No. 21-49

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES TOLLE,

Petitioner/Plaintiff,

v.

ROCKWELL COLLINS CONTROL TECHNOLOGIES, INC., COLLINS AEROSPACE /d/b/a Rockwell Collins Control Technologies, Inc., ROCKWELL COLLINS CONTROL TECHNOLOGIES, INC. d/b/a Rockwell Collins, Inc., ROCKWELL COLLINS, INC., COLLINS AEROSPACE d/b/a Rockwell Collins, Inc., ROCKWELL COLLINS CONTROL TECHNOLOGIES, INC. /d/b/a United Technologies Corporation, ROCKWELL COLLINS, INC. /d/b/a United Technologies Corporation, COLLINS AEROSPACE /d/b/a United Technologies Corporation, and UNITED TECHNOLOGIES CORPORATION

Respondents/Defendants.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Without any indication from the District Court's Opinion that it found a defect in Plaintiff's pleadings or factual allegations of his Complaint, the District Court failed to follow the pleading standards required by this Court, including multiple instances of ignoring or refusing to provide a presumption of truth to Plaintiff's multiple, detailed factual allegations and related references to evidence from public sources which support Plaintiff's claims. The defiance of the lower court to respect this Court's precedents and follow the pleading standards of this Court, which was affirmed by the Appellate Court without comment, raises the following questions concerning the District Court's Rule 12(b)(6) analysis and dismissal.

a) Did the District Court err in finding, without explanation, that "there is no indication that the Gay Pride flag is associated with such animus" (Memorandum Opinion, Appendix A, note 4) even though the factual allegations in Plaintiff's Complaint provide evidence of animus if taken as true during a Rule 12(b)(6) review?

b) Did the District Court defy this Court's precedent in *Neitzke v. William*, 490 U.S. 319, 327 (1989) when it dismissed Plaintiff's Complaint "based on a judge's disbelief of a complaint's factual allegations" by ignoring Plaintiff's ample factual allegations showing there is some indication that the Gay Pride flag is associated with animus towards Christians in order to find "there is no indication that the Gay Pride flag is associated with such animus" (Memorandum Opinion, Appendix A, note 4)?

c) Did the District Court err by finding "nor did [the flag]...unreasonably interfere with plaintiff's work performance" (Memorandum Opinion, Appendix A, p. 8) under Rule 12(b)(6) when Plaintiff's Complaint did include factual allegations which, if taken as true,

show that the display of the offensive flag did interfere with Plaintiff's work performance?

d) Did the District Court err in finding under Rule 12(b)(6) that Plaintiff did not allege that he had an employment requirement to work under the offensive flag when Plaintiff's Complaint included factual allegations showing that his work requirements forced him to see the flag displayed in front of the work entrance and that the employer offered no accommodation to alter the requirements of his work which forced him to see the flag multiple times each day?

e) Did the District Court err in finding that Plaintiff faced no discipline following his request for an accommodation under Rule 12(b)(6) when Plaintiff's Complaint provides factual allegations showing constructive discharge and that Plaintiff received threats of termination following his complaint?

f) Did the District Court err by finding that Plaintiff's Complaint did not sufficiently allege that a group of persons was impacted due to religion under Rule 12(b)(6) when Plaintiff's Complaint included factual allegations showing disparate impact towards Christians as a group and evidence of another Christian in the workplace confirming this?

g) Did the District Court err in finding no adverse action towards Plaintiff by the employer under Rule 12(b)(6) when Plaintiff's Complaint includes factual allegations showing adverse actions after his complaint based on hostile working conditions and threats and/or by showing a constructive discharge?

II. The District Court based its constructive discharge analysis on an intolerability standard using a reasonable person in Plaintiff's position without concern for whether the reasonable person used in its analysis is religious or not. The following questions are related to the District Court's approach which was affirmed by the Appellate Court without comment.

a) Is the reasonable person test for intolerability under the constructive discharge doctrine of *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204

(2004) (hereinafter, *"Suders"*) and *Green v. Brennan*, 136 S. Ct. 1769, 1776-77 (2016) (hereinafter, *"Green"*) compatible and consistent with the test based on a "person in Plaintiff's position" from *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (hereinafter *"Oncale"*)? Failure of this Court to enforce a consistent standard for a reasonable person test for constructive discharge and Title VII discrimination cases will cause confusion and likely lead to uneven application of the law in these cases.

b) Does the reasonable person test in *Oncale* require that a "person in Plaintiff's position" be applied to the constructive discharge analysis for religious accommodation and should the reasonable person test in that case be based on the perspective of a religious person who shares the faith of a devout Plaintiff? Failure of this Court to find error in how intolerability in Petitioner's case was based on an average employee who does not share Petitioner's religious beliefs or objections to the offensive object will strip the reasonable person test from *Suders*, *Green*, and *Oncale* of its ability to find other reasonably offensive conditions to be intolerable for devoutly religious persons (for example, when a devout Muslim has to remove a head scarf; or when a devout Jewish person is only offered pork-based employer-provided meals). If the Court's constructive discharge criteria can find intolerability for devout Muslims and Jews, it should be similarly applied to find intolerability for devout Christians as in Plaintiff's and other cases.

III. The District Court relies on *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011) (hereinafter, *"Hoyle"*), which quotes *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (hereinafter *"Ellerth"*), but the U. S. Court of Appeals for the Fourth Circuit in *Hoyle* erroneously equates an "adverse action" to the Supreme Court's "tangible employment action" (*Ellerth* at 761) considered for "resolution of the vicarious [employer] liability issue we consider

here" (*Ellerth* at 761) and the District Court finds no adverse action if the work conditions caused by the employer did not have economic impact on Plaintiff based on this. Petitioner believes that employer liability is not in question in the present case and the District Court's use of *Hoyle's* definition of adverse action based on *Ellerth's* tangible employment action is too narrow for analyzing Title VII discrimination in his case. This Court's guidance in *Meritor Savings Bank, FSB v. Vinson* 477 U.S. 57 (1986), hereinafter "*Meritor*", interprets the "conditions" of employment more broadly than just economic and states: "the language of Title VII is not limited to 'economic' or 'tangible' discrimination" (*Meritor* at 64). Was it an error for the District Court to base its analysis of the change in Plaintiff's working conditions after his complaints to the employer only on economic impact and to ignore non-economic changes in the conditions of Plaintiff's work environment in its findings concerning adverse actions by Plaintiff's employer?

IV. Can the District Court ignore this Court's precedent in *Carter v. Stanton*, 405 U.S. 669, 671 (1972) and deny Plaintiff the due process protections of Rule[1] 12(d) or Rule 56 when considering new matter during a Rule 12(b)(6) review?

V. Is a District Court required to give a party notice that it is considering and not excluding new matter and an opportunity to oppose it prior to ruling against the party, even if the party may know that the court has been presented with the new matter?

1 Any "Rule" referenced in this instant Petition is referring to a rule from the current Federal Rules of Civil Procedure, unless otherwise indicated.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Tolle states that he has no parent corporation in this action and no publicly held corporation has an interest with Petitioner Tolle in this action.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

Tolle v. Rockwell Collins Control Techs., 1:20-cv-00174 (E.D. Va. Jun. 18, 2020), granting Defendants' Motion to Dismiss.

James Tolle v. Rockwell Collins, Number 20-1768, U. S. Court of Appeals for the Fourth Circuit. Unpublished Opinion of Panel date May 10, 2021, affirming District Court's dismissal, *per curiam*.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Federal Cases

United States Constitution

Rules

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and orders below.

OPINIONS BELOW

(CITATIONS OF ORDERS ENTERED IN THE CASE)

1. On or around February 19, 2020, Petitioner filed a complaint with the United States District Court for the Eastern District of Virginia after investigation of his charges and a Notice of Right to sue by the Equal Employment Opportunity Commission. Petitioner's Complaint alleged claims of religious discrimination and harassment under 42 U.S.C. § 2000e-2(a)(1) and § 2000e-2(m) and an unlawful employment practice which causes a disparate impact on the basis of religion in violation of 42 U.S.C. § 2000e-2(k), and/or § 2000e-2(m).

2. On June 18, 2020, the District Court entered an Order and Memorandum Opinion (Appendix A) (collectively, "DISMISSAL"; "District Court's Opinion" or "Opinion" for Memorandum Opinion) dismissing Petitioner's case with prejudice.

3. Petitioner's Appeal to the U. S. Court of Appeals for the Fourth Circuit was docketed on July 14, 2020 and the Appellate Court's Panel issued an unpublished Opinion affirming the District Court's DISMISSAL with their Judgment on May 10, 2021 (Appendix B).

4. Petitioner filed a timely Petition for Rehearing or Rehearing *En Banc* with the Appellate Court on May 18, 2021, which was denied by the Panel on June 7, 2021. Petitioner is seeking a Writ of Certiorari based on the Appellate Court's Unpublished Opinion of May 10, 2021 and the District Court errors it affirmed.

JURISDICTION

5. The District Court entered a Final Order dismissing Petitioner's Complaint on June 18, 2020. Petitioner appealed to the U. S. Court of Appeals for the Fourth Circuit on July 14, 2020. The Appellate Court issued a Panel Opinion on May 10, 2021, which affirmed the lower court's dismissal. Petitioner is seeking a Writ of Certiorari to a United States Court of Appeals pursuant to 28 USC § 1254(1) and Supreme Court Rule 10 because the District Court's Opinion, which the Appellate Court affirmed without comment, contains substantial errors in law on important matters which are in conflict with the precedent of this Court or with other U. S. Courts of Appeal and serve to deny Petitioner's rights to due process under the rules of civil procedure and the Fifth Amendment of the U. S. Constitution. The District Court's review under Rule 12(b)(6) and the dismissal affirmed by the Appellate Court have departed so far from the accepted and usual course of judicial proceedings according to this Court's pleading standard as to demand a review by the Court and an exercise of this Court's supervisory powers. Failure of this Court to address these errors will create a split in the Courts of Appeal, weaken this Court's precedents, strike at the rule of law and deprive citizens in the Fourth Circuit of fundamental due process rights that citizens in other Circuits currently enjoy under the pleading standards of this Court and the rules of civil procedure.

