause of action, under Title VII; (2) his age discrimination cause of action, under ADEA[1], UGESP[2], and (3) to amend his Complaint with new defendants and cause of action;

QUESTION PRESENTED

Does the Tenth Circuit affirming in favor of Respondents' summary judgement conflict with *Anderson v. Liberty Lobby, Inc.*[3], where in *Tolan v. Cotton*[4], this Court warranted summary relief because:

> "[T]he Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*[3] ...For that reason, we vacate its decision and remand the case for further proceedings consistent with this opinion."

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[1] Age Discrimination in Employment Act of 1967 (ADEA; 29 U.S.C. § 621 to 29 U.S.C. § 634).

[2] Uniform Guidelines on Employee Selection Procedures ("UGESP").

[3] 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[4] 134 S. Ct. 1861, 1863, 572 U.S. 650, 188 L. Ed. 2d 895 (2014).

PARTIES TO THE PROCEEDING

Petitioner is Alireza Vazirabadi, who was the Plaintiff-Appellant in the Tenth Circuit. Respondents, who were Defendants-Appellees in the Tenth Circuit are: Denver Health and Hospital Authority (DHHA), as employer, Jeremy Lee, DHHA employee, Elizabeth Fingado, DHHA employee, Mark Genkinger, DHHA employee, Theodore Pokrywka, DHHA employee.

As the third-party, CEB, Inc. (now Gartner, Inc.) was the Respondents' contractor that on July 8, 2016 subjected Petitioner to *Are you over age 40?* questioning. About April 2017, Gartner, Inc. (Gartner.com), with over 15,000 employees and its headquarters in Stamford, Connecticut, completed purchase of CEB, Inc. (App. 112). Per Gartner's CEO, *"CEB is now Gartner"*. (App. 113). Also, per Respondents' disclosure of October 12, 2017, pursuant to Fed. R. Civ. P. 26(a)(1), "CEB Talent Assessment [is] now Gartner." (App. 114, ¶¶ 13-14).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alireza Vazirabadi ("Petitioner"), having first hand knowledge of the events in this case, respectfully petitions for writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals ("Tenth Circuit") and the District Court for the District of Colorado ("district court") in this case.

The legal citations and arguments used are those of a layperson without any formal or informal legal training. Therein, Petitioner respectfully asks this Court's indulgence.

OPINIONS BELOW

The unpublished Order and Judgement of the Court of Appeals for the Tenth Circuit (App. 1) affirming the District Court Order, reprinted as *Vazirabadi v. Denver Health & Hosp. Auth.*, No. 18-1411, 2019 WL 3522417 (10th Cir. Aug. 2, 2019). The unpublished Order of the District Court for the District of Colorado (App. 16), reprinted as *Vazirabadi v. Denver Health And Hospital Authority, et al.*, Civil Action No. 17-cv-01737-RBJ (D. Colo. October 11, 2018). The unpublished Order of the Court of Appeals for the Tenth Circuit denial of Appellant's petition for en banc and rehearing is reprinted as *Vazirabadi v. Denver Health And Hospital Authority*, et al., No. 18-1411 (September 4, 2019). (App. 36).

JURISDICTION

The Court of Appeals for the Tenth Circuit entered Order and Judgement on August 2, 2019 and denied order for rehearing en banc and rehearing on September 4, 2019. On November 18, 2019, Petitioner filed his application (19A554) with Justice Sotomayor to extend the time to file his petition for a writ of certiorari from December 3, 2019 to December 30, 2019. On November 19, 2019, Justice Sotomayor granted this time extension, until December 30,

2019. On December 17, 2019, the petition for writ of certiorari received by the Clerk of the Supreme Court. Pursuant to Rule 14.5, petition was returned to Petitioner to repair deficiencies of the petition, within 60 days from December 17, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

I. STATEMENT OF THE CASE

The lower courts did not view Petitioner's—as Plaintiff, Appellant and *"nonmovant"*— arguments and evidence, from the prism of *Anderson v. Liberty Lobby, Inc.*[5] that the "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions..." And the fact Petitioner was not afforded *Anderson's*[5] viewpoint that "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." (*Id.*).

Applied for the Jobs and Rejected

1. On Friday of July 8, 2016, the 53-year old Petitioner, with over 20 years of Industrial Engineering experience, applied online for the position of Lean[6] Facilitator (ID# 44362) at Denver Health Hospital and Authority ("DHHA"), in Denver, Colorado. DHHA is a public health care organization operating within the city and county of Denver and employs approximately 7,000 people. The advertised position did not require any foreign language fluency; however, Petitioner was asked in what other languages he is fluent—*"... able to speak... on a wide variety of topics in a*

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[5] 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[6] Lean manufacturing or lean production is a systematic method originating in the Japanese manufacturing industry for the minimization of waste (*muda*) within a manufacturing system without sacrificing productivity, derived mostly from the Toyota Production System (TPS) that was developed by an Industrial Engineer, Mr. Taiichi Ohno and a Mechanical Engineer, Mr. Eiji Toyoda, between 1948 and 1975. Source: en.wikipedia.org/wiki/Lean manufacturing

fluid and almost effortless fashion"—he entered Farsi/Persian, identifying his Iranian national origin/heritage. Then, in midst of his online assessment testing, conducted by Respondents' contractor, CEB, without his consent, Petitioner was asked: *Are you over age 40?* He confirmed by selecting "Yes" button. (App. 85, ¶22). Two days later, he applied for position of Lean Coordinator (ID# 44376). (App. 84, ¶20). On July 15, 2016, for both positions, Petitioner had 30-minute panel interview by phone, with five panel members, led by the hiring Manager, Mr. Jeremy Lee ("Lee"). About three weeks later, Lee informed Petitioner he was not selected for neither positions. Respondents hired a 28-year-old hired Hispanic male, Agustin, who was an intern for the two hiring managers, before his hiring. (*Id.*) The other hired candidate was a 34-year-old Caucasian female, Erin. The hired candidates were about 20 years younger, with 15 years less related experience than the Petitioner. (*Id.*)

EEOC, Court Filing and First Motion to Dismiss

2. Upon filing and exhausting the EEOC process, with no resolution, in July 2017, Petitioner filed his Complaint in the U.S. District Court for District of Colorado, in Denver. On September 8, 2017, Respondents filed Motion to Dismiss ("MTD") and submitted 14-page document, as Exhibit G (App. 70, 93). Specifically, page 2 of this exhibit depicted a "Questionnaire/Consent" (App. 70) form that Respondents alleged its contractor, CEB, presented Petitioner before his testing and he consented in *that* form he is *over age 40.* (*Id.*). Since the Petitioner never given or seen such a form, prior or during his assessment testing, against Exhibit G, Petitioner filed:

> "...Motion to Strike and Sanction Defendants and Attorney for Fraudulent, False, Altered, Doctored Documents". (App. 108, 109).

