Case No.

IN THE

Supreme Court of the United States

AARON JENSEN,

Petitioner,

v.

WEST JORDAN CITY,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

APRIL L. HOLLINGSWORTH
Counsel of Record
HOLLINGSWORTH LAW OFFICE, LLC
1881 South 1100 East
Salt Lake City, UT 84105
(801) 415-9909
april@aprilhollingsworthlaw.com
Counsel for Petitioner

QUESTIONS PRESENTED

It is well understood that plaintiffs can and should, for strategic reasons, bring claims under every theory of liability that may apply to a defendant's conduct and the plaintiff's damages. Likewise, it is well understood that a plaintiff is not entitled to a double recovery even if he prevails on multiple theories of liability. Underlying these clear rules is substantial confusion among the courts regarding whether and how damages should be apportioned per claim, particularly when the claims include one with a damages cap.

This case presents a number of questions this Court should answer:

1. When a plaintiff prevails on multiple claims against a defendant for the same damages, what factors determine how or whether the damages are to be apportioned or allocated among the various claims? Does the jury make the determination, or a judge after the verdict is rendered? When one of the theories includes a damages cap and the verdict exceeds the cap, should the award be apportioned to maximize the plaintiff's recovery?
2. Whether the value of pension benefits awarded to a plaintiff for a Title VII violation to compensate for his inability to return to his prior profession are, on the one hand, back pay, front pay, or equitable relief as were available under the pre-1991 statute, or on the other hand, "future pecuniary losses" under the expanded remedies available after the 1991 amendments, and therefore subject to the statutory caps on damages?

PARTIES TO THE PROCEEDING

Petitioner Aaron Jensen was the Plaintiff when this lawsuit was filed, and the Appellant and Cross-Appellee in the appeal to the Tenth Circuit. He is a private citizen, and a former employee of the Respondent, West Jordan City.

Robert Shober was named as a defendant to the lawsuit in his official capacity. The district court's decision denying Jensen's motion to add Shober as a defendant in his personal capacity was one of the issues in Jensen's appeal to the Tenth Circuit, so Shober was an appellee in the appeal. He is not a party in this petition.

TABLE OF CONTENTS

Page

APPENDIX

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — CONTINUED

Cases **Page**

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Aaron Jensen respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 968 F.3d 1187, and reproduced at App. 1. The District Court's opinion is reproduced at App. 55-106.

JURISDICTION

The Court of Appeals issued its judgment on August 4, 2020 and denied rehearing on September 29, 2020. App. 107. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Factual Background

Prior to 2010, Petitioner Aaron Jensen was a 12 ½ year veteran of the defendant West Jordan City Police Department. On several occasions, Jensen complained to police officials about being subjected to repeated sexual harassment. Eventually, the parties agreed to a settlement of that harassment claim. Pursuant to that settlement, West Jordan City paid Jensen $80,000 and Jensen resigned from the Police Department in April 2009. As part of that agreement, the City agreed not to retaliate against Jensen.

After leaving his employment with West Jordan City, Jensen intended to resume his law enforcement career with some other jurisdiction. Following Jensen's resignation, however, West Jordan City officials claimed to have found narcotics in Jensen's office and evidence that he had misused public money, and they caused him to be arrested and criminally prosecuted by a different police department on three felony charges in May 2010. Jensen's mugshot was widely published in print and televised stories about his arrest, and he was terminated from the job he had at the time. West Jordan City officials then influenced the prosecution, including providing false or misleading testimony at the preliminary hearing on those charges. The arrest and prosecution were fatal to Jensen's efforts to obtain employment as a law enforcement officer. In the wake of that arrest and felony charges, no law enforcement agency would hire Jensen—even though the charges were later dismissed and the records ultimately expunged. Due to the delay in being able to work in law enforcement, Jensen lost his Police Officer Standard and

Training ("P.O.S.T.") certification. In the years following his arrest, as a result of being unemployed and disgraced, Jensen lost his home and his marriage, and was frequently suicidal.

Jensen sued West Jordan City under several theories of liability for the pecuniary and non-pecuniary damages caused by the City's conduct in pursuing baseless criminal charges against him: Title VII of the Civil Rights Act of 1964, based on the City's retaliation against him for his sexual harassment claim; Malicious Prosecution in violation of the Fourth Amendment (brought under 42 U.S.C. § 1983); Free Speech Retaliation in violation of the First Amendment (also under Section 1983), for retaliation against him for his speaking out against public officials' misconduct; and breach of contract and breach of the covenant of good faith and fair dealing, based on the City's breach of the non-retaliation provision of the settlement agreement it had entered into with him regarding his sexual harassment allegations.

