No. 21-361

IN THE

Supreme Court of the United States

GUANGCUN HUANG,

Petitioner,

v.

TIM HUI-MING HUANG et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GUANGCUN HUANG
Pro Se

PO Box 1004
Fremont, CA 94538
(210) 589-5684

QUESTIONS PRESENTED

1. Whether this Court's decisions interpreting the Eleventh Amendment, *see e.g. Fitzpatrick v. Bitzer*; *Port Authority Trans-Hudson Corp. v. Feeney*, bar Title VII and other claims against UTHSCSA even when UTHSCSA explicitly and voluntarily invoked federal jurisdiction before being served

2. Whether Petitioner had provided sufficient factual pleadings of Title VII claim when he met all Fifth Circuit's requests to do so

3. Whether this Court's decisions interpreting the Eleventh Amendment, *see e.g. Edelman v. Jordan*; *Ex parte Young*, bar actions against state officials

4. Whether this Court's decisions interpreting the First Amendment, *see e.g. American Communications Assn. v. Douds*; *Citizens United v. Fed. Election Comm'n*; *Kingsley Books, Inc. v. Brown,*; *Jones v. Opelika,*; *Tory v. Cochran*, bar UTHSCSA from selectively subjecting academic scientist Petitioner to thought-probing in academic setting

5. Whether this Court's decisions interpreting the First Amendment, *see e.g. Pickering v. Board of Education,* 391 U. S. 563, 574 (1968); *Connick v. Myers,* 461 U.S. 138, 146 (1983); *Garcetti v. Ceballos*, 547 US 410, 425, 438 (2006), protect an academic employee's speech, outside of performing his official duties, on research misconduct over an external event in international research community

6. Whether Petitioner has standing to obtain declaratory and injunctive relief when suffering ongoing violation of federal law and request damages and equity relief

7. Whether Texas Tort Claim Act bar claims against individual employees for their retaliatory actions outside the scope of their employment

8. Whether this Court's decisions interpreting the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit the University of Texas Health Science Center at San Antonio's denial of promotion of non-religiosity employee and selective denial of an individual's thoughts.

9. Whether First Amendment Rights and freedom of movement are Petitioner's liberty interest

10. Whether UTHSCSA's counter-motion to stay discovery should be dismissed when it failed to make mandatory initial disclosure and being compelled to disclose

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Guangcun Huang.

Respondents are Tim Hui-Ming Huang, Chairman of the Department of Molecular Medicine, the School of Medicine, the University of Texas Health Science Center at San Antonio, in his Official Capacity and in his Individual Capacity; Chun-Liang Chen, an employee of the Department of Molecular Medicine, in his Official Capacity and in his Individual Capacity; Chun-Lin Lin, an employee of the Department of Molecular Medicine, in his Official Capacity and in his Individual Capacity; Kohzoh Mitsuya, an employee of the Department of Molecular Medicine, in his Official Capacity and in his Individual Capacity; DeAnna Hester, the Administrator of the Department of Molecular Medicine, in her Official Capacity and in her Individual Capacity; the University of Texas Health Science Center at San Antonio; Jennifer S. Potter, the Vice Dean of the School of Medicine at the University of Texas Health Science Center at San Antonio, in her Official Capacity and in her Individual Capacity; William L. Henrich, the President of the University of Texas Health Science Center at San Antonio, in his Official Capacity and in his Individual Capacity; other employees of the University of Texas Health Science Center at San Antonio, in their Official Capacity and in their Individual Capacity.

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PUBLIC RECORD

PETITION FOR A WRIT OF CERTIORARI

Academic scientist Petitioner Guangcun Huang ("Petitioner") respectfully submits his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. 1a-14a) is available at 2021 WL 519411, and its order denying rehearing en banc is reprinted at App. 36a. The federal district court's order granting Respondents' motion to dismiss and dismissing case with prejudice is reprinted at App. 15a-35a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on February 10, 2021. App. 1a. A timely petition for rehearing en banc was denied on March 24, 2021. App. 36a. This Court's March 19, 2020 order extended the deadline to file petitions for writs of certiorari in all cases to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. On July 19, 2021 this Court ordered that for cases in which the relevant lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued before July 19, 2021, the deadline remains extended to 150 days from that judgment or order. Petitioner's Petition for a Writ of Certiorari is due August 23, 2021 because August 21, 2021 is a Saturday. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. XI:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XIV, § 1, 5:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ...
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 - Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

Title VII of the Civil Rights Act of 1964, as amended, as it appears in 42 U.S.C. beginning at section 2000e. *See e.g.* 42 U.S.C. § 2000e, 2000e-2(a), 2000e-5(a)-(g). App. 37a-43a.

