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No. 23-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DR. GUANGYU WANG, Pro Se

Petitioner,

v.

NEVADA SYSTEM OF HIGHER EDUCATION,

Respondent.

ON 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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QUESTIONS PRESENTED

How to incorporate a human decision-making process and the anti-retaliation standard into a hierarch network processing model and why it matters to secure statutory remedial mechanisms available to the victims of retaliation under Title VII and related statutes.

PARTIES TO THE PROCEEDING

Petitioner: Dr. GUANGYU WANG, *PRO SE*

Respondent: NEVADA SYSTEM OF HIGHER EDUCATION

Petitioner, is not a corporation.

RELATED CASES

Guangyu Wang v. Nevada System of Higher Education, charge No. 480-2014-00657, U. S. Equal Employment Opportunity Commission, San Francisco District Office. Determination entered on June 26, 2017 along with Investigative Memorandum dated June 23, 2017.

Guangyu Wang v. Nevada System of Higher Education, No. 3:18-cv-75-MMD-CLB, U. S. District Court for Nevada, Reno. Judgement entered on May 10, 2021 along with decisions from November 6, 2018 to January 10, 2022.

Guangyu Wang v. Nevada System of Higher Education, No. 21-15981, U. S. Court of Appeals for the Ninth Circuit. Judgement entered on November 30, 2022 along with a decision dated December 15, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Guangyu Wang, *Pro Se*, respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS AND ORDERS BELOW

The decisions of the U. S. Court of Appeals for the Ninth Circuit appear at Appendix A are unpublished and reproduced at App. 1-6.

The decisions of the U. S. District Court for Nevada, Reno appear at Appendix B are unpublished and reproduced at App. 7-73.

The investigative memorandum and the determination of the U. S. Equal Employment Opportunity Commission, San Francisco District Office, appear at Appendix C are unpublished and reproduced at App. 74-83.

JURISDICTION

The Date on which the U. S. Court of Appeals for the Ninth Circuit decided my case was November 30, 2022

A timely petition for rehearing was denied by the U. S. Court of Appeals for the Ninth Circuit on the following date: December 15, 2022.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

□

STATEMENT OF THE CASE

Petitioner, Dr. Guangyu Wang ("Dr. Wang"), is a leading biomedical scientist of Asian descent who specializes in membrane transport and related diseases such as cystic fibrosis. When he worked at University of Alabama at Birmingham ("UAB"), he was awarded a small bridging four-year National Scientist Development Grant from American Heart Association ("AHA") with a high priority score in 2010. With that grant he was offered a position of the medical school faculty from University of Nevada Reno ("UNR") within respondent (Nevada System of Higher Education) to activate it (**Appendix D**).

After UNR signed a primary Award Agreement in June 2010 to contract that grant program with petitioner and the AHA from July 1, 2010 to June 30, 2014, both UAB and UNR signed the respective letters to transfer that grant from UAB to UNR in late June 2010. Two standard months later the AHA approved the grant transfer to allow respondent to start petitioner's AHA grant-dependent employment as a Research Assistant Professor in the Department of Pharmacology as shown in the preliminary offer letter. With the 4-year grant funds timely and completely transferred from UAB to respondent via petitioner, together with grant-associated funding materials including lab supplies and expensive cDNA samples that were created by petitioner and a part of his ongoing scientific experiments, respondent approved a

4-year grant budget to support petitioner's research program and his renewal after June 30, 2011 in favor of his applications of big grants from National Institute of Health ("NIH") (**Appendix E-a**).

Although his annual appraisal at UNR was excellent, petitioner was suddenly discharged by a new department chair Dr. Iain Buxton ("Buxton") in 2012, leaving petitioner's grant-associated experimental funding materials including lab supplies and expensive samples escrowed at UNR along with his active AHA grant upon a receipt signed by Buxton. Following that discharge, petitioner filed a lawsuit which was related to a race discrimination charge under Title VII against respondent in late 2012 (**Appendix E-b**).

Although the lawsuit had been settled in April 2013 and University of California Davis ("UC-Davis") had eventually offered petitioner a new approved faculty position beginning on June 1, 2013 until June 30, 2014 to secure petitioner's binding official application for a NIH grant with UC-Davis to be valid from a submission date June 3, 2013, petitioner claimed that Buxton, after learning of that offer for the transfer of petitioner's AHA grant from respondent to UC-Davis, still expressly referred to petitioner's lawsuit as misconduct or problem on June 18, 2013, and subsequently subjected him to a set of retaliation in different ways for filing the lawsuit (**Appendix E-b**). On the same day as June 18, 2013, Buxton called UC-Davis to provide a negative recommendation to prevent petitioner from securing that job offer. Meanwhile, he emailed a fiscal officer of respondent to prevent the grant transfer. Even if respondent signed the transfer letter in late June 2013 and the AHA finally approved the grant transfer in late August 2013 to allow petitioner's AHA grant funds and grant-associated funding materials including lab supplies and expensive

samples to be transferred timely and completely from respondent to UC-Davis via petitioner in the same obligated way as UAB did (**Appendices D-E**), Buxton still deducted tens of thousands of dollars from petitioner's active AHA grant account in violation of the Settlement Agreement of April 2013, and later he indicated that those funding materials escrowed at UNR had been discarded, barring petitioner from retrieving them from respondent while further threatening his personal security on UNR campus and badmouthing him in front of his colleagues (**Appendix E-b**).

