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**

## SUPPLEMENTAL BRIEF FOR RESPONDENTS

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## ARGUMENT

1. In support of the petition, the United States attempts to turn the Eleventh Circuit's contextually nuanced analysis into a rigid categorical rule. It begins by accepting Petitioner's *allegation* that he was placed on paid leave because of his race as true. Gov't Amicus Brief at p. 4. But that was not the record in this case. This case was decided on summary judgment, not a motion to dismiss, so the allegations must be backed with actual *evidence*. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The undisputed evidence established that Petitioner was the top executive at LSA, had been accused of "harassment and the creation of a hostile environment" by two subordinate employees, "had threatened staff with retaliation" and had threatened to "destroy LSA if challenged by the Board on any of [his] decisions." USDC Doc. 41-2 at p. 84. That is why he was placed on paid leave during the investigation. *Id.*

In the district court and before the Eleventh Circuit, Petitioner relied on a single potential comparator, Eileen Harris, who had been in a position subordinate to the Executive Director. USDC Doc. 44, p. 17; USCA11 Brief at p. 50. The only evidence Petitioner presented about this comparator was his own hearsay testimony as to what he understood the allegations against her had been – allegations which predated his tenure with LSA. USDC Doc. 44, p. 17. He then offered his own opinion that, based on this hearsay, he would have characterized the complaints as akin to a hostile

environment. *Id.* There was no allegation, much less actual evidence, that Harris had threatened retaliation against the staff or the destruction of the organization.

In the district court, Petitioner admitted that: "The record is ambiguous as to LSA's handling of the Harris complaints." *Id.* at 18. Before the Court of Appeals, he conceded that "Harris may or may not be a strict comparator under this court's *en banc* decision in *Lewis v. City of Union City, Ga.*, 918 F.3d 1219 (11th Cir. 2019) (comparator and a plaintiff must be "similarly situated in all material aspects")." USCA11 Petitioner's Brief at p. 50. Indeed, Harris was clearly not similarly situated as she held a subordinate position and had not threatened to retaliate against other employees or destroy the organization. Nor was there any admissible evidence that she created a hostile environment. She therefore was not an appropriate comparator.

The United States takes Petitioner's limited allegation – which was not supported by the record – and creates the hyperbolic hypothetical: What if "all Black employees [were placed] on paid leave based explicitly on their race"? Gov't Amicus Brief at p. 10. The United States then, without any basis, argues that such "brazen acts of workplace discrimination" would not be actionable under the Eleventh Circuit's standard. *Id.*

The Eleventh Circuit's record-based decision in this case did not lay down such a categorical rule:

> 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 (*emphasis* added). In reaching this conclusion, the Eleventh Circuit carefully weighed Petitioner's argument that five non-economic factors made his paid leave actionable. *Id.* at 10a-11a. The Court of Appeals did not discount any of these non-economic factors because they did not involve economic harm. Instead, it evaluated each of the five in its factual context and concluded: "Put simply, the *circumstances* of Davis's paid suspension do not rise to the level of an adverse employment." *Id.* at 11a (*emphasis* added).

The Eleventh Circuit did not hold that paid leave could never amount to an adverse employment action, only that it did not reach that threshold under the facts of *this* case. Under the Eleventh Circuit standard, the more-than-de-minimis harm threshold can be satisfied by intangible and emotional harms if they are objectively reasonable. *See*, *e.g.*, *Hinson v. Clinch Cnty., Ga. Bd. of Educ.*, 231 F.3d 821, 830 (11th Cir. 2000). And

the type of blatant discrimination that the government hypothesizes about in its brief would no doubt be objectively and inherently emotionally harmful.

2. There is not a firmly entrenched circuit split. The United States urges that now is the time for this Court to address any differences among the circuits on the adverse employment action issue. Gov't Amicus Brief at p. 16. Respondents here agree with the analysis of the Respondent in *Muldrow v. City of St. Louis*, No. 22-193 (filed Aug. 29, 2022) and adopt its Supplemental Brief on this issue.

We write separately to emphasize that the two circuits with any appreciable difference in standards, the Fifth and the District of Columbia, have both signaled that their formulations are not yet fully evolved. In *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022), the District Columbia held that the "undefined . . . phrase 'terms, conditions, or privileges of employment' " is "not without limits" and expressly reserved the question of whether a de minims harm exception may apply. And the Fifth Circuit's *en banc* oral argument in *Hamilton v. Dallas County*, No. 21-10133, made clear its intent to announce a new standard in line with the majority of courts that require material adversity. *See* www.ca5.uscourts.gov/OralArgRecordings/21/21-10133_1-24-2023.mp3 (last reviewed May 29, 2023). With these circuit developments still ahead, it would be premature for this Court to address the issue now.

## CONCLUSION

Respondents respectfully request that the Court deny the petition for certiorari.

Respectfully submitted,

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