Jensen's claims were tried to a jury in June 2017. Jensen, his father, and his therapist all testified about his significant emotional distress due to the City's conduct in having him arrested on false charges, and the subsequent years he spent trying to clear his name.

Jensen's claim for pecuniary relief was limited to the effect of the retaliation on his police pension. App. 110-11. Local law enforcement officials in Utah are part of a single pension system, which bases benefits on a former officer's total service in one or more law enforcement agencies. App. 114-16. The amount a recipient

receives is 2.5% of his or her final salary for each year of service, up to a total of 20 years. App. 121. A recipient is entitled to begin drawing that pension after 20 years of service, regardless of age; a recipient without 20 years of service can draw the pension at age 60. Jensen contended that, but for the retaliation, he would have been hired as a law enforcement officer in 2010 and, as a result, would have had substantially greater pension rights. Jensen presented testimony from a forensic accountant about the difference in the amount of pension benefit he will receive when he turns 60 versus what he would have received if he had been able to reach 20 years of service, which the accountant assumed could have happened as early as December 1, 2016 or 2017 (six months after the trial). App. 109-140. The accountant testified that the range of lost benefits was between $1,074,000 and $1,101,093. App. 126.

Neither party provided any testimony that distinguished either the pecuniary or non-pecuniary damages by legal theory. The jury instructions warned the jury against awarding damages "more than once for the same injury," but did not explain how to avoid that or how certain damages might be attributable to different claims. During trial, the parties hotly debated the structure of the verdict form to be provided to the jury. In response to West Jordan City's proposed form that asked the jury to determine what amounts of damages were attributable to each claim, Jensen argued, "I don't think that there is a realistic way of allocating damages." App. 210. The court responded, "Yet they do. We ask them to do it. It may not be realistic, but we ask them to do it all the time and somehow they do." App. 210-11.

At the end of the trial, the judge used a verdict form that permitted the jury to allocate specific damages to each of those claims, but which also gave the jury the option of awarding the damages under all claims. Jensen's counsel objected to the verdict form that permitted the jury to allocate damages among the claims. Counsel argued again that the legal claims arose from the same misconduct and had resulted in the same harm, and there was no realistic way to allocate damages among the various claims.

The jury found the City liable under all of plaintiff's claims. App. 239-45. The jury awarded a total of $1,024,400 for economic injuries, only slightly less than the amount of additional pension benefits which Jensen's expert calculated Jensen would have received if he had been able to reach his 20-year retirement by the end of 2017. App. 243. The jury also awarded Jensen $1,750,000 for pain and suffering. App. 244. The jury did not allocate any portion of the total of $2.77 million in damages to any distinct claims. Instead, the jury reported that the amount allocable to each claim was zero. App. 239-45.

Following this initial verdict, over Jensen's counsel's objections, the court instructed the jury, "We need you to go back and allocate, as best you can, the [total damages award] for the various claims as best you can do that. So we'll send you back to deliberate on that." App. 247. When the jury returned, it had allocated almost all of the damages to the first claim on the verdict form, which was the Title VII claim—$1,000,400 in economic damages and $1,740,000 in non-economic damages. App. 247-49. The jury allocated the remainder of the original award

($34,000) to the other claims, in mostly $4,000 increments. *Id.;* App. 254-59. The only claim that had a damages cap was the Title VII claim. App. 250.

West Jordan City then filed a motion to reduce the damages award. It argued that the Title VII damages cap, in this instance $300,000, applied to the award of economic damages as well as the award for non-economic damages. The district court agreed, finding that "Jensen's lost retirement benefits are similar to lost future earnings, which are based on a general harm to reputation" and therefore, are subject to Title VII's caps on compensatory damages. App. 61-62. The district court reduced the jury award of $2.77 million to $334,000. App. 53-54.

