

No. _____

IN THE

Supreme Court of the United States

UKPAI IGWEIKE UKPAI

Petitioner,

v.

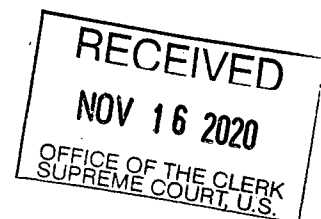
CONTINENTAL AUTOMOTIVE
SYSTEMS US, INC.,

Respondent.

**On Petition For Rehearing for A Writ Of
Certiorari To The United States Court Of
Appeals For The Sixth Circuit**

**PETITION FOR REHEARING FOR WRIT
OF CERTIORARI 20-172**

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INTRODUCTORY STATEMENT

The constitution of the United States, through the fifth amendment, affords every citizen the right to due process and equal protection under the law. This court, by its holdings and precedents have established authorities which the lower courts are bound to follow in the administration of justice and consistent with stare decisis.

QUESTIONS PRESENTED FOR REVIEW

1. Does the disposition of a case by a circuit court, in violation of an existing precedent established by this court, constitute a denial of a litigant's "Due Process" and "Equal Protection Under The Law" rights?
2. Does the vagueness and inconsistency of what constitutes a "similarly situated comparator" in employment discrimination cases render the concept void for vagueness and unconstitutional?
3. Is the requirement that a litigant produce a similarly situated comparator in proving a prima facie case a violation of the litigant's constitutional rights of due process and equal protection under the law?

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Petitioner Ukpai I Ukpai respectfully petitions this Court for a rehearing of Petitioner's writ of certiorari (20-172) to the United States Court of Appeals for the Sixth Circuit to review the order and opinion entered on February 18, 2020 and sustained by the order entered on May 4, 2020.

JURISDICTION

This court denied Petitioner's writ of certiorari (20-172) on October 13, 2020. Petitioner requests this rehearing under Supreme Court Rule 44(2) based on other substantial grounds not previously presented.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

GROUND FOR GRANTING A REHEARING

1. **The circuit court's review violates the doctrine of Stare Decisis. This action is a violation of petitioner's constitutional rights of due process and equal protection under the law.**

This petition raises the constitutional issue of equal justice under the law and denial of due process for litigants when a circuit court deviates from using the right standard of review in disposing a case while also clearly violating binding precedents and the holdings of this court which it is bound to follow. Due process guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding. The doctrine of Stare Decisis imposes on a circuit court precedents, both its own and those of this court, that it must follow¹. As a practical and administrative matter, this court needs to resolve this issue because the circuits are constrained by the "no panel overruling" rule².

¹ See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) (describing federal stare decisis as "a system of strict binding precedent"); *id.* at 1167 (doubtful that the "Framers viewed precedent in the rigid form that we do today"); *Ford v. Cimarron Ins. Co.*, 230 F.3d 828, 832 (5th Cir. 2000) (rule that one panel cannot overrule another is "immutable"); *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998) ("We are, of course, a strict stare decisis court."); *Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 405 (6th Cir. 1998) (prior panel decision is "binding stare decisis"); *Robbins v. Amoco Prod. Co.*, 952 F.2d 901, 904 (5th Cir. 1992) (panel "owe[s] strict obedience to circuit precedent").

² See *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 136 F.3d 34, 40 (1st Cir. 1998); *Woodling v.*

Furthermore, since a circuit court panel possess the authority to overrule precedent only when there has been an intervening, contrary decision by the Supreme Court or by the relevant court of appeals sitting en banc, a panel's decision that clearly violates precedents is an issue that has to be reviewed by this court when the only remedy, an en banc circuit hearing, has not been granted by the circuit court. As, on one hand, a litigant may make persuasive arguments for overruling precedent but the panel is obliged by circuit rule to ignore them³, so likewise, on the other hand, should the court

Garrett Corp., 813 F.2d 543, 557 (2d Cir. 1987); *Abdulai v. Ashcroft*, 239 F.3d 543, 553 (3d Cir. 2001); 3D CIR. I.O.P. 9.1; *Norfolk & West. Ry. Co. v. Dir., Office of Worker's Comp. Programs*, 5 F.3d 777, 779 (4th Cir. 1993); *Abraham*, 137 F.3d at 268; *Sam & Ali, Inc.*, 158 F.3d at 405; *Dir., Office of Workers' Comp. Programs v. Peabody Coal Co.*, 554 F.2d 310, 333 (7th Cir. 1977); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994); *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000); 11TH CIR. RULE 36-3; *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc); *Thompson v. Thompson*, 244 F.2d 374, 375 (D.C. Cir. 1957); *LaForte v. Horner*, 833 F.2d 977, 980 (Fed. Cir. 1987).