6. Per Supreme Court Rule 13.1, a Petition for Writ of Certiorari is timely filed within 90 days after the entry of judgment by the lower court. According to Supreme Court Rule 13.3, the time to file the Petition runs from the date of a denial of a timely filed request for rehearing. The instant Petition is timely filed under these rules because the Petition is filed less than 90 days from the denial of Petitioner's request for rehearing in the Court of Appeals on June 7, 2021.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

7. The constitutional and statutes relied on in this Petition are as follows.

a) The Fifth Amendment to the United States Constitution, which includes protections for due process and equal protection under law, provides as follows:

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

STATEMENT

8. This case involves errors in the District Court which included serious departures by the District Court from this Court's pleading standard for a Rule 12(b)(6) review, as well as errors involving other precedents of this Court and related constitutional protections for due process. The District Court's Rule 12(b)(6) analysis of Plaintiff's workplace harassment claim is particularly egregious because the District Court refused to consider multiple, detailed factual allegations with citations to public sources which support Plaintiff's claims and, without finding any error in Plaintiff's pleadings, dismissed Plaintiff's claim based on the District Court's own conclusory statement that "there is no indication that the Gay Pride flag is associated with such animus" (Memorandum Opinion, Appendix A, note 4). Without any other evidence, the District Court's failure to take Plaintiff's factual allegations as true and to rely on a contrary, unsubstantiated assertion by the lower court appears to be a rejection of this Court's pleading standard in order to insert the lower court's own biased view of the Gay Pride flag into its Rule 12(b)(6) analysis, which served to foreclose on Plaintiff's claims. The background and statement of position which supports Petitioner's request for Certiorari based on these errors is as follows.

9. Plaintiff worked as a statutory employee for Rockwell Collins Controls Technologies (hereinafter "RCCT" or "Rockwell Collins") until October, 2019.

10. In or around June 2019, Rockwell Collins flew the Gay Pride flag on the flag pole over all or almost all of its locations for 30 days, which included the Sterling location of RCCT where Plaintiff had worked continuously from on or around November, 2018, until his departure in or around October, 2019.

11. During the months of June through September, 2019, Plaintiff complained to RCCT management concerning how the flag was an object which Petitioner found offensive based on his religious practice and belief and was creating a hostile work environment which affected and/or altered the conditions of his work; during this time, Plaintiff requested an accommodation for his religious practices. RCCT offered Plaintiff no reasonable accommodation and never demonstrated how an accommodation would cause any undue hardship to the conduct of RCCT's business. The employer's refusal to offer Plaintiff an accommodation and the employer's promise to continue display of the offensive object every year for the month of June led to Plaintiff believing that he was being forced to either abandon his religious practice or be subject to management's threats of discipline and termination if he should stay employed. Petitioner is a devout Christian who is unwilling to compromise his religious beliefs in order to satisfy an employer's requirements and having to choose between being faithful to his religious beliefs or keeping a job where he was threatened with discipline or termination if he did not alter his religious practice became so intolerable for Petitioner that he felt that he had no other choice but to leave employment in October, 2019. If the Court grants Certiorari in Petitioner's case, it will have an opportunity to determine how the law under the precedents in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004) (hereinafter, "*Suders*") and *Green v. Brennan*, 136 S. Ct. 1769, 1776-77 (2016)

(hereinafter, *"Green"*) address constructive discharge for situations where an employer forces a devout employee to alter his or her religious practice to continue working. Certiorari will also allow the Court to mitigate the split that is developing in religious accommodation law among the Circuits for these situations.

12. Prior to Petitioner's end of employment, on or around September 28, 2019, Petitioner reported RCCT's discriminatory actions against him to the Equal Employment Opportunity Commission (hereinafter, "EEOC") and filed charges on or around November 16, 2019. The EEOC issued a Notice of Right to Sue letter on or around December 4, 2019.

13. On or around February 19, 2020, Petitioner filed a complaint with the United States District Court for the Eastern District of Virginia, which alleged claims of religious discrimination and harassment under 42 U.S.C. § 2000e-2(a)(1) and § 2000e-2(m) and an unlawful employment practice which causes a disparate impact on the basis of religion in violation of 42 U.S.C. § 2000e-2(k), and/or § 2000e-2(m).

14. Defendants filed a Motion to Dismiss Petitioner's Complaint on May 4, 2020 (hereinafter, "motion") and a Reply in Support of their Motion to Dismiss (hereinafter, "REPLY") on May 19, 2020, alleging new facts in their REPLY. Whether Petitioner received due process after the District Court decided to rely on the new matter in Defendants' REPLY rather than excluding it and either failed to convert Defendants' Rule 12(b)(6) motion to summary judgment according to Rule 12(d) or failed to provide Plaintiff notice and procedural protections under Rules 12(d) and 56 after conversion are important questions concerning due process raised in this Petition. Granting Petitioner's request for Certiorari will allow the Court to address the violation of due process rights when lower courts in the Fourth Circuit ignore or fail to properly follow the rules of civil procedure and deny Fifth Amendment due process.

15. On June 18, 2020, the District Court entered an Order and Memorandum of

Opinion (Appendix A) (collectively, "DISMISSAL") dismissing Petitioner's case with prejudice. The District Court's Memorandum Opinion which included analysis under Rule 12(b)(6) did not find any defect in the pleading of the factual allegations of Plaintiff's Complaint but ignored or refused to take as true several of Plaintiff's relevant factual allegations in making its determination that Plaintiff failed to state a claim. One example of this is that despite Plaintiff's Complaint providing multiple, detailed, well-pleaded factual allegations concerning how the history of the Gay Pride flag is related to animus towards Christians (Appendix C, ¶¶52(a), 75, notes 5-6), the District Court ignored all of these factual allegations and seems to have inserted its own biased opinion about the Gay Pride flag into its Rule 12(b)(6) analysis instead. In affirming this action, the Appellate Court directly contradicts the pleading standards established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and indicates that lower courts in the Fourth Circuit can defy this Court's precedent and the rule of law to redefine the judicial process with seeming impunity. If this Court is concerned with ensuring due process and enforcement of its precedents concerning the proper standard of review during the pleading stage, it should grant Petitioner's request for Certiorari and review how the Appellate Court has affirmed such seemingly blatant disregard for the Court's guidance by the lower courts in the Fourth Circuit.

16. The Petitioner's Notice of Appeal was filed on July 7, 2020, under Fed. R. App. P. 3 in order to appeal the District Court's final decision within 30 days after entry of the District Court's Order. Petitioner's Appeal to the U. S. Court of Appeals for the Fourth Circuit was docketed on July 14, 2020 and the Appeal was fully briefed on August 22, 2020. The Appellate Court's Panel issued an unpublished Opinion affirming the District Court's dismissal with Judgment on May 10, 2021 (Appendix B).

17. Petitioner filed a timely Petition for Rehearing or Rehearing *En Banc* with the Appellate Court on May 18, 2021, which was denied at the direction of the Panel on

June 7, 2021, without comment. Petitioner is seeking a Writ of Certiorari based on the Appellate Court's Unpublished Opinion of May 10, 2021 and the District Court errors it affirmed.

18. The basis for federal jurisdiction over Petitioner's Complaint in the U. S. District Court for the Eastern District of Virginia is as follows:

a) Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), insofar as the events and/or omissions giving rise to Tolle's claims occurred in this judicial district, and pursuant to 42 U.S.C. § 2000e-5, insofar as Rockwell Collins maintains a place of business in, and the unfair employment practice was committed in, this judicial district.

REASONS FOR GRANTING THE PETITION

19. Petitioner believes that there are three substantial errors in law which urgently need to be addressed by this Court in order to avoid fundamental violations of law and Constitutional rights in the Fourth Circuit or before a split on important issues is created between the Courts of Appeal. The most egregious error affirmed by the Appellate Court is the District Court's abandonment of this Court's pleading standard since *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) (hereinafter "*Iqbal*") under Rule 12(b)(6), striking at the rule of law and the availability of due process and equal protection during the pleading stage. Even though the District Court found no defect in the pleading of the factual allegations of Plaintiff's Complaint during its Rule 12(b)(6) review and despite the fact that Plaintiff's Complaint provides multiple, detailed, well-pleaded factual allegations (citing substantiating evidence) concerning how the history of the Gay Pride flag is related to animus towards Christians, the District Court's Opinion ignored all of these factual allegations and evidence in order to make a finding about the Gay Pride flag which, without any other explanation, seems to align with the District Court's biased opinion about the Gay Pride flag and unfairly prejudices Plaintiff's claims. This one example of

the District Court's defiance of the Court's pleading standard, affirmed by the Appellate Court, is such a corruption of the judicial process defined by this Court that the Court should grant Certiorari based on this error in law, if for no other reason. Without Certiorari or any other action by the Court to review the District Court's errors in its Rule 12(b)(6) analysis, or at least this most serious instance, the Court will allow lower courts in the Fourth Circuit to repeat this practice and ignore well-pleaded factual allegations of any complaint in the future in order to achieve the result a judge wants, with seeming impunity based on the Appellate Court's affirmation in Petitioner's case. The Court's pleading standard since *Iqbal* has struck a balance between providing all plaintiff's access to the Federal courts and providing some reasonable limitations on the claims brought to trial. However, failing to protect the pleading standard under *Iqbal* in Petitioner's case will set the stage for lower courts in the Fourth Circuit to have the latitude to ignore any factual allegation they do not like and thereby achieve any outcome of pleading that a lower court may want. If a Federal court wants to put its thumb on the scales of justice for whatever reason, it should not be allowed to during the pleading stage, where plaintiffs have no jury or rules of evidence to rely on for a fair hearing. By choosing to ignore substantial, relevant and specific factual allegations in Plaintiff's Complaint in order to achieve the outcome the District Court seems to have preferred for the Gay Pride flag, the pleading standard seems to be under assault in the Fourth Circuit and the Appellate Court's affirmation of this action by the lower court will not ensure it survives. In the end, only this Court will be able to rescue the pleading standard in the Fourth Circuit and Petitioner hopes that the Court will use Petitioner's instant request to grant Certiorari for this purpose, before the judicial process based on the pleading standard is re-defined and the gates to justice at the pleading stage are closed by the courts in the Fourth Circuit to those plaintiffs with whom the lower courts do not agree.

