No. _____

In the Supreme Court of the United States

RAFAEL FRIEDRICHSEN,
Petitioner,

v.

JOSE RAMON RODRIGUEZ, TASHA HARDY, DANA DARDEN, LISA PIERINI, ROSALVA GUEDEA, and BBVA COMPASS BANK, N.A.,
Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Texas fail to maintain uniformity in decisions when it denied the Writ of Mandamus regarding whether a timely filing of an EEOC charge is a Jurisdictional or Limitation Requirement to Title VII Suits?

2. Did the Supreme Court of Texas violate the Petitioner's due process rights when it failed to provide valid reasons in the disposition of Writ of Mandamus and Rehearing?

3. Whether the Appellate Court's denial of the Motion to Recall or Withdraw Mandate violate Petitioner's due process rights?

4. Whether Appellate Court erred in affirming in granting Respondents' Motion for Summary Judgment in violation of the Petitioner's Constitutional Right to Jury Trial?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the courts, whose judgments or orders are subject to this Petition, include:

Petitioner Rafael Friedrichsen (Plaintiff in the trial court, 11th Judicial District, Harris County, Texas, Appellant in the Fourteenth Court of Appeals, and Petitioner in the Supreme Court of Texas).

Respondents Jose Ramon Rodriguez, Tasha Hardy, Dana Darden, Lisa Pierini, Rosalva Guedea, and BBVA Compass Bank, N.A. (Defendants in the trial court 11th Judicial District, Harris County, Texas, Appellees in the Fourteenth Court of Appeals, and Real Parties-in-Interest in the Supreme Court of Texas).

The Honorable Kevin Jewell, Margaret "Meg" Poissant, and Randy Wilson, Fourteenth Court of

Appeals Judges (Respondents in the Petition for Writ of Mandamus filed in the Supreme Court of Texas).

LIST OF RELATED CASES

Herein-below is the list of all proceedings/related cases in other courts that are directly related to the case in this Court:

- *Rafael Friedrichsen v. Jose Ramon, Rodriguez, Tashahardy, Dana Darden, Lisa Pierini, Rosalva Guedea, and BBVA Compass Bank, N.A.,* Cause No 2018-69454, lawsuit filed in the 11th Judicial District, Harris County, Texas. On July 12, 2019, the trial court granted the Respondents' Plea to Jurisdiction and entered a Final Summary Judgment

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rafael Friedrichsen, respectfully petitions for a writ of certiorari to review the opinion and judgment of the Fourteenth Court of Appeals of Texas and Orders denying Writ of Mandamus and Motion for Rehearing by the Supreme Court of Texas.

OPINIONS AND ORDERS BELOW

On July 29, 2022, while no opinion was issued and the decision was unpublished, the Supreme Court of Texas denied the Motion for Rehearing of the order denying the Petition for Writ of Mandamus, which is reproduced in Appendix A, page 1a. The order denying Petition for Writ of Mandamus was entered on May 20, 2022, by the Supreme Court of Texas, which is reproduced in Appendix B, page 3a.

Refusal to hear Motion for En Banc Reconsideration due to lack of jurisdiction was entered on February 8, 2022, by the Fourteenth Court

of Appeals, which is reproduced in Appendix C, page 5a. On January 25, 2022, the Fourteenth Court of Appeals, Texas, issued an order denying the Motion to Recall and Withdraw the Mandate, which is reproduced in Appendix D, page 8a. On October 26, 2021, the Fourteenth Court of Appeals, Texas, issued a memorandum opinion and affirmed the Trial Court's judgment, which is reproduced in Appendix E, page 39a.

On July 12, 2019, the 11th Judicial District Court, Harris County, Texas, entered an Order granting the Respondents' Plea to Jurisdiction and Summary Judgment, which is reproduced in Appendix F, page 39a.

