

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD L. WILBORN Pro Se

Petitioner

v.

ALEJANDRO N. MAYORKAS
United States Secretary
of Homeland Security

Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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U.S. Court of Appeals
Ninth Circuit
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Courthouse
95 7th Street
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Washington, DC 20530-0001

Counsel of Record Rule 34.1

QUESTION(S) PRESENTED

The following Questions are to provide notice of the grounds Petitioner seeks certiorari and resolve questions of particular importance.

- 1. Whether procedural due process under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States, denied by the District Court of Southern California and the U.S. Attorney's Office for the District of Southern California, are deprivation of a constitutionally protected liberty or property interest and a denial of adequate procedural protection.**
- 2. Whether the Civil Rights Act of 1964, (Title VII), the Civil Service Reform (CSRA), or USERRA violations, provide removal of jurisdiction given to federal courts to precluded federal employees, under the circumstances of the case.**
- 3. Whether this Supreme Court has subject matter jurisdiction of constitutional claims United States' has not waived sovereign immunity.**
- 4. Whether failure to state a claim under Fed. R. Civ. P. 12(b)(6) accepted as true warrant dismissal for lack of subject matter jurisdiction, without considering all allegations of material fact.**
- 5. Whether dismissal with prejudice for failure to state claim under Title VII facially challenges the validity of the statute, under CSRA claimed by Respondent as the only original forum for this case.**
- 6. Whether expunged EEOC case used to obstruct legitimate procedures for appealing personnel actions are fairly included herein.**

**LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOS
JUDGMENT IS SOUGHT**

Caption of the case contain all parties and name, Rule 14.1(b)(i).

**LIST OF AL PROCEEDING IN STATE AND FREDERAL TRAIL AND
APPELLATE COURT, THAT ARE DIRECTLY RELATED TO THE CASE IN
THIS COURT**

1. Court in Question: U.S. Federal District Court for the Southern

District of California;

a. Case Docket Number: 3:20-cv-01981

b. Caption on the Proceeding: Wilborn v. Wolf

Date of entry: October 28, 2021.

2. Court in Question; U.S. Court of Appeals for the Ninth Circuit.

a. Case Docket Number 21-56391

Date of entry: August 26, 2022.

RULE 29.6(c) CORPORATE DISCLOSURE STATEMENT

**There is no parent company or publicly held company, in which
Petitioner, owns, 10% or more of the corporation's stock, structured as a
corporation, business, home or establishment. etc.**

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JURISDICTION

Above titled section is intended to provides a brief preliminary statement of the basic jurisdictional facts.

Statutory source of Courts jurisdiction: Rule 14.1(e)(i) & (iv), 14(g)(i)-(ii) providing for inclusion of other jurisdictional material in the Statement of Case. No statement of notification required 14.1(e)(v), by 29.4(b) or (c).

Judgement of the Court of Appeals for the Ninth Circuit was entered April 26th, 2022, submitted August 17th, 2022, No. 21-56391 on Appeal from the United States District Court for the Southern District of California; No. 3:20-cv-01981, from the Final Agency Decision of the U.S. Dept. of Homeland Security August 31, 2015; Agency Case No. HS-CBP-01763-2014 and U.S Equal Employment Opportunity Commissions, Decision July 14th, 2020; Appeal No. 0120182404, Rule 14.1(b)(iii). now and previously naming the head of the Petitioners agency as the appropriate defendant, in all cases above. 42 § 2000e-5, & § 2000e-16(c).

Jurisdiction of this Court is preyed to be invoked under 28 U.S.C. § 1254(1), 28 U.S.C. §2101(c), Section 1&2 of Article III of the Constitution.

Standing invoked in Article III judicial power to decide only these cases, within and actual controversies, that the Supreme court can exercise its jurisdiction to determine the constitutionality of federal...and executive acts in the context of adjudging “legal rights of litigants in actual controversies.” *Liverpool S.S. Co. v. Commissions of Emigration*, 113 U.S. 33, 39 (1885).