Jensen appealed to the Tenth Circuit, asserting that the post-verdict instruction issued by the judge misstated the law and improperly required the jury to allocate its award. Jensen also argued that the $1,000,400 in economic damages awarded by the jury under Title VII were not subject to the Title VII damages cap. A divided panel affirmed the decision of the district court. App. 1-52. The dissenting judge argued that the district court's post-verdict instruction was inconsistent with Tenth Circuit precedent and substantially risked improperly influencing the jury. App. 34-39.

Proceedings Below

Petitioner Jensen filed two appeals from the district court's decisions (Tenth Circuit Nos. 17-4173 and 17-4196), and Defendant West Jordan City filed a cross-appeal (17-4181). The Tenth Circuit consolidated all of the appeals, and its decision at issue in this petition disposed of all issues in the appeals and cross-appeal.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Regarding Apportioning Damages Conflicts with the Reasoning and Outcome of Every Other Circuit to Decide this Issue

The Tenth Circuit is hardly the first circuit to have wrestled with the question of whether and how to apportion damages among various claims. Most of the circuits that have considered whether to allocate damages among claims that include a damages cap have relied on the D.C. Circuit's decision in *Martini v. Fed. Nat'l Mortgage Ass'n.*, 178 F.3d 1336 (D.C. Cir. 1999) and the Ninth Circuit's decision in *Passantino v. Johnson & Johnson*, 212 F.3d 493 (9th Cir. 2000).

In *Martini*, the plaintiff sued for sexual harassment and retaliation under Title VII and the D.C. Human Rights Act. At trial, the judge provided the jury with one set of instructions that covered the plaintiff's claims under both statutes. *Martini*, 178 F.3d at 1339. The verdict form, however, (to which both parties objected) provided for the jury to assess damages under each statute. *Id.* at 1349. The jury awarded substantial damages under both statutes: "$153,500 in backpay, $1,894,000 in front pay and benefits, and $3,000,000 in punitive damages under Title VII, as well as $615,000 in compensatory damages and $1,286,000 in punitive damages under the D.C. Human Rights Act." *Id.* at 1339. The district court then reduced the "damages (excluding backpay) to $300,000." *Id.* The D.C. Circuit reversed, finding that "the portion of Title VII damages exceeding the statutory cap should have been reallocated to her recovery under the D.C. Human Rights Act." *Id.* The *Martini* court reasoned, "Were we not to treat damages under federal and local law as fungible where the standards of liability are the same, we would effectively

limit the local jurisdiction's prerogative to provide greater remedies for employment discrimination than those Congress has afforded under Title VII." *Id.* at 1349-50.

In *Passantino,* decided less than a year after *Martini*, a female employee brought claims of gender discrimination and retaliation under Title VII and the state anti-discrimination statute, which were tried to a jury in the United States District Court for the Western District of Washington. "[T]he jury found for Passantino on both federal and state law retaliation claims, and awarded damages without specifying any particular allocation." *Passantino*, 212 F.3d at 509. "Faced with the general verdict, the district court chose to allocate the award to the state rather than the federal claim," such that the award was not subject to the Title VII caps. *Id.* The Ninth Circuit affirmed this decision, finding that "the most reasonable assumption" from the jury's unallocated verdict was "that the jury awarded the same damages on both the federal and state claims." *Id.* But the court found the damages awarded to be "duplicative," "because the two claims were essentially the same; they involved the same conduct and were evaluated under the same legal standard." *Id.* Therefore, "[i]n the absences of a contrary directive, such as a statutory mandate that damages be allocated to one claim rather than another, the district court had authority to allocate the damages to either claim." *Id.* Citing to *Martini,* the *Passantino* decision found "the awards were effectively fungible, and the district court's action was entirely within its discretion and consistent with the jury's verdict." *Id.*

This last point was important to the decision in *Passantino*. The court noted that because "[t]he jury's entire compensatory damages award was lawful under state law, and its punitive damage award was lawful under federal law (subject to any constitutionally valid limitation imposed by the statutory cap)", "[a]n allocation that would serve to reduce lawfully awarded damages would fail to respect the jury's verdict and conflict with the purpose and intent of one of both statutes." *Id.* at 510. Further, the *Passantino* decision stated "that, in circumstances such as these, subjecting the whole damage award to Title VII's cap would be inconsistent with Title VII's provisions [against limiting state remedies]." *Id.*

