No. _____

In The
Supreme Court of the United States

DAREK J. KITLINSKI; LISA M. KITLINSKI,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT ADMINISTRATION;
MERRICK B. GARLAND, ATTORNEY GENERAL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL L. FOREMAN,
Counsel of Record for Petitioners

PENN STATE LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Boulevard, Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

I. Whether, to shift the burden of proof to the employer in a Uniformed Services Employment and Reemployment Rights Act (USERRA) case, the employee must prove simply that protected status or activity was a motivating factor—as provided in USERRA's text—or instead, as required by several circuits, including the Fourth Circuit, prove that the employer had hostility to military service or an undefined "discriminatory animus."

II. Whether a federal employee's right to retained counsel includes having that counsel present when that employee has pending litigation against their federal employer and when the employer conducts an interview of the employee that a reasonable person would believe related back to the pending litigation.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court are Darek J. Kitlinski and Lisa M. Kitlinski, who were plaintiffs in the district court and plaintiff-appellants in the court of appeals.

Respondents in this Court are the United States Department of Justice, Drug Enforcement Administration and Merrick B. Garland, Attorney General, which were defendants in the district court and defendant-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Darek J. Kitlinski and Lisa M. Kitlinski are individuals.

STATEMENT OF RELATED CASES

This case arises from the following proceedings: *Kitlinski v. U.S. Dep't of Just.*, 123 M.S.P.R. 41 (M.S.P.B. 2015); *Kitlinski v. U.S. Dep't of Just.*, 16-CV-60, 2016 WL 10519129 (E.D. Va. May 6, 2016); *Kitlinski v. U.S. Dep't of Just.*, 16-CV-60 2016 WL 7228734 (E.D. Va. Oct. 24, 2016); *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374 (Fed. Cir. 2017) decided by Judge Bryson who wrote the opinion in which Judge Dyk and Judge Chen joined; *Kitlinski v. Sessions*, 16-CV-60, 2017 WL 5309622 (E.D. Va. Nov. 9, 2017); *Kitlinski v. Sessions*, 16-CV-0060, 2018 WL 11267429 (E.D. Va. Jan. 11, 2018); *Kitlinski v. Barr*, 16-CV-60, 2019 WL 7816853 (E.D. Va. Apr. 10, 2019) decided by Liam O'Grady,

STATEMENT OF RELATED CASES—Continued

United States District Judge; *Kitlinski v. U.S. Dep't of Just.*, 749 F. App'x 204 (4th Cir. 2019); *Kitlinski v. U.S. Dep't of Just.*, 994 F.3d 224 (4th Cir. 2021) decided by Judge Floyd who wrote the opinion in which Judge Wilkinson and Judge Groh joined. There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Petitioners Darek J. Kitlinski and Lisa M. Kitlinski respectfully request that this Court grant certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on April 8, 2021.

OPINIONS BELOW

The April 10, 2019, order of the United States District Court for the Eastern District of Virginia, Alexandria Division, *Kitlinski v. Barr*, 16-CV-60, 2019 WL 7816853 (E.D. Va. Apr. 10, 2019), is reproduced at Pet. App. 22. The April 8, 2021, opinion of the United States Court of Appeals for the Fourth Circuit, *Kitlinski v. U.S. Dep't of Just.*, 994 F.3d 224 (4th Cir. 2021), is reproduced at Pet. App. 1. The June 4, 2021, denial of rehearing and rehearing en banc of the Fourth Circuit is reproduced at Pet. App. 44.

STATEMENT OF JURISDICTION

The Fourth Circuit entered its judgment on April 8, 2021. On June 4, 2021, the Fourth Circuit denied the petition for rehearing en banc. On March 19, 2020, and April 15, 2020, the Court ordered an extension of the filing period for 150 days. These orders were rescinded on July 19, 2021. However, this case falls under the orders granting an extended filing period. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves claims of unlawful discrimination and retaliation under the United States Employment and Reemployment Rights Act (USERRA), specifically 38 U.S.C. § 4311, Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited (Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3153).

38 U.S.C. § 4301 (Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3150)

(a) the purposes of this chapter are—

> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

38 U.S.C. § 4311 (Pub. L. 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3153)

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's

> action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
>
> (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
>
> (d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

STATEMENT OF THE CASE

A. Overview

Congress enacted the United States Employment and Reemployment Rights Act (USERRA) to protect servicemembers' and veterans' civilian employment

rights. 38 U.S.C. § 4301. USERRA prohibits discrimination by employers based on an employee's "obligation for service in the uniformed services." 38 U.S.C. § 4311(c)(1). USERRA further states that, "an employer may not discriminate . . . against or take any adverse employment action against any person because such person . . . has exercised a right provided for in this chapter." 38 U.S.C. § 4311(b). USERRA's express language provides that once an employee shows that their status as a servicemember or prior USERRA activity was a motivating factor in an adverse employment action, the burden of proof shifts to the employer to demonstrate it would have taken the same adverse action despite consideration of the employee's military status or prior USERRA activity. The statute does not require a heightened showing of hostility or other showing of undefined animus.

Darek and Lisa Kitlinski filed claims under USERRA and Title VII, in addition to other claims, against their employer, the Drug Enforcement Administration (DEA), after the agency made various adverse employment decisions that ultimately resulted in their terminations. Pet. App. 4–5, 7–8. The district court granted summary judgment in favor of the DEA, which was affirmed by the Fourth Circuit Court of Appeals. The Fourth Circuit found that the Kitlinskis did not meet their burden because they did not show that the DEA exhibited discriminatory animus[1] or other

[1] An examination of the oral argument reinforces that the court rejected the claim because there was no showing of antimilitary hostility. *See infra*, n.24 and accompanying text.

animus, the presence of which would have shifted the burden of proof to the DEA to show a same-decision defense.

Petitioners respectfully request that this Court grant certiorari to resolve the confusion across the circuits on whether USERRA's "motivating factor" test is satisfied once a plaintiff has proven that protected status or activity was a motivating factor—or whether a higher showing is required.

Integral to the DEA's decision to terminate Darek and Lisa was the agency's infringement of Darek's and Lisa's attorney-client relationship. The DEA attempted to interview Darek and did interview Lisa while denying them the right to their retained counsel on matters that substantively related to their pending employment discrimination claims against the DEA.