STATEMENT OF THE CASE Rule 14.1(g)

Rule 14.1(g) calls for the inclusion in the petition for certiorari of a concise statement of the case setting out the facts material to consideration of the Questions present.

Rule 14.1(g)(ii) provides “[i]f review of a judgement of a United States court of appeals is sought,” the statement of the case shall also show “basis for federal jurisdiction in the court of first instance.

A. Factual Background

Court of Appeals jurisdiction.

The jurisdiction of the district court was entitled by Petitioner to invoke jurisdiction of Federal District Court being cited on face of complaint and amendments support alleging actions under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act 1972, 42 U.S.C. § 2000e et seq., Notice of Right to Sue, authority granting him permission to file a lawsuit to be enforced in federal court, Title VII's own venue provision (42 U.S.C. § 2000e-5(f)(3), federal venue statute generally applies when the court's subject matter jurisdiction is based on federal question or diversity jurisdiction (28 U.S.C. § 251391(a)(1)), 42 U.S. Code§ 2000e-3(a)'s "because of Retaliation, Fourth, Fifth and Fourteenth Amendments of Constitution, 42 U.S. Code§ 2000e-3(a)'s "because of Retaliation. And or 28 U.S.C. 1331 (General federal question jurisdiction).

Petitioner attempts to present a concise statement of the case's factual material questions, intending Statement of Case to be a short document.

B. Court of Appeals Decision (Memorandum)

On August 26th, 2022 U.S. Court of Appeals for Ninth (9th) Circuit entered its Memorandum, Affirming portions of the U.S. District Court of Southern California, district court's, Dismissal with Prejudice and without leave to amend of Petitioners based on failure to state a viable claim and Appeals court jurisdiction "dismissal under Fed. R. Civ. 12(b)(6) failure to state a claim explaining 12(b)(6) under 12(b)(1) case (subject matter jurisdiction) possible plain error. *Harper v. United States Dep't of Interior* United States District Court, D. Idaho November 12, 2021 571 F.Supp.3d 1147 116 Fed. R. Evid. Serv. 1924. The court will dismiss a complaint without leave to amend only when the deficiencies in the complaint could not be cured by amendment.

C. Procedures of District Court

Petitioner questions procedural due process review where the district court did not represent its jurisdiction to dismissal, denial of motion access under its Civil Rules 7.1, by perjury stating procedure under Civ.R. not undertaken; seen as obstruction or impeding of justice under color of law (oath) – Conduct: producing or attempting to produce a false, altered or counterfeit (material)document or record during an judicial proceeding.

D. Waiver of Sovereign Immunity by Congress Under Title VII

U.S. Attorney's office defended district court as its client while not stating any comment towards their same conduct to falsify case law.,, obstructing or impeding due administration of justice. SD § 3C1.1 Fifth and Fourteenth Amendments: substantive and procedural due process.

Sovereign immunity has been waved by Congress under Title VII;

- a. Other material essential to understanding the petition for review is Title VII waives the federal government's sovereign immunity with respect to lawsuits brought by federal employees (or applicants for federal employment) against their (current or prospective or former) employers alleging employment discrimination or retaliation by those employers. 42 U.S.C. § 2000e-16(c); see **Munoz v. Mabus**, 630 F.3d 856, 861 (9th Cir. 2010) ("Section 717 of Title VII ... provides an express waiver of sovereign immunity in suits against the government for discriminatory employment practices."). No. 13-1196 IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST WAXING V. WANG, Plaintiff-Appellant, v. EEOC, Defendant-Appellee On Appeal from the United States District Court for the District of Massachusetts (No. 12-10740).

E. Abuse of Discretion

Court of Appeals held that: dismissal of action for failure to state a claim, with prejudice and with opportunity to amend complaint, was abuse of discretion, and (2) dismissal of action with prejudice for failure to comply with court order or local rule was an "abuse of discretion Wheeler v.

Terrible Herbst Inc. U.S. Court of Appeals, Ninth Circuit, November 19, 2012 498 Fed. Appx. 707 2012 WL 5857425. After seven (7) months of attempted amendments based on clerical and local rule mistakes, approval of amended complaint was granted, dismissed without permission to amend, after one single approved complaint.

