

No. 22-263

In The
Supreme Court of the United States

YVES WANTOU,

Petitioner,

v.

WAL-MART STORES, TEXAS, L.L.C.,

Respondent.

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

PETITION FOR REHEARING

YVES WANTOU
105 Ash St., #10
Pittsburg, TX 75686
Telephone: (703) 307-1675
Email: wantoude@yahoo.com

Petitioner, Pro Se

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Pursuant to Rule 44.2. Yves Wantou, Petitioner in this case (hereafter “Petitioner” or “Wantou”), respectfully petitions for rehearing of the Court’s order denying certiorari in this case.

REASONS TO GRANT REHEARING

Rehearing of the denial of certiorari is appropriate in situations involving “intervening circumstances of a substantial or controlling effect or . . . other substantial grounds not previously presented.”¹ Here, there exist substantial grounds not previously presented, as well as intervening circumstances of a substantial effect, for which the Court should grant rehearing and/or vacate and remand the subject judgment.

1. First, rehearing should be granted in this case to preserve Wantou’s Seventh Amendment right to jury trial, which, without rehearing, would be irretrievably violated as a result of Wantou being denied jury trial on the issue of hostile work environment (“H.W.E.”) on the basis of clear and admitted errors made by the District Court and the Fifth Circuit, errors which unduly infringed on Wantou’s Seventh Amendment right to jury trial. In past cases, including very recent cases, this Court has granted certiorari and directly vacated and remanded judgments obtained through errors affecting a petitioner’s fundamental constitutional rights; especially when, as in the instant case (as will be shown below), the respondent effectively admits to the

¹ S. Ct. L.R. 44.2.

error in question.² This Court has the duty to preserve even citizen's Seventh Amendment right to jury trial. Under the Seventh Amendment of the United States Constitution, the right to jury trial must be preserved:

"In Suits of common law, where the amount in controversy, shall exceed twenty dollars, the right of trial shall be preserved".³

It is clear from the plain text of the Seventh Amendment that said Amendment cannot be obviated, but instead must be preserved at all levels of our judicial system. The issue of a guarantee of jury trial was so important to the framers of the Constitution that said issue alone led to the adoption of the entire Bill of Rights: one objection raised during the Philadelphia Convention regarding the U.S. Constitution as originally drafted by the Founding Fathers was that it did not provide a right to a civil jury trial.⁴ That criticism ultimately led to the adoption of the entire Bill of Rights, as the entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under

² See, e.g., *Areli Carbajal Escobar v. Texas*, United States Supreme Court Case No. 21-1601 (Case pending before the Court) (granting petition for certiorari on January 9, 2023 and directly vacating judgment and remanding in light of confession by respondent as to error affecting petitioner's constitutional rights).

³ U.S. CONST. amend. VII (Emphasis added).

⁴ Moses, Margaret L., *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185 (2000) (citing Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 657 (1973)).

consideration lacked a specific guarantee of jury trial in civil cases.”⁵

Thus this Court, as the highest in the land and as the Court of last resort, has the duty to preserve every citizen’s Seventh Amendment right to jury trial when said right is violated; and rehearing in this case serves as the last opportunity for the Court to uphold the Seventh Amendment and preserve Wantou’s right to jury trial, which was abjectly violated. Here, the Equal Employment Opportunity Commission (“EEOC”) insisted, and the Fifth Circuit itself recognized, that the District Court had granted summary judgment on Wantou’s H.W.E. claim using erroneous standards.⁶ Given that the District Court indisputably unduly granted summary judgment on the basis of erroneous standards, the Fifth Circuit had the duty to *preserve* Wantou’s Seventh Amendment right to jury trial, which was violated by such undue grant of summary judgment by the District Court. Yet, instead of preserving Wantou’s right to jury trial, as required by the Seventh Amendment, the Fifth Circuit itself unjustifiably violated said right. Indeed, the District Court granted summary judgment by concluding, based on totally erroneous grounds (as admitted by the Fifth Circuit),

⁵ Wolfram, *supra*, at 657; see also, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339-43 (1979) (Rehnquist J. dissenting) (providing a brief historical background of the Seventh Amendment.).

