ORIGINAL

20-296

No. 20-_____

In The

Supreme Court of the United States

CHRISTINA V. LE,

Petitioner,

v.

Secretary,
DEPARTMENT OF THE NAVY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The circuit courts of appeals split on the issue of jurisdiction regarding breach of settlement agreement resolving discrimination charge under Title VII of the Civil Rights Act of 1964.

The question presented is whether an employee is entitled to file suit of breach of settlement agreement as discrimination or retaliation under Title VII.

In *Babb v. Wilkie*, No. 18-882, 589 U.S. ___ (2020), the Court specifically held, "That Congress would want to hold the Federal Government to a higher standard than state and private employers is not unusual"; a subsidiary question is whether this holding is applicable to federal employees under Title VII discrimination and retaliation.

2. In *Hannah v. Larche*, 363 U.S. 420 (1960), the Court stated:

> [The] exact boundaries [of due process] are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.

The question presented is whether the EEOC's actions, findings, and conclusions are subject to judicial review under the Administrative Procedure Act (APA) in connection with the adjudication of claims under Title VII of the Civil Rights Act of 1964.

PARTIES

The petitioner is Christina V. Le.

The respondent is the Secretary, Department of the Navy.

RELATED CASES

Related cases are as follows:

1. [related to] The instant case:

United States Court Of Appeals For The Ninth Circuit

Case No. 19-55578

CHRISTINA V. LE v. RICHARD V. SPENCER, Secretary of the Navy

Entry of Judgment: April 13, 2020

United States District Court Central District Of California

Case No. EDCV 18-01564-JGB(SPx)

CHRISTINA V. LE v. RICHARD V. SPENCER, Secretary of the Navy

Entry of Judgment: April 24, 2019

2. Previous case:

United States District Court Central District Of California

Case No. EDCV 14-00103-JGB(SPx)

CHRISTINA V. LE v. RICHARD V. SPENCER, Secretary of the Navy

Entry of Judgment: May 21, 2014

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Christina V. Le respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit Order of Summary Affirmance dated November 22, 2019 is set out at App. 1a. District Court Judgment (DCJ) and Dismissing Order dated April 24, 2019 are set out at App. 2a and 3a. The DCJ is based on the District Court Order (opinion) dated February 27, 2019. App. 5a.

JURISDICTION

A timely petition for rehearing en banc was denied on April 13, 2020. App. 17a. On March 19, 2020, the Supreme Court extended the time to file this petition for a writ of certiorari to 150 days from the date of the lower court judgment.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] *See* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 2000e-2(a) provides in relevant part that "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-3(a) provides in relevant part that "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-5(b) provides that the EEOC has a statutory duty to attempt to resolve findings of discrimination on charges through conciliation. 42 U.S.C. § 2000e-16(a) provides in relevant part that "All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

28 U.S.C. § 1367(a) provides in relevant part that "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action."

29 C.F.R. § 1614.407(c) provides, in relevant part, that "A complainant who has filed an individual

complaint . . . is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court . . . within 90 days of receipt of the Commission's final decision on an appeal." 29 C.F.R. § 1614.504(a) provides in relevant part that "Any settlement agreement knowingly and voluntarily agreed to by the parties . . . shall be binding on both parties . . . The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased."

The principal statutory authorities governing judicial review of agency action are 5 U.S.C. §§ 701-706. 5 U.S.C. § 704 provides in relevant part that "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 706 provides in relevant part that "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; . . . (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."

INTRODUCTION

Every year, tens of thousands of employees bring retaliation claims under Title VII of the Civil Rights Act of 1964 and related statutes prohibiting workplace discrimination. EEOC FY 2019 statistics shows retaliation charges continue to represent the majority of charges with 53.8% (39,110 cases) of all filed charges.[2] The EEOC has a statutory duty to attempt to resolve findings of discrimination on charges through conciliation. 42 U.S.C. § 2000e-5(b). Consequently, there have been a significant number of claims of breach of settlement agreements due to a large number of cases resolved through settlements prior to a formal determination. Yet, over the span of 30 years, from 1985 to 2015, the federal courts of appeals have provided conflicting decisions on the issue of jurisdiction regarding breach of settlement agreement resolving discrimination charge under Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII").

The mission of the U.S. Equal Employment Opportunity Commission (EEOC) is to stop and remedy unlawful employment discrimination in the workplace by enforcing Federal laws that prohibit employment discrimination.[3] For the Federal sector in particular,

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[2] *See* EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data, https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data.