**F. Expunged EEOC Decision Used as Retaliation
While in the EEOC Process of Appeal**

Appeals courts presents that “the district court properly dismissed Wilborn’s (Petitioners) retaliation claim because Wilborn failed to allege facts sufficient to show there was a causal relationship between any protected activity and a materially adverse employment action

“The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a “because of” cause of the alleged adverse action by the employer. That question, of “because of” or “but for”, is better suited to resolution by courts closer to the facts of this case. The judgment of the Court of Appeals for the Fifth Circuit was vacated, and the case remanded for further proceedings consistent with this opinion. University of Texas Southwestern Medical v. Nassar Supreme Court of the United States June 24, 2013 570 U.S. 338133 S.Ct. 2517186 L.Ed.2d 503”

In Petitioner v. Dep’t of Interior, EEOC Petition No. 0320110050, July 16, 2014, the Commission found that the “but for” standard discussed in Nassar does not apply to retaliation claims by federal sector applicants or employees under Title VII or ADEA because the relevant federal sector statutory language does not contain the “because of”

language on which the Supreme Court based its holding in Nassar. . . (requiring but for" causation for ADEA claims. . .")

Petitioner v. Dep't of Interior, supra, the Commission clarified the causation standard for retaliation claims under Title VII or ADEA for federal sector applicants or employees that being "because of" statutory language.,

Plaintiff believes the legal standard for Agency's unlawful discriminatory action is Title VII prohibition against employers from discriminating against any of employee, . . . AMENDED COMPLAINT 20-cv-01981-LAB (BGS) Case 3:20-cv-01981-LAB-BGS Document 28 Filed 04/28/21

PageID.1821 Page 26- 27 "...because such employees have opposed any employment practice made unlawful by Title VII or because an employee has made a charge or participated in any manner in an investigation, proceeding or hearing under Title VII, 42 USC Section 2000e-3(a).

"The Agency shall expunge all evidence of Complainant's (5 day) suspension from his personnel file and all other Agency files." Aug. 20th, 2013. Case 3:20-cv-01981-LAB-BGS Document 1-2 Filed 10/07/20 PageID.66 Page 60 of 65, Lines 18-20" Because of Agency using this evidence, in violation of EEOC Administrative Judges ORDER, the Petitioner was retaliated against and issue January 30th, 2015 disciplinary order using the five day suspension to support agency action. This while Petitioner was still in the EEOC process not resolved until May 23rd, 2015; EEOC Appeal No. 0720140037, agency No. HSCBP006542010.

Statement of Case present in length as Appeals court presented five (5) statements, causes of action, requiring answers and questions regarding Statement of Case document.

REASONS FOR GRANTING WRIT(PETITION)

Rule 10: Consideration Governing Review of Certiorari

Petitioner believes “review on writ of certiorari is not a matter of right, but of judicial discretion. The following although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:” Conflict Between Decisions of Same Court of Appeals; Decisional Conflicts.

- (a) United States court of appeals has entered a decision in conflict with decision(s) of another United States court of appeal on the same important matter; has decided an important federal question in a way that. . .so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Courts supervisory power . . .(c) . . . or a United States court of appeal has decided an important question of federal law that has not been, but should be, settled by this court or has decided an important federal question in a way that conflicts with relevant decisions of this Court,”

“There is a (wide spread) *Circuit split* on this issue, as the First, Second, and Tenth Circuits have held the CSRA precludes constitutional claims seeking equitable relief. See Elgin v. U.S. Dep't of Treasury, 641 F.3d 6, 11–13 (1st Cir. 2011); Dotson v. Griesa, 398 F.3d 156, 179–82 (2d Cir. 2005); Lombardi v. Small Business Admin., 889 F.2d 959, 961–62 (10th Cir. 1989). But see Elgin, 641 F.3d at 13–18 (Stahl, J., concurring). The Fourth, Seventh, and Eleventh Circuits have left the question open. See Bryant v. Cheney, 924 F.2d 525, 528 (4th Cir. 1991); Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir.1996); Hardison v. Cohen, 375 F.3d 1262, 1266–67 (11th Cir. 2004).” Harper v. United States Dep't of interior, United States

District Court, D. Idaho. November 12, 2021571
F.Supp.3d 1147 116 Fed. R. Evid. Serv. 1924,
Footnote 11. 48 word count

These decisions have been left open invalidating acts of Congress.

