No. _____

In the
Supreme Court of the United States

VAUN MONROE,

Petitioner,

v.

COLUMBIA COLLEGE CHICAGO
AND
BRUCE SHERIDAN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

THOMAS D. ROSENWEIN
Counsel of Record
ROSENWEIN LAW GROUP
105 W. Madison St., Suite 1500
Chicago, IL 60202
(312) 792-1957
trosenwein@rlawgrp.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Did the court of appeals err in requiring Petitioner Vaun Monroe ("Monroe") to show, on a motion to dismiss, that equitable estoppel can only arise when a defendant is shown to have engaged in a "deliberate design" to mislead him, which ruling is in tension with the standard for equitable estoppel employed in the majority of the other Circuit Courts of appeals as well as the Circuit Courts *inter se*?

2. Did the court of appeals err in giving no deference or weight to the EEOC's assumption of jurisdiction on Monroe's charge filing, and subsequent investigation of the charge for three years resulting in the issuance of a "right to sue" letter, as reflecting a timely assertion of his claims with that agency?

The questions presented arise in the following context: Monroe is an award-winning director and film maker, who teaches directing, screenwriting and film studies. He was the first and only Black male hired as a tenure-track professor in the Film and Video Department of Columbia College Chicago. ("Columbia"). He was denied tenure by the Columbia in 2013. Pursuant to Columbia's "up or out" tenure system, if tenure is denied, the faculty member is afforded a final or "terminal" year of employment before the employment relationship ends. While employed in his "terminal year", Monroe filed a complaint of discrimination with the City of Chicago Commission on Human Relations, alleging racial

discrimination and workplace retaliation. While in his "terminal year," he subsequently filed a charge of discrimination with the EEOC in February 2014, which charge was accepted and investigated for three years, resulting in a "right to sue" letter issued in May 2017. Monroe timely filed suit thereafter.

His discrimination suit for violation of Title VII and 43 U.S.C. §1981 was dismissed by the trial court on the basis that the tenure recommendation of Columbia's provost was the last adverse employment action (March 18, 2013), rather than the later decision of Columbia's president denying tenure (August 12, 2013). Since the provost's decision was 326 days prior to Monroe's filing with the EEOC, the trial court dismissed with prejudice the Title VII (and §1981) claims of the amended complaint under Rule 12(b)(6). The Court rejected Monroe's reliance on equitable estoppel based on (1) Columbia's president earlier informing Monroe that the president makes final employment decisions, and (2) Columbia's affirmative statement to the EEOC that the president's decision was the operative date for the denial of tenure.

Some two years after dismissing Monroe's Title VII and §1981, the trial court entered summary judgment on Monroe's Title VI claim on the same late-filing basis, even though Columbia belatedly raised that issue on summary judgment without having asserted an affirmative defense regarding late filing either in answer to the complaint or amended complaint, in violation of Fed. R. Civ. P. 8(c), bullet 17. Columbia

also did not include the late filing defense to the Title VI claim in its earlier motion to dismiss. The merits of Monroe's discrimination claims were never reached.

Most unusually, the Seventh Circuit Court of Appeals divided the appeal into two rulings: it issued a precedential opinion only on the statute of limitations for Title VI claims (announcing for the first time at the Circuit level that a two-year statue applies). At the same time, it issued a separate non-precedential, unsigned Order that affirmed the dismissal of Monroe's Title VII and §1981 claims (and state claims) on all grounds asserted. No reason was given for this splitting of its rulings in this manner. The effect of that splitting is to both shroud for review the Seventh Circuit's ruling on the issue of equitable estoppel, which was a primary issue on appeal, and to obscure the significant Circuit Court conflicts that exist on this issue.

By this Petition, Monroe seeks relief with regard to the dismissal of his Title VII and §1981 claims as set forth in the Seventh Circuit's Order as well as the grant of summary judgment on the Title VI claim.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Vaun Monroe, Columbia College Chicago and Bruce Sheridan ("Sheridan"), the department chair at the time of the events in question. Sheridan was sued for state claims which are not at issue in this Petition.

STATEMENT OF RELATED CASES

There are no proceedings in other courts directly related to the case in this Court.

TABLE OF CONTENTS

APPENDIX

TABLE OF CITATIONS

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI

Vaun Monroe petitions the Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions below are of the U.S. Court of Appeals for the Seventh Circuit, No. 20-1530, Monroe v. Columbia College, et al, argued September 22, 2020, and decided March 19, 2021. The precedential opinion decided on March 19, 2021, is reported at 990 F.3d 1098, authored by Circuit Judge Ilana Diamond Rovner, solely regarding the statute of limitations for Monroe's Title VI claim. (App. 1) On that same date, the panel issued an unsigned, non-precedential Order on Monroe's remaining claims, which is unreported but available at 2021 U.S. App. LEXIS 8153 *; __ Fed. Appx. __; 2021 WL 1134401. (App. 8)

In its Order, the Court of Appeals considered Monroe's appeal from the grant of Columbia's motion to dismiss his Title VII and 28 U.S.C. §1981, as asserted in his amended complaint, and decided by the District Court for the Northern District of Illinois, Judge Thomas Durkin, on April 27, 2018. (App. 23) In its precedential opinion regarding Title VI, the Court of Appeals considered Judge Durkin's opinion of March 30, 2020 (App. 40), affirming the entry of summary judgment against Monroe on his remaining Title VI federal count (and state law claims).