STATEMENT OF THE CASE

A. Facts

Academic scientist Petitioner Guangcun Huang ("Petitioner"), at the University of Texas Health Science Center at San Antonio ("UTHSCSA"), learned that another UTHSCSA employee Respondent Kohzoh Mitsuya ("Mitsuya"), when submitting a manuscript to external international research journal *Caner Research* for consideration for publication, forged co-author's consent to submission and made other false statements in the manuscript. App. 50a. On April 8, 2018, outside the course of performing his official duties, Petitioner complained to Respondent Tim Hui-Ming Huang ("Tim Huang"), the Chairman of Department of Molecular Medicine at UTHSCSA's School of Medicine, in his official Chairman's capacity, App. 45a, over Mitsuya's research misconduct, and, on April 12, 2018,[1] to Roberts A. Hromas ("Hromas"), the Dean of School of Medicine, App. 46a, in accordance with UTHSCSA's policy, App. 47a-48a, but Tim Huang, although conceded that Mitsuya indeed was making false statement in the manuscript, took actions, *inter alia*, calling and holding a meeting, on April 13, 2018, App. 46a, 48a, in the presence of Respondent DeAnna Hester ("Hester"), the Administrator of Department of Molecular Medicine, and other employees, and threatening Petitioner of termination, App. 46a-48a, and literally restraining Petitioner from moving away from his desk, *Id.*, when at work for the next several months, and, without authority, intentionally and falsely accused Petitioner

[1] In June 2018, Petitioner further notified the Editor-in-Chief at *Cancer Research* about Mitsuya's research misconduct and the manuscript was immediately rejected.

of being "unhealthy" and spreading it, through emails, to other unrelated UTHSCSA employees (App. 2a, 16a). Petitioner filed an unlawful retaliation complaint against Tim Huang, and it was upheld by UTHSCSA's Office of Regulatory Affairs & Compliance on April 19, 2018. App. 17a; App. 44a-49a. The investigation report also noted that Mitsuya's alleged acts fell into research misconduct (App. 49a); however, School of Medicine Investigator Respondent Jennifer S. Potter ("Potter") later ran a sham investigation and, *inter alia*, intentionally ignored the above UTHSCSA's opinion, *Id.*; *see also* App. 50a-52a *but compare* App. 44a-49a. Petitioner was still enjoined from moving away from his desk when at work and he was eventually transferred to Hromas's Lab on September 4, 2018 (App. 2a, App. 48a, App. 54a).

In April 2019, Petitioner filed suit against UTHSCSA and its employees in state court, App. 18a, alleging, *inter alia*, unlawfully retaliating him, as determined by UTHSCSA, for his speech, more specifically internal report directed at his nominal superior but outside the course of performing his official duties, on research misconduct over an external event in the worldwide research community, selectively enjoining him from his message, expressing his thoughts during academic debate, before its publication (App. 17a), and violations of Fourteen Amendment and Texas Constitution, and seeking monetary, declaratory and injunctive relief. In May 2019, Petitioner filed with the Equal Employment Opportunity Commission ("EEOC") a charge of discrimination. App. 18a. In June 2019, then Individual Respondents removed the case to federal court (*Id.*) while UTHSCSA, in July 2019 but *before being served*, wrote to EEOC *explicitly* asking for a Right-to-Sue letter so that UTHSCSA

could "defend *all*...alleged complaints in the Charge *under one lawsuit [in federal court]*" (*Id.*). In February 2020, Petitioner received the Right-to-Sue letter (*Id.*) and, as requested by UTHSCSA (*Id.*), added Title VII claim alleging that, *inter alia*, during his tenure at Department of Molecular Medicine, Petitioner, due to his non-religiosity, was repeatedly but differently treated including: (i) that Petitioner was singled out and requested to have *two first-author research papers* to be eligible to be promoted to Assistant Professor (App. 2a, 16a); and (ii) that he published *two* first-author research *papers* (App. 54a; *but compare* App. 2a,) but was never being promoted while UTHSCSA's similarly situated employees *who were religious* were promoted even *without any first-author paper* (App. 54a). Petitioner also alleged that Tim Huang frequently made him, being the only non-religiosity one, uncomfortable when discussing religion during meetings. App. 32a. Petitioner further alleged that, in January 2018, Tim Huang told Petitioner that Tim Huang himself had instructed Hester to work on paperwork promoting Petitioner, but Hester denied that later. App. 3a. On April 2, 2018, during a public meeting, when Petitioner complained of not being promoted with 4 years of excellent annual performance review, Tim Huang couldn't explain why Petitioner had never been promoted but instead falsely denied the existence of annual performance review documents signed by Tim Huang himself. Tim Huang conceded Petitioner's complaints constituted to a hostile work environment. UTHSCSA's President William L. Henrich ("Henrich") and other employees wittingly allowed Tim Huang to continue retaliating Petitioner including restricting his movement for months while UTHSCSA was investigating Tim Huang

over the alleged unlawful retaliation and even after UTHSCSA had determined the said unlawful retaliation, and further denying Petitioner of a promotion otherwise deserved (App. 54a-55a). Mitsuya was promoted on September 1, 2018 (*Id.* at 54a) and before Petitioner was transferred on September 4, 2018 (*Id.*).

When the case was pending and Petitioner alleged other research misconduct related to Tim Huang, UTHSCSA, in October 2019, implemented a new policy making internal report on research misconduct official duties of employees like Petitioner, forcing Petitioner *either to comply with the policy* by making internal report on *other* research misconduct as he alleged in his pleadings this case and subject himself to unlawful retaliation as occurred and determined by UTHSCSA here *or not to comply with the policy* by knowingly not making any internal report on research misconduct but subject himself to disciplinary actions. The new policy again states that "(m)isconduct also includes retaliation of any kind against a person who reported or provided information about suspected or alleged misconduct".

