ORIGINAL

No. 22-299

In the Supreme Court of the United States

TRISHA DORAN,

Petitioner,

v.

DENIS MCDONOUGH,
Secretary of the Department of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to
the Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Babb* (2020), this Court held that the plain meaning of the statutory language of ADEA's federal-sector provision mandates liability if a decision-making process is not "made free from any discrimination based on age." Because Title VII's federal-sector provision contains the same statutory language at issue in *Babb*, some circuits state the McDonnell-Douglas framework no longer applies to federal-sector claims. Other circuits, in contrast to *Babb's* "made free from any" standard, dismiss Title VII claims, if an agency asserts they had an "honest belief" in their stated reasoning even if mistaken or contrary to evidence before the agency.

1. Whether this Court's rationale in *Babb* applies to federal-sector Title VII claims; and if so whether the McDonnell-Douglas framework has been abrogated by *Babb*; and if so whether the proper Title VII framework is the EEOC federal-sector regulations.

2. Whether Title VII protects federal-sector employees from actions "motivated by" retaliation.

3. Whether the "honest belief" rule used in some circuits to dismiss Title VII claims is impermissible deference to agency, in conflict with several of this Court's holdings; and if so whether this Court's instructions in *Kisor* should be used to evaluate the reasonableness and legitimacy of discriminatory agency actions; and if so whether speculation, guidance memos or employee opinion letters are entitled to deference when taking agency action against regulated parties like Petitioner.

PARTIES TO THE PROCEEDING

The petitioner is Trisha Doran

The respondent is the Secretary of the Department of Veterans Affairs, currently Denis McDonough.

LIST OF PROCEEDINGS

U.S. District Court for the Southern District of Ohio Eastern Division.

No. 2:16-cv-665,

Doran v. McDonald

Judgment entered May 29, 2020.

U.S. Court of Appeals for the Sixth Circuit.

No. 20-3694,

Doran v. McDonough

Judgment entered November 09, 2021.

U.S. Court of Appeals for the Sixth Circuit.

Doran v. McDonough

No. 20-3694,

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Petitioner respectfully requests that this Court grant review and remand the judgment of the United States Court of Appeals for the Sixth Circuit below.

OPINIONS AND ORDER BELOW

These opinions were not designated for publication.

Doran v. McDonough, opinion in the U.S. Court of Appeals for the Sixth Circuit, No. 20-3694, (November 09, 2021) affirmed the decision of the District Court is unreported and is reproduced at App.01a-20a.

Doran v. McDonald, The opinion in the U.S. District Court for the Southern District of Ohio Eastern Division, No. 2:16-cv-665 (May 29, 2020) granted summary judgment in favor of the defendant is unreported and is reproduced at App.21a-48a.

Doran v. McDonough, The order from the U.S. Court of Appeals for the Sixth Circuit denying rehearing No. 20-3694, (February 15, 2022) is unreported and is reproduced at App.49a.

JURISDICTION

A Petition for Rehearing of the Sixth Circuit Court of Appeals panel was denied on February 15, 2022. A timely extension to file Petition of Certiorari was granted on May 12, 2022 by Justice Brett Kavanaugh, extending the deadline to July 15, 2022 Sup. Ct. Dkt. 21-A701. By letter dated July 19, 2022, the clerk of court extended the time to file this petition to September 17, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1)

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to this petition. App.65a-70a.

29 U.S.C. §633a(a) All personnel actions affecting employees...who are at least 40 years of age...shall be made free from any discrimination based on age.

42 U.S.C. §2000e-16(a) All personnel actions affecting employees...shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. §2000e-16(b) ... the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies ..., and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

42 U.S.C. §2000e-16(e) Government agency or official not relieved of responsibility to assure non-discrimination in employment or equal employment opportunity. Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

29 C.F.R. § 1614.501(a).

When...the Commission...finds that an... employee has been discriminated against, the agency shall provide full relief...

29 C.F.R. § 1614.501(c).

(c) Relief for an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay ..., unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

INTRODUCTION

This Petition presents the Court with another opportunity to further its expressed commitment to guide the courts below on two nationally important and far reaching issues – discrimination in the federal-sector workforce and judicial deference to federal agencies. Specifically, this Court's holding in *Babb v. Wilkie (*2020*)* has fundamentally changed the legal analysis of federal-sector discrimination claims on the basis of age. As a result, a circuit split has developed below regarding the proper legal analysis of federal-sector Title VII discrimination claims. Some circuits now apply *Babb's* rationale to federal-sector Title VII claims and state *Babb* has entirely abrogated the *McDonnell-Douglas* framework for federal-sector claims.

Other circuits, like the opinion below in the Sixth Circuit are not applying *Babb* to federal-sector Title VII claims – they apply a Pretext-Plus framework using the insurmountable judicially created "honest belief" rule to dismiss federal-sector Title VII claims that are entirely valid under the *Babb* standard. This Court admonished such a pretext-plus approach in *Reeves (*2000*)*. The "honest belief" rule is also contrary to many more of this Court's holdings discussed below. These two entirely different judicial analysis frameworks require this Court to intervene and provide much needed and timely guidance to unify the courts below regarding how Congress intended the judiciary to protect the constitutional rights of the federal workforce by holding the Government to a higher and different standard than the non-federal-sector.

This Petition also presents the Court with an opportunity to further define what the appropriate

level of judicial deference is to a federal agency when a challenged personnel action is supported only by an alleged agency "expertise" opinion letter and a disputed interpretation of commentary in an appendix of a local guidance document in the Title VII context and if this Court's instruction and *Kisor* criteria (2020) may be an appropriate part of the "new" federal-sector Title VII framework that *Babb* demands.