20. The errors in law committed in the District Court and affirmed by the Appellate

Court directly conflict with this Court's precedents. First, the multiple examples that Petitioner provides (see Part I) show how the District Court's Rule 12(b)(6) analysis is contrary to *Iqbal* by ignoring multiple, key factual allegations in Plaintiff's Complaint without reason and how the District Court seemingly did this in order to rely on its own bias or achieve the outcome it preferred, notwithstanding what is actually pleaded in Plaintiff's Complaint. This includes the most egregious example already mentioned of how the District Court seems to ignore multiple, substantial factual allegations and evidence concerning how the Gay Pride flag has become a symbol of "discriminatory behavior towards Christians" (Appendix C, ¶75; see also Appendix C, ¶52(a) and note 5) to reach a finding "there is no indication that the Gay Pride flag is associated with such animus"[2]. Second, the District Court's Opinion in Petitioner's case includes an important question concerning the interpretation of the reasonable person test from this Court's constructive discharge doctrine from *Suders* and *Green* when the employee is a devout religious person and the employer has refused to provide an accommodation to the employee (see Part II). The District Court Opinion which was affirmed by the Appellate Court and does not consider religious devotion as part of the reasonable person in the employee's position is at odds with courts in other Circuits which are recognizing that a reasonable person test for intolerability involving a failure to accommodate is different than other constructive discharge cases. Lastly, Petitioner raises multiple issues in how the District Court relied on new matter which it did not exclude, leading to errors in law or violations of due process under Rules 12(d) and 56 (see Part III). If the Court does not grant Certiorari to review these errors, it will allow this Court's pleading standard for Rule 12(b)(6) reviews to be blatantly defied in the Fourth Circuit, allow confusion on the constructive discharge doctrine to continue, and ignore the breakdown of the rule of law and violations of due process under Rules 12(d) and 56 in the Fourth Circuit.

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2 Memorandum Opinion, Appendix A, note 4.

21. Petitioner also believes that the District Court abused its discretion by denying Plaintiff's request to amend his Complaint with matter concerning facts which are material to the District Court's ruling when the District Court's decision is based on clear error (see Part IV).

22. Arguments demonstrating each of these District Court errors are presented in Parts I-IV. Standards of review are *de novo* for questions concerning errors in law. The District Court's denial of Plaintiff's Amended Complaint should be reviewed as an abuse of discretion.

Part I. District Court's Rule 12(b)(6) Errors

23. The District Court improperly ruled under Rule 12(b)(6) which was material legal error and in direct conflict with this Court's guidance in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), hereinafter "*Iqbal*". This is demonstrated by the reasons for the lower court's pleading stage errors provided in the following. For each of these reasons that Rule 12(b)(6) was not properly followed, where Plaintiff's Complaint actually contains one or more material factual allegations which the District Court failed to read or ignored, it should be clear to the Court that the District Court cannot satisfy *Iqbal's* requirement to take all of these factual allegations as true and still be able to rule as it did. Each instance provides reversible error during the pleading stage.

a) When considering Plaintiff's harassment claim, the District Court wrongly states "[employer's] conduct was not frequent, severe or...threatening" (Memorandum Opinion, Appendix A, p. 8), but Plaintiff's Complaint alleges frequent, all-day, every-day display of an offensive object for 30 days (Appendix C, ¶30).[3] The District Court also erroneously states "nor did [the flag]...unreasonably interfere with plaintiff's work performance" (Memorandum

3 Plaintiff's Complaint also includes factual allegations showing e-mails from Rockwell Collins' management which include actual threats of termination in response to his complaints (Appendix C, ¶¶ 46, 52(d)).

Opinion, Appendix A, p. 8) even though Plaintiff's Complaint provides multiple factual allegations showing that Defendants' offensive object did unreasonably interfere with Plaintiff's work (Appendix C, ¶¶31, 32, 57(a), 101(a)). Furthermore, the District Court admits that displaying a flag "associated with hatred or animus" (Memorandum Opinion, Appendix A, note 4) can be severe and pervasive enough to create a hostile work environment but wrongly states that "there is no indication that the Gay Pride flag is associated with such animus" (*Id.*), which wholly ignores the multiple, detailed factual allegations (and citations to evidence from public sources) in Plaintiff's Complaint showing that the Gay Pride flag was not created as a symbol of peace and has been associated with animus and retaliation against Christians (Appendix C, ¶¶52(a), 75, notes 5-6), including the following excerpt from the National Catholic Register:

> "According to Chuck Fimandri, chief counsel to the Freedom of Conscience Defense Fund, many Christians who oppose the Gay pride movement have been targeted in the workplace: 'They have a mortgage to pay and kids to feed, so they give in and shut up,' Fimandri said. 'Others quit and try to get another job. Or they get fired and end up on social services. There are thousands and thousands of them across the country. They have said something or donated to something or declined to say something positive about same-sex marriage and have become pariahs in their places of employment.' (quoted in the National Catholic Register, 'It's Not a Gay Old Time for Those Who Support Traditional Marriage', April 7, 2015)" Appendix C, note 5, inner quotes removed.

This Court should not find that the District Court is following the Court's standard of review under *Iqbal* if the District Court is making such blatant errors in considering the factual allegations of Plaintiff's Complaint. How can the District Court be given credit for properly taking these multiple factual allegations in Plaintiff's Complaint as true under *Iqbal*, showing the Gay Pride flag and movement's animus towards Christians, and still make the statement "there is no indication that the Gay Pride flag is associated with such animus" (Memorandum Opinion, Appendix A, note 4)? It should be clear that by the District Court's own admission in the District Court's Opinion (*Id.*), Plaintiff's Complaint can allow the Court to infer that it is likely that a harassing workplace was caused by Defendants if all of the factual allegations of this animus in

Plaintiff's Complaint are taken as true. It is hard to believe that this glaring oversight was not influenced by some bias in the lower court.

b) When considering Defendants' failure to accommodate, the District Court findings claim that Plaintiff did not adequately allege "that he was subjected to any kind of employment requirement" which conflicted with his religious beliefs (Memorandum Opinion, Appendix A, p. 11), but Plaintiff's Complaint provides factual allegations showing that Defendant's Human Resources representative responded to Plaintiff's request for a location where he would not be required to work in view of the offensive object by telling him that the flags were flying at "all locations" (Appendix C, ¶39) and she did not "offer Tolle any accommodation...at another location" (*Id.*). It should be clear to the Court that the only reasonable interpretation of these factual allegations from Plaintiff's Complaint under *Iqbal* lead to the conclusion that it was a requirement of Plaintiff's work to be within sight of an object which he found offensive, an object which the company was flying at every location where employees were required to work, and that without an accommodation which would allow Plaintiff to work elsewhere, he was required to continue to work under the flag.

c) Furthermore, during its failure to accommodate consideration, the District Court states that "the complaint is devoid of allegations that plaintiff was disciplined for failing to comply with that requirement" (Memorandum Opinion, Appendix A, p. 11), but Plaintiff's Complaint provides factual allegations showing that Plaintiff received threats of termination following his complaint ("Any employee who treats another in a way that contradicts this expectation will subject him or herself to discipline, up to and including termination." Appendix C, ¶46) as well as continuing conditions which were so intolerable that led to Plaintiff's constructive discharge (Appendix C, ¶¶52-53). It is just plainly wrong that Plaintiff's Complaint is "devoid of allegations" of disciplinary or adverse action and the District Court's failure to find

a constructive discharge or any adverse action, *infra*[4], contributed to this error.

d) When considering disparate impact, the District Court states that Plaintiff's Complaint "does not sufficiently allege that one group of people, for reasons of religion...was impacted more than another." (Memorandum Opinion, Appendix A, pp. 12-13, inner quotations removed), but Plaintiff's Complaint provides factual allegations showing that Defendants' flying a Gay Pride flag did create an environment which was unwelcoming to Christian employees and applicants, clearly "one group of people", including at least one other Christian employee who confirmed that the environment created was unwelcoming to Christians (Appendix C, ¶¶7, 57(d), 155(a)-(d), 156).

e) Concerning disparate treatment, the District Court's finding that Plaintiff's Complaint does not plausibly show a constructive discharge is wrong, *infra.*[5] Plaintiff's Complaint also includes sufficient factual allegations of other adverse action based on conditions of his work according to *Meritor, infra.*[6]

24. All of the factual allegations from Plaintiff's Complaint recited above and related to the District Court's Rule 12(b)(6) errors are substantial, well pleaded allegations. Indeed the District Court made no finding showing that any of these factual allegations were defective or not well pleaded.[7] According to this Court's teaching in *Iqbal*, "When there are well-pleaded factual allegations, a court should assume their veracity" (*Iqbal* at 664). If the lower court had

4 See Part II, "District Court's Errors Concerning Adverse Actions".
5 See Part II, sub-section "*Failure to Properly Apply this Court's Precedent concerning Intolerability for Constructive Discharge*".
6 See Part II, sub-section "*District Court Erred by Failing to Find Other Adverse Actions*".
7 Although the District Court states (Memorandum Opinion, Appendix A, pp. 6-7) that "legal conclusions pleaded as factual allegations, unwarranted inferences, unreasonable conclusions, and naked assertions devoid of further factual enhancement are not entitled to the presumption of truth" according to *Wikimedia Found v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017) when discussing the legal standard for pleading that would satisfy *Iqbal's* requirements, the District Court does not actually find that any of Plaintiff's factual allegations fall into any of these categories and the District Court makes no other finding which would give reason for this Court not to take Plaintiff's factual allegations as true.

observed the guidance of this Court's precedent and taken all of the factual allegations of Plaintiff's complaint as true, Petitioner believes that facial plausibility of Plaintiff's claims would have been clear and would allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" (*Id.* at 663).