⁶ Pet.App.113, 122-24; Pet.App.11.

that Wantou had not been subject to an actionable H.W.E. under Title VII.⁷

“To succeed on [a] Title VII claim for hostile work environment, [Wantou] was required to establish that: (1) he was subjected to hostile work environment; and (2) [Wal-Mart] was liable for the harassment that caused the hostile work environment to exist.”⁸ While Circuit Courts of Appeals have typically reversed grant of summary judgment when a district court granted summary judgment solely on the basis of prong (1) [whether the plaintiff was subjected to H.W.E.] using erroneous standards,⁹ in this case the Fifth Circuit refused to reverse grant of summary judgment, and instead (while admitting the District Court had erroneously adjudicated prong (1)), decided to adjudicate prong (2) [whether the employer was liable for the harassment], an alternative ground, at first instance and flagrantly violated Wantou’s right to jury trial in the course of said alternative ground adjudication, by basing said adjudication on completely imaginary and arbitrary facts totally unrelated to the trial record, utterly violating Wantou’s right

⁷ Pet.App.113, 122-28.

⁸ *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 647-48 (9th Cir. 2021) (citing *Freitag v. Ayers*, 468 F.3d 528, 539 (9th Cir. 2006)).

⁹ See, e.g., *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 647-48 (9th Cir. 2021) (“Because the district court granted summary judgment to Wynn based solely on the first prong of the claim, we limit our review to whether Fried was subjected to a hostile work environment.”).

to jury trial through such undue adjudication based on imaginary and arbitrary facts.

In particular, the most important fact as to prong (2) is the date when Wantou first complained to Wal-Mart, consistent with Wal-Mart's own policies, about being illegally harassed. This date is fundamental and pivotal to adjudicate prong (2) because "it is well established that an employer can create a hostile work environment by failing to take **immediate and corrective** action in response to a coworker's or third party's sexual harassment or racial discrimination the employer knew or should have known about."¹⁰ **"All federal circuits are in accord on this point."**¹¹ Based on the actual date on which Wantou first complained to Wal-Mart about being illegally

¹⁰ *Id.*

¹¹ *Id.* (citing *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 607 (7th Cir. 2021); *Roy v. Correct Care Sols., L.L.C.*, 914 F.3d 52, 57 (1st Cir. 2019); *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 273-74 (2d Cir. 2016); *Freeman v. Dal-Title Corp.*, 750 F.3d 413, 423 (4th Cir. 2014); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012); *Malone v. Ameren UE*, 646 F.3d 512, 517 (8th Cir. 2011); *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957-58 (11th Cir. 2010); *Huston v. Procter & Gamble Paper Prods Corp.*, 568 F.3d 100, 104 (3d Cir. 2009); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1139 (10th Cir. 2008); *Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999) (per curiam); *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999); *Folkerson v. Circus Circus Enters, Inc.*, 107 F.3d 754, 756 (9th Cir. 1997)). See also, e.g., 29 C.F.R. § 1604.11(e) (providing that employers may be liable for sexual harassment perpetrated by nonemployees "in the workplace, where the employer . . . knows or should have known of the conduct and fails to take **immediate and appropriate corrective action**").

harassed, and based on the date on which contemporary documentation shows Wal-Mart first responded to Wantou's complaints of illegal harassment, the answer as to prong (2) (whether the employer was liable for the harassment) is a binary (Yes or No) answer: the answer is "Yes" if contemporary documentation shows Wal-Mart's actions (if any) in response to Wantou's complaints of illegal harassment were both **immediate and corrective**, and "No" if Wal-Mart's response (if any) was not **immediate and corrective** (meaning Wal-Mart's response (if any) was ***either*** not immediate ***or*** not corrective).

Here, the Fifth Circuit made the fatal factual error of making the erroneous allegation that "According to Wantou, he first informed Wal-Mart in late October 2015 about his hostile work environment"¹². That statement by the Fifth Circuit was totally without any basis whatsoever; and that date of "late October 2015" introduced by the Fifth Circuit is purely imaginary and arbitrary, and completely unsupported by the trial record. Nowhere did Wantou make such an allegation. This single gross factual error, and introduction of imaginary and arbitrary fact, by the Fifth Circuit as to such a pivotal, case-determining fact, violated Wantou's Seventh Amendment right to have his "right of trial preserved", and should clearly negate and nullify the Fifth Circuit's entire opinion. Moreover, the fact that the Fifth Circuit had at its disposal, the EEOC's

¹² App.31 (Footnote #1).

own analysis of the trial record (*Amicus Brief*),¹³ and that the EEOC properly identified the time at which Wantou first duly complained to Wal-Mart about illegal harassment, but the Fifth Circuit chose to instead use an arbitrary and imaginary date, makes the violation of Wantou’s right to jury trial all the more gross. Indeed, the **EEOC (which Congress charged with administering and enforcing Title VII¹⁴, and is therefore Congress-designated subject matter expert as to Title VII, and therefore undeniably has unique expertise as to Title VII matters)** properly identified that the trial record showed that Wantou had duly, consistent with Wal-Mart’s policy, repeatedly complained about H.W.E. for many months **starting no later than June 2015.**¹⁵

