No. 20-1140

In The
Supreme Court of the United States

ANGELA DEBOSE,

Petitioner,

v.

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant certiorari, where the appeals court below did not decide an important federal question that conflicts with relevant decisions of this Court.

II. Whether Petitioner has presented compelling reasons to grant certiorari, where the appeals court has not so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

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INTRODUCTION

Petitioner asserts that "[c]ertiorari is appropriate because the Eleventh Circuit has decided an important federal issue that conflicts with relevant decisions of this court, and because the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power." [Petition for Writ of Certiorari, p. 13].

However, neither assertion is true. The Eleventh Circuit's decision in this case did not decide an important federal question that conflicts with relevant decisions of this Court. Supreme Court Rule 10(c). Moreover, the Eleventh Circuit did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10(a). Consequently, no compelling basis for this Court's review is presented, and the Petition should be denied.

STATEMENT OF THE CASE AND FACTS

Respondent adopts the recitation of the case and the facts appearing in the Eleventh Circuit's Opinion dated April 27, 2020. [Petitioner's App'x., A-1]. In addition, pursuant to Supreme Court Rule 15(2), Respondent corrects the following misstatements of fact that appear in the Petitioner's Statement of the Case and Facts:

1. "Dr. Dosal ('Dosal'), Vice Provost, and Dr. Ralph Wilcox ('Wilcox'), USF Provost, and others in senior leadership circulated racially-charged derogatory (e.g., *black bitch, black witch*) e-mails about [DeBose]." [Petition for Writ of Certiorari, p. 2]. No such evidence was introduced at trial.

2. "Thereafter, Dosal and Wilcox effectively demoted DeBose, reducing her scope of work, through a reorganization." [Petition for Writ of Certiorari, p. 2]. The undisputed trial evidence was that Wilcox did not participate in that decision. [Respondent's App'x., Doc. 492, R.A. 110-112]. Instead, Dosal and Sidney Fernandez (USF's Interim Chief Information Officer) jointly made the decision to move DegreeWorks from the Registrar's Office to IT. [Respondent's App'x., Doc. 492, R.A. 110-111, lines 18-25, 1-5].

3. "Dosal and Wilcox isolated and excluded DeBose from meetings where her attendance was usual or expected. DeBose was marginalized and treated disrespectfully. Dosal failed to conduct DeBose's annual performance appraisal, impacting her consideration for merit based salary increases and promotion." [Petition for Writ of Certiorari, p. 2]. No such evidence was introduced at trial.

4. No evidence was introduced at trial that HR and DIEO failed to investigate DeBose's EthicsPoint complaint, as DeBose asserts. [Petition for Writ of Certiorari, p. 3].

5. DeBose asserts that Dosal and Wilcox disqualified DeBose for promotion to Assistant Vice President

of Enrollment Planning & Management "in a humiliating way that other employees were not" because of DeBose's protected activity. [Petition for Writ of Certiorari, p. 3]. However, the district court granted summary judgment on DeBose's retaliatory denial of promotion claim because it was "undisputed that DeBose did not engage in any statutorily protected activity until *after* she learned that Hamilton had been appointed to the AVP EPM position." [Petitioner's App'x., A-17, p. 19].

6. DeBose makes reference to a December 2014 EEOC discrimination complaint, but no such complaint was admitted into evidence at trial. [Petition for Writ of Certiorari, p. 3].

7. There is no support in the trial record for DeBose's assertion that "Dosal and Wilcox showed heightened anger and aggression towards DeBose." Instead, the record shows the opposite. [Respondent's App'x., Doc. 489, R.A. 082-086, R.A. 088, R.A. 089].

8. There is no basis in the trial record for DeBose's assertion that "Mootoo, when visiting the Registrar's Office, routinely and inappropriately used the word 'nigger' around DeBose and her staff. Dosal knew of Mootoo's use of the "N" word in the Registrar's Office but did nothing." [Petition for Writ of Certiorari, p. 3].

9. DeBose asserts that, "[b]ecause of DeBose's protected activity, Dosal solicited complaints about DeBose from those with whom she worked closely, including Mootoo, and scheduled meetings with DeBose, having no agenda, so he could berate her." [Petition for

Writ of Certiorari, p. 3]. No such evidence was introduced at trial.

10. There is no evidence in the trial record that the written reprimand issued to DeBose violated USF policy or practice, as DeBose asserts. [Petition for Writ of Certiorari, pp. 3, 24].