B. Proceedings Below

Petitioner filed suit in the state court against UTHSCSA and its employees in April 2019, and Individual Respondents removed it to the federal district court in June 2019. App. 18a. On July 10, 2019, UTHSCSA, *before being served*, wrote to EEOC *explicitly* asking for a Right-to-Sue letter so that it could "defend *all*...alleged complaints in the Charge *under one lawsuit [in federal court]*". *Id.* Petitioner requested UTHSCSA to waive service on July 25, 2019, and such waiver was filed on July 30, 2019. A Scheduling Order was issued on August 6, 2019. UTHSCSA failed

to make any mandatory initial disclosures but resonated it with an excuse that "Plaintiff has not provided Defendants with his initial disclosures", which is explicitly excluded in Fed. R. Civ. P. Rule 26(a)(1)(D). More than 2 months later, UTHSCSA, in October 2019, without conferring with Petitioner in good faith, filed Opposed Motion to Stay Discovery and Opposed Motion for Protective Order, which was granted over opposition. (App. 19a)

As he later pointed out in his Opening Brief to the Fifth Circuit, Petitioner attempted three times to timely amend complaint, as a matter of course pursuant to Fed. R. Civ. P. Rule 15(a)(1), in the district court. The first one was mistakenly rejected by court clerk but the district court denied, without explanation, Petitioner's motion for correction. Fifth Amended-Complaint was timely submitted, in the traditional manner as required, and the clerk received and stamped it on December 5, 2019 but never filed it. The other Amended-complaint, pursuant to Fed. R. Civ. P. Rule 15(a)(1), was timely filed on November 4, 2019, but opposing counsel immediately requested it to be stricken, and was removed from the record. Without being permitted to amend pursuant to Fed. R. Civ. P. Rule 15(a)(1), Petitioner was explicitly advised that he would not be permitted to amend complaint although the district court, on March 16, 2020, stated that "(t)his case is still at the very beginning stage" without any mandatory initial disclosure made by UTHSCSA.

Petitioner received, in February 2020 (App. 18a), the Right-to-Sue letter and, as UTHSCSA requested (*Id.*), added Title VII claim in March 2020, which was granted on March 16, 2020 but clerk never filed the complaint. In April 2020, the

district court ordered granting Respondents' motion to dismiss for lack of jurisdiction and for failure to state a claim *with prejudice* under Fed. R. Civ. P. Rules 12(b)(1) and 12(b)(6), *inter alia*, granting UTHSCSA Eleventh Amendment immunity from Title VII and hostile workplace environment claims, ruling Petitioner's speech, outside the course of performing his official duties, on research misconduct over an external event unprotected, permitting Respondents' selectively subjecting Petitioner to thought-probing—not allowing scientist Petitioner to think, denying Individual Respondents' liability including unlawful retaliation against Petitioner, as determined by UTHSCSA, due to Petitioner's complaint, outside the course of performing his official duties, about research misconduct over an external event, and denying Petitioner's other relief including declaratory/injunctive relief on, *inter alia*, UTHSCSA's new policy making internal report on research misconduct official duties of employees like Petitioner, forcing Petitioner *either to comply with the policy* by making internal report on *other* research misconduct as he alleged in his pleadings this case and subject himself to unlawful retaliation as occurred and determined by UTHSCSA here *or not to comply with the policy* by knowingly not making any internal report on research misconduct but subject himself to disciplinary actions. App. 15a-35a.

Petitioner timely appealed to the Fifth Circuit in May 2020. In his Opening Brief, Petitioner argued, *inter alia*, that Individual Respondents are not entitled to qualified immunity, from claims under 42 U.S.C. § 1983, under Fed. R. Civ. P. Rule 12(b)(1), and the district court erred in dismissing his claims against Individual Respondents in their individual capacities under Fed. R. Civ. P. Rule 12(b)(1). In his

Reply Brief, Petitioner further pointed out that Respondents, in their Answering Brief, did not address the above issue at all, and that Respondents had also failed to timely appeal the district court's failure in dismissing other multiple claims listed in the charts introduced in their Answering Brief. The Fifth Circuit stated that "the district court's findings as to lack of jurisdiction under [Fed. R. Civ. P.] Rule 12(b)(1) do not cover all of Appellant's claims" (App. 9a) and that "(i)n particular":

> the district court's jurisdictional findings do not cover Appellant's claims under 42 U.S.C. § 1983 against Appellees Huang, Chen, Lin, Mitsuya, and Hester, and against Appellees Henrich and Potter in their individual capacities to the extent that Appellant seeks damages for these claims. The district court did not make any findings in response to Appellees' motion to dismiss argument that individual Appellees acting in their official capacities are not "person[s]" within the meaning of 42 U.S.C. § 1983.

Id. at 9a n.2. The Fifth Circuit then "turn(ed) to the district court's reasons for granting Appellees' motion to dismiss for failure to state a claim", under Fed. R. Civ. P. Rule 12(b)(6), regarding First Amendment, Fourteenth Amendment Due Process, Fourteenth Amendment Equal Protection, Title VII and Hostile Work Environment.

In their Answering Brief, Respondents conceded that they "did not argue for dismissal (of Title VII claim) based on (Eleventh Amendment) immunity".