In its Brief in Opposition to Wantou’s Petition for Certiorari (“BIO”), Wal-Mart itself was unable to identify any basis in the trial record upon which the Fifth Circuit’s imaginary and arbitrary allegation as to the date on which Wantou first complained to Wal-Mart about illegal harassment may be founded. To the contrary, Wal-Mart’s own allegations on this subject, in Wal-Mart’s BIO, only supported the fact that said allegation by the Fifth Circuit was indeed purely imaginary and arbitrary.¹⁶ This was effectively a confession by Wal-Mart on the error as to

¹³ Pet.App.108-33.

¹⁴ Pet.App.113

¹⁵ Pet.App.116; ROA.7170-78.

¹⁶ See Pet.Reply.10-11.

the imaginary and arbitrary fact introduced by the Fifth Circuit regarding the date on which Wantou first complained to Wal-Mart about being illegally harassed. In past cases, such confession as to an error affecting constitutional rights has been, alone, a basis for this Court to grant a petition for certiorari and/or vacate judgment and remand for further consideration.¹⁷ The judgment by the Fifth Circuit should be vacated and the case remanded in order to preserve Wantou's constitutional rights, just like the Court did in *Carbajal*, in which the Court did a GVR (Grant, Vacate and Remand) due to confession as to error affecting the fundamental constitutional rights of the petitioner.¹⁸

2. As stated above, the Fifth Circuit did not have to adjudicate prong (2); but once it chose to do so, it had the inescapable duty to not unduly infringe on Wantou's inalienable Seventh Amendment right to jury trial, including by not introducing ***case-determining*** imaginary and arbitrary facts in the case. Even setting aside the imaginary and arbitrary facts introduced by the Fifth Circuit in this case, the Fifth Circuit violated Wantou's constitutional right to jury trial by assuming the position of the ultimate factfinder in adjudicating prong (2) at first instance. Summary Judgment is appropriate only if "***pleadings, depositions, [. . .]*** show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter

¹⁷ See, *Carbajal*, *supra*.

¹⁸ *Id.*

of law.”¹⁹ Here, and because Wantou’s summary judgment pleadings (which the Fifth Circuit was required to review *de novo*) and depositions statements cited therein sufficiently refuted Wal-Mart’s first-instance alternative ground allegations to the Fifth Circuit, and raised genuine issues of material fact (“G.I.M.F.’s”),²⁰ it was a violation of Wantou’s constitutional rights for the Fifth Circuit to resolve, as the ultimate factfinder, prong (2). Furthermore, “[o]nce an employer has notice [of illegal harassment], then it must respond with **remedial action reasonably calculated to end the harassment.**”²¹ The Fifth Circuit failed to even examine the question as to whether Wal-Mart’s purported response was reasonably calculated to end harassment, let alone the G.I.M.F.’s as to this question, which again should have been resolved by a jury. “In actions at law, issues that are proper for the jury must be submitted to it ‘to preserve the right to a jury’s resolution of the ultimate dispute,’ **as guaranteed by the Seventh Amendment.**”²² Civil juries are crucial because judges are likely to have “a bias towards those of their

¹⁹ *Haire v. LSU*, 719 F.3d 356, 362 (5th Cir. 2013) (Emphasis added).

²⁰ See Pet.27-34; Pet.Reply.1-6, 15-16; Reply Brief, Fifth Circuit 20-40284, at 19.

²¹ *EEOC v. Xerxes Corp.*, 639 F.3d 658, 669 (4th Cir. 2011) (emphasis added) (quoting (*EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008)); *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989).

²² *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996).

own rank and dignity; for it is not to be expected, that the *few* should be attentive to the rights of the *many*. This [the civil jury trial] therefore preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens.”²³

3. The importance of this case became even more conspicuous after the Court’s denial of Wantou’s Petition for Certiorari in January 2023. Numerous reputable law journals and law reviews, including, .e.g., the Jurist, Law 360, etc. . . . published articles on the instant case, articles which spoke to the importance of this case in the legal community. The Jurist is a non-profit online legal news organization that has won the Webby People’s Voice Award and has repeatedly been recognized by the American Bar Association Journal as one of the best web sites by lawyers for lawyers.²⁴ In an article published January 24, 2023, the Jurist stated:

²³ See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN L. REV. 639, 695-96 (1973) (quoting *Letters of Centinel*, No. II, FREEMAN’S J., Oct. 24, 1787, reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 584 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Historical Soc’y of Pa. 1888)).