11. DeBose asserts that "[o]n February 4th, the same day as DeBose's MDF legal action . . . , Dosal also engaged Ellucian, L.P. ('Ellucian') to bring Andrea Diamond ('Diamond'), Functional Consultant, to campus to perform an '*urgent*' post-implementation assessment ('PIA') of DegreeWorks. . . ." [Petition for Writ of Certiorari, p. 4]. However, the undisputed trial evidence was that Carrie Garcia began discussing a post-implementation assessment with outside consultant Ellucian in July of 2014, and that the funding request for the Ellucian post-implementation assessment was made in September or October of 2014, both long before DeBose filed her federal injunction action in February of 2015 [Respondent's App'x., Doc. 495, R.A. 188-189, lines 25, 1-11; R.A. 190-191, lines 16-25, 1-16; Respondent's App'x., Doc. 477, R.A. 065; Respondent's App'x., Doc. 477-26, R.A. 074-075], and that the decision to include the Registrar's Office in the Ellucian interviews was made by the Ellucian consultant, Andrea Diamond ("Diamond"), not USF. [Respondent's App'x., Doc. 495, R.A. 192-193, lines 20-25, 1-23; Respondent's App'x., Doc. 477-43, R.A. 076-078; Respondent's App'x., Doc. 477, R.A. 068].

12. Contrary to DeBose's assertion, Diamond never debriefed with Wilcox "to edit her report and/or request changes." [Petition for Writ of Certiorari, pp. 4, 9]. In fact, the undisputed trial testimony is that the Ellucian consultant, Ms. Diamond, never debriefed with Provost Wilcox. [Respondent's App'x., Doc. 492, R.A. 114, lines 17-22].

13. DeBose asserts that "Diamond wrote that DeBose did not answer questions, kept registrar's staff from meeting with her, and was a risk that could keep Student Success from achieving its goals." [Petition for Writ of Certiorari, p. 4]. That understates the Ellucian Report. Under "Accomplishments," the Ellucian Report stated:

> Registrar Focus Group: The Registrar's Office uses Degree Works only when dealing with students face to face. They do not use it for clearance of Graduation. **This session was not as informative as I would like considering the data that is used in Degree Works is maintained by this office. The lack of cooperation during this session leads me to believe there is some disconnect between the Registrar's Office and the other offices on campus.**

(emphasis supplied). Under "Areas of Risk," the Ellucian Report stated:

> Registrar's Office: During my assessment, I felt that as a whole USF has really captured the spirit of Higher Education which is ultimately Student Success. Instead of functioning

> in a s[i]loed structure that I have seen at other institutions, you have managed to create an atmosphere of working together for the good of the institution, staff and most importantly students. **Where I did not see this atmosphere is within the Registrar's Office.** So why is this a risk factor for Degree Works? The registrar's office is responsible for the majority of the data that Degree Works utilizes. USF has been on the cutting edge of using Degree Works and its technology and functionality. This takes innovation and the willing to try new things. **I feel the registrar's office is not willing to encompass change.** This could ultimately hold you back from your future goals.

[*Id.*] (emphasis supplied).

14. Contrary to DeBose's assertions, Dosal and Wilcox repeatedly denied that any adverse employment action, including the non-renewal of DeBose's employment, was taken against DeBose because she filed complaints of discrimination. [Petition for Writ of Certiorari, pp. 8-9].[1] [Respondent's App'x., Doc. 489, R.A. 085-086, lines 10-25, 1; Respondent's App'x., Doc. 489, R.A. 087-088, lines 16-25, 1-4; Respondent's App'x., Doc. 490, R.A. 094-095, lines 25, 1-25; R.A. 102-103, lines 1-25, 1-22; Respondent's App'x., Doc. 492, R.A.

[1] DeBose distorts Dosal's testimony, which was that, because of DeBose's complaint about him, he was taken out of any decision-making role with respect to the non-renewal of DeBose's employment. [Respondent's App'x., Doc. 490, R.A. 100-104, lines 8-25, 1-25, 1-25, 1-25, 1-19].

113, lines 19-24; Respondent's App'x., Doc. 494, R.A. 183, lines 15-24]. Wilcox decided to non-renew DeBose's annual appointment because of the findings in the Ellucian Report. [Respondent's App'x., Doc. 493, R.A. 119-120, lines 7-25, 1-2; Respondent's App'x., Doc. 492, R.A. 109, lines 22-25; Respondent's App'x., Doc. 494, R.A. 179-181, lines 23-25, 1-25, 1-19]. Dosal was not involved in Wilcox's decision to non-renew DeBose's employment. [Respondent's App'x., Doc. 490, R.A. 097, lines 1-23; R.A. 098, lines 2-7; R.A. 099, lines 2-14; R.A. 100-101, lines 24-25, 1-3; R.A. 102, lines 3-19].

15. DeBose asserts that, "in public/media accounts, Wilcox pointed to DeBose as an identified risk per the Ellucian Report." [Petition for Writ of Certiorari, p. 5]. No such evidence was introduced at trial.