The courts below are also divided on the issue if federal-sector Title VII protects employees from retaliatory actions and if so what the correct causation standard is. This Court has assumed without deciding that federal employees are protected from retaliation in *Gomez-Perez v. Potter* (2008) and *Green v. Brennan* (2016). Many circuits apply this Court's *Burlington Northern standard* (2006), some circuits apply the "but-for" standard while others apply the "motivated by" standard to federal-sector Title VII retaliation (*Ford v. Mabus*, D.C.C. 2010). This Petition presents the statutory basis and federal-sector regulations applicable to this issue that prove Congress intended to protect the federal workforce from retaliation when it codified "any" discrimination into Title VII and the congressionally authorized federal-sector EEO regulations clearly prohibit "any" personnel action "motivated by" any retaliation.

And lastly, this Petition allows this Court to provide guidance and clarity to the courts below regarding the Congressional changes made by the Americans with Disabilities Amendments Act of 2008 (ADAA) to claims of "regarded as" disabled to federal-sector Rehabilitation Act violations and to unify the courts below on the proper federal

employment causation standard in 29 U.S.C. §791 that is "on the basis of" as opposed to the federal grant assistance programs where 29 U.S.C. §794(a) applies the "solely" due to standard.

STATEMENT OF THE CASE

A. Legislative Background

In 1964, Congress prohibited discrimination in employment by enacted The Civil Rights Act of 1964 (CRA of 1964), more commonly referred to as Title VII, codified at 42 U.S.C. §2000e *et seq*. In 1969, President Nixon extended protection from discrimination to the federal civilian workforce per Executive Order 11478.

In 1972, Congress reorganized the Civil Service Commission and created The Equal Employment Opportunity Commission (EEOC) by amending §705(a) of the CRA of 1964 (Title VII) at 42 U.S.C. §2000e-4(a). (EEO Act of 1972). The EEO Act of 1972 also amended the CRA of 1964 at Section 11 by adding a new section, §717, entitled "Nondiscrimination In Federal Government Employment," better known as Title VII's federal-sector provision at 42 U.S.C. § 2000e-16 App.65a-70a.

It is notable that Congress did not simply add federal-sector employees to the already established "private-sector" provision at §707, but instead chose to fashion a new, separate and different §717 to the CRA 1964 and in doing so intended to hold the Federal Government to a much higher and different standard than that of the private-sector. 42 U.S.C. §2000e-16(e). This Court has acknowledged the

purposeful and notable textual differences Congress specified between the federal-sector and non-federal-sector provisions of the ADEA in *Babb v. Wilkie*, 140 S. Ct. 1168, 1176 (2020).

For example, the plain meaning of the statutory text at 42 U.S.C. §2000e-16(e) is crucial here because it unambiguously codified the standard Congress intended the federal government to abide by. It commands federal officials that they must make it their "primary responsibility to assure non-discrimination in employment as required by the Constitution" and that "nothing ...shall relieve any Government agency" of this "primary responsibility." Clearly, once again Congress means what it codifies and it means that federal officials must actively "assure" that any action they take is not discriminatory in any way.

Combining the rationale in *Babb* to the exact same statutory language in federal-sector Title VII at 42 U.S.C. §2000e-16(a) and the plain meaning of §2000e-16(e) above, this would suggest that Congress intended that any discriminatory federal-sector decision-making process or personnel action is to be reversed even if the government was mistaken or unaware that it was discriminatory because logically a "mistake" means the federal official did not "assure" the personnel action was not disparate defying the statutory duty §2000e-16(e) commands "Nothing in this act shall relieve any Government official" of this duty. This is important in this Petitioner because we assume the unambiguous text of "nothing...shall relieve any...official" of this duty would also include prohibiting the Sixth Circuit from applying its "honest belief" rule to relieve federal agencies of liability for personnel actions and

decision-making processes that are tainted by discrimination if the agency states it made an "honest" mistake and "honestly believed" in the legitimacy of a personnel action. According to the command of Congress at §2000e-16(e), this defense would not be available, because by making an "honest" mistake, they did not fulfill their statutory "primary responsibility" to "assure" nondiscrimination in federal government employment. Besides, Congress wanted the EEOC and the judiciary to protect the workforce, not federal agencies.

To effectuate this purposeful higher standard, Congress specifically authorized the EEOC to devise a completely separate regulatory and remedial scheme for the federal-sector. Congress intended this to be lawfully binding on federal agencies so the judiciary may rely upon the federal-sector EEOC regulations in holding the federal government to this Congressionally-directed higher standard. 42 U.S.C. §2000e-16(b), 29 C.F.R. §1614.

Specifically, 42 U.S.C. §2000e-16(b) unambiguously gave the EEOC Congressional authority for two purposes. One, to issue federal-sector anti-discrimination regulations ("shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate"). Two, to devise an "appropriate" remedial scheme for the federal-sector that would effectuate the policy and purpose of Title VII ("shall have authority to enforce the provisions of subsection (a) through appropriate remedies").

The EEOC as a federal entity itself, works directly with and in cooperation with the other federal agencies when developing these federal-sector regulations. Congress directs the federal agencies to submit their EEO plans annually to be

approved by the EEOC. See 42 U.S.C. §2000e-16(b)(1) The federal-sector EEOC regulations are then issued only after consultation with all affected departments and agencies. Likewise, Congress also commanded the federal agencies to comply with the federal-sector EEO regulations at 42 U.S.C. §2000e-16(b)(3) commanding "The head of each department, agency or unit shall comply with such rules, regulations, orders and instructions" issued by the EEOC." Considering the statutory authority given to the EEOC via 42 U.S.C. §2000e-16(b) to create and issue the federal-sector EEO regulations and the congressional command for all agencies to comply with them, the EEOC federal-sector regulations are lawfully binding on agencies and should be given *Chevron*-level deference in federal-sector Title VII complaints. 29 C.F.R. §1614.101, 29 C.F.R. §1614.102 App.68a

This deference is pivotal here for two reasons. First, applying the EEOC federal-sector regulations to federal-sector Title VII claims makes clear that this Court can finally rule that federal employees are protected in Title VII claims from personnel actions motivated by retaliation (discussed below). 29 C.F.R. §1614,103, App.69a; 29 C.F.R. §1630.12, App.70a