In response, the district court in a filing stated:

> "The Court will consider any evidence, not speculation, that Exhibit G was fabricated or created after the fact. Obviously, if anyone associated with the defendants did such a thing, now would be a good time to withdraw the exhibit and refile the motion to dismiss. If defendant has evidence that Exhibit G is a legitimate document that was contemporaneously completed, this would be a good time to present that evidence to the plaintiff, to try head off further litigation on this subject." (App. 38, ¶4).

3. Filed First Amended Complaint ("FAC")

3.1 In his FAC, Petitioner stated "[t]his position did not require any foreign language fluency." (App. 84, ¶21). He argued:

> **Language Fluency Questioning: "Pretext to Identify Applicants National Origin, Race and Religion"** (App. 86, ¶28).

"By confirming as Farsi/Persian bilingual, Plaintiff [Petitioner] identified his national origin. Defendants [Respondents] in [EEOC] Position Statement, as well as in Doc. 17 [(*Id.*)], state reason for questioning 100% of applicants for *language fluency* is: "Denver Health offers [*asks*] this question, because at times the organization may have a job position for which bilingual is a preferred qualification and this question allows applicants to submit this information during the online application process."

Petitioner argued Respondents' explanation is pretext:

> **"A)** According to ethnologue.com...world population uses 6,909 world languages...
>
> **B)** Per [Respondents'] June 2017 online ads, out of 220 open positions, 43 positions (19.5%) specifically stated

preferred Spanish bilingual... [the]..43 Spanish bilingual positions indicate:

> **1)** 100% of bilingual positions...need[ed] are for Spanish bilinguals.
>
> **2)** It ~~is~~ [was] established when [Respondents] need specific bilingual candidates, it is already advertised (43 positions) for specific job with job description.
>
> **3)** Then, questioning 100% of job applicants to know if they are bilingual, ...it has the look and feel of pretext to identify job applicant's nationality, race and religion.
>
> **4)** [Respondents] presented zero facts by all collected bilingual applicants how many ever matched with other jobs, since logically there is no logic in it to begin with. [Hypothetically,] for example, a Somali bilingual in Biology applies for stem cell research in Oncology Dept., then accounting Department for years was searching for a Somali bilingual for bill collection try to hire this Biology Researcher for accounting! This simply does not make sense..." (App. 86, ¶28, App. 87, ¶4).

3.2 Never Saw Questionnaire/ Consent Form

Petitioner stated:

> "...In the midst of testing, Plaintiff saw a single question on his computer screen *Are you over the age of 40?* with a Yes and No button to select. Plaintiff is 100% sure; there was no "Prefer not to say" option. Plaintiff selected Yes button and proceeded to next questions." (App. 85, ¶22).

3.3 Fourth Cause of Action: Age Discrimination in Employment Act of 1967— 29 U.S.C. § 621 to 29 U.S.C. § 634

Respondents (DHHA only), by subjecting Petitioner to *Are you over age 40?* questioning by its contractor, CEB, without consent, by sharing his over-age-40 with Respondents, where hired candidates are about 20 years younger with three times less experience, as Petitioner's fourth cause of action for age discrimination, under ADEA—29 U.S.C. § 621 to 29 U.S.C. § 634. (App. 89, ¶49).

3.4 Fifth Cause of Action: Title VII, 42 U.S.C. § 2000e-2(a)(1)

Because Respondent (DHHA only) subjected Petitioner to *language fluency questioning* that identified his Iranian national origin that discriminated against him, he claimed national origin discrimination under Title VII, 42 U.S.C. § 2000e-2(a)(1). (App. 90, ¶54).

4. With Incriminating Statement, Respondents Rebut Exhibit G Not Authentic

In second Motion to Dismiss, Respondents in a footnote (App. 91), rebut Petitioner's claim that Exhibit G (Questionnaire/Consent form) never existed and was created on the day of filing Motion to Dismiss—about 14 months after assessment test—by stating:

> "A copy of the word document provided by CEB was included as Exhibit G to Defendants' Motion to Dismiss (Document #17). *Because it was **scanned** and **printed** by the undersigned's office before including it as an exhibit [G], the metadata for this exhibit apparently evidences it was created on the day the Motion to Dismiss was filed.*" (*Id.*)(emphasis added).

4.1 Respondents Made Incriminating Statement

Petitioner argued, Respondents' statement that "it was ***scanned*** and ***printed*** by the undersigned's office", it incriminates Respondents, by making this provable false statement in their support of never-existed Questionnaire /Consent form (App. 70), because Exhibit G in court's ECF system *still* displays "Peter Heiligenthal" (App. 93)—CEB Account Manager—as its author, created this form on the day of Respondents' court filing. Therefore, Respondents *never* "scanned" nor "printed" this document *before* court filing. *If* Respondents had "scanned" and "printed" that exhibit, *then*, "Peter Heiligenthal" name should have disappeared. The fact his name still shown, it proves Respondents never scanned and printed Exhibit G. Respondents still cannot rebut Exhibit G was created on the day of court filing. (App. 92, ¶1).

