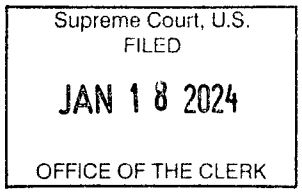
Case No.
In the
Supreme Court
of the
United States

23-6543



Petitioner
Odeiu Powers, *Pro Se*

v

Respondents
United States Department of Homeland Security
United States Department of Labor

On petition for writ of Certiorari
to the United States Court of Appeal of the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I Questions Presented

1. Must rulings reflect material facts on the record? Neither Petitioner nor Respondent dispute that Petitioner was a tenured civil service employee fired without due process. Moreover, although Petitioner is a preference-eligible veteran, Respondent unilaterally banned her from competing for federal civil service placement so that Petitioner could not dispute the ban that remains in place. None of the rulings below reflect these facts. Instead, they imply that there are no questions of due process deprivations.

2. Absent the timing allowances granted by the *Federal Rules of Civil Procedure*, is the *sua sponte* extension of time to act after an expired deadline a discretionary matter? After Respondents missed the deadline to respond to the amended claims and Petitioner moved for summary judgment, the court below unilaterally extended the expired deadline without excuse or request from Respondents.

3. Must judgments reflect docketed matters of merit? To validate the merit of pretrial summary judgment against the US government, Petitioner filed a list of fully argued supporting facts before the court ruled on the merit of the request. The document remains unacknowledged by the courts below. Despite repeatedly calling attention to the document at district and appeal levels, each court has ruled that Petitioner's claims warranted dismissal because she sought pretrial summary relief without establishing merit. The US District Court of the Northern District of Georgia concluded that Petitioner sufficiently pleaded the merit and timely filed the petitioned claims before transferring the case. The US District Court of South Florida twice dismissed the claims for lacking merit and possibly being untimely.

4. When do timely appeals filed and defended in good faith, and even found to be abusive of judicial discretion, create a pattern of delay deserving of dismissal? As part of the district court's justification for the contempt sanction, Petitioner's three prior appeals, including one that overturned a previous

dismissal for abuse of discretion, were cited as a pattern of delay. The US Court of Appeals for the Eleventh Circuit ruled the same, although the court did not rule that any of the appeals were frivolous before co. The rulings also implied that Petitioner missed or delayed filing deadlines, but the docket below shows otherwise.

5. Is *sua sponte* dismissal of all claims sustainable when the sanction was without warning against a *pro-se* party, barred opportunity to redress or re-file, was based on a nonexistent local rule, and no other authority supported the ruling? After Respondent objected to the *sua sponte* extension of the missed deadline to respond to the amended claims and asked the court to determine merit related to summary judgment based on the matters on the record, the district court dismissed all claims for contempt. Despite Petitioner's pleas to reconsider or reverse because of legislative bars against refiling, the court below upheld the dismissal.

6. Does a nonexistent authority serve as a fair warning? The appealed action is the second dismissal of the case by the originating court. Each time, the court cited *United States District Court South Florida Local Rule 7.1(c)* as its authority for dismissal, although the rule only provides guidance for the Memorandum of Law, which did not apply to the matters the court was considering at that time. Upon appeal, the Eleventh Circuit found that the rule gives fair warning.

II List of Parties

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Unrepresented minor, BP, Co-appellant below

Unrepresented minor, PP, Co-appellant below

III Related Cases and Index to Appendices

Appendix	Forum, Document Title	Case Caption	Docket Number	Date Filed	Appx Page
All are unpublished					
N/A	United States Court of Appeals for the Federal Circuit, Petition for Review of USMSPB Dismissal for Lack of Jurisdiction. Pending.	Powers v USMSPB, USDHS	24-1303	12/29/23	N/A
A	United States Court of Appeals for the Eleventh Circuit Request for Panel or Board Hearing Denied. Mandate Issued.	Powers et al v USDHS, USDOL	22-10042	10/23/23	1
N/A	US Merit Systems Protection Board Petition for Review Denied for Lack of Jurisdiction	Powers v USDHS	AT-0752-21-0418-I-3	11/09/23	N/A
N/A	US Department of Labor Office of Worker's Compensation	Powers v USDHS	062421292	10/11/2023	N/A
B	United States Court of Appeals for the Eleventh Circuit Opinion to Affirm Dismissal	Powers et al v USDHS, USDOL	22-10042	07/19/23	5
N/A	Complaint of Pattern of Judicial Bias to the Chief Judge and Panel of Reviewing Judges of the US Court of Appeals of Eleventh Circuit. Dismissed for Failure to Show Pattern.	Powers v US District Court Judge	11-21-90155	01/31/22	N/A
C	United States District Court for the Southern District of Florida *Sua Sponte* Order to Dismiss All Claims for Contempt	Powers et al v USDHS, USDOL	0:19-cv-62967-AHS	12/10/21	17
D	United States Court of Appeals for the Eleventh Circuit *Sua Sponte* Opinion for Lack of Jurisdiction	Powers et al v USDHS, USDOL	21−13053−JJ	11/19/21	25
E	United States Court of Appeals for the Eleventh Circuit Mandate for Lack of Jurisdiction	Powers et al v USDHS, USDOL	21-13053-JJ	11/19/21	27