[3] *See* U.S. Equal Employment Opportunity Commission (EEOC) OPEN GOVERNMENT PLAN, (Version 4.0, July 2016), https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-open-government-plan.

the EEOC states, "EEOC assures federal agency and department compliance with EEOC regulations . . . concerning EEO complaint adjudication . . . provides guidance and assistance to our Administrative Judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints (emphasis added)."[4] Each year, the EEOC adjudicates tens of thousands of EEO cases. As such, the EEOC's actions or decisions should be held accountable under the APA. 5 U.S.C. § 706 requires the reviewing court to hold unlawful and set aside agency actions, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "contrary to constitutional right" or "unsupported by substantial evidence."

STATEMENT OF THE CASE

I. Legal Background

A. Subject Matter Jurisdiction Regarding Breach of Settlement Agreement Resolving Discrimination Charge Under Title VII

In deciding subject matter jurisdiction, seven circuit courts of appeals split on the issue of jurisdiction regarding breach of settlement agreement resolving discrimination charge under Title VII. See *Eatmon v.*

[4] *See* Federal Sector, https://www.eeoc.gov/federal-sector.

Bristol Steel & Iron Works Inc., 769 F.2d 1503 (11th Cir. 1985) (an individual, not just the EEOC, may bring suit under Title VII to enforce a predetermination settlement agreement); *Ruedlinger v. Jarrett*, 106 F.3d 212 (7th Cir. 1997) (all of the reasons that support Title VII jurisdiction over such actions when brought by the EEOC apply with equal force to actions brought by the aggrieved employees to enforce conciliation agreements); *Vimla Saksenasingh v. Secretary of Education*, 126 F.3d 347 (D.C. Cir. 1997) (Saksenasingh could sue on her original complaint, and the breach of settlement claim could be brought as a supplemental retaliation claim under 28 U.S.C. § 1367); *Frahm v. United States*, 492 F.3d 258, 262 (4th Cir. 2007) (the district court found that it lacked jurisdiction with respect to the breach of settlement agreement claim because of 28 U.S.C. § 1491(a)(1), which confers jurisdiction on the Court of Federal Claims for "any claim against the United States founded . . . upon any express or implied contract with the United States"); *Lindstrom v. United States*, 510 F.3d 1191 (10th Cir. 2007) (waiver of sovereign immunity under section 717 of Title VII [42 U.S.C. §§ 2000e-5(f), 2000e-16] does not apply to breach of settlement agreement); *Munoz v. Mabus*, 630 F.3d 856 (9th Cir. 2010) (Congress has not provided for enforcement of settlement agreements in federal court); *Charles v. McHugh*, 613 F. App'x 330 (5th Cir. 2015) (Congress has not waived sovereign immunity).

B. Constitutional Rights To Due Process And Equal Protection Under The APA

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that the concepts of Equal Protection (Fourteenth Amendment) and Due Process (Fifth Amendment) are not mutually exclusive, establishing the reverse incorporation doctrine.

Under the APA, government agency's violation of constitutional rights is subjected to judicial review. "When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420 (1960). The Supreme Court set the conditions to determine "final" agency action in *Bennett v. Spear*, 520 U.S. 154 (1997). The Court stated that the EEOC has the authority to determine "rights or obligations" in *West v. Gibson*, 527 U.S. 212 (1999). In *Sackett v. EPA*, 566 U.S. 120 (2012), the Sacketts contended, under the APA, that the EPA (Environmental Protection Agency) deprived them of "life, liberty, or property, without due process of law," in violation of the Fifth Amendment and the Court granted certiorari, reversed and remanded. The Court held that approved JD [Jurisdictional Determination] is a final agency action judicially reviewable under the APA. *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___ (2016).

II. Factual Background And EEOC Administrative Proceedings

A. Factual Background

Petitioner Le had a history of very good performance with regular and significant salary increases until she filed EEO complaints in 2009. From 1991-2002 she worked at Naval Surface Warfare Center (NSWC) Port Hueneme Division, Ventura, California where she received continuous pay raises and excellent praises in letters of recommendations from high level managers. In January 2003, she transferred to the NSWC Corona Division, 1999 Fourth St., Norco, CA 92860, working as an engineering team lead, in the Sunset Supply Base (SSB) QA32 branch under Quality Assessment (QA) department. She was rated excellent performance and received significant and uninterrupted pay raises from 2003-2008. Around 2008, management allowed cronyism and harassments to develop and the work environment became increasingly hostile as her immediate supervisor, Branch Head (BH) Raymond Tadros, wanted to give her job to his favorite employee, a Caucasian man. Ms. Le filed her first EEO complaint in May 2009. Then management issued no pay raise in 2009 and 2010 and humiliated her by moving her into a small shared office while allocating large private offices to her peers. In March 2010, Mr. Tadros removed her from the team lead position.