In that regard, in 2014 petitioner filed a Title VII retaliation charge with the Equal Employment Opportunity Commission ("EEOC"), which, although misunderstanding the lab supplies and products as lab equipment, still determined in 2017 that respondent had retaliated against petitioner for filing the prior lawsuit against respondent by providing a negative reference to UC-Davis to prevent petitioner from securing a job offer (**Appendix C**). After exhausting his administrative remedies which did not satisfy both the EEOC and petitioner regarding that established violation of Title VII, petitioner filed a related suit in United States District Court for Nevada, Reno pursuant to the Right-to-Sue Letter from United State Department of Justice in 2018. In it, he alleged that Buxton's retaliated against him in violation of 42 U.S.C. § 2000e *et seq*, causing damages insofar as Buxton's retaliation caused UC-Davis to develop more and more concerns and reservations about its employment relationship with petitioner, resulting in (1) a delay of the AHA grant-independent start date at UC-Davis from June 1 to October 1, 2013 along with a loss of salary and benefits, (2) the non-renewal of his appointment at UC-Davis after June 30, 2014 along

with a loss of salary and benefits until now, and the termination of his active AHA grant before it ended on March 31, 2015, (3) a loss of other grant opportunities, (4) a loss of the grant-associated funding materials including lab supplies and expensive samples, and (5) accompanying emotional damages and reputation harm.

In the proceedings, the District Court construed petitioner's amended complaint as five advanced retaliation claims: the first two involving the negative reference, the third involving the funds deduction, the fourth involving the discarding of funding materials, and the fifth involving respondent's barring petitioner from retrieving his AHA grant-associated funding materials from respondent and related personal security threat and reputation damage (**Appendix B** at App 10, 17, 19-20, 27, 56). The District Court also concluded that petitioner was in fact retaliated against, at least in part, for his prior lawsuit against respondent (**Appendix B** at App 21-24), in agreement with the EEOC's prior determination (**Appendix C** at App 81-83). Nevertheless, it granted summary judgment in favor of respondent on the first four claims (**Appendix B** at App 34-44), and prevented petitioner from using the background evidence relating to the first four claims for jury trial on the final construed claim five (**Appendix B** at App 48-52). Then, a jury found in favor of respondent on the final construed claim and the District Court taxed costs against petitioner (**Appendix B** at App 53-54, 57-61, 72).

Following the jury's verdict, petitioner filed an appeal to the Ninth Circuit. That Circuit, in turn, reversed the taxation of costs but affirmed the District Court in all other respects separately on November 30, 2022 (**Appendices A-B**). Subsequently, petitioner filed a timely Petition for Panel Rehearing to address the

overlooked material points of fact or law. However, the Ninth Circuit denied that petition without any reasons on December 15, 2022 (**Appendix A**) and the mandate was issued on December 23, 2022. Following that final decision, petitioner filed a timely Motion to Recall the Mandate along with a Motion for Reconsideration on December 30, 2022 regarding the conflicted decisions between the Ninth Circuit and the Supreme Court, and the conflict of interest between the Ninth Circuit and the District Court or respondent. However, that Circuit denied both motions without any reasons on January 4, 2023. In this case, petitioner appeals to this Supreme Court.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10 of this Supreme Court in 2023, a party may appeal to the Supreme Court when a United States court of appeals 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.

In this Title VII retaliation case, respondent's retaliation has been established, at least in part, so that the entire case has the merits. On the other hand, this case involves very important questions of federal law on how to incorporate a human decision-making process and the anti-retaliation standard into a hierarch network processing model and why it matters to secure statutory remedial mechanisms available to the victims of retaliation under Title VII and related statutes (§ 2000e-3(a), § 2000e-5, § 1981a, § 1988, and Civil Rights Act of 1991). They are of particular significance because claims of retaliation are being made with ever-increasing frequency but the

inherently factual remedy may not always be warranted under the relevant federal law. After this Ninth Circuit has confirmed respondent's violation of Title VII, petitioner is entitled to inherently factual damages and costs under Title VII and the related statutes. At a minimum, reinstating petitioner's employment at UNR and sending petitioner's compensation claims for the inherently factual emotional injury from established wrongful conduct, which respondent does not dispute, should be ruled one way or another under the controlling federal law to secure robust protections against retaliation and statutory remedial mechanisms available to the victims of retaliation under the anti-retaliation provisions (§ 2000e-3(a) prohibits employer retaliation "because [an employee] has opposed . . . an unlawful employment practice . . . or . . . made a [Title VII] charge."; § 2000e-5(g)(1), in relevant part, states "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order . . . reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate."); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9th Cir. 2003) ("While objective evidence requirements may exist in other circuits, such a requirement is not imposed by case law in . . . the Ninth Circuit, or the Supreme Court." (internal quotation marks omitted); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir. 1994) (holding that compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms.).

However, after the Petition for Panel Rehearing was denied and the ensuing Motion for Reconsideration along with the Motion to Recall the Mandate was also denied, respondent goes unpunished upon a “hit-and-run” and thus is still free to retaliate against petitioner without any remedy available to him. In so holding, *Wang*, 2022 WL 17336215 at *1, the validity of Title VII law and policies would be significantly chilled. This chilling effect not only would thwart petitioner’s unfettered access to Title VII’s remedial mechanisms but also may affect many employees entitled to robust protection under an extensive range of important federal laws aimed at eliminating discrimination and retaliation. Therefore, terminating the case without any remedy available to petitioner is inappropriate, particularly when the Ninth Circuit not only overlooked the points of law or fact, but also entered several erroneous decisions in a separate way that directly conflicts with this Court’s relevant decisions on the same or similar matters, raising very important questions of federal law on: 1) how to incorporate a human decision-making process and the anti-retaliation standard into a hierarch network processing model under Title VII (§ 2000e-3(a)), and (2) why it matters to secure statutory remedial mechanisms available to the victims of retaliation under Title VII and related statutes (§ 2000e-5, § 1981a, § 1988, and Civil Rights Act of 1991). Therefore, there is an overriding need to settle them in this Court to keep national uniformity by using this representative vehicle case.