A nationally binding rule is imperative not the the petitioner has suffered an individual injustice. Exampled Equal Employment Opportunity Commission will have to decide where a complaint such as the Petitioner will have to have his case decided, changing the present procedure on merit. Effect would be nationwide., changing the procedure on retaliation. The district court has presented... “an alternative remedy (to EEOC) is available through the Civil Service Reform Act (“CSRA”), which precludes Wilborn from bringing a private cause of action, in this case. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir.1991), Case 3:20-cv-01981-LAB-BGS Document 50 Filed 10/28/21 PageID.1948 Page 6

Claims for equitable relief present a federal question that is not precluded by the CSRA and can be addressed by this Court pursuant to 28 U.S.C. § 1331.

Id. at 1035 (quoting *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1977)) (internal quotation marks omitted); see also Whitman v. Dep't of Transportation, 547 U.S. 512, 513–14, 126 S.Ct. 2014, 164 L.Ed.2d 771 (2006) (per curiam) (in vacating and remanding to the Ninth Circuit, the Supreme Court held “The Court of Appeals was correct to say that 5 U.S.C. § 7121(a)(1) [of the CSRA] does not confer jurisdiction. Another statute,

however—a very familiar one—grants jurisdiction to the federal courts over ‘all civil actions arising under the Constitution, laws, or treaties of the United States.’ 28 U.S.C. § 1331. The question, then, is not whether 5 U.S.C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) removes the jurisdiction granted to the federal courts”). *Ibid* *Harper* 1167.

Supreme Court recognized Bivens claims for violations of the Fourth, Fifth, and Eighth Amendments. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); (Fourth Amendment); Davis v. Passman, 442 U.S. 228, 234, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). (Fifth Amendment)

CSRA does not preclude actions seeking equitable relief for constitutional violations) there is a two-part test for courts to employ when deciding whether a Bivens claim may proceed in a new context.⁷ See Wilkie v. Robbins, 551 U.S. 537, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007).

The first question the court must answer is “whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.”

The second prong requires that a court analyze “any special factors counselling hesitation before authorizing a new kind of federal litigation,” even in the absence of an alternative remedy.

Under Title VII, which Petitioner filed this case after exhaustion of EEOC administrative action Petitioners constitutional claims are not barred where CSRA does not preempt Title VII, as previously stated, Congress, this Supreme Court, and 9th Cir. represent the following:

- a. Title VII waives the federal government's sovereign immunity with respect to lawsuits brought by federal employees (or applicants for federal employment) against their (current or prospective or former) employers alleging employment discrimination or retaliation by those employers. 42 U.S.C. § 2000e-16(c); see *Munoz v. Mabus*, 630 F.3d 856, 861 (9th Cir. 2010) ("Section 717 of Title VII ... provides an express waiver of sovereign immunity in suits against the government for discriminatory employment practices."). No. 13-1196 IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST WAXING V. WANG, Plaintiff-Appellant, v. EEOC, Defendant-Appellee On Appeal from the United States District Court for the District of Massachusetts (No. 12-10740).
- b. Cases construing the sovereign immunity of the Federal Government also hold that conduct by federal officers forbidden by statute is not shielded by sovereign immunity even though the officer is not acting completely beyond his authority. See *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937); *Work v. Louisiana*, 269 U.S. 250, 46 S.Ct. 92, 70 L.Ed. 259 (1925);"

Personnel actions preclusion in this, case before this Court were the use of expunged case information to support proposal for disciplinary action while the matter was still on appeal in EEOC proceedings. Not personnel action so Bivens not precluded.