Second, the EEOC regulations are in agreement with this Court's holding in *Babb* at 1171 that the appropriate remedial scheme for federal-sector discrimination claims involves the "but-for" causation standard - but the EEOC federal-sector regulations put that burden on the agency and require them to prove the discriminatory "decision-making process" or personnel action would still have been taken "but-for" the discrimination with clear and convincing evidence. Considering the agency

regulations that guide performance reviews, and personnel actions in addition to the Merit System Principles it should be easy for any federal agency to satisfy this "clear and convincing" standard for any "decision-making process" or personnel action. 29 C.F.R. §1614.501. App.69a-70a

B. Factual Background

Petitioner is a female Gastroenterologist that worked for the Department of Veterans Affairs (the VA) at a small outpatient clinic in Columbus, Ohio App.24a. During her first five years of service, she consistently earned the highest "Outstanding" performance ratings. App.2a. When hired in 2008, the VA promised to enroll her in the VA's Educational Debt Reduction Program (EDRP) to help repay her student loans but this was never effectuated. App.3a.

In July 2014, a newly hired male colleague showed her the financial bonuses he was quickly awarded. She opposed this gender based financial differential treatment to Human Resources (HR), the union (AFGE) and the Chief of Staff (COS) to try to get the student loan assistance financial bonus she was promised, but the VA took no action to remedy the gender based financial disparity. App.3a.

In September of 2014, the Gastroenterology department (GI) supervisor reviewed her performance and completed her bi-annual Ongoing Professional Performance Evaluation form (OPPE) specifically noting no patient safety concerns, nor had he counselled her regarding any other concerns. Over that year, when emergency procedures were needed, the GI supervisor would double schedule

only Petitioner to perform them - something none of the men were told to do. She opposed the ongoing disparate workload and asked the GI supervisor to stop double scheduling her to be two places at one time, but he continued to have only her perform the emergency procedures by being double scheduled. On November 7, 2014 Petitioner again opposed this ongoing gender based differential treatment in an email to the COS requesting the double scheduling to stop.

On November 20, 2014 despite Petitioner providing the most care encounters in the GI department, having an excellent safety profile and no concerns were raised in the OPPE just two months prior - the GI supervisor drastically lowered her 2014 Proficiency Rating after these two incidents of her opposing disparate treatment. App.3a. This lowered performance rating was another discriminatory act because Petitioner's comparator males had numerous serious patient complications when she had none, yet the males were given outstanding ratings with glowing remarks, while her excellent performance was degraded with derogatory and untrue remarks. App.2a. Petitioner opposed this disparate treatment to the GI supervisor, instead of remedying the disparities, the supervisor's retaliatory animus worsened. He launched several additional discriminatory and retaliatory actions against her over the next few months.

On December 22, 2014, Petitioner informed the division manager of the GI supervisor's ongoing discriminatory and retaliatory behavior creating a hostile work environment. The manager agreed the GI supervisor's actions were improper, in violation of VA policy and he was treating Petitioner unfairly.

The manager reversed the supervisor's most recent proposed disparate admonishment against Petitioner, but did nothing to correct the 2014 performance rating so Petitioner started preparing a formal grievance against the GI supervisor with the union's help.

On January, 26, 2015, one of Petitioner's patients (Patient A) had a reaction to sedation. Sedation intolerance is not uncommon, is easily stopped with sedation reversal agents like Narcan. All men in the department have had sedation events and those were reviewed by the Anesthesia department that educates the medical provider if a trend develops. The charge nurse had recently improperly removed the Narcan from its prior "readily available" location. This unapproved relocation delayed delivery of reversal agents to Patient A by a few minutes. App.57a. During the confusion of locating the reversal agents Petitioner had asked a nurse to call for back up, the nurse had a "code blue" called overhead, but Patient A was stable. A male physician entered the room to help. He commandeered the care of Patient A from Petitioner, cancelled Petitioner's orders for Narcan and ordered the stable patient be transferred out of the clinic to a local non-VA hospital. App.16a. Although evidence demonstrated the patient was physically unharmed by the sedation reaction, the GI supervisor alleged "patient safety concerns" to initiate suspension of Petitioner, yet took no action against the other male physician for denying Narcan administration and ordering the unnecessary hospitalization.

It is appropriate at this point to pause because although the GI supervisor next piled on multiple

allegations against Petitioner, he later acknowledged under oath he knew these allegations were either not true, were purely speculative and were never honestly held. App.57a. Likewise, the COS also accused Petitioner of causing Patient A to have a cardiac arrest that also proved to be untrue based on evidence produced to Petitioner much later. App.63a.

Shortly after the sedation event, in February, 2015 the local VA had the sedation event reviewed by a different GI division director from a different non-local VA medical center. With their medical expertise and knowledge of proper VA policy and procedure, the non-local subject matter expert opined that the lack of Narcan was central to the sedation event and recommended no action be taken against Petitioner. The COS did not follow those orders and instead at the direct urging of the GI supervisor, convened a number of punitive, disciplinary review boards at the local VA to review their false allegations against Petitioner. App.53a-56a.

On June 2, 2015, despite none of the review panels recommending that Petitioner be removed from the VA, the COS sent the Petitioner a Notice of Proposed Removal. App.56a. On July 14, 2015, Petitioner initiated contact with an EEO counselor at the VA's Office of Resolution Management (ORM) and reported fifty-five incidents of gender discrimination and reprisal, hostile work environment and actions taken by the GI supervisor and COS that caused others to "regard" Petitioner "as disabled." The VA-ORM-EEO complaint spanned incidents from early 2014 up to and including the June 2, 2015 Notice of Proposed Removal. App.32a. The facility director received this EEO complaint on July 29, 2015 and three weeks later, on August 21,

2015, he removed Petitioner from the VA on the urging of the COS. App.32a. Petitioner filed a formal EEO complaint on October 15, 2015. App.32a. The GI supervisor later testified two males were hired to replace Petitioner. App.51a.