Appendix	Forum, Document Title	Case Caption	Docket Number	Date Filed	Appx Page
F	United States District Court for the Southern District of Florida Opinion to Deny Pretrial Summary Judgment. *Paperless Order.* See Docket Report Entry 103, 107	Powers et al v USDHS, USDOL	0:19-cv-62967-AHS	09/02/21	79, 80
G	United States Court of Appeals for the Eleventh Circuit, Order to Reverse Dismissal for Abuse of Discretion. Mandate Issued.	Powers v USDHS	20–12289–AA	02/09/21	28
H	United States District Court for the Southern District of Florida Order to Dismiss All Claims; Judgment on the Pleadings.	Powers v USDHS	0:19-cv-62967-AHS	05/22/20	42
I	United States Court of Appeals for the Eleventh Circuit Order to Deny Review of Injunctive Relief.	Powers v USDHS	20–10863–AA	02/12/20	48
J	United States District Court for the Southern District of Florida Order to Deny Injunctive Relief. *Paperless Order.* See docket entry 51	Powers v USDHS	0:19-cv-62967-AHS	01/24/20	76
K	United States District Court for the Northern District of Georgia Order on Merit of the Claims, Timeliness.	Powers v USDHS	1:19–cv–0088	11/12/19	56
M	United States EEOC Notice of Right to Sue	Powers v USDHS	0201709397	02/11/19	148
M	United States Merit Systems Protection Board Notice of Dismissal IRT Whistleblower Retaliation	Powers v USDHS	AT-1221-16-0509-W-1	01/05/17	135
L	US District Court of South Florida Docket Report	Powers et al v. USDHS et al	0:19-cv-62967-AHS		71
M	Second Amended Complaint (Docket Entry (ED) 95)	Powers et al v USDHS et al	0:19-cv-62967-AHS	08/04/21	83

Appendix	Forum, Document Title	Case Caption	Docket Number	Date Filed	Appx Page
N	Motion for Summary Judgment (ED 101)	Powers et al v USDHS et al	0:19-cv-62967-AHS	08/20/21	265
O	Summary of Merit in Support of Motion for Summary Judgment (ED 102)	Powers et al v USDHS et al	0:19-cv-62967-AHS	08/23/21	274
P	Objection to Order Leading to Dismissal for Contempt (ED 121)	Powers et al v USDHS et al	0:19-cv-62967-AHS	11/29/21	279
Q	Petitioner Request to Reconsider Dismissal for Contempt (ED 123)	Powers et al v USDHS et al	0:19-cv-62967-AHS	12/15/21	284
R	Respondent's Opposition to Petitioner's 2020 Request to Reconsider Dismissal (ED 67)	Powers v USDHS	0:19-cv-62967-AHS	06/03/20	294

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In Re Murchison, 349 US 133. 136. (1955): due process requires, as a minimum, that an accused be given public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel." Petitioner argued: "Trial before the judge who was at the same time the complainant, indicter, and prosecutor constituted a denial of the fair and impartial trial required by the Due Process Clause..." The Court agreed: "Every procedure which would offer a possible temptation to the average man as a judge... not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of the law."	28
Joint Antifascist Refugee Committee v McGrath, supra, 341 US 185 (1951) "to be deprived not only of present government employment but of future opportunity for it certainly is no small injury..."	18
Kolender v Lawson, 461 US 352, 357	31
Leocal v Ashcroft, 543 US 1, 12 (2004) describes the need to interpret a statute that gives meaning to each word.	
Mass Cas. Ins. Co. v Forman 469 F.2d 259, 260 n1 (5th Cir 1972) "noting that the denial of a motion for default judgment is not a final, appealable order. 'Because the orders are not immediately appealable, we lack jurisdiction over this order.'"	6