³ The "no panel overruling" rule which can be characterized as a rule of stare decisis or as a rule of circuit administration is explicitly treated by a fair number of cases as a variant of stare decisis. See, e.g., *Stauth v. Nat'l Union Fire Ins. Co.*, 236 F.3d 1260, 1267 (10th Cir. 2001); *United States v. Lewko*, 269 F.3d 64, 66 (1st Cir. 2001); *Abraham*, 137 F.3d at 269; *Williams v. Chrans*, 50 F.3d 1356, 1357 (7th Cir. 1995). In the present context it acts as part of stare decisis doctrine as the "no panel overruling" rule, like the rules of stare decisis generally, specifies the terms on which precedent may be overruled

follow precedents in disposing a litigant's case. Any divergence from this standard presents a denial of due process for the litigant and is evidence of unequal treatment under the law. These issues become more pronounced, as in the instant case, when a legal concept involved in the disposition, namely the concept of similarly situated employees, has been used in an onerous manner (thereby violating the precedent⁴ by this court that the burden was not meant to be onerous and also at variance⁵ with prior decisions of both the Sixth as well as other Circuits). This violation of precedent and the practical fact that this was not corrected at the circuit court level, invariably due to the 'no panel overruling' rule, equates to a denial of due process to petitioner as has been noted by some

⁴ *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Watson*, 487 U.S. at 986

⁵ *Ortiz v. Norton* 254 F.3d 889 (10th Cir. 2001); *Abdu-Brisson v. Delta Air Lines, Inc.* 239 F.3d 456 (2d Cir.), cert. denied, 122 S. Ct. 460 (2001); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998); *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 511 (3d Cir. 1996.); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); In *Johnson v. California*, 545 U.S. 162 (2005), this court granted certiorari to review a California rule that imposed and improperly restrictive standard for establishing a prima facie case of discrimination in the use of peremptory challenges. 545 U.S. at 170; see *Batson v. Kentucky*, 476 U.S. 79 (1986). The practical importance of the standard adopted by the Sixth circuit is significantly greater than the rule at issue in *Johnson*.

scholars⁶. Such violations of precedents, at best, can be attributed to the vagueness of the concept involved which points to it being void for vagueness.

2. **The court's use of, and reliance on, the concept of "similarly situated employees" to exclude petitioner from the protection of the anti-discrimination laws is a violation of petitioner's constitutional right of equal protection under the law.**

The vagueness and arbitrariness in the use of the similarly situated employee concept and its lack of any consistent set of characteristics (even within the same circuit)⁷ violates the due process clause through being void for vagueness. This

⁶ John McCoid has observed that if rigorously followed, the "no panel overruling" rule "seems to be on the borderline of a denial of due process to the party who is adversely affected by the prior decision. He has no true day in court on his claim or defense." John McCoid, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 513 (1991); see also Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 306-07 (1979), (identifying a due process problem in the application of stare decisis, albeit a due process problem of less severity than that posed by res judicata).

⁷ *Lewis v. City of Union City, Ga* No. 15-11362, 2019 U.S. App. LEXIS 8450 (11th Cir. Mar. 21, 2019); *Clayton v. Meijer, Inc.*, 281 F.3d 605609-10 (6th Cir.2002); *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 511 (3d Cir. 1996; *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998); *Mitchell v. Toledo Hospital*, 964 F. 2d 577 (6th Cir. 1992); *Ortiz v. Norton* 254 F.3d 889 (10th Cir. 2001)

vagueness has led to different circuits fashioning different standards to decide what constitutes a 'similarly situated employee'. This extremely discretionary, arbitrary and, often times, inconsistent standards makes manifest the vagueness of the concept and points to its violation of a litigant's constitutional right especially when an alternative path is available to the court to evaluate the issue in question. This court has held that the concept of void for vagueness gives too much discretion and leads to laws that are "unevenly enforced"⁸. The violation of petitioner's constitutional right to due process and equal protection under the law is magnified when the practical effect of the court's decision is the complete exclusion of a plaintiff from the protection of the anti-discrimination laws, more so, when this court and other circuits have established alternative means for the court to decide the issue of petitioner's discrimination by respondent⁹.

⁸ *U.S v White*, 2010, also *United States v. White*, 571 F.3d 365, 365-66, 373 (4th Cir. 2009)

⁹ *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998) and *County of Washington v. Gunther* 452 U.S. 161 (1981); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Debrow v Century 21 Great Lakes, Inc.* 463 Mich 534, 620 NW2d 836 (2001), *Mitchell v Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992); *Hazle v Ford Motor Company*, 464 Mich 456, 466, 628 NW2d 515 (2001), citing M Civ JI 105.02; *Cordova*, 124 F.3d at 1148 (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994); *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29 (2d Cir. 1994); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d at 1217 (1998); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986);

Ultimately, this court would have to resolve this issue to protect the constitutional rights of litigants as the recent en banc decision of the Eleventh Circuit¹⁰ illustrates. Noting the inconsistencies and the problems in applying different standards within the circuit, the Eleventh Circuit confessed that the situation is "...a mess"¹¹ before the en banc court adopted its latest standard that a plaintiff must demonstrate, at the first stage of the analysis, that she and the comparators were

