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No. 21-720

In The
Supreme Court of the United States

RODNEY S. RATHEAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR REHEARING

RODNEY S. RATHEAL, pro se
910 Mesquite Springs Drive
Unit 101
Mesquite, Nevada 89027
435-817-7937
rs.ratheal@gmail.com

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PETITION FOR REHEARING

Pursuant to Rule 44 of this Court, Petitioner Rodney S. Ratheal hereby respectfully petitions for rehearing of the January 10, 2022 denial of the *Ratheal v. United States*, 21-720, Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit. This petition for rehearing is filed within 25 days of this Court's decision.

According to Rule 44.2, a petition for rehearing should present intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

The original petition challenged the Tenth Court of Appeals' affirmation of the erroneous dismissal of an abuse of process claim against the United States involving the Security and Exchange Commission's violation of its own *No Admit No Deny* settlement policy. The courts below argued that Ratheal could not relabel a defamation claim as abuse of process in order to avoid the discretionary function exception (DFE) to the Federal Tort Claims Act (FTCA) waiver of sovereign immunity; and the case was dismissed for lack of subject matter jurisdiction based on the exception. This petition for rehearing presents new substantive precedent supporting that (A) in this case government defamation constitutes abuse of process, and (B) the discretionary function exception does not bar the abuse of process claim.

REASONS FOR GRANTING THE PETITION

- I. The Court Should Grant This Petition for Rehearing to Review the Newly Presented Substantive Legal Precedent Supporting the Petitioner's Argument That:**
 - (A) The SEC Publishing a Defaming Whistleblower Notice That Implies Guilt in Violation of Its Own No Admit No Deny Policy Directive That After Settlement Allegations Remain Allegations to Which Guilt Is Not Credited, Constitutes Abuse of Process Under FTCA 28 U.S.C. 2680(h);**
 - (B) The FTCA 28 U.S.C. 2680(a) Discretionary Function Exception Does Not Bar an Abuse of Process By Defamation-by-Implication Claim Against the United States.**

Petitioner previously presented legal precedent showing that the Tenth Circuit's affirmation of FTCA 28 U.S.C. 2680(a) as the basis for dismissal of this case was a major error of law inconsistent with previous circuit court findings and Supreme Court precedent that holds the discretionary function exception does not apply if an agency is charged with failing to act in accord with a specific mandatory policy directive. Rehearing is now appropriate for this Court to review the Tenth Circuit's affirmation of the dismissal in view of substantial precedent that has not been previously presented. The additional information provides support

for the position that government defamation can be legitimately characterized as abuse of process.

The Security and Exchange Commission's *No Admit No Deny* (NAND) 17 Code of Federal Regulations 202.5/e Enforcement settlement policy was enacted in 1972. Under the policy, in order to settle a complaint, a defendant is required to state that he or she neither admits nor denies the allegations. Consequently:

“ . . . the absence of an admission means that the allegations contained in the consent decree are simply allegations, and therefore, they cannot be afforded any certainty as to their truth”; and because an allegation that is neither admitted nor denied has “no evidentiary value” . . . ; the public “has [no] reason to credit those allegations, which remain entirely unproven” (Kaul, P., *University of Michigan Journal of Law Reform*, 550/114, 2015).

In this case, Ratheal alleges that in 2016 the SEC abused process by violating its No Admit No Deny policy agreement with him by posting defaming online whistleblower notices crediting guilt by implication. Without noting that the settlement was a No Admit No Deny, the notice listed him under fraud with the 2012 complaint attached as the basis of the rewards, implying the allegations were true; when in fact, there had been no conviction or admission of fraud; and SEC No Admit No Deny policy holds that after litigation, allegations remain allegations to which guilt is not credited.

In its order affirming the dismissal of Ratheal's case, the Tenth Circuit allowed that the whistleblower posting was defamation, but not abuse of process. To the contrary, in his original petition, Ratheal made, but without providing substantial precedent, valid argument that this case represents a unique and specific situation in which defamation by implication constitutes abuse of process because the conduct violated a mandated agency directive specifically grounded in the very nature of No Admit No Deny policy regarding guilt and allegation status in consent decrees. In order to further establish that the defamation constituted abuse of process, definitive new information and comparable substantive precedent not previously cited is now presented.

