No._____

IN THE SUPREME COURT OF THE UNITED STATES

Paulo K Mwassa,

Petitioner,

v.

Presbyterian Homes and Services (PHS)

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner Paulo K Mwassa (Pro se)

QUESTIONS PRESENTED

1. Whether the federal-sector provision of Title VII of the Civil Rights Act of 1964, which provides that actions affecting employees shall be made free from any "discrimination" 42 U.S.C. 2000e-16(a), requires a plaintiff to prove that retaliation for protected activity was a but-for cause of the challenged action.
2. Whether opinion may trump the undisputed and indisputable facts regarding employee's hundred percent clean record while working for employer.
3. Whether employers should not be punished for racial profiling and malicious Prosecution, even when the law concerning the constitutional violation, clearly established.
4. Whether courts should continue to deny justice to Title VII victims who brought his or her case in good faith belief and with merit.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Paulo K Mwassa is the Plaintiff-Appellant in the court below.

Respondent, Presbyterian Homes and Services (PHS), is the Defendant-Appellee in the court below.

Petitioner is not a corporation and has no parent or publicly held company owning 10% or more of any corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paulo K Mwassa respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is on case No. 22-1611.

JURISDICTION

The district court exercised federal question jurisdiction over Paulo K Mwassa's claims brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et. Seq., for employment discrimination on the basis of race, color, religion, gender, or national origin, all plaintiff's claims are based on this law which prohibit discrimination. Appeal from U.S. District Court for the District of Minnesota (0:19-cv-01511-SRN), Appendix D.

The Eighth Circuit entered judgment on September 30, 2022 (case No. 22-1611), Appendix A.

(ORDER) the petition for rehearing en banc and the panel rehearing are denied on November 02, 2022, Appendix B.

(MANDATE) entered on November 09, 2022, Appendix C. This petition is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a), employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin". This Court should grant certiorari to resolve the proper standard of causation.

Petitioner Paulo K Mwassa, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth

Circuit. In a decision filed September 30, 2022, Circuit Judges (Colloton, Kelly, and kobes) affirmed the district court's grant of Summary Judgement to Presbyterian Homes and Services (PHS).

A jury should decide whether PHS is liable to Paulo K Mwassa under Title VII of the Civil Rights Act of 1964 for racial profiling discrimination due to his color, national origin and in retaliation for his previous complaints.

Paulo K Mwassa respectfully submit that the Eighth Circuit Court of Appeals' opinion is contrary to the following decisions of the Supreme Court. Hughes v. Stottlemeyer, 506 F.3d 675 (8th Cir. 2007), Graning v. Sherburne County, 172 F.3d 611 (8th Cir. 1999). Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); United States v. Cont'l Can Co., 378 U.S. 441 (1964); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000); FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999); FTC v. Freeman Hosp., 69 F.3d 260 (8th Cir. 1995); Morgenstern v. Wilson, 29 F.3d 1291 (8th Cir. 1994); H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531 (8th Cir. 1989); United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976).

The Eighth Circuit Court's decision also raises questions of exceptional importance. Such as:

1. Whether the federal-sector provision of Title VII of the Civil Rights Act of 1964, which provides that actions affecting employees shall be made free from any "discrimination" 42 U.S.C. 2000e-16(a), requires a plaintiff to prove that retaliation for protected activity was a but-for cause of the challenged action.
2. whether opinion may trump the undisputed and indisputable facts regarding Paulo K. Mwassa's hundred percent clean record for nine years while working for PHS.
3. whether employers should not be punished for racial profiling and malicious prosecution of employees, even when the law concerning the constitutional

violation, clearly established.

4. whether courts should continue to deny justice to Title VII victims such as Paulo K Mwassa who brought his case in good faith belief and with merit that while working at PHS, he was racially discriminated endlessly. The Supreme Court has long expressed extraordinary support to victims of workplace discrimination. The Eighth Circuit Court denied Paulo K Mwassa's constitutional right to be free from workplace discrimination in a sweeping, sua sponte decision that marks a radical shift away from the judicial system's historical support to Title VII victims.