Accordingly, Petitioners further request that this Court grant certiorari to determine whether a federal employee's right to retained counsel includes having that counsel present when that employee has pending litigation against their federal employer and when the employer conducts an interview of the employee that a reasonable person would believe related back to the pending litigation.

B. Factual History[2]

Darek and Lisa Kitlinski are a married couple with a combined fifty-three years of public service in the federal government. Pet. App. 3–4. Darek served eleven years in the Air Force Reserves before, in 2000, beginning his twenty years of service in the United States Coast Guard Reserves—service that included several deployments. J.A. 22:14, 1440:6–14.[3] Darek responded to multiple national crises, including but not limited to, the terrorist attacks on September 11, 2001, the Deepwater Horizon oil spill, and the Ebola virus outbreak of 2014. J.A. 1439. Darek began working for the DEA in 1998 as a Special Agent. J.A. 22:14, 1439, 1440:6–14; Pet. App. 3. In 2009, he earned the position of supervisor in the DEA's San Diego Division. Pet. App. 3. Lisa's career in public service includes nineteen years of employment with the DEA. She began in 1997 and worked diligently as a forensic scientist until she earned a promotion in 2011 to a program manager position at the DEA headquarters in

---

[2] This case comes to the Court on an appeal of summary judgment. As such, all reasonable inferences are to be made in the Petitioners', here, Darek and Lisa's, favor. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014) ("[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgement . . . a 'judge's function' at summary judgement is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' ") (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986)).

[3] Citations to the Joint Appendix filed in the Fourth Circuit below are "J.A." followed by the page number.

Arlington, Virginia, the position she held when she was terminated in 2016. Pet. App. 3–4.

When Lisa was promoted, Darek requested to be transferred to DEA offices in the Washington, D.C. area in order to be with his wife and children. Pet. App. 4. Between March 2011 and June 2014, in accordance with the DEA's Married Core Series Transfer Policy, Darek submitted multiple transfer requests. *Id.* Although Darek, on multiple occasions, made the best-qualified list for these positions, the DEA denied his transfer requests because of his sex.[4] Pet. App. 23; J.A. 1473:6–8. Darek's efforts to live and work closer to his family did not stop with the denied transfer requests. When vacancies became available, he applied to various DEA positions in and around Virginia. Pet. App. 4. The DEA repeatedly denied his applications. Pet. App. 4, 23–24.

In July of 2011, Darek began active-duty service for the U.S. Coast Guard in Washington D.C., taking USERRA-protected leave from the DEA. Pet. App. 4. While on active duty, Darek challenged the DEA's adverse employment decisions, including denial of his transfer requests, by filing both formal and informal EEO complaints with the Department of Justice, one of which rose to an EEOC hearing.[5] Most crucial to this

---

[4] In a March 2015 decision, the EEOC found in favor of Darek in his claim that the DEA discriminated against him on the basis of sex. EEOC Decision No. 0120123094 (2015).

[5] As noted *supra*, n.4, Darek's EEOC finding is EEOC Decision No. 0120123094 (2015), also available as *Kelley P., Complainant*, E.E.O.C. D.O.C. 0520150309 (2015).

Petition, Darek filed several USERRA complaints with the Merit Systems Protection Board (MSPB).[6] The MSPB resolves employee complaints filed under USERRA. Lisa served as a material witness in Darek's EEO complaints and USERRA claims.[7]

On September 23, 2014, Darek and Lisa traveled to the DEA headquarters together in the Kitlinskis' vehicle, which they parked in a DEA-secured parking garage. J.A. 672–73. Lisa was going to her office at the DEA headquarters, while Darek reported to the building for a deposition regarding his previous EEO complaints. Pet. App. 5. Following the completion of the brief deposition, Darek took the Kitlinskis' car and drove home, while Lisa remained at work at the DEA headquarters building. Pet. App. 25; J.A. 910.

When Darek pulled into the garage at his home, he noticed a red flashing light on the vehicle and, upon closer look, identified a BlackBerry device hidden between the hood and windshield. J.A. 300–01. Darek

---

[6] The most relevant of MSPB filings were *Kitlinski, D. v. U.S. Dep't of Just.*, No. SF-4324-14-0184-I-1 etc. (Apr. 16, 2015) (initial decision), review denied at *Kitlinski v. U.S. Dep't of Just.*, 123 M.S.P.R. 9, 2015 WL 6688191, *1 (Nov. 3, 2015); *Kitlinski, D. v. U.S. Dep't of Just.*, No. SF-4324-15-0088-I-1 etc. (Feb. 13, 2015) (initial decision), review denied at 123 M.S.P.R. 41 (Nov. 16, 2015), aff'd in part, vacated in part sub nom. *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374 (Fed. Cir. 2017); and *Kitlinski, L. v. U.S. Dep't of Just.*, No. DC-4324-15-0889-I-1, 2015 WL 4877927 (Aug. 14, 2015).

[7] Lisa Kitlinski Dep. Apr. 30, 2014, *Kitlinski, D. v. U.S. Dep't of Just.*, No. SF-4324-14-0184-I-1 etc. (Apr. 16, 2015) (initial decision), review denied at *Kitlinski v. U.S. Dep't of Just.*, 123 M.S.P.R. 9 (Nov. 3, 2015).

had familiarity with these devices because of his experience as a DEA Special Agent and his requisite knowledge of the technology that the DEA often used in conjunction with such devices; accordingly, he believed the device had tracking capabilities and was planted for the purpose of tracking him and Lisa. J.A. 2197. The Kitlinskis later discovered that the BlackBerry was a DEA-issued device assigned to Donna Rodriguez, a Section Chief for the DEA's Research and Analysis Staff of the Human Resources Division. Pet. App. 25. The Kitlinksis believed the device was being used to gain information relevant to Darek's pending claims against the DEA because the Research and Analysis Staff was responsible for the DEA's responses to internal complaints, including those filed by Darek. J.A. 840.

The next day, Darek reported this disconcerting discovery of the BlackBerry device to the FBI Northern Virginia Anti-Corruption Squad. J.A. 666, 1508. Darek then filed a complaint regarding the BlackBerry incident with the Department of Justice's Office of the Inspector General (OIG) on September 26. Pet. App. 5. Darek expressed his concern for his and Lisa's safety, given his knowledge that BlackBerry devices can be used for surveillance through global position tracking and listening. Pet. App. 19; J.A. 858–59. The OIG declined to investigate Darek's allegations. Pet. App. 5. Lisa also reported the BlackBerry incident. Pet. App. 5–6. On October 2 she contacted the DEA's Office of Professional Responsibility (OPR) and they officially opened an inquiry into the incident on October 7. Pet.