In February 2021, the Fifth Circuit affirmed the district court's order, holding, *inter alia*, that the Eleventh Amendment bars UTHSCSA and officials from suit including Title VII claim although UTHSCSA had explicitly but voluntarily invoked federal jurisdiction before it was served in state court where this case originated, that Petitioner surrounded his freedom of thoughts when accepting government employment, that Petitioner's speech, outside the course of performing his official

duties, on research misconduct over an external event in the worldwide research community unprotected, and that Petitioner has no standing for requesting declaratory/injunctive relief on, *inter alia*, UTHSCSA's new policy making internal report on research misconduct official duties of employees like Petitioner, forcing Petitioner *either to comply with the policy* by making internal report on *other* research misconduct as he alleged in his pleadings this case and subject himself to unlawful retaliation as occurred and determined by UTHSCSA here *or not to comply with the policy* by knowingly not making any internal report on research misconduct but subject himself to disciplinary actions. App. 1a-14a. A timely petition for rehearing en banc was denied on March 24, 2021. App. 36a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Fifth Circuit not only "[repeatedly] decided an important federal question in a way that conflicts with relevant decisions of this Court", S. Ct. Rule 10(c), it also "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter", S. Ct. Rule 10(a), "has decided an important federal question in a way that conflicts with a decision by a state court of last resort", *Id.*, and "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power", *Id.*

I. The Fifth Circuit's Analysis On UTHSCSA And Individual Respondents' Eleventh Amendment Immunity From Title VII And Other Claims After UTHSCSA Had Consented To Suit In Federal Court Conflicts With The Decisions Of This Court And Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise

Of This Court's Supervisory Power.

In their Answering Brief, Respondents conceded that they "did not argue for dismissal (of Title VII claim) based on (Eleventh Amendment) immunity". The Fifth Circuit dismissed all claims against UTHSCSA as barred by the Eleventh Amendment, App. 6a-7a. The Fifth Circuit "has so far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power". S. Ct. Rule 10(a).

The Fifth Circuit's decision affirming UTHSCSA's Eleventh Amendment Immunity from suit also conflicts with this Court's precedent. In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976), this Court stated that:

> [I]n the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin."

Id. at 447-48. "Title VII, which originally did not include state and local governments, had in the interim been amended to bring the States within its purview." *Id.* at 448-49. The Court also stated that there was "no dispute" that, in extending the scope of Title VII to "States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment." *Id.* at 453 n.9.

Eleventh Amendment is also waived if the state consents to suit. A state may waive its immunity by initiating or participating in litigation. *See e.g. Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 616 (2002). In *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305–06 (1990), this court stated that:

> The Court will give effect to a State's waiver of Eleventh Amendment immunity " 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' " *Atascadero State Hospital, supra,* 473 U.S., at 239240, 105 S.Ct., at 3145-3146 (quoting *Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347, 1360, 39 L.Ed.2d 662 (1974) (internal quotation omitted)). A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts, *see, e.g., Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 150, 101 S. Ct. 1032, 1034, 67 L.Ed.2d 132 (1981) (*per curiam*), and "[t]hus... it must specify the State's intention to subject itself to suit in federal court." *Atascadero State Hospital, supra,* 473 U.S., at 241, 105 S. Ct., at 3146.

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305–06 (1990). Here, UTHSCSA has "*specif(ied)* (its) intention to subject itself to suit in *federal court*" (*Id.* at 306) because on July 10, 2019, UTHSCSA, *before being served,* wrote EEOC a letter *explicitly asking for a Right-to-Sue letter* so that it *could* "defend *all*...alleged complaints in the Charge *under one lawsuit [in federal court]*". App. 18a. There was one and only *one case at the time* because then Individual Respondents, without UTHSCSA, removed this case to *federal district court* on June 28, 2019. *Id.* Thus, UTHSCSA has explicitly and voluntarily invoked federal jurisdiction and waived its sovereign immunity.

Henrich and Potter in their official capacity are not entitled to sovereign immunity from actions against them for damages arising out of willful and negligent disregard of state laws and due to Petitioner's seeking not only damages imposing individual and personal liability on the officials but also declaratory or injunctive relief, *inter alia,* terminating Potter and other Individual Respondents and

UTHSCSA's new policy making internal report on research misconduct official duties of employees like Petitioner, forcing Petitioner *either to comply with the policy* by making internal report on *other* research misconduct as he alleged in his pleadings this case and subject himself to unlawful retaliation as occurred and determined by UTHSCSA here *or not to comply with the policy* by knowingly not making any internal report on research misconduct but subject himself to disciplinary actions. *See e.g. Edelman v. Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908); *Johnson v. Lankford*, 245 U.S. 541 (1918); *Martin v. Lankford*, 245 U.S. 547 (1918); *Scheuer v. Rhodes*, 416 US 233 (1974). However, the Fifth Circuit stated that "Henrich and Potter, both employees of UTHSCSA and state officials, did not join the removal of this case to federal court and did not otherwise waive sovereign immunity. Accordingly, Henrich and Potter are entitled to Eleventh Amendment immunity from suit in their official capacities." App. 7a. Thus, the Fifth Circuit's decision on Eleventh Amendment again conflicts with this Court's precedents. S. Ct. Rule 10(c).

II. The Fifth Circuit's Analysis On Petitioner's Title VII Factual Pleadings Has So Far Also Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power.

Petitioner alleged that he was repeatedly but differently treated including: (i) that Petitioner was singled out and requested to have two first-author research papers to be eligible to be promoted to Assistant Professor (App. 2a, 16a); and (ii) that he published two first-author research papers (App. 54a) but was never being promoted (App. 53a-55a) while UTHSCSA's similarly situated employees who were religious were promoted even without any first-author paper (App. 54a). Petitioner