STATEMENT OF THE CASE

Paulo K. Mwassa is black (male), national origin (Uganda), is a citizen of the United States of America and a resident of the state of Minnesota; he worked for PHS as a TMA and CNA from January 27, 2009, until his termination on June 12, 2018.

Facts surrounding the Employment Discrimination subjected to Paulo K. Mwassa from January 1, 2018, to June 12, 2018, at Presbyterian Homes and Services' facility (Waverly Gardens) at 5919 Centerville Road, North Oaks, MN 55127.

PHS, employed white/females (Terry Beach (Nurse Work floor supervisor), Alana Nelson (Administrator) and Tricia Prigge (Manager)). PHS was aware of management's propensity to racially discriminate or harass its employees, he reported to management several times, but management took no action to stop it.

On April 4, 2018 (Exhibit 1, Exhibit 5), Paulo K Mwassa wrote a letter to Ms. Nelson complaining how he was being discriminated by Ms. Beach. He described to Ms. Nelson in the letter at first and then in the meeting with Ms. Nelson. Ms. Beach treats me differently than other coworkers who are not black. He explained to Ms. Nelson how Ms. Beach would tease him, imitate his voice, and make fun of his African accent when talking to him on the work radio talkies during work. Ms. Beach would do this to belittle

him or make fun of him before his coworkers who are none black such as (Natalia Christine and Joey Ordos). He told Ms. Nelson that Ms. Beach subjects him to disparate treatment and a hostile work environment. Ms. Beach openly made derogatory comments about black employees and suggested to him to "move back to nigger land (Referring to Africa)" He was very offended by these comments, and complained to PHS's upper management, but these complaints were ignored, the racist comments continued. He overheard Ms. Beach telling a resident how black employees are not good, ugly, rude, mean, and rough. He overheard Ms. Beach encouraging a resident to falsely accuse black employees of abuse and neglect to the resident, in return Ms. Beach promised the resident that, "she would forward the false complaints to the management to act. He told Ms. Nelson how the situation was affecting his self-esteem and ability to concentrate at work, the same resident Ms. Beach encouraged to report black employees, made a complaint that a black man abused him at night (Exhibit 57, Exhibit 58, Exhibit 59, Exhibit 60, Exhibit 61, Exhibit 62, Exhibit 63, Exhibit 64 and Exhibit 65). PHS profiled him, subjected him to baseless investigation and administrative filled with intentional malice, he asked Ms. Nelson that, did the resident say his name when complaining since the resident know his name? Ms. Nelson responded that, "the resident did not mention his name, the resident complained of a black man abusing him". Ms. Nelson picked him among all employees to be the one put on administrative leave because of his color. Later, PHS found out that it was not him, Ms. Nelson apologized for racially targeting him.

On June 7, 2018 (Exhibit 6) Paulo K Mwassa wrote a letter to Ms. Prigge describing how he was being targeted by Ms. Nelson. He requested a meeting with Ms. Prigge to investigate his concern. He explained to Ms. Prigge how Ms. Nelson had been targeting him (Exhibit 66) ever since he complained about discrimination.

On June/11/2018. Ms. Nelson and Ms. Prigge held me captive in Ms. Prigge's office and then immediately called police to interrogate me in Ms. Prigge's office without my permission, following a false allegation about a suspicious activity (Exhibit 66, Exhibit 7, Exhibit 14. PHS's Managers intentionally, deliberately fed police with intentional malice and they were on a character assassination. Paulo K Mwassa. overheard Ms. Nelson saying that "*blacks are criminal in nature*" to Ms. Prigge.

PHS subjected black employees to stricter level of scrutiny when compared to similarly situated white co-workers For-example Nurse Terry Beach who was not disciplined no matter how much minority employees complained about her racist conduct and harassment. Black employees were repeatedly reprimanded for relatively minor mistakes. The same behavior from similarly situated white employees were largely ignored even when reported. PHS failed to take effective remedial action in response to racially charged complaints instead when he complained, he was terminated, defamed, and maliciously prosecuted for a crime he did not commit.

BACKGROUND

Plaintiff sued PHS, he alleged that PHS violated the United States Constitution when PHS Racially profiled him to be a criminal based on his race color and national origin and in retaliation for his previous complaints to upper management about workplace discrimination subjected to him. Plaintiff established that PHS committed a constitutional violation: the law concerning the constitutional violation was clearly established. The Circuit judges should have adopted case law in areas of discrimination claims. "Substantial or motivating factor test articulated by the . . . Supreme Court for retaliation claims in Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287 (1977)", the Circuit Judges rejected the McDonnell Douglas framework for employment discrimination claims where Plaintiff established all required elements. Plaintiff established a prima facie case of discrimination. Plaintiff presented sufficient evidence

to show the defendant's proffered reason was pretext for illegal discrimination. The circuit Judges shifted the Appellate Case by denying Paulo K Mwassa's constitutional right to be free from workplace discrimination. Plaintiff presented evidence showing work discrimination was a motivating factor in the adverse employment action. Plaintiff asserted that PHS's discriminatory motive played a part in the adverse employment action. The Circuit Judges should have ruled that a reasonable jury could find Plaintiff's race played a part in PHS's decision to terminate Plaintiff. There was sufficient evidence that PHS's managers and supervisors harbored discriminatory animus toward Plaintiff. PHS could not meet its burden to prove Plaintiff's termination would have occurred in any event. The eighth circuit should have held the Supreme Court's longstanding general ban on workplace discrimination. The circuit judges should have held that the district court "erred in granting PHS's motion for Summary Judgement. Therefore, a jury should decide whether Paulo K Mwassa's constitutional rights were violated. Paulo K Mwassa categorically denied all accusations raised by PHS under oath and he Submitted evidence showing that there was no substantiated finding of abuse, neglect or misappropriation of materials in his work file for nine years (Exhibit 9). Plaintiff's charges subjected to him by PHS were dismissed because of racial profiling, intentional malice, and lack of probable cause. Paulo K Mwassa testified under oath that he has never purchased, owned, or installed a spy camera anywhere on planet earth.

REASONS FOR GRANTING THE PETITION

Employees are being treated differently than others, many do not know what their burden of proof will be due to circuit split. The circuit judges' decision is striking, the circuit judges arrived at the overwhelming majority of its legal analysis sua sponte. The circuit judges' analysis, adopted cases, and cases applied in their ruling do not appear anywhere in their order or judgement. The circuit judges shifted the burden of persuasion to him without defendant requesting that the appellate court or the circuit judges do so and without affording him any opportunity to respond to the circuit judges' arguments.

The circuit judges' sua sponte analysis is disfavored, especially in a case such as this appeal, which touches on a constitutional issue. See, e.g., Ladner v. United States, 358 U.S. 169, 172-73 (1958).

The district court misapplied governing legal principles to its findings of fact. ("despite Rule 52(a), a court can correct 'a finding of fact that is predicated on a misunderstanding of the governing law'") (quoting Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 501 (1984)); see also Du Pont, 351 U.S. at 381 (appellate review considers whether "erroneous legal tests were applied to essential findings of fact"). Empire Gas, 537 F.2d at 303 (holding that the trial judge had applied an incorrect legal standard in its determination). In any event, it appears the absence of briefing and argument led the panel (A) to adopt legal conclusions that are Appellate Case inconsistent with Supreme Court and Eighth Circuit precedent, (B) to gloss over an important, reoccurring intra-circuit split, and (C) to a conclusion that if allowed to stand will inhibit freedom in this Circuit. The petition for a writ of certiorari should be granted for two independent reasons:

(A) Misapplication of cases which have no application in summary judgment proceedings deciding constitutional right. Cases upon which the circuit judges relied, were not summary judgment or constitutional cases. See Mt. Healthy, 429 U.S. at 282-83. The Supreme Court held that a district judge making findings in a bench trial was permitted to shift the burden of proof to the defendant after the plaintiff proved by a preponderance of the evidence, and with direct evidence of illegal discrimination, See Mt. Healthy, 429 U.S. at 282-83 & 287. There is direct evidence that PHS's Managers (Terry Beach, Alana Nelson and Tricia Prigge) discriminated against Paulo K Mwassa.

(B) The circuit judges' decision violates the Supreme Court. Paulo K Mwassa presented sufficient evidence and asserted that he was intentionally discriminated by PHS's managers. See..St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). In Hughes v. Stottlemeyer, 506 F.3d 675, 678-79 & n.1 (8th Cir. 2007) court held that McDonnell

Douglas applies at summary judgment in a § 1983. Quoted Stewart v. Indep. Sch. Dist. No. 196, 481 F.3d 1034, 1042-43 (8th Cir. 2007, Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); see, e,g., Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir.1991) (approving of other circuits' decisions that characterized direct evidence of race or sex discrimination as an employer's statement that "no woman would be named to a B scheduled job" or "if it was his company, he wouldn't hire any black people"). Circuit judges's decision misconstrued and conflicts with other cases. Accordingly, Supreme Court review is warranted.

It appears there are some panel decisions that are inconsistent. Rynder v. Williams, 650 F.3d 1188, 1194 & n.1 (8th Cir. 2011). Davison v. City of Minneapolis, 490 F.3d 648, 654-55 & n.5 (8th Cir. 2007), in which a split panel invoked the now-defunct "free to choose" prior panel rule to shift the burden of persuasion to a defendant in a non-direct evidence case. See Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (later abrogating the much-criticized "free to choose" prior panel rule). Graning v. Sherburne County, 172 F.3d 611, 615 n.3 (8th Cir. 1999). Plaintiff has presented direct evidence showing that the employer used the plaintiff's protected classa (race) in the employment decision, the Davison panel declined to follow Graning in light of intervening inconsistent panel decisions. Here the panel simply adopted Davison without briefing, argument, or any analysis of the intracircuit split. This reoccurring intra-circuit split warrants review. Dempsey v. City of Omaha, 633 F.3d 638, 645 n.1, vacated by en banc order (8th Cir. Apr. 11, 2011), that identified the issue of this Court's "inconsistent treatment". This court should review, examine the intra-circuit split, and adopt the analysis of Hughes and Graning.

This case is the perfect vehicle for resolving the intra-circuit split: as shown below, Plaintiff's case against PHS has merit. Paulo K Mwassa's termination was pretextual, he was told openly and directly by his supervisor Terry Beach to move back to nigger land where work is easy when he voiced his concern to his supervisor how the work floor was unmanageable due to under staffing of employees, and he overheard his managers

(Alana Nelson and Tricia Prigge) openly talking to each other that black people are criminal in nature. Plaintiff's filed case should have survived summary judgment. Discrimination cases. See Kodish v. Oakbrook Terrace Fire Protection Dist., 604 F.3d 490, 500-01 (7th Cir. 2010); Gunville v. Walker, 583 F.3d 979, 984 n.1 (7th Cir. 2009), plaintiff could prevail in if they could demonstrate that their speech was a motivating factor in the defendant's decision. plaintiffs must demonstrate but-for causation. Waters v. City of Chi., 580 F.3d 575, 584 (7th Cir. 2009). But see Greene v. Doruff, 660 F.3d 975 (Posner, J.) (disagreeing with this Seventh Circuit precedent). See, e.g., Hackworth v. Torres, No. 1:06–CV–773– RCC, 2011 WL 1811035, at *3 (E.D. Cal. May 12, 2011). If allowed to stand, the circuit judges' opinion would conflict with decisions of the Supreme Court and this Court.

I. OPINION DOES NOT TRUMP FINDINGS OF FACT ESTABLISHING THAT PAULO K MWASSAWAS RACIALLY PROFILED DUE TO HIS RACE, COLOR, NATIONAL ORIGIN AND IN RETALIATION FOR HIS PREVIOUS COMPLAINTS ABOUT WORKPLACE DISCRIMINATION HE EXPERIENCED WHILE WORKING FOR PHS.

The district court based its conclusion on opinion. The district court erred because that opinion contradicted the undisputed findings of fact that Paulo K Mwassa was innocent and cleared of accusations raised by PHS. The Supreme Court and this Court have both declared that "[w]hen indisputable record facts contradict or otherwise render opinion unreasonable, it cannot support a jury's verdict." Brooke Group, 509 U.S. at 242; accord Concord Boat, 207 F.3d at 1057; Morgenstern, 29 F.3d at 1297. 2 The law in other circuits is to the same effect. See also Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp., 79 F.3d 182, 198

(1st Cir. 1996) ("The touchstone of market definition is whether a hypothetical monopolist could raise prices."); Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (same); Olin Corp. v. FTC, 986 F.2d 1295, 1299 (9th Cir. 1993) (court committed legal error by allowing opinion to stand in the way of a judgment. The panel's acquiescence in this error requires rehearing by this Court.

II. THE PANEL DECISION CONFLICTS WITH THE REQUIREMENT OF TITLE VII WHICH PROHIBIT WORKPLACE DISCRIMINATION.

The panel decision also warrants Supreme Court review because it departs from this Court's repeated support to Title Vii victims. The panel, however, departed from governing law regarding Workplace discrimination law.. Thus, the district court needed to examine the counterfactual scenario –. The panel also erred in holding that Paulo K Mwassa offered no evidence about the discrimination he experienced while working at PHS. Thus, the panel was mistaken by the district court's misinterpretation of plaintiff's fact, it was a significant, legal error.

III. THE PANEL DEPARTED FROM LONGSTANDING GOVERNING LAW THAT PROTECTS TITLE VII VICTIMS.

Fundamentally, the district court's and the panel's conclusions misunderstood the nature of Plaintiff's filed lawsuit.

IV. PAULO K MWASSA ESTABLISHED THAT THE TERMINATION WAS PRETEXUAL.

Given the evidence, exhibits, and witnesses' notarized declarations presented by Paulo K Mwassa, the district court's and the circuit judges' conclusions cannot stand. The Supreme Court held that "evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." Swift & Co. v. United States, 196 U.S. 375, 396 (1905)).

This appeal now presents issues of exceptional importance. The Supreme Court has long expressed extraordinary support for Title VII victims. As this Court explained in Brousard-Norcross v. Augustana College Association in the tenure context, Courts . . . are understandably reluctant to review the merits of a tenure decision . . . [T]riers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion. Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited. Finally, statements of peer judgments as to departmental needs, collegial relationships and individual merit may not be disregarded absent evidence that they are a facade for discrimination. 935 F.3d 974, 975-96 & n.3 (8th Cir. 1991). If allowed to stand as written, the circuit judges' sweeping, sua sponte decision will mark a radical shift away from the judicial system's historical support to Title VII victims. It is no exaggeration to conclude that minority employees with arguably nominal say at work will be discriminated beyond measure at work and being denied justice in Courts frequently. Stever v. Indep. Sch. Dist. No. 625, St. Paul, 943 F.2d 845, 855 (8th Cir. 1991). Paulo K Mwassa has evidence, directly and indirectly implicating decision makers with impermissible motives. The district court erred, there is sufficient evidence on which a jury could find Presbyterian

Homes and Services intentionally discriminated against Plaintiff based on his race, color, national origin, and in retaliation due to his previous complaints to upper managers about workplace discrimination. There is evidence that discrimination was the but-for cause, or even a motivating factor, in Paulo K Mwassa's termination. Paulo K Mwassa's affidavits, exhibits, notarized declaration, and witnesses' declaration under oath is sufficient to survive summary judgement. The district's finding that there was no evidence is wrong. PHS's managers had intention to discriminate Paulo K Mwassa. see.. Haas v. Kelly Servs., Inc., 409 F.3d 1030, 1036 (8th Cir. 2005). Tuggle v. Mangan, 348 F.3d 714, 720 (8th Cir. 2003). Paulo K Mwassa's allegations against PHS raise a genuine issue of material fact and are worthy of a jury trial, the Eighth Circuit Court of Appeals if not checked will torment Title VII victims.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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March 16, 2023

APPENDIX