On April 12, 2021, the same panel of the Court of Appeals for the Seventh Circuit denied Monroe's Petition of Panel Rehearing of its Order. (App. 60)

STATEMENT OF JURISDICTION

The judgments of the 7th Circuit Court of Appeals were rendered on March 19, 2021, and the Petition for Rehearing denied on April 12, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1 as modified by this Court's March 19, 2020 Order, extending the deadline to file petitions for writs of certiorari to 150 days from the order denying a timely petition of rehearing. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin. The statute specifically makes it unlawful:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which

> would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally assisted programs. The statute states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 1981 of the Civil Rights Act of 1866 prohibits discrimination on the basis of race, color and ethnicity when making and enforcing contracts. Specifically, the statue provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes,

licenses, and exactions of every kind, and to no other.[1]

STATEMENT OF THE CASE

A. INTRODUCTION

The decisions by the District Court, affirmed by the Court of Appeals, were all based on the question of the timeliness of Monroe's filings with the EEOC and with the timeliness of his lawsuit filing with respect to his §1981 claim. Monroe's federal discrimination claims were never adjudicated on the merits. With regard to all federal claims asserted, both the District Court and the Court of Appeals rejected equitable estoppel as a basis for Monroe's timely filing with the EEOC. Monroe had early asserted his claims before the Chicago Commission on Human Relations, demonstrating his diligence in pursuing his claims. Columbia not only misled Monroe as to its President having the final decision on a tenure application (as its president earlier had directly advised in writing that he makes the decision to retain or release faculty), but it also never disputed the timeliness of Monroe's charge filed with the EEOC; instead, Columbia submitted a written response to the EEOC and Monroe affirmatively stating that the decision of

---

[1] "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." §1981(b).

its President is the last date for any tenure denial. (Dkt#55) The Seventh Circuit excused Columbia's filing of its motion to dismiss on its diametrically opposed theory that the earlier provost decision really constituted the tenure denial, by stating that "it is not unusual for lawyers to overlook points or to advance new arguments as a case proceeds, after all." (App. 20) Neither court afforded any deference to the EEOC's acceptance of Monroe's filing with that agency as timely.

We submit it was error for the Court of Appeals to disregard Monroe's equitable estoppel argument as well as the EEOC's acceptance of his charge, and to do so on the basis that Monroe had not shown a "deliberate design" to mislead him.

B. FACTUAL BACKGROUND

Monroe was the first Black male tenure-track professor in Columbia's Film & Video Department (later the Department of Cinema and Television Arts) ("Department"). (Dkt#87, ¶2)

One of the courses he taught in his first semester at Columbia was an "adaptation" course, *i.e.*, the process of adapting a novel or other writing to the screen. He chose to examine Chester Himes' "A Rage in Harlem". When he announced the materials to be used on the first day class, 3 students dropped the class immediately. Of his classroom evaluations, seven of ten students responded, and two made

pointed references to the "African-American content" of the class, which they found distasteful including student evaluation comments from that class such as "We spent far too long nearly every week talking about issues of race" and "If I wanted to take a class about African Americans and Film I will sign up for it." Such comments were in contrast to his evaluations when he taught the same course one semester later, substituting the film "The Twilight Zone" for "A Rage in Harlem," where the evaluations were extremely positive. (*Id.* ¶¶5,6)

Also in his first year, Monroe taught a course that focused primarily on an historical approach to portrayals of Blacks in Hollywood narrative films, titled "Black Is; Black Ain't; African-American Identity in Cinema." No such course had been taught at Columbia for at least twenty years. The class had five White men, no White women in a class of 17 students; the remainder of the students were Black. At week 4 the White men began sitting huddled together at the front of the class and did not respond to any of Monroe's interventions aimed at involving them more productively in the class. Monroe received the lowest student evaluations of his entire teaching career with only 6 of the 17 students completing the form. (*Id.* ¶7; Dkt#87 Ex. E ¶12)

When he met with Sheridan at the end of his first year for an annual review, Monroe raised issues regarding bias in student evaluations generally and as they related to his teaching, particularly student bias

toward minority faculty in student evaluations and cited academic studies to that effect. (Dkt#87, ¶9) Sheridan accused Monroe of "playing the race card," not "assuming responsibility for my classroom" and needing to "reflect on [my] pedagogical approach" in response. (*Id.*)

In his second year, Monroe taught a course known as "Screenwriting 2," which focused on writing feature length films. During that semester, he learned (from a telephone call from his agent) that a student in the course had created a derogatory website criticizing Monroe, called "Black Supremacy (Now with a Photo of the Beast!)." When Monroe reported his discovery of this website to the assistant and associate chairs reporting to Sheridan, he was expressly directed to "do nothing," *i.e.*, to simply ignore it. (*Id.*, ¶10)