25. For the foregoing reasons, the District Court's application of the legal standard for failure to state a claim under *Iqbal* was fatally flawed due to the lower court's failure to accept Plaintiff's multiple, detailed factual allegations as true concerning workplace harassment, failure of Defendants to accommodate Plaintiff's religious practice or belief, and disparate impact and disparate treatment based on religion. It is of note that in one instance, the District Court ignored Plaintiff's multiple factual allegations concerning the animus towards Christians which the Gay Pride flag represents and based its dismissal on, without any other explanation, what seems to be its biased opinion of the object's animus. It should be clear to the Court that this is a violation of *Neitzke v. William*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance... dismissals based on a judge's disbelief of a complaint's factual allegations"). Each of the instances above which are errors where the District Court failed to properly apply *Iqbal* are errors in law which are not harmless and should lead to reversal of the pleading stage findings of the District Court for Petitioner's claims of workplace harassment, failure to accommodate religious belief or practice, disparate impact and disparate treatment based on religion. Even if the Court is not persuaded by the multiple examples of how the District Court failed to properly apply the Court's precedent in *Iqbal*, it should be troubling that the lower court ignored Plaintiff's well-pleaded factual allegations in order to inject what appears to be the District Court's own opinion of or bias towards the Gay Pride flag and dismiss Petitioner's claim of workplace harassment. By the District Court's own admission, an employer can be "liable for a hostile work environment for posting a flag...associated with...animus based on...religion" (Memorandum Opinion,

Appendix A, note 4) and the only way that the District Court could not find harassment in Plaintiff's Complaint is by ignoring all of Plaintiff's relevant factual allegations. This concern alone should be sufficient reason for the Court to grant Petitioner's request for Certiorari.

Part II. District Court's Errors Concerning Adverse Actions

Failure to Properly Apply this Court's Precedent concerning Intolerability for Constructive Discharge

26. The constructive discharge doctrine established by this Court in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004) (hereinafter, "*Suders*") and *Green v. Brennan*, 136 S. Ct. 1769, 1776-77 (2016) (hereinafter, "*Green*") requires a court to consider the intolerability of the conditions faced by the employee before finding a constructive discharge. Both *Suders* and *Green* call for a reasonable person test when determining if a constructive discharge is an adverse action:

> "The constructive-discharge doctrine contemplates a situation in which an employer discriminates against an employee to the point such that his 'working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign.' *Pennsylvania State Police v. Suders*,542 U.S. 129, 141,124 S.Ct. 2342,159 L.Ed.2d 204 (2004). When the employee resigns in the face of such circumstances, Title VII treats that resignation as tantamount to an actual discharge. *Id.*, at 142–143, 124 S.Ct. 2342." *Green* at 1776-77.

27. The District Court in Plaintiff's case erred in its interpretation of this Court's constructive discharge precedents. First, the District Court wrongly added a deliberateness test to its consideration of Plaintiff's constructive discharge, contrary to the teaching in *Green*.[8] More importantly, the District Court's error is reversible because its interpretation of

8 See Memorandum Opinion, Appendix A, p. 14. This contradicts higher court precedent: "We do not also require an employee to come forward with proof...that his quitting was his employer's plan all along." *Green v. Brennan*, 136 S. Ct. 1769, 1779-80 (2016); "The Supreme Court now has clearly articulated the standard for constructive discharge, requiring objective 'intolerability'...but not 'deliberateness,' or a subjective intent to force a resignation." *U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131, 144 (4th Cir. 2017).

intolerability in Plaintiff's case was flawed and did not properly apply the "reasonable person" test of this Court's constructive discharge precedents in *Suders* and *Green*.

28. The District Court should have more properly considered how to apply this Court's teaching concerning a test of a reasonable person in Plaintiff's position for a Complaint involving a failure of the employer to accommodate Plaintiff's religious belief or practices. The District Court erred in finding that forcing Plaintiff to see an object offensive to Plaintiff's religious beliefs and practice every day at work "would have had virtually no impact on a reasonable person's working life" (Memorandum Opinion, Appendix A, p. 15). If this Court's constructive discharge doctrine calls for a test of intolerability based on a reasonable person in Plaintiff's position of the same faith as Plaintiff, the District Court's finding is clearly a misapplication of the Court's precedents since an offensive object to a religious person cannot be expected to have "virtually no impact on a reasonable person" in that person's shoes. For example, can a court find that an image of Mohammed which a devout Muslim would find offensive to his religious beliefs reasonably has no impact on the life of a person of that faith? The only way that the District Court can minimize the impact of a religiously offensive object in the work place to a reasonable person is to rely on the perspective of other employees who do not share the beliefs of the faith which finds an objection in the object. Petitioner believes that this Court's precedents calling for consideration of a "reasonable person in the employee's position" (*Suders* at 141) require a court to interpret the "employee's position" from the perspective of one who shares the faith of the employee, which the District Court clearly did not do in making its finding of no intolerability in Petitioner's case, stating that Petitioner should have "continued working undeterred, and simply ignored the flag if he found it offensive" (Memorandum Opinion, p. 15).

29. Prior to the *Suders* guidance on constructive discharge, this Court taught how a

court should use "a reasonable person in the employee's position". In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (hereinafter, "*Oncale*"), the Court explained:

> "We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' *Harris, supra,* at 23. In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field — even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office *Oncale* at 81, quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), hereinafter "*Harris*".

30. If a court's proper analysis according to this Court's precedent in *Oncale* can find the objective reasonableness of an employee's response to offensive behavior different between a coach's player and the coach's opposite sex secretary, the proper analysis of intolerability under the Court's constructive discharge doctrine based on a reasonable person in the employee's position for a religious employee versus a non-religious employee should also encounter differences in the objective reasonableness of their responses to a religiously offensive stimulus, if "all the circumstances" (*Oncale* at 81, quoting *Harris*) of the devoutly religious employee are correctly taken into account. This should have informed the District Court in Petitioner's case concerning how to apply the intolerability analysis after *Suders* and *Green.*

31. If this Court's precedents for objective reasonableness before *Suders* and after *Suders* are to be consistent, the reasonable person test of intolerability for constructive discharge should consider the "perspective of a reasonable person in the plaintiff's position" (*Oncale* at 81) in a case of religious discrimination based on a reasonable person in the same manner as was taught in *Oncale.* If the Court does not intend for there to be a different standard for reasonableness between constructive discharge cases and discriminatory harassment cases, the reasonableness test for intolerability for constructive discharge should then be based on a

reasonable person who shares the same faith as the Plaintiff and, if "all the circumstances" of that employee are considered, what is reasonable for a person having the same faith to do in response to an object which is offensive to their shared religion should be the standard. Similarly, an intolerability test based on a reasonable person who does not share the same faith or religious objections, as used by the District Court in Plaintiff's case, should not be proper under this Court's precedent. On the other hand, if this Court intended for the guidance on the reasonable person test for constructive discharge to be different from that used in *Oncale*, it should be important for the Court to grant Petitioner Certiorari in order for the Court to clarify this part of its constructive discharge precedents.

32. Since *Green*, other courts have interpreted this Court's precedents for constructive discharge intolerability in like manner to how Petitioner's arguments interpret them. Prior to the District Court's ruling on intolerability in Petitioner's religious accommodation case, the U. S. Court of Appeals in the Fourth Circuit has found reason for intolerability and constructive discharge after an employer fails to provide accommodation of religious practice:

> "...there exists substantial evidence that Butcher was put in an intolerable position when Consol refused to accommodate his religious objection....This goes well beyond the kind of run-of-the-mill 'dissatisfaction with work assignments, [ ] feeling of being unfairly criticized, or difficult or unpleasant working conditions' that we have viewed as falling short of objective intolerability. *Cf. Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994) (internal quotation marks omitted)." *U.S. Equal Emp't Opportunity Comm'n v. Consol Energy, Inc.*, 860 F.3d 131, 145 (4th Cir. 2017), hereinafter, "*Consol*".

33. This seems to directly contradict the District Court's ruling in Petitioner's case and supports Plaintiff's arguments that what is reasonably intolerable for a devoutly religious person has to be based on a reasonable person of faith. In *Consol*, Butcher objected to being faced with a scanner system because according to his beliefs, "requiring him to use a scanner system...would render him a follower of the Antichrist" (*Consol* at 145). Even though no other reasonable person in Butcher's position who did not share Butcher's beliefs would consider the

situation intolerable, the Appellate Court found that failing to accommodate Butcher and forcing a person having Butcher's beliefs to violate his faith would be objectively intolerable under this Court's reasonable person test taught in *Green*. The District Court's analysis in Petitioner's case does not take any of the *Consol* precedent into consideration when refusing to include persons sharing Plaintiff's faith in its reasonable person test of intolerability. Furthermore, the Appellate Court's affirmation of this District Court's error in light of the Fourth Circuit precedent in *Consol* does not address this apparent contradiction with its precedent in any way. Plaintiff believes that if the District Court had properly applied this Court's constructive discharge guidance according to the precedent in the Fourth Circuit after *Consol*, the District Court would have found that it is objectively reasonable for persons sharing Plaintiff's faith and objections to the Gay Pride flag to find being forced to see the offensive object every day was intolerable.