The First Circuit, like many others, followed the lead of *Martini* and *Passantino* in *Rodriguez-Torres v. Caribbean Forms Mfg.*, 399 F.3d 52 (1st Cir. 2005). In 2003, a jury in the District of Puerto Rico reached a verdict in favor of the plaintiff in an employment discrimination case brought under Title VII and the Puerto Rican discrimination statute. *Torres v. Caribbean Forms Mfr.,* 286 F.Supp.2d 209 (D. Puerto Rico 2003). The jury awarded the plaintiff $250,000 in compensatory damages, but did not specify whether the damages were for the Title VII claim or the Commonwealth discrimination statute. The jury also awarded the plaintiff $250,000 in punitive damages for the Title VII claim. *Id.* at 219. Following the verdict, in light of the $200,000 cap on compensatory and punitive damages based on the size of the employer, the trial judge reduced the punitive damages award to $199,999 and allocated $1 of the compensatory damage award to the Title

VII claim. *Id.* The judge allocated the remaining $249,999 the jury awarded for compensatory damages to the Commonweath claim, which had no damages cap. *Id.*

In affirming the trial court's apportionment of the damages award among the claims, the First Circuit examined the approaches of several other courts of appeals that "have addressed the problem of allocating damages where the jury provides award for parallel state and federal discrimination claims but the award exceeds the applicable federal cap." *Rodriguez-Torres,* 399 F.3d at 66. The court found, "All have approved the method employed by the district court here, namely, considering the unspecified award as fungible between the state and federal claims and allocating the award so as to maximize the plaintiff's recovery while adhering to the Title VII cap." *Id., citing Hall v. Consol. Freightways Corp.,* 337 F.3d 669, 678-79 (6th Cir. 2003); *Gagliardo v. Connaught Labs, Inc.*, 311 F.3d 565, 570-71 (3d Cir. 2002); *Passantino v. Johnson & Johnson,* 212 F.3d 493, 509-10 (9th Cir. 2000); *Martini v. Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1349-50 (D.C.Cir. 1999); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir. 1997).

The *Rodriguez-Torres* decision listed another reason for its decision that deserves mention: "First, where the jury makes an unapportioned award, there is no basis for believing that the jury favored applying the damages to the federal over the state claim." *Id.* While Petitioner agrees with the outcome affirmed in *Rodriguez-Torres,* this explanation raises important questions. Implicit in this rationale for the apportionment — that "there is no basis for believing that the jury favored applying the damages to the federal over the state claim" — is that there is

a basis for applying the damages to the federal over the state claim, and that such a decision is the province of the jury. Based on the lack of guidance in any case law in any jurisdiction on this point, however, it is not clear what such a basis might be.

The *Rodriguez-Torres* decision also adopted the reasoning from *Martini* that "allocating the excess damages to the state law claim respects 'the local jurisdiction's prerogative to provide greater remedies for employment discrimination than those Congress has afforded under Title VII." *Id.* at 66*, citing Martini,* 178 F.3d at 1349-50. On this point, many different jurisdictions have agreed, as the *Rodriguez-Torres* decision noted. In upholding the jury's decision to make an uninformed allocation in this case, however, the Tenth Circuit's approach in this case effectively limited the verdict regarding several uncapped claims by the Title VII caps.

Several other circuits have made decisions achieving results similar to that of *Martini, Passantino,* and *Rodriguez-Torres*—giving the plaintiff the maximum recovery by allowing them to recover damages under the statutes without damages caps—but the varying means of doing so demonstrate the need for direction from this Court as to how such situations should be handled. The Sixth Circuit has determined that after a jury awarded compensatory damages to the plaintiffs "based on both federal and state law claims, the plaintiffs were entitled to elect which statute they would receive damages under." *Denhof v. City of Grand Rapids,* 494 F.3d 534, 548 (6th Cir. 2007).

The Fifth Circuit holds that the decision on how to apportion damages is the court's to make, and that it can only apply the damages to one of the prevailing statutes. In *Miller v. Raytheon Co.,* a Texas jury determined that Raytheon had violated both the Age Discrimination in Employment Act ("ADEA") and the Texas anti-discrimination statute by discriminating against the plaintiff based on his age. 716 F.3d 138, 142 (5th Cir. 2013). The jury awarded back pay and lost pension benefits, "both of which were doubled as ADEA liquidated damages", as well as $1 million in mental anguish damages and $15 million in punitive damages under the Texas statute. Following the trial, the district court adjusted the jury's verdict, allowing damages under only one of the statutes, and in doing so, "declined to award punitive damages in order to prevent a double recovery." *Id.* at 143. In response to the plaintiff's appeal of this aspect of the district court's decision, the Fifth Circuit stated, "When a federal claim overlaps with a pendant state claim, the plaintiff is entitled to the maximum amount recoverable *under either the federal or state claim*. . . . Accordingly, Miller may recover *under only one statute*, and the district court correctly granted him the higher recovery available under the ADEA." *Id.* at 147 (emphasis added).

