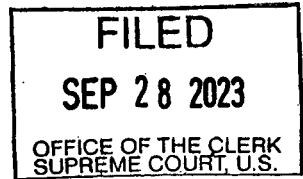


No. 23-345



---

---

In The

**Supreme Court of the United States**

---

IN RE JEFFRY THUL

---

**On Petition For A Writ Of Mandamus  
To The United States Court Of Appeals  
For The Sixth Circuit**

---

**PETITION FOR A WRIT OF MANDAMUS**

---

JEFFRY J. THUL  
P.O. Box 1403  
Dayton, TN 37321  
(423) 774-8440  
jeffrythul@gmail.com

---

---

## QUESTIONS PRESENTED

I am a *partially recovered* federal employee classified under 5 C.F.R. § 353.301(d); yet, I remain unrestored. The U.S. Court of Appeals for the Sixth Circuit averring there is no **federal** case law to determine:

Whether the National Park Service municipality's properly constituted legislative body's conduct violated 5 C.F.R. § 353.301(d), or constitutional rights of which a reasonable person would have known?

Whether a private remedy is implicit in 5 C.F.R. § 353.301(d) not expressly providing one?

## **DEFENDANTS**

A petition seeking a writ of mandamus shall state the name and office or function of every person against whom relief is sought. For clarity purposes, the conduct in controversy was committed by nineteen federal defendants who were (1) acting under color of law, and (2) their conduct deprived the plaintiff of a federal right, either constitutional or statutory, causing injury. (Pet. App. at 29-34)

## **RULE 29.6 STATEMENT**

The petitioner has no parent corporation or publicly held company that owns 10% or more of its stock

## **RELATED CASES**

*Thul v. United States*, No. 23-5094, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 21, 2023. (Pet. App. at 1-5)

*Thul v. United States*, No. 1:22-cv-0096, U.S. District Court Eastern District of Tennessee. Judgment entered December 19, 2022. (Pet. App. at 6-14)

*Thul v. United States*, No. 23-5094, U.S. Court of Appeals for the Sixth Circuit. Petition for Rehearing DENIED on August 30, 2023. (Pet. App. at 5)

## TABLE OF CONTENTS

	Page
Questions Presented .....	i
Defendants .....	ii
Rule 29.6 Statement .....	iii
Related Cases .....	iii
Table of Contents .....	iv
Appendix .....	vii
Table of Authorities .....	viii
Opinions .....	1
<b>U.S. District Court Eastern District of Tennessee</b>	
Ch. Judge Travis McDonough .....	1
<b>U.S. Court of Appeals for the Sixth Circuit</b>	
Panel: Circuit Court Judges Moore, Stranch, and Bush .....	1
<b>Tennessee Supreme Court</b>	
<i>Estate of French v. Stratford House</i> , 333 SW 3d 546 (Tenn. Supreme Court 2011) .....	2
<b>Dr. Marie Beasley, DO</b>	
Petitioner’s primary treating psychiatrist .....	2
<b>Supreme Court</b> .....	2
Jurisdictional Statement .....	3
Special Notifications .....	3
A. Notification to Solicitor General of the United States .....	3
B. Notification to the Department of Interior .....	3
C. Notification to the 19 Individual Defendants ....	3

## TABLE OF CONTENTS – Continued

	Page
Relevant Constitutional and Statutory Provisions Involved.....	4
Statement of the Case .....	5
Contentions.....	6
Petition for Extraordinary Writ .....	6
Problem .....	7
Crux of the Problem .....	8
Supporting Evidence And Arguments .....	9
Background .....	9
Clock is Started .....	9
Exceptional Circumstances Warrant the Court's Discretionary Powers .....	10
Defendant's Conduct – Establishing Policy .....	10
Exceptional Circumstances – Beyond the Rehabilitation Act.....	10
Sixth Circuit Averment .....	12
Case or Controversy .....	13
Aiding the Court's Appellate Jurisdiction.....	13
Individual Capacity Test.....	14
Sixth Circuit Misrepresentation of Fact .....	14
Personal Liability Tort Litigation Against Federal Employees .....	15
Qualified Immunity Defense .....	16