JURISDICTION

The last decision of the Supreme Court of Texas denying the Petition for Writ of Mandamus was entered on May 20, 2022, Appendix B, page 3a, and

the Motion for Rehearing was denied on July 29, 2022, Appendix A, page 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and the Fourteenth Amendment of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

USCS Const. Amend. 14, § 1 provides:

"…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1257(a) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the

Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

On September 27, 2018, Petitioner Rafael Friedrichsen (hereinafter referred to as "Friedrichsen" or "Petitioner") filed a lawsuit against Respondents for an Age-based Discrimination at Workplace pursuant to the Texas Commission on Human Rights Act ("TCHRA"), Defamation and Intentional Infliction of Emotional Distress.

Petitioner was employed by BBVA COMPASS BANK, N. A (hereinafter referred to as "BBVA") as an International Wealth Strategist and held the same position until his termination. At the time of his termination, Petitioner was 61 years old. During his

tenure with BBVA, Petitioner received well above average reviews, promotions and performance bonuses, salary increases, and stock options. Petitioner was aware of and followed all the employment procedures, code of conduct, and ethics. Notwithstanding, on numerous occasions, Petitioner over-heard statements like *"hey old man," "you need an extra-long vacation,"* and other similar statements regarding his age, which he believe have been spoken by his co-workers and/or his supervisor Jose Ramon Rodriguez (hereinafter referred to as "Jose"). Those statements were made in and around BBVA's office and nearby common areas.

Petitioner was discriminated against because of his age during his employment with BBVA. The Petitioner observed that Jose was spending more time and was providing more investor leads to younger members of the International Wealth Management

team. Respondents' strategies failed to compel Petitioner to resign from his job voluntarily. Thus, one of BBVA's employees, Rosalva Guedea (hereinafter referred to as "Rosalva"), made a false allegation against Petitioner, stating, *"Rafael, you committed fraud with this document and you will be reported…"*. When these hostile employment tactics failed, Petitioner was caught up in a scheme where he became an innocent victim of a smear campaign. Respondents purportedly alleged that he fraudulently "scanned and pasted a client's signature" on a life insurance application. Rosalva's unsubstantiated and unjust accusation, along with BBVA's unfair investigative process, was used as a disguise to force Petitioner out of his employment at BBVA.

At all times, Petitioner was doing his job competently, ethically, and professionally. Petitioner started working for Respondent (when it was

Bancomer in Mexico City) nearly 47 years ago. Petitioner performed his job very well and was promoted and offered a position in the United States. Various conversations were made with Petitioner regarding his job performance, health condition, and mental capacity just to give him suggestions like "long vacation" or "enjoy an extended time off." The Petitioner clarified that he was fine and did not need any vacation or extended time off.

All those behavior tactics, thoughts, and false allegations created a hostile work environment for Petitioner, and he got stressed dealing with it. Petitioner tried to continue to work, but the false allegation and unsubstantiated accusation from Rosalva were pressuring him to quit his job. Jose did not think Petitioner should stay around to deal with BBVA's Corporate Investigation Department.

On or about March 30, 2018, Respondent Lisa Pierini (hereinafter referred to as "Lisa"), a member of the Corporate Investigation team, started an investigation without giving Petitioner a fair opportunity to explain his version of the misunderstanding. Petitioner was questioned and investigated by Lisa and Dana Daren (hereinafter referred to as "Dana"). Lisa rushed the interview and rendered an incorrect conclusion. Dana simply rubber-stamped Lisa's investigation. Dana did not show the Petitioner that she did anything to investigate the "scanned and pasted client's signature" false accusation. Petitioner believes that Jose, Lisa, and Dana took such adverse actions through intimidation to force him to quit or retire or be terminated. On or about April 13, 2018, Jose and Tasha Hardy (hereinafter referred to as "Tasha") of BBVA's Talent & Culture terminated Petitioner's

employment by using the bogus transaction to frame him and concluding that Petitioner fraudulently "scanned and pasted a client's signature." Tasha did not give Petitioner a fair opportunity to explain his version of facts. Jose and Tasha simply told Petitioner that he violated BBVA's Code of Conduct and was terminated that day. Due to BBVA, Jose, Lisa, Dana, Rosalva, and Tasha—Petitioner lost his job and was investigated by FINRA (Financial Industry Regulatory Authority). Petitioner's FINRA license was adversely impacted, leading to Petitioner's inability to find replacement employment in the banking and financial industry.