Other circuits allow the court to apply the damages to multiple statutes to maximize the plaintiff's recovery. In *Madison v. IBP, Inc.,* for instance, the Eighth Circuit affirmed the district court's decision to apply portions of the jury's verdict to claims under both Title VII and 42 U.S.C. § 1981, and to grant the plaintiff's request "to allocate the $110,000 compensatory damage award for sexual

discrimination and harassment to her state law claims, thereby avoiding the Title VII damages limitation." 257 F.3d 780, 792 (8th Cir. 2001). Relying on *Passantino v. Johnson & Johnson,* the Eight Circuit agreed that the plaintiff's claims were "effectively fungible" among the various claims, and allowed the lower court to mix and match the verdict among the various statutes to maximize the plaintiff's recovery. *Id.*

Even the Tenth Circuit's approach to this issue has been internally inconsistent. Prior to the decision in this case, the Tenth Circuit determined that whether damages should be allocated among several claims is a question for the jury. *Fox v. Ford Motor Co.,* 575 F.2d 774, 787 (10th Cir. 1978). Despite this authority, in this case, when the jury initially did not allocate damages per claim in this case, the trial judge told them to "go back and allocate." App. 247. This allocation ultimately resulted in the verdict being reduced from $2.77 million to $334,000, which conflicts with the authority of other circuits by taking the decision regarding whether to allocate from the jury, and failing to apportion the damages to maximize the plaintiff's recovery.

The lack of consistency among circuits is evident by the fact that even when the other circuits agreed with allocating the damages to claims without damages caps in order to maximize the plaintiff's recovery, they effected the desired outcome in varying ways: creating a verdict form that asked the jury to assign damages per claim; allowing the plaintiff to choose which statute to receive damages under

following the verdict; or allowing the district court to apply the damages to multiple claims, or only to one claim.

This case is a perfect vehicle for this Court to weigh in on whether and how to apportion damages per claim because it involves several claims where not only are the elements of proof similar for some of the claims, there were no differences in damages attributable to the various claims presented to the jury. This Court has not yet provided guidance on either situation, and the differing approaches adopted by the circuit courts suggest guidance is necessary to create uniformity among the lower courts.

This Court's guidance is also necessary because of the impact this case is likely to have on Title VII cases. Lawyers representing plaintiffs in employment cases in this circuit are already considering whether to withdraw Title VII claims in cases arising under several statutes, either on the eve of trial or in the midst of trial if the court approves an apportionment verdict form. Defense counsel, well aware that apportionment saved the defendant $2.4 million in this case, will assuredly press for apportionment verdict forms, and seek a "*Jensen* charge" advising juries that the court "needs" them to apportion. If one side asks for a jury instruction spelling out a standard as to when apportionment is warranted, the other side may oppose that on the ground that "as best you can" was deemed sufficient in this case.

The issues raised by this case are enormously significant to Title VII litigants, and sure to resurface in other cases. As the law stands in the Tenth Circuit, it would likely be legal malpractice for plaintiff's counsel not to drop a Title

VII claim prior to verdict if a plaintiff has other overlapping claims. The resulting damage to the usefulness of one of this country's most important civil rights laws cannot be allowed to come to pass.

II. This Court Should Determine Whether Pension Benefits Lost Because a Plaintiff Could Not Resume His Career Due to the Defendant's Retaliation are Subject to Title VII's Damages Cap

This Court determined 20 years ago that "front pay" awarded to a plaintiff in a Title VII case is not subject to the statute's damages cap. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852-53 (2001). This Court should now decide whether pension benefits, lost because a plaintiff could not resume his career due to a defendant's conduct, are "front pay" or "lost future earnings" which are subject to the caps.