5. Subpoena Served on 3rd Party Forensic Pursuit

While searching to hire a local forensic IT expert to examine job applicants' documents, Petitioner contacted Forensic Pursuit in downtown Denver. About March 23, 2018, Mr. Adam Henba, a Forensic Pursuit representative offered services, upon *signing* a "*retainer*" agreement and making a deposit payment. He also required to run a conflict of interest search. Upon search, per Mr. Henba, in September of 2017, he found Denver Health placed a similar forensic analysis order with them, and consequently they could not offer such services to the Petitioner. (App. 95, ¶4). Therefore, about two weeks later, Forensic Pursuit was served with Petitioner's subpoena seeking his job application and other applicants' records. Respondents filed a motion to quash his subpoena. In response, Petitioner argued:

> "Defendants [Respondents] failed to present **any shred of evidence** that Forensic Pursuit **contracted by attorney of record**, Susan M. Stamm of Harris, Karstaedt, Jamison & Powers, P.C., related to Plaintiff's [Petitioner's]

> case....with Defendants' **failure to present any evidence** of established relationship with Forensic Pursuit, it is plausible Forensic Pursuit **contracted by other individual(s)** at Denver Health, unbeknown to Defendants [Respondents], *until* [the] subpoena served on April 4, 2018... Defendants presented no evidence or description of the "privilege" they invoked, with no quantification and description of what types of records are protected under [their] claimed "privilege". (App. 94, ¶2).

Respondents, instead of presenting "*retainer*" agreement with Forensic Pursuit, or other evidence of proving consulting relationship, only presented an affidavit by Forensic Pursuit's CEO, Mr. Robert Kelso ("Kelso"), claiming his company was contracted by the defendants' attorney's law firm. (*Id.*).

5.1 May 9, 2018: Court Orders Telephonic Hearing.

The district court ordered a telephonic subpoena hearing for five days later. On May 9, Petitioner sends a three-page letter to the court and the Respondents' attorney, presenting his planned argument for the day of hearing if in case "*failing to verbalize his position while discussing it with the Court*". (*Id.*).

5.2 May 14: Compel Motion Quashed, Court Accused Petitioner as *"being paranoid"*

In May 14, 2018 hearing, Petitioner's first Forensic Pursuit subpoena and compel motion denied. When Petitioner raised issues of Respondents' failure to present any proof of relationship with Forensic Pursuit and Respondents' attorney's law firm, the court accused Petitioner as "...*being paranoid* that Defendants [DHHA] falsifying his hiring records". (App. 99, ¶6).

5.3 May 15, 2018: Motion for Reconsideration

The next day, Petitioner filed a motion for the court to reconsider denial of his Forensic Pursuit subpoena.

5.4 May 16: *Second* Forensic Pursuit Subpoena

After his first subpoena quashed because of alleged *"work product"*, Petitioner processed his second subpoena. *This time*, his subpoena only asked for record(s) production, proving Respondents' law firm's consulting relationship with Forensic Pursuit, in form of copies of retainer agreement, invoices or payments requested/received or any email exchanges.

5.5 May 18: Motion for Reconsideration Denied

The district court denied Petitioner's motion for reconsideration of denial of his Forensic Pursuit first subpoena. (App. 40).

6. Recusal Motion Under 28 U.S.C. § 144 *and* § 455(a)

Three days after denial of his reconsideration motion, Petitioner filed for court's recusal, pursuant to 28 U.S.C. § 144 *and* § 455(a). (App. 97-103). For § 144, Petitioner presented his affidavit with eight specific bias incidents, with specific dates, time and detail of each incident. (*Id.*).

7. Last Day of Discovery: 3rd Party Delivered New Evidence.

On May 31, 2018, a day before discovery ends, third-party CEB delivered portion of subpoenaed documents to Petitioner.

7.1 A week later (6/7/2018), based on CEB *just* delivered documents, Petitioner filed a motion attached with his new amended Complaint, sought court's permission to amend his FAC, by adding CEB as new defendants with cause of actions.

7.2 In the amended Complaint, Petitioner argued CEB falsely claims the Uniform Guidelines on Employee Selection Procedures ("UGESP") gives them the legal authority to subject Petitioner to *over-age-40* questioning,

which has no legal basis. He argued only under Title VII, record collection such as race, sex/gender and ethnicity have authorized data collection, with ***no age*** collection. He argued, under UGESP Section D. Limitations, it explicitly states *"These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967.."*

7.3 Petitioner presented evidence, as exhibit, that next *to* his name in the job application, number ***"40"*** appears, *designating* him *as over-age-40* job applicant. (App. 69).

7.4 Therefore, in his amended Complaint, Petitioner updated his age discrimination claim, in his fourth cause of action:

> "Under the cover of online assessment testing, Plaintiff was asked *Are you over the age of 40?* Plaintiff's Yes response became part of DHHA Defendants integrated Peoplefluent hiring software application that operates under full control of DHHA Defendant's employee and not third party contractors."

8. June 28, 2018: District Court Denied Recusal Motion, Denied Motion to Amend and *Second* Forensic Pursuit Subpoena

(A) The recusal motion only acknowledged, considered and denied under § 455(a), with *no reference* to invoked 28 U.S.C. § 144. (App. 45, ¶A).

(1) In appeal, by citing *United States v. Gigax*[7], the Panel overlooked the context Petitioner invoked 28 U.S.C. § 144, by stating:

> "Inasmuch as the grounds for disqualification set out in Section 144 'personal bias or prejudice either against (a party) or in favor of any adverse party' are included

[7] 605 F.2d 507, 512 (10th Cir. 1979).

> in Section 455, we *may* consider both sections together." (App. 5)(emphasis added).

However, it appears in the above case, 28 U.S.C. § 144 was not invoked by the Appellant, unlike the Petitioner in this case. The record in *U.S. v. Gigax* appears to state "(1) failing to recuse himself, *sua sponte*," *Gigax*, at 510.

(2) The Panel, with no basis, misconstrued Petitioner's invoked recusal under 28 U.S.C. § 144, by stating:

> "On appeal, Vazirabadi does not dispute the substance of the district court's findings." (*Id.*).