Authority	Page #
5 USC 2302(b)(1)(A): a prohibited personnel practice is a personnel action; meaning (ix) a decision concerning pay, benefits, awards, or concerning education or training may be reasonably expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (xii) any other significant change in duties, responsibilities, or working conditions with respect to an employee in, or applicant for, a covered position in an agency" may not be taken by (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority (A) on the basis of race..., as prohibited under the section 717 of the Civil Rights Act of 1964 (42 USC 2000 e, 16).	11, 14, 15, 17
5 USC 2302(b)(9)(A): a prohibited personnel practice is a personnel action; meaning (ix) a decision concerning pay, benefits, awards, or concerning education or training may be reasonably expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (xii) any other significant change in duties, responsibilities, or working conditions with respect to an employee in, or applicant for, a covered position in an agency" may not be taken by (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority (9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.	14, 15, 16

Authority	Page #
5 USC 2302(b)(11) "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to that authority (A) knowingly take, recommend, or approve any personnel action if the taking of that action would violate a veteran's preference requirement or (B) Knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement."	15
5 USC 2108(3)(C): A *preference eligible veteran* means an individual who served on active duty as defined by [this title] at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred during the period beginning on September 11, 2001.. and has been discharged or released from active duty in the armed forces under honorable conditions; and is a disabled veteran."	10, 11
5 USC 4303: *Due Process for Employees* "...an agency may reduce in grade or remove an employee for unacceptable performance [but that employee] is entitled to "(A) 30 days' advance written notice of the proposed action which identifies (i) specific instances of unacceptable performance...(ii) the critical elements of the employee's position involved in each instance of unacceptable performance; (B) be presented by an attorney or other representative (C) a reasonable time to answer orally and in writing; and (D) a written decision..."	18
5 USC 5596(b)(4): *Back Pay Act*: "...in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or absent such filing, the date of the administrative determination."	29

Authority	Page #
Fed R. Civ P. 41b: Dismissal of Actions: INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, (a) defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule- except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19- operates as adjudication on the merits.	7, 9,28, 29, 30
Fed. R. Civ. P. 55(d) "JUDGMENT AGAINST THE UNITED STATES: A default judgment against may be entered against the United States… only if the claimant establishes a claim to relief by evidence that satisfies the court."	5, 22, Appendix O, p.274
Fed. R. Civ. P. 83(b): Rules by District Courts; Judges Directives- "PROCEDURE WHEN THERE IS NO CONTROLLING LAW. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 USC 22072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement."	27
US District Court of the Southern District of Florida Local Rule 7.1	i, 3,9, 28, 31,32, Appendix 15,

VI Opinions Below

Initiation, Adjudication and Transfer to USDCSFL

The cause below was filed as a complaint with jury demand on February 26, 2019, in the US District Court for the Northern District of Georgia (USDCNG). The claims alleged that although Powers was a probationary employee, USDHS fired her as a result of racially-motivated harassment, which led to the filing of a grievance which, in turn, was used to justify her termination mere weeks after USDHS recommended her for retention in her annual performance appraisal.

On July 12, 2019, Respondent appeared and moved to dismiss for failure to state a claim, improper forum, and lateness (Appendix L, P. 73, Entered Document (ED)14). In a series of motions until ED 20 on October 07, 2019, Petitioner and Respondent fully argued their positions for and against the motion.

On November 12, 2021, the presiding magistrate found that the claims were timely and sufficiently pled but filed in the wrong forum. The action warranted transfer to the appropriate forum, not dismissal (Appendix K, p. 56). USDHS must have filed its opposition to the ruling within 14 days (Appendix L, p.73, ED 22). When neither party objected, the court adopted the magistrate's recommendation and transferred the claims to the US District Court for the Southern District of Florida (USDCSFL) on December 03, 2019 (Appendix L, P. 73, ED 23).

First Request for Injunctive Relief

Although Respondent appeared and answered the claims in USDCSFL, none of the answers directly affirmed or denied the claims (Appendix L, p. 74, ED 33). On January 24, 2020, Powers learned

that she was a tenured employee versus the probationary employee USDHS previously misled her to believe. Because 5 USC 7701(c)(2) holds that "*Harmful Error:* requires that [t]he agency's decision may not be (upheld) . . . if the employee or applicant shows harmful error in the agency's procedures. . ." she moved for immediate injunctive relief (Appendix L, p.75, ED 44).