The 2009 EEOC case was settled on August 3, 2010. This agreement (hereafter, "2010 Settlement

Agreement"), signed by QA Department Head (QADH) Gregg Johnson and Ms. Le, provided her with a *Department Staff* position reporting directly to the QADH which is two levels above branch head. In addition, the Agreement provided her with telework benefit; restored to a large private office that she was previously encumbered; compensated pay raises and bonuses for 2009 and 2010; restored loss sick leave; and monetary compensation of $100,000 (including attorney's fees and costs). Pursuant to the terms of the Agreement, the QADH was also required to supervise and mentor Ms. Le for career advancement. Not long after settlement, management started to pursue a series of adverse actions against Ms. Le: issued no pay raises; moved Ms. Le back into small shared office; and reassigned Ms. Le to an entry-level position (beginner auditing work) despite her length of service and experience. Ms. Le again filed EEO complaints in September 2011 through December 2014 (eleven Issues), which were unlawfully fragmented processing into 3 separate EEO cases.

Ms. Le was diagnosed with significant depression, anxiety and high levels of stress, which related to the hostile work environment where she was employed. In October 2013, Ms. Le's primary care physician put Ms. Le off work for one month from October 16 through November 17, 2013. The doctor strongly recommended that Ms. Le "be separated from the hostile environment". Therefore, Ms. Le requested Leave Without Pay (LWOP) as Reasonable Accommodation. Her LWOP request was denied in November 2013; then in March

2014, after Administrative Judge (AJ) Dennis Carter granted a default judgment on Reassignment case in which he found discrimination and retaliation, QADH Doug Sugg at that time, approved Ms. Le's LWOP from March 2014 to the end of February 2015. Mr. Johnson, formerly QADH, now ARDH (Acquisition and Readiness Assessment Department Head) replaced Mr. Doug Sugg, further approved Ms. Le's LWOP till part of October 2015. On October 17, 2015, Mr. Johnson denied Ms. Le's LWOP request, EEOC 480-2016-00749X (new Issue 1). On December 02, 2015, Mr. Johnson issued the Notice of Proposed Removal (new Issue 2). On March 1, 2016, directed by Mr. Johnson and without advanced notice, Mr. William Collier, Human Resources specialist, and Mr. John Ryan, Information Technology worker, suddenly seized her laptop at building 509, NSWC Corona Division, EEOC 480-2016-00750X (new Issue 3). On March 9, 2016, Deputy Technical Director Dianne Costlow, Mr. Johnson's superior, issued the Removal letter effective March 11, 2016, EEOC 480-2016-00750X (new Issue 4). These 4 new issues were again unlawfully fragmented processing into 2 new separate EEO cases.

B. EEOC Administrative Proceedings

The EEOC conducted 7-day hearing in July and August 2015 for 3 EEOC cases starting September 2011 through March 2014 (eleven Issues). On November 7, 2016, AJ Dennis Carter issued his final ruling (FR) that arbitrarily contradicted his previous rulings on January 29, 2014, April 13, 2015 and May 5, 2015

in which the AJ granted and reaffirmed a Default Judgment and an Adverse Inference against the Agency.

On December 8, 2016, Ms. Le filed Notice of Appeal to the OFO (Office of Federal Operations, EEOC appellate authority), appeal No. 0120170670. On April 27, 2018, the OFO issued a decision which affirmed the FR without proper written fact finding and lawful analysis. On February 25, 2017, Ms. Le filed Notice of Appeal, appeal Nos. 0120171311 and 0120171312 (EEOC 480-2016-00749X and EEOC 480-2016-00750), regarding the four new Issues (complaints) for the period from October 2015 to March 2016 (involuntary termination). For these two appeals, on April 27, 2018, the OFO issued a decision to VACATE and REMAND for further processing at EEOC LA District. On July 26, 2018, the AJ ignored the OFO ruling and issued an Order to dismiss these four new Issues. The below civil action has been filed within 90 days of Ms. Le's receipt of her right-to-sue letters from the EEOC. Ms. Le has complied with all statutory prerequisites to filing this action.