App. 5–6. The Kitlinskis' attorney notified the DEA that they believed the BlackBerry's placement on the Kitlinskis' vehicle was in retaliation for exercising their USERRA rights, as subsequently reflected in Darek's motion to amend his USERRA complaint pending before the MSPB, filed on October 7. J.A. 870.

On October 20, while Darek and the Kitlinskis' attorney were in San Francisco attending a two-day MSPB hearing (SF-4324-14-0184-I-2), OPR Inspector Jose Roman contacted Lisa's supervisor and ordered Lisa to report to him to discuss the BlackBerry device. Pet. App. 6; J.A. 1379. Lisa initially declined an interview with OPR, relaying through her supervisor that she was represented by the attorney in Darek's ongoing claims against the DEA because of her role as a material witness. J.A. 1119–20.

On October 27, Inspector Roman contacted Lisa directly and ordered her to appear and produce the BlackBerry device at a "compelled interview," notwithstanding Lisa's request to direct all questions relating to the investigation to her attorney, as well as her attorney's protestations. J.A. 38, 1401, 1121. OPR failed to notify Lisa of the subject of the October 28 interview, despite multiple requests from Lisa and her attorney. J.A. 1411. OPR, however, repeatedly informed Lisa that her counsel could not be present. J.A. 38. Although Lisa's attorney objected to the DEA and OPR compelling Lisa's participation in this interview without her counsel present, she complied with OPR's order and appeared on October 28. J.A. 1425–26, 1428.

During the interview, Lisa asserted the attorney-client and spousal privileges, declining to answer questions she believed could jeopardize Darek's pending litigation. Pet. App. 6, 25; J.A. 1121. The DEA was on notice that Lisa was represented by counsel and that the Kitlinskis asserted the BlackBerry incident was directly related to the ongoing litigation. J.A. 840, 1425.

Shortly thereafter, on November 20, Inspector Roman arrived at Darek's Coast Guard workplace without notice and demanded that Darek appear for an OPR interview. J.A. 1406. At the time, in accordance with his USERRA-protected Coast Guard assignment, Darek was on leave from the DEA. Inspector Roman presented Darek with a written notification directing him to appear at the DEA headquarters for an interview the next day. *Kitlinski v. Merit Sys. Prot. Bd.*, 857 F.3d 1374, 1376 (Fed. Cir. 2017). Inspector Roman demanded Darek sign the notice. J.A. 845. When Darek asked the OPR investigator for an opportunity to call his attorney and have him on speakerphone before signing, the OPR investigator refused his request. J.A. 1406. Because he was denied consultation with his counsel, Darek declined to sign the written notification. Pet. App. 7.

The investigators threatened Darek that failure to comply with the OPR directive to appear for the interview could result in disciplinary action. *Id.* Later that day, Darek's attorney emailed Inspector Roman, expressing willingness to schedule a mutually convenient time for OPR to interview Darek with his counsel

present. J.A. 852–53. Notwithstanding Darek's attorney's efforts to schedule an interview, Inspector Roman again demanded that Darek appear for an interview with OPR the next day. J.A. 850. Inspector Roman was aware that Darek had pending USERRA and EEO employment litigation against the DEA and that he was represented by counsel. J.A. 852–53. Despite the interview subject's close temporal relationship to a deposition regarding the pending employment litigation against the DEA, Inspector Roman ignored Darek and his attorney's repeated requests to have counsel present during the interview. J.A. 850.

On May 27, 2015, Darek and Lisa were recommended for termination by the then-Chair of the DEA's Board of Professional Conduct. Pet. App. 7. The Chair issued letters stating that Darek's and Lisa's conduct during the internal investigation was the reason for their termination. The Kitlinskis unsuccessfully contested the recommendation and were ultimately terminated from their employment with the DEA on January 11, 2016.

C. Proceedings Below

Following mixed success bringing both formal and informal discrimination and retaliation complaints before the MSPB and EEOC, Darek and Lisa filed suit in the United States District Court for the Eastern District of Virginia under USERRA and Title VII, alleging wrongful termination, sex discrimination, and retaliation claims arising out of the BlackBerry incident. Pet.

App. 8, 25. The district court granted summary judgment in favor of the government but failed to address the wrongful termination claims, causing the Fourth Circuit to remand the case on the first appeal. Pet. App. 9; *Kitlinski v. U.S. Dep't of Just.*, 749 F. App'x 204, 205 (4th Cir. 2019) (per curiam). On remand, the district court denied the Kitlinskis' motion for "an evidentiary hearing on the wrongful termination claims, or, in the alternative, to supplement their summary judgment briefing with respect to the wrongful termination claims." Pet. App. 9. The district court again granted summary judgment in favor of the government. Pet. App. 9, 43.

The Kitlinskis appealed the grant of summary judgment as to the wrongful termination claims under USERRA and Title VII. The Fourth Circuit affirmed the lower court's judgment, incorrectly stating that USERRA requires a showing of "discriminatory animus" and overlooking the material fact that OPR questioned Lisa on the same subject matter on which Darek had pending MSPB claims. Pet. App. 11–16; Pet. Mot. Reh'g at 1, 3, 4–8, 15–16. Darek and Lisa filed a motion for panel rehearing and rehearing en banc on May 24, 2021, which the Fourth Circuit denied in an order filed June 4, 2021. Pet. App. 45.

REASONS FOR GRANTING THE WRIT

I. Introduction

The questions presented are profoundly important to active-duty servicemembers and reservists, like Darek, who put their lives on the line and their civilian lives on hold to serve our country. Reserve members have evolved beyond a strategic force called upon only in times of major war or national emergency; today, reservists serve as an operational safeguard for all peacetime and combat operations and share burdens and risks with their active component counterparts.[8] The COVID-19 response operation exemplifies the increasingly important role reserve members play in American response readiness, with over 3,000 reservists serving at the height of the response—one of the largest domestic mobilizations in Army Reserve history.[9] The country must protect these individuals' returns to civilian employment in order to properly care for servicemembers after exigency ceases.