The damages caps for Title VII were added as part of the Civil Rights Act of 1991, and only apply to remedies that were not available under the earlier version of the statute, section 706(g) of the Civil Rights Act of 1964. *Pollard,* 532 U.S. at 852-53. Under the 1964 Act, victims of discrimination could recover "make whole" remedies, which included "injunctions, reinstatement, backpay, lost benefits, and attorney's fees . . . ." *Id.* at 847-48, 850. The remedies that were added in the 1991 Act were "compensatory and punitive damages." *Id.* at 851, *citing* 42 U.S.C. § 1981a(a)(1). This Court held that all remedies that were available under the original version of the statute are not subject to the caps. *Id.* at 854. The Court specifically held that front pay was a remedy available under the original Title VII, and therefore not subject to the damages caps. *Id.* at 848.

Confusion has nonetheless arisen as to the characterization of certain types of relief because of the language in the 1991 amendment to Title VII. The amendments included a damages cap on "compensatory damages awarded under this section for *future pecuniary losses* . . . ." 42 U.S.C. 1981a(b)(3) (emphasis added). The *Pollard* decision provided an explanation for why "front pay" is not "future pecuniary losses." *Pollard*, 532 U.S. at 852. But courts have since come to conflicting decisions about whether damages should be categorized as front pay or future pecuniary losses, which has important ramifications to the size of the plaintiff's ultimate recovery.

This case exemplifies the debate. At trial, Jensen testified about being unable to get another job as a police officer after being arrested on several felony charges. He had earned 12.5 years of service towards a 20-year retirement plan, and if he had been able to resume his law enforcement career with a different department, he would have begun earning a pension as soon as he reached that 20-year mark. Theoretically, without his arrest, he might have reached that mark prior to trial or within a few months of trial, when he was in his early 40s. Instead, he will not start earning a pension until he turns 60. A forensic accountant provided the only testimony as to the value of Jensen's lost pension benefits. App. 109-140.

The Tenth Circuit determined that Jensen's lost pension benefits were more akin to an "injury to character and reputation" than front pay, and determined they were subject to Title VII's damages cap. App. 17-18. This decision suggests that in determining whether damages are front pay or future pecuniary losses, it matters

why the pension benefits were awarded. This case is cert-worthy because there is a split among the circuits as to whether economic losses caused by damage to one's reputation are back pay, front pay, or "future pecuniary losses."

The Tenth Circuit's decision as to the characterization of Jensen's pension benefits turned on the fact that Jensen was awarded the benefits because he could not "go back to being a police officer following his arrest." App. 17. As such, the court determined that Jensen's claim for those benefits was "effectively" based on his position "that West Jordan 'narrowed the range of economic opportunities available to him . . . [and] caused a diminution in his ability to earn a living,'" such that Jensen's claim was for "a lost future earnings award" rather than front pay. App. 17-18. The court determined that the district court correctly reasoned that such "lost future earnings are analogous to 'injury to professional standing' and 'injury to character reputation'," which were "other nonpecuniary losses" that were subject to Title VII's damages cap. *Id.*

This decision relied on the Seventh Circuit's pre-*Pollard* decision in *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998). Prior to its decision in *Williams*, the Seventh Circuit had not even determined that front pay was a remedy available under Title VII, but in *Williams,* the court affirmed the trial "court's decision to award both front pay and Williams's lost future earnings as damages." *Id.* at 946, 951-53. The court explained the distinction between the two types of awards: "[t]he front pay award approximated the benefit Williams would have received had she been able to return to her old job;" but the "lost future earnings award, in contrast,

compensates Williams for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of Pharmacia's discrimination." *Id.* at 953. The court explained that "front pay awards are limited in duration" because they end when the plaintiff obtains comparable employment, but "lost future earnings" are not similarly limited because "[t]he reputational or other injury that causes the diminution in expected earnings can stay with the employee indefinitely." *Id.* at 954. The Tenth Circuit in *Jensen* determined that Jensen's lost pension benefits were the capped because they were like the "reputational" injury described in *Williams*. App. 17-18.

