No. 21-991

In The
Supreme Court of the United States

DIANA BERBER,
Petitioner,
v.
WELLS FARGO BANK, N.A. and MARSHA PAINTER,
Respondents.

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

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Where Respondent Wells Fargo Bank, N.A. ("Wells Fargo") entered into a Deferred Prosecution Agreement ("DPA") with the United States Attorneys' Offices for the Central District of California and the Western District of North Carolina for unlawful practices separate from those that this case turned on, did the lower courts err when declining to set aside judgment on Petitioner Diana Berber's ("Petitioner") employment discrimination claims.

PARTIES TO THE PROCEEDING

1. Petitioner was the plaintiff-appellant in the Court of Appeals.

2. Respondents, Wells Fargo and Marsha Painter ("Painter") (collectively "Respondents") were defendants/appellees in the Court of Appeals.

RULE 29.6 DISCLOSURE STATEMENT

Wells Fargo's parent corporation is Wells Fargo & Co., and Wells Fargo & Co. is a publicly held company that owns 10% or more of Wells Fargo's stock. Except for Wells Fargo & Co., no other publicly held company owns 10% or more of Wells Fargo's stock.

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INTRODUCTION

For the second time, Petitioner seeks certiorari of this routine and fact-bound state-law employment case. For the second time, she fails to show that certiorari is proper. Petitioner is a former Wells Fargo personal banker who was terminated for poor performance in 2014. Over two years later, Petitioner sued Wells Fargo and her former supervisor, Painter, under the Florida Whistleblower Act (the "FWA") and the Florida Civil Remedies for Criminal Practices Act (the "Florida RICO Act").

The District Court dismissed the Florida RICO Act claim on the pleadings and entered summary judgment for Wells Fargo on the FWA claim. Petitioner appealed and the Eleventh Circuit affirmed in full. Petitioner requested rehearing en banc, citing Wells Fargo's then-recent DPA with the Department of Justice, which she claimed was dispositive to the District Court's decisions below. The Eleventh Circuit denied her request. Petitioner then sought a writ of certiorari from the Court, arguing it should reverse and remand in light of the DPA so she could proceed to trial. The Court denied her petition.

Around the same time, Petitioner also asked the District Court to set aside the judgment in light of the DPA. The District Court denied her request and found the DPA did not impact the factors upon which judgment rested. On yet another appeal, the Eleventh Circuit affirmed.

Now, Petitioner seeks certiorari for a second time. This request is substantially similar to the first because it asks the Court to parse through the facts and reverse the lower courts based on the DPA. The Court should decline Petitioner's request for several

reasons. First, there is no basis to grant certiorari because the case centers on specific factual issues that are well-settled by state law. Second, Petitioner does not argue that the lower courts committed any specific error and the Court should reject Petitioner's invitation to guess. Third, nothing in this case would serve the Court's purpose and role. And fourth, the lower courts correctly decided this case and declined to set aside the judgment below.

In short, the Court should deny the petition and preserve its limited resources for meritorious cases of actual significance and legal import.

STATEMENT OF THE CASE

In July 2013, Wells Fargo hired Petitioner as a personal banker in Fort Lauderdale, Florida. Petitioner reported to Painter. In her role, Petitioner had to meet regular sales goals. She did not meet those goals. In particular, she frequently failed to set a sufficient number of business appointments, failed to attend business-generating events, and came into work late at least once without providing notice. Painter repeatedly admonished Petitioner for these failures and issued her several written warnings.

Petitioner did not improve her performance. So Wells Fargo terminated Petitioner in March 2014, explaining by letter that she had not "met the performance expectations regarding daily activities to attain sales goals required in this position."

Petitioner then sued Wells Fargo in Florida state court and Wells Fargo removed the action. After four amendments, Petitioner alleged Wells Fargo violated the FWA by terminating her after she refused to engage in fraud. She also alleged Wells Fargo and Painter violated the Florida RICO Act by ignoring

Wells Fargo employees that were defrauding Wells Fargo customers. In support, she attached several documents about investigations into Wells Fargo employees opening accounts for customers without consent.