I. People’s decision-making and related conduct are based on a biological neural network model

Decision-making is a vital component of human behavior and based on the brain's computational capabilities. However, the brain is a complex biological system that processes information by way of billions of neurons organized in intricate networks. The brain-based decision-making involves the synthesis of different kinds of information: multimodal sensory inputs, autonomic and emotional responses, past associations, and future goals. These inputs must be integrated with information regarding uncertainty, timing, cost-benefit, and risk for appropriate actions. Thus, a simple analysis to break down a problem into its constituent components to study their behavior is not enough and effective to test hypotheses and to solve problems in the world of man. Instead, systematic neural network models are required to synthesize components and thus to illuminate how brain functions at multiple levels of the mechanisms from the transformation of inputs into the neural activity to the execution of a specific task. As a critical and systematic link between structure and function, neural network models from bottom-up to top-down are powerful tools to establish a causal chain from the recurrent feed-forward or feed-back input, elements of a circuit, network activity to eventual behavior, which are sometimes difficult to explore experimentally. In order for a model to help understand the mechanisms that enable behavior in biological circuits, three principles are critical to design network models: (1) strict biological constraints are necessary to establish the linear or nonlinear connectivity strength or weights or motifs (2) the network activity should match the recorded activity, and (3) the minimal network should be able to perform the task of interest. For complex behavioral tasks, artificial neural networks and machine learning-based training can help achieve

these goals (*Fellows LK*. The Cognitive Neuroscience of Human Decision Making: A Review and Conceptual Framework, V3(3), *Behav Cogn Neurosci Rev.* 159-172 (2004); *Peterson JC, Bourgin DD, Agrawal M, Reichman D, Thomas L, Griffiths TL*. Using large-scale experiments and machine learning to discover theories of human decision-making. V372 (6547). *Science* 1209-1214 (2021); *Lin B. Bouneffouf D. & Guillermo Cecchiet G.*, Predicting human decision making in psychological tasks with recurrent neural networks. V17(5). *PLOS One.* e0267907 (2022); *Timón LB, Ekelmans P, Kraynyukova N, Rose T, Busse L and Tchumatchenko T*. How to incorporate biological insights into network models and why it matters, in press. *J Physiol.* doi: 10.1113/JP282755 (2022)).

II. Systematic synthesis is needed to form an Analytical Hierarchy Network Processing (“AHNP”) model from parts for reasonable decision-making

When people make decisions across the boundaries of a variety of areas of information, systematic synthesis is necessary to form an Analytic Hierarchy Network Processing (“AHNP”) model from parts for reasonable decision-making. Because people are always biologically equipped to indicate intensity of dominance throughout the lifetime (equal, moderate, strong, very strong, and extreme), this model can help people to synthesize priorities in addition to using analysis and applying judgments in each area to create these priorities. In general form, the AHNP model has a strictly-imposed layered structure and involves cycles between clusters and loops within the same cluster to allow not only subsequent extraction of information features from input but also simultaneous

consideration of several factors and multi-criteria at different levels throughout the entire analysis. In this model it is unnecessary to compare levels according to influence because they are already arranged in a predetermined order of importance from top to bottom. When it uses a supermatrix approach to incorporate component dependence and interdependence and feedback, the whole network cannot be divided into two or more disconnected parts in a decision system, or it makes no sense to determine the influence of one part on another via a signal transduction. (*Saaty & Vargas, Decision Making with the Analytic Network Process, 2nd Edition, Springer, 1-40 (2006)*).

When modeling a problem, people need a hierarchic network structure to represent that problem, as well as pairwise comparisons to establish relations within the structure. Paired comparison judgments in this AHNP model are applied to pairs of homogeneous elements. Relative influence may be then evaluated in terms of importance, preference or likelihood with priorities. Sensitivity analysis is finally used to determine the stability of the best outcome subject to perturbations in judgments. When the context of benefits, opportunities, costs, and risks ("BOCR") is introduced to this AHNP model, it is possible to identify, classify, and arrange all the factors and interests that influence the outcome of a decision. A decision is only as reasonable as the framework, which people use to represent its clusters, their elements, and the connections, faithfully reflects what people perceive in the real world with high sensitivity. (*Saaty & Vargas, Decision Making with the Analytic Network Process, 2nd Edition, Springer, 1-40 (2006)*).

When people analyze causal influences and their effects to test a hypothesis and to solve a problem, this AHNP method is better than a traditional way in which

deductive logic uses assumptions to deduce an outcome carefully. The reason is simple. Although this traditional linear and one-by-one approach allows several separate conclusions to be available, logic tells people little or nothing about how to bring the different conclusions into an integrated outcome in a consistent way. Particularly in front of the poor assumptions and the faulty reasoning, people's imagination and experience used in this traditional analytical approach cannot guarantee to discover the truth. (Saaty & Vargas, *Decision Making with the Analytic Network Process*, 2nd Edition, *Springer*, 1-40 (2006)).