## TABLE OF CONTENTS – Continued

	Page
Adequate Relief is Unobtainable In or From any Other Court .....	16
Ergo Questions .....	17
Reasons for Granting the Writ .....	18
I. The District Court’s decision conflicts with Supreme Court’s guiding principles established in <i>Cort v. Ash</i> , 422 U.S. 66 (1975) .....	18
A. Petitioner’s Substantial Rights .....	19
a. Is the plaintiff “one of the class for whose <i>especial</i> benefit the statute was enacted, that is, does the stat- ute create a federal right in favor of the plaintiff?” .....	19
b. Is there any indication of legisla- tive intent, explicit or implicit, ei- ther to create such a remedy or to deny one? .....	20
1. Ergo Question #1.....	21
II. The District Court’s decision conflicts with Tennessee Supreme Court’s guiding principles established in <i>Estate of French</i> <i>v. Stratford House</i> , 333 SW 3d 546, 561 (Tenn. Supreme Court 2011) .....	21
c. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plain- tiff? .....	21

## TABLE OF CONTENTS – Continued

	Page
d. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? .....	22
2. Ergo Question #2.....	23
III. Conclusion .....	25

## APPENDIX

<i>Thul v. United States</i> , No. 23-5094, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 21, 2023.....	App. 1
<i>Thul v. United States</i> , No. 1:22-cv-0096, U.S. District Court Eastern District of Tennessee. Judgment entered December 19, 2022 .....	App. 6
<i>Thul v. United States</i> , No. 23-5094, U.S. Court of Appeals for the Sixth Circuit. Petition for Rehearing DENIED on August 30, 2023.....	App. 15
Riverview Psychiatry April 16, 2018 .....	App. 16
DOI Waiver .....	App. 18
Sept 16 Ltr .....	App. 20
Sept 16, 2019 Cert. of Service .....	App. 24
Excerpt from Request for Rehearing .....	App. 26
Defendants.....	App. 29



## TABLE OF AUTHORITIES

	Page
CASES	
<i>Arnold v. United States</i> , 816 F.3d 1306 (9th Cir. 1986) .....	1, 14
<i>Bankers Life &amp; Cas. Co. v. Holland</i> , 346 U.S. 379 (1953) .....	6
<i>Berkovitz v. United States</i> , 486 U.S. 531 (1988) .....	17
<i>Bivens v. Six Unknown Federal Narcotics Agents</i> , 403 U.S. 388 (1971) .....	18, 19
<i>Board of Comm'rs of Bryan Cty. v. Brown</i> , 520 U.S. 397 (1997) .....	10, 12, 15
<i>Bowen v. Commissioner of Social Sec.</i> , 478 F.3d 742 (6th Cir. 2007) .....	8
<i>Brock v. United States</i> , 64 F.3d 1421 (1995) .....	1, 14
<i>Calhoon v. Harvey</i> , 379 U.S. 134 (1964) .....	18
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971) .....	24
<i>Cort v. Ash</i> , 422 U.S. 66 (1975) .....	5, 6, 18
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998) .....	16
<i>Davis v. Passman</i> , 442 U.S. 228 (1979) .....	5, 6, 21
<i>Davis v. Scherer</i> , 468 U.S. 183 (1984) .....	16
<i>Estate of French v. Stratford House</i> , 333 SW 3d 546 (Tenn. Supreme Court 2011) .....	2, 5, 6, 20-23
<i>Ex parte Fahey</i> , 332 U.S. 258 (1947) .....	6
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) ....	2, 13, 16, 24

## TABLE OF AUTHORITIES – Continued

	Page
<i>Heimberger v. Pritzker</i> , No. 2:12-cv-01064, 2014 WL 1050341 .....	1
<i>J. I. Case Co. v. Borak</i> , 377 U.S. 426 (1964) .....	18
<i>Knafel v. Pepsi-Cola Bottlers of Akron, Inc.</i> , 899 F.2d 1473 (6th Cir. 1990) .....	6
<i>Kuklinski v. Lew</i> , No. 3:14-cv-843, 2017 WL 360962 (W.D. Ky. Jan. 24, 2017) .....	1
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) .....	16
<i>Monell v. New York City Dep’t of Social Services</i> , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) .....	12
<i>National Railroad Passenger Corp. v. National Assn. of Railroad Passengers</i> , 414 U.S. 453 (1974) .....	18
<i>Otto v. Hecker</i> , 781 F.2d 754 (9th Cir. 1986) .....	1, 14
<i>Pembaur v. Cincinnati</i> , 475 U.S. 469 (1986) ....	5, 12, 15
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989) .....	16
<i>Roche v. Evaporated Milk Assn.</i> , 319 U.S. 21 (1943) .....	7
<i>Securities Investor Protection Corp. v. Barbour</i> , 421 U.S. 412 (1975) .....	18
<i>Texas &amp; Pacific R. Co. v. Rigsby</i> , 241 U.S. 33 (1916) .....	17
<i>Wheeldin v. Wheeler</i> , 373 U.S. 647 (1963) .....	18
<i>Will v. United States</i> , 389 U.S. 90 (1967) .....	6, 7

TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. V .....	4, 5, 13, 15, 23
U.S. Const. art. III, § 2 .....	7
STATUTES AND REGULATIONS	
5 U.S.C. § 706 .....	24
5 U.S.C. § 706(2)(A) .....	24
5 U.S.C. § 706(2)(B) .....	24
5 U.S.C. § 706(2)(C) .....	24
5 U.S.C. § 706(2)(D) .....	24
28 U.S.C. § 1254(1) .....	3
28 U.S.C. § 2674 .....	21
29 U.S.C. § 791(b) .....	4, 19
29 U.S.C. § 794 .....	4, 19
5 C.F.R. § 353.301 .....	19
5 C.F.R. § 353.301(a) .....	9, 10
5 C.F.R. § 353.301(d) .....	4-8, 10, 11, 13, 15-25
OTHER AUTHORITIES	
House Committee on Oversight and Govern- ment Reform, Serial No. 114–73 (June 14, 2016) .....	9, 14

## OPINIONS

### U.S. District Court Eastern District of Tennessee Ch. Judge Travis McDonough

“[t]he Sixth Circuit has not yet specifically addressed the issue of whether Title VII [and other federal employment-discrimination statutes] preempt[] claims that arise out of facts and circumstances that seek to address injuries other than workplace discrimination.” *Kuklinski v. Lew*, No. 3:14-cv-843, 2017 WL 360962, at \*4 (W.D. Ky. Jan. 24, 2017). Other courts are split on the issue.” (Pet. App. at 11)

Additionally,

“A “highly personal wrong” “requires serious ‘personal violation’, such as rape, sexual assault, or stalking, defamation, and harassment with phone calls. Applying the more forgiving “highly personal wrong” standard, this Court concludes that Thul’s claims are preempted by employment-discrimination statutes. *Heimberger v. Pritzker*, No. 2:12-cv-01064 , 2014 WL 1050341 at \*9 (cleaned up) (citing *Brock v. United States*, 64 F.3d 1421 (1995); *Arnold v. United States*, 816 F.3d 1306 (9th Cir. 1986); *Otto v. Hecker*, 781 F.2d 754 (9th Cir. 1986)).” (Pet. App. at 12)

### U.S. Court of Appeals for the Sixth Circuit

Panel: Circuit Court Judges Moore, Stranch, and  
Bush

“Thul points to other circuits that permit employment-discrimination based FTCA claims . . . We have never addressed whether this exception is available to

federal employees and need not do so here because Thul's complaint squarely concerns workplace disability discrimination." (Pet. App. at 4, 5)

**Tennessee Supreme Court**

*Estate of French v. Stratford House*, 333 SW 3d 546  
(Tenn. Supreme Court 2011)

"The negligence *per se* doctrine may be applied based upon violations of regulations or ordinances, as well as statutes." (Pet. App. at 27)

**Dr. Marie Beasley, DO**

Petitioner's primary treating psychiatrist

"Each time that the work environment complaint is further delayed in being resolved sets him back tremendously in his PTSD recovery, despite his compliance with treatment recommendations." The compounded effect of dealing with the harassment complaint directly affected his recovery. But without any resolution regarding the work related harassment, it increased the symptoms and continues to prevent his recovery." (Pet. App. at 16)

**United States Supreme Court**

"[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982).



### **JURISDICTIONAL STATEMENT**

This Court has jurisdiction under 28 U.S.C.  
§ 1254(1).

---

### **SPECIAL NOTIFICATIONS**

A. Notification to Solicitor General of the  
United States,  
Elizabeth Prelogar  
Solicitor General of the United States, Room 5616  
Department of Justice  
950 Pennsylvania Ave., N. W.,  
Washington, DC 20530-0001.  
Attch: 3 paper copies

B. Notification to the Department of Interior,  
Associate Solicitor  
Division of General Law  
Office of the Solicitor  
U.S. Department of the Interior  
1849 C Street, N.W., Office 6440  
Washington, D.C. 20240  
Attch: 3 paper copies

C. Notification to the nineteen individual defendants

The individual defendants were served through their  
appointed agent at the DOI, ODICR's Employment  
and Labor Law Unit at DOICivilRights@ios.doi.gov.