On or about May 21, 2018, Petitioner, by and through his trial counsel, contacted Jose and Lisa via U.S. Postal Mail and via email at lisa.pierini@bbva.com to seek a resolution, but Jose and Lisa never responded. Knowing that Petitioner's

reputation, banking, and financial career were at risk of suffering severe damage, Jose and Lisa ignored Petitioner's letter and email. Petitioner suffered substantial damages due to these false allegations made against him by Respondents. In the trial court, Petitioner provided sufficient proof that he did not commit any violation against BBVA's Code of Conduct-Falsification of Records. See Affidavit of Mario Gutierrez Diez. Appendix G, page 42a. It is noteworthy, as of the current date, Mr. Diez is willing to testify that Petitioner did not falsify his signature.

Thereafter, on or about September 27, 2018, Petitioner sued the Respondents and filed the Verified Original Petition. On February 19, 2019, Petitioner filed a Charge of Discrimination with the Texas Workforce Commission Civil Rights Division (TWC) and the Equal Employment Opportunity Commission

(EEOC). On February 28, 2019, the TWC/EECO issued Friedrichsen a right-to-sue letter.

On April 22, 2019, Respondents filed their Plea to Jurisdiction and Alternative Motion for Complete Summary Judgment. On June 9, 2019, Petitioner filed his Response to Plea to Jurisdiction & Traditional Motion for Summary Judgment. On June 14, 2019, Respondents filed their Reply in support of their Plea to Jurisdiction and Alternative Motion for Summary Judgment on all claims.

On or about July 12, 2019, the Trial Court granted the Respondents' Plea to Jurisdiction and Final Summary Judgment and denied Petitioner's claims. Appendix F, page 39a. On December 4, 2019, Petitioner filed his Brief in the Fourteenth Court of Appeals against the Trial Court's Order granting Respondents' Plea to the Jurisdiction and Motion for Summary Judgment. On January 3, 2020,

Respondents filed their Brief. On January 21, 2020, Petitioner filed his Reply Brief. On October 26, 2021, the Fourteenth Court of Appeals issued its Memorandum Opinion affirming the Trial Court's Order. (Appendix E, page 11a).

On November 23, 2021, Petitioner filed his Motion for En Banc Reconsideration in the 11th Judicial District Court, Harris County, Texas. On or about January 6, 2022, the Fourteenth Court of Appeals, Texas, issued the Mandate. (Appendix H, page 50a). On or about January 12, 2022, Petitioner filed his Motion to Recall/Withdraw Mandate in the Fourteenth Court of Appeals, Texas, which was denied on January 25, 2022. Appendix D, page 8a.

After the denial, on or about February 2, 2022, Petitioner petitioned to the Supreme Court of Texas and filed a Writ of Mandamus, seeking to enforce the well-established rule of law, which the Appellate

Court ignored while issuing its Opinion. On May 20, 2022, the Supreme Court of Texas denied Petitioner's Petition for Writ of Mandamus without providing any specific reasons for its ruling. Appendix B, page 3a. On or about June 21, 2022, Petitioner timely filed a Motion for Rehearing of Petition for the Writ of Mandamus in the Supreme Court of Texas, which was denied on July 29, 2022, without providing any specific reasons. Appendix A, page 1a.