III. Federal Court Proceedings

On July 24, 2018, Ms. Le commenced civil action in the District Court for the Central District of California alleging that she was subject to discrimination, hostile work environment, and retaliation based on prior EEO activities in violation of Title VII of the Civil Rights Act of 1964, the Age Discrimination in

Employment Act of 1967 (ADEA), the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973. Defendant filed first motion to dismiss on September 24, 2018 ("MTD1").

On November 19, 2018, Ms. Le filed First Amended Complaint (FAC). On December 3, 2018, Defendant filed second motion to dismiss ("MTD2"). On February 27, 2019, the District Court granted in part Defendant's MTD2 (docket No. 37) and granted Ms. Le leave to amend her FAC. On March 10, 2019, Ms. Le filed Notice of Intent not to file a second amended complaint and requested the District Court to issue a final judgment so that Ms. Le can properly file a Notice of Appeal to the Ninth Circuit. On April 24, 2019, the District Court issued a Minute Order (docket No. 44) to dismiss Ms. Le's FAC without leave to amend and closed the case; also a final judgment (docket No. 45) was issued. On May 20, 2019, Ms. Le filed Notice of Appeal with the Ninth Circuit. On July 18, 2019, Ms. Le filed Plaintiff-Appellant's Opening Brief. On September 17, 2019, Defendant-Appellee filed Motion For Summary Affirmance ("MSA"). On September 25, 2019, Ms. Le filed opposition to MSA. On November 22, 2019, the Ninth Circuit issued a Summary Affirmance. On January 6, 2020, Ms. Le filed Petition For Rehearing En Banc and the Ninth Circuit denied this petition on April 13, 2020.

The principal document based on which Appellant appealed to the Ninth Circuit is the District Court Order #37 (with opinion). The District Court's subsequent orders (without opinion) are procedural requirements

for appeal. On appeal, Ms. Le argued that, in making decision on jurisdiction, the District Court erred because Ms. Le filed charges for Defendant's discriminatory and retaliatory conducts occurred not before but after the 2010 Settlement Agreement. More importantly, the District Court erred in preventing Ms. Le to demonstrate necessary background facts. The material facts related to the settlement agreement as articulated in the FAC are to support Ms. Le's allegations that the EEOC violated the Due Process and Equal Protection under the APA and to serve as background for subsequent (post August 2010) discrimination and retaliation claims.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Resolve Circuit Courts Split On The Issue Of Jurisdiction Regarding Breach Of Settlement Agreement Resolving Discrimination Under Title VII.

The first question presented is a matter of national importance. As long as the first question presented remains unanswered by this Court, thousands of employees and their employers operate in a legal environment lacking uniformity.

Allowing geographical and public-vs-private sector happenstance to affect the jurisdiction of numerous number of breach of Settlement Agreement claims

brought each year produces untenable results. This uncertainty should not persist.

A. The Eleventh and Seven Circuits Have Held That Under Section 706(f)(3) of Title VII, 42 U.S.C. § 2000e-5(f)(3), The District Court Shall Have Jurisdiction Of Actions Brought By Aggrieved Persons.

In *Eatmon*, the Eleventh Circuit held:

> Section 706(f)(3) of Title VII, provides, in relevant part, that "[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter [i.e., Title VII]" . . . the courts have recognized that suits brought by the EEOC to enforce "Title VII conciliation agreements" entered into by the EEOC, the employer and the affected employees also are suits "brought under" Title VII, over which federal courts have subject matter jurisdiction . . . Following this line of authority, we hold that the releases signed by the employed appellees, in which they agreed not to bring charges under Title VII in return for Bristol Steel's compliance with the executive order conciliation agreement, are themselves "Title VII conciliation agreements" (emphasis added).

In *Ruedlinger*, the Seventh Circuit stated:

> We agree with the Eleventh Circuit's statement in Eatmon, 769 F.2d at 1510, that: All of the reasons that support Title VII jurisdiction over such actions when brought by the EEOC apply with equal force to actions brought by the aggrieved employees to enforce conciliation agreements entered into by the EEOC, their employers and themselves. The congressional goal of enforcing Title VII through conciliation and voluntary compliance would be hampered if employees could not seek to enforce in federal courts conciliation agreements between themselves, their employers and the EEOC . . . Accordingly, we hold that private plaintiffs may bring an action under Title VII to enforce a pre-determination settlement agreement.

B. The Fourth, Tenth, And Fifth Circuits Have Held That The District Court Does Not Have Subject Matter Jurisdiction Because Congress Did Not Consent To Being Sued By Federal Employees To Enforce Settlement Agreements.