In the Motion, Petitioner pled that the opposition's actions were causing ongoing and undue health and financial hardships, which included multiple periods of homelessness, exacerbation of her mental illnesses that were connected to periods of active military service, and diminished capacity to care for her minor children and herself. She also showed that her right to relief was indisputable, that waiting for relief would only compound the injuries already caused by opposition, and future financial compensation would not adequately relieve the ongoing damage (Appendix L, p. 75, ED 44).

In reply, Respondent did not argue for or against the merits of Powers' motion. Instead, they repeated the unverified claims that USDHS previously used to fire Ms. Powers. The court denied the motion without explanation in paperless order ED 51 (Appendix J, L. p. 76). Powers did not request reconsideration. She appealed to the US Court of Appeals for the Eleventh Circuit. The appeal court denied the request for review because Powers did not request the lower court's reconsideration before appealing (Appendix I).

Claims Dismissed for Insufficient Pleading, Second Appeal

Despite the previously settled arguments, the unamended claims, and USDCNG's adjudication that the claims were sufficiently and timely pled, on remand, Respondent again moved to dismiss the claims (Appendix L, p. 76, ED 56). Powers timely answered and *sur replied* to Respondent's motion for dismissal.

Citing the Eleventh Circuit's standards for judging the merits of the pleadings of a represented party versus the pro-se claims before it (Appendix H, p. 43), the court dismissed Powers' claims. The

court used inferences that were not necessarily the most favorable to the claims to conclude that the claims were not adequately pled (Appendix H, p. 42), a review standard contrary to that of the Eleventh Circuit.

On request to reconsider, Opposition cited *USDCSFL Local Rule 7.1(c)* as grounds for the court to ignore Powers' timely-filed *sur reply (Appendix R, p. 297). The court denied the* Petitioner's request by paperless order (Appendix L, p. 77, Document 68). She filed her second appeal to the petitioned court. The Court of Appeals of the Eleventh Circuit reversed the dismissal for various abuses of discretion on February 09, 2021. (Appendix G, p. 30). They remanded the case for the second time to USDCSFL with the order to grant the Petitioner the opportunity to amend the pleadings to a format that was acceptable to the USDCSFL.

First and Second Amended Complaints

In May 2021, Powers timely filed ED 77, the amended complaint of 13 claims, added minor parties as co-plaintiffs, and USDOL as co-defendant (Appendix L, p. 78). Without answering or denying the allegations, Respondent filed a third request for summary dismissal (Appendix L, p. 78, Document 82). In a series of replies, *sur replies*, etc. (Appendix L, p. 78-79, ED s 82-88), Petitioner and Respondent addressed and resolved every question of merit raised by Respondent's answer to dismiss, including re-litigating questions of timeliness previously argued and settled in the USDCNG (Appendix K, p. 56).

Upon the court's approval, Powers filed a second amended complaint within **5 days** as ordered by a paperless order, ED 93, dated August 03 (Appendix L, p. 79). The second amended claim added a 14th allegation of deprivation of due process after legislated forum ripening. All other parties and claims remained unchanged. Although Appendix L, p. 79 reflects August 9, 2021; as the date of entry,

opposition was served the amended claims via email on August 04, 2021 (Appendix p. 269, 270), and the action was docketed August 06, 2020 (Appendix L, p. 79, ED 95 and Appendix M, p. 115).

Respondent's Answer to Second Amended Claims Late. Second Move for Injunctive Relief.

Opposition's answer to the amended claims was due August 18, 2021, 14 days after service per the court's order (Appendix L, p. 79, ED 93) and *Fed. R. Civ. P. 15(a)(3)* Amended and Supplemental Pleadings: "Time to Respond. Unless the court orders otherwise, any required response to an amended pleading ***must*** be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later."(bold italics added for emphasis) (Appendix N, p. ED 101, Request to Reconsider).