REASONS FOR GRANTING THE WRIT

In this case, the Supreme Court of Texas failed to follow and apply its precedent ignoring the pertinent cases of *Adams v. Cal-Ark Int'l, Inc.,* 159 F. Supp. 2d 402 (E.D. Tex. 2001); *Zipes v. TWA*, (1982) 455 U.S. 385, 393 [102 S.Ct. 1127, 1132, 71 L.Ed.2d 234, 243]); and *Perez v. Living Centers-Devcon,* (Tex. Ct. App. 1998) 963 S.W.2d 870 that have been around for several years. The Supreme Court of Texas denied

Petitioner's constitutional protections in unreasonable manner. First, it refused to apply the pertinent law to the issue of exhaustion of administrative remedies. Second, it summarily rejected his Petition without explanation or fair hearing.

This Court has often held that the opportunity to be heard in a meaningful manner and meaningful time is an essential part of the constitutional due process right. Yet, in this case, the Supreme Court of Texas denied Petitioner's Petition for Writ of Mandamus and Motion for Rehearing without giving any reason.

Therefore, the Petitioner's Writ of Certiorari should be granted because the decision matter of this Petition conflicts with the constitutional principles safeguarded by this Honorable Court on Amendment XIV to the United States Constitution.

1. **This Court should grant Certiorari because the Courts below had failed to maintain uniformity in the decision when they failed to follow the precedents that timely filing of EEOC charge is a Jurisdictional Requirement to Title VII Suits.**

The Courts below erred in not considering the United States Supreme Court's Precedent. Petitioner, through the Writ of Mandamus, showed that the United States Supreme Court's decision repeatedly stated and held that the date when an administrative claim is filed does not affect the trial court's jurisdiction. The Supreme Court held that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite but rather a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. *Zipes v. TWA*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132 (1982).

According to *Mennor v. Fort Hood National, bank*, 829 F.2d 553, 554 (5th Cir. 1987), "In a state

without a local fair employment practice agency, a plaintiff must file such a charge with the EEOC within 180 days after the alleged unlawful employment practice occurs. 42 U.S.C. § 2000e-5(e)(1). However, in a state or local fair employment agency, otherwise known as a "deferral state," the deadline to file a charge with the EEOC is extended to 300 days, regardless of whether the action filed in state court is timely filed according to state law. Thus, the 300-day rule applied to Petitioner's complaint as he specifically used the Texas Workforce Commission form and dual-filed the Charge with the Civil Rights Division under the work-sharing agreement between EEOC and Texas Commission on Human Rights (TCHR) that indicated that he wanted his claim filed with the TCHR, as well as the EEOC. This filing was sufficient to institute state proceedings with the TCHR and extend the limitation period to 300 days.

See *Adams*, 159 F. Supp. 2d at 408. The Court holds the discretionary power pursuant to Civil Rights §66 in respect of filing of an employment discrimination charge with the EEOC.

"The limitation period for filing an EEOC complaint is not jurisdictional but rather, it is in the nature of a statute of limitations. Being in the nature of a statute of limitations, the 300-day limitation period is subject to equitable tolling, estoppel and waiver." *Thibodeaux v. Transit Mix Concrete & Materials Co.*, 3 F. Supp. 2d 743 744 (E.D. Tex. 1998)

Here, in this case, Petitioner filed his EEOC claim on February 19, 2019, i.e., 312 days after his termination. The Petitioner could not file the EEOC claim within 300 days after his termination because, during that period, Petitioner's wife had serious health issues, and he had to care for his wife. The trial court's failure to toll the limitation period caused

injustice to Petitioner. The trial court committed an error in **not** tolling the limitation period for filing an EEOC complaint because the limitation period for filing an EEOC complaint is not jurisdictional, but rather, it is in the nature of a statute of limitations. Being in the nature of a statute of limitations, the 300-day limitation period is subject to equitable tolling, estoppel, and waiver.

The rulings of the Supreme Court of Texas and the Fourteenth Court of Appeals, Texas, connoting that the Petitioner failed to exhaust the administrative remedies, which is in contravention with the United States Supreme Court view, which held that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite, but rather a requirement like a Statute of limitations.