Waiver presented for review. (Pet. App. at 18, 19)  
Attch: 1 electronic copy

---

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Partially recovered employees substantive rights are codified at 5 C.F.R. § 353.301(d) stating,

“Agencies must<sup>1</sup> make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.)”

“The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . In numerous decisions, this Court “has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.”

**In this case**, the equal protection component of the Due Process Clause thus confers on Mr. Thul a federal constitutional right to be free from [any] discrimination which cannot meet the requirement that,

“Agencies must make every effort to restore in the local commuting area . . . an individual who has *partially*

---

<sup>1</sup> According to Black’s Law Dictionary 4th Edition, “must” is a word that is primarily of mandatory effect. It is the only word that imposes a legal obligation on readers to tell them that something is mandatory. (Extracted August 12, 2023)

*recovered* from a compensable injury and who is able to return to limited duty.”

*Davis v. Passman*, 442 U.S. 228, 235-36 (1979)

---

### STATEMENT OF THE CASE

The DOI, National Park Service (“NPS”) municipality is alleged to have established a policy of *evading* ongoing EEO investigations by constructively suspending *partially recovered* employees. *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986) “No one has ever doubted, for instance, that a municipality may be liable under [the Fifth Amendment] for a single decision by its properly constituted legislative body.”

After which, FECA benefits are used to fund these suspensions in violation of 5 C.F.R. § 353.301(d), causing injury. Where, in the state of Tennessee, a statute may be interpreted as fixing a standard of care that when violated is considered negligence.

Petitioner asked the Sixth Circuit to determine “whether a private remedy is implicit in 5 C.F.R. § 353.301(d) not expressly providing one?” The Panel responded in the negative, “[w]e **DENY** the petition because Thul has not cited any misapprehension of law or fact that would alter our prior decision.” (Pet. App. at 15). Mr. Thul had pointed to the following relevant cases: *Cort v. Ash*, 422 U.S. 66 (1975); and, relating to federal tort claims, *Estate of French v. Stratford House*,



333 SW 3d 546, 561 (Tenn. Supreme Court 2011). (Pet. App. at 27)

---

### CONTENTIONS

Mr. Thul disagrees with the Sixth Circuit, contending that when the NPS municipality sanctioned his termination, the legislative body violated his substantial right to restoration under the equal protection component of the 5th Amendment, codified at 5 C.F.R. § 353.301(d). *Davis v. Passman*, 442 U.S. 228, 235-36 (1979). *And*,

In the Sixth Circuit, the NPS municipality is prohibited from using FECA to fund this . . . **pay-to-discriminate** practice? See *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1480 (6th Cir. 1990), “Furthermore, the court correctly applied the law in finding that workers’ compensation, like unemployment benefits, are subject to the collateral source rule.”

**Therefore**, in the state of Tennessee, the negligence *per se* doctrine may be applied based upon violations of regulations or ordinances, as well as statutes. *Cort v. Ash*, and *Estate of French v. Stratford House*.

---

### PETITION FOR EXTRAORDINARY WRIT

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953); *Ex parte*

*Fahey*, 332 U.S. 258, 259 (1947). As we have observed, the writ “has traditionally been used in the federal courts only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’” *Will v. United States*, *supra*, at 95, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943).

Petitioner, Mr. Jeffry Thul is a *partially recovered* employee whose substantive rights are codified at 5 C.F.R. § 353.301(d). Congress provides a bright-line rule, “Agencies must make every effort to restore in the local commuting area . . . an individual who has partially recovered from a compensable injury and who is able to return to limited duty.” Article III, Section 2 of the U.S. Constitution *limits* federal judicial jurisdiction to resolving (emphasis added) cases arising under the Constitution, federal laws, and other enumerated areas. Mr. Thul remains unrestored.

### **Problem**

Since December 2020, the Petitioner has been attempting to litigate this deliberate indifference case within the Eastern District so he can return to his federal job, according to the circumstances in this case. In this instant matter, “without any resolution regarding the work related harassment, it increased the symptoms and continues to prevent his recovery.” *Id.* Opinions, Dr. Beasley. The Sixth Circuit recognizing that where, “the opinion of a treating source is not accorded controlling weight, a [trier of fact] *must* apply certain factors . . . in determining what weight to give the

opinion.” See Five Factors expounded, *Bowen v. Commissioner of Social Sec.*, 478 F.3d 742, 747 (6th Cir. 2007).

No determination was ever made as to the treating physician’s diagnostic professional opinion that, “without any resolution regarding the work related harassment, it increased the symptoms and continues to prevent his recovery.”