Fernandes v. Costa Bros. Masonry, Inc. 199 F.3d 572 (1st Cir. 1999); *Conward v. Cambridge School Committee* 171 F.3d 12 (1st Cir. 1999); *Marzano v. Computer Science Corp.* 91 F.3d 497 (3d Cir. 1996); *Matczak v. Frankford Candy & Chocolate Co.* 136 F.3d 933 (3d Cir. 1997); *Bray v. L.D. Caulk Dentsply International* No. C.A. 98-441-SLR, 2000 WL 1800527 (D. Del. July 31, 2000); *Maull v. Div. of State Police*, 141 F. Supp. 2d 463,478 (D. Del. 2001) ("While there does not appear to be a requirement that a plaintiff prove that similarly situated individuals were treated differently at the prima facie case stage of a race discrimination claim, the Third Circuit does require the plaintiff to show circumstances which give rise to an inference of discrimination [Such circumstances] include the more favorable treatment of individuals who are not in the plaintiff's protected class."); No. Civ. A. 00-509, 2001 WL 632932, at *3 (E.D. Pa. June 6, 2001) (stating that the plaintiff may establish a prima facie case with evidence that the employer treated similarly situated individuals more favorably but that such evidence was not required); *Mitchell v. Toledo Hospital* 964 F.2d 577 (6th Cir. 1992) (she [Plaintiff] could establish that "a comparable non-protected person was treated better."); *Schneider v. United States Dep't of Transp.* No. 96-15141, 1997 WL 124346, at * 1 (9th Cir. Mar. 13, 1997)

¹⁰ *Lewis v. City of Union City* 918 F.3d 1213 (11th Cir. 2019)

¹¹ *Id.*

"similarly situated in all material respects"¹². The standard adopted by the Sixth Circuit in its review of the instant case is no different in its level of vagueness and arbitrariness as the same Sixth Circuit had held in *Ercegovich v. Goodyear Tire & Rubber Co.*,¹³ that the plaintiff only had to show that he was similar to the comparator in "all of the relevant aspects,"¹⁴ Even with this standard, the Sixth Circuit clearly violated this courts holding that the plaintiff's burden is not onerous¹⁵. The Third Circuit in rejecting a similarly situated requirement stated that, "[a]ll employees can be characterized as unique in some ways and as sharing common ground with 'similarly situated employees' in some other ways"¹⁶ The court stated that the requirement "would seriously undermine legal protections against discrimination ... [because] any employee whose employer [could] for some reason or other classify him or her as 'unique' would no longer be allowed to demonstrate discrimination inferentially....."¹⁷ The court saw "no value in, and no mandate in our jurisprudence for, such a requirement."¹⁸ In the instant case, in

¹² Id

¹³ 154 F.3d 344 (6th Cir. 1998).

¹⁴ Id

¹⁵ *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)

¹⁶ *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 511 (3d Cir. 1996).

¹⁷ *Id.* at 510-11.

¹⁸ *Id.* at 511; see also *Abdu-Brisson*, 239 F.3d at 467;

finding that the petitioner and the comparator (Urban) are not similarly situated, the Sixth Circuit noted that Ukpai and Urban

“... were Continental employees, both were supervised by Gilley while at KCAP, and both were tasked with performing the same pump inspections that Ukpai was expected to perform. However, there are also significant differences. First, Urban's permanent place of employment was a Continental facility in the Czech Republic, whereas White was based at a Continental facility in Newport News, Virginia. The supervisors in Auburn Hills who ultimately terminated Ukpai's employment did not supervise Urban or White. While the supervisor issue might not be determinative, it is still relevant, particularly where Urban and White worked at entirely different facilities”¹⁹.

The vagueness and arbitrariness of the concept is evident since all the Sixth Circuit panel had to do to support its opinion (in spite of the presumption it made in favor of the respondent in clear violation of its own and this court's precedents²⁰) was ultimately note a difference

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344,353 (6th Cir. 1998).

¹⁹ App A of Writ of Certiorari (20-172), Sixth Circuit Opinion at pp 4.

²⁰ *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *Anderson v. Liberty Lobby, Inc.*, 477

which is neither relevant to the conduct in question nor to the supervision of petitioner and the comparator while totally relegating, as irrelevant, whether the supervisor involved treated the comparator differently from the petitioner.

CONCLUSION

Petitioner respectfully asks that this Court grant this Petition for the rehearing of the writ of certiorari, so that his case may be examined on its merits and the law.

Respectfully submitted,



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CERTIFICATE OF PETITIONER

No.

UKPAI IGWEIKE UKPAI,

Petitioner

v.

CONTINENTAL AUTOMOTIVE SYSTEMS US,
INC.,

Respondent

As required by Supreme Court Rule 44(2), I certify that the petition for rehearing for a writ of certiorari is restricted to substantial grounds not previously presented and it is presented in good faith and not for delay

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 2020



/s/ Ukpai I Ukpai