Petitioner, appealed the removal to a three physician panel referred to as the Disciplinary Appeal Board (DAB) that reviews major adverse actions taken against title 38 medical providers under 38 U.S.C. §§ 7461(b)(1), 7462. App.6a. It was at the DAB hearing where the GI supervisor admitted under oath the allegations he made against Petitioner were knowingly untrue or speculation – the DAB's report referred to them as "misrepresentations and exaggerations." Due to these false allegations, the findings and conclusions of the review panels that occurred at the Columbus VA under his influence were also untrue and "technically inaccurate" per the DAB. App.52a.

When the GI supervisor tried to explain he was motivated by "concerns," the DAB clarified this with him and he admitted, there was no objective evidence that could have legitimized any of his "concerns" about the Petitioner. Both the GI supervisor and the COS opined they had no actual concerns regarding Petitioner's overall competence or safety profile. The VA subject matter expert chosen by the Columbus VA submitted a written medical opinion to the DAB and opined under oath at the DAB hearing that Petitioner's actions did not violate any standard of care, did not violate any VA policy and did not warrant any disciplinary action, nor a suspension, nor a removal action per VA policy. App.53a,57a.

The DAB then dismissed the majority of the false allegations against Petitioner and ordered the COS to produce the hospital record of Patient A to support his hearsay allegation that Patient A had a "cardiac arrest" because the Petitioner visited the patient in the hospital and reported no cardiac arrest. The hospital records were not produced. The DAB sustained the removal action based on the one sedation reaction incident and referred to the "damaged relationship" between Petitioner and the GI supervisor as an aggravating factor.

On May 13, 2016 the DAB opinion and removal was effectuated. App.7a. Because more than 180 days had passed since Petitioner filed the formal VA-ORM EEOC complaint and the agency had made no significant progress to address or remedy the underlying discrimination and retaliation, Petitioner filed a Title VII complaint in June of 2016. App.21a.

C. Proceedings Below:

The Title VII case was stayed while Petitioner briefed a Judicial Review (the APA case) to exhaust her administrative claims. App.2a. The district court affirmed the DAB decision, holding the removal action was "a warranted and prudent course of action." App.7a.

Shortly after the APA opinion, the non-VA hospital records of Patient A was finally produced to Petitioner and reviewed. The hospital record proved Patient A definitively did not experience a cardiac arrest nor any physical harm as a result of the VA or Petitioner's actions. The hospital records were extremely relevant because the DAB charged Petitioner with administering Patient A an

"egregious" dose of sedation, yet the patient was administered the same dose of sedation multiple times at the hospital by a variety of physicians without any intolerance or reaction - thus proving the sedation was perfectly appropriate for Patient A. App.62a-63a.

Petitioner filed a F.R.C.P. 60(b) motion to set aside judgement based on the relevant newly discovered hospital record evidence. App.31a. The district court passed on the motion because it was filed 31, not 28 days after judgment and per Rule 4(a)(4)(A) – the timely filed notice of appeal prevented the district from entering a ruling on the motion. *Id.* The sixth circuit did not address the newly discovered evidence and affirmed the district court's ruling on the APA claim. App.7a.

After the sixth circuit affirmed the judicial review in favor of the agency, the prior stay on the Title VII claim was lifted and after a brief discovery period, the VA filed a motion for summary judgment. App.9a. On May 29, 2020, the district court granted the VA's motion for summary judgment based largely on deference to the agency via the judicially created pretext-plus "honest belief" rule, stating regardless if Petitioner's evidence satisfied the prima facie and pretext stage of the *McDonnell-Douglass* framework - the VA "honestly believed" Petitioner posed a threat to patient safety so they were entitled to take the personnel action. App.22a-51a.

Within days of the district magistrate's opinion, the state medical board released the results of their mandatory investigation of Petitioner due to the VA taking major adverse action against her. The state medical board exonerated Petitioner, and questioned why the VA took any action against her.

The medical board cited the VA's lack of readily available Narcan as the major contributing factor to the sedation event.

Petitioner appealed the district magistrate's Title VII opinion to the Sixth Circuit Court of Appeals. App.2a-21a. She first filed a motion to strike stipulations that were submitted to the district magistrate because they were filed without her knowledge or consent and omitted and misrepresented material facts. Petitioner also motioned to supplement the record with the medical board findings and requested a remand back to the district to consider the interim medical board proceedings as additional and substantial pretext evidence that the one sedation reaction was insufficient to warrant any legitimate safety concerns. The sixth circuit declined to strike the stipulations, declined to supplement the record and passed on considering a remand back to the district court to consider the newly discovered pretext evidence. App.10a.

On appeal, Petitioner argued the district court erred in granting summary judgment in favor of the VA on several grounds. Most importantly, Petitioner informed the sixth circuit panel of this Court's intervening decision in *Babb* v. *Wilkie* (2020) holding the plain meaning of the statutory language in the federal-sector provision of the ADEA "free from any discrimination" meant that the Government is liable for discrimination if a decision-making process to take a personnel action was tainted by "any" differential treatment on the basis of age. Petitioner reasoned because other circuits are now analyzing federal-sector discrimination and retaliation claims under this new *Babb* standard of "any" taint of

differential treatment affecting the decision-making process standard – then the sixth circuit should also follow suit and remand the case back to the district court to be decided under the new *Babb* standard. The appeal panel did not address the new *Babb* standard at all and instead analyzed Petitioner's Title VII claim under the *McDonnell-Douglass* framework.