As of June 30, 2021, over 40,740 Americans actively serve our Nation through the United States Coast Guard, with another 6,236 Coast Guard members on reserve.[10] The Coast Guard represents just one

---

[8] Reserve Forces Policy Board, RFPB Report FY20-01, *Improving the Total Force Using the National Guard and Reserves*, at 22 (August 14, 2020).

[9] Michael J. Keegan, *COVID-19 Response: Largest Domestic Mobilization in Army Reserve History*, The IBM Center for The Business of Government (June 22, 2020), https://bit.ly/3Gn9lev.

[10] Sandi Gohn, *What Does the Coast Guard Do and 7 Coast Guard Facts to Know*, USO (Aug. 3, 2021), https://bit.ly/3b8Ecx2.

branch of our military. Over two million people actively serve in the United States military today.[11] In addition, there are approximately nineteen million United States veterans as of 2021.[12] Each year, nearly 200,000 servicemembers separate from active duty in the United States military.[13]

With approximately 3,500 active-duty members returning from Afghanistan this year alone,[14] it is vital that servicemembers know their rights and duties regarding their civilian employment and that they do not suffer retaliation when they exercise rights afforded to them under USERRA. Recently, more than 114,000 people were airlifted from the Kabul airport during the United States' withdrawal from Afghanistan—including all American troops.[15] Our servicemembers, who leave their civilian employment and serve honorably in support of the United States military, now more than ever before, deserve the assurance that once their

---

[11] *Id.*

[12] Katherine Schaeffer, *Changing Face of America's Veteran Population*, Pew Rsch. Ctr. (Apr. 5, 2021), https://pewrsr.ch/3B5HI61.

[13] Brenda Carlson, *USDA Helps Military Veterans Answer the Question, "What's Next?"*, U.S. Dep't of Agric. (Feb. 21, 2017), https://bit.ly/3G6Olsz.

[14] *The U.S. War in Afghanistan: 2021 Biden Decides on Complete U.S. Withdrawal by 9/11*, Council on Foreign Relations, https://on.cfr.org/3ppxU4s (last visited Oct. 27, 2021); *Remarks by President Biden: On the Way Forward in Afghanistan*, White House (Apr. 14, 2021, 2:29 PM), https://bit.ly/30PUIQH.

[15] Idrees Ali & David Brumstrom, *Explainer: What Happens Now that U.S. Troops Have Left Afghanistan*, Reuters (Aug. 31, 2021, 7:35 AM), https://reut.rs/3G3S75P.

service is completed, they will be able to return to their civilian careers with as little disruption as possible.

Congress intended USERRA to afford substantial protection to our Nation's servicemembers. This case presents an important question, over which federal courts of appeals are openly and intractably confused, concerning the application of USERRA's motivating factor test. Circuit courts interpreting USERRA's burden-shifting framework, specifically the statute's motivating factor test, apply conflicting standards. Additionally, this case presents a narrow question of public importance regarding the attorney-client relationship, concerning a federal employee's right to retained counsel during an internal investigation.

II. USERRA's Motivating Factor Standard Has Been Inconsistently Applied By The Circuit Courts, Some Of Which—Like The Fourth Circuit—Have Imposed Additional Requirements Beyond The Statutory Text.

Congress articulated the causation standard an employee must prove under USERRA. A servicemember must show that: (1) they engaged in a protected activity and (2) that the protected activity was "a motivating factor for the employer's action." 38 U.S.C. § 4311(c)(2). Once an employee meets their burden, the burden of proof shifts to the employer to prove a "same-decision defense"—that it would have taken the same action without considering the employee's protected status or activity. *See* 38 U.S.C. § 4311(c); 20 C.F.R.

§ 1002.22. The Court has not defined "motivating factor" in the context of USERRA, nor explicitly in the context of any other statute. The Court has, however, recognized that the motivating factor language, as it is codified in the 1991 Civil Rights Amendments to Title VII, mirrors the language used in USERRA. *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011). In *Staub*,[16] the Court explained USERRA is "very similar to Title VII."[17] *Id.*

While not defining what motivating factor causation requires, the Court has repeatedly explained that under Title VII, motivating factor is a less stringent standard than the heightened standard of "but-for" causation. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020) ("[Motivating factor is a] more forgiving

---

[16] *Staub* is the only case where the Court has considered the causation standard under USERRA. In *Staub*, the Court considered the cat's paw theory of liability where an actor who is not the decisionmaker influences the decisionmaker to make an adverse employment action because of the non-decisionmaker's hostility towards a protected class. *Staub*, 562 U.S. at 422. Because *Staub* involved the issue of vicarious liability and imputing liability up through the corporate structure with a more attenuated connection between the hostility and the adverse employment action, the Court discussed "*antimilitary animus*" in that special circumstance, which is not present here. *See id.*

[17] Courts have consistently interpreted USERRA similarly to Title VII. *See*, *e.g.*, *Beck v. Dep't of Navy*, 997 F.3d 1171, 1188 (Fed. Cir. 2021) (highlighting that courts have acknowledged the analogous relationship between Title VII and USERRA for quite some time in various employment contexts); *Lisdahl v. Mayo Found.*, 633 F.3d 712, 721 (8th Cir. 2011) (stating "[t]here is no reason to understand 'adverse employment actions' differently in the USERRA context" when being compared to Title VII cases).

standard."). The Court further recognized that Title VII's motivating factor standard is "*of course*, [] a *lessened* causation standard" when compared to but-for causation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348–49 (2013) (emphasis added). Like claims under Title VII's motivating factor standard, claims litigated under USERRA do not require a heightened showing. *See id.* Under a motivating factor standard, bad intent on behalf of an employer is not a prerequisite to finding that an employee's protected trait is a motivating factor in an adverse employment decision, thereby placing the burden of proof on the employer to show a same-decision defense. Further, no showing of "discriminatory animus"[18] is required by the plain language of either USERRA or Title VII.[19]

Despite USERRA's clear framework, *see* 38 U.S.C. § 4311(c), and the Court's determination that the motivating factor standard is a lower burden than the

---

[18] "Discriminatory Animus" has not been defined by the Court, nor any other. Black's Law Dictionary defines animus as either "Ill Will; Animosity" or "Intention." *Animus*, Black's Law Dictionary (11th ed. 2019). Whether courts are requiring antimilitary animus or simply requiring greater intent than what is required under the motivating factor standard is unclear. However, either theory heightens the plaintiff's burden beyond USERRA's straightforward discrimination framework.