²⁴ John Austin, *Top Five Free Legal News Websites for the Legal News Junkie*, ABA Journal (October 31, 2019) <https://www.americanbar.org/groups/litigation/committees/trial-practice/2019/top-five-free-legal-news-websites/>; Paul Caron, *JURIST Wins Webby People’s Voice Award as Best Law Website of 2006*, (May 12, 2006) (https://taxprof.typepad.com/taxprof_blog/2006/05/jurist_wins_web.html); Molly McDonough, *Paper Chase is ‘Doing Public Service,’ Sharing Info Real Time and for Free*, ABA Journal

“The case marked a high-profile issue of racial and national discrimination by one of the world’s largest corporations. In a brief in support of Wantou, the Equal Employment Opportunity Community Commission (EEOC) claimed the US Court of Appeals for the Fifth Circuit improperly held Wantou to needlessly high standard. EEOC claimed:

‘The district court wrongly required Wantou to show both severe and pervasive harassment, although the law requires him to show only one or the other. Nonetheless, the evidence in this case would allow a reasonable jury to find that he was subjected to both, and the district court erred in ruling otherwise.’

The Supreme Court’s denial of review marks a gap in case law which could have enforced a higher standard of preventing employers from committing workplace discrimination.”²⁵

Similarly, Law360, is a subsidiary of LexisNexis and delivers breaking news and analysis to more than 2

(December 2, 2008) (https://www.abajournal.com/magazine/article/paper_chase_is_doing_public_service_sharing_info_real_time_and_for_fee); *Jurist--Paper*, ABA Journal (December 2, 2008) (https://www.abajournal.com/blawg/jurist_paper_chase/).

²⁵ Patrick Slater, *U.S. Supreme Court denies review of Walmart racial bias suit*, The Jurist (January 24, 2023) (<https://www.jurist.org/news/2023/01/us-supreme-court-denies-review-of-walmart-racial-bias-suit/>).

million U.S. legal professionals.²⁶ Law360 published an article as to this Court's denial of certiorari in this case, further attesting to the importance attributed to this case by the legal community across the nation.²⁷

The Court should take note of the importance attributed and the attention afforded to this case by the legal community and grant rehearing in this case so that it may be adjudicated according to the proper standards of the law and the constitution.

4. This case is a good vehicle to resolve the questions presented in the petition as to Wantou's hostile environment claim; and particularly the second question presented, as the matters involved are purely legal. As stated and shown above, with use of the proper date on which Wantou first complained to Wal-Mart regarding illegal harassment, the question as to prong (2) above is strictly binary (Yes or No). If contemporaneous documentation (or lack thereof) shows Wal-Mart did not immediately respond to Wantou's complaints of illegal harassment, then Wal-Mart is simply liable and Wantou's Seventh Amendment right to jury trial must be *preserved*.

5. Even if the Court is not amenable to grant rehearing in this case at this moment, it would be appropriate for the Court to hold the case in abeyance

²⁶ About Law360, Law360 Corporate Website (<https://www.law360.com/about#single>).

²⁷ Patrick Hoff, *Justices Decline Ex-Walmart Pharmacist's Race Bias Case*, Law360 (January 23, 2023) (<https://www.law360.com/articles/1568195>).

pending *Muldrow v. City of St. Louis, State of Missouri et al.* (U.S. Supreme Court Case # 22-193), in which the Court has requested the views of the Solicitor General. Indeed, said case raises the question as to what constitutes subtle violations of Title VII; and therefore as to which subtle acts can raise G.I.M.F.'s in a Title VII claim,²⁸ acts which were further overlooked in this case. Overlooking said subtle acts, that can properly raise a genuine issue of material fact, also violates Wantou's Seventh Amendment right to jury trial.

CONCLUSION

The petition for rehearing should be granted, and the Court should either directly vacate the judgment and remand (GVR) to preserve Petitioner's Seventh Amendment right to jury trial; or hear the case on the merits; or alternatively hold the case in abeyance pending *Muldrow*.

Respectfully submitted,

YVES WANTOU
105 Ash St., #10
Pittsburg, TX 75686
Telephone: (703) 307-1675
Email: wantouude@yahoo.com

Petitioner, Pro Se

²⁸ Sup.App.6-7, 10.

CERTIFICATE OF GOOD FAITH

Pursuant to Rule 44, Rules of the Supreme Court, I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44, paragraph 2, Rules of the Supreme Court, and is being presented in good faith and not for delay.

YVES WANTOU