Secondly, Petitioner argued the district court erred in deciding there were no disputed issues of material fact presenting a triable issue on discrimination and retaliation when it ignored and/or discounted Petitioner's valid prima facie and pretext evidence and instead decided the motion under the improper pretext-plus, "honest belief" rule. For example, the district magistrate ruled Petitioner's evidence did not demonstrate she was replaced by or treated differently than comparator males. App.38a-42a. On appeal, Petitioner argued the magistrate discounted and misunderstood the evidence that properly satisfied the prima facie stage of proving she was treated differently than comparator males and on several occasions and not just on the basis of the final personnel action. The appeal panel again miscomprehended her prima facie evidence and incompletely evaluated comparator evidence pertaining only to the removal action. App.16a-19a. The panel did not address or decide if Petitioner's evidence of differential treatment in decisions and actions other than the removal action were discriminatory or retaliatory. Under the *Babb* standard, this evidence would be material.

The district magistrate held the retaliation claim was abandoned because there was no retaliation argument separate from the

discrimination argument and because Petitioner's EEO complaint was filed after she received the notice of proposed action, it could not be the "but-for" cause of the removal action. App.37a. Again the magistrate relied on the honest belief rule stating regardless of any evidence of retaliation, the VA had an "honest belief" in their "safety concerns" and Petitioner "cannot" prove that "safety" is pretextual. App.44a. On appeal, the panel felt Petitioner did not fully develop the retaliation claim below and that it was addressed "in a cursory way at best" so declined to decide the retaliation claim on appeal. App.20a-21a.

The district magistrate also held Petitioner abandoned the ADAA/ Rehabilitation Act "regarded as" disabled claim again because of improperly formatted argument in the response brief. The magistrate dismissed the claim under the improper legal standard of "solely due to." App.36a. The appeal panel did not address the Rehabilitation Act claim on appeal.

On February 7, 2022, a Petition for Panel Hearing was filed arguing the panel made several fundamental errors. App.52a-64a. First, their factual findings were clearly erroneous and directly contrary to Petitioner's evidence including similarly situated males that were treated better, how she was replaced by two males and the panel misconstrued her valid pretext evidence comprising of multiple expert opinions that were not new – they were part of the DAB record. Second, Petitioner challenged the Sixth Circuit's application of the "honest belief rule" for this case because it was directly contrary to their own precedent in *Babb* v. *Maryville Anesthesiologists P.C.*, 942 F.3d 308 (6th Cir. 2019), an ADAA violation where that appeal panel reversed summary

judgment for the employer because the employee sufficiently countered the employer's alleged "safety" concerns with a supportive expert opinion that the employee's actions were within the standard of care and the appeal panel stated that this dispute was important because "such evidence created a genuine issue of fact about precisely that - that the employer failed to make a reasonably informed and considered decision before terminating Babb." *Id.* at 323. That same rationale should have been applied to Petitioner's case because there were four sworn expert opinions supportive of Petitioner before the DAB and this ample pretext evidence should have been enough to deny application of the "honest belief" rule below. Third, Petitioner also challenged the Sixth Circuit's application of the honest belief rule to this federal-sector case because it amounts to inappropriate ipse dixit deference to an agency employee's opinion and no deference was due to the agency per this Court's recent holding in *Kisor v. Wilkie*, 139 S.Ct. (2019). App.61a-63a.

On February 15, 2022, the Sixth Circuit panel did not address any of these arguments and denied Petitioner's request for rehearing.

REASONS FOR GRANTING THE PETITION

I. This Court's holding in *Babb* has transformed the appropriate framework that now applies to federal-sector Title VII claims creating a nationwide circuit split requiring unification

In *Babb*, 140 S. Ct., 1174 (2020), this Court ruled that the plain meaning of "free from any discrimination" language in the federal-sector Age

Discrimination in Employment Act (ADEA) means that federal-sector personnel actions must be made in "a way that is not tainted by differential treatment based on" a protected characteristic, age. Also in *Babb*, this Court observed that the adjectival phrase "based on age" "modifies the noun 'discrimination,' " not "personnel actions." *Id.* "As a result, age must be a but-for cause of discrimination - that is, of differential treatment - but not necessarily a but-for cause of a personnel action itself." *Id.*

Justice Thomas was the lone dissenter in the *Babb* decision due to his concern that *Babb's* new "any taint" standard disrupted the settled expectations of federal employers and that the majority did not cite any statutory remedial scheme that would displace the Court's long standing tort-like but-for causation rule. But, he did agree that the majority's rationale did extend to federal-sector Title VII claims:

> *"Because §633a(a)'s language also appears in the federal-sector provision of Title VII, 42 U.S.C. §2000e-16(a), the Court's rule presumably applies to claims alleging discrimination based on sex, race, religion, color, and national origin as well."*

- *Babb*, 140 S. Ct. at 1181 (Thomas, J., dissenting).

Some circuits agree with Justice Thomas and have extended the *Babb* rationale to federal-sector Title VII claims. For example, *Babb* on remand to the 11th Circuit held that this "Court's decision in *Babb's* case . . . articulated there now controls cases arising under Title VII's nearly identical text" and "Because the relevant statutory provisions of the ADEA and Title VII are essentially identical, the *Babb* Court's

interpretation of the ADEA's phrase "personnel actions...shall be made free from any discrimination based on" must control here, too. See *Babb II, Babb v. Sec'y, Dep't of Veterans Affairs*, 992 F.3d 1193, 1196, 1199-1200 (11th Cir. 2021).

In applying *Babb* to federal-sector Title VII case, the 11th circuit recently ruled that "any" and all episodes of alleged disparate treatment could be a violation of Title VII, not just the final personnel action. "So, even when there are non-pretextual reasons for an adverse employment decision . . . the presence of those reasons doesn't cancel out the presence, and the taint, of discriminatory considerations. Without quite saying as much, then, it seems that the Supreme Court accepted *Babb's* argument that the District Court should not have used the *McDonnell-Douglas* framework." - *Babb* II, 992 F.3d at 1204 (citation and internal quotation marks omitted). *Bell v. McDonough*, 8:20-cv-1274-VMC-CPT, 18 (M.D. Fla. Feb. 17, 2022)

In fact, the Eleventh Circuit now has held in multiple unpublished decisions that the *McDonnell-Douglas* burden-shifting framework and the "convincing mosaic" test no longer apply to determinations of liability in federal-sector Title VII discrimination claims because they both "are methods of showing that the protected characteristic was the but-for cause of the ultimate decision." *Durr*, 843 Fed.Appx. at 247.