also alleged that Tim Huang frequently made him, being the only non-religiosity one, uncomfortable when discussing religion during meetings. App. 32a. Petitioner further alleged that, in January 2018, Tim Huang told Petitioner that Tim Huang himself had instructed Hester to work on paperwork promoting Petitioner, but Hester denied that later. App. 3a. On April 2, 2018, during a public meeting, when Petitioner complained of not being promoted with 4 years of excellent annual performance review, Tim Huang couldn't explain why Petitioner had never been promoted but instead falsely denied the existence of annual performance review documents signed by Tim Huang himself. Tim Huang conceded Petitioner's complaints constituted to a hostile work environment. Months later, Mitsuya, who is religious, was promoted on September 1, 2018 and before Petitioner was transferred on September 4, 2018 (App. 54a). Here, Petitioner argues that he was not promoted due to his non-religiosity in violation of Title VII of the Civil Rights Act of 1964, App. 12a, and alleged that (1) due to his being the only non-religiosity one (App. 32a); although (2) he was qualified (App. 53a-55a) and Tim Huang even claimed having instructed Hester on Petitioner's promotion paperwork (App. 3a); (3) he was not promoted (App. 53a-55a); and (4) the position he sought was filled by three others, including Mitsuy, App. 54a, outside the protected class. However, The Fifth Circuit stated that:

> In a "failure to promote" claim under Title VII the plaintiff has the burden to show that "(1) [he] was within a protected class; (2) [he] was qualified for the position sought; (3) [h]e was not promoted; and (4) the position [he] sought was filled by someone outside the protected class." *Blow v. City of San Antonio,* 236 F.3d 293, 296 (5th Cir. 2001). Appellant has not made this prima facie

showing.

App. 12a; *but compare supra* at 14. Thus, The Fifth Circuit "has so far also departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power". S. Ct. Rule 10(a).

III. The Fifth Circuit's Analysis On Petitioner's Being Selectively Subject To Thought-Probing Conflicts With This Court's Decisions On Overly Broad Prior Restraint On A Particular Individual's Speech.

Concurring in *Whitney v. California*, 274 US 357, 375 (1927), Justice Brandeis wrote that:

> (The framers of the Constitution) believed that *freedom to think as you will and to speak as you think* are means indispensable to the discovery and spread of political truth...they knew that order cannot be secured merely through fear of punishment for its infraction; that *it is hazardous to discourage thought*, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that *the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies*; and that the fitting remedy for evil counsels is good ones.

Id. at 375 (emphases added). Quoting Justice Holmes's dissenting opinion in *United States* v. *Schwimmer,* 279 U.S. 644, 654-55 (1929), Justice Jackson, in his concurring and dissenting, each in part, opinion in *American Communications Assn. v. Douds,* 339 US 382, 439, 442, 444 (1950), wrote that:

> But "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought —not free thought for those who agree with us but freedom for the thought that we hate...While the Governments, State and Federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought...This is

> not only because individual thinking presents no danger to society, but because thoughtful, bold and independent minds are essential to wise and considered self-government...The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it...And I have pointed out that men cannot enjoy their right to personal freedom if fanatical masses, whatever their mission, can strangle individual thoughts and invade personal privacy.

Id. at 439, 442, 444. Similarly, Justice Frankfurter wrote that:

> As MR. JUSTICE JACKSON'S opinion indicates, *probing into men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization.* The cardinal article of faith of our civilization is the inviolate character of the individual. *A man can be regarded as an individual and not as a function of the state only if he is protected to the largest possible extent in his thoughts* and in his beliefs as the citadel of his person.

Id. at 421 (emphases added), and Justice Black wrote that:

> We have said that "*Freedom to think is absolute of its own nature*; the most *tyrannical* government is powerless to control the inward workings of the mind."

Id. at 445 (emphasis added); citing dissenting opinion in *Jones v. Opelika*, 316 U.S. 584, 618 (1942) (it also declared that "(f)reedom of speech, freedom of the press, and freedom of religion all have a double aspect — freedom of thought and freedom of action". *Id.*) adopted as this Court's opinion in *Jones v. Opelika*, 319 U.S. 103 (1943).

Here, academic scientist Petitioner was singled out and censored from using the phrase "I think" to express his thought in writing during scientific discussion. App. 3a. First, Petitioner was attacked for his message "I think" expressing his thoughts. Moreover, Petitioner was singled out and attacked for his message "I think"

expressing his thoughts while others freely used the same message "I think" in the same context, and Respondent Chun-Liang Chen ("Chen"), who denied Petitioner to sue the phrase, wrote "I think" in his email to Petitioner in the email string within 48 hours. This is content discrimination and viewpoint discrimination, facially unconstitutional and considered an especially egregious form of content discrimination. In *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010), this Court held that "(s)peech restrictions based on the identity of the speaker are all too often simply a means to control content" and "the Government may commit a constitutional wrong when...it identifies certain preferred speakers." *Id.* at 340. Third, what being attacked here is factually the freedom to think which "is absolute of its own nature...Individual freedom and governmental thought-probing cannot live together. As the Court admits even today, under the First Amendment 'Beliefs are inviolate.' " *American Communications Assn. v. Douds*, 339 US 382, 445-46 (1950). Moreover, Petitioner's thoughts during scientific discussion — at academic setting — was suppressed. The expression of his thoughts was censored before its publication. This is an overly broad prior restraint on speech. This Court has emphasized that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. *Bantam Books, Inc. v. Sullivan, supra*, at 70..." (internal quotation masks omitted), *Freedman v. Maryland*, 380 US 51, 57 (1965), and this Court "(has) tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint. *Kingsley Books, Inc. v. Brown*, 354 US

436 (1957). In *Tory v. Cochran*, 544 US 734, 738 (2005), this Court stated that:

> [It] amounts to an overly broad prior restraint upon speech, lacking plausible justification. See *Nebraska Press Assn. v. Stuart*, 427 U. S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 390 (1973) (a prior restraint should not "swee[p]" any "more broadly than necessary"). As such, the Constitution forbids it. See *Carroll v. President and Comm'rs of Princess Anne*, 393 U. S. 175, 183-184 (1968) (An "order" issued in "the area of First Amendment rights" must be "precis[e]" and narrowly "tailored" to achieve the "pin-pointed objective" of the "needs of the case"); see also *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U. S. 569, 575, 577 (1987) (regulation prohibiting "all `First Amendment activities'" substantially overbroad).