A. The SEC Publishing a Defaming Whistleblower Notice That Implies Guilt in Violation of Its Own No Admit No Deny Policy Directive That After Settlement Allegations Remain Allegations to Which Guilt Is Not Credited, Constitutes Abuse of Process Under FTCA 28 U.S.C. 2680(h).

Government defamation has been claimed as a violation of the Fourteenth Amendment to the U.S. Constitution as a deprivation of liberty without due process of law in several cases (Berlik, L., *Government Defamation May Violate Civil Rights, Labor and Employment Law Blog, LexisNexis, Virginia Defamation Law Blog*). Based on precedent established in *Sciolino v. Newport News* (4th Cir. 2007), government

defamation may violate both state and federal law, and may concurrently also constitute a more fundamental violation than the mere defaming effect. It can also abuse lawful process.

For example, substantive due process protections and due process rights “are created only by the federal Constitution” *Regents of University of Michigan v. Ewing*, 474 U.S. at 229, 106 S. Ct. at 515; *Adamson v. City of Provo, Utah* (Casetext Search), and in *Sciolino*, it was determined that a liberty interest claim based on defamation under the Due Process Clause can be made if a plaintiff alleges that the charges against him damaged his reputation; were made public; were made in relation to actual loss of job, status or profession; and were false (*Law Professor Blogs, LLC*, Stigma Plus Claims in the Workplace, 2007).

Similarly and in the same manner, just as government defamation may be considered a violation of the fourteenth amendment as a deprivation of liberty, in Ratheal’s case, government defamation may be considered a violation of the No Admit No Deny policy as an abuse of process. Further, his claim meets the Court established basic elements required in *Sciolino*, in that the defaming whistleblower posting allegations damaged Ratheal’s reputation, were made public, negatively affected his profession, and were false. Also it is not singly the defamation effect on Ratheal, but the attribution of guilt by implication in violation of the NAND agreement regarding allegation status that constitutes the basis of the abuse of process claim.

Although in the present case Fourteenth Amendment violations are not claimed, other legal similarities to *Sciolino* exist, including the deprivation of Ratheal's (1) liberty to "engage in any of the common occupations of life," *Roth*, 408 U.S. at 472, 92 S.Ct. 2701 . . . ; (2) right to due process "where a person's good name, reputation honor, or integrity is at stake because of what the government is doing to him," *Wisconsin v. Constantineau* (S. Ct. 1971); and (3) opportunity to clear his name after it has been ruined by dissemination of false, stigmatizing allegations.

The Court determined that when "the State attaches 'a badge of infamy' to the citizen, due process comes into play" *Id.* 507; and fundamental to due process is an opportunity to be heard, "an opportunity which must be granted at a meaningful time," *Armstrong v. Manzo* (S. Ct. 1965) *Id.* Whether Ratheal will be afforded due process and his rightful day in court is caught up in an erroneous jurisdictional web, and is at this time, dependent on whether this Court grants rehearing.

B. The FTCA 28 U.S.C. 2680(a) Discretionary Function Exception Does Not Bar an Abuse of Process By Defamation-by-Implication Claim Against the United States.

The new information presented in this petition provides precedent that government defamation may be characterized as a violation of due process and

certain civil rights and liberties at the federal level (*Id., Sciolino*). Consistent with that precedent, government defamation may be legitimately characterized as an abuse of process claim under FTCA 28 U.S.C. 2680(h) and not be subject to dismissal under 2680(a) because the discretionary function exception does not apply if an agency is charged with failing to act in accord with a specific and well known mandatory policy directive.

II. In View of the Additional Substantive Precedent Validating Ratheal's Abuse of Process Claim, This Court Should Grant This Petition For Rehearing.

The issue of government defamation is fundamental to subject matter jurisdiction in this case and relevant to other tort cases in which the defendant is the Government.

CONCLUSION

Petitioner respectfully requests the Court to grant this petition for rehearing.

Respectfully submitted,

RODNEY S. RATHEAL, pro se,
Petitioner
910 Mesquite Springs Drive
Unit 101
Mesquite, Nevada 89027
(435) 817-7937
rs.ratheal@gmail.com

January 27, 2022

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay; and is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

/s/

RODNEY S. RATHEAL, pro se,
Petitioner
910 Mesquite Springs Drive
Unit 101
Mesquite, Nevada 89027
(435) 817-7937
rs.ratheal@gmail.com