In contrast, when all the involved factors and criteria are introduced in advance into this hierarchy network system that allows for dependence and interdependence and feedback and cycles along the flow of influence in the supermatrix, all possible outcomes can be merged together structurally along several paths to allow both judgment and logic to be used to evaluate the relative influence from which the overall answer can be derived. In this case, the many apparent influence roles presumably arise from the functional plasticity at the different levels, lending importance to a detailed characterization of mode-dependent mechanisms along with their cross-talk or cooperativity or interdependence and relationships, which in turn decrease the signal noise of alternative perturbations and thus increase the sensitivity of the final outcome to the involved factors and criteria, and reinforce the stability of the final outcome. This approach needs subjective expert knowledge and experience along with feelings and intuition rather than the ability to reason logically to decide the outcome unerringly. In particular, when some matter of low importance that is determined with logical certainty is found to be cumulatively influential because of its indirect

relationship with other important factors, this method can generally result in a sound overall outcome about the real world that the traditional analytical way may not capture precisely and thoroughly. In this regard, the AHP model is more likely to be a strongly more effective decision-making tool in practice than the traditional one (*Saaty & Vargas, Decision Making with the Analytic Network Process, 2nd Edition, Springer, 1-40 (2006)*).

III. This Title VII retaliation case has a hierarchy network structure naturally under the anti-retaliation standard

Regarding the Title VII retaliation, the Supreme Court has decided that the protected activity must be a but-for cause of the alleged adverse action or the prohibited conduct by the employer to establish subsequent damages (see *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)). As relevant here, this Title VII retaliation case naturally has a general form of hierarchy network structure under the anti-retaliation standard (**Appendix E-b**). It has 10 strictly-imposed layers that are organized in a predetermined order of importance from top to bottom. According to the anti-retaliation standard, the most important thing should be the protected activity on the top. The next is the alleged adverse employment actions or the prohibited conduct that resulted from the protected activity. The following layers are the damages that were caused by the adverse employment actions with different weights. In this Title VII retaliation case, petitioner's prior lawsuit against respondent in 2012 was the protected activity and served as the root and unique cause. However, respondent called that lawsuit as misconduct or

problem in June 2013 and then had a whole set of alleged adverse employment actions from June to October 2013. They included the negative reference to UC-Davis, the deduction of petitioner's AHA grant funds and the discarding of petitioner's grant-associated funding materials. The negative reference had also a negative inner-dependent feed-back loop to stimulate the deduction and the discarding across respondent (**Appendix E-b**).

As a result, UC-Davis had concerns about its relationship with petitioner. This concerns, once was spontaneously enhanced across UC-Davis via an inner-dependent feedback loop, caused three negative effects on petitioner's employment terms and conditions at UC-Davis. The first was that petitioner's AHA grant-independent start date was delayed from June 1 to October 1, 2013; the second was that petitioner's 2-year AHA grant budget was shortened to 1 year, increasing budget pressure; the third was that petitioner's resubmission of big grant applications from the NIH was disrupted. While the first two also affected the third, all these three negative effects had an interdependent feed-back to further strengthen UC-Davis' concerns about its employment relationship with petitioner. When more and more concerns increased cost and risk but decreased benefit and opportunity, UC-Davis' long-term research program for all participants including petitioner, although had been approved, was finally inactivated from an open state. In the end UC-Davis declined to renew petitioner's employment after June 30, 2014 and the AHA subsequently terminated petitioner's active grant also after June 30, 2014. As a direct and indirect result, respondent's whole set of alleged adverse employment actions brought about petitioner's huge damages. They included, but are not limited to, the loss of salary and

benefit, grants, funding materials, good reputation, as well as emotional hurt (**Appendix E-b**).

In sharp contrast, as shown in Appendix E-a, petitioner had no prior lawsuit against UAB in 2010. Subsequently, UAB did not take any adverse employment action or the prohibited conduct as respondent did later. Instead, UAB timely and completely transferred petitioner's four-year grant funds and grant-associated funding materials to respondent via petitioner (**Appendix E-a**). As a consequence, petitioner's 4-year AHA grant budget was not shorted by respondent. Although petitioner's AHA grant-dependent start date was delayed from July 1 to October 1, 2010, petitioner's application of big grants from the NIH was not affected because his experimental research under the AHA grant was still ongoing. Hence, petitioner's research program was still maintained in an activated state, and his employment was also renewed for another year after June 30, 2011 along with his active AHA grant until respondent had the new department chair, Dr. Iain Buxton, as petitioner's supervisor in 2012 (**Appendices D-E**).

Taken together, in this hierarch network structure from top to bottom along the flow of influence, subsequent extraction of retaliation information features was originated from the same and unique input—petitioner's 2012 lawsuit against respondent as the protected activity. Respondent's whole set of three inter-dependent alleged adverse actions and three resultant inter-dependent negative effects on the employment relationship between UC-Davis and petitioner could be considered synthetically at the same time. When it uses a supermatrix approach to converge component dependence and interdependence and feedback and circles, the whole network cannot be divided into two or more disconnected parts in the

decision system. Otherwise, it makes no sense to determine the influence of one part on another via the signal transduction along petitioner's employment chain (**Appendices D, E-b**). More importantly, the negative but-for control further weakened the signal noise of alternative perturbations but enhanced the sensitivity of UC-Davis' response to respondent's whole set of alleged adverse employment actions and thus stabilized the final outcome (**Appendices D-E**). In this regard, the AHNP model should be used as a strongly more effective tool to help decision-makers correctly establish a causation link that can faithfully mirror what actually happened in this real Title VII retaliation case. However, the Ninth Circuit did not do in that way.