It appears the Panel overlooked the key provision of 28 U.S.C. § 144 that differentiates it from § 455(a):

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge *shall proceed no further therein*, but *another judge* shall be assigned to hear such proceeding." *United States v. Grinnell Corp.*, 384 U.S. 563, 582, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)(emphasis added).

In Petitioner's case, neither the judge "*proceed[ed] no further therein*", nor "*another judge*" assigned to hear such proceeding. Yet, under same invoked 28 U.S.C. § 144: "Judge Wyzanski referred the question of his disqualification to Chief Judge Woodbury of the Court of Appeals for the First Circuit..." (*Id.*).

(B) The district court denied Petitioner to amend his Complaint, by stating:

> "He apparently hopes that the Court will study his proposed amended complaint and the documents, figure out what is in the documents that might

> support the allegations in the proposed amended complaint and the assertions in his motion, and grant it.
>
> *In this instance* the Court exercises its discretion under D.C.COLO.LCivR 7.1(d), which provides that "Nothing in this rule precludes a judicial officer from ruling on a motion at any time after it is filed." Although both Rule 15 of the Federal Rules of Civil Procedure and this Court's routine practice permit liberal amendment of pleadings, there has to be some reasonable justification in the motion to amend. Here there is none."
> (App. 54, ¶D)(emphasis added).

(C) The court also denied Petitioner's *second* Forensic Pursuit subpoena that sought **no** "work product" with the following contradictory ruling:

Court's 2nd Denied Subpoena Ruling (App. 50, ¶B)

I	"This one seeks production of proof that defendants and or defense counsel had actually hired Forensic Pursuit, i.e., contracts, Purchase Orders, payment records. Id. He does note that he is not requesting disclosure of "work product" records with this subpoena." (*Id.*).
II	"Mr. Kelso, the Chief Executive Officer of Forensic Pursuit, has confirmed that Mr. Vazirabadi has articulated no reason to doubt their word." (*Id.*).
III	"If there is metadata hidden in any of those documents that would support Mr. Vazirabadi's case, he could have hired an expert to extract it – just not Forensic Pursuit. If Forensic Pursuit has done something with the information to help guide the defendants in their defense of this case, that is precisely the type of information that is not available to Mr. Vazirabadi absent a showing of exceptional circumstances." (App. 51).
IV	"I repeat: defense counsel, as an officer of the court, has represented multiple times that Forensic Pursuit was hired as a consulting expert with no expectation of providing trial testimony." (App. 50, ¶B).

In the Appeals Court, Petitioner argued above part I and III contradict each other, where the district court first confirms "he is not requesting disclosure of 'work product', then in Part III, Petitioner's subpoena denied for seeking *work product* records. Also, Petitioner argued the court with no basis, incorrectly states Petitioner "articulated no reason to doubt [Forensic Pursuit's] word." Petitioner never made such articulation. On the contrary, Petitioner presented the Panel with number of his district court filings, opposite of such alleged "articulation". (App. 74).

The Appeals Court Did Not Consider Petitioner's Challenge to *Second* Denied Subpoena.

In the Court of Appeals, the Panel never addressed the lower court's contradictory ruling on Petitioner's second granted quashed subpoena that certainly could have annulled Petitioner's first Forensic Pursuit quashed subpoena. (App. 73-74).

9. July 3, 2018: First Unsuccessful Appeal to the Tenth Circuit

Petitioner unsuccessfully filed his first appeal to the Tenth Circuit Court of Appeals (Case No. 18-1275), for seeking review of denial of his second quashed subpoena, recusal and motion to amend his Complaint. First, the Appeals Court, *sua sponte* denied Petitioner's appeal because the Appeals Court jurisdiction "is limited to review of final decisions. 28 U.S.C. § 1291." Petitioner argued, pursuant to 28 U.S.C. § 1292, his appeal should be allowed for recusal motion order "when they have a final and irreparable effect on the rights of the [Plaintiff-Appellant] parties. *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541, 545 - SC 1949."

10. August 7, 2018: 2nd Attempt to Amend

In the first denial to amend his Complaint, it appeared the district court meant, "his motion provides no explanation whatsoever as to how the documents show this [reason to amend]". (App. 54, ¶D). Therefore, in his second attempt to amend, from his new proposed Complaint, Petitioner exported supporting argument and evidence into his motion seeking to amend his Complaint.

99% True: Petitioner Designated as *"Over-Age-40"*

10.1 In the district court and the Appeals Court, Petitioner argued there are 90 numbers that are two-digits, from 10 to 99. Therefore, the probability of *randomly* or *accidentally* selecting number *40* among the 90 numbers is

1.11% (1/90x100=1.11%). Additionally, with his affidavit, Petitioner argued, he never saw or given CEB's alleged Questionnaire/ Consent form (App. 70) asking *Are you over age 40?* And the fact CEB admitted capturing *over-age "40"* number in electronic data format. (App. 110, ¶3, App. 111) Also, Petitioner presented number of evidence that CEB assessment test score and testing progress activity was fully integrated *within* Respondents' recruitment software. (App. 115-118, App. 120-121). Therefore, based on above evidence, with 99% accuracy, Petitioner concluded, he was ***designated*** as *over-age-40* applicant in Respondents' job application. (App. 80, ¶19).

11. August 29: Respondents Filed Motion for Summary Judgement ("MSJ")

With ten affidavits, Respondents filed Motion for Summary Judgement.

12. September 13, 2018: Petitioner's Response Against MSJ

In the district court, against the MSJ, Petitioner presented number of factual contradictions, between the affidavits and existing records. In the Appeals Court, the Panel, with no proof and basis, incorrectly *"forfeited"* Petitioner's evidence and arguments against affidavits' contradictions as *"arguments not presented to the district court"*. (App. 10).