16. DeBose asserts: "DeBose was forced to exhaust her leave in violation of a 'grandfather' clause in her contract, which provided that she would receive regular pay in the event of a compulsory leave and receive full payout of PTO. USFBOT materially breached DeBose's regular employment contract and an extended contract to 2019-20 year." [Petition for Writ of Certiorari, p. 5]. There is no evidence in the trial record supporting these assertions. On the contrary, the district court dismissed DeBose's breach of contract claim before trial because DeBose alleged the existence of an *oral* contract to extend her employment through 2019 [Petitioner's App'x., A-17, pp. 22 and 26; Respondent's App'x., Doc. 50, R.A. 003-004], and granted summary judgment on DeBose's 2015 contract claim because the undisputed record evidence demonstrated that

USFBOT complied with its contractual obligations by providing DeBose with three months' notice of termination. [Petitioner's App'x., A-17, pp. 22-23].[2]

17. DeBose asserts that "Dosal, Wilcox, Mootoo and USFBOT's representatives, ordered the destruction of DeBose's personnel files, containing her work projects, awards, recognitions, performance evaluations, leave and attendance records, and her employment contracts." [Petition for Writ of Certiorari, p. 5]. However, the files that were destroyed were department files, not DeBose's official USF personnel file, and there is no evidence that Dosal or Wilcox was involved in the destruction of the files. Moreover, DeBose filed repeated motions for sanctions on account of the destruction of her department personnel file. Those motions were denied by the magistrate judge, who determined that DeBose had failed to prove that USF had acted in bad faith and further concluded that DeBose had failed to meet her burden of proving that any of the destroyed documents were crucial to prove her *prima facie* case. [Respondent's App'x., Doc. 103, R.A. 006-049; Respondent's App'x., Doc. 144, R.A. 050-060]. Since DeBose failed to seek district court review

[2] DeBose argues that the Eleventh Circuit overlooked her 2015 employment contract, which was part of the summary judgment evidence excluded by the district court. [Petition for Writ of Certiorari, p. 22]. However, summary judgment was entered on DeBose's 2015 contract claim because USF complied with its contractual obligations regarding notice of termination, and not because DeBose failed to prove the existence of the 2015 contract.

of the magistrate's rulings, she waived the right to challenge those rulings on appeal. Fed.R.Civ.P. 72(a).

18. DeBose asserts that, "[o]n May 26, 2015, Wilcox called and spoke to Earle C. Traynham ('Traynham'), UNF Provost, about DeBose and gave a 'poor reference,' in violation of USF policy." [Petition for Writ of Certiorari, pp. 5, 20, 24-25]. Instead, the trial evidence was that Traynham called Wilcox because Traynham was seeking Wilcox's assessment of DeBose's professional capabilities. [Respondent's App'x., Doc. 493, R.A. 121, lines 13-15; R.A. 123, lines 6-15]. During the telephone conversation, Wilcox told Traynham he had great respect for DeBose's technical skills and abilities, but that DeBose lacked collegiality, was uncollaborative, and that USF had decided to move in a different direction. [Respondent's App'x., Doc. 493, R.A. 123-124, lines 14-25, 1-7; R.A. 122, lines 6-20].

19. There is no support in the trial record for DeBose's assertion that, prior to Wilcox's call with Traynham, DeBose was offered and had accepted a position with UNF [Petition for Writ of Certiorari, p. 5] [Respondent's App'x., Doc. 493, R.A. 126-127, lines 25, 1-24; R.A. 129, lines 7-22; Respondent's App'x., Doc. 494, R.A. 182, lines 1-11], or that, following the call, UNF rescinded the job offer to DeBose. [*Id.*].

REASONS FOR DENYING CERTIORARI

I. THE ELEVENTH CIRCUIT DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The exercise of certiorari jurisdiction is a matter of judicial discretion, and a writ of certiorari is granted only for "compelling reasons." Supreme Court Rule 10. Certiorari is properly granted when a court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(c).