Throughout his years at Columbia, Monroe was treated in a disparate manner from others who were not Black. Thus, the Department has a number of coordinator positions, *i.e.*, positions that are administrative in nature and typically provide an additional stipend for undertaking such a role. (Dkt#75, Ex. N, pp. 58,59) All of Monroe's White peers in all the years he was at Columbia were assigned coordinator positions by the Chair. During his career at Columbia, coordinator positions in both of his specialties, Screenwriting and Directing, became open, but he was not appointed by Sheridan. Instead, Sheridan selected and appointed two Senior Lecturers, who were White, to those posts, even

though Senior Lecturers are a lower rank that tenure-track assistant professors and such an appointment would have strengthened Monroe's case for tenure. (Dkt#87, ¶¶11,12)

By the time of Monroe's third year at Columbia, the college had instituted a new "third year review" for tenure track faculty, which included a decision on continuing employment. Monroe assembled the required materials and provided them, *inter alia*, to Sheridan to review. Thereafter, and prior to the Department meeting to assess his record for the third-year review, Sheridan told Monroe that he would pass "with no difficulty." (*Id.* ¶13; Dkt#87, Ex. E ¶17)

However, in direct violation of Columbia's policies requiring an independent reviews by Department faculty and Department chair, Sheridan led the Department meeting and directed the review. (Dkt#87, ¶¶14,15) At the Department meeting, Monroe made a presentation, and Sheridan pointedly questioned Monroe regarding his student evaluations, despite Sheridan's knowledge that as the only Black male Professor in a majority Caucasian department, Monroe was particularly vulnerable to unfavorable evaluations from a small sample of students, sometimes a single student, as shown by the academic studies of evaluations, noting that overreliance on teaching evaluations was partially responsible for the lack of minority professors in academia, and made a case for a more nuanced reading of his accomplishments and value to the Department. (*Id.*)

The Department faculty voted against Monroe's retention, and Sheridan wrote his own report recommending against Monroe's employment retention at Columbia despite his earlier assurances of passing the review "with no difficulty." (Dkt#75, Ex. D, E; Dkt#87, ¶¶14,15) The provost concurred. (Dkt#75, Ex. G)

Monroe then grieved the non-retention decision with Columbia's Elected Representative Committee ("ERC"). In that committee's report, the ERC stated that it "finds that under IV D. 1 of the Tenure document, the Film and Video Department did not abide by its stated procedures for evaluating the teaching of Vaun Monroe during his tenure track period." The ERC further stated:

> "The ERC believes the lack of classroom observation reports to be a prejudicial deviation from procedures established by the Film & Video Department for evaluating tenure track faculty. In this case the lack of observation by tenured faculty-or the lack of documentation of observation -and a low percentage of student course evaluations placed a great deal of emphasis on the evaluations of a relatively small sampling of students." (Dkt#87, Ex. E ¶¶23, 24)

Following the transmission of the ERC report to Columbia's then president, Warrick Carter ("Carter"),

he reviewed Monroe's file and decided to renew his contract. In pertinent part, Carter stated:

> "*My decision regarding your faculty status at Columbia College Chicago* is that your tenure-track appointment be continued for the 2011-2012 academic year.
>
> *My decision in this matter* is based on several factors, including what appears to be ambivalence regarding your continuation at both the department and school levels; lack of adequate supporting material being brought forth from the department; clear errors of fact regarding your performance which were detailed in the ERC report: and my own concerns that evaluation procedures were not conducted according to departmental guidelines" (emphasis supplied) (*Id.* ¶25)

Thereafter, at Monroe's initiative, he met with Sheridan to clear the air and reset the relationship as Carter's decision was contrary to Sheridan's recommendation and Sheridan remained the Department chair. (*Id.* ¶26) Sheridan was hostile at the meeting, taking the opportunity to accuse Monroe of various alleged misdeeds.

Thereafter, Sheridan assigned Monroe to teach only in introductory courses for the rest of his career at Columbia (only allowing limited teaching of Monroe's directing specialty after Monroe's tenure

application was rejected), even though Monroe's best student evaluations were in his higher-level directing courses. (*Id.* ¶28) As a result, Monroe taught more introductory courses than his White tenure-track colleagues. (*Id.* Ex. 1, ¶28)

Rather than assign Monroe to teach his specialty in directing, Sheridan hired a White male, with a Bachelor's degree in Marketing, as an adjunct instructor in Fall of 2011 and assigned him to teach Directing 1. That adjunct taught a Directing 1 class every semester through the remainder of Monroe's employment at Columbia. In three years at Columbia, he actually taught more classes in Monroe's specialty than Monroe taught in his entire time on the tenure track. (*Id.* ¶30)

Sheridan refused to allow Monroe to participate in an interdisciplinary course that would have boosted his profile and contributions for his tenure decision. (*Id.* ¶31) This was directly contrary to the Dean's recommendation letter, written in February 2008, in which Monroe was encouraged to seek cross-disciplinary collaborations across departments: "I look forward to Mr. Monroe's initiatives to outreach to other departments to provide exciting opportunities for students, as well as his contributions to the Film/Video Department". (*Id.*) Monroe repeatedly requested to serve on the Directing committee that explored ways in which the theater and film departments could work together and was repeatedly denied by Sheridan. (*Id.*)