12.1 Affidavit's Contradictory *"no one could apply"* Statement

Per affidavit of Director of Recruitment, Mr. Mark Genkinger ("Genkinger"): for the two applied positions, *"no one could apply"* for Lean Facilitator position (ID# 44362), *before* June 27, 2016, and *before* June 29, 2016 for Lean Coordinator Position (ID# 44376). (App. 105, ¶¶4-6). Petitioner's textual argument and exhibits proving this affidavit's contradiction is manifested in the table below:

Affidavit's *"no one could apply before"* Dates v. Actual Test Dates

Applicant	Tested Dates	*"no one could apply before"*	Tested for Position	App. No.
Agustin, L.	6/25/2016	**6/29/2016**	Coord. 44376	115
Erin, P.	6/27/2016	**6/29/2016**	Coord. 44376	116
Redacted	2/19/2016	**6/29/2016**	Coord. 44376	119
Redacted	4/6/2016	**6/27/2016**	Facil. 44362	118

Against MSJ, in the district court filing, Petitioner referenced MSJ's exhibits of above four applicants' test records—two of them were the hired candidates "Agustin" and "Erin"—that tested specifically for the positions *"no one could apply before"* 6/27 and 6/29 of 2016. (App. 81, ¶20, App. 115-118).

12.2 Approved Positions for Nonexistent Depts.
Per Genkinger's affidavit, Respondents made the following statement (App. 105, ¶4):

> "The requisition I signed included a code for the job description associated with this position, namely 'DZZA4048_Administration'."

In the district court, against Respondents' MSJ statement, Petitioner argued Genkinger's contradictory statement that:

(A) The job code for Lean Coordinator position is DZZA4146, and for Lean Facilitator is DZZA4048. (App. 75, ¶6C).

(B) He argued "DZZA4048_Administration" is **not** the job code for Lean Facilitator, as Genkinger's affidavit claims. (App. 76).

(C) Against the MSJ, in the district court filing, Petitioner presented manifestation of Respondents' records. Below, the top table presents the correct job codes, requisition numbers, position titles and the *department name*. The lower

table manifests Respondents' requisition approval records, where the affidavit refers to *nonexistent* department—DZZA4048_Administration" —as a *nonexistent* job code for Lean Facilitator position. (App. 75, ¶6C, App. 76).

Lean Systems Improvement Department Open Positions

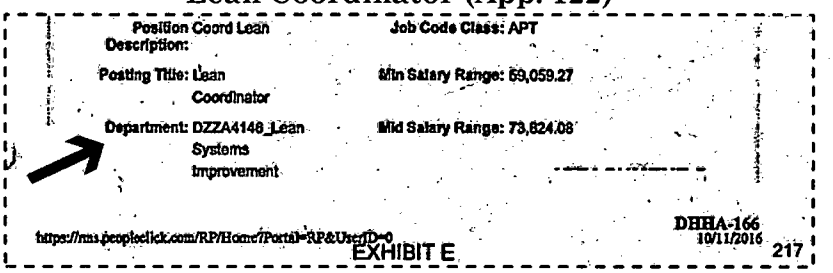
Job code	Req. #	Position Title	Department Name
DZZA4146	44376	Lean Coordinator	Lean Systems Improvement
DZZA4048	44362	Lean Facilitator	Lean Systems Improvement

Falsified Version of Open Positions

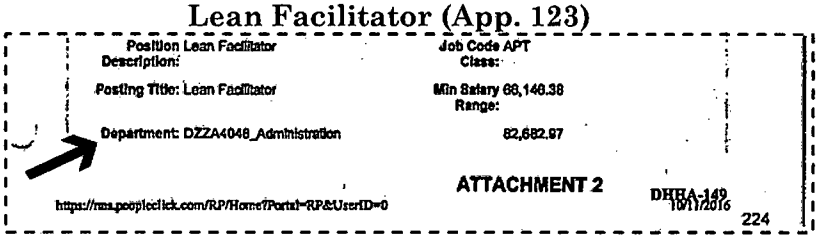
Job code	Req. #	Position Title	Department Name
DZZA4048	44362	Lean Facilitator	DZZA4048_Administration
DZZA4146	44376	Lean Coordinator	DZZA4146_Lean Systems Improvement

In the district court, Petitioner argued Respondents' Department of *"DZZA4048_Administration"* and Department of *"DZZA4146_Lean Systems Improvement"* do not exist, where the two approved requisitions display such *nonexistent* departments for Lean Coordinator (ID# 44376) and Lean Facilitator (ID# 44362) positions. (App. 75, ¶6C, App. 122 and 123).

Lean Coordinator (App. 122)



Lean Facilitator (App. 123)



12.3 Two Separate Panel Interview Dates Stated as One Date Event

At least five Respondents' employees' affidavits *identically* and *incorrectly* state all 16 candidates interviewed on July 15, 2016. However, the records prove 8 candidates interviewed on July 15, 2016 and 8 others interviewed 10 days later, on July 25, 2016. (App. 71, ¶11.3, App. 81, ¶24- App. 82).

12.4 Ten Affidavits Without Wording *to Convey/Denote* Affiant's Statement is *"true and correct"* and *"under penalty of perjury"*

(A) In the district court, Petitioner argued the affidavits were invalid because none of the ten affidavits contained any wordings *to convey the meaning* that affiant's statement is *"true and correct"* and the statement made *"under penalty of perjury"*. (App. 104, 107). Against the MSJ, Petitioner stated:

> "Plaintiff argues the ten (10) affidavits submitted, all have *exact identical defects*—missing key affidavit statement—while three different attorneys/law firms in three different states drafted these affidavits, yet all missing *"true and correct"* and *"under penalty of perjury"*. This leads to infer the *defects are intentional*, far from being inadvertent or accidental. Pursuant to Fed. R. Civ. P. 56(h), Plaintiff respectfully asks the Court to determine if Defendants' affidavits were made in bad faith." (emphasis added).

(B) In the appeal, the Panel, by referring to Black's Law Dictionary (11th ed. 2019) described an affidavit is:

> "[a] voluntary ***declaration of facts*** written down and ***sworn to*** by a declarant, [usually] before an officer authorized to administer oaths." (App. 9, ¶D) (emphasis added).