IV. The Ninth Circuit entered several erroneous decisions in a separate way that directly conflicts with the Supreme Court's relevant decisions on the same or similar matters when not using the AHNP model to review the relevant claims together as a whole network under the anti-retaliation standard

A. The Ninth Circuit entered an erroneous decision in a separate way that directly conflicts with this Court's relevant decision when not using the common and unique but-for cause to link respondent's whole set of relevant alleged adverse employment actions together as a whole network under the anti-retaliation standard

Regarding the liability of the retaliation claim brought under § 2000e-3(a), the Supreme Court has decided that the protected activity must be a but-for

cause of the alleged adverse action or the prohibited conduct by the employer (see *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)). In this case, respondent agreed that petitioner's prior lawsuit against respondent in 2012 was a common and unique protected activity before Buxton's whole set of subsequent alleged adverse employment actions in 2013. Despite respondent's negative reference on June 18, 2013, deduction of funds from petitioner's AHA grant on September 26, 2013, and discarding of petitioner's grant-associated funding materials including lab supplies and expensive samples on October 15, 2013, the record evidence demonstrated that Buxton had initiated an instantaneous alleged retaliatory signal along petitioner's employment chain from the upstream to the downstream almost at the same time as Buxton called petitioner's protected activity as misconduct or problem on June 18, 2013 (**Appendices D, E-b**). Regarding petitioner's prior lawsuit against respondent, on the same day he called petitioner's hiring official Peter Cala at UC-Davis to provide a negative reference. On the other hand, on the same day he emailed the grant officer Charlene Hart at UNR to prevent the transfer of petitioner's AHA grant from UNR to UC-Davis via petitioner no matter whether his grant funds were equivalently costed as experimental funding materials or not. Furthermore, the negative reference, once had expanded across respondent via the inner-dependent feed-back loop, also promoted the deduction of petitioner's AHA grant funds and the discarding of petitioner's grant-associated funding materials. Therefore, these three organic action parts, once joined together as a whole network, cannot be separated. Pursuant to the Civil Rights Act of 1991 Sec 105a(k)(1)B(i), "if the complaining party can demonstrate to the court that

the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice." In this case, once the common and unique but-for cause served as the same recurrent input signal to promote synchronicity and had inherently triggered the same signal transduction along petitioner's employment chain sequence, and thus linked Buxton's whole set of several subsequent alleged adverse employment actions from June 18 to October 15, 2013 together, those actions should be reviewed and ruled together as one employment practice consisting of homogeneous elements in the same cluster of the AHNP model. However, the Ninth Circuit failed to do so. In fact, it has never mentioned petitioner's prior lawsuit against respondent as the common and unique but-for cause of Buxton's subsequent whole set of alleged adverse actions. In holding that "Wang alleged separate claims arising from specific distinct acts", it separately reviewed and ruled on each of them in a way that not only absolves respondent of liability but also directly conflicts this Court's decision regarding the but-for cause for the anti-retaliation standard (Appendix A).

B. The Ninth Circuit entered an erroneous decision in a separate way that directly conflicts with this Court's relevant decision when not using the extended range of the adverse employment action to review construed claims three and four along the same employment chain under the anti-retaliation standard

The Supreme Court has extended the anti-retaliation standard (see *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006)). It states:

“[A] Title VII retaliation claim need not be supported by an adverse action that materially altered the terms or conditions of the plaintiff’s employment; instead an allegedly retaliatory action is subject to challenge so long as the plaintiff can show that ‘a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”

However, the Ninth Circuit still disregarded that much broader range of employer’s adverse conduct and related facts, absolving respondent of liability. Thus, its rulings on the third and fourth construed claims were irrelevant to the adverse actions, and that irrelevant or separate way factually conflicts with this Court’s relevant decision regarding the extended anti-retaliation standard (**Appendix A**).

Regarding the construed claim three, it is utterly irrelevant who cut the check because petitioner’s claim relates to the deduction of funds more than \$21,589.02 from his AHA grant account on September 26, 2013 (which is undisputed in violation of the Settlement Agreement of April 2013) and not the issuer of his settlement check. However, the Ninth Circuit still held that “undisputed evidence showed that the prior settlement amount of \$21,589.02 was paid by the State of Nevada and not from Wang’s grant.” (**Appendix A**). In so holding, it failed to use that extended standard to determine whether the deduction prevented the more funds from being available to UC-Davis in favor of

petitioner's renewal along his employment chain, and thus constituted an adverse action that would dissuade a reasonable worker from making or supporting a charge of discrimination, particularly when construing the facts that UAB did not deduct any funds from petitioner's active AHA grant (**Appendix E-a**), and that UNR did not deduct over \$30,000 from petitioner's active grant account until Buxton complained about petitioner's prior lawsuit to the fiscal official at UNR (**Appendix E-b**), and thus in the light most favorable to petitioner.

Similarly, regarding the construed claim four, in holding that "NSHE had no duty to preserve lab supplies purchased with university funds and that the university's obligations under a prior settlement agreement extended only to two equipment items unrelated to the lab supplies, obligations that NSHE satisfied." (**Appendix A**), this Ninth Circuit never used that extended standard to determine if the discarding of those grant-associated funding materials factually constituted an adverse action that would dissuade a reasonable worker from making or supporting a charge of discrimination, particularly when construing several facts in the light most favorable to petitioner: 1) those tens of thousands of dollars of petitioner's grant-associated funding materials including lab supplies and cDNA samples were necessary for petitioner to bridge his previous research with his recombinant DNA reassurance under his active grant at UNR to secure more big funds from the NIH available to UC-Davis in favor of petitioner's renewal along his employment chain (**Appendix D**); 2) UAB timely and completely transferred those grant-associated funding materials to UNR via petitioner and thus those funding materials were not owned by UNR and should be transferred to UC Davis in the same obligated way as UAB did

(**Appendices D-E**); 3) UNR contracted petitioner's AHA grant program with petitioner and the AHA upon the signed primary Award Agreement effective from July 1, 2010 to June 30, 2014 (**Appendix D**), which, in relevant part, superseded the Settlement Agreement signed by only petitioner and respondent; 4) the individual who discarded petitioner's grant-associated funding materials including lab supplies and expensive samples became hostile to petitioner after he filed his lawsuit expressly because he filed a lawsuit (refusing to sign petitioner's grant transfer because of his "concern regarding [petitioner's] law suit"). Of special note, petitioner had requested that UNR preserve his samples on two occasions, prompting the District Court to find a "factual dispute" that "there was, perhaps, an understanding the lab supplies would be kept, and that they were not kept because of the protected activity." Needless to say, that express holding at trial on the final construed claim five in petitioner's complaint factually contradicts the summary judgment it entered on the construed claim four (**Appendix B** at App 41-44), warranting a reversal of the summary judgment grant on petitioner's fourth construed retaliation claim.