2. This Court should grant Certiorari because Petitioner's due process and equal protection of rights are violated

when the Supreme Court of Texas failed to provide valid reasons in the disposition of Writ of Mandamus and Rehearing.

The rulings of the Supreme Court of Texas and the Fourteenth Court of Appeals, Texas, violate the Due Process Clause of the United States Constitution.

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 1070 (1886)

The failure to follow the controlling and indistinguishable precedents as applied to other litigants denies equal protection to the Petitioner. According to *In re Parks*, 603 S.W.3d 454, 463 (Tex. App. 2020) Where state law denies a civil litigant the right to due process, the declaration that a judge approves of the result is no answer; the process is the right. *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988).

Consistency in the law of the highest Texas courts, the Supreme Court of Texas and the Fourteenth Court of Appeals, is of the utmost importance. Unfortunately, the Supreme Court of Texas and the Fourteenth Court of Appeals undermined the Texas courts' precedents, establishing that failure to timely exhaust the administrative remedies is not a jurisdictional

requirement but a limitation requirement, which can be waived.

The Supreme Court of Texas' ruling denying the Petitioner's Petition and not following its well-established precedents violates the Petitioner's Equal Protection Clause and the Due Process Clause of the United States Constitution. When the United States Supreme Court has fulfilled its duty to interpret law, a state court may not contradict or fail to implement the rule so established. U.S. Const. art. VI, cl. 2. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530, 132 S. Ct. 1201, 1202 (2012). The Texas state court system (including the Fourteenth Court of Appeals and the Supreme Court of Texas) denied Petitioner equal protection of laws and deprived Petitioner of due process in violation of the Fourteenth Amendment of the United States Constitution.

The issues raised by Petitioner before the Supreme Court of Texas included both jurisdictional and non-jurisdictional matters, and the Supreme Court of Texas and the Fourteenth Court of Appeals of Texas did not apply the law to any of those. The issues involve failure to follow the well-established precedents. The Orders are not based upon the pertinent laws.

Thus, Texas courts erroneously deprived Petitioner of his constitutional right to equal protection of the law. Now, the Petitioner is entirely dependent upon the wisdom of the Honorable Supreme Court of the United States. Accordingly, the Petitioner's Writ of Certiorari should be granted based on applicable precedents.

3. The Court should grant the Petition to resolve the conflict between the Texas Supreme Court and the Fourteenth Court of Appeal's refusal to Recall the Mandate and this Court's precedents.

As this Court acknowledged in *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), "the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances." Id. at 550 (citing 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed.1996)). Courts of appeal have defined such extraordinary circumstances as, inter alia, "good cause," to "prevent injustice," or in "special circumstances." *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 593 (3d Cir. 1977).

The Court of Appeals has an inherent power that the court can use as a last resort against unforeseen contingencies to recall their mandates

avoiding the miscarriage of justice. In recent years, some judges and commentators have expressed concern that abbreviated dispositions may be used to avoid addressing important issues, including jurisdictional and Constitutional issues, whose resolution might require judges to hold contrary to their preconceptions. "The Court has the authority to withdraw its mandate at any time during the term of court as was issued. See *French v. State*, 572 S.W.2d 934 (Tex.Cr.App. 1978); *Deramee v. State*, 379 S.W.2d 908 (Tex.Cr.App. 1964)." *Shaffer v. State*, 780 S.W.2d 801, 802 n.* (Tex. Crim. App. 1989)

Petitioner filed a Motion for En Banc Reconsideration in the 11th Judicial District Court, Harris County, Texas. Due to this, Petitioner's Motion for En Ban Reconsideration was considered not timely filed in the Fourteenth Court of Appeals. On January 6, 2022, the Appellate Court issued its

Mandate. All this time, he believed, in good faith, that it was filed in the proper forum. The Supreme Court of Texas deprived Petitioner of the opportunity to be heard at a meaningful time and in a meaningful manner in violation of the Fourteenth Amendment of the United States Constitution.