Id. at 738. "(A) *man can be regarded as an individual* and not as a function of the state *only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person*". *American Communications Assn. v. Douds*, 339 US 382, 421 (1950) (emphases added).

Thus, the Fifth Circuit's decision rejecting a particular individual Petitioner's using "I think" conflicts with this Court's precedents. S. Ct. Rule 10(c).

IV. The Fifth Circuit Has Entered A Decision, Applying *Garcetti v. Ceballos* To Academic Setting, In Conflict With The Decisions Of Other Circuits' On The Same Important Matter.

Dissenting in *Garcetti v. Ceballos*, 547 US 410, 438 (2006), Justice Souter wrote "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities... 'pursuant to . . . official duties.'" *Id.* at 438. In response, Justice Anthony Kennedy – the author of the majority opinion in *Garcetti*, stated that:

> We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id, at 425. In *Adams v. Trustees of the Univ. of NC-Wilmington,* 640 F. 3d 550, 564 (4th Cir. 2011), the Fourth Circuit stated that:

> Applying Garcetti to the academic work...under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service...That would not appear to be what Garcetti intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.

Id. at 564. The Ninth Circuit also held that *Garcetti* does not apply to academic setting, explaining that:

> We conclude that Garcetti does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed "pursuant to the official duties" ...We hold that academic employee speech not covered by Garcetti is protected under the First Amendment, using the analysis established in Pickering.

Demers v. Austin, 746 F. 3d 402, 412 (9th Cir. 2014). The proceeding here involves the same issue on academic freedom as well, but the Fifth Circuit applied *Garcetti* to academic setting, stating that "... (n)or did Appellant speak to a matter of public concern when he used the phrase 'I think' in work-related emails". Thus, the Fifth Circuit's decision conflicts with both Fourth Circuit's and Ninth Circuit' decisions on the same matter of academic setting. S. Ct. Rule 10(a). *See also supra* at 15-18.

V. The Fifth Circuit's Analysis Holding Petitioner's Speech Unprotected When He, Outside The Course Of Performing His Official Duties, Spoke On Research Misconduct Over An External Event In The International Research Community Conflicts With the Decisions of this Court.

As this Court stated in *Connick v. Myers,* 461 U.S. 138, 146 (1983), matters of

public concern are those which can be fairly considered as relating to any matter of political, social, or other concern to the community. Speech which discloses *any evidence of corruption, impropriety, or other malfeasance on the part of ... officials*, in terms of content, *clearly concerns matters of public import. Id.* at 146. As this Court explained in *Pickering v. Board of Education*, 391 U. S. 563, 574 (1968), statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. *Id.* at 574. In *Garcetti v. Ceballos*, 547 US 410, 423-24 (2006), this Court stated that "(e)mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for...discussing politics with a co-worker". *Id.* at 423-24 (2006); citing *Rankin v. McPherson*, 483 U. S. 378 (1987).

In *Lane v. Franks*, this Court again declared that "citizens do not surrender their First Amendment rights by accepting public employment". *Lane v. Franks*, 134 S. Ct. 2374 (2014). The Court stated that "the First Amendment protection of a public employee's speech depends on a careful balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *citing Pickering v. Board of Ed. of Township High School Dist.* 205, Will Cty., 391 U. S. 563, 568 (1968) (internal quotations omitted). The Court further stated that "(t)here is considerable value,

moreover, in encouraging, rather than inhibiting, speech by public employees. For [g]overnment employees are often in the best position to know what ails the agencies for which they work." *Lane v. Franks*, 134 S. Ct. 2374 (2014); *quoting Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) (internal quotations omitted). The Court then cited "a two-step inquiry into whether a public employee's speech is entitled to protection" as Garcetti described whether "the employee spoke as a citizen on a matter of public concern" and "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Lane v. Franks*, 134 S. Ct. 2378 (2014); quoting *Garcetti v. Ceballos*, 547 U. S. 418 (2006). Respondents rightly conceded that it was not Petitioner's duty at the time to report research misconduct because the related policy requiring Petitioner to make a such report was "implemented in October 2019". Thus, Petitioner's statements reporting research misconduct at the time was speaking as a citizen, and "(t)he First Amendment limits an employer's regulation of speech in the workplace '[s]o long as employees are speaking as citizens about matters of public concern.' " App. 10a; *quoting Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