34. Not only does the District Court's decision in Plaintiff's case depart from how the Fourth Circuit has interpreted this Court's reasonable intolerability under *Suder* and *Green*, but it also directly conflicts with how other courts outside the Fourth Circuit have treated constructive discharge and intolerability for religious discrimination and failure to accommodate cases. In *Young v. Southwestern Savings and Loan Assoc.* 509 F.2d 140 (5th Cir. 1975), hereinafter "*Young*", the Fifth Circuit found religious offenses which were repugnant to an employee's beliefs as reasonably intolerable for constructive discharge after failure of the employer to accommodate a religious objection, finding reason for her to leave based on her religious conflict with her employer's requirements:

> "The only possible reason for...[Young's] resignation on September 15, 1971, was her resolution not to attend religious services which were repugnant to her conscience, coupled with the certain knowledge from Bostain, her supervisor, that attendance at the staff meetings — in their entirety — was mandatory and the reasonable inference that if she would not perform this condition of her employment, she would be discharged. In these circumstances, when she could hope no longer that her absence at the meetings would not be noticed, she could reasonably infer that in one week, one month or two

> months, she would be discharged because of the conflict between her religious beliefs and company policy. Surely it would be too nice a distinction to say that Mrs. Young should have borne the considerable emotional discomfort of waiting to be fired instead of immediately terminating her association with Southwestern. This is precisely the situation in which the doctrine of constructive discharge applies, a case in which an employee involuntarily resigns in order to escape intolerable and illegal employment requirements." *Young* at 144.

35. In the Tenth Circuit, the court in *Equal Employment Opportunity Commission v. 704 HTL Operating, LLC*, 979 F. Supp. 2D 1220 (D.N.M. 2013), hereinafter, *"HTL"* similarly found that the objectively reasonable person required for intolerable constructive discharge shared the same faith as the employee in that case ("Defendants fail to argue...the position that an objectively reasonable Muslim woman would tolerate the employment requirement that she style her hijab in a deliberately secular, hair-revealing manner.", *HTL* at 1231). Furthermore, another court in the Tenth Circuit has drawn attention to the tension between an employee's First Amendment right to practice his religion in the work place and the need for him to maintain employment: "...the Court finds that the ultimatum given to Plaintiff was to resign from his job or to agree to cease conducting his noon prayers *in the building*." (*Farah v. A-1 Careers*, No. 12-2692-SAC at *23 (D. Kan. Nov. 20, 2013), hereinafter, *"Farah"*). In *Farah*, the court found no constructive discharge after considering this issue because of several examples, unlike Petitioner's case, where Farah's employer attempted to accommodate his noon prayers.

36. As in *Consol* and *Young*, Petitioner was forced to face something "repugnant" to his conscience in his work environment for a whole month in 2019 and the promise of having to face the same every year due to Defendants' refusal to offer any accommodation to his religious practice. The only alternative for a devout person in Plaintiff's shoes (someone who shares his beliefs) besides resignation was to stay away from work during the time that the offensive object was displayed (for up to 1 month each year) and, as in *Young*, Plaintiff faced the very real possibility that he would be disciplined and fired if he missed such a large amount of work.

Plaintiff's Complaint provides multiple factual allegations showing that Plaintiff had to leave employment due to objectively intolerable working conditions after Defendants failed to accommodate his religious practice (Appendix C, ¶¶53,106(d),120(a)-(e), 121(b)). *Console* and *Young* teach that constructive discharge applies to Plaintiff's resignation based on a failure to accommodate a religious practice and that the District Court's failure to find a constructive discharge is an error in law. In the Fourth Circuit, constructive discharge provides evidence of adverse action for religious discrimination (*Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001), "Of course, 'ultimate employment decisions' — to hire, discharge, refuse to promote, etc. — can constitute the necessary adverse employment action") and the District Court erred because an adverse action based on constructive discharge can be used to satisfy criteria for multiple forms of Title VII discrimination, including the use of Plaintiff's allegations of constructive discharge to infer violations of both religious discrimination based on Defendants' failure to accommodate and disparate treatment.[9]

37. The District Court's failure to apply this Court's precedents for intolerability correctly and failure to find religious discrimination from the adverse action of a constructive discharge is a reversible error.

District Court Erred by Failing to Find Other Adverse Actions

38. The District Court also erred by focusing solely on economic and tangible adverse actions by Defendants. The District Court states: "Plaintiff has not adequately alleged that he suffered an adverse employment action. 'An adverse action is one that constitutes a significant change in employment status...or a decision causing a significant change in benefits.'"

9 See *James v. Booz-Allen Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004) at 375 and note 2: "*Von Gunten*'s discussion of what constitutes adverse action applies here as '[i]n the absence of strong contrary policy considerations, conformity between the provisions of Title VII is to be preferred.', quoting *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985)".

(Memorandum Opinion, Appendix A, p. 13, quoting *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011), hereinafter "*Hoyle*"). The District Court erred in not finding a change in employment status through the constructive discharge alleged in Plaintiff's Complaint, *supra*. But the District Court also erred by wrongly relying on case law for a "tangible employment action".

39. *Hoyle* relies on this Court's ruling in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), hereinafter "*Ellerth*". However, *Hoyle* inaccurately draws on this Court's definition of a "tangible employment action" in *Ellerth* (at 761) to define all forms of an "adverse action" (*Hoyle* at 337) under Title VII. This Court's teaching on tangible employment action from *Ellerth* does not apply to Petitioner's case because *Ellerth's* consideration of tangible employment action was limited to "resolution of the vicarious [employer] liability issue we consider here" (*Ellerth* at 761). Searching for a "tangible employment action" to impute liability to the employer is not required in Petitioner's instant case because the discriminatory actions by Defendants were indisputably liable to the employer, which explicitly instituted the policy to display the offensive object (Appendix C, ¶¶39, 40(a),40(f)).

40. The District Court's use of *Hoyle* led to its fatally flawed analysis of adverse action by only considering a "change in benefits" and "materially adverse action" (Memorandum Opinion, note 9) based on economic factors: "There is no indication...that Rockwell Collins took a materially adverse action against plaintiff....In fact...far from retaliating against plaintiff, Rockwell Collins offered him a job as a regular employee...." (*Id.*) The District Court's findings contradict this Court's guidance from *Meritor*, which specifically states:

> "The language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment. *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U.S. 702, 707, n. 13 (1978)" *Meritor* at 64.

The District Court erred in law by not properly using the full scope of this Court's guidance for Title VII adverse action under *Meritor.*

41. Plaintiff's Complaint alleges sufficient impact to the "conditions" of his employment following his complaint of the religiously offensive object. The facts alleged show that Defendants were responsible for a hostile work environment where Plaintiff found a religiously offensive object (Appendix C, ¶¶31,74(a)-(d)) which impacted his work (Appendix C ¶¶31-32,73(b)) and Defendants allowed these conditions to continue by failing to offer the accommodation requested by Plaintiff (Appendix C, ¶¶35,39,45,52(c),97(a)-(e)). Forcing Plaintiff to continue working in an unmitigated hostile environment was an adverse action. Furthermore, Plaintiff's Complaint alleges threats by Defendants' representatives against Plaintiff based on his religious beliefs (Appendix C, ¶46) which contributed to a hostile work environment that sufficiently altered the conditions of his work to be an adverse action.

42. In *Rogers v. Equal Employment Opportunity Com'n*, 454 F.2d 234, 238 (5th Cir. 1972), the Fifth Circuit found reason for a hostile work environment to be sufficient to impact Title VII's "conditions" of employment. This Court incorporated this principle in its Opinion in *Meritor*, stating: "Since the [EEOC] Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." (*Meritor* at 66) If the District Court had applied the full scope of this Court's precedent for Title VII discrimination to Plaintiff's Complaint, it should have found that the hostile work environment created by Defendants' actions which forced him to alter his religious practice and by Defendants' threats against Plaintiff due to his religious beliefs did sufficiently impact the "conditions" of his employment to make it plausible that there was a violation of Title VII due to discrimination based on religion.

Part III. Error in Law or Due Process Violation when Considering New Matter under Rule 12

District Court Failed to Follow Supreme Court Precedent and Rule 12(d)

43. The District Court erred in law by not converting the Defendants' motion to summary judgment following new matter presented by Defendants as is required under Rule 12(d). The District Court improperly ruled on Defendants' motion after accepting matter which was outside of Plaintiff's Complaint. Defendants' arguments cited *Peterson v. Hewlett-Packard*, 358 F.3d 599 (9th Cir. 2004), hereinafter "*Peterson*", and claimed "Like the plaintiff in *Peterson*, Plaintiff made abundantly clear to Rockwell Collins that he believes homosexuality is a sin" (Defendants' Reply in Support of their Motion to Dismiss, Appendix D, p. 3) and "as Plaintiff seems to assert, employers are required to conform to the individual moral code of each employee who seeks to impose their personal and individual views on the rest of the workforce" (Defendants' Reply in Support of their Motion to Dismiss, Appendix D, p. 4). However, Plaintiff's Complaint never contained any factual allegation in which Plaintiff stated "he believes homosexuality is a sin". Furthermore, Plaintiff's Complaint makes no assertion that "employers are required to conform to the individual moral code" of Plaintiff and, based on what is in the facts of the Complaint, Plaintiff never expected or asked Rockwell Collins to do this. This was new matter presented as part of Defendants' REPLY to Plaintiff's opposition to a Rule 12(b)(6) challenge[10], precluding Plaintiff a reasonable opportunity to oppose such new matter because it was inserted as part of Defendants' REPLY at the last stage of the briefings to the District Court. The District Court did not exclude this new matter from Defendants' brief and even used Defendants' arguments from Peterson, stating: "Defendants have drawn a useful comparison with...Peterson...." (Memorandum Opinion, Appendix A, p. 16). The District Court accepted

10 "Factual allegations contained in legal briefs or memoranda are also treated as matters outside the pleading for purposes of Rule 12(b)", *Fonte v. Bd. of Mgers. Of Cont. Towers Condo*, 848 F.2d 24, 25 (2d Cir. 1988)).