To avoid creating vast numbers of apparent conflicts in the decisions of a court caused by "result-driven" rulings, state court panels may go beyond "unpublished" status by not addressing issues. The refusal to address fundamental issues such as jurisdiction may occur in any disposition, but the temptation is greatest for abbreviated dispositions. The court uses the reduced length, sometimes coupled with "unpublished disposition," Memorandum or Order designation, to justify an attenuated responsibility to follow the judicial process, the laws and the applicable facts. However, regardless of the

length and designation of a disposition, the courts must follow the laws and apply them to the evidence in the record. Constitutional Due Process and Equal Protection guarantee to protect all litigants, not just those Track-One litigants deemed by a state court worthy of its full attention.

"Rule 24(2) of the Rules of this Court, which provides 'A mandate once issued will not be recalled except by order of the court for good cause shown.' In order to constitute 'good cause shown' under the rule, there must be exceptional circumstances shown, which in the opinion of the Court are sufficient to override the strong public policy that there should be an end to a case in litigation, that when the judgment therein becomes final the rights or liabilities of the parties therein are finally determined, and that the parties thereafter are entitled to rely upon such adjudication as a final settlement of their controversy.

Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244." *Hines v. Royal Indem. Co.* 253 F.2d 111, 114 (6th Cir. 1958)

Petitioner properly raised the issues to the Supreme Court of Texas in the Writ of Mandamus and then in Motion for Rehearing. There was no substantive response. This misuse of the judicial process is precisely why the Honorable Court should grant certiorari on this Question, to resolve whether lower courts may dispense threadbare justice in the manner as done in this case.

Moreover, Circuit courts have recalled their mandates when this Court's later opinions in unrelated cases addressing similar legal issues have shown the appellate court's analysis to be "demonstrably wrong." However, those cases did not involve this Court's express abrogation of the appellate court decision by name, as is true here. If a

subsequent case reaching a different conclusion on similar facts has rendered an earlier unrelated case demonstrably wrong and subject to recall, then this Court's explicit abrogation of the case at bar must trigger recall of the mandate. The Fourteenth Court of Appeals' refusal to do so is itself demonstrably wrong.

According to Rule 10 of the Rules of the Supreme Court of the United States, a petition for a writ of certiorari will be granted only for compelling reasons. Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *NLRB v Pittsburgh S.S. Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 456 (1951). The Supreme Court of Texas' failure to allow the litigants to be

heard in a meaningful time and meaningful manner is sufficient consideration for granting a certiorari review.

The constitution's framers recognized that adherence to precedent is an important limitation on unchecked judicial power in a tripartite, balanced government. The present facts provide an ideal vehicle to address this Question. If this Honorable Court concludes that the improper treatment of Petitioner by a State Supreme Court should be taken up, then this case presents facts highly suitable for that consideration. Therefore, this Honorable Court should grant the Petition.

4. The Court should grant the Petition because the courts below have violated Petitioner's Constitutional Right to Jury Trial.

The justices of the Fourteenth Court of Appeals affirmed the trial Judge's orders granting

Respondents' summary judgments. The justices of the Texas Supreme Court denied Petitioner's Petition for Writ of Mandamus and Motion for Rehearing. The said decision of the justices of the Fourteenth Court of Appeals was not motivated by compliance with Texas Rules of Appellate Procedure; instead, it was motivated by a "spirit of evasion for the purpose of ignoring" Petitioner's constitutional right to a jury trial for the benefit of Respondents. Further, the denial of Petitioner's Writ of Mandamus and Motion for Rehearing by justices of Texas Supreme Court were not motivated by Texas state law or by the court's constitutionally mandated promulgation of the rule of civil procedure necessary for the efficient and uniform administration of justice in the various courts; it was motivated by a "spirit of evasion for the purpose of ignoring" Petitioner's constitutional right to a jury trial for the benefit of Respondents.