The Fifth Circuit's own precedents also held that "matters of public concern are those which can be fairly considered as relating to any matter of political, social, or other concern to the community." *Alexander v. Eeds*, 392 F.3d 138, 142 (5th Cir. 2004) (internal quotations omitted); quoting *Branton v. City of Dallas*, 272 F.3d 730, 739 (5th Cir. 2001); quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983). Petitioner's

statements on research misconduct, including and focusing in Mitsuya's forging co-author's consent to submit to international research journal for consideration for publication and making false statements, as conceded by Tim Huang, clearly concerns matters of public concern and are protected speech. *See e.g.* Office of Public Affairs, *Duke University Agrees to Pay U.S. $112.5 Million to Settle False Claims Act Allegations Related to Scientific Research Misconduct*, U.S. Department of Justice (March 25, 2019), https://www.justice.gov/opa/pr/duke-university-agrees-pay-us-1125-million-settle-false-claims-act-allegations-related; Sheila Kaplan, *Duke University to Pay $112.5 Million to Settle Claims of Research Misconduct*, N.Y. Times (March 25, 2019), https://www.nytimes.com/2019/03/25/science/duke-settlement-research.html. In fact, Petitioner's statements "(t)his manuscript had been submitted without my permission and there was materially false statement regarding Authors' Contributions in this manuscript as well" directed to the Editor-in-Chief of *Cancer Research* resulted in immediate rejection of the manuscript. The fact that Petitioner conveyed the same statements to external research community and it resulted in rejection of the manuscript defeated Respondents' arguments and the Fifth Circuit's holding that Petitioner "did not speak to a matter of public concern when he reported Mitsuya's alleged misconduct, as this reporting stemmed from Appellant's belief that he was entitled to first authorship of the research paper". App. 10a. Petitioner lost his authorship entirely when he notified the Editor-in-Chief of *Cancer Research* of the same statements, *i.e.* his internal report on Mitsuya's research misconduct. Petitioner's statements, unrelated to his official

duties, on research misconduct over an external event in the international research community clearly concern matters of public important and deserve full constitutional protection. On the other hand, Defendants here did not, and cannot, have "an adequate justification for treating the employee differently from any other member of the general public". *Garcetti v. Ceballos*, 547 U. S. 418 (2006). App. 44a-49a. Thus, the Fifth Circuit's decision again conflicts with this Court's precedents. S. Ct. Rule 10(c).

VI. The Fifth Circuit's Analysis Holding the Petitioner Has No Standing To Obtain Declaratory And Injunctive Relief Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power.

Here, Petitioner allege that he was unlawfully retaliated by Tim Huang, as determined by UTHSCSA, when Petitioner, outside the course of performing his official duties, made an internal report on research misconduct over an external event in the international research community. App. 44a-49a; *see also supra* at 19-22. The Fifth Circuit's decision denying Petitioner's Speech to be protected. *Id.* When this case was pending, UTHSCSA implemented a new policy, in October 2019, making internal report on research misconduct official duties of employees like Petitioner, forcing Petitioner *either to comply with the policy* by making internal report on *other* research misconduct as he alleged in his pleadings this case and subject himself to unlawful retaliation as occurred and determined by UTHSCSA here *or not to comply with the policy* by knowingly not making any internal report on research misconduct but subject himself to disciplinary actions. Thus, Petitioner was suffering ongoing violation of federal law.

In their Answering Brief to the Fifth Circuit, Respondents claimed that Petitioner "cannot rely on *Ex parte Young*'s limited exception to Eleventh Amendment immunity for official capacity claims" and that the "district court properly found that the *Ex parte Young* did not apply to Huang's claims, because he did "not sufficiently allege[] an 'ongoing violation of federal law,'" nor is his requested relief "'declaratory or injunctive in nature and prospective in effect.'"

In *Verizon Maryland, Inc. v. Public Service Commission of Maryland,* 535 U.S. 635, 645 (2002), this Court stated that, in determining whether the *Ex parte Young* exception applies, a court need only conduct "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645. The Fifth Circuit's own precedent also showed the same. *See e.g. McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 416-17 (5th Cir. 2004). However, here, the Fifth Circuit analysis holding that Petitioner has no standing for declaratory or injunctive relief on, *inter alia*, UTHSCSA's new policy and terminating Individual Respondents including Tim Huang, Potter, Hester, Mistuya and Chen, and dismissed claims against Henrich in his official capacities. Thus, the Fifth Circuit again has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power". S. Ct. Rule 10(a). Moreover, the Fifth Circuit analysis holding that Petitioner's "requested injunctive relief" is "outside what (the district court) can order" (App. 9a,), also departed from the accepted and usual course of judicial proceedings, and it's undisputable that to retract Tim Huang's false statements attacking Petitioner's

professional and personal characters is not just to order "the destruction of records" (*Id.*; *see also* App. 29a).

VII. The Fifth Circuit's Analysis On Texas Tort Claims Act Conflicts With Texas Supreme Court's Decision.

Texas Supreme Court hold that "traditional scope-of-employment analysis in *respondeat superior* cases, which concerns only whether the employee is discharging the duties generally assigned to [the employee]." *Laverie v. Wetherbe*, 517 SW 3d 748, 753 (Tex. 2017) (internal quotation omitted). Tim Huang's calling staff meetings to threaten termination, ordering Petitioner to "sit by his desk" depriving Petitioner's liberty in the lab, making other defamatory statements during staff meetings and/or in emails to HR and/or other personal are not within the scope of his employment, and in fact, he was investigated by UTHSCSA and found of unlawful retaliation against Petitioner. App. 44a-49a. Tim Huang did not, and cannot, claim that he himself was qualified/eligible to evaluate Petitioner's mental status, nor was Tim Huang discharging his duties assigned to him to evaluate Petitioner's mental status while Tim Huang falsely accused Petitioner of being "quite unhealthy". Chen clearly stated that Petitioner was "not under (his) supervision at all". Chen singled out and censored Petitioner, a scientist, from using the common phrase "I think" to express his thoughts during research discussion. Chen's conduct is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience". *Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999). Therefore, UTHSCSA's move, to dismiss those tort claims against Individual Respondents pursuant to Tex. Civ. Prac. & Rem. Code § 101.106(f),

should be dismissed. Thus, the District Court erred when it applied Tex. Civ. Prac. & Rem. Code §101.106(f) to Petitioner's claims against those Individual Respondents in their Individual Capacity. App. 8a.