C. The Ninth Circuit entered an erroneous decision in a separate way that directly conflicts with this Court's relevant decision when not using the common and unique but-for cause to link the relevant retaliation-induced damages together as a whole network under the anti-retaliation standard

Regarding the damages of the retaliation claim brought under § 2000e-3(a) and § 2000e-5 and relevant statutes, the Supreme Court has emphasized that the protected activity must be a but-for cause of the alleged

adverse action or the prohibited conduct by the employer to establish subsequent damages (see *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)). In this case, the alleged adverse employment actions by respondent, which stemmed from the common and unique protected activity—petitioner’s prior lawsuit against respondent in 2012, triggered the common retaliatory signal along petitioner’s employment chain in 2013. When this signal transduced along the same employment chain to UC-Davis, UC-Davis developed more and more concerns and reservations about its employment relationship with petitioner (**Appendices D, E-b**).

First, only three days after Buxton’s retaliatory call was petitioner’s AHA grant-independent start date delayed, inhibiting his ability to meet the programmatic needs by timely getting sufficient experimental data physically at UC-Davis to make progress on his research and to secure more funding for his renewal (**Appendices D, E-b**). *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) (“[E]vidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant.”); *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011) (“A plaintiff may also raise a triable issue of pretext through evidence that an employer’s deviation from established policy or practice worked to [his or] her disadvantage.”). Similarly, petitioner provided evidence that his employment was not renewed by UC-Davis at least because of the retaliatory call, thereby demonstrating damages through the loss in salary and benefits and grant funding that resulted from the nonrenewal (“In late February or early March of 2014, Zheng told Plaintiff that the faculty in the UC-Davis Med department had

known about Plaintiff's lawsuit," and that "he would not have employed Plaintiff if he had known about Plaintiff's prior lawsuit against UNR" shortly before issuing his nonrenewal."; terminating Wang's AHA funding due to the nonrenewal at UC-Davis).

Second, the deduction of the funds from petitioner's active AHA grant further increased budget pressure on UC-Davis and thus prevented petitioner from securing a two-year budget and more short-term funding available to UC-Davis for his renewal (**Appendices D, E-b**).

Finally, the discarding of petitioner's AHA grant-associated funding materials including lab supplies and expensive samples completely stopped him from timely getting enough experimental data physically at UC-Davis to make progress on his research and to secure more long-term program funding for his prolonged employment at UC-Davis as approved (**Appendices D, E-b**). Meanwhile, all these three negative economic fluctuations not only disrupted petitioner's long-term program funding and set back petitioner's research and affected petitioner's performance at UC-Davis but also in turn reinforced UC-Davis' concern about its employment relationship via the inter-dependent feedbacks. When the concern across UC-Davis was further exacerbated spontaneously to arrive at a possible singular point that cost and risk exceeded benefit and opportunity to destabilize or to inactivate the long-term research program for all participants including petitioner throughout their lifetime, UC-Davis declined to reappoint petitioner after June 30, 2014 due to "programmatic needs" (**Appendix E-b**).

In sharp contrast, respondent had never concerned about the employment relationship between respondent and petitioner before July 1, 2011 and thus

renewed his employment after June 30, 2011 until Buxton became petitioner's new supervisor and department chair in 2012 (**Appendix E-a**). In this case, when the common and unique but-for cause was used, combined negative economic effects exerted by respondent's common alleged retaliation signal along the same employment chain materially prevented petitioner from meeting programmatic needs for his renewal at UC-Davis, and thus weakened petitioner's employment relationship with UC-Davis and finally inactivated the long-term research program from the open faculty position approved by UC-Davis, particularly (1) when his ability to obtain funding was a very important part of his role at UC-Davis, and (2) Dr. Zheng, petitioner's immediate supervisor at UC-Davis, testified that petitioner had "a rough ride" getting set up at UC-Davis, and that petitioner had disappointed him by not obtaining more grant funding or making progress on his research at UC-Davis. In other words, it was the common and unique protected activity—petitioner's prior lawsuit against respondent in 2012—that resulted in respondent's whole set of alleged adverse employment actions and subsequent petitioner's nonrenewal at UC-Davis after June 30, 2014, and other related damages including the termination of petitioner's active faculty position-based AHA grant by the AHA after June 30, 2014 (**Appendices D, E-b**). Pursuant to the Civil Rights Act of 1991 Sec 105a(k)(1)B(i), "if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice." In that regard, the damages induced by the same root but-for cause by way of one alleged adverse employment practice should be considered together.

However, in holding that “Wang alleged separate claims arising from specific distinct acts”, this Ninth Circuit separately reviewed the damages as to the first two established retaliation claims, and ruled that “Wang failed to establish damages from” the retaliatory call that Dr. Buxton made to petitioner’s supervisor at UC-Davis (**Appendix A**). Thus, that circuit did not use this common and unique but-for cause to link petitioner’s damages together as a whole network and entered an erroneous decision in a separate way that not only absolves respondent of damages but also directly conflicts with this Court’s relevant decision on the same important matter.