DeBose argues that the Eleventh Circuit's ruling that the district court's exclusion of 550 pages of unauthenticated summary judgment exhibits[3] was

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[3] DeBose also suggests that summary judgment was improperly entered on her disparate impact claims due to the exclusion of her unauthenticated summary judgment exhibits. [Petition for Writ of Certiorari, pp. 22-23]. However, the district court granted a motion to strike the affidavit submitted by DeBose's statistical expert because DeBose never timely disclosed the expert [Respondent's App'x., Doc. 357, R.A. 197-201], and DeBose chose not to appeal that ruling to the Eleventh Circuit. Moreover, DeBose's unauthenticated spreadsheet was insufficient to establish disparate impact because: 1) DeBose admitted that USF did not have a uniform practice of direct appointments; 2) DeBose's "statistics" did not compare the racial composition of qualified persons in the relevant labor market; and 3) there was no evidentiary basis for DeBose's assumption that the employment decisions reflected in her "statistics" were all made by direct appointments. *See Wards Cove Packing Company, Inc. v. Antonio*, 490 U.S. 642, 657 (1989) ("a Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance* in the work force").

harmless error conflicts with this Court's ruling in *McCandless v. United States*, 298 U.S. 342 (1936). [Petition for Writ of Certiorari, p. 21]. However, in its ruling, the Eleventh Circuit did not decide an important federal question; it merely followed the "well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground[s] for reversal unless it affirmatively appears from the whole record that it was not prejudicial." *McCandless*, 298 U.S. at 347-48. *See also* 28 U.S.C. §2111.

II. THE ELEVENTH CIRCUIT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

As set forth in Supreme Court Rule 10(a), certiorari review also may be warranted where the lower court has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Review for this reason is typically limited to situations where there is a substantial question about the constitutionality or integrity of a court's procedures. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (reviewing district court rules that permit broadcasting of high-profile trial without standards or guidelines in place, contrary to federal statutes and the policy of the Judicial Conference of the United States); *Nguyen v. United States*, 539 U.S. 69, 73-74 (2003) (granting writ of certiorari

raising the question of whether judgment was invalid due to participation of a non-Article III judge on panel).

There is no substantial question in this case about the constitutionality or integrity of a court's procedures. Instead, DeBose is simply seeking rehearing of rulings by the Eleventh Circuit that were adverse to her.

DeBose argues that the Eleventh Circuit's Rule 42 consolidation of her appeals deprived her of her substantive right to appeal from a final judgment. However, the Eleventh Circuit did not consolidate DeBose's appeals pursuant to Fed.R.Civ.P. 42, which governs the procedure for civil actions and proceedings in district courts. Fed.R.Civ.P. 1. More importantly, the Eleventh Circuit's consolidation, which occurred after DeBose had noticed two appeals, did not deprive DeBose of the right to pursue an appeal to the Eleventh Circuit of the final judgment entered against her.

DeBose has not identified any issue that the Eleventh Circuit's consolidation foreclosed her from raising on appeal. While DeBose asserts that the Eleventh Circuit's consolidation prevented her from "effectively appealing" the district court's Orders granting USFBOT's motion for judgment as a matter of law and denying DeBose's motion for new trial [Petition for Writ of Certiorari, p. 14], that is simply not true.

DeBose raised and fully briefed both issues in her appeal to the Eleventh Circuit.[4]

DeBose essentially complains of the misapplication of well-settled law to the particular facts of this case. However, Supreme Court Rule 10(c) applies neither to errors of law nor even to minor departures from customary practice. It applies instead to matters of major concern to the integrity of the federal judicial process so as to warrant the exercise of this Court's supervisory powers.

Even in a close case which a party feels was wrongly decided, "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern a grant of certiorari." *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020)

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[4] DeBose asserts that the district "would not permit her to testify as a fact witness in her own case to the substantive issues but only as to damages." [Petition for Writ of Certiorari, p. 17]. That is untrue. After DeBose rested her case in chief, USFBOT moved for judgment as a matter of law because DeBose failed to introduce any evidence of damages. Rather than granting USFBOT's motion, the district court allowed DeBose, over USFBOT's objection, to re-open her case in order to take the stand and testify about her damages. [Respondent's App'x., Doc. 462, R.A. 195-196]. DeBose never raised this issue on appeal, nor did she raise on appeal racial discrimination in the selection of the jury or any errors in jury instructions. [*Id.*]. *See Apodaca v. Raemisch*, 139 S. Ct. 5, 7 (2018) (Sotomayor, J., concurring in denial of certiorari) (since the "litigation before the lower courts did not focus on" the issue raised by petitioner, the case "is not well suited to our considering the question now"); *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642, 1653 (2016) (it is "not this Court's practice to adjudicate either legal or predicate factual questions in the first instance").

(citation omitted) (Sotomayor, J., dissenting). That is particularly true where, as here, the issues raised are highly fact-specific. *See Kennedy v. Brementon School Dist.*, 139 S. Ct. 634, 639 (2019) (Alito, J., concurring in denial of certiorari) (the Court "generally do[es] not grant [certiorari] review to decide highly fact-specific questions").

In short, certiorari "jurisdiction was not conferred upon the court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.). That is what DeBose seeks. There simply is no compelling reason for review on a writ of certiorari.

CONCLUSION

Petitioner has not presented any compelling reason for this Court to grant certiorari. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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