In *Lindstrom*, citing *Frahm*, the Tenth Circuit held:

> Congress has, admittedly, waived sovereign immunity in Title VII suits where the federal government is the employer. 42 U.S.C. § 2000e-16(d). However, this statutory waiver

> does not expressly extend to monetary claims [or claims for specific performance] against the government for breach of a settlement agreement that resolves a Title VII dispute.

In *Charles*, the Fifth Circuit stated:

> Charles's claim is based on two arguments: (1) her alleged incompetence to voluntarily sign the Agreement and (2) the alleged coercion. These are both arguments seeking rescission based entirely upon contract law principles. That the contract was a settlement agreement for Title VII claims is tangential. Charles does not allege that she was discriminated against during settlement negotiations on any of the prohibited grounds, nor that the alleged coercion was because of her "race, color, religion, sex or national origin." § 2000e-16(c). Therefore, she does not assert a claim for which Congress has waived sovereign immunity.

Charles agrees with *Frahm and Lindstrom* that "Congress did not consent to being sued by federal employees to enforce settlement agreements reached as a result of Title VII discrimination claims, and thus a district court does not have subject matter jurisdiction over the suit." *Lindstrom* declined to adopt the rulings of *Eatmon* and *Ruedlinger*, citing these cases did not involve the reach of 29 C.F.R. § 1614.504(a) because the federal government was not the employer.

C. The D.C. Circuit Has Held That The District Court Has Supplemental Jurisdiction Under 28 U.S.C. § 1367 On Breach Of Settlement Agreement As Retaliation Under Title VII.

Section 1367 codified the concept of pendent or ancillary jurisdiction set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The section also provides the statutory basis upon which a federal district court can exercise subject matter jurisdiction over a state law claim that could not, by itself, be brought in federal court if such a claim arises from the same set of operative facts that form the basis of the underlying federal claim. Specifically, § 1367(a) provides, in relevant part, that "district courts *shall* have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (emphasis added).

In *Saksenasingh*, the D.C. Circuit ruled, "the District Court had discretion to exercise jurisdiction over her retaliation claims. Dismissal of the retaliation claims for want of jurisdiction was error. 28 U.S.C. s 1367 (1994)." The Court further asserted, "Because Saksenasingh could sue on her original complaint, and the breach of settlement claim could be brought as a supplemental retaliation claim."

In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Supreme Court held:

> Although the district courts may not exercise jurisdiction absent a statutory basis, it is well established in certain classes of cases that, once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy.

D. The Ninth Circuit Has Asserted That Congress Has Not Provided For Enforcement Of Settlement Agreements In Federal Court And That 29 C.F.R. § 1614.504 Is "Silent" As To Whether An Employee May Proceed To Federal Court.

"No such waiver of sovereign immunity exists in the regulatory or statutory scheme as a whole; rather, reading 29 C.F.R. § 1614.504 in context only reinforces our conclusion that Congress had no intention of providing a cause of action based on an alleged breach of a predetermination settlement agreement." *Munoz v. Mabus*, 630 F.3d 856 (9th Cir. 2010). The Court asserted, "Congress, while encouraging resolution of Title VII complaints through predetermination settlement agreements . . . has nonetheless not provided for enforcement of such agreements in federal court." *Id.* In particular, the Court articulated "Had Munoz chosen to reinstate his underlying discrimination complaint instead of seeking specific performance, his claim could eventually have been heard in federal

court after exhausting administrative procedures, even though § 1614.504 is silent as to that possibility." *Id.*

E. This Court Should Settle The Issue Of Whether 29 C.F.R. § 1614 Authorized A Civil Action In Federal Court On Breach Of Settlement Agreement Resolving Discrimination Charge Under Title VII.

Citing *Frahm*, *Lindstrom* stated:

> The court concluded that 29 C.F.R. § 1614.504(a) only permits a federal employee complainant to elect one of two options – either request specific performance or reinstatement of the complaint – and that no other options are available. *See id.* at 263. Congress did not consent to being sued by federal employees to enforce settlement agreements reached as a result of Title VII discrimination claims, and thus a district court does not have subject matter jurisdiction over the suit.

Charles stated, "The only relevant EEOC regulation that contemplates civil action in the district court is 29 C.F.R. § 1614.407, but this section does not independently authorize any civil action in federal court – it only sets deadlines for those civil actions already permitted by statute."