It has never been disputed that back pay awarded under Title VII is not subject to the damages caps. *See, e.g., Pollard*, 532 U.S. at 847-48. Since this Court determined in *Pollard* that front pay is not subject to Title VII's damages caps, at least two circuits have determined that lost income attributable to a defendant's damage to a plaintiff's reputation with a third party are properly considered to be back pay, not "reputational injury." In *Szeinbach v. Ohio State University*, 820 F.3d 814 (6th Cir. 2016), the Sixth Circuit considered a damages claim by a plaintiff who alleged the defendant had harmed her reputation, limiting her ability to get a higher-paying job at a different institution. Unlike the Tenth Circuit in this case, the Sixth Circuit considered the value of the damage to the plaintiff's ability to get another job to be back pay. Specifically, the court explained that if the defendant had caused the plaintiff not to get a job with a different employer, "then the appropriate measure of back pay would be the difference between (1) what

Szeinbach actually earned at OSU, and (2) what Szeinbach would have earned while working for the other university." *Id.* at 823. *Szeinbach* reasoned, "This interpretation of the backpay remedy is consistent with the remedy's purpose," which was "to place the plaintiff in the position that she would have occupied in the absence of any illegal conduct by her employer." *Id.* at 823-24.

Szeinbach relied in its analysis on *Nassar v. Univ. of Texas Sw. Med. Ctr.*, 674 F.3d 448 (5th Cir. 2012), *vacated on other grounds,* 570 U.S. 338 (2013). *Szeinbach* noted that the plaintiff in *Nassar* had been offered a job with a different employer, "Parkland," but an employee of the defendant university had contacted Parkland and stopped it from hiring Nassar; Nassar later went to work for a third employer. *Szeinbach*, 820 F.3d at 823, *citing Nassar,* 674 F.3d at 451. The Fifth Circuit decided "that the amount of Nassar's back pay could appropriately be based on a comparison between what he was earning with the third employer and what he would have earned had UTSW not improperly interfered with his job offer from Parkland." *Nassar,* 674 F.3d at 451.

Szeinbach and *Nassar* are consistent with Title VII case law prior to the 1991 amendments, in that economic redress was clearly available prior to 1991 if a worker's former employer retaliated against that worker in a manner that caused the rejection or dismissal of that worker by another employer. In *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977), when the plaintiff filed an EEOC charge against her former employer, the former employer retaliated by informing a prospective employer about that EEOC charge. The Tenth Circuit

affirmed the district court's conclusion that this retaliation effectively blacklisted the plaintiff, preventing her from getting hired by that prospective employer, and that the plaintiff was entitled to damages under Title VII for this retaliation. *Id.* at 1164-66; *see Sherman v. Burke Contracting, Inc.,* 861 F.2d 1527, 1535-36 (11th Cir. 1990) (awarding $10,000 against former employer that induced plaintiff's current employer to dismiss him); *Czarnowski v. Desoto, Inc.,* 518 F. Supp. 1252, 1260 (E.D. Ill. 1981) (awarding $16,000 against former employer for wages lost when plaintiff did not obtain a job because former employer disclosed to prospective employer that plaintiff had filed an EEOC charge).

The Tenth Circuit's decision in this case is inconsistent with all of these cases, pre- and post-1991 amendments, including its own decision in *Rutherford.* Jensen argued that his total lost pension benefits should be based on when he would have become pension-eligible in the absence of the retaliation. If (in the absence of retaliation) Jensen had obtained a position in law enforcement in 2010, he would have accumulated a total of 20 years of service by the end of 2017, and thus been entitled to begin drawing pension benefits, without regard to his age. The effect of the retaliation—and of Jensen's resulting inability to obtain a law enforcement job in or after 2010—was to postpone pension-eligibility until Jensen reaches 60. The *Szeinbach* court, relying on *Nassar,* would have determined that "the district court should have considered the possibility that employment opportunities with third-party employers might have affected the proper calculation of back pay." *Szeinbach,* 820 F.3d at 824.

This Court should grant certiorari to settle this split in the circuits as to whether economic losses recovered under Title VII that are caused by harm to a plaintiff's reputation are to be considered front pay or back pay that is not subject to damages caps, or "future pecuniary losses" that are subject to the caps. Without this Court's review, plaintiffs in the Tenth Circuit will find their economic damages claims capped so long as the defendant can attribute the damages to the plaintiff's diminished reputation, even when caused by the defendant.

CONCLUSION

For the reasons above, this Court should grant the petition for writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

April L. Hollingsworth
Counsel of Record
HOLLINGSWORTH LAW OFFICE, LLC
1881 South 1100 East
Salt Lake City, UT 84105
(801) 415-9909
april@aprilhollingsworthlaw.com
Counsel for Petitioner Aaron Jensen

February 26, 2021