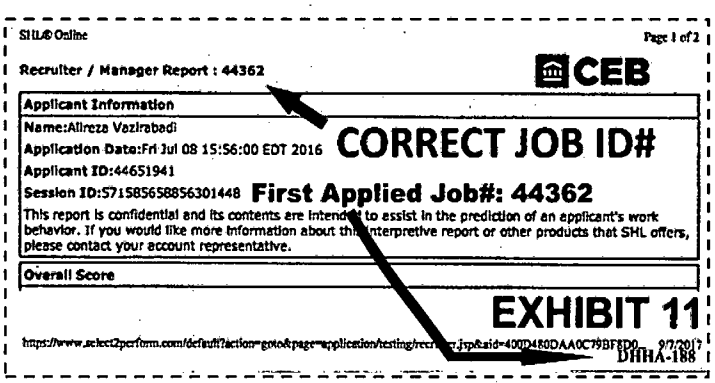
Even with Black's Law Dictionary definition, none of the ten affidavits make any statement, to *convey the meaning* that the affiants are making ***"declaration of facts"***, and none of the affiants ***"sworn to"***. All affiants state is *"duly sworn upon oath, depose and state..."* as though it is decoupled from the affiant's statement that follows in the affidavits. In other words, the affiants' "***sworn***" oath does not bind with the statement made in the affidavits.

12.5 First, Lower Rank Candidate Offered the Job

In affidavit of Ms. Elizabeth Fingado, ("Fingado"), Director of Lean Department, she stated the hired candidate, "Erin", was offered the job because she ranked highest by the interview panel. However, Petitioner presented Respondents' records that the job was *first* offered to *lower* rank candidate, "Kathryn"—with zero "healthcare related experience". Only after she declined the offer, then, 1st ranked candidate, Erin was offered the job. (App. 82, ¶25, App. 120-121).

12.6 Petitioner's Test with Wrong Position ID#

The first position Petitioner applied on that July 8, 2016 was Lean Facilitator position ID# 44362. On that same day, he had his assessment test for *that* position #44362, as shown below in his cropped CEB test report. In first wave of discovery documents, Respondents provided Petitioner this test record. He also received hired candidates test results (App. 115, 116) that showed their test score ***integrated within*** Respondents' recruitment software application.


SHL® Online

Page 1 of 2

Recruiter / Manager Report : 44362

CEB

Applicant Information

Name:Alireza Vazirabadi

Application Date:Fri Jul 08 15:56:00 EDT 2016

Applicant ID:44651941

Session ID:571585658856301448

CORRECT JOB ID#

First Applied Job#: 44362

This report is confidential and its contents are intended to assist in the prediction of an applicant's work behavior. If you would like more information about this interpretive report or other products that SHL offers, please contact your account representative.

Overall Score

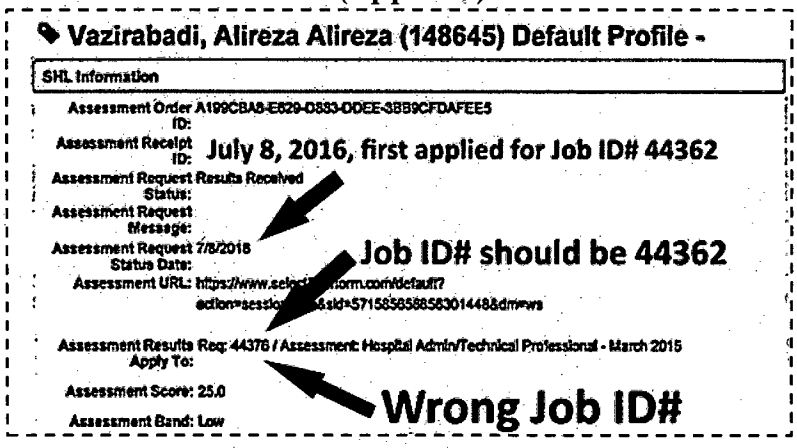
EXHIBIT 11

https://www.select2perform.com/default?action=goto&page=application/testing/rec...jsp&aid=400D480DAA0C79BFED0... 9/7/2017

DHHA-188

When Petitioner raised the issue why he was not provided the same-looking assessment test (App. 115, 116) that hired candidates have, sometime later, Respondents provided him similar-looking test result record (App. 117). However, there was a serious flaw with Petitioner's new test record. Basically, his assessment test on July 8, 2016 was for position ID# 44362, however, Respondents provided his test with incorrect position ID# 44376.

(App. 117)



12.7 Over 60,000 Job Applicants Subjected to Language and *Over-Age-40* Questioning

Respondents claim, on a monthly basis, about 5,000 job applicants were subjected to *over-age-40* questioning. (App. 106, ¶40). Petitioner argued, on annual basis, over 60,000 job applicants, with no legal justification, were subjected to language fluency and *Over-Age-40* questioning, in violation of Title VII, ADEA and UGESP. (App. 82, ¶26).

13. October 11, 2018: MSJ Granted and Denial of Amending Complaint

The district court issued its final order granting summary judgement in favor of Respondents. In the same order, Petitioner's motion to amend his Complaint denied. (App. 16).

November 16, 2018

14. Brief Filed with the Tenth Circuit Court

The main issues presented for appeal:

14.1 Does it violate Title VII, when an employer subjects job applicants to language-fluency questioning, when applicants confirm to be fluent in languages such as Farsi/Persian, Amharic, Arabic, Somali, Swahili, by inference, and with great accuracy, leads to identifying job applicant's national origin, race, religion and ethnicity, when applied position(s) require no language fluency.

14.2 Does it violate UGESP and ADEA, when employers either directly or through third-party contractors subject job applicants to *are you over age 40?* questioning.

14.3 Whether an affidavit is valid, when affiant does not include wordings in his/her statement to convey *the meaning* that affiant's statement is *"true and correct"*, and that his/her statement made *"under penalty of perjury"*.