Sheridan also refused to allow Monroe to teach an interdisciplinary course he created that was well received by Television Department Chair, Sharon Ross and faculty Sara Livingston. Sheridan never responded to Monroe's request to teach the interdisciplinary course, and instead Professor Ross informed Monroe that Sheridan had told her he needed Monroe in the department to teach screenwriting. However, Sheridan assigned Monroe to teach again in Foundations, not in specialized screenwriting courses. (*Id.* ¶32)

Sheridan sent an accusatory email to the Goodman Theatre upon receiving a request from them to collaborate on a professional interdisciplinary project that culminated in making an authentic 1930's homage film as part of the play Goodman Theatre was mounting, "By The Way, Meet Vera Stark." Even though Monroe put together a crew of Columbia College faculty staff and students to work on this project Sheridan found an excuse to deny the collaboration, stating that he would have liked to approve the project, but his approval was compromised by Monroe's alleged failure to follow procedure. (*Id.* ¶33)

At the time of Monroe's tenure evaluation in his sixth year of employment, the Department reviewed and discussed his record, significantly this time without the presence of Sheridan. The reviewing faculty approved his tenure application in a 9-5 vote. The vote was divided into the standard three

categories for assessment-- teaching, service and scholarly or creative endeavor -- with a clear majority in teaching and service and an overwhelming majority in scholarly and creative endeavor. The vote is important because one's our peers are the people most qualified to comment incisively on one's accomplishments. (*Id.* ¶34)

However, similar to his report at the third-year level, Sheridan did not support Monroe's tenure application. Instead, in a report that is usually 2 pages in length, Sheridan wrote an unprecedented 8-page report detailing why Monroe purportedly had not met the standards for tenure in the department and therefore should be denied tenure. (*Id.* ¶35; Dkt# 75, Ex. J; Dkt#87, SOAF ¶25)

In particular, Sheridan included in his report a lengthy reference to a student email regarding one of Monroe's courses, that was never shared with Monroe. Sheridan never asked for Monroe's response to the email. Had Sheridan discussed the email with Monroe, he would have been able to clarify that the student's attempts to describe a class problem were, in actuality, an individual student's struggles in the course. And, since this complaint came mid semester, Sheridan had no way of knowing that the student evaluations would bear out Monroe's understanding of the class' progress and individual students' difficulties. In the class of 9 students, 6 of 8 comments were overwhelmingly positive, "Very helpful in elucidating difficult subjects. Writing exercises and in-

depth answers to wheatear questions we had. Tailored feedback to the writer", "The material we read really helps with what we are learning about and putting those lessons to work in our writing", "I gained a copious amount of knowledge", "…Is regularly available if we ever need any questions answered. He also made time for us outside of class if we needed other help. He always provided helpful feedback when necessary", "I felt that Vaun's teaching method was conducive to my learning in writing a full-length script. He was always able to answer our questions and back it up with real world experience. Possibly one of my favorite classes", "This class was difficult in the best way. My favorite class I have taken at Columbia". (*Id.* ¶42)

Sheridan was not only dismissive of Monroe. Sheridan was dismissive of Black students who created a film critical of the Department's attitude toward Black students, the lack of Black faculty and the inattention to Black perspectives in film-making, and blamed Monroe for the film. (Dkt#87, SOAF ¶32, 36; Ex. E, ¶44) He also was rude and dismissive to a female Black tenure-track professor by intervening in her class without notice and ousting her from that class and showing such disrespect to her that she resigned rather than remain at Columbia under Sheridan's hostile leadership. (Dkt#87, SOAF ¶38)

Sheridan's negative recommendation on Monroe's tenure then was sent to the Dean. The Dean reviewed the dossier and overruled Sheridan, recommending

Monroe for tenure. (Dkt#51, ¶54) However, on March 18, 2013, the interim Provost (who as Vice President for Academic Affairs had previously voted against Monroe in his third-year evaluation) notified Monroe of her negative recommendation, denying him tenure and promotion to Associate Professor. (Dkt#75, Ex. L; Dkt#87, ¶39)

Monroe grieved the Interim Provost's decision to the ERC, but the ERC only commented that procedural irregularities "might" have been significantly prejudicial. (Dkt#51, ¶55) Monroe then filed a complaint of racial discrimination, harassment, and retaliation with Columbia's Office of Human Resources. The newly installed interim Vice President of Human Resources did not provide Monroe with a report regarding the matter but did reject the complaint. (*Id.* ¶56)

By the time Monroe had submitted his response to the ERC report, which had delayed notifying Monroe of its assessment of the grievance, President Carter had retired, and a new president (Kwang-Wu Kim) was freshly installed, who had no previous experience with Columbia or with Monroe. (*Id.* 58, 59) On August 12, 2013, Kim ruled against Monroe and denied him tenure. Approximately one month after Kim's denial, and while still employed at Columbia in his "terminal year," Monroe filed a complaint of discrimination with the City of Chicago Commission on Human Relations, alleging racial discrimination and workplace retaliation. (*Id.* ¶62)

Concerned that Commission might not have sufficient resources to move expeditiously, Monroe filed a charge of discrimination with the EEOC on February 7, 2014. The EEOC accepted the charge and investigated for three years but reached no determination, instead providing Monroe with a "right to sue" letter in May 2017. (*Id.* ¶63) The suit that is the subject of this petition then followed.