[19] For example, discriminatory animus cannot be required by the text of Title VII because Title VII applies to *any* discrimination, not only "ill will" or "intention[al]" discrimination. *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that a policy against most women in the workplace violates Title VII regardless of its well-intended purpose of protecting unborn fetuses).

but-for causation standard, *Bostock*, 140 S. Ct. at 1740, there is clearly confusion among the circuit courts regarding what is required to show that protected status or activity was a "motivating factor," which itself would be sufficient to switch the burden of proof to the employer. Several circuits apply the statutory framework as written, or at most, expand upon the statutory language to provide different ways to meet the statutorily-imposed burden. However, other circuits, like the Fourth Circuit, have added additional requirements that an employee must prove to meet its burden.

a. Several circuit courts apply USERRA's plain language.

The Second, Third, and Sixth Circuits interpret USERRA's motivating factor test by adhering to the statute's plain language.[20] The Third Circuit's succinct explanation of the motivating factor test is consistent with USERRA's plain language: "a plaintiff meets his or her initial burden simply by showing that military service was 'a substantial *or motivating factor*' in the adverse employment action."[21] *Caroll v. Del. River Port*

---

[20] Notably, these circuits' approach in deferring to the statutory text has been deemed the correct one by the Court. *See Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

[21] Indeed, even in this framing, courts have added that a plaintiff may satisfy their burden by showing that protected status or activity was "a substantial" factor—a showing not

Auth., 843 F.3d 129, 132 (3d Cir. 2016) (emphasis added).

The Second Circuit similarly holds that a USERRA plaintiff proves a prima facie case by showing that their protected status or activity was "a substantial or motivating factor." *See Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir. 1996). The Second Circuit explained that once a plaintiff proves that protected status or activity was a motivating factor, the employer must prove that but for the plaintiff's protected status or activity, the employer would have taken the same action. *Id.*

Likewise, the Sixth Circuit does not impose additional requirements beyond those provided in the statutory text. *See Hickle v. Am. Multi-Cinema, Inc.*, 927 F.3d 945, 952 (6th Cir. 2019). In another case, the Sixth Circuit clarifies that protected status or activity as a motivating factor can be proven by providing evidence of the following non-exhaustive factors:

> proximity in time between the employee's military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and disparate treatment of certain employees

---

contained in the statute. However, because this is phrased as a disjunctive, "or motivating" factor, this added language, while confusing, appears to be surplusage.

> compared to other employees with similar work records or offenses.

Savage v. Fed. Express Corp., 856 F.3d 440, 447 (6th Cir. 2017).[22] The Sixth Circuit does not require anti-military animus in order to prove that protected status or activity was a motivating factor, but, as the court explains, anti-military animus can be one way to show that protected status or activity was a motivating factor.

b. Other circuit courts, like the Fourth Circuit in the case below, have imposed additional requirements to establish a prima facie case under USERRA.

Not all circuits apply the clear burden-shifting framework provided by USERRA's plain text. The Fourth Circuit, in addition to the First, Fifth, Seventh, Eleventh, and Federal Circuits, has—in some instances[23]—interpreted USERRA to require the employee

---

[22] These factors (commonly referred to as the *Sheehan* factors) were initially announced by the Federal Circuit. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). However, the factors have been adopted, at least in part, by nearly every circuit. *See Velázquez-García v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 19 (1st Cir. 2007); *Murphy v. Radnor Township*, 542 F. App'x 173, 178 (3d Cir. 2013); *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 314 (4th Cir. 2001); *Rademacher v. HBE Corp.*, 645 F.3d 1005, 1010–11 (8th Cir. 2011); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 900 (9th Cir. 2002); *Greer v. City of Wichita*, 943 F.3d 1320, 1324 (10th Cir. 2019); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005).

[23] Even within these circuits, the application has been inconsistent. Several of these circuits that have imposed a heightened

to make an additional, heightened showing that the employer had a "discriminatory animus" or "discriminatory motive." These circuits' heightened standards are readily distinguishable from the Sixth Circuit's approach where hostility to military service is, among other evidence, one way to prove that protected status or activity was a motivating factor.

In this case, the Fourth Circuit repeatedly purported to apply a motivating factor test, including, for example, when it stated, "[t]o succeed on [a discrimination claim under § 4311(a) and a retaliation claim under § 4311(b)], the Kitlinskis must show, respectively, that either Darek's status as a servicemember or his prior protected activity was 'a motivating factor' in his termination." Pet. App. 12. While the Fourth Circuit frequently claimed to apply the requisite motivating factor test delineated by the plain language of USERRA, the court—in effect—applied something different.

Despite the Fourth Circuit's consistent reference to USERRA's motivating factor test, the panel departed from the plain language of the statute by holding that no reasonable factfinder could conclude that either Darek's status as a servicemember or his prior

---

burden for plaintiffs have also—in multiple instances—resolved USERRA claims without any discussion of a "discriminatory animus." *See*, *e.g.*, *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 309 (4th Cir. 2006); *Hill*, 252 F.3d at 312; *Gambrill v. Cullman Cnty. Bd. of Educ.*, 395 F. App'x 543, 544 (11th Cir. 2010); *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368–69 (Fed. Cir. 2009).

protected activity was a "motivating factor" in his and Lisa's terminations. Pet. App. 12–13. In concluding the Kitlinskis failed to satisfy their burden, the court reasoned that § 4311 requires something more. Specifically, the Fourth Circuit reasoned that "§ 4311 . . . requires *some evidence of discriminatory animus* by a civilian employer."[24] Pet. App. 12 (emphasis added); *see also Harwood v. Am. Airlines, Inc.*, 963 F.3d 408, 415–16 (4th Cir. 2020) (requiring that "discriminatory animus" be "connected in some way to the adverse employment action"); *Bunting v. Town of Ocean City*, 409 F. App'x 693, 696 (4th Cir. 2011) (holding that the plaintiff failed to make a prima facie showing of discrimination under USERRA, reasoning that the court found "no evidence that [the defendant] harbored animus toward [the] [p]laintiff as a consequence of his military service").[25] In doing so, the Fourth Circuit departed from the plain language of USERRA.