Defendants' new matter which claimed that Tolle "believes homosexuality is a sin" to draw a comparison with the Plaintiff in *Peterson,* stating: "In Peterson, the plaintiff...'...believes that homosexual activities violate the commandments contained in the Bible and that he has a duty to expose evil when confronted with sin'" (Memorandum Opinion, Appendix A, p. 16, quoting *Peterson* at 601, inner quotations removed). By allowing Defendants' new matter to be presented, not excluding it, and even relying on it to form the District Court's Opinion, the District Court improperly allowed Defendants to present new evidence into a Rule 12(b)(6) procedure.

44. According to Rule 12(d), a court is required to convert a Rule 12(b)(6) review to summary judgment if new matter is presented and not excluded by the court, specifically stating:

> "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." (Rule 12(d))

45. This Court has clearly established that it is an error in law for a court to fail to convert a Rule 12(b)(6) review to summary judgment under Rule 56 after not excluding new matter and such error is reversible, stating:

> "But it appears that at the hearing on the motion to dismiss, which was based in part on the asserted failure "to state a claim upon which relief can be granted" (App. 19), matters outside the pleadings were presented and not excluded by the court. The court was therefore required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56." *Carter v. Stanton,* 405 U.S. 669, 671 (1972) (hereinafter *"Stanton"),* referring to "Rule 12(b)" which is now covered under Rule 12(d).

46. There is no evidence in the record that the District Court in Plaintiff's case converted its Rule 12(b)(6) review to a summary judgment proceeding and if it had intended to follow the law and do so, "its order is opaque and unilluminating as to either the relevant facts" (*Stanton* at 671) from Plaintiff's Complaint which rebutted Defendants' new matter or the law

guiding its conversion. It is notable that even if the District Court intended a conversion to summary judgment, the District Court never gave Plaintiff any proper notice or opportunity to oppose Defendants' claim that Tolle's beliefs were similar to Peterson before the District Court accepted these new alleged facts. If the District Court had followed Rule 12(d) and this Court's precedent in *Stanton* correctly to consider Defendants' new matter under Rule 56, Rule 56 requires that the trial court not grant summary judgment until "[a]fter giving notice and a reasonable time to respond" (Rule 56(f)). Indeed, this Court has expected notice and opportunity to oppose prior to a summary judgment decision ("district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). If the purpose of Rules 56 consideration is not intended to deny Plaintiff the opportunity to oppose Defendants' efforts to dismiss genuine issues for trial (especially after conversion due to new matter which was inserted into Defendants' REPLY to Plaintiff's opposition brief, which Plaintiff never had an opportunity to oppose), the District Court erred by cutting off Plaintiff's ability to show that the alleged facts based on the new matter were genuinely in dispute ("the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try" *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944), hereinafter "*Sartor*").

47. Other courts have ensured the protections for plaintiffs under Rule 56 before summary judgment, including recognizing the requirements for notice to all parties, the reasonable opportunity to oppose summary judgment, and even discovery in some cases.[11]

11 It is notable that despite the U. S. Court of Appeals for the Fourth Circuit being silent on Petitioner's Assignment of Error for not providing notice when considering new evidence, the Appellate Court has explicitly previously found that Defendants may present new evidence during a Rule 12(b)(6) proceeding "only after notice that the court intends to convert the Rule 12(b)(6) motion into a Rule 56 motion." *Fayetteville Investors v. Commercial Builders*, 936 F.2d 1462 (4th Cir. 1991) (note 9). Courts in other circuits roundly require notice and reasonable

48. The failure of the District Court to convert its Rule 12(b)(6) review to summary judgment under Rule 56 after deciding to not exclude Defendants' new matter and even relying on it in its decision is an error in law[12] because it did not follow the express rules of procedure under Rule 12(d), the precedent of this Court and the established practice throughout the courts of the land. Furthermore, such error was not mere harmless error to Petitioner because the District Court used the arguments and new matter presented by Defendants to dismiss Plaintiff's

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opportunity to oppose before summary judgment, which Petitioner was not afforded after the new matter in this case. See *Rivera v. Centro*, 575 F.3d 10, 15 (1st Cir. 2009) ("If, however, the supplemental materials submitted to the district court fall outside this narrow class of documents, and the court chooses to consider them using Rule 12(d)'s conversion procedure, '[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.' Fed.R.Civ.P. 12(d)."); *Glob. Network Commc'ns v. City of N.Y*, 458 F.3d 150, 155 (2d Cir. 2006) ("The conversion requirement of Rule 12(b) thus..ensures that when a trial judge considers evidence dehors the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it."); *Radich v. Goode*, 886 F.2d 1391, 1393 (3d Cir. 1989) ("The court must give a party opposing summary judgment an adequate opportunity to obtain discovery. *Dowling*, 855 F.2d at 139."); *International Shortstop, Inc. v. Rally's*, 939 F.2d 1257, 1267 (5th Cir. 1991) ("The Supreme Court itself has cautioned against granting summary judgment prematurely. In *Anderson*, the Court indicated that the nonmoving party's obligation to respond to a motion for summary judgment 'is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.' *Anderson*,106 S.Ct. at 2511 n. 11. The Court stated that the nonmoving party must present affirmative evidence in response to a summary judgment motion, 'even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery.*' *Id.*106 S.Ct. at 2514 (emphasis added)."); *Dayco Corp. v. Goodyear Tire Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975) ("The 'reasonable opportunity' language of Rule 12(b) is designed to prevent unfair surprise to the parties....Where one party is likely to be surprised by the proceedings, notice is required."); *Interco Inc. v. National Sur. Corp.*, 900 F.2d 1264, 1269 (8th Cir. 1990) ("A federal district court may grant summary judgment, pursuant to Fed.R.Civ.P. 56, *sua sponte*, provided that the party against whom judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted. 10A C.A. Wright, A.R. Miller M.K. Kane, *Federal Practice and Procedure* § 2720, p. 27 (2d ed. 1983)."); *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) ("In *Peterson*, we also concluded that when a conversion to a Rule 56 motion is proper, 'the trial court should give the parties notice of the changed status of the motion and thereby provide the parties to the proceeding the opportunity to present to the court all material made pertinent to such motion by Rule 56.'", quoting *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454, 457 (10th Cir. 1978)); *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 507 (D.C. Cir. 2016) ("Rule 56(e)(1) empowers the District Court to 'give a party who has failed to address a summary judgment movant's assertion of fact an opportunity to properly support or address the

claims of religious discrimination without giving Plaintiff any opportunity to oppose them. By drawing a comparison between Peterson's belief that "homosexuality is a sin" and Plaintiff's objections to the display of the Gay Pride flag, the District Court relied on Defendants' alleged new matter as a material fact for which Petitioner believes there was genuine dispute based on Plaintiff's Complaint. By failing to follow Rule 12(d) after not excluding this genuine issue from its decision and failing to give Plaintiff any opportunity to contest the new matter, the District Court erred in law by cutting off Plaintiff's right of trial of the material issue in dispute by jury as in *Sartor*, which was not merely harmless error.

District Court Denied Plaintiff Due Process Required by Rules 12(d) and 56

49. Rule 56 states that "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." The District Court failed to give Plaintiff the opportunity to do this prior to its DISMISSAL and denied Plaintiff due process rights under the Federal Rules of Civil Procedure and the Fifth Amendment[13] for this reason. The District Court erred in law in not following Rule 12(d) to convert its review to summary judgment after Defendants submitted new matter and the District Court did not exclude this matter from its decision to dismiss, *supra*. By failing to follow the

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fact.' *Grimes* , 794 F.3d at 92", quotes for Rule 56(e)(1) removed).

12 Failure of the District Court to follow Rule 12(d) and Rule 56 procedures and this Court's precedent for converting a Rule 12(b)(6) review when considering new matter is an error in law. Although a lower courts decision to convert a Rule 12(b)(6) motion to summary judgment when considering new matter can be reviewed for abuse of discretion, such standard of review properly applies only when the lower court is properly following the requirements of civil procedure and previous court precedent. The failure of the lower court to follow the explicit rules of civil procedure or to follow this Court's precedent in how it handles new matter before summary judgment are errors in law and should be reviewed as such.

13 Failure to provide a non-moving party procedural protections under Rule 12(d) or Rule 56 are violations of the due process required under the Fifth Amendment of the U. S. Constitution (see consideration of due process rights for Fifth Amendment violations under Rule 56 in *United States v. Fisher-Otis Company, Inc.*, 496 F.2d 1146, 1151 (10th Cir. 1974)).

law and properly convert its review to summary judgment under Rule 56, the District Court failed to give Plaintiff the due process required under the rules for a conversion of a Rule 12(b)(6) motion to summary judgment. Alternatively, even if the Court finds that the District Court did properly convert Defendants' motion to summary judgment according to Rule 12(d), then the District Court failed to provide due process to Petitioner when it failed to provide Petitioner notice of its conversion and did not provide Petitioner any reasonable opportunity to oppose the summary judgment in accordance with Rule 56.