The Appellate Court, while affirming to grant the Respondents' Motion for Summary Judgment, acted erroneously. Procedurally, the Respondents did not adequately plead that common law claims are preempted by TCHRA as an affirmative defense. As a threshold matter, the trial court should have denied their Motion for Summary Judgment because the Respondents' pleadings did not support their affirmative defense of "preemptive". The Texas Rules of Civil Procedure provide that a "judgment of the court shall conform to the pleadings." TEX. R. CIV. P. 301. Likewise, to obtain a judgment on a Motion for Summary Judgment, the judgment obtained through summary judgment must be supported by the pleadings. In order to obtain a summary judgment based on an affirmative defense, the party seeking summary judgment on that affirmative defense must have pleaded that affirmative defense in its live

pleadings. *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W. 2d 492, 494 (Tex. 1991). Moreover, the justices of the Fourteenth Court of Appeals of Texas committed an error in relying on *Hoffmann-La Roche, Inc. v Zeltwanger*, 144 S.W.3d 438 (Tex. 2004) to support their conclusion that TCHRA preempted Petitioner's common law claims of Defamation and IIED. The justices of the Supreme Court of Texas and the Fourteenth Court of Appeals have committed an error in not considering that the facts of the *Hoffmann* case were distinguishable from the facts of the instant case. In *Hoffmann*, the Defamation cause of action was not there. Plaintiff, a former employee, prevailed at trial on her claims against defendant, her former employer, for sexual harassment under Tex. Lab. Code Ann. § 21.051 and intentional infliction of emotional distress. The jury awarded the employee damages for mental anguish and punitive damages

under her sexual harassment claim. The jury also awarded damages for mental anguish and punitive damages under the intentional-infliction claim. The appellate court reversed the decision. However, the Supreme Court of Texas remanded the case back to the trial court for it to render judgment for the appropriate damages under the employee's sexual harassment claim. In *Hoffmann,* it was stated, "when the gravamen of the plaintiff's complaint is for sexual harassment, the plaintiff must proceed solely under a statutory claim unless there are additional facts, unrelated to sexual harassment, to support an independent tort claim for intentional infliction of emotional distress. We therefore reverse the judgment of the court of appeals and remand the cause to the trial court for rendition of judgment consistent with this opinion". Contrary to *Hoffmann*, the instant case is related to Defamation, not sexual

harassment. Therefore, *Hoffmann* is not applicable in the present scenario. The Respondents' reliance on *Hoffmann* was misplaced. Therefore, Petitioner's Defamation and IIED claims are not preempted by Chapter 21 as a matter of law. Petitioner added material evidence in the form of an Affidavit of Mario Gutierrez Diez, which clearly showed that his Defamation claim was not on the same set of facts as that of his statutory claims. Trial Court's analysis was based on an erroneous interpretation of persuasive authorities; the Fourteenth Court of Appeals erred in affirming Trial Court's judgment and not remanding Petitioner's common-law Defamation and IIED claim to the Trial Court for consideration on the merits.

The courts below erred in not maintaining the uniformity of the court's decision by not following *Perez v. Living Centers-Devcon*, (Tex. Ct. App. 1998)

963 S.W.2d 870 and erred in affirming that TCHRA preempted Petitioner's claim for Defamation and IIED.

In *Perez*, appellant employee brought a claim against appellee employer. Appellee removed the case to federal court and filed answers. A federal district court held that it lacked jurisdiction as appellant had not exhausted all her administrative remedies under Title VII of the Civil Rights Act, 42 U.S.C.S. § 2000e et seq. Following remand, the appellant amended her petition to add the common law claims of negligence, assault and battery, intentional infliction of emotional distress, and invasion of privacy. The trial court granted summary judgment in favor of appellee on the grounds that her claim must be considered under Title VII or the analogous Texas Commission on Human Rights Act (TCHRA), Tex. Lab. Code Ann. § 21, so that appellant must have exhausted all her remedies

under those acts. On appeal, the court reversed, holding that there was nothing in the legislative history of the TCHRA that indicated that Legislators meant for the TCHRA to preclude common law causes of action so that appellant could maintain her claims.