Munoz held:

> 29 C.F.R. § 1614.504 allows an employee alleging noncompliance to choose between two exclusive remedies, namely specific performance or reinstatement of the original discrimination complaint. 29 C.F.R. § 1614.504(a) . . . On its face, the regulation is silent as to whether an employee may proceed to federal court after receiving an adverse EEOC determination.

Munoz seems to indicate 29 C.F.R. § 1614 is flawed, and that § 1614.504 ends the administrative process and subsequently complainant has no more recourse.

Munoz, Charles and *Lindstrom* are not persuasive. Their rulings are in conflict with the EEOC's well-established practice because the EEOC's decision letter always includes a paragraph named Complainant's Right To File A Civil Action specifying "you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days" of receipt of the Commission's final decision on an appeal which is evidently based on 29 C.F.R. § 1614.407(c). This paragraph clearly defines the next step beyond the EEOC administrative process, which includes action taken based on § 1614.504 and related the OFO's decision, that is a civil action for Title VII, Age Discrimination in Employment Act and Rehabilitation Act. Section 1614.504 does not need to repeat what has been clearly established by § 1614.407 regarding plaintiff's right to file a civil action. The *Munoz, Charles* and *Lindstrom* courts seem to use § 1614.504 to invalidate § 1614.407.

F. This Court Should Resolve The Issue Of Whether "To Hold The Federal Government To A Higher Standard" Is Applicable To Federal Employees Under Title VII.

Regarding age discrimination, in *Babb v. Wilkie*, No. 18-882, 589 U.S. ___ (2020), the Court ruled, "That Congress would want to hold the Federal Government to a higher standard than state and private employers is not unusual". In broad contrast to the *Babb* Court, the *Munoz* and *Lindstrom* courts imposed a higher obstacle for Federal employees as compared to the *Eatmon* and *Ruedlinger* courts' standard for private employees. The time is ripe for this Court to resolve the issue of whether this higher standard principle is applicable to federal employees under Title VII discrimination and retaliation based on sex, race, color, national origin, and prior EEO activity.

II. Certiorari Should Also Be Granted To Affirm That The EEOC's Adjudication Is Subject To Judicial Review Under The APA.

The second question presented is a matter of national importance because the EEOC is the principle agency designated by Congress to enforce Federal laws that prohibit discrimination in the workplace.

A. The EEOC's Action Or Decision Amounted To Final Agency Action Is Subjected To Judicial Review Under The APA, 5 U.S.C. § 704.

The Administrative Procedure Act of 1946 (APA) creates a presumption in favor of judicial review of agency action. In order for an agency action, in this case an EEOC's action or decision, to be subject to judicial review it must be final. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

The Supreme Court held:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948) – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (emphasis added). *Bennett v. Spear*, 520 U.S. 154 (1997).

The Supreme Court unambiguously ruled that the EEOC has the authority to determine and oblige rights or obligations of other government agencies:

> The question in this case is whether the Equal Employment Opportunity Commission (EEOC) possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964, 84 Stat. 121, 42 U.S.C. § 2000e et seq. We conclude that the EEOC does have that authority. *West v. Gibson*, 527 U.S. 212 (1999).

Even disclosing the employer confidential information without notice constitutes a final agency action under the APA. The D.C. Circuit stated:

> A "final agency action" within the meaning of the APA is "the consummation of the agency's decisionmaking process . . . by which rights or obligations have been determined or from which legal consequences will flow." Bennett v. Spear . . . In sum, as we held in Venetian II, rejecting the Commission's challenge to the ripeness of Venetian's claims, "the question whether EEOC's disclosure policy is lawful presents a live and focused dispute emanating from agency action that is both final and consequential to Venetian." 409 F.3d at 367. *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925 (D.C. Cir. 2008) (emphasis added).

B. Government Agencies Are Liable For Due Process Violations Committed In The Course Of Performing Their Adjudication Functions.

The Supreme Court held that property owners can challenge the EPA's compliance order as a final agency action:

> The Sacketts, who do not believe that their property is subject to the [Clean Water] Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief. Their complaint contended that the EPA's issuance of the compliance order was "arbitrary [and] capricious" under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and that it deprived them of "life, liberty, or property, without due process of law," in violation of the Fifth Amendment. *Sackett v. EPA*, 566 U.S. 120 (2012).