50. The District Court denied Petitioner due process and erred in law by failing to provide Notice to Petitioner for a proceeding which should be decided by summary judgment, *supra*, and by failing to provide Plaintiff a reasonable opportunity to oppose the summary judgment and take discovery to support its opposition. Rule 12(d) requires that "All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Furthermore, Rule 56(f) requires that courts only make summary judgments "[a]fter giving notice and a reasonable time to respond". Many courts have found that 'reasonable opportunity' like that under Rule 12(d) requires notice before summary judgment. Notably in the Fourth Circuit: "We have held that the term 'reasonable opportunity' includes 'some indication by the court to all parties that it is treating the 12(b)(6) motion as a motion for summary judgment,' with the consequent right in the opposing party to file counter affidavits or to pursue reasonable discovery. 491 F.2d at 513, *quoting Dale v. Hahn*,440 F.2d 633, 638 (2 Cir. 1971)" *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976).[14] The District Court did not exclude Defendants'

14 See also *Rivera v. Centro*, 575 F.3d 10, 16 (1st Cir. 2009) ("we do not endorse the district court's treatment of the motion to dismiss (i.e., its *sub silentio* conversion into a motion for summary judgment)"); *Dayco Corp. v. Goodyear Tire Rubber Co.*, 523 F.2d 389, 393 (6th Cir. 1975) ("The 'reasonable opportunity' language of Rule 12(b) is designed to prevent unfair surprise to the parties....Where one party is likely to be surprised by the proceedings, notice is required."); *Interco Inc. v. National Sur. Corp.*, 900 F.2d 1264, 1269 (8th Cir. 1990) ("A federal district court may grant summary judgment, pursuant to Fed.R.Civ.P. 56, *sua sponte*, provided that the party against whom judgment will be entered was given sufficient advance notice and an

new matter and even relied on it in its DISMISSAL, *supra.* If the Court finds that the lower court erred in law by not converting its Rule 12(b)(6) review to summary judgment under Rule 56 when it decided not to exclude the new matter, it should be clear that Plaintiff was denied due process notice when the District Court failed to follow proper procedure. Alternatively, if the Court believes that the District Court did convert its Rule 12(b)(6) review to summary judgment, the District Court still did not follow proper civil procedure because Plaintiff did not receive "notice and a reasonable time to respond" as required under Rule 56(f) after the District Court decided to convert its review to summary judgment. For these reasons, the District Court's failure to give Plaintiff notice after deciding to not exclude the new matter in Defendants' REPLY and to rely on it in the District Court's Opinion is an error in law which violates Petitioner's due process protected by the rules of civil procedure.

51. The District Court's opinion relied on new matter related to genuine issue of material fact in Plaintiff's case and the District Court's error which denied Plaintiff's due process rights to notice and a reasonable opportunity to respond was not merely harmless. Furthermore, the failure of the District Court to provide specific procedural due process under Rules 12(d) and 56 after conversion to summary judgment was required prejudiced Petitioner's reasonable opportunity to respond, to challenge the new matter (i.e., the alleged facts of Defendants) and to show the genuine issues related to the matter which the District Court did not exclude from its Opinion. The procedural due process errors of the lower court prejudiced Petitioner according to the requirements of Rules 12(d) and 56 more specifically as follows.

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adequate opportunity to demonstrate why summary judgment should not be granted. 10A C.A. Wright, A.R. Miller M.K. Kane, *Federal Practice and Procedure* § 2720, p. 27 (2d ed. 1983)."); *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) ("In *Peterson*, we also concluded that when a conversion to a Rule 56 motion is proper, 'the trial court should give the parties notice of the changed status of the motion and thereby provide the parties to the proceeding the opportunity to present to the court all material made pertinent to such motion by Rule 56.'", quoting *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454, 457 (10th Cir. 1978)).

a) Petitioner was deprived of reasonable opportunity to submit "all the material that is relevant to the motion" as allowed by Rule 12(d). Petitioner had no opportunity to provide all material or evidence concerning the genuine issues described above after a conversion to summary judgment because the District Court gave Petitioner no notice or opportunity to do this after the conversion. Petitioner also had no opportunity to rebut the new matter presented by Defendants in their REPLY because the District Court gave Petitioner no time to respond and conducted no hearing before accepting the new matter.

b) Rules 56(a) and (c) afford Petitioner important protections by requiring the moving party to clearly identify the basis for summary judgment and the materials in the record supporting the conversion. However, there was no motion by Defendants for summary judgment and even if the Court considers Defendants' REPLY (Defendants' Reply in Support of their Motion to Dismiss, Appendix D) as satisfying these rules, Petitioner never did have an opportunity to respond to or rebut the new matter presented by Defendants under Rules 56(c)(1) or 56(c)(2) because it was only identified at the end of briefings and the District Court decided Defendants' motion without a hearing. Furthermore, if the District Court converted Defendants' motion to summary judgment *sua sponte*, it precluded the Petitioner any opportunity to respond, object, or request any discovery in order to oppose the summary judgment.

c) Rule 56(d) protects Petitioner from summary judgment based on facts not available to him at the time the summary judgment is considered. Petitioner had no opportunity to oppose summary judgment, take discovery or provide material or evidence concerning the genuine issues related to the new matter. Petitioner was prejudiced in this regard concerning the genuine issues decided by the District Court's Opinion because the District Court provided Petitioner no notice or opportunity to do this after Defendants' REPLY.

d) The District Court's Local Rules include additional requirements for summary

judgment motions, including allowing for "a fact which is controverted in the statement of genuine issues filed in opposition", which afford Petitioner further protections which were not provided in this case. Petitioner was given no opportunity to specifically identify the genuine issues in the case, as discussed above, after conversion to summary judgment as required by the Local Rules.

52. The District Court erred in law by not excluding new matter from Defendants' REPLY during its review of Defendants Rule 12(b)(6) motion and by not converting its review to summary judgment as required by Rule 12(d) and this Court's precedent, *supra*. This is reversible error which should cause the Court to grant Petitioner's request for Certiorari. Alternatively, if the Court finds that the District Court did properly convert Defendants' motion to summary judgment after new matter, the District Court still erred in law by not providing Plaintiff the procedural due process required after conversion under Rules 12(d) and 56, *supra*. Ensuring that the lower courts adequately protected Petitioner's constitutional right to due process should be reason for the Court to grant Petitioner's request for Certiorari.

Part IV. District Court's Failure to Allow Plaintiff's Amended Complaint is Based on Clear Error

53. The District Court's denial of Plaintiff's request to amend his Complaint is an abuse of discretion because it is based on clear error. Specifically, the District Court ignored additional factual allegations added to the Amended Complaint which are material facts related to genuine issues affecting the District Court's findings. This is explained in the following.

54. The District Court explains its denial of the Amended Complaint by stating "These amendments do nothing to cure the issues described above" (Memorandum Opinion, Appendix A, p. 18). However, this is clearly in error because the factual allegations included in Plaintiff's Amended Complaint provide material fact which directly contribute to Plaintiff's

pleadings and would aid Plaintiff in overcoming the District Court's concerns about Plaintiff's workplace harassment and disparate treatment claims.

55. In the District Court's analysis of Plaintiff's workplace harassment claim, the District Court states that its decision is based on the fact that, quoting Defendants, "Plaintiff was not even required to look at the flag: he merely had to pass by it in the parking lot before he entered the building for work"[15] and "Such conduct falls woefully short of being 'severe or pervasive enough to create an objectively hostile...work environment.'"[16], quoting *Harris*. These findings are clearly in error if the Court considers the changes in the Plaintiff's Amended Complaint which address how purposely prominent and pervasive the flag was displayed and how Plaintiff had to more frequently see the offensive object (i.e., could not avoid seeing it in its prominent location) every time he went outside during the day, not just once when he entered the building in the morning.

a) First, the Amended Complaint modifies Plaintiff's Complaint at Appendix C, ¶30, to state the the Gay Pride flag was flown "on the flag pole in front of" Plaintiff's work location. Also, a note was added explaining how this location was purposely chosen to display the flag in the most influential location at the work site, making the company's favoritism of the Gay Pride movement well known and pervasive throughout the company, stating as follows:

> "The main flag pole at the Sterling location is situated in the main parking lot, which is in front of all employee entrances to the building. This flag pole is purposely installed in a prominent position and Tolle had to view the Gay Pride flag on this flag pole every day when arriving at the building or leaving the building during its display ."

b) . This location of the display was key in order to make the company's sponsorship of the Gay Pride movement well known to all employees and the public and pervasive throughout the company. The following factual allegation supporting this was added to

15 Memorandum Opinion, Appendix A, p. 9.
16 *Id.*

Plaintiff's Complaint at Appendix C, ¶¶ 69(c), 71(c), 89(c), 92(a), 98(a),133(b) and between 90(e) and 90(f), and between 116(a) and 116(b):

> "Due to the prominent location of the flag pole at his location, Tolle was required to see the Gay Pride flag every day that it was flown whenever he arrived at work or left the building."

56. All of these factual allegations rebut Defendants' arguments against Plaintiff's claim of a hostile work environment, establishing a frequent and pervasive display of an offensive object which was intended to be seen by all employees throughout the work site. In light of the above, it is clearly erroneous for the District Court to state that these changes to Plaintiff's Complaint "do nothing" to the "issues" considered in the District Court's Opinion. Not only do these changes directly relate to the issues which the Defendants and District Court have raised concerning Plaintiff's workplace harassment claims, but if taken as true, these allegations should help reverse the District Court's finding concerning this claim. Because of this clear error, the District Court abused its discretion by not allowing or considering these changes. This error was not merely harmless to Plaintiff because the changes have a direct bearing on the issues the Defendants and District Court raised with Plaintiff's workplace harassment claims.