REASONS FOR GRANTING THE WRIT

This Court's intervention is necessary to resolve a conflict among the Circuits regarding the standard for equitable estoppel, a conflict that the Seventh Circuit itself recognized in its Order. (App. 18) The Seventh Circuit held that equitable estoppel requires a showing "a deliberate strategy on the part of the defendant" or a showing that defendant "clearly understood that its actions would cause Monroe to delay." (App. 20) This holding also goes beyond this Court's estoppel decisions, which apply estoppel to provide relief where a party has reasonably "relied on its adversary's conduct in such a manner as to change his position for the worse." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 59 (1984). Accord, *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011) (explaining that "equitable estoppel operates to place the person entitled to its benefit in the same position he would have been in had the representations been true.") (internal quotation marks deleted). See, also, *Petrella v. Metro-Goldwyn-Mayer,* 572 U.S. 663, 684-85 (2014) ("[t]he gravamen

of estoppel, a defense long recognized as available in actions at law, is misleading and consequent loss.") (Ginsburg, J.) The dissent similarly characterized the "gravamen of estoppel" as "a misleading representation by the plaintiff that the defendant relies on to his detriment.") (Breyer, J., *Id.,* at 699)

Additionally, this Court's intervention is needed to provide clarity and order to the application of equitable estoppel, particularly in the employment/discrimination context, as the individual Circuits internally promulgate contradictory holdings with regard to the standard to be employed.

Finally, this Court's intervention is needed to address the question of what deference is owed to the EEOC as a governmental agency that, in this instance, accepted as timely Monroe's charge and proceeded to investigate for three years; an issue which both the District and Circuit Courts failed to address.

1. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS APPLIED AN UNTENABLE STANDARD FOR EQUITABLE ESTOPPEL THAT HIGHLIGHTS THE CONFLICT AMOUNG THE CIRCUITS REGARDING THE APPROPRIATE STANDARD FOR THE DEFENSE.

The Seventh Circuit rejected Monroe's reliance on Third Circuit precedent,[2] although relied on in part by the District Court, in finding Monroe's argument regarding the applicability of equitable estoppel to be unpersuasive. However, in doing so, the Seventh Circuit heightened the conflict with other circuits.

Key to Monroe's equitable estoppel argument is that Columbia took the active step of affirmatively representing to the EEOC (and to Monroe) that it is Columbia's president who makes the final decision on employment/tenure decisions. Monroe's filing with the EEOC was well within the 300 days of the president's decision (175 days from president's decision on 8/12/2013 by his EEOC filing on 2/7/2014). Columbia filed its "Respondent's Position Statement" to Monroe's EEOC charge, and served Monroe, on April 29, 2014 (Dkt#55), in which it stated that the Provost "issued a *recommendation* for denial of tenure" (id., p. 5, emphasis supplied), while "*[a]ccording to Columbia's tenure process*, *the President then makes a*

[2] *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3rd Cir. 1994)

final decision regarding the granting or denial of tenure. That decision is not appealable. In the present matter, and for the reasons articulated in the [Provost's] original denial, *President Kim determined that tenure should not be granted*." (*Id.*, p. 7, emphasis supplied)[3]

In other words, Columbia did not simply forget to raise a statute of limitations defense or otherwise passively keep silent. Rather, Columbia took the affirmative, active step of declaring to a governmental agency statutorily required to review a discrimination charge, that the presidential decision is the date when the adverse employment event occurred. Had Columbia told the EEOC that Monroe's EEOC filing had to be dated from the time the interim provost makes the final tenure recommendation/decision, or indeed had Columbia said nothing, Monroe would have been on notice that he would need to preserve his discrimination claim by timely filing a §1981 lawsuit, which there was ample time to do.

As the Seventh Circuit correctly noted, Columbia's affirmative statement to the EEOC was made while Monroe still had the opportunity to timely file that §1981 claim in court (four-year statute of limitations for a §1981 claims under 28 U.S.C. Section 1658(a),

---

[3] Recall that earlier, the then president of Columbia similarly had represented to Monroe that it was "[m]*y decision regarding your faculty status at Columbia College Chicago"* to keep Monroe at Columbia following his third-year review.

i.e., until at least August 12, 2018, if the president's decision was the triggering event or until March 18, 2017, even if the provost's decision was controlling). (App. 20)

But the Seventh Circuit excused Columbia's active step of representing that the adverse employment action was that of the president by stating that there was no showing of a "deliberate strategy" on its part to mislead Monroe. (App. 20), and further stating that nothing in the record shows that Columbia "clearly understood that its actions would cause Monroe to delay taking action on his claims." (*Id*.).