The Supreme Court held that an approved Jurisdictional Determination, which satisfies the *Bennett*'s conditions, is a final agency action judicially reviewable under the APA:

> The Clean Water Act regulates "the discharge of any pollutant" into "the waters of the United States." 33 U. S. C. §§ 1311(a), 1362(7), (12) . . . During the time period relevant to this case, for example, the Corps defined that term to include all wetlands, the "use, degradation or destruction of which could affect

> interstate or foreign commerce." 33 CFR § 328.3(a)(3). Because of that difficulty, the Corps allows property owners to obtain a standalone "jurisdictional determination" (JD) specifying whether a particular property contains "waters of the United States." § 331.2. *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___ (2016).

In *Sackett v. EPA* and *Army Corps of Engineers v. Hawkes Co.*, the federal law at issue is the Clean Water Act and the government agencies that adjudicate the disputed issues are the EPA and the Army Corps of Engineers respectively. Similarly, here, the federal law at issue is Title VII. As such, EEOC's actions, findings, and conclusions should be reviewable under the APA.

C. The EEOC's Reviewable Actions Pursuant To 5 U.S.C. § 706.

In the instant case, the EEOC's adjudication failed to follow the law and settled precedents including failure to follow its own regulation, EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, August 25, 2016 ("EEOC Enforcement Guidance"). EEOC Enforcement Guidance subsection II.C.1.b provides the following:

> By contrast, in federal sector Title VII and ADEA retaliation cases, the Commission has held that the "but for" standard does not apply because the relevant federal sector statutory provisions do not employ the same language on which the Court based its holding in

> *Nassar.* The federal sector provisions contain a "broad prohibition of 'discrimination' rather than a list of specific prohibited practices," requiring that employment "be made free from any discrimination," including retaliation. Therefore, in Title VII and ADEA cases against a federal employer, retaliation is prohibited if it was a motivating factor.

The EEOC's actions, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "contrary to constitutional right" or "unsupported by substantial evidence", in violation of 5 U.S.C. § 706(2)(A), (B) and (E), are as follows:

> (1) the OFO erroneously construed C.F.R. § 1614.504 regarding the Office issue (holding that "not yet move [into smaller office] constitutes no breach");
>
> (2) the OFO wrongly closed appeal No. 0120132026 ([already moved] Office issue) as "a duplicate" of appeal No. 0120132025 (Reassignment issue);
>
> (3) the OFO conspired with the Agency (U.S. Navy) to allow the time-barred Agency Response (more than 1-year late);
>
> (4) the Administrative Judge (AJ) interfered with the Federal suit EDCV-14-00103-JGB(SPx);
>
> (5) the AJ's arbitrary and capricious adjudication ignored material facts and failed to

follow the law and binding precedents, in particular EEOC Enforcement Guidance;

(6) the OFO ignored evidence, affirmed the AJ's decision without proper written fact finding, lawful analysis and reasons for its decision;

(7) the EEOC LA District failed to follow established precedent regarding EEOC's Jurisdiction ("firmly enmeshed" doctrine); and

(8) the AJ dismissed the cases, defied the OFO Order that VACATES and REMANDS for further processing EEOC Nos. 480-2016-00749X and 480-2016-00750X.

III. This Case Is An Ideal Vehicle For Resolving The Conflict Among The Circuits And Affirming The Important Issue Of Due Process And Equal Protection Under The APA.

This case provides this Court a particularly suitable vehicle to resolve the questions presented.

1. This case provides an opportunity to the dispute among circuit courts regarding the jurisdiction of breach of settlement agreement resolving discrimination charge under Title VII of the Civil Rights Act of 1964 for both private-sector and Federal employees.

2. An answer to both questions presented will be outcome determinative for Ms. Le's claims of discrimination and retaliation under Title VII as well as her claims of Due Process

and Equal Protection violation under the APA.

3. A favorable outcome for Ms. Le will enable her to recover full relief. 29 C.F.R. § 1614.501.

IV. The Ninth Circuit's Summary Affirmance Is Incorrect.

In granting Defendant's motion to dismiss, the District Court failed to apply established precedents regarding FRCP Rule 12(b)(1), Rule 8(a), and erred on the issue of jurisdiction regarding breach of settlement agreement resolving discrimination charge as Retaliation under Title VII; and the Ninth Circuit erroneously affirmed.

A. The District Court Erroneously Conflated Subject Matter Jurisdiction With FRCP Rule 8(a) (General Rules Of Pleading)

In *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the Supreme Court held:

> "Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief a merits-related determination." 2 J. Moore et al., Moore's Federal Practice § 12.30[1], p. 12-36.1 (3d ed. 2005) (hereinafter Moore). Judicial opinions,

> the Second Circuit incisively observed, "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva*, 229 F. 3d, at 361 (emphasis added).