Petitioner's case unraveled in deposition. She conceded that nobody at Wells Fargo had asked her to do anything fraudulent and that she did not know of any instances where Painter asked others to act fraudulently. She further conceded that it was not until two years after her termination that she began to believe her termination was related to any fraudulent conduct.

The District Court dismissed Petitioner's Florida RICO Act claim with prejudice for two reasons. First, the District Court found Petitioner had not alleged Wells Fargo was sufficiently distinct from its parent company, Wells Fargo & Company, to support liability under the Florida RICO Act. Second, the District Court found Petitioner could not plausibly plead proximate causation because her alleged injury – termination – was too attenuated from the outward-facing fraud she alleged was perpetrated on Wells Fargo customers.

The District Court then entered summary judgment for Wells Fargo on the FWA claim. That decision was based on three findings. First, the District Court found that because Petitioner had not known about or been asked to perform any fraudulent activity, she could not have objected to or refused to participate in the same. Indeed, the District Court cited Petitioner's summary judgment affidavit, where she admitted she did not come to believe that Wells Fargo terminated her for failing to engage in

fraudulent activities until almost two and half years after the fact. As such, the District Court found no evidence that Petitioner reported anything fraudulent to anyone at Wells Fargo. Second, the District Court found Petitioner could not rebut the evidence that she was terminated for subpar job performance. And third, the District Court found that nothing in the record allowed Petitioner to show Wells Fargo's legitimate, non-retaliatory reason for termination was a pretext for retaliatory conduct. As the record did not show Petitioner had been asked to engage in any conduct, the District Court reasoned Petitioner could not have suffered retaliation.

Petitioner appealed to the Eleventh Circuit. In its decision, the Eleventh Circuit acknowledged that between Petitioner's termination and her lawsuit, the Consumer Financial Protection Bureau had investigated Wells Fargo for fraudulent sales practices and reached a settlement.

But the Eleventh Circuit affirmed the District Court's dismissal of Petitioner's Florida RICO Act claim because Petitioner's alleged injury – termination – was disconnected from the alleged predicate acts against customers. It reasoned that, "[a]t best, [Petitioner's] termination was an unrelated consequence many steps down the causal chain."

The Eleventh Circuit also affirmed the District Court's entry of summary judgment on Petitioner's FWA claim because she was unaware of any potentially fraudulent activities and because the record was devoid of any evidence showing she ever affirmatively objected to, or refused to participate in, fraudulent activities. The Eleventh Circuit also echoed the District Court by finding Petitioner failed

to rebut Wells Fargo's legitimate, non-retaliatory reason for termination. And it determined that the record revealed alternative grounds for Petitioner's termination, including her failure to report to work on time without notice at least once, and failure to generate sufficient business meetings and events.

Petitioner requested rehearing en banc. She asked again five days later. Almost a month later, Petitioner asked the Eleventh Circuit yet again.

In conjunction with those requests, Petitioner asked the Eleventh Circuit several times to take judicial notice of Wells Fargo's execution of the DPA. The DPA's accompanying Statement of Facts generally stated Wells Fargo had implemented a volume-based sales model that led employees to engage in fraudulent or unethical practices by opening accounts for customers without consent. The Eleventh Circuit denied Petitioner's requests for rehearing en banc.

Petitioner then sought certiorari with the Court for the first time, arguing the DPA rendered erroneous the Eleventh Circuit's opinion and its subsequent order denying rehearing en banc. Petitioner asked the Court to reverse the Eleventh Circuit and to remand the case with directions to proceed to trial. The Court denied Petitioner's request.

Petitioner also filed a contemporaneous Motion to Set Aside Final Judgment in the District Court under Federal Rule of Civil Procedure 60(b)(3), 60(b)(6) and 60(d). Pet. App. at A11. While vague, the Motion to Set Aside Final Judgment seemed to argue relief was proper because (1) Wells Fargo's conduct as reflected in the DPA was improper; (2) the DPA showed Painter was untruthful in a summary judgment declaration;

and (3) Wells Fargo and its attorneys were somehow less than candid with the District Court about Wells Fargo's retail sales practices.