Columbia's affirmative statement to the EEOC, that the president's decision was the triggering event, was not an idle remark or one made off-handedly in some informal context. It was a deliberate statement made in a legal filing with a federal agency empowered to review and investigate discrimination claims. The Panel ignored the fact that once Monroe received his right to sue letter and filed his federal lawsuit (August 10, 2017), Columbia immediately filed its motion to dismiss the Title VII and §1981 claims, relying precisely on the provost's recommendation as the trigger for the statute of limitations. This was not "advancing a new argument" or an "overlooked point," as the Seventh Circuit leans over backwards to suggest. (App. 20) Columbia's statute of limitations contention in its motion to dismiss below was a complete reversal and direct contradiction of the legal position taken by Columbia before the EEOC.

However, the Court of Appeals' ruling required Monroe to show, in responding to a 12(b)(6) motion to dismiss, that Columbia had either a "deliberate strategy" or an understanding that its actions "would cause Monroe to delay taking action on his claim." That imposition of an additional burden on the "active step" standard demonstrates the conflict with other circuit courts. In applying equitable estoppel in the discrimination context, the Circuit Courts of appeal are in conflict and the standard for employing the doctrine in need of clarification.

The Circuit Courts divide into roughly two camps, which may be labelled "objective" and "subjective."[4] The "objective" or majority group are the First, Second, Third, Sixth, Tenth, Eleventh and D.C. Circuits, which generally apply the doctrine when a defendant engages in "misleading" behavior, *i.e.*, focusing on the behavior of the defendant in taking an active step upon which the employee relies. The Fourth, Fifth, and Eighth Circuits may be said to be in the "subjective" or the minority camp and would agree with the Seventh Circuit in this case that estoppel requires a "deliberate design," *i.e.*, the principal focus is on the intentionality of the defendant.

[4] We use the term "roughly" since as shown in the next section below (pp. 24-28), Circuit Courts are internally inconsistent in the tests for estoppel to be applied.

Thus, in the objective camp are these representative cases: *Vera v. McHugh*, 622 F.3d 17, 30 (1st Cir. 2010) ("Equitable estoppel is appropriate when an employee is aware of her Title VII rights but does not make a timely filing 'due to [her] reasonable reliance on [her] employer's misleading or confusing representations or conduct.' "); *Dillman v. Combustion Engineering, Inc.,* 784 F.2d 57 (2nd Cir. 1986) (estoppel can be applied when employer "lulled the plaintiff into believing that it was not necessary for him to commence litigation."); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3rd Cir. 1994) (extension of a statute of limitations "makes eminent equitable sense where the defendant has, by deceptive conduct, caused the plaintiff's untimeliness."); *Tilley v. Kalamazoo Cnty. Rd. Comm'n,* 777 F.3d 303 (6th Cir. 2015) (misrepresentation by defendant and detrimental reliance by plaintiff required); *Donovan v. Hahner, Foreman & Harness, Inc.,* 736 F.2d 1421, 1427 (10th Cir. 1984) ("when an employer misleads an employee regarding a cause of action, equitable estoppel may be invoked."); *Dawkins v. Fulton Cnty. Gov't,* 733 F.3d 1084 (11th Cir. 2013) (same); *Smith-Haynie v. District of Columbia,* 155 F.3d 575 (D.C. Cir. 1998) (equitable estoppel "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations.")

In the subjective camp, see, *English v. Pabst Brewing Co.,* 828 F.2d 1047 (4th Cir. 1987*)* ("The statute of limitations will not be tolled on the basis of

equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge."); *Jones v. Alcoa*, 339 F.3d 359 (5th Cir. 2003) (same); *Dorsey v. Pinnacle Automation Co.,* 278 F.3d 830 (8th Cir. 2002) (same).

We submit that the Circuit Courts in the "objective" group would likely have accepted that equitable estoppel applied and allowed Monroe's Sections VI, VII and §1981 to proceed to the merits. Petitioner believes that the "objective" view of the equitable estoppel doctrine is the better approach and is more in line with this Court's views on estoppel generally.[5] The "objective" approach does not require the impossible task of ferreting out of motives on a motion to dismiss and provides a more workable framework for assessment.

However, for present purposes, what is significant is that there is an important conflict among the

---

[5] *Supra*, pp. 16-17. See, also, *R.H. Stearns Co. of Bos., Mass., v. United States*, 291 U.S. 54, 61 (1934) ("The applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned[.]") (internal quotation marks and citation omitted).

Circuits that merits this Court's attention and resolution.

2. INTERVENTION BY THIS COURT IS NEEDED TO CLARIFY THE STANDARD FOR EQUITABLE ESTOPPEL AS THE CIRCUIT COURTS ARE APPLYING DIFFERENT STANDARDS EVEN WITH REGARD TO CASES *INTER SE*.

While the Seventh Circuit noted that it takes a narrower view than other circuits regarding when equitable relief is appropriate, citing *Thelen v. Marc's Big Boy Corp*., 64 F.3d 264, 267-68 (7th Cir. 1995). (App. 18), we submit there is a lack of clarity regarding that standard within the Circuit, as well as within other Circuits, that further speaks to the need for this Court's corrective action.