---

[24] Although the Fourth Circuit's opinion ambiguously states that there was no "discriminatory animus" present, the oral argument illuminates what the court actually required. Judge Wilkinson stated that the "complaint alleges . . . a violation of USERRA . . . but it's hard for me to connect it up to the basic allegation of the complaint if there was some antimilitary animus afoot here." *See* Oral Argument at 42:03, *Kitlinski v. U.S. Dep't of Just.*, 994 F.3d 224 (4th Cir. 2021) (No. 19-1621), https://bit.ly/3vwkDbD. *See also id.*, at 36:15 ("I wonder if we're not wandering fairly far afield from the subject of the complaint, which was that there was somehow antimilitary animus that motivated this whole thing.").

[25] *But see supra*, n.23 (citing multiple Fourth Circuit decisions that require a plaintiff to prove no more than USERRA's text requires).

As discussed in detail at pages 6–8, Darek filed several USERRA and EEO claims against the DEA that were pending and were being actively litigated at the time the BlackBerry was planted. Lisa was a material witness to Darek's already-existing claims. During this time, immediately following a deposition for one of Darek's claims, Darek found the DEA-issued BlackBerry on the Kitlinskis' vehicle. Pet. App. 5. The Kitlinskis' attorney put the DEA on notice that they believed the planting of the BlackBerry was retaliation for their earlier USERRA activity. J.A. 870.

Soon after that notice, the DEA demanded that Darek and Lisa attend interviews to discuss the DEA's alleged retaliation—the planted BlackBerry. J.A. 1379, 1406. The Kitlinskis notified the DEA that they would be willing to meet so long as their attorney was present. J.A. 852–53. The DEA denied that simple request. J.A. 38. Accordingly, because she was refused the presence of her retained counsel, Lisa declined to answer certain questions reasonably related to Darek's ongoing litigation in order to protect her attorney-client privilege and to avoid undermining the ongoing USERRA and EEO claims. Pet. App. 6. Likewise, because the DEA refused the presence of Darek's retained counsel, Darek declined to attend a meeting regarding the BlackBerry. After Lisa's interview and Darek's declined attempts to set up an interview with his counsel present, Darek filed a retaliation claim under USERRA regarding the planted BlackBerry. *Kitlinski, Darek J. v. U.S. Dep't of Just.*, No. SF-4324-15-0088-I-1 (Feb. 13, 2015) (initial decision).

Purportedly, because the Kitlinskis refrained from answering questions about the subject of possible litigation without their attorney present, they were subsequently terminated. Pet. App. 7–8.

Crucially, when viewing the facts and evidence in the light most favorable to the Kitlinskis, a reasonable factfinder—applying the motivating factor test consistent with USERRA's plain language—could have concluded that Darek's status as a servicemember or his or Lisa's prior protected activity was a motivating factor in their terminations. There is a clear causal link between the Kitlinskis' assertion of rights under USERRA and their subsequent terminations. However, because the Fourth Circuit required an additional showing of "discriminatory animus," that heightened requirement led to a finding that no reasonable factfinder could have found for the Kitlinskis, alleviating the DEA's burden of proving a same-decision defense.

The Fourth Circuit is not alone in its confusion applying USERRA's text. The First, Seventh, and Eleventh Circuits use "discriminatory animus," "discriminatory motivation," and "motivating factor" without meaningfully defining or differentiating those phrases. The First Circuit, like the Fourth Circuit, begins its USERRA analysis with the statutory text, stating that a plaintiff need only prove that protected status or activity was "a motivating factor." *See Velázquez-García v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 17–18 (1st Cir. 2007). However, the court then discusses how plaintiffs can prove "discriminatory animus." *Id.* at 18–19. In another case, the First Circuit states that the

Sheehan factors, used in other circuits as a way to show that protected status or activity was a motivating factor, can actually be used to show there was "discriminatory intent or motivation." *Angiuoni v. Town of Billerica*, 838 F.3d 34, 39 (1st Cir. 2016).

The Seventh Circuit provided—consistent with the statutory text—that "a plaintiff makes out a prima facie case by showing that his membership was a 'motivating factor.'" *Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278, 284 (7th Cir. 2015). However, the Seventh Circuit then departs from the plain language of the statute by stating that "circumstantial evidence [can] create[ ] a 'convincing mosaic' from which a reasonable jury could infer discriminatory motive." *Id.* According to the Seventh Circuit, this circumstantial evidence can be used to infer "the employer's ill motive." *Id.*

The Eleventh Circuit also found that "[s]ection 4311 clearly mandates proof of discriminatory motive." *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005). The inconsistent application of these terms across these circuits fails to reveal whether the terms "discriminatory animus" or "discriminatory motivation" are being used as a synonym for "motivating factor" or as a separate term of art—and an additional requirement—that does not appear in USERRA's plain text.

The Fifth and Federal Circuits' opinions suggest an even more egregious reading of USERRA's plain text—appearing to require the employee to show something closer to but-for causation before the burden

shifts to the employer to show a same-decision defense. Like the Fourth Circuit, the Fifth Circuit explicitly requires "a discriminatory or retaliatory motive [to] be shown to establish a violation of § 4311." *Bradberry v. Jefferson County*, 732 F.3d 540, 547 (5th Cir. 2013). However, the Fifth Circuit has even required a higher showing than undefined discriminatory animus, stating that the plaintiff must show but-for causation to meet their burden. Specifically, the Fifth Circuit required a plaintiff to prove that "the employer discriminated against him or her *because of*[26] the employee's [protected status or activity]." *Id.* (emphasis added). The Fifth Circuit's requirement is more burdensome than what should be required for § 4311's motivating factor test.

The Federal Circuit has also misinterpreted "a violation of USERRA to require 'discriminatory animus,' or that the veteran be treated in a harsher manner than non-veterans." *Jolley v. Merit Sys. Prot. Bd.*, 752 F. App'x 964, 968 (Fed. Cir. 2018) (quoting *Sheehan*, 240 F.3d at 1014 n.3).[27] In another case, the Federal Circuit states that "[t]he essence of a meritorious . . . USERRA claim is that a covered individual was denied a benefit

---

[26] The Court's recent decision in *Bostock* shows that the phrase "because of" indicates but-for causation. *Bostock*, 140 S. Ct. at 1739.