### **Crux of the Problem**

The DOI, Office of Solicitor, the U.S. District Court Eastern District of Tennessee, and the U.S. Court of Appeals for the Sixth Circuit **REFUSES** to acknowledge Mr. Thul’s substantial rights conveyed by 5 C.F.R. § 353.301(d) and the injuries this violation is causing.

Petitioner is seeking a writ of mandamus to assist the lower court in the lawful exercise of its prescribed jurisdiction pursuant to 5 C.F.R. § 353.301(d), or to compel it to exercise its authority when it is its duty to do so. *Bowen v. Commissioner of Social Sec.* at 747, “The regulation further assures claimants that “[w]e will always give good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.”

Unless Mr. Thul is raped, sexually assaulted, or stalked, defamed, and harassed with phone calls, his line-of-duty caused psychological injury or illness PTSD, which is protected by 5 C.F.R. § 353.301(d), means nothing in the U.S. Court of Appeals for the Sixth Circuit.



## SUPPORTING EVIDENCE AND ARGUMENTS

### Background

At the time that gives rise to this complaint, the EEO environment within the NPS was under heavy fire by Congress. On June 14, 2016, the House Committee on Oversight and Government Reform made express findings of fact that, dating as far back as 2006, the Service had failed to meet its EEOC requirements. Leading to a culture of harassment, discrimination and reprisal against NPS employees. The standard operating procedure, a fact of life, a normal condition of employment. Seventy (70) percent of the NPS' EEO problems addressed by Congress that day, originated in the NPS, Southeast Regional Office (SERO), where this complaint takes place. (House Committee on Oversight and Government Reform, Serial No. 114-73 (June 14, 2016))

### Clock is Started

There is no dispute Mr. Thul was injured in the line-of-duty, and is receiving compensatory benefits. *Circa*. August 2017 the Agency was provided with the awareness of fact that Mr. Thul's injuries were related to an occupational disease described as *short-term*. His primary treating psychiatrist, Dr. Marie Beasley, DO notified the Agency that he was *partially recovered* and anticipated a return to duty on *January 2018*. On November 16, 2017 both the Agency and the Plaintiff received knowledge the Office of Workers' Compensation Program (OWCP) accepted Mr. Thul's claim for his

line-of-duty caused psychological disease, Post-traumatic Stress Disorder (PTSD). Starting the clock relating to his entitlement to be restored immediately and unconditionally to his former position or an equivalent one within one-year. (5 C.F.R. § 353.301(a))



## **EXCEPTIONAL CIRCUMSTANCES WARRANT THE COURT'S DISCRETIONARY POWERS**

### **Defendant's Conduct – Establishing Policy**

In *Bryan Cty. v. Brown*, 520 U.S. 397 at 418, the Supreme Court explains, “the choice of policy and its implementation are one, and the first or only action will suffice to ground municipal liability simply because it is the very policymaker who is acting.”

It was during this period, August 2017 – September 2019, the Defendants *et al.*, in violation of 5 C.F.R. § 353.301(d), held Mr. Thul *incommunicado*, segregated from the temporary job assignments that were designed to accommodate his injury and assist in his recovery. All along, his position remained open and available. Mr. Thul failed to make a full recovery. On Mon, Sep 16, 2019 he received notification he was being terminated from his federal employment, based only on his injuries.

### **Exceptional Circumstances – Beyond the Rehabilitation Act**

On Mon, Sep 16, 2019 at 6:13 PM, 22 hours, and 7 minutes before the final decision was made to

terminate Mr. Thul, the NPS' properly constituted legislative body made up of Defendants N. Tony Nguyen, Ken Brodie, and Letitia Coleman received Mr. Thul's \*\*\*URGENT and IMMEDIATE\*\*\* Request for an Intervention. Mr. Thul **ALERTING** this legislative body that his termination violated 5 C.F.R. § 353.301(d). (Pet. App. at 24; Warning at 20-23)

On September 17, 2019 at 4:20 PM, exactly 40 minutes before the Plaintiff was to be terminated, Defendants Ed Buskirk, Ken Brodie, Letitia Coleman, and DOI Solicitor Cecelia Townes, Esq., in violation of 5 C.F.R. § 353.301(d), stood by and witnessed Defendant N. Tony Nguyen, the NPS' Associate Director, Workforce and Inclusion, **CLOSE** Mr. Thul's NPS DO-16E Case No.: 857, Hostile Work Environment investigation, **WITHOUT** resolution. Serving Mr. Thul with the following NPS municipality **DECLARATION**:

“Thank you for your email to the Director. I am responding on his behalf. It is our practice not to comment on matters that are the subject of litigation or part of the Equal Employment Opportunity (EEO) complaint process. I would refer you to the Deciding Official, Mr. Buskirk, and/or the Solicitor, Ms. Cecelia Townes, to discuss the matter further.”

