No. 22-231

In The
Supreme Court of the United States

ARTUR DAVIS,

Petitioner,

v.

LEGAL SERVICES ALABAMA, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this case – which involves unique issues created by this Court's employment law precedent, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) – is the appropriate vehicle to review the purported differences in Title VII standards broadly applicable to more common employment decisions about terms and conditions of employment.

PARTIES TO THE PROCEEDING

Petitioner Artur Davis was the plaintiff in the district court proceeding and appellant in the Court of Appeals. LSA, LaVeeda Morgan Battle and Alex Smith were defendants in district court and appellees in the Court of Appeals and are Respondents here.

CORPORATE DISCLOSURE STATEMENT

Legal Services Alabama (LSA) is a non-profit, public interest corporation. LSA is not publicly traded and no publicly held entity owns 10% or more of the stock of LSA.

RELATED PROCEEDINGS

Davis v. Legal Services Alabama, No. 2:18-cv-26, 472 F. Supp. 3d 1123 (M.D. Ala. 2020).

Davis v. Legal Services Alabama, No. 20-12886, 19 F.4th 1261 (11th Cir. 2021).

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JURISDICTIONAL STATEMENT

Respondents do not dispute that this Court has jurisdiction under 28 U.S.C. § 1254(1), but deny that this case satisfies the standards for review under Supreme Court Rule 10.

STATEMENT OF THE CASE

A. Procedural History

Petitioner filed this lawsuit against his former employer, Legal Services Alabama, Inc., a public interest law firm, and two volunteer members of its Board of Directors, LaVeeda Morgan Battle and Alex Smith. Eleventh Circuit Joint Appendix (CA11JA) 22a. The Amended Complaint alleged race discrimination and retaliation under 42 U.S.C. Section 1981 and Title VII of the Civil Rights Act of 1964 against LSA, and defamation and conspiracy under Alabama state law against all three defendants. *Id.*

The district court granted summary judgment on all claims. CA11JA 48a. Petitioner appealed the race discrimination and defamation claims to the United States Court of Appeals for the Eleventh Circuit. He did not appeal the retaliation claims. Before the panel, Petitioner argued that the "totality of the circumstances" of his paid leave rose to the level of an "adverse employment action." Petitioner's Principal Brief (USCA11) at p. 42. After considering the totality of the circumstances and consistent with the decisions of every Court of Appeals to address the issue, the

Eleventh Circuit held that his temporary paid leave during the investigation was not actionable under Title VII. Pet. App. 10a. The Court of Appeals denied his Petition for Rehearing *En Banc.* Pet. App. 50a.

B. Relevant Facts

Legal Services Alabama (LSA) is a non-profit public interest law firm which provides civil legal services for low-income eligible clients. Pet. App. 3a. LaVeeda Morgan Battle and Alex Smith are private attorneys and volunteer members of the Board of Directors of LSA. Pet. App. 2a. At the time of the events in this case, Battle (who is African American) was the President of the Board of Directors of LSA. Pet. App. 23a n.3, 24a.

Petitioner was hired by LSA's Board to serve as its Executive Director in December 2016. Battle was a member of the Search Committee which decided to hire Petitioner as the Executive Director. Pet. App. 22a, 23a n.3.

Early in his tenure, Petitioner began making significant changes to LSA without first seeking approval of the Board of Directors. He implemented new LSA programs and only informed the Board after the fact. He hired new employees and made changes to staff compensation outside LSA guidelines and without Board approval. He spent down LSA reserves without Board approval. Pet. App. 3a. Petitioner expressed to the Board that he did not believe that it had authority to direct his actions as Executive Director. U.S. District Court (USDC) Doc. 41-4 at pp. 51-53.

The Board originally planned to address these issues with Petitioner during the summer of 2017 as part of constructive feedback about his performance. However, during this same time frame, the Board received information from the Assistant Executive Director, Jaffe Picket (who is African American), that several long-tenured staff employees (who are also African American) had complained about Petitioner's management style and intimidating demeanor. Specifically, one employee claimed that Petitioner created a "hostile environment" for her. USDC Doc. 41-1 at ¶ 6.

Although the Board had originally planned to address the other concerns through performance feedback, the allegations of an intimidating, hostile work environment toward staff required the Board to address these issues immediately. USDC Doc. 41-1 at ¶ 7. On August 18, 2017, the Board placed Petitioner on paid leave pending an investigation into the employee complaints and provided him with a letter detailing the concerns to be investigated. The letter stated, in part:

> This letter follows a meeting of the Executive Committee of the Board of Directors of Legal Services Alabama today wherein the Executive Committee considered your remarks, and several serious issues and allegations that have arisen during your tenure as Executive Director, and the Executive Committee has adopted the enclosed resolution.
>
> * * *

We now turn to our concerns about your management of LSA's staff. LSA's adopted Equal Opportunity Policy and Procedures strictly prohibit all forms of harassment of LSA's employees, which includes but is not limited to the creation of a hostile work environment, offensive, intimidating, threatening, demeaning or vulgar language and unprofessional actions. As you are aware LSA's Equal Opportunity Policy and Procedures applies to all LSA officers, supervisors, managers, and employees. LSA maintains a "zero tolerance" policy for all types of harassment and for inappropriate, unprofessional or offensive conduct. LSA policy prohibits all intimidation or threats against any LSA employee. A violation of LSA's policy against harassment can lead to disciplinary action, up to and including discharge, as appropriate in the circumstances.