Because this Court in *Babb* has instructed the circuits below to evaluate claims of discrimination in terms of effect on the decision-making process that leads to an ultimate personnel action and not just the personnel action itself, it does appear that *Babb* has made Title VII into a simple two-step analysis of

liability and remedy instead of the complicated *McDonnell-Douglass* framework that applies to non-federal-sector Title VII claims.

Babb has created a circuit split that leads to vastly difference outcomes for federal employees with similar Title VII complaints. Consider the difference between the Eleventh Circuit that is taking this Court's ruling seriously in deciding federal-sector Title VII cases consistent with *Babb* as compared with the Sixth Circuit that is bound by its judicially created "Honest Belief Rule" that evaluates Title VII claims like at will wrongful termination claims evaluating only if there was a reason to terminate the employee. This split demands the Court provide a unified approach and guidance to the circuits below. Despite the fact that the *Babb* decision is relatively recent, there is no reason to let this issue percolate through the circuits below any longer because this issue is a constitutional civil rights issue with an easy fix. Because the federal-sector statutory language of the ADEA under review in *Babb* is the exact same statutory language in the federal-sector provision of Title VII, *Babb's* rationale should apply to Title VII as well, thus changing the Title VII framework for federal-sector claims consistent with the 11th Circuit's rulings that the *McDonnell-Douglas* framework no longer applies to federal-sector Title VII claims.

II. Title VII Does Protect Federal-sector Employees from Actions "Motivated by" Retaliation

The Court should grant this petition because they have never definitively ruled on if Title VII protects federal-sector employees from retaliation, nor what the proper causation standard for federal-sector retaliation under Title VII is.

Some circuits have held for more than thirty years that the federal–sector provision of Title VII prohibits retaliation for protected activity. See *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 449-450 (9th Cir. 1976); *Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. Unit A Mar. 1981); *Canino v. U.S. E.E.O.C.*, 707 F.2d 468, 472 (11th Cir. 1983). The D.C. Circuit agrees, "Federal agency employers are also prohibited by Title VII from retaliating against employees for asserting their Title VII rights." *Calhoun v. Johnson*, 632 F.3d 1259, 1261 (D.C. Cir. 2011).

This Court has "assume[d] without deciding that it is unlawful for a federal agency to retaliate against a civil servant for complaining of discrimination," *Green v. Brennan*, 136 S. Ct. 1769, 1775 n.1 (2016), although Justice Thomas in his dissent pointed out "Title VII does not provide federal employees with a cause of action for retaliation." see Id. at 1792 n.2.

Justice Thomas is correct that the text of 42 U.S.C. §2000e-16(a) does not specifically mention the word retaliation. That could be because in the next section at §2000e-16(b), Congress specifically authorized and ordered the EEOC to create the federal-sector EEO regulations ("shall issue") any

rule, regulations, orders or instructions it deems "necessary and appropriate" to carry out their responsibilities to enforce subsection (a) through "appropriate remedies." App.66a. It is remarkable that Congress also commanded the head of every federal agency "shall comply with" those congressionally authorized federal-sector EEO regulations at 42 U.S.C. §2000e-16(b)(3). App.66a.

In accordance with that Congressional command and authority, the EEO has fashioned a separate regulatory (and remedial) scheme that is binding on federal agencies. 29 C.F.R. §1614. App.68a-71a. These binding EEOC federal-sector regulations clearly state federal employees are protected from retaliation "No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act...or for participating in any stage of administrative or judicial proceedings under those statutes." 29 CFR §1614.101 (b). Notably, the EEOC considers retaliation a form of discrimination for purposes of protection under Title VII. "...Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part." 29 C.F.R. §1614.103(a).

Consistent with the congressional command to prohibit discrimination and retaliation (42 U.S.C §2000e-16(a)) and to hold the Government to a higher standard (§2000e-16(e)), the EEOC federal-sector regulations prohibit personnel action "motivated by" retaliation for protected activity. (EEOC Guidance on Retaliation) App.71a.

This higher standard is discussed in depth in the precedential Merit System Protection Board (MSPB) opinion, *Savage v Dept. of Army*. The MSPB

held that federal employees may establish a violation of Title VII by showing that retaliation was a "motivating factor" in a contested personnel action. The MSPB decision was instructive that federal-sector employees are not required to demonstrate the "but-for" test or a convincing mosaic of evidence to prove their Title VII claim because "the dispositive inquiry is whether the employee has shown by preponderance of the evidence that the discrimination or retaliation was the motivating factor in the contested personnel action." *Savage v Dept. of Army,* No. AT-0752-11-0634-I-2, (M.S.P.B. Sept. 3, 2015).

The MSPB's rationale is consistent with *Babb* that when prohibiting discrimination, the focus of analysis should not be on the legitimacy of the personnel action, but whether it was retaliatory for earlier protected activity by evaluating if the decision-making process to take the action was tainted by any differential treatment (or retaliatory animus).

Some circuits are currently applying *Babb* to Title VII federal-sector retaliation claims: "we concluded § 2000e-16(a) did not require but-for causation, at least in relation to retaliation claims. *Babb II*, 992 F.3d at 1204-05 (11th Cir. 2021) ("If a decision is not 'made free from any discrimination based on' that which § 2000e-16(a) protects, then an employer may be held liable for that discrimination regardless of whether that discrimination shifted the ultimate outcome.")." *Lewis v. Sec'y of U.S. Air Force*, No. 20-12463, 27-28 (11th Cir. Jun. 30, 2022)

Putting all that statutory language, the EEO federal-sector regulations and MSPB precedent all

clearly support that Title VII fully protects federal-sector employees from personnel actions "motivated by retaliation." This Court should grant review of this Petition to unify the courts below on this important and far reaching federal issue this Court has yet to rule on.