The frequently cited test in the Seventh Circuit is *not* a showing of a "deliberate strategy on the part of the defendant" or a showing that defendant "clearly understood that its actions would cause Monroe to delay," as held below. (App. 20). Rather, the usual test is whether the defendant took "active steps to prevent plaintiff from suing in time," *i.e.*, an objective assessment of a defendant's conduct. The "active steps to prevent plaintiff from suing in time" approach to equitable estoppel has been stated in many decisions. See, *e.g.*, *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 721 (7th Cir. 2004) ("[e]quitable estoppel will operate as a bar to the defense of statute of limitations

if 'the defendant t[ook] active steps to prevent the plaintiff from suing in time...") *Williamson v. Indiana University*, 345 F.3d 459, 463 (7th Cir. 2003) (plaintiff failed to show university or EEOC "took active steps to prevent her from bringing her charge within the allotted time."); *Sharp v. United Airlines, Incorp.*, 236 F.3d 368, 372 (7th Cir. 2001) (equitable estoppel "'is available if the defendant takes active steps to prevent the plaintiff from suing in time."); *Jackson v. Rockford Housing Authority*, 213 F.3d 389, 394 (equitable estoppel available "if the defendant takes active steps to prevent the plaintiff from suing in time."); *Speer v. Rand McNally & Co.*, 123 F.3d 658, 663 (7th Cir. 1997) (equitable estoppel requires that ""the defendant takes active steps to prevent the plaintiff from suing in time, ..."); *Wheeldon v. Monon Corp.*, 946 F.2d 533, 537 (7th Cir.1991) ("The 'granting of equitable estoppel should be premised on a defendant's improper conduct as well as a plaintiff's actual and reasonable reliance thereon.' ").

Yet within the Seventh Circuit, there is another line of cases that has held that equitable estoppel is available "*only* if the employee's otherwise untimely filing was the result either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge," *Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 292 (7th Cir. 1986), citing *Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir.1982) (internal quotation marks removed, emphasis supplied). The *Mull* decision goes

on to add that equitable estoppel "should be premised" on applying both the objective test (actual and reasonable reliance on conduct or representations of a defendant) as well as the subjective test (evidence of improper purpose on the part of defendant or defendant's actual or constructive knowledge of the deceptive nature of its conduct). (*Id.*)

In *Hentosh v. Herman M. Finch Univ. of Health Sci./Chicago Med. Sch.*, 167 F.3d 1170, 1174 (7th Cir.1999), the Court of Appeals tried to clarify that the objective and subjective tests are two different ways of demonstrating estoppel and are not to be combined. Thus, *Hentosh* held that equitable estoppel "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time" and "*may* be available when an employee's untimely filing was a result of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.") (at 1174, emphasis supplied).

However, two years later in *Hedrich v. Bd. Of Regents of the University of Wisconsin System et al.*, 274 F.3d 1174, 1182 (7th Cir. 2001), the Seventh Circuit misstated the holding in *Hentosh* when it ruled:

> In order to make out a claim for equitable estoppel, the plaintiff must present evidence that the defendant [took] active steps to prevent the plaintiff from suing in time. [citing

> Hentosh] These steps *must* amount to "a deliberate design by the employer or . . . actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." (emphasis supplied)

By changing the "may" of *Hentosh* to the "must" of *Hedrich,* and conflating the two different methods of demonstrating estoppel, we see where the confusion in the appropriate test to be applied is made manifest. In the instant matter, as shown, the Seventh Circuit ignored the authority that employs the objective test, as well as the either/or approach of *Hentosh*, and simply adopted the requirement of a "deliberate design." (App. 20)

We note that the Seventh Circuit is not the only Circuit Court of Appeals with a confusing and inconsistent approach to equitable estoppel. The Ninth Circuit also veers among different tests. On the one hand, it appears to be in the "objective" group. The Ninth Circuit applies equitable estoppel when "defendant's wrongful actions prevent[] the plaintiff from asserting his claim." *Leong v. Potter,* 347 F.3d 1117 (9th Cir. 2003). However, in *Santa Maria v. PacBell,* 202 F.3d 1170, 1176 (9th Cir. 2000), the Ninth Circuit stated that while equitable estoppel "focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit," it then directed courts to consider a non-exhaustive list of factors for the purpose of avoiding the conflation of conduct giving rise to estoppel with the underlying

wrong, which factors include "evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct. (*Id.*) Thus, in *Johnson v. Henderson*, 314 F.3d 409 (9th Cir. 2002), the Ninth Circuit denied equitable estoppel despite the employee being misled as there was no "evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct." (at 416)

In sum, we see at least two of the Circuit Courts of Appeals struggling with internal contradictions among the tests to be applied. Although beyond the limitations of this Petition, other Circuits show similar inconsistencies. In effect, there is no consistent approach to equitable estoppel. As a result, both lower courts and practitioners are swimming in a sea of conflicting views that promote confusion and unpredictability.