The District Court denied Petitioner's motion. *Id.* at A12. In so doing, the District Court held that the DPA did not affect the fundamental issues that doomed Petitioner's claim – that she

> (1) did not know of any illegal practices at the time [she was terminated]; (2) never reported any illegal activity, internally or externally; (3) was never asked to engage in, and thus did not refuse to engage in, illegal activities; and (4) did not rebut the proffered legitimate reasons for her termination: being late to work, not scheduling appointments with potential customers, and not organizing out-of-work events to generate sales.

Id. at A14.

Petitioner then appealed to the Eleventh Circuit, which held that the District Court did not abuse its discretion by denying the Motion to Set Aside Judgment. *Id.* at A5. In so doing, it found that the record did not substantiate Petitioner's allegations that Wells Fargo obtained its judgment through fraud, or that Painter lied in her summary judgment declaration. *Id.* at A6-A7. Moreover, it specifically held that relief was not merited under Federal Rule of Civil Procedure 60(b)(3), 60(b)(6), or 60(d). *Id.* at A7-A9.

REASONS TO DENY THE PETITION

The Court should deny this fact-bound petition because the issues Petitioner presents are neither

complex, nor novel, and will require the Court to expend judicial resources best used elsewhere on matters of broad import. Moreover, denial is also proper because the lower courts correctly declined to set aside judgment on Petitioner's Florida RICO Act and FWA claims.

I. The Petition is Fact-Bound, Vague, and Unremarkable.

There is no basis for the Court to grant the petition here. "A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. The Court's Rules list the following instances in which certiorari may be granted:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by

> this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. The Rules also provide that, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Against that backdrop, Petitioner does *not* present a case involving (1) a conflict between United States courts of appeals; (2) a conflict between a United States court of appeals and a state court of last resort; (3) a conflict on an important question among state courts of last resort; or a (4) a conflict between the Court's decisions and those of lower courts. Instead, Petitioner simply argues that the lower court got the facts wrong. In so doing, Petitioner asks the Court to expend its limited resources on a painstaking review of the facts in this nearly six-year-old single plaintiff case involving settled state law claims. There are several fatal issues with Petitioner's request.

First, Petitioner's argument is a fact-bound reiteration of what the Court has already denied. Like her first petition, Petitioner asks the Court to add facts where none exist by applying the DPA to her case in a dispositive way and then to reverse the lower courts so she can proceed to trial. Notably, this request has also been rejected twice by the Eleventh Circuit (in response to Petitioner's request for re-hearing en banc and the most recent appeal). Petitioner's request is incongruous with the Court's role and function because "error correction is outside the mainstream of the Court's functions and not among the 'compelling reasons' that govern the grant of certiorari." *Barnes v. Ahlman*, 140 S. Ct. 2620,

2622, 207 L. Ed. 2d 1150 (2020) (Sotomayor, J. dissenting) (internal punctuation modified). Indeed, the Court regularly passes on such cases, where the operative inquiry is "primarily a question of fact." *See, e.g. N.L.R.B. v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981). It should do so again here.

Second, Petitioner's arguments are exceedingly vague. She does not specifically argue that the Court should have set aside judgement on her Florida RICO Act claim or her FWA claim, and instead requests that judgment be reversed on the whole. That is fatal because the Florida RICO Act and the FWA have different legal elements. Moreover, Petitioner does not argue an abuse of discretion occurred because of an erroneous interpretation of any specific facts, or through the application of any specific subsection of Federal Rule of Civil Procedure 60. That is problematic because "Rule 60(b) proceedings are subject to only limited and deferential appellate review." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Thus, appeals on Rule 60(b) motions are governed by an abuse of discretion standard. *Browder v. Dir., Dep't of Corr. of Illinois*, 434 U.S. 257, 263 n.7 (1978). Under that standard, courts "leave undisturbed a district court's ruling unless [they] find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Id.* By failing to advance even cursory arguments under this framework, Petitioner has left the Court to guess at her position. The Court should not tax its limited resources by descending into this rabbit hole, and should instead hold that Petitioner provides no basis for certiorari.