Additionally, the Fifth Circuit also stated that Moreover, Respondents, in their Answering Brief to the Fifth Circuit Court, stating that:

> Under Texas Civil Practice & Remedies Code § 101.106(e), if a suit is filed "against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e).

App. 7a-8a. Respondents argued, in their Answering Brief to the Fifth Circuit, that Petitioner could not sue UTHSCSA. Moreover, Fourteen Amendment stated that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIII. The Fifth Circuit's Analysis On Petitioner's Failure To State A Claim Conflicts With Decisions Of This Court's Precedents, Conflicts With Other Circuits' Decisions On The Same Matter, And Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Power.

The Fifth Circuit stated that "the district court's findings as to lack of jurisdiction under [Fed. R. Civ. P.] Rule 12(b)(1) do not cover all of Appellant's claims" (App. 9a) and that "(i)n particular":

> the district court's jurisdictional findings do not cover Appellant's claims under 42 U.S.C. § 1983 against Appellees Huang, Chen, Lin, Mitsuya, and Hester, and against Appellees Henrich and Potter in their individual capacities to the extent that Appellant

> seeks damages for these claims. The district court did not make any findings in response to Appellees' motion to dismiss argument that individual Appellees acting in their official capacities are not "person[s]" within the meaning of 42 U.S.C. § 1983.

Id. at 9a n.2. The Fifth Circuit then "turn(ed) to the district court's reasons for granting Appellees' motion to dismiss for failure to state a claim", under Fed. R. Civ. P. Rule 12(b)(6), regarding First Amendment, Fourteenth Amendment Due Process, Fourteenth Amendment Equal Protection, Title VII and Hostile Work Environment.

On First Amendment, the Fifth Circuit held that:

> Appellant did not speak to a matter of public concern when he reported Mitsuya's alleged misconduct, as this reporting stemmed from Appellant's belief that he was entitled to first authorship of the research paper. Nor did Appellant speak to a matter of public concern when he used the phrase "I think" in work-related emails.

App. 10a. Petitioner has argued that he was speaking, outside the course of performing his official duties, *see supra* at 19-22, to a matter of public concern he made internal report on Mitusya's misconduct and that he was selectively subject to thought-probing at academic setting, *see supra* at 15-18.

On Fourteenth Amendment Due Process, the Fifth Circuit held that:

> [I]n § 1983 suits alleging a violation of the Due Process Clause of the Fourteenth Amendment, . . . [p]laintiffs must (1) assert a protected 'liberty or property' interest and (2) show that they were deprived of that interest under color of state law... Appellant has not identified any constitutionally protected liberty or property interest of which he was deprived.

App. 11a. Petitioner argued, in his Reply Brief to the Fifth Circuit, that First Amendment Rights and freedom of movement are Petitioner's liberty interest. *See e.g. Kolender v. Lawson*, 461 US 352, 358 (1983); citing *Shuttlesworth v. City of Birmingham*, 382 U. S. 87, 91 (1965); *Kent v. Dulles*, 357 U. S. 116, 126 (1958);

Aptheker v. Secretary of State, 378 U. S. 500, 505-506 (1964).

On Fourteenth Amendment Equal Protection, the Fifth Circuit held that:

> To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.

App. 11a. Petitioner was selectively subject to thought-probing at academic setting (*see supra* at 15-18), and discriminated on his non-religiosity (*see supra* at 13-14).

On Title VII claim, App. 12a, Petitioner has argued that he had made exactly factual pleadings requested by the Fifth Circuit Court. *See supra* at 14-15. On Hostile Work Environment claim, App. 12a-13a, Petitioner has argued that he was speaking, outside the course of performing his official duties, to a matter of public concern when he made internal report on Mitusya's misconduct (*see supra* at 19-22) and that he was selectively subject to thought-probing at academic setting (*see supra* at 15-18).

Additionally, the Fifth Circuit sated that Petitioner "merely makes conclusory assertions in support of this argument" on interlocutory decisions although Petitioner not only claims, *inter alia*, that Respondent never received any mandatory initial disclosures from Respondent UTHSCSA and that UTHSCSA responded that with "Plaintiff has not provided Defendants with his initial disclosures", which is explicitly excluded in Fed. R. Civ. P. Rule 26(a)(1)(D).

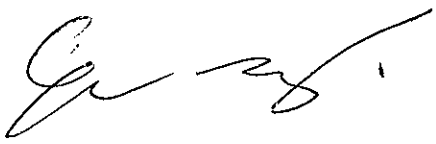
The Fifth Circuit again has not only "[repeatedly] decided an important federal question in a way that conflicts with relevant decisions of this Court", S. Ct. Rule 10(c), it also "has entered a decision in conflict with the decision of another

United States court of appeals on the same important matter", S. Ct. Rule 10(a), "has decided an important federal question in a way that conflicts with a decision by a state court of last resort", *Id.*, and "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power", *Id.*

CONCLUSION

The petition for writ of certiorari should be **GRANTED**.

Respectfully submitted,



GUANGCUN HUANG, *Pro Se*
PO Box 1004
Fremont, CA 94538
(210) 589-5684

August 23, 2021.