III. Federal-sector Personnel Actions That Might Be Discriminatory Should be Supported with Clear and Convincing Evidence to be Sustained

Although *Babb's* "any" action widened the net of possible actions under review for liability, it maintained the "but for" standard for remedy purposes by reference thru §2000e-16(d) to §2000e-5(g)(2). *Babb*, 140 S.Ct. at 1177-78. *Ford v. DeJoy*, 4:20-cv-00778-NAD, 14-15 (N.D. Ala. Dec. 27, 2021)

A non-federal-sector claimant must prove the "but-for" causation standard through a preponderance of the evidence according to the *McDonnell-Douglas* framework.

That is not the case with federal-sector employees. Again, 42 U.S.C. §2000e-16(b) authorizes the EEOC to issue federal-sector regulations that are binding of the Government. The EEOC federal-sector regulations remedial scheme also express the higher standard expected of federal officials that it is their "primary responsibility to assure" any possible personnel action is not discriminatory or retaliatory. 42 U.S.C §2000e16(e). If the federal government takes a discriminatory or retaliatory action against a federal-sector employee, the EEO federal-sector regulations state in order for that personnel action to be sustained, it is the agency's burden to prove with

"clear and convincing" evidence that "but-for" the possible taint of any discrimination or retaliation on a decision-making process to take a personnel action, "the personnel action would have been taken even absent the discrimination." 29 C.F.R. §1614.501(c) App.69a-70a. If the agency cannot prove this with clear and convincing evidence, the EEO federal-sector regulations require the agency to provide the employee relief. 29 C.F.R. §1614.501(c)

This Court should grant review of this Petition so that the "appropriate remedy" for federal-sector discrimination that was an issue even after the oral arguments in *Babb* before this Court can be decided and the courts below unified to enforce this congressionally authorized remedial scheme.

IV. This Court should Overrule the Judicially Created "Honest Belief Rule" that is in Opposite to this Court's Precedent

The Court should grant this petition because some circuits are depriving citizens of their constitutional entitlement to be free from discrimination when their Title VII claims are dismissed by applying the judicially created "Honest Belief Rule." This judicially created doctrine allows employers to escape liability for discrimination even if the employee's evidence successfully satisfies the *McDonnell-Douglas* prima facie and pretext-No Basis in Fact stage. Under the honest belief rule, "the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998).

Furthermore, "the falsity of [a] [d]efendant's reason for terminating [a] plaintiff cannot establish pretext as a matter of law" under the honest belief rule. *Joostberns,* 166 Fed. Appx. at 794 (footnote omitted). As long as the employer held an honest belief in its proffered reason, "the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless." *Smith,* 155 F.3d at 806. But that rationale is contrary to this Court's opinion in *McDonnell-Douglas* (A jury may find in favor of the plaintiff if it finds the employer lied about the reason for its action.). *McDonnell Douglas* v. Green, 411 U.S. at 804 (1973). The pretext-plus standard created by the honest belief rule is also contrary to this Court's holding in *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 149-54 (2000), holding that in most cases pretext-only evidence is sufficient to survive a motion for summary judgment.

The court below also relied on the honest belief rule to dismiss the claim below simply because the VA performed some reviews and the magistrate said this "insulated" the VA's legitimate reason for taking action against petitioner, but that rationale is also contrary to this court's decision in *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011) ("We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of 'fault.'"

The honest belief rule is also contrary to F.R.C.P. 56 because it allows judgment for an employer-defendant despite a plaintiff-employee's evidence that is sufficient to create genuine disputes

of material facts. Allowing the courts below to apply the honest belief rule to federal-sector employment actions also turns the federal government into an "at-will employer" by-passing a plethora of constitutional procedural due process protections at the whim of a supervisor's mistaken belief.

Regardless, in some circuit's now, it appears the honest belief rule in not applicable to federal-sector Title VII claims after *Babb* because those circuits state the *McDonnell-Douglas* framework has been abrogated by *Babb* which would also abrogate the honest belief rule. "At this time, a plaintiff's burden under the *Babb* standard appears light - at least with respect to liability. Under that *Babb* standard, Defendant Postmaster DeJoy cannot show that he is entitled to judgment as a matter of law." And "Under the new *Babb* test, USPS's non-discriminatory reason is not sufficient for the court to grant summary judgment on *liability*.." *Ford v. DeJoy*, 4:20-cv-00778-NAD, 22-23 (N.D. Ala. Dec. 27, 2021)

The Court should grant review on this Petition to unify the courts below that the "honest belief rule" represents an impermissible pretext-plus standard that was overruled by *Reeves* and may have been abrogated by *Babb*.

V. The Sixth Circuit's Decision Below Conflicts with this Court's Directives in Kisor

As mentioned above, for a federal agency to sustain a possible discriminatory personnel action, the federal-sector EEO regulations require that the agency prove with clear and convincing evidence that

the personnel action still would have been taken despite the taint of discrimination.

In this case, after the DAB dismissed the majority of charges against the Petitioner, the only remaining criticism from the notice of proposed action was the criticism "you should have considered" sedating the patient differently. But "consider" does not "compel" a certain action. As such, the personnel action was taken over a difference of opinion. So what is the proper weight or deference to be given to agency opinion letters or guidance memos on a regulated party like a licensed physician that had not been given notice of the agency's alleged "new interpretation" of a guidance document?

In *Harris County*, this Court ruled that agency actions supported by opinion letters and guidance documents have no binding effect on judges beyond their ability to persuade under *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944) and that it was improper to defer to the agency's newly proclaimed position on overtime requirements because it amounted to a *de facto* new regulation. *Christensen v. Harris County*, 529 U.S. 576 (2000).