The Supreme Court clarified the standard for pleading a claim in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009):

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

In the instant case, the District Court failed to apply the aforementioned precedents. The District Court erroneously conflated subject matter jurisdiction with Ms. Le's need and ability to prove Defendant bound by the federal law asserted as the predicate for relief a merits-related determination as required by Rule 8(a). Defendant's MTD1 failed to specify whether it is a facial challenge or factual challenge that the Defendant seeks. Defendant's MTD2 neither provided any extrinsic evidences nor challenged the truth of Ms. Le's

allegations. District Court failed to apply the requirements in *Leite v. Crane Co.*, 749 F.3d 1117 (9th Cir. 2014) as follows:

> Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways. A "facial" attack accepts the truth of the plaintiff's allegations but asserts that they "are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2004). The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir.2013). A "factual" attack, by contrast, contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. *Safe Air for Everyone*, 373 F.3d at 1039; *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir.1979) (emphasis added).

B. The District Court Erroneously Applied *Munoz* And The Ninth Circuit's Affirmation Is Incorrect.

In issuing the Summary Affirmance, the Ninth Circuit failed to apply the law and its own precedent, as articulated in section IV.A above; and ignored

Appellant's arguments as articulated in her Opening Brief.

The District Court stated, "the Court lacks jurisdiction over breaches of EEOC settlement agreements, as Congress has not waived sovereign immunity over such claims. Munoz v. Mabus, 630 F.3d 856, 863 (9th Cir. 2010). Such claims are improper before this Court and must be dismissed for want of jurisdiction." *Munoz* stated, "Because Munoz withdrew this complaint in exchange for securing the settlement agreement, it cannot serve as a basis for jurisdiction."

Ms. Le's discrimination and retaliation claims in the instant case include Defendant's conduct not before but after August 3, 2010. Ms. Le neither withdrew her complaints nor entered into any additional settlement agreement. The 2010 Settlement Agreement specifically states, "The parties agree that this Agreement may be used as evidence in a later proceeding in which either of the parties alleges a breach of this Agreement." The District Court erred in the application of *Munoz* and the Ninth Circuit's Affirmation is incorrect.

C. The District Court Erroneously Applied *Ward* And The Ninth Circuit's Affirmation Is Incorrect.

The District Court stated, "Though Plaintiff may seek district court review of claims which she exhausted before the EEOC, the Court lacks subject matter jurisdiction over constitutional claims against the EEOC brought by individuals who are not employees

of the EEOC. Ward v. EEOC, 719 F.2d 311, 313 (9th Cir. 1983)." The *Ward* Court held, "Congress neither expressly nor impliedly provided for an action against the EEOC for negligence, and the EEOC's nonfeasance is not reviewable under the Administrative Procedure Act. 5 U.S.C. Sec. 704."

First, *Ward* is superseded by *Bennett* (establishing what constitutes final agency action) and *West* (establishing the EEOC's adjudication authority to determine and oblige rights or obligations of other government agencies). Second, in *Ward*, the plaintiff alleges that "the EEOC failed to investigate his charge, that the EEOC sent his right-to-sue letter to an incorrect address in 1977" and the *Ward* court articulated as "EEOC's nonfeasance is not reviewable". *Ward* did not consider the issue of what constitutes a final agency action as *Bennett* later ruled. Here, unlike *Ward*, the EEOC performed full adjudication in Ms. Le's cases. Ms. Le's EEOC cases resulted in final agency actions from the EEOC and the OFO which satisfy the conditions of "consummation" and "rights or obligations have been determined" as articulated by the *Bennett* Court, thus are subjected to judicial review under the APA. Third, Ms. Le did not bring a Title VII action against the EEOC. Ms. Le brought up the issue of the EEOC's violations of Due Process and Equal Protection under the APA and sought redress from the District Court. Last but not least, the fact that Ms. Le did not sue the EEOC for relief does not mean that the EEOC's adjudication is irrelevant or has no impact on Ms. Le's pending case at federal court level. Quite the

contrary, in the course of performing adjudication function, the EEOC violated Ms. Le's Due Process and Equal Protection and materially and adversely affected her cases. See ¶¶ 102-122 of the FAC. As the Supreme Court ruled in *Hannah v. Larche*, administrative agencies have a duty, grounded in due process, to use the procedures of adjudication to assure fair adjudication. The District Court erred in failing to apply proper precedents and the Ninth Circuit's affirmation is incorrect.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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