14.4 Whether Petitioner's due process violated, when the court did not consider his motion under 28 U.S.C. § 144.

II. APPEALS COURT RULING ISSUES

15. One repeated reason, with no basis, the Appeals Court denied number of Petitioner's raised issues for review was Petitioner's *"arguments not presented to the district court to be forfeited"*, (App. 10), despite the fact Petitioner did not raise any new issue or argument in his Briefs.

15.1 Pro se's Pleadings Not Read According to *Hall v. Bellman*[8]

In substance, the Appeals Court—as well as the district court—did not treat this *pro se* Petitioner's pleadings, as described in practical terms in *Hall v. Bellman*[8]:

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[8] 935 F.2d 1106, 1110 (10th Cir. 1991).

> "[I]f the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, *it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements*...At the same time, it is [not] the proper function of the district court to assume the role of advocate for the pro se litigant...[It] does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." (emphasis added)(*Id.*).

Despite the fact Petitioner in every version of his Complaint identified and described Respondents' language fluency questioning, as direct evidence of discriminatory hiring practice that caused Petitioner's Iranian national origin identified and discriminated against, as well as invoking cause of action under Title VII (42 U.S.C. § 2000e-2(a)(1) (App. 86, 87, 90), still, the Panel erred stating:

> "Vazirabadi's briefs raise additional claims *that he did not present to the district court*. For example, he now asserts that defendants violated § 2000e-2(a) *by asking for his language fluencies*". (App. 15, ¶F).

15.2 Affidavits' Contradictions Filed in the District Court.

In support of Motion for Summary Judgement ("MSJ"), Respondents presented ten affidavits. Against the MSJ, *in the district court filing* (App. 75-83), Petitioner comprehensively argued and presented evidence of *important* contradictions between affiants' statements and existing records. However, the Panel, with no basis, incorrectly considered Petitioner's *"arguments not presented to the district court to be forfeited"*. (App. 10).

15.3 The Panel Overlooked to Recognize Key Supporting Evidence of Petitioner's *Over-Age-40* Designation

By only acknowledging and examining Petitioner's single evidence, as described here, without his other supporting evidence, the Panel states:

> "The attempt to prove age discrimination in this case *rests on an* unauthenticated screenshot of a document review tool that supposedly shows hidden metadata that flagged Vazirabadi as an over-forty candidate and on an allegation that SHL [CEB] transmitted the hidden metadata to Denver Health with Vazirabadi's competency[9] test scores. The district court found that Vazirabadi "failed to put forward any admissible or even arguably credible evidence that creates a triable issue of fact as to whether [Denver Health] knew [ ] Vazirabadi's age, much less acted on it." We agree." (App. 12). (emphasis added).

The Panel did not recognize Petitioner's following supporting evidence that he argued in the district court and then presented in his Briefs that indeed made it plausible that the Petitioner was *designated* as *over-age-40* job applicant in his application:

> **(A)** The Panel overlooked the fact Petitioner's metadata presentation is *reproducible* by anyone wish to download the same file Respondents uploaded directly to EEOC server. (App. 109).
>
> **(B)** Petitioner presented evidence—Respondents' own records—that CEB assessment test score of job applicants was fully *integrated within* Respondents'

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[9] The Panel repeatedly erred to equate Petitioner's *"assessment"* test to *"competency"* test. (App. 2, 11), where Respondents admitted Petitioner and one hired candidate had identical test score. (App. 115, 117).

recruitment software application—Peoplefluent. (App. 115-118, App. 120-121).

(C) Respondents and CEB admitted Petitioner subjected to *Are you over age 40?* questioning. (App. 91).

(D) CEB admits creating a so-called *Questionnaire/ Consent* form that asked Petitioner if he is *over-age-40.* (App. 70, App. 110-111).

(E) Since early in the case and in his affidavit, Petitioner stated he never saw or given CEB *Questionnaire/Consent* (Exhibit G/C) form before or during his assessment testing.(App. 108-109).

(F) Petitioner argued Respondents made incriminating statement by claiming *Questionnaire/ Consent* form (Exhibit G/C) *"was scanned and printed by the undersigned's office before* including it as an exhibit [G], the metadata for this exhibit apparently evidences it was created on the day the Motion to Dismiss was filed." (App. 91, 92, ¶1).

(G) CEB admits it "stores demographic [*over-age-40* confirmation] information provided by test takers [Petitioner] in a searchable, electronic database." (App. 110, ¶3, App. 111).

(H) Petitioner presented two evidence (App. 124, 125) that prove he could not have been presented with CEB *Questionnaire/Consent* form, since neither of these two evidence gives any inkling of such a form ever existed. (App. 80, ¶18).

(I) In support of his opposition to Motion for Summary Judgement, Petitioner submitted his sworn affidavit that all of his exhibits and evidence are true and authentic, which neither lower courts acknowledge its existence.

Above, he also presented argued point that with 99% accuracy/probability, the number "40" next to Petitioner's name, in his job application, is indeed his *over-age-40* designation. However, as the *nonmovant*, the Panel did not view *any* of Petitioner's evidence, in terms of:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. REASONS FOR GRANTING THE PETITION

(A) 300,000 Applicants, Plus Petitioner, Subjected to Discriminatory Hiring Classifications.

Respondents admitted (App. 106, ¶40), while "it varied, on a monthly basis, DHHA typically received over 5,000 applications", where applicants subjected to language fluency and *Are you over age 40?* questioning. Per CEB representative affidavit, from 2015, Respondents job applicants subjected to *Are you over age 40?* questioning, as part of the assessment testing. Therefore, it is not unreasonable from 2015 to end of 2019, in addition to Petitioner, about 300,000 job applicants subjected to *over-age-40* and language fluency questioning.