[27] Evidence of disparate treatment or hostility *can* be evidence that military service was a motivating factor. However, these courts, including the Fourth Circuit, appear to hold that the employee *must* show this hostility to establish motivating factor, thereby adding an element to the employee's burden not contained in the statute.

because he or she served in the military." *Brasch v. Merit Sys. Prot. Bd.*, 664 F. App'x 915, 918 (Fed. Cir. 2016) (emphasis added). Despite the Supreme Court's clear statement that motivating factor is a less stringent standard than but-for causation, *Bostock*, 140 S. Ct. at 1740, these circuits are conflating the two standards.

Although several circuits require proof of discriminatory motivation, courts have also stated that the employee's protected status or activity is a motivating factor "'if the defendant relied on, took into account, considered, or conditioned its decision on that consideration.'" *Coffman*, 411 F.3d at 1238 (quoting *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 617 (E.D. Va. 1999)); *Petty v. Metro. Gov't of Nashville-Davidson Cnty.*, 538 F.3d 431, 446 (6th Cir. 2008) (citing *Coffman*, 411 F.3d at 1238); *Murphy v. Radnor Township*, 542 F. App'x 173, 177 (3d Cir. 2013) (citing *Coffman*, 411 F.3d at 1238); *see also Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368 (Fed. Cir. 2009). The circuits' inconsistent standards beg the question: whether an employee, if their employer "considered" the employee's protected status or activity while making the decision, can meet their burden short of showing that the employer had discriminatory animus or motivation.

A short hypothetical vividly demonstrates the confusion across the circuits. Assume "Supervisor" served in the military and comes from a multi-generation military family. "Employee," who is in the United States Army Reserve, requests a military transfer to a different location that would reduce commuting costs and

give Employee an increase in salary. Supervisor explains that the position Employee seeks is very competitive. Supervisor also explains that while he always tries to help those that serve our country, Supervisor is concerned that Employee will be deployed soon and further explains that rather than transferring Employee now, Supervisor will wait until after the deployment and then explore comparable transfers.

In this hypothetical, there is no evidence that Supervisor harbors anti-military bias, but Employee's military service clearly factored into Supervisor's decision not to transfer Employee. Under the causation standard as applied in the Second, Third, and Sixth Circuits—which apply USERRA's plain language—Employee would be able to show that military service was a motivating factor in the decision not to transfer Employee, and the burden would correctly shift to the employer to show they would have made the same decision. Alternatively, in the Fourth Circuit, there would be no shift of burden because the Fourth Circuit required some showing of anti-military bias. In yet another standard, the First, Seventh, and Eleventh Circuits, in addition to showing that the service was a motivating factor, Employee would have to show some form of undefined animus in order to shift the burden of proof to the employer. In the Fifth and Federal Circuits, Employee would be required to prove that the undefined animus was a but-for cause to shift the burden. As demonstrated above, Employee's rights under USERRA are wholly dependent on where they file their claim.

Our servicemembers deserve a national standard of causation under USERRA—to be uniformly applied irrespective of where they file. This Court should grant certiorari, resolve this confusion, and articulate a standard that is consistent with the plain language of USERRA. The integrity of USERRA—a statute meant to benefit and protect those servicemembers that place their lives on the line to protect this country—requires a clear standard. The circuit courts are eradicating the line between "motivating factor" and "but-for" causation to the detriment of this Nation's servicemembers. Accordingly, Petitioners request that this Court grant certiorari and clarify what standard our servicemembers must meet to enforce their rights.

III. Whether An Employee Who Has Pending Employment Litigation Against Their Employer In Court Has The Right To Their Retained Counsel While Being Required To Appear For An Interview Initiated By The Same Employer Against Which The Litigation Is Pending.

This question is of fundamental importance to public servants, including those who, like Darek, serve our country in the military with the expectation that they may continue their civilian careers upon their return. Petitioners are not asking this Court to revisit *In re Groban*, 352 U.S. 330 (1957)[28] nor to hold there is

[28] The Court in *Groban* noted that "[a] witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other

a right to have retained counsel present anytime a federal agency conducts an internal investigation of workplace misconduct. Rather, the question presented here is narrow: whether a federal employee's right to retained counsel is violated when they have pending employment discrimination claims against their federal employer; when the employee insists on the presence of their already-retained counsel in an interview; when that interview relates to subjects a reasonable person would believe relates to that employee's litigation; and when that employee is ultimately terminated for their insistence on their retained counsel's presence. If a federal agency can pursue such interviews and deny employees the presence of their counsel, it can effectively end-run the attorney-client relationship.

The DEA terminated Darek and Lisa after an internal investigation, which included an interview that related back to, or which a reasonable person would believe related back to, Darek's USERRA litigation. In doing so, the DEA circumvented both the purpose of the attorney-client relationship as well as the protections that relationship provides. This is at odds with the Fifth Amendment's due process guarantees, which afford individuals the right to retain counsel in civil litigation.[29] The Fourth Circuit's decision invites

---

investigatory bodies." *Id.* at 333. In *Groban*, the statute at issue, § 3737.13 of the Ohio Code, specifically provided that the " 'investigation . . . may be private' and that he may 'exclude from the place where (the) investigation is held all persons other than those required to be present.' " *Id.* at 331 (alterations in original).

[29] In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court observed "[i]f in any case, civil or criminal, a state or federal court

federal employers charged with employment law violations to circumvent their employees' right to be meaningfully heard in pending employment litigation against that federal employer by simply ordering employees who are party to the litigation to either comply with internal investigations—without their counsel present—or be terminated.

Protecting the attorney-client relationship is fundamental because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Bhd. of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Applying their special skills and knowledge of the legal system, attorneys can safeguard their clients' interests, including the attorney-client privilege and its corollary societal benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 270–71 (1970). The Court's recognition of the critical role counsel plays in safeguarding due process does not change just because it is a federal agency conducting an internal investigation that could lead to

---

were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.* at 69. Petitioners note from the outset the many factual distinctions between this case and *Powell*, not least of which is the difference between the civil right, stemming from due process protections, and the explicit Sixth Amendment criminal right. However, *Powell* remains oft cited for the proposition that a right to retain (as opposed to the right to have appointed) civil counsel exists as a matter of constitutional due process. *See*, *e.g.*, *Adir Int'l, LLC v. Starr Indem. and Liab. Co.*, 994 F.3d 1032, 1039 (9th Cir. 2021).

termination of employment. Because Darek's pending employment litigation was against the agency conducting the relevant interview, counsel's presence was integral to safeguard both Darek's and Lisa's legal interests.