Finally, this case is not so compelling or rare to

merit granting the petition. Chief Justice William Howard Taft once stated, "The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit." Hearings on the Jurisdiction of Circuit Court of Appeals and United States Supreme Court before the House Committee on the Judiciary, 67th Cong., 2d Sess., Ser. No. 33, p. 2 (1922). This case falls far short of that threshold. Nothing about the propriety of the lower courts' substantive decisions on the fact-bound, state-based issues can be extended broadly. Consequently, this is not the type of case the Court should take.

II. The Lower Courts Determined the Case Correctly.

Even if the Court were not inclined to pass on the case because of its fact-bound, vague, and unremarkable nature, it should do so because the lower courts correctly declined to set aside judgment on Petitioner's claims.

a. The Lower Courts Properly Decided Petitioner's Florida RICO Act Claim.[1]

The lower courts correctly decided the dismissal of Petitioner's Florida RICO Act claim. The Florida RICO Act statute provides that, "It is unlawful for any person[,] employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity . . . ." Fla. Stat. § 772.103(3). To

[1] Although the petition does not mention the Florida RICO Act claim, the claim is enveloped by Petitioner's request for certiorari. Thus, Wells Fargo addresses the Florida RICO Act claim here.

allege a violation of the Florida RICO Act, a party must claim there has been the (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of criminal activity. *See id.*

Florida has adopted the Court's conclusion that RICO liability requires a plaintiff to suffer an injury proximately caused by a predicate criminal act. *Bortell v. White Mountains Ins. Grp., Ltd.*, 2 So. 3d 1041, 1047 (Fla. 4th DCA 2009) (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)).[2] When determining if a criminal act proximately injured a plaintiff, a court must ask if the alleged violation led *directly* to the plaintiff's injuries. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006).

Against that backdrop, Petitioner alleged an enterprise between Wells Fargo, Wells Fargo & Co. (Wells Fargo's parent company), and Painter. Petitioner further claimed Wells Fargo defrauded customers in an ongoing fashion by opening unrequested accounts. Finally, Petitioner alleged she was terminated for not committing the purportedly fraudulent acts her co-workers committed.

Analyzing Petitioner's allegations, the lower courts recognized she could not plausibly allege that the purportedly outward-facing predicate criminal acts directly caused *her* termination. Specifically, the Eleventh Circuit noted that "at best, [Petitioner's] termination was an unrelated consequence many steps down the causal chain." That holding squarely aligns with the law. *See Anza*, 547 U.S. at 458 (finding a plaintiff failed to state a RICO claim upon

[2] "[T]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

which relief could be granted when damages did not flow directly from the relevant conduct); *see also Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 18 (2010) (same).

b. The Lower Courts Correctly Decided Petitioner's FWA Claim.

The lower courts also correctly decided the entry of summary judgment on Petitioner's FWA claim.

Under the FWA, "An employer may not take any retaliatory personnel action against an employee because the employee has . . . objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of the law, rule, or religion." Fla. Stat. § 448.102(3). To establish a prima facie FWA claim, a plaintiff must show "(1) [s]he engaged in statutorily protected expression; (2) [s]he suffered an adverse employment action; and (3) there is some causal relation between the two events." *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1132 (Fla. 4th DCA 2003). Once that occurs, the burden shifts to the employer to "proffer a legitimate, non-retaliatory reason for the adverse employment action." *Id.* at 1132. Thereafter, the employee may still prevail if she can "prove by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct." *Id.*

Petitioner alleged she refused to engage in fraudulent sales practices and Wells Fargo terminated her for that reason. Yet she acknowledged that nobody ever asked her to commit fraud and she never knew any fraud was being committed. The courts below recognized those concessions, and that nothing showed she objected to the practices she did not know about, ultimately concluding she had not

engaged in any statutorily protected activity.