(B) The Appeals Court Averted Addressing Legality of Language Fluency Questioning, Under Title VII

Petitioner presented his national origin discrimination cause of action, under Title VII, with direct evidence of language fluency question by Respondents. However, the Court Panel overlooked Petitioner's direct evidence of

language fluency questioning, by stating *"Appellant does not challenge the district court's finding that he has no direct proof of national origin discrimination."* (App. 14); then the Panel states *Petitioner did not raise* language fluency questioning "violated § 2000e-2(a)(2)":

> "Vazirabadi's briefs *raise additional claims that he did not present to the district court.* For example, *he now asserts* that defendants violated § 2000e-2(a)(2) by asking for his language fluencies. (App. 15, ¶F) (emphasis added).

On one hand the Panel erred determining Petitioner "*has no direct proof of national origin discrimination*", then incorrectly finding his direct evidence only presented in the appeal. In his Briefs, Petitioner did not succeed to convince the Appeals Court that:

> "Job applicants language fluency questioning, like disguised termites, from within, silently eat away Title VII and other laws intended to protect most vulnerable in the society. This Court should end *weaponization* of language-fluency questioning and close this deceptive loophole." (App. 68).

(C) The Appeals Court Averted Addressing Legality of *Are You Over Age 40?* Questioning, under ADEA and UGESP

Despite Petitioner's direct evidence of age discrimination cause of action, beginning with his first Complaint, under ADEA and later under UGESP, where in massive scale, not only Petitioner subjected to *over-age-40* questioning, but thousands of other job applicants identified and *classified*, as under and *over-age-40* applicants. Petitioner presented number of supporting evidence, in addition to his job application metadata representation (App. 69) that with 99% probability/accuracy, he was indeed ***designated*** *as over-age-40* in his job application. The Panel erred and

overlooked Petitioner's supporting evidence and arguments.

(D) Over 45,000 Denver Public Schools ("DPS") Job Applicants Subjected to *Bilingual Language Questioning* ("BLQ")

Only in the context that language fluency questioning is widely-used, as a discriminatory hiring practice, as a proxy to identify job applicants' national origin/heritage, religion and race, Petitioner presents this fact that in August 2015, when he applied online for Process Improvement Engineer ("PIE") position at Denver Public Schools ("DPS"), he was subjected to *Bilingual Language Questioning* ("BLQ").

DPS online application asked Petitioner to checkmark (tick), from a pull-down menu, listed *specific* languages, such as Arabic, Amharic, Ethiopian, Somali, Swahili, Vietnamese, Russian, etc., and asked whether Petitioner is *"bilingual"*—not fluent in a language, but being *bilingual*—in any of the listed languages; and if his language not listed, he enter it manually. Petitioner entered Farsi/Persian that identified his Iranian national origin.

In that unpublished case (*Vazirabadi v. Denver Public Schools*, Civil Action No. 17-cv-1194-WJM-SKC (D. Colo. June 25, 2019)), Petitioner has appealed to the Tenth Circuit Court of Appeals (Case Number 19-1245). DPS admitted, with 64 pages of data, supported by its IT employee's affidavit (App. 126) with a summary table (App. 127) that from 2013 to 2015, over 45,304 DPS job applicants subjected to *Bilingual Language Questioning*. For example, to identify the 34 Somali bilinguals, DPS subjected 99.92% (45,270 applicants) of other job applicants, by asking them whether they are bilingual in Somali. In case of the 328 identified Arabic bilingual applicants, DPS asked 99.19% (44,976 applicants) applicants whether they are bilingual in Arabic. To identify the 17 Tigrigna bilingual applicants, DPS asked 99.96% of

its applicants (45,287), whether he/she is bilingual in Tigrigna, and so on.

(E) The Appeals Court, by Not Ruling on Language Fluency Questioning, Allows More Applicants Have Identified and Classified National Origin/Heritage, Race and Religion.

During Respondents' motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), the district court did not find it applicable that "[l]anguage, by itself, does not identify members of a suspect class", *Soberal-Perez v. Heckler*[10], by stating:

> "[B]eing bilingual in Farsi and his name, in combination, could potentially support a reasonable inference that Mr. Vazirabadi was either Iranian or from another middle Eastern country where Farsi is a dominant language. It may further be reasonably inferred, *for present purposes only*, that Mr. Vazirabadi might be a Muslim. Those inferences would place him in a suspect class, and the Court concludes that dismissal for failure to state a claim *at this point in the process would not be appropriate*." (App. 64) (emphasis added).

However, since the Appeals Court avoided considering legality of language fluency questioning, under Title VII, where Petitioner unequivocally argued language-fluency questioning **is not** "suspect class" identifier/detector. Instead, Petitioner equated language fluency question-and-answer "to an X-ray machine that *agnostically*, by *inference,* with great accuracy, identifies mostly immigrant job applicants' national origin, race, ethnicity and religion, *independent* and *regardless* of such identifications may or may not lead to a suspect class." (App. 67). To explain irrelevancy of *Soberal-Perez v. Heckler*[10] that "[l]anguage,

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[10] 717 F.2d 36, 41 (2d Cir. 1983).

by itself, does not identify members of a suspect class" (*Id.*), Petitioner referred to EEOC *"broadly"* defined national origin definition, under 29 CFR Part §1606.1 that:

> "The [EEOC] Commission *defines national origin broadly* as including, but not limited to, the denial of equal employment opportunity because of an individual's, or *his or her ancestor's, place of origin*; or because ..., *cultural* or *linguistic characteristics* of a *national origin group*." (App. 66)(emphasis added).

Then, under 29 CFR Part §1607.3, Petitioner argued EEOC asks to be vigilant for:

> "A. Procedure having adverse impact constitutes discrimination unless justified. The *use of any selection procedure* which has an adverse impact on the hiring...*will be considered to be discriminatory*...". (*Id.*)(emphasis added).

Therefore, as it stands today, the district court final ruling, despite the court's earlier finding during Fed. R. Civ. P. 12(b)(6) process, states:

> "Mr. Vazirabadi assumes that his national origin was known because he voluntarily disclosed that he is fluent in Farsi. But the affidavits emphatically state that defendants were unaware of his national origin. *This makes sense because* "[l]anguage, by itself, does not identify members of a suspect class." *Soberal-Perez*, 717 F.2d at 41. (App. 33)(emphasis added).

IV. CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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