This is a further reason why this Court should intervene to clarify the appropriate test for the doctrine of equitable estoppel.

3. THE COURT OF APPEALS REFUSAL TO AFFORD ANY DEFERENCE OR WEIGHT TO THE EEOC'S ASSUMPTION OF JURISDICTION ON MONROE'S CHARGE, WHICH ASSUMPTION REFLECTED A FACTUAL DETERMINATION THAT MONROE TIMELY ASSERTED HIS CLAIMS, DENIGRATES THE AGENCY AND CONTRADICTS THE LAW REGARDING SUCH FACTUAL DEFERENCE.

We note at the outset what this issue does *not* involve. First, no issue is raised here with respect to the issue of the deference to be accorded to agency interpretations of law, pursuant to doctrines of deference associated with this Court's decisions in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) and *Auer v. Robbins,* 519 U.S. 452 (1997).

Second, no issue is raised regarding deference or weight to be afforded the results of an agency's formal adjudicatory function, as those covered by the Administrative Procedure Act, 5 U.S.C. §§ 554 – 557, which findings are judicially reviewed under either a substantial evidence standard or under an arbitrary and capricious standard.

Rather, what is at issue is the degree of deference or weight that the courts below should have given to the fact of the EEOC's acceptance of the charge, with a resulting three-year period of investigation before issuing a right to sue letter, particularly when

Columbia submitted a response to the EEOC that affirmatively represented that its president's decision was the actual tenure denial and never raised a late-filing defense with the EEOC.

The EEOC's acceptance of the charge did not go to a jurisdictional issue. This Court's precedents make plain that the 300-day filing rule is not jurisdictional, but rather a non-jurisdictional claim-processing rule. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 397 (1982) ("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

Neither the District Court nor the Court of Appeals addressed the fact that no determination of untimeliness was made by the EEOC. The EEOC accepted the Charge and investigated Monroe's charge for over three years before issuing its "right to sue" letter. (Dkt# 50, ¶63) Of course, the EEOC own procedures require it to police the filing requirements. See, *e.g.*, EEOC Compliance Manual Section 2 – Threshold Issues, 2-IV TIMELINESS (issued 5/12/00), which states "Because most jurisdictions have FEPAs, the limitations period will usually be 300 days. However, an investigator should check with the legal unit to determine the applicable period when uncertain." The Manual then provides this apt example under Title VII by way of instruction to its investigators:

> **Example** - On January 1, 1998, CP was notified that she was being discharged from her position with Respondent in State X. Two hundred days later, CP filed a charge with the EEOC alleging that Respondent discharged her based on her age (45) and sex. State X has an FEP law prohibiting sex discrimination; however, neither State X nor the local jurisdiction where CP was employed has an FEP law prohibiting age discrimination. Therefore, CP's charge was timely with respect to her sex discrimination claim but untimely for preserving her private suit rights with respect to her age discrimination claim. (Accessed at https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-IV-A-1)

Neither the District Court nor the Seventh Circuit gave any consideration to the EEOC's *factual* acceptance of Monroe's discrimination and retaliation claims as timely. As stated in *E.E.O.C. v. General Elec. Co.*, 532 F.2d 359, 366 (4th Cir. 1976):

> There is certainly nothing unusual or novel in sustaining an administrative determination or resting a judicial judgment on facts which were admitted or included, with the specific or implied knowledge and consent of the parties, in the agency investigation or in the trial record, especially where there is no substantial prejudice to any party by such procedure.

Here, affording deference to the EEOC's acceptance of Monroe's charge as timely does not prejudice the parties. Rather, it allows Monroe's discrimination claims to be heard on the merits, the merits of which the trial court never reached. We do not contend that courts must accord total or even substantial deference to the EEOC in all situations. The amount of deference will vary depending on the facts of each case. But in a case, such as the instant matter, in which other factors show the employer took actions that misled an employee as to timing, EEOC determinations need to be weighed in the balance.

Although the District Court gave no weight to the EEOC's acceptance of Monroe's charge, it did put much weight on President Kim's use of the term "appeal" and Columbia's policies using such language. But Monroe is not a lawyer and is not required to interpret language as a lawyer might. Monroe is a layman, not a "legal technician," and Columbia's actions in lulling him should not be a basis for ignoring equitable estoppel. As this Court stated in *Ornelas v. United States*, 517 U.S. 690, 695, (1996), courts look to the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Monroe could reasonably rely on Columbia's conduct, and the EEOC's acceptance of the charge needs to be weighed in the balance.

CONCLUSION

For all the above and foregoing reasons, Plaintiff--Appellant Vaun Monroe requests that his petition for writ of certiorari be granted.

Respectfully submitted,

Vaun Monroe

By: */s/ Thomas D. Rosenwein*
Counsel of Record

Dated: July 29, 2021

THOMAS D. ROSENWEIN
Counsel of Record
ROSENWEIN LAW GROUP
105 W. Madison St., Suite 1500
Chicago, IL 60202
(312) 792-1957
trosenwein@rlawgrp.com

Counsel for Petitioner