The Panel erred in not considering the TCHRA's text, specifically, the Legislature's stated purpose for enacting it. Although the act has been amended multiple times since it was first enacted in 1983, its original and current codification have always reflected that one of its primary purposes is "to secure for persons in this state…freedom from discrimination in certain employment transactions." Because discrimination, whether because of race, color, disability, religion, sex, national origin, or age, was not recognized as a tort under the common law, statutory remedies like TCHRA were necessary to provide a remedy for such misconduct. Therefore, the

next question is, whether the Legislature enacted TCHRA to limit recovery under the common law. The Court's analysis in *Perez* persuasively demonstrates that the answer to that question is "no." Accordingly, the Court in *Perez* concluded: "These purposes have remained virtually unchanged despite legislative amendments in 1989, 1993, and 1995. Notably, neither an intent to serve as an exclusive remedy, nor an intent to preclude common law causes of action, is contained within the stated purposes of the TCHRA. See TEX. LAB. CODE ANN. § 21.001 (Vernon 1996). Additionally, the statute contains no provision that implies the TCHR's administrative review system precludes a lawsuit for common law causes of action. Instead, the opposite proposition can be implied." *Perez v. Living Centers-Devcon*, supra at p. 963, 870.

"The right to jury trial guaranteed by the Sixth and Fourteenth Amendments "is a fundamental right,

essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Brown v. La.*, 447 U.S. 323, 330 (U.S. 1980); *Duncan v. Louisiana*. 391 U.S. 145, 158 (1968). 391 U.S. 145, 158 (1968).

Petitioner provided the material evidence in the form of an Affidavit of Mario Gutierrez Diez, stating that Petitioner did not forge the signatures, which clearly showed that his Defamation claim was not based on the same set of facts as that of his statutory claims. The trial court's analysis was based on an erroneous interpretation of persuasive authorities, and subsequently, the appellate court as well erred in affirming the trial court's judgment and not remanding Petitioner's common-law defamation claim based on the merits. The justices of the Supreme Court of Texas and the Fourteenth Court of Appeals of Texas failed to maintain the uniformity of

the court's decision by not following the controlling authority of *Perez* on the issue.

This Court should grant the Petitioner's Writ of Certiorari because the trial court deprived the Petitioner's right to substantive and/or procedural due process and equal protection of the laws by dismissing his Motion to Rehearing.

CONCLUSION

This Court must grant certiorari to correct an anathema to the Texas judicial system and repair the harm the judges did to Texas and federal constitutions, Texas case law, Texas Rules of Civil and Appellate procedure, and Texas and American jurisprudence. Petitioner complied with Texas case law, Texas Rules of Civil Procedure and the Rules of Appellate Procedure that were promulgated by the Texas Supreme Court. However, the judges not only ignored the state and federal constitutions, Texas case

law, Texas Rules of Civil and Appellate Procedures, but they did much more. They abandoned their impartiality and actively involved themselves in this case to benefit the Respondents. The judges' conduct put at risk the confidence every citizen in the State of Texas has in the fairness of Texas and American jurisprudence. Their conduct was not motivated by a fair and impartial judicial system but was motivated by the "spirit of evasion for the purpose of ignoring" Petitioner's constitutional right to a jury trial for the benefit of Defendants.

The Supreme Court of Texas failed to follow its controlling precedents and this Court's precedents in dismissing the suits based on failure to exhaust administrative remedies. The Supreme Court of Texas denied equal protection to the Petitioner.

Therefore, Petitioner prays this Honorable Court to grant the Writ of Certiorari and Order the

Fourteenth Court of Appeal to vacate the Mandate issued on January 25, 2022.

Respectfully submitted,

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