It has come to my attention that you have stated that management of staff is strictly under your domain. However, the Board has the overall responsibility for LSA's Equal Opportunity Policies and is ultimately responsible for the employment decisions regarding the Executive Director.

LSA's Equal Opportunity Policy and Procedure provides that an LSA Employee may notify the President of the Board directly when the complaint pertains to the Executive Director. LSA's policy requires that all complaints of harassment or other conduct prohibited by LSA's Equal Opportunity Policy and Procedure, must be promptly and thoroughly

investigated, and LSA must take appropriate action including disciplinary action if necessary, based upon the results of the investigation.

As President of the Board I have received confidential communications from LSA staff regarding complaints of harassment and the creation of a hostile work environment by your unprofessional treatment of LSA employees when you have been informed by them about existing LSA protocols and procedures; demeaning support staff, intimidating and threatening staff with retaliation unless they agree to keep the Board uninformed about matters involving LSA. LSA's policy prohibits retaliation against any employee who in good faith brings any harassment allegation to the attention of LSA management or the Board.

It is also the policy of LSA that all LSA employees must refrain from any action and avoid public announcements that might reflect adversely upon LSA. I have received reports that you have stated that you would "destroy LSA if challenged by the Board on any of your decisions."

These serious allegations must be investigated by the Board according to the LSA protocols and procedures as contained in the LSA Employee Handbook.

I have communicated these complaints to the Board's Executive Committee, which has authorized the commencement of LSA's required investigation into these complaints.

> Additionally, upon receiving notice of these allegations and issues, the Board's Executive Committee has determined it is in the best interest of LSA to insure that the budget, the LSA program and LSA's staff do not incur irreparable harm prior to the completion of the Board's investigation.

USDC Doc. 41-2 at pp. 83-86; Doc. 41-4 at pp. 34, 54-57. Petitioner was placed on paid leave pending the investigation. Pet. App. 3a.

The LSA Board retained retired United States Magistrate Delores Boyd (who is African American) to conduct an investigation into the allegations. Pet. App. 24a-25a; USDC Doc. 41-1 at ¶ 7. On August 22, 2017, before the investigation began, Petitioner submitted notice of his resignation – which the Board accepted. Pet. App. 24a.

Judge Boyd's investigation proceeded. Upon completion of her investigation, Judge Boyd produced a detailed investigative report as well as an Executive Summary. USDC Doc. 41-5 at pp. 6, 9, 48-50. In the Executive Summary, Judge Boyd identified various problems she discovered which had arisen during Petitioner's tenure as Executive Director. Specifically with respect to the hostile environment complaints from "LSA's two longest serving employees," the report concluded that Petitioner's resignation had "restored a positive and productive workplace." *Id.* at p. 50.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit ruled consistent with every Court of Appeals that has addressed the issue of whether a paid investigatory leave is actionable under Title VII.

In interpreting the code section at issue in this petition, 42 U.S.C. § 2000e-2(A)(1), this Court has repeatedly held that there is a threshold of substantiality above which an employment action must rise to implicate Title VII. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 786-788 (1998) ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view."); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview."); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 60, 64 (1986) ("not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII"). The Eleventh Circuit's decision in this case is squarely in line with this Court's precedent requiring a degree of substantiality to be within Title VII's purview.

In weighing the substantiality of the paid investigatory leave in this case, the Eleventh Circuit expressly joined the unanimous holdings of every other Court of Appeals to address the issue:

> **No Circuit has held that a simple paid suspension, in and of itself, constitutes an adverse employment action.** *See Joseph v. Leavitt*, 465 F.3d 87 (2d Cir. 2006) (holding that paid leave there did not constitute an adverse employment action but leaving open the possibility that a paid suspension or accompanying investigation carried out in an exceptionally unreasonable or dilatory way may constitute an adverse employment action); *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015) (same); *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001) abrogated on other grounds by *Burlington N.*, 548 U.S. at 68 (holding that, categorically, paid suspension or leave is not an adverse employment action); *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000) (same); *Peltier v. United States*, 388 F.3d 984 (6th Cir. 2004) (same); *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772 (7th Cir. 2007) (same); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (8th Cir. 2012) (same); *Haddon v. Exec. Residence at White House*, 313 F.3d 1352 (Fed. Cir. 2002) (same).
>
> **We agree with our sister Circuits that a simple paid suspension is not an adverse employment action**.