The lower courts also noted that even if Petitioner had made a prima facie case, she still could not rebut Wells Fargo's legitimate, non-retaliatory reason for her termination – poor performance and inability to make sales goals. The Eleventh Circuit also found that the record revealed additional legitimate justifications for termination, including failing to arrange business appointments and out-of-office business events. These unanimous decisions squarely aligned with governing state law.

c. The Lower Courts Correctly Declined to Set Aside Judgment.

The petition centers on the lower courts' refusal to set aside the dismissal and summary judgment in light of the DPA. But the record shows that the lower courts correctly declined to set aside judgment because the DPA is wholly immaterial to Petitioner's claims.

For instance, the DPA does not enable Petitioner to plausibly state a Florida RICO Act claim by alleging she was directly injured by customer-facing predicate acts. Likewise, as the lower courts found, the DPA does not change the merits of summary judgment on Petitioner's FWA retaliation claim because it does not change concessions that she (1) did not know of any illegal activities; (2) never reported any illegal activity; and (3) was never asked to engage in any illegal activity. Pet. App. at A6-A11, A14. Moreover, as the District Court found, the DPA does not change Petitioner's inability to rebut the proffered legitimate reasons for termination, including being late to work, not scheduling appointments with potential customers, and not organizing out-of-work business

events. *Id.* at A14

Notwithstanding that reality, Petitioner improperly attempts to commingle the DPA with this case and to complain that she did not receive compensation under the DPA. But this case was never about the DPA or compensation thereunder. And Petitioner admits Wells Fargo properly made payments under the DPA to the Department of Justice and the Securities and Exchange Commission. Petition for Writ of Certiorari at 18. Nothing about those payments impacts the merits of the decisions below.

Petitioner's only other argument is that she was terminated for refusing to engage in illegal activity. The courts below rejected that argument in the original summary judgment order and the appeal therefrom. Thus, her argument fails because "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder*, 434 U.S. at 263. Even if the Court were to consider Petitioner's argument, as the Eleventh Circuit has observed, and common-sense dictates, Petitioner could not have refused to engage in illegal activities unless she knew of them and was asked to join.

Beyond these arguments, Petitioner also provides block citations to three cases without any substantive analysis. But none of those cases apply here. For starters, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* was decided almost 78 years ago and involved a concentrated effort to commit fraud upon the court and the United States Patent and Trademark Office by submitting fabricated evidence about which there was no other knowledge. 322 U.S. 238, 242-244 (1944). Unlike *Hazel-Atlas*, Petitioner does not argue that

Wells Fargo or its attorneys acted fraudulently in this case, or that any fabricated evidence was submitted.

Likewise, *Klapprott v. United States* was decided almost 73 years ago and involved a proceeding by the United States to revoke an individual's citizenship without affording the individual a reasonable opportunity to defend himself. 335 U.S. 601, 615 (1949). Unlike *Klapprott*, Petitioner had a full opportunity to present her case, and the existence of the DPA did not weigh on the case or hamper that ability.

Lastly, *Liljeberg v. Health Servs. Acquisition Corp.* was decided almost 33 years ago and involved a district judge that violated a statute by failing to recuse himself where an appearance of impartiality was presented. 486 U.S. 847, 852-861 (1988). Unlike *Liljeberg*, Petitioner does not contend, and the facts do not show, that she was denied an opportunity to present her case to an impartial arbiter.

In sum, there is no reason for the Court to grant certiorari here. The case is routine, vague, bound to its facts, and significant only to the parties. Moreover, error correction is discordant with the Court's mission, especially when any proffered error sits squarely in state law. And even if the Court were to look past those ineluctable conclusions, there is no reason to second guess the uniform decisions of the courts below because the DPA is immaterial to Petitioner's claims.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: February 9, 2022

Respectfully submitted,

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