(Pet. App. at 24, 25)

On September 17, 2019 at 5:00 PM, the NPS municipality, in violation of 5 C.F.R. § 353.301(d), sanctioned Buskirk's termination of Mr. Thul's federal

service based only on his injuries. Demonstrating that, through its *deliberate* conduct, the municipality was the “moving force” behind the injur[ies] alleged. See *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

**Establishing** the NPS municipality’s policy of constructively suspending *partially recovered* employees to avoid investigations, causing injury. See *Bryan Cty. v. Brown*, at 418, “. . . the first or only action will suffice to ground municipal liability simply because it is the very policymaker who is acting.”

See also *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986), “*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts “of the municipality” – that is, acts which the municipality has officially sanctioned or ordered.”

### **Sixth Circuit Averment**

The Sixth Circuit **AVERS** it has not specifically addressed the issue of whether Title VII [and other federal employment-discrimination statutes] preempt[] claims that arise out of facts and circumstances that seek to address injuries other than workplace discrimination.” In the Panel’s opinion, “[w]e have never addressed whether this exception is available to federal employees . . .” (*Id.* Opinions).



### CASE OR CONTROVERSY

Today, Petitioner's July 29, 2019, NPS DO-16E, Case No.: 857 remains **UNRESOLVED**. Defendant, Attorney Advisor, Office of the Solicitor, DOI, Ms. Cecelia Townes, in violation of 5 C.F.R. § 353.301(d), oversaw and approved the NPS municipality's deliberate indifference to the Plaintiff's substantive rights to restoration. The NPS municipality, in violation of 5 C.F.R. § 353.301(d), refuses to allow their legislative body to be investigated. Which, in turn is preventing Mr. Thul's restoration in the local commuting area. Forcing him into this compulsory litigation where this "process of having to reiterate this complaint is both distracting from his treatment and traumatic by nature."

**Establishing** this case or controversy involves irreparable harm and inadequacy of legal remedies for civil damages within the Sixth Circuit, insofar as to **whether** the Defendant's *et al.*'s conduct violated clearly established 5 C.F.R. § 353.301(d) rights, or Fifth Amendment equal protection rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982).

---

### AIDING THE COURT'S APPELLATE JURISDICTION

A remedy which restrains the NPS municipality or it's properly constituted legislative body from violating the federal rights conveyed to their *partially recovered* employees by 5 C.F.R. § 353.301(d) is obviously



unavailable. (House Committee on Oversight and Government Reform, Serial No. 114-73 (June 14, 2016)). The Eastern District court alleges there is no other case law addressing the municipality's misconduct other than a discrimination claim . . . In the Panel's opinion, "[w]e have never addressed whether this exception is available to federal employees . . ."

### **Individual Capacity Test**

The Eastern District and Sixth Circuit courts are circumventing the individual capacity representation test by evaluating *tort* based discrimination claims using subjective criteria from states other than Tennessee, or the Sixth Circuit, "A highly personal wrong requires serious 'personal violations' such as rape, sexual assault, or stalking, defamation, and harassment with phone calls." Citing *Brock*, 64 F.3d at 1421; *Arnold v. United States*, 816 F.3d 1306 (9th Cir. 1986); *Otto v. Hecker*, 781 F.2d 754 (9th Cir. 1986). (Pet. App. at 12)

### **Sixth Circuit Misrepresentation of Fact**

Causing the reviewing Panel to opine to the record that, "Thul now essentially admits, his state-law negligence claims are based on alleged violations of the Rehabilitation Act . . ." (Pet. App. at 4). Petitioner objects. I made no such claim, and this judicial opinion IS NOT supported by any factual allegations or admissions made in this case.

### **Personal Liability Tort Litigation Against Federal Employees**

Based on the Department of Justice defined strategies developed in their Personal Liability Tort Litigation Against Federal Employees, Vol. 58, No. 6 (November 10), the Sixth Circuit's unsubstantiated opinions can only be made to the record for the specific purpose of short-cutting the federal *tort* qualified immunity determinative process. See Pet. App. at 4 (cont.), "... And the Rehabilitation Act 'constitutes the exclusive remedy for a federal employee alleging disability based discrimination.'" (Citation omitted).