D. The Ninth Circuit entered an erroneous decision in a separate way that directly conflicts with this court’s relevant decision when not using the common and unique but-for cause to link all the relevant claims together as a whole network for a fair jury trial under the anti-retaliation standard

The Supreme Court has established that Title VII allows an employee to use “prior [discrete] acts as background evidence in support of a timely claim.” (see *Nat’l R.R. Passenger Corp v. Morgan*, 536 U.S. 101, 113 (2002)). Regarding the fifth construed claim, respondent’s retaliatory action—barring petitioner from retrieving his grant-associated funding materials including lab supplies and expensive samples from UNR that allegedly were very important to his past and future experimental research under his active grant—arose out of the parties’ employment relationship along petitioner’s employment chain (**Appendix B** at App 19). Therefore, “A plaintiff may seek relief for retaliatory actions taken after her employment ends if

‘the alleged discrimination is related to or arises out of the employment relationship.’” *Hashimoto v. Dalton*, 118 F.3d 671, 675 (9th Cir. 1997) (quoting *Passer v. Am. Chem. Soc’y*, 935 F.2d 322, 330 (D.C. Cir. 1991)).

When construing the background evidence relating to the first four claims and respondent’s retaliation established by the EEOC and the District Court, together with the negative control about petitioner’s renewal at UNR from July of 2011 until June of 2012 upon the timely and completely transfer of those funding materials from UAB to respondent in the absence of a prior lawsuit against UAB (**Appendix E-a**), in the light most favorable to petitioner, a rational jury could find that respondent’s retaliatory action would dissuade a reasonable worker from making or supporting a charge of discrimination. However, in so holding that the “district court did not abuse its discretion by excluding evidence relating to the first four claims from the jury trial on the fifth claim” (**Appendix A**), the Ninth Circuit entered an erroneous decision on construed claim five in a separate way that not only absolves respondent of liability and damages but also directly conflicts with the Supreme Court’s relevant decision regarding the background evidence in Title VII.

Although petitioner listed his factual allegations in five numbered paragraphs and the “party who brings the suit is the master to decide what law he will rely upon,” *Caterpillar Inc v. Williams*, 482 U.S. 386, 392 n.7 (1999) (internal quotation marks omitted), the manner in which petitioner plead his complaint made clear that each of the five paragraphs was part of *one* claim that *one* individual at UNR had engaged in *one* conscious plan to ruin his career development in an induced hostile work environment (pleading that “Iain Buxton . . . intentionally retaliated against me . . . to

deprive my grant-dependent employment opportunities.”). And in *Nat’l R.R. Passenger Corp v. Morgan*, 536 U.S. 101 (2002), the Supreme Court drew a distinction between “[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire,” *id.* at 114, that “occurred on the day that it happened,” *id.* at 110 (internal quotation marks omitted), and claims that are “based on the cumulative effect of individual acts” and “cannot be said to occur on any particular day.” *Id.* at 115.

As applied here, at least each alleged action had been involved in each harm petitioner alleged but the cumulative effect of the retaliatory call along with the funds deduction and the discarding of his years of research funding materials eventually undermined his relationship with UC-Davis enough to result in its non-renewal. According to the Civil Rights Act of 1991 Sec 105a(k)(1)B(i), “if the complaining party can demonstrate to the court that the elements of a respondent’s decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.”. Accordingly, Buxton’s actions should have been treated as one set of unlawful unemployment practice made up of a series of concrete acts in a whole network rather than five separate discrete acts that bore no relation to one other. *Porter v. Cal. Dep’t of Corr.*, 419 F.3d 885, 893 (9th Cir. 2005) (“[T]o determine whether all of these events constitute ‘one unlawful employment practice. . . we consider whether the earlier and later events amounted to the same type of employment actions, occurred relatively frequently, [or] were perpetrated by the same managers.” (internal quotation marks omitted)). Thus, the Ninth Circuit erred in not reviewing the cumulative and inter-dependent negative effects of those claims together on

the grounds that they were not individually actionable with enough respective weights in a whole network. *Morgan*, 536 U.S. at 115 (acknowledging that there are Title VII claims “based on the cumulative effect of individual acts” that “may not be actionable on [their] own.”); *Green v. Brennan*, 578 U.S. 547, 575 (2016) (Alito, J., concurring) (explaining that “an act contributing to a hostile work environment need not be independently actionable by dint of its *severity*” because a “hostile work environment claim is based on the *cumulative* effect of individual acts that may not sufficiently affect the conditions of employment to implicate Title VII unless considered in the aggregate.” (internal quotation marks omitted)). What is more, in fact, this Ninth Circuit has decided that “[c]ausation may be found even if there are multiple links in the chain connecting the defendant’s unlawful conduct to the plaintiff’s injury” so long as the links that comprise the chain are plausible. (see *Mendia v. Garcia*, 768 F.3d 1009, 1012-13 (9th Cir. 2014)).

However, in holding that “Wang alleged separate claims arising from specific distinct acts”, it separately reviewed and ruled on each of them including the final construed claim in a separate way that directly conflicts this Court’s decision (**Appendix A**), particularly when the common and unique but-for cause has actually linked all the relevant claims of retaliation and damages together as a whole network in this Title VII retaliation case for a fair jury trial, and when reinstating petitioner’s employment at UNR and the emotional damages have never been sent for jury trial after both the EEOC and the District Court have established respondent’s retaliation as to the first two construed claims (**Appendices B and C**).

E. The Ninth Circuit entered an erroneous decision in a separate way that directly conflicts with this Court's relevant decision when disregarding the inherently factual damages as a result of respondent's established retaliation under the anti-retaliation standard.