In 2008, the D.C. Circuit also held that guidance documents were inconclusive and insufficient to bind an agency or a party. See *Ass'n of Am. R.Rs. v. DOT*, 198 F.3d 944, 948 (D.C. Cir. 1999) (holding a letter and two emails from lower level officials did not amount to an authoritative agency interpretation)

In 2018, this Court denied cert. in *DuPont v. Smiley* that asked a similar question – whether agencies are entitled to Skidmore deference when the Agency's position is arrived at through litigation. In

the dissent to grant cert. J. Gorsuch and J. Thomas asked, "How are people to know if their conduct is permissible when they act if the agency will only tell them later during litigation?" and "I believe this circuit split and these questions warrant this Court's attention. If not in this case then, hopefully, soon"

Professor Rappaport at the Center for the Study of Constitutional Originalism at the Univ. of San Diego asked a similar question of why an agency would get Skidmore deference[1]: "[I]f *Skidmore* deference is justified based on expertise, then why is such deference applied only to government agencies? After all, private parties can also be quite expert about particular areas."

That question is pertinent here, because the VA as an agency does not possess any substantive medical expertise per se. The VA relies on its employed medical professionals to provide this expertise, but those "opinions" can be biased due to discrimination or retaliation. In this case, the GI supervisor had no expertise in the type of sedation Petitioner used so his non-expert opinion should not have been given deference over hers. Which begs the question, when an agency personnel action is taken that is most likely retaliatory due to prior protected opposition of differential treatment, how would a federal employee go about proving an opinion based adverse action was improper? Likewise, how can a federal official "assure" they are fulfilling their "primary responsibility" of guaranteeing non-discrimination in federal government employment at the commanded by 42 U.S.C. §2000e-16(e)? And how

[1] https://lawliberty.org/against-skidmore-deference/

can a federal employee prove or the agency defend by clear and convincing evidence that the personnel action was justified or not?

These questions are important because if *Babb* applies to Title VII, then the *McDonnell-Douglas* framework no longer applies to Title VII for federal-sector claims and a new framework will be needed. The *Kisor* criteria can be a part of this framework. A properly and well supported agency actions would easily satisfy all *Kisor* criteria and a contrived opinion based action would fail the Kisor criteria test.

On Petition for Rehearing, Petitioner argued that the *Kisor* criteria should be used as an objective standard that would cut through any alleged discriminatory bias in the local VA and DAB opinions and allegedly new interpretation of the sedation guidance document. The Sixth Circuit passed on this issue.

VI. This Petition is Certworthy

1. This petition is a worthy vehicle for the Court to decide the questions presented. The timing is right to apply *Babb* to federal-sector Title VII claims because thousands of federal employees across the nation are affected by discrimination and retaliation daily. This petition can clarify the statutory higher standards that Congress intended the Government to abide by when it prohibited discrimination in federal employment, including retaliation. This petition also brought forth several federal-sector EEO regulations and their binding statutory authority on federal agencies that this court has not ruled on yet, but can rely on in

fashioning the proper post-*Babb* federal-sector Title VII analysis framework that is sorely needed to unify the circuits below. This petition also shows how the post-*Babb* Title VII federal-sector framework includes protection from retaliation and requires the federal-sector to prove by clear and convincing evidence that a possibly discriminatory and/or retaliatory action is legitimate to be sustained. The Court can also explore if the *Kisor* criteria should be a part of this new post-*Babb* Title VII framework.

2. This case is a worthy vehicle for the Court to consider if the judicially created "Honest Belief Rule" used only in some circuits to dismiss Title VII claims is valid, void or needs limits. This judicially created rule creates pockets of citizens across the nations that are deprived of their constitutional right to be free from discrimination when their Title VII cases are dismissed based on an employer's mistaken belief, whereas other similar cases in other circuits would not be dismissed and the discrimination would be remedied. It seems utterly important and likely that the Supreme Court would agree they have an obligation to assure that all employees should be equally protected from discrimination - no matter what circuit they work in. Likewise the honest belief rule is a Pretext-plus framework – the type this Court in *Reeves* prohibited. If the court does not resolve or end the use of the honest belief rule – it is highly likely that it will spread to other circuits and become a recurring problem for our workforce across the nation.

3. Although the details of this case are medical in nature, they are no more difficult than this Court's prior mastery of understanding of a "moiety." Although at first blush there appears to be too many

factual disputes, there really are not any. The courts below just did not credit Petitioner's evidence over deference to the agency. The original allegations floored against Petitioner were dismissed and the remaining allegation regarding Patient A has no evidentiary support after the hospital record was obtained. All material facts are favorable to the Petitioner.

4. This petition is also a worthy vehicle to demonstrate the application of the "motivated by" retaliation standard because there is ample evidence of gender based differential treatment and animus for six months prior to the sedation event that was a pretextual reason for taking adverse action against the petitioner.

5. It would be wrong to allow this case to stand as decided by the courts below because it will set a standard that it is acceptable to terminate a previously excellent federal employee based on a supervisor's alleged honest belief even when he later testifies that his belief was never honestly held.

VII. Petitioner will Prevail on Remand

1. Under the new *Babb* standard of "any" discrimination tainting a decision-making process in taking a personnel action and/or motivated by retaliation, Petitioner's evidence would clearly demonstrate that gender and retaliation played a part in the way the VA treated her differently than her male colleagues. Petitioner will prevail on remand.

2. If this Court applies the *Babb* standard to federal-sector Title VII claims, abrogating the *McDonnell-Douglas* framework, the honest belief

rule would not prevent petitioner from prevailing on remand.

3. With or without the *Kisor* criteria, if this Court rules an agency must show by clear and convincing evidence that a possibly discriminatory or retaliatory personnel action was legitimate, petitioner will prevail on remand because there is no credible and relevant evidence other than the disputed DAB opinion letter to support the agency action.

Conclusion

Respectfully Submitted,

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