57. The District Court's error in not allowing Plaintiff's Amended Complaint also has direct bearing on the District Court's analysis and findings concerning the Plaintiff's disparate treatment claim. Specifically, the District Court Opinion does not accept Plaintiff's factual allegation showing evidence of "a bias in Rockwell Collins policies which was markedly in favor of Gay Pride while unwilling to show public support for any other minority point of view" (Appendix C, ¶ 48). This is noted in the District Court's consideration of Plaintiff's disparate treatment claim and the District Court makes a lack of bias a key reason for its dismissal of Plaintiff's claim, stating "Rockwell Collins...explicitly confirmed that it did not support one

viewpoint over another" (Memorandum Opinion, Appendix A, p. 17). However, Plaintiff's Amended Complaint included factual allegations which show that Defendants' actions were in fact more biased and favored the Gay Pride minority than other minorities. This is shown in the following changes from Plaintiff's Amended Complaint:

a) The Amended Complaint added the factual correspondence between Plaintiff and RCCT, contemporaneous with the display of the Gay Pride flag: "I have never seen another minority flag flown over the company except this one. What is Collins Aerospace's policy on flying other minority flags over its facilities?" (added to sub-paragraphs at Appendix C, ¶ 34).

b) The Amended Complaint added the fact that the company's response to Plaintiff provided no evidence of supporting minorities with prominent flag displays other than its support of the Gay Pride movement:

> "Wade's e-mail also reflected this bias in his response to Tolle's questions about flying other minority flags: 'Collins Aerospace is not a Company which is affiliated or sponsored by any particular chruch [*sic.*] or religion, and thus the Company does not sponsor or support any particular religious or political viewpoint, practice or membership to the exclusion of others.' It is noteworthy that Rockwell Collins responses to Tolle's questions did not explain why Rockwell Collins did not fly other minority flags in the same manner as the Gay Pride flag." (added to text at Appendix C, ¶¶ 48, 152(d))

58. These factual allegations from the Amended Complaint directly serve to defeat the District Court's finding that Rockwell Collins' policy towards the Gay Pride flag did not favor one minority over another. If the District Court would have properly allowed these material facts in Plaintiff's Amended Complaint and taken them as true as part of its analysis, it would have found that they show a bias which satisfies the fourth criteria the District Court cited for a *prima facie* case of religious discrimination: "different treatment from similarly situated employees outside the protected class" (Memorandum Opinion, Appendix A, p. 13, quoting *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010), *aff'd sub nom. Coleman v. Court of Appeals of Maryland*, 566 U.S. 30 (2012)).

59. In light of this material contribution of these factual allegations to the Court's consideration of Plaintiff's claims, it is clearly erroneous for the District Court to state that these changes to Plaintiff's Complaint "do nothing" to the "issues" considered in the District Court's Opinion. Not only do these changes directly relate to the issues which the District Court has raised concerning Plaintiff's satisfying a *prima facie* case for disparate treatment, but if taken as true, these allegations should help reverse the District Court's finding concerning this claim. Because of this clear error, the District Court abused its discretion by not allowing or considering these changes. This error was not merely harmless to Plaintiff because the changes have a direct bearing on the issues the District Court raised with Plaintiff's religious discrimination claim.

60. Based on the foregoing examples of how the District Court's dismissal of the material factual allegations from the Amended Complaint in its consideration of key claims of Plaintiff's Complaint, it should be clear that the District Court's reasons for not granting Plaintiff's request to amend his Complaint were clearly erroneous and this Court should grant Petitioner's request for Certiorari in order to ensure that the District Court did not abuse its discretion based on this error.

CONCLUSION

61. Petitioner's arguments have shown multiple errors in the District Court's application of this Court's pleading standard which have been affirmed without comment by the Appellate Court. The most egregious example of this is based on wholesale refusal to consider multiple, well-pleaded factual allegations and referenced evidentiary support from Plaintiff's Complaint in order to obtain the interpretation of the case which seems to align best with the District Court's own opinion of the Gay Pride flag and this represents an assault by the District Court on this Court's pleading standard after *Iqbal*. The fact that the District Court's Opinion

finds no defect in Plaintiff's many factual allegations that it ignored for workplace harassment and other claims bolsters Petitioner's arguments that the District Court rejected this Court's pleading standard when considering Plaintiff's claims. If the District Court had taken all these allegations as true according to the proper application of *Iqbal*, the District Court's findings could not be justified. These errors by the District Court were not mere harmless errors because without the District Court's improper review under *Iqbal*, Plaintiff's Complaint would have met this Court's pleading standard and should not have been dismissed. Not only did the District Court's errors directly prejudice Plaintiff's Complaint, but the District Court's DISMISAL based on these errors denied Plaintiff due process during the pleading stage under this Court's standard of review. Even if the Court believes that the failure in Appellate review of this error is restricted only to Petitioner's case, the lower courts' actions have still denied Petitioner his Fifth Amendment right to due process and Article III right to judicial review based on reversible error. But failure of the Court to grant Certiorari in order to ensure the protection of its precedents and standards on pleading in Petitioner's case is likely to lead to more prevalence of this practice which the Appellate Court affirmed and portends the dismantling of this Court's rule of law in the Fourth Circuit. If the District Court's actions in Plaintiff's case becomes the norm for Rule 12(b)(6) reviews, lower courts will be able to pick and choose which factual allegations they want to use in order to obtain the results which they prefer. Based on the Appellate Court's refusal to address Plaintiff's complaints on this (or even comment), the lower courts of the Fourth Circuit can defy this Court's standards for pleading with apparent impunity, simply by adding a self-serving statement contrary to the pleadings such as "there is no indication that the Gay Pride flag is associated with such animus" as in this case (Memorandum Opinion, Appendix A, note 4). In fact, if the District Court had not ignored all of Plaintiff's factual allegations to make such a statement, its juxtaposed statement that an employer "could be liable for a hostile

work environment for posting a flag...associated with...animus based on...religion" (Memorandum Opinion, Appendix A, note 4) is an admission by the District Court that it would have had to find facial plausibility in Plaintiff's claim concerning the Gay Pride flag. If a trial court wants to corruptly influence a case, it should not be allowed to do so in the pleading stage. The trial phase provides more judicial controls and appellate scrutiny to deter such misconduct and if the Court is going to take a pass on redressing bias from the bench, it should not take a pass when it involves the pleading stage.

62. Without any action by the Court, the pleading stage seems to be ripe for abuse in the Fourth Circuit where anything seems to be affirmed by the Appellate Court. Failure of this Court to protect its pleading standard in the Fourth Circuit will deny many citizens other than Plaintiff of a fair way to access the Federal courts and will set up a disparate system of justice where citizens in the Fourth Circuit are denied Article III access to the courts by lower courts following their own arbitrary pleading standards while citizens in other parts of the country enjoy the consistency and neutrality of this Court's current standard for pleading. This raises the specter of equal protection claims under the Fifth Amendment as well, as citizens in the Fourth Circuit are treated differently than elsewhere.[17] If the Court is concerned with ensuring that all complaints in the courts of this land are accorded review under the same pleading standard and that this Court's precedents are respected in all Circuits, the Court should grant Petitioner's request for Certiorari in order to address the errors in law in the District Court's Rule 12(b)(6)

17 An arbitrary or no pleading standard in one Circuit strikes at the fundamental basis of due process, the "basic principle that all people must stand on an equality before the bar of justice in every American court" *Chambers v. Florida*, 309 U.S. 227, 241 (1940), and equal access to the Federal courts where "they [all people] should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs" *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886). Under the Fifth Amendment, these fundamental principles of equal access apply to actions in the Federal courts which defy this Court's standards and serve to expose citizens to arbitrary or capricious bars to the courts at the pleading stage by following no clear pleading standard (see *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

review.

63. Petitioner has also shown that the District Court Opinion affirmed by the Appellate Court establishes an interpretation of the reasonable person test for intolerability from *Suders* and *Green* which does not properly address the problem presented by employers who refuse to offer reasonable religious accommodation and force devout employees to choose between their work and their faith. This action in the Fourth Circuit is creating a split in the Courts of Appeals because other courts are applying the intolerability test more prudentially when devout employees have been refused an accommodation. If the Court does not take any action, this situation will deny persons in the Fourth Circuit who face religious discrimination the benefit of the constructive discharge doctrine from *Suders* and *Green.* Devout employees in the Fourth Circuit will be advised to continue working at a location where their religious beliefs conflict with their employment requirements until they are terminated because no one in this situation will have access to the constructive discharge doctrine as long as the District Court's decision in Plaintiff's case is upheld. In the meantime, the split that this is causing between the Circuits will just grow larger as more employees in other parts of the country who face religious discrimination will be afforded their right to a constructive discharge. If the Court does not want its precedents in *Suders* and *Green* to be applied differently in failure to accommodate cases throughout the nation, the Court should take this opportunity to grant Petitioner a Writ for Certiorari so that the Court can clarify how the *Suders* and *Green* constructive discharge precedent should apply to devout employees whose employer refuses to offer them an accommodation.

64. Furthermore, Petitioner's arguments have shown that the District Court's handling of the new matter submitted in Defendants' REPLY has either failed to follow rules of civil procedure for conversion to summary judgment or failed to provide procedural protections

to Plaintiff after converting to summary judgment. Either error is a violation of Plaintiff's due process rights under the rules of civil procedure and the Fifth Amendment and the Court should grant Certiorari to protect its precedents, Petitioner's due process, and to enforce the accepted and usual course of practice under these rules of civil procedure. Do due process rights of *pro se* parties matter? Without action by the Court, the courts in the Fourth Circuit can continue to apply the rules of civil procedure and deny due process without regard to this Court's precedents.

65. For the foregoing reasons, this Court should grant Certiorari and Petitioner respectfully requests that the Court issue a Writ of Certiorari which allows this Court to consider the questions presented and reversal of the dismissal of Plaintiff's Complaint by the lower courts. Furthermore, Petitioner is a *pro se* party and if the Court finds any defect in the form, style or length of this instant Petition, Petitioner respectfully requests that the Court grant leave to consider the instant Petition, as is, in the interests of justice and in order to achieve judicial economy.

Dated: July 12, 2021

Respectfully submitted,

By: _____

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