However, Mr. Thul's case involves a separate claim involving the NPS municipality's policy of constructively suspending *partially recovered* employees in violation of 5 C.F.R. § 353.301(d). See *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997), "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly . . . Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts." *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986). Additionally, "[t]o deny compensation to the victim would therefore be contrary to the fundamental purpose of [the Fifth Amendment]." *Id. Pembaur* at 481.

### **Qualified Immunity Defense**

The qualified immunity defense is wholly objective and no inquiry into a defendant's subjective good faith is appropriate. *See Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (observing that *Harlow* “purged qualified immunity doctrine of its subjective components”); *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (observing that *Harlow* “rejected the inquiry into state of mind in favor of a wholly objective standard”). The qualified immunity inquiry remains wholly objective even when the official's subjective intent is an essential part of plaintiff's affirmative case. *See Crawford-El v. Britton*, 523 U.S. 574, 588 (1998) (explaining that qualified immunity “may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated,” because “[e]vidence concerning the defendant's subjective intent is simply irrelevant to that defense.”).

The **documentary evidence** establishes the NPS municipality and its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality, terminated Mr. Thul in violation of 5 C.F.R. § 353.301(d).

### **Adequate Relief is Unobtainable In or From any Other Court**

In *Price Waterhouse v. Hopkins*, 490 US 228, 250 (1989), this Court holds that when [municipalities] violate 5 C.F.R. § 353.301(d), “[t]he [municipality] is a wrongdoer; he has acted out of a motive that is

declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.”

Thereby, “[the Defendants *et al.*] discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.” See *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

**Establishing** that within the U.S. Court of Appeals for the Sixth Circuit, the U.S. District Court Eastern District of Tennessee, the DOI, Office of the Solicitor and its subordinate Agency, the National Park Service, *partially recovered* federal employees classified under 5 C.F.R. § 353.301(d) have no defined federal rights, whatsoever.

**Thereby**, demonstrating that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.



## ERGO QUESTIONS

1. Whether the National Park Service municipality’s properly constituted legislative body’s conduct violated 5 C.F.R. § 353.301(d), or constitutional rights of which a reasonable person would have known?

2. Whether a private remedy is implicit in 5 C.F.R. § 353.301(d) not expressly providing one?



### REASONS FOR GRANTING THE WRIT

#### I. The District Court's Decision Conflicts with the Supreme Court's guiding principles established in *Cort v. Ash*, 422 U.S. 66 (1975).

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted,” *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied) – that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, e.g., *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e.g., *Amtrak, supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); cf. *J. I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v.*

*Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment).

### **A. Substantive Rights**

*Partially recovered* employees substantive rights are codified at 5 C.F.R. § 353.301(d),

“Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.)”

- a. Is the plaintiff “one of the class for whose *especial* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff?”**

**YES.** In this instant matter, Mr. Thul was injured in the line-of-duty. The class for whose *especial* benefit the statute was enacted is codified at 5 C.F.R. § 353.301, (a) Fully recovered within 1 year; (b) Fully recovered after 1 year; (c) Physically disqualified; (d) Partially recovered.

Is the plaintiff one of the class? **YES.** Circa. August 2017 the Agency was provided with the awareness of fact that his injuries were related to an occupational disease described as *short-term*. His primary treating psychiatrist, Dr. Beasley, DO, notified the Agency that he was *partially recovered* and anticipated a return to duty on *January 2018*. A position, which was open and available at the time.

**b. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?**

**YES.** Congress provides a clear and objective bright line standard for resolving ambiguities and making judgments in this case. “Agencies must make every effort to restore in the local commuting area . . . an individual who has partially recovered from a compensable injury and who is able to return to limited duty.” As previously determined, the term “must” is the only word that imposes a legal obligation on readers to tell them that something is mandatory.

In Tennessee, when a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard of care . . . from which it is negligence to deviate. *Estate of French v. Stratford House*, 333 SW 3d 546, 561 (Tenn. Supreme Court 2011).

Despite Mr. Thul’s warning, the NPS municipality’s properly constituted legislative body terminated him in violation of 5 C.F.R. § 353.301(d). Clearly a

“bright-line” rule violation, from which it is negligence to deviate.

**In this case**, the equal protection component of the Due Process Clause conferred upon Mr. Thul a federal constitutional right to be free from [any] discrimination which cannot meet the requirement that,

“Agencies must make every effort to restore in the local commuting area . . . an individual who has *partially recovered* from a compensable injury and who is able to return to limited duty.”