Although the scope of the right to retain counsel in civil litigation has not been explicitly defined, the Court has recognized the attorney-client relationship's importance to the successful functioning of the legal system. *See*, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981). Despite the attorney-client relationship's importance, the relationship was rendered meaningless here. Because of Darek's pending litigation against the DEA, the Kitlinskis were left with a Hobson's choice: either go forward with the interview and risk jeopardizing Darek's existing claims against the DEA or continue to insist that they be permitted to have their retained counsel present and be fired.

Darek and Lisa faithfully protected their attorney-client relationships—relying on the legal system to safeguard those relationships—and were fired as a result. The Fourth Circuit's decision directly undermines the attorney-client relationship. Without this Court's intervention, the Fourth Circuit's decision allows a federal agency against which an employment discrimination claim was filed to circumvent the protections that effectuate justice in the adversarial system by ordering employee-plaintiffs and employee-witnesses to appear without their counsel at interviews of nebulous scope.

Further emphasizing the importance of this question, the Court has recognized that, in certain circumstances, federal employees have a property interest in their employment. *See Gilbert v. Homar*, 520 U.S. 924, 928–29 (1997) ("[W]e have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process.") (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972)).

When the DEA presented Lisa with a notice that her failure to cooperate in a compelled interview could result in termination, her protected property interest in her employment hinged on a waiver of her right to have her retained counsel present. Similarly, Darek's protected property interest in his employment hinged on whether he was willing to waive his right to have his retained counsel present during an interview. Lisa and Darek were not unwilling to participate in the DEA's internal investigation. They were unwilling, however, to waive their right to have their retained counsel present during the DEA interviews. The deprivation of Darek's and Lisa's protected property interests as a result of their reliance on their due process right to their retained counsel reinforces why this Court should grant certiorari and resolve this narrow yet important question.

Protecting the attorney-client relationship naturally involves protecting the attorney-client privilege.[30] Proceeding without her attorney, Lisa appeared for the compelled interview with OPR. J.A. 38. During the interview, Lisa refused to answer questions she believed could jeopardize Darek's pending litigation, asserting the attorney-client and spousal privileges. Pet. App. 6, 25. Lisa was subsequently terminated by the DEA for her lack of cooperation in the internal investigation, specifically her refusal to—without counsel present—answer questions she believed could jeopardize Darek's pending litigation. Notably, Lisa's termination hinged not on her unwillingness to participate in the OPR investigation but rather on her unwillingness to answer questions she believed to be privileged. This highlights an essential role of an attorney in pre-trial proceedings—to clarify when it is appropriate to invoke the attorney-client privilege. The Fourth Circuit's refusal to address this issue signals a willingness to devalue the privilege itself.

Ultimately, a federal employee's right to retain counsel should include having that counsel present during any interview that reasonably relates to pending litigation against their employer. We ask that this

---

[30] The Court has consistently and repeatedly affirmed the importance of protecting the attorney-client privilege because it is foundational to "the observance of law and the administration of justice" by encouraging full and frank disclosures between clients and their attorneys. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Court clarify whether federal employees have the right to have retained counsel present in an interview that a reasonable person would believe relates to pending litigation when that agency-employer is the opposing party in the pending employment litigation. Otherwise, the Fourth Circuit's decision stands to destroy the attorney-client relationship, jeopardize the constitutional due process rights of our public servants, and erode their ability to seek relief under USERRA and Title VII.

IV. This Case Is A Perfect Vehicle For Addressing These Issues As Large Numbers Of Our Troops Have Recently Returned Home And Are Attempting To Rejoin Civilian Employment.

The time is now to ensure that the rights of military servicemembers and veterans across the United States are both clarified and protected. For the first time since 2001, there are no American troops in Afghanistan after the United States completed the evacuation of most of its citizens—including all American troops—and thousands of at-risk Afghans.[31] Now, more than ever, servicemembers who leave their civilian employment and serve honorably in support of the United States military deserve the assurance that once their service is completed, they will be able to return to their civilian careers with as little difficulty and disruption

[31] Ali & Brumstrom, *supra* note 15.

as possible. This assurance, for many servicemembers, will be crucial in the months and years to come.

USERRA's purpose and legislative history support timely clarifying the rights afforded to United States servicemembers. USERRA was passed for the following purposes:

> (1) to encourage noncareer service in the uniformed services . . . ; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon completion of service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301. Because USERRA was enacted for the purpose of protecting the rights of military servicemembers, it is construed broadly and in favor of its military beneficiaries.[32] However, merely refraining from discriminating or retaliating against servicemembers is not enough for the federal government. By Congress's explicit instruction, "the Federal Government

---

[32] The Department of Labor recognized that the Act is intended to "be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *See* 70 Fed. Reg. 75,246 (Dec. 19, 2005) ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced."). This mirrors the position taken by several circuits. *See*, *e.g.*, *Harwood*, 963 F.3d at 414; *Mace v. Willis*, 897 F.3d 926, 928 (8th Cir. 2018).

should be a model employer in carrying out the provisions of [USERRA]." 38 U.S.C. § 4301(b).

The facts and circumstances of this case have and will continue to affect the lives of Darek and Lisa for years to come. However, the issues presented by this case are not unique. Rather, the issues presented will affect the lives of servicemembers across the United States when asserting rights afforded to them under USERRA. Our servicemembers deserve a clear and uniform understanding of their rights—rights to be interpreted irrespective of where they file a claim.

Congress made explicit promises to those that serve our country—that their service or exercise of a right under USERRA would be protected. We ask a lot of those that serve, particularly in this volatile time. Because of what we as a Nation ask, it is critical that this Court timely clarify what must be proven to establish a violation of USERRA and act to protect the attorney-client relationship when our public servants have retained counsel to vindicate their rights.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant certiorari to review the judgment of the Fourth Circuit, reverse the decision of the lower courts, and remand.

Respectfully submitted this 1st day of November, 2021.

MICHAEL L. FOREMAN,
Counsel of Record for Petitioners

PENN STATE LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Boulevard, Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu