No. ______________________

IN THE

SUPREME COURT OF THE UNITED STATES

VIRGIL M. LORENZO,

Petitioner,

v.

LLOYD J. AUSTIN, III, Secretary
Department of Defense,

Respondent.

PETITIONER'S APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 Petitioner Virgil M. Lorenzo respectfully requests that the time to file a Petition for Writ of Certiorari in this Court be extended for 31 days to and including May 15, 2023.

The U.S. Circuit Court of Appeals for the Ninth Circuit denied Mr. Lorenzo's petition for rehearing on December 15, 2022 following its decision of November 4, 2022, which affirmed the district court's denial of his appeal brought under Title VII, 42 U.S.C. § 2000e et seq. and 29 U.S.C. § 794(a). Thus, Mr. Lorenzo's petition for certiorari currently is due on or before March 15, 2023. This application for extension of time is being filed more than ten days before that date. *See* Supreme Court Rules 30.2.

Copies of the opinion of the court of appeals affirming the judgment of the district court, and of the order denying the petition for rehearing are attached to this application as Appendix A, and Appendix B, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The petition will raise the important federal question of whether the Ninth Circuit's holding in *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105-1107 (9th Cir. 2019) that "but for" causation under the American's With Disabilities Act means that recovery under that statute requires proof disability discrimination was the sole cause of the challenged decision is consistent with this Court's holding in *Bostock v. Clayton County, Georgia*, __ U.S.__, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020) that "but for" causation for discrimination based on sex under the

Title VII authorizes recovery based on proof that gender discrimination was a necessary cause, even if not the only cause, of the challenged decision.[1]

The petition also will raise the following important question of federal law that has not been, but should be, settled by this court, to wit: does an employer's consideration of an employee's accent in formulating his job responsibilities establish a prima facie case of discrimination based on the employee's national origin? *See, e.g. Fragrante v. City and County of Honolulu*, 888 F.2d 591, 595-596 (9th Cir. 1988).

Since the Court of Appeals' denial of Mr. Lorenzo's petition for rehearing on December 15, 2022, I have been prevented from researching and writing the petition for writ of certiorari and will be unable to complete the petition within the 90 days provided by Rule 13 for the following reasons.

I am a sole practitioner and I am sole counsel for Mr. Lorenzo. Although I have been working diligently, prior obligations have required me to file the appellant's opening briefs in *Becky Hoang, et al. v. Trang Huynh Nguyen*, Wa. Ct. App. No. 83978-1 on December 16, 2022, in *United States v. Rodrigo Alvarez-Quinonez,* Ninth Cir. No. 22-30161 on February 27, 2023 and to prepare a complex appellant's opening brief in *People v. Bracamontes*, Cal. Ct. App. No. H048925, in which time already has been extended, and in which the brief now must be filed within 15 days following the completion of the supplemental record, which I understand to be imminent. In addition, following the courts having granted extensions of time, I must file the

1. As the Court of Appeals decision in this case notes, in construing Rehabilitation Act claims, such as the one here in issue, the Ninth Circuit applies the same standards as are mandated under the Americans with Disabilities Act. Appendix A at p. 5 n. 3 (citing *Coons. v Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004)).

appellant's reply briefs in *United States v. Clyde McKnight,* Ninth Cir. No. 21-30189 by March 13, 2023 and in *Becky Hoang, et al. v. Trang Huynh Nguyen*, Wa. Ct. App. No. 83978-1 by March 15, 2023.

Assistant U.S. Attorney Katherine Parker, who was one of respondent's attorneys in this case, advised me by email that respondent does not object to the extension.

WHEREFORE, Petitioner Virgil M. Lorenzo requests that this Court grant him an extension of time up to an including May 15, 2023, in which to file his petition for writ of certiorari.

Dated: February 28, 2023

Respectfully submitted,

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APPENDIX A

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGIL M. LORENZO, Plaintiff-Appellant, v. LLOYD J. AUSTIN III, Secretary, Department of Defense, Defendant-Appellee.	No. 21-56381 D.C. No. 3:19-cv-01128-WQH-BGS MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted October 4, 2022
Pasadena, California

Before: FORREST and SANCHEZ, Circuit Judges, and FREUDENTHAL,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

Mr. Virgil Lorenzo was terminated from his position as a middle school science teacher at a Department of Defense school in Okinawa, Japan.[1] Lorenzo appeals the district court's grant of summary judgment against his claim under Title VII, 42 U.S.C. § 2000e et seq., that he was terminated because of his Filipino nationality, and his claim under the Rehabilitation Act, 29 U.S.C. § 794(a), that he was terminated because of his actual or perceived hearing impairment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. When responding to a summary judgment motion, the plaintiff may establish his or her case "by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). Under either approach, Lorenzo "must produce some evidence suggesting that [his termination] was due in part or whole to discriminatory intent, and so must counter [Defendant's] explanation." *Id.* Because Lorenzo has not produced evidence suggesting discriminatory intent and does not counter Defendant's reasons for termination, his claim fails under either approach. *See id.* at 1123; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

[1] The current Secretary of Defense, Lloyd J. Austin III, was automatically substituted as Defendant on January 22, 2021, pursuant to Fed. R. Civ. P. 25(d).

Lorenzo's argument is based on an email that he received from the principal on September 23, 2010. It reads:

> Mr. Lorenzo, Please contact [parent] about setting up a conference to discuss [student]. She has some concern's [sic] about your accent and [student] understanding some of the concepts covered. Thank you.

Lorenzo has failed to connect any animus held by the parent to the principal who decided to terminate Lorenzo. The text of the email conveys only that the principal wanted Lorenzo to meet with a parent who believed her child was having difficulty understanding Lorenzo's accent in class—a facially legitimate concern. *See Fragante v. City and Cnty. of Honolulu*, 888 F.2d 591, 596–97 (9th Cir. 1989) (explaining that, regarding an employee's accent, "[t]here is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance" (emphasis omitted)).

Lorenzo's statements about his meetings with the parent cannot establish the connection. There is no evidence that the principal knew about the events of Lorenzo's first meeting with the parent during which she displayed an "air of superiority" and "wondered aloud why a middle school would hire someone with [Lorenzo's accent]," or that the principal knew about Lorenzo's second meeting with the parent when she became irate.

Moreover, temporal proximity does not indicate causation under the circumstances. Since Lorenzo's probationary employment lasted only four months, the events at issue generally occur as close to his August 10, 2010, hiring as to his December 17, 2010, termination. Moreover, the September 23 "accent" email was sent after the principal had already began giving Lorenzo "support and specific directions." Further, the school received a number of other parent and student concerns regarding Lorenzo's teaching practices that were unrelated to Lorenzo's accent. The school's termination decision followed a reasonable chronology of escalating support, counseling, and intervention.

Finally, Lorenzo fails to demonstrate a genuine dispute of material fact that the employer's proffered nondiscriminatory reasons for termination—failure to monitor and assess student achievement—were pretextual. Additionally, the discrete instances raised by Lorenzo in his post-termination meeting fail to contradict the principal's documented assessment of Lorenzo's poor performance. The record is replete with evidence that Lorenzo failed to meet the requirements of his employment.[2]

[2] We need not address the "same actor" presumption because Lorenzo's Title VII claim fails even without it. *See generally Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270–71 (9th Cir. 1996).

2. Even assuming Lorenzo has established the first two elements of his Rehabilitation Act Claim,[3] he cannot establish that he was terminated because of his disability. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999).

Lorenzo relies on an incident in November 2010, when a student's cell phone chimed during the principal's observation of Lorenzo's class. Lorenzo argues that the principal excoriated him for not taking the phone, but the record fails to show that the principal's response related to Lorenzo's diminished hearing. Rather, the record supports the principal's conclusion that "[Lorenzo] heard the cell phone. He reacted to the cell phone. He just didn't manage the cell phone."

Under the circumstances, temporal proximity does not create an inference of causation. As noted above, the principal's escalating support, counseling, and intervention were ongoing by the time of the cell phone incident.

AFFIRMED.

[3] Rehabilitation Act claims are evaluated under the same standards as the Americans with Disabilities Act (ADA). *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (citing 29 U.S.C. § 794(d)).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

VIRGIL M. LORENZO,

Plaintiff-Appellant,

v.

LLOYD J. AUSTIN III, Secretary, Department of Defense,

Defendant-Appellee.

No. 21-56381

D.C. No.
3:19-cv-01128-WQH-BGS
Southern District of California,
San Diego

ORDER

Before: FORREST and SANCHEZ, Circuit Judges, and FREUDENTHAL,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing.

Judges Forrest and Sanchez have voted to deny the petition for rehearing en banc and Judge Freudenthal so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.