In a similar Title VII retaliation case (*Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)), the victim Dr. Naiel Nassar was eventually awarded over \$400,000 in backpay and more than \$3 million in compensatory damages. The District Court later reduced the compensatory damages award to \$300,000 although there is no cap under § 1981a and Civil Rights Act of 1991. When that case was appealed to the Supreme Court, even if the but-for cause was used, the relevant remedies were not affected. However, the Ninth Circuit's rulings did not relate petitioner's any relief such as backpay and compensatory damages to the established retaliation (**Appendix A**), particularly when (1) the common and unique but-for cause has factually linked both retaliation and damages together as a whole network that cannot be inherently divided into two parts, and (2) Buxton's retaliatory call has been established and involved in the delay of petitioner's AHA grant-independent start date from June 1 to October 1, 2013 at UC Davis and petitioner's non-renewal at UC-Davis after June 30, 2023 and other relevant damages including emotional and reputation hurt as the EEOC determined (**Appendix C**). Thus, the Ninth Circuit's separate ruling way not only absolves respondent of damages but also directly conflicts with this Court's relevant decision regarding the retaliation-induced damages from the same but-for cause.

V. The human decision-making process and the anti-retaliation standard need to be incorporated into the AHNP model to secure the statutory remedial mechanisms available to the victims of retaliation under Title VII and related statutes

Causation is a complicated concept for the decision-makers such as judges or juries in the best of circumstances to establish as a necessary step to mirror an employer's real decision-making process. Regarding the Title VII retaliation claims, this Court has decided that the protected activity must be a but-for cause of the alleged adverse action or the prohibited conduct by the employer to establish subsequent damages (see *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013)). On the other hand, in *Gross* (*Gross v. FBL Financial Group, Inc.*, 557 U.S. 167 (2009)), this Court realized:

“It is one thing to require a typical tort plaintiff to show “but-for” causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of “but-for” causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a “but-for” relation when we consider, not physical forces, but the mind-related characterizations that constitute motive.”

Hence, the proper and actionable uniform causation standard structure model under Title VII §2000e-3(a) to secure the implementation of §2000e-5 and relevant statutes have central importance to the fair and

responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency but the relevant remedy may not always be warranted under the relevant federal laws.

Regarding a Title VII retaliation case, when a simple and sequential causation link among constituent tangible components exists, a linear analytical hierarch processing ("AHP") model with three levels of a goal, criteria, and alternatives is enough to analyze problems in details, to allow both deductive and inductive thinking without use of the syllogism, to test hypotheses, and to solve problems with one by one conclusions in an outcome. (*Saaty & Vargas, Decision Making with the Analytic Network Process, Springer, 2nd Edition, 1-40 (2006)*). For example, in *NASSAR*, NASSAR complained about his supervisor's harassment at UTSMC. Consequently, that supervisor objected to a job offer from a UTSMC-affiliated hospital and the job offer was thereby withdrawn. Once the retaliation was established upon jury trial, NASSAR was awarded in the form of backpay and compensatory emotional damage (*Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)*). Further, even if the range of the adverse employment action has been extended (*Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006)*), more standards can be integrated into the AHP model.

However, when people need more accurate expression than logic language analysis to make reasonable decisions across the boundaries of different areas of tangible or intangible information, which cannot be separated for analysis, this AHNP model is required to increase the hierarchy's connections gradually so that pairs of components are linked with dependence and inter-dependence and feedback as

desired and some components have an inner-dependent loop. In this way this model can assist the mind in rearranging its thoughts and experiences, extracting judgments recorded in memory and quantifying them in the form of priorities after paired comparison, and then allowing for diverse opinions to be discussed and debated. Therefore, the hierarchy network structures used in multiple nonlinear causation links can make it possible to use control standards to identify, classify, synthesize and organize all the paired factors and interests that influence the outcome of a decision with distinct normalized priorities of the alternatives. (Saaty & Vargas, Decision Making with the Analytic Network Process, 2nd Edition, *Springer*, 1-40 (2006)).

Frankly speaking, when complexity is involved in the human brain function for decision-making, not only may a multilevel hierarchy produce a different decision than a simple hierarchy of three levels, but also a network may generate a significantly different decision than a more complex hierarchy. In this case, decision-makers cannot collapse complexity artificially into a simplistic structure of two levels, criteria and alternatives, and expect to get the whole outcome of interactions in the form of highly condensed judgments that faithfully mirror all that goes on in the real world. People must learn how to employ more elaborate structures to decompose these judgments and then to organize reasoning and calculations in sophisticated but simple ways to help understand the complexity around us (Saaty & Vargas, Decision Making with the Analytic Network Process, 2nd Edition, *Springer*, 1-40 (2006)). The above hierarchy network analysis in this Title VII retaliation case demonstrates that it is not very difficult to do this although more time and effort are needed.

In any way, we must use networks with dependence and interdependence and feedback and cycles to arrive at the kind of reasonable decisions needed to deal with the current and future network world, particularly when potential conflict of interest may sometimes intricately affect a rule of national application in which there is an overriding need for national uniformity. To this end, it is necessary to incorporate the human decision-making process and the anti-retaliation standard into a complex hierarch network processing model to secure the statutory remedial mechanisms available to the victims of retaliation under Title VII and related statutes. It is also more demanding than the traditional separate approach adopted by the Court of Appeals to entitle such incorporation to judgment as a matter of law so that the retaliator cannot escape liability and damages after a "hit-and-run".

CONCLUSION

The Court should grant the petition for certiorari and accept the case for plenary review, or alternatively, summarily reverse the wrong decisions below.

Respectfully Submitted,

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