Pet. App. 9a (emphasis added).

Importantly, none of the cases upon which Petitioner relies to conjure a circuit split involve a temporary paid investigatory leave; all of his cases involve employment actions with a greater degree of permanence. *See*, *e.g.*, *Pegram v. Honeywell, Inc.*, 361 F.3d 272,

282 (5th Cir. 2004) (transfer to another position with different incentive plan); *Betts v. Summit Oaks Hosp.*, 687 Fed. Appx. 206, 207-08 (3d Cir. 2017) (change in work assignments to area with greater workload); *Cham v. Station Operators, Inc.*, 685 F.3d 87, 94 (1st Cir. 2012) (reduction in hours and loss of shifts); *Davis v. New York City Dep't of Educ.*, 804 F.3d 231, 235 (2d Cir. 2015) (reduction in discretionary bonus); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375-76 (4th Cir. 2004) (denial of promotional opportunities by job reassignment and unfavorable performance evaluation); *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007) (denial of work assignment which limited promotion opportunities); *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 927-28 (8th Cir. 2007) (change in duties, denial of training and poor performance evaluation); *Piercy v. Maketa*, 480 F.3d 1192, 1203-05 (10th Cir. 2007) (denial of transfer to another facility with different duties); *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (denial of day shift position); *Grimsley v. Marshalls of MA, Inc.*, 284 Fed. Appx. 604, 606, 609 (11th Cir. 2008) (increased workload and denial of breaks); *Chambers v. Dist. of Columbia*, 358 F.4th 870, 874-75 (D.C. Cir. 2022) (job transfer); *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090 (9th Cir. 2008) (assignment to more dangerous and strenuous work).

The Courts of Appeal are unanimous in holding that a paid investigatory leave, without more, is not actionable.

II. This case – which implicates an employer's obligation under Title VII to investigate allegations of a hostile environment – is not the appropriate vehicle to set the standard for a broader class of employment actions.

In contrast to the cases relied upon by Petitioner, this case involves a temporary paid leave to allow an investigation into allegations from senior African American staff members that Petitioner created a hostile environment. In applying Title VII's non-discrimination provision, this Court has "recognize[d] the employer's affirmative obligation to prevent violations" and "give[s] credit here to employers who make reasonable efforts to discharge their duty." *Faragher*, 524 U.S. at 806; *see also* EEOC, Policy Guidance on Current Issues of Sexual Harassment, No N-915-50 (1990) ("When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring.").

Recognizing this affirmative obligation, the Court of Appeals emphasized the importance of an employer having the ability to place an employee, particularly a high-ranking employee such as Petitioner, on leave during an investigation of their conduct:

> We agree with our sister Circuits that a simple paid suspension is not an adverse employment

> action. A paid suspension can be a useful tool for an employer to hit "pause" and investigate when an employee has been accused of wrongdoing. And that is particularly so in a case like this one – where the employee under investigation is in charge of all the employees who are the witnesses. As a practical matter, employers cannot expect employees to speak freely to investigators when the person under investigation is looking over their shoulders. Employers should be able to utilize the paid-suspension tool in good faith, when necessary, without fear of Title VII liability.
>
> Davis does not disagree that a simple paid suspension does not rise to the level of an adverse employment action. Rather, he asserts that the manner in which his suspension was handled, and the circumstances that accompanied it, combined to amount to an adverse employment action. We therefore must consider whether the circumstances here escalated Davis's paid suspension to an adverse employment action. We conclude they did not.

Pet. App. 9a-10a.

As the Eleventh Circuit ruled consistent with every Court of Appeals to have considered the actionability of a paid suspension, there is no circuit split and review is not warranted. Should this Court decide to review the broader issue of adverse employment actions, this case is not the appropriate vehicle for such a review as it involves considerations unique to an employer's legal obligation under Title VII to promptly

and effectively address allegations of a hostile environment. Other cases, such as *Hamilton v. Dallas County*, 42 F.4th 550 (5th Cir. 2022), *pet. for reh'g en banc granted*, currently before the *en banc* Court of Appeals for the Fifth Circuit, present the issue without the complication of an employer's countervailing obligation to address allegations of a hostile environment.[1] If the Court takes up the issue, it should do so in a different case.

CONCLUSION

Because this case involves issues unique to investigatory leaves which do not apply to the broader class of employment actions implicated by the petition, Respondents respectfully request that the Court deny the petition for certiorari.

Respectfully submitted,

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[1] In *Hamilton*, the *en banc* Fifth Circuit has agreed to reexamine its "ultimate employment decision" standard in the context of a Title VII case in which shift assignments were made on a facially discriminatory basis. *Hamilton*, 42 F.4th 550.