*Davis v. Passman*, 442 U.S. 228, 235-36 (1979)

### **1. ERGO QUESTION #1**

Whether the National Park Service municipality’s properly constituted legislative body’s conduct violated 5 C.F.R. § 353.301(d), or constitutional rights of which a reasonable person would have known?

## **II. The District Court’s Decision Conflicts with Tennessee Supreme Court’s Decision in *Estate of French v. Stratford House*, 333 SW 3d 546, 561 (Tenn. Supreme Court 2011)**

### **c. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?**

**YES.** The Federal Tort Claims Act constitutes consent to suit and is fundamentally limited to cases in which “a private individual (would be liable) under like circumstances.” 28 U.S.C. § 2674.



In this instant matter, the Defendants' violation of federal law, codified at 5 C.F.R. § 353.301(d), is causally connected to Mr. Thul's inability to progress in his recovery,

"Each time that the work environment complaint is further delayed in being resolved sets him back tremendously in his PTSD recovery, despite his compliance with treatment recommendations." The compounded effect of dealing with the harassment complaint directly affected his recovery. But without any resolution regarding the work related harassment, it increased the symptoms and continues to prevent his recovery." (*Id.* Opinions, Dr. Beasley)

**Establishing** allegations of injuries proximate to, or caused by the Defendants *et al.*'s violations of regulations or ordinances, as well as statutes.

**d. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?**

**YES.** The Tennessee Supreme Court in *Estate of French v. Stratford House*, 333 SW 3d 546, 561 (Tenn. Supreme Court 2011) summarized the doctrine of negligence *per se* as follows:

The standard of conduct expected of a reasonable person may be prescribed in a statute

and, consequently, a violation of the statute may be deemed to be negligence *per se*. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard of care . . . from which it is negligence to deviate. In order to establish negligence *per se*, it must be shown that the statute violated was designed to impose a duty or prohibit an act for the benefit of a person or the public. It must also be established that the injured party was within the class of persons that the statute was meant to protect.

The negligence *per se* doctrine may also be applied based upon violations of regulations or ordinances, as well as statutes. *Estate of French* at 672-73.

**Establishing** the Agency's violation of 5 C.F.R. § 353.301(d) is considered negligence in the state of Tennessee. A claim for which relief may be granted, over and above the Rehabilitation Act limit of \$300,00.00. An amount the U.S. District Court Eastern District of Tennessee will have to determine that is of an "Exceptional Circumstance – Beyond the Rehabilitation Act" *tort* claim, and just short of a Fifth Amendment Constitutional violation claim.

## 2. ERGO QUESTION #2

Whether a private remedy is implicit in 5 C.F.R. § 353.301(d) not expressly providing one?

**Establishing** Mr. Thul has sufficiently presented allegations supporting a claim implicit in 5 C.F.R. § 353.301(d) not expressly providing one. A claim for which relief can be provided under Tennessee *tort* law. The Defendants *et al.*'s defense is based only on a qualified immunity defense using subjective factors prohibited under the doctrine of qualified immunity. Where, the decision to violate 5 C.F.R. § 353.301(d) is being made by reasonably competent federal officials who should know the law governing their conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982).

**THEREFORE**, as the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) stated, [p]lainly, there is "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S. C. § 706 (1964 ed., Supp. V).

In all cases agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [5 C.F.R. § 353.301(d)]" or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D) (1964 ed., Supp. V). *Citizens* at 414.

### III. CONCLUSION

Congress provided the NPS municipality and its properly constituted legislative body with bright line rules pertaining to 5 C.F.R. § 353.301(d). The Sixth Circuit avers there is no case guidance explaining how this bright line rule is to be applied to **federal municipality** violations of 5 C.F.R. § 353.301(d) in the state of Tennessee, or elsewhere. This writ of mandamus will assist the lower court in the lawful exercise of its prescribed jurisdiction pursuant to NPS municipal violations of 5 C.F.R. § 353.301(d).

**Where now** in the Sixth Circuit, to get any relief for federal *tort* claims involving discrimination, *partially recovered* federal employees with psychological injuries will have to be raped, sexually assaulted, or stalked, defamed, and harassed with phone calls. Compelling this Court to exercise its authority when it is its duty to do so. Anything less allows Agencies to evade investigations by forcing *partially recovered* employees into constructive suspensions funded by FECA, in violation of 5 C.F.R. § 353.301(d). Where, in the state of Tennessee, this conduct falls well outside the standard of conduct expected of a reasonable person.

Respectfully submitted,

JEFFRY J. THUL  
P.O. Box 1403  
Dayton, TN 37321  
(423) 774-8440  
jeffrythul@gmail.com