Nor was the use of the proposal ever stated to be initiated or improving the efficiency of the agency, rather just an action against the Petitioner.

In the context of the CSRA, which has been held to be a special factor counseling against recognizing a new Bivens claim, see Saul v. United States, 928 F. 2d 829, 840 (9th Cir. 1991), the Ninth Circuit has stated;

[T]he CSRA precludes even those Bivens claims for which the act prescribes no alternative remedy. The CSRA's comprehensive remedial provisions convince us that there was no inadvertence by Congress in omitting a damages remedy against.

The CSRA does not preclude non-personnel actions taken by federal employees against their subordinates. Id. at 1078, 1080 (holding that illegal search of employee's home was not a personnel action so Bivens claim was not precluded).

CSRA does not provide the "black letter" law that Title VII was given by Congress., that is and we quote:

"Unlawful Employment Practices"
SEC. 2000e-2. [Section 703],
(a) Employment practices
It shall be an unlawful employment practice for an employer-
(n) Resolution of Challenges to employment practices
implementing litigated or consent judgements, or orders...
(2) Nothing in this subsection shall be construed to-(D)
authorize or permit the denial to any person the due process of law required by the Constitution."

CSRA does not provide this guarantee and not preempting Title VII., in this matter before the Supreme Court, by the Constitution., it would deny due process where the statue does not secure due process as Title VII does. In vacating and remanding to the Ninth Circuit, the Supreme Court held “The Court of Appeals was correct to say that 5 U.S.C. § 7121(a)(1) [of the CSRA] does not confer jurisdiction. Another statute, however—a very familiar one—grants jurisdiction to the federal courts over ‘all civil actions arising under the Constitution, laws, or treaties of the United States.’ 28 U.S.C. § 1331. The question, then, is not whether 5 U.S.C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) removes the jurisdiction granted to the federal courts”). *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1977)) (internal quotation marks omitted); see also *Whitman v. Dep’t of Transportation*, 547 U.S. 512, 513–14, 126 S.Ct. 2014, 164 L.Ed.2d 771 (2006).

Finally the right to due process is believed conferred, not by legislative grace, but by constitutional guarantee. *Cleveland Bd. Of Educ. v. Loudermill*, Supreme Court of the United States arch 19, 1985 470 U.S. 532 105 S.CT. 1487. 83-1487, 1362, 6392. Again Title VII constitutional guarantee of due process is promised by CSRA and the Petitioner has presented jurisdiction to the district court, court of appeals and now to this Supreme Court as the Bill of Rights and America’s Declaration of the People’s Unalienable Civil Liberties.

Petitioner has continually presented claims of discrimination, retaliation and denial of benefits.. ."benefit of medical leave due Plaintiff's veteran military disability, was denied. Case 3:20-cv-01981-LAB-BGS Document 1

Filed 10/07/20 PageID 3 . . Petersen v. Department of Interior Merit Systems Protection Board. July 19, 1996 71 M.S.P.R. 227.

Defendants basing sovereign immunity, 38 §§ 4301(3)(c)(2), 38 U.S.C. § 4311(a)(b). 38 U.S.C. § 4324, 38 U.S.C. § 4327 . . . inapplicability of statutes of limitations.

Petitioner's claims are factual and sufficiently legal contrary to district courts determinations.

Although the term "retaliation" is not used in USERRA, the gravamen of this section is to prohibit adverse employment actions taken in retaliation for the exercise of the rights provided by USERRA. See Gagnon v. Sprint Corp., 284 F.3d 839, 853 (8th Cir.2002) (Section 4311(b) sets out "[t]he USERRA standard for retaliation claims"). Wallace v. City of San Diego United States Court of Appeals, Ninth Circuit. February 12, 2007 479 F.3d 616.

Where a plaintiff alleges constructive discharge in violation of a federal statute, constructive discharge is governed by a federal standard. See Pennsylvania State Police v. Suders, 542 U.S. 129, 141, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004) (setting out standard for constructive discharge under Title VII). *Ibid* Wallace Footnote 1 & 2.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: November 18, 2022

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Respectfully submitted,

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