Hertz Corp v Alamo Rent-A-Car, Inc., 16F.3d 1126 1132 (11th Cir 1994) ruled that "once the court has identified the date upon which the leave to amend expires, and that expiration date becomes the date of the final order unless the court grants an extension of time upon consideration of a motion filed before the expiration date has passed." However, by August 20, 2021, Respondent failed to file an answer, a request for extension of time, or an explanation for why it missed its deadline. As dictated by local filing rules for unrepresented parties, Petitioner emailed the presiding judge and Opposition her emergency action for summary judgment. She also express mailed a copy for docketing (Appendix N, p. 265-269). The request was officially docketed on August 23 (Appendix L, p. 79, ED 101).

Where *Fed. R. Civ. P. 8(b)(2)* General Rules of Pleading dictates that "A denial must fairly respond to the substance of the allegation," more than two and a half years after action was brought and nearly six years after she was fired, the opposition had yet to respond to the substance of the claims. Instead, on August 23, they late answered with a new request to dismiss Powers' claims (Appendix L, p. 79, ED 98).

Fed. R. Civ. P. 6(b)(1)(B) establishes that for "[e]xtending Time: (1) In general. When an act may or must be done within a specified time, the court may, for good cause, extend time on motion made after the time has expired if the party failed to act because of excusable neglect." However, Opposition did not explain the lateness nor requested extension of the expired filing deadline.

Instead, on the same day the respondents filed their late answer to the amended claims, August 23, the Respondents filed their final action below: a motion to remove counsel as a party to the suit (Appendix L, p. 79, ED 99). After that, the presiding judge acted as opposition until *sua sponte* dismissal of Powers' claims in ED 124, on December 10, 2021 (Appendix L, p. 79-81).

In deference to *Fed Rule Civ Pro 55d,* Powers submitted a summary of the docketed pleadings that supported the merit of her claims against the US (Appendix O, p. 274) on August 23. On August 28, USDCSFL ruled by paperless order that Respondent's answer was not actually late-filed. Therefore, Powers' request for summary judgment was moot (Appendix L, p. 79, ED 103).

Upon requested reconsideration, USDCSFL changed its position to rule, again by paperless order, that although Respondent's answer was indeed late, the deadline to answer the pleadings was a matter of local discretion and could therefore be extended at will (Appendix L, p. 80, ED 107). Contrary to the court's previous summary dismissal of Powers' claims, USDCSFL ruled that the case would remain open to determine merit. As Appendix L shows, USDCSFL never ruled on ED 102, Petitioner's summary of the merit of her claims, which was submitted in support of the motion for summary judgment.

Third Appeal Filed

Powers filed a third appeal to the US Court of Appeals for the Eleventh Circuit. In what she later learned was a severe breach of court etiquette, Powers repeatedly referred to the judge below by name

and title while alleging a pattern of bias and delays against her claims in brief. Without mentioning her discourtesy, the court dismissed the appeal *sua sponte* before Respondent filed brief.

In brief, Powers argued that the petitioned court had found in *Carter v Butts Cty. GA*, 110 F. Supp. 3D 1325, 1332 (MD GA 2015), affirmed in part on other grounds and remanded, 821 F.3d 1310 (11th Cir. 2016): "Under [*Fed Rule Civ Pro]6b*, to extend an expired deadline, a party must show good cause and demonstrate excusable neglect." Additionally, in *FTC v Stephen Lalonde*, Civil Action 11-13569 (11th Cir 2013), the court held that it was not obligated to extend Lalonde's missed deadline after the pro-se defendant argued that he missed the filing date because he was incarcerated and could not respond in time. Which was similar to the circuit's sentiments established in *Hertz v Alamo*. She also emphasized that although the court below had ruled that it intended to hold the case open to determine merit, it had also passed on multiple opportunities to rule on the merit of the claims.

However, in its dismissal of Powers' The Court of Appeals for the Eleventh Circuit reversed course and cited *Broussard v Lippman,* 643 F2d 1131, 1133 (5th Cir Unit A Apr. 1981): "Because a district court's orders were issued entered to facilitate further investigation proceedings on the merits, its orders were not necessarily final"; *Mass Cas. Ins. Co. v Forman* 469 F.2d 259, 260 n1 (5th Cir 1972) "noting that the denial of a motion for default judgment is not a final, appealable order. 'Because the orders are not immediately appealable, we lack jurisdiction over this order.'" (Appendix D, p26).

Additionally, in its dismissal, the court of appeals stated that under *Supreme Fuels Trading FZE v Sargeant*, 689 F.3d 1244, 1246 (11th Cir 2012), "an order that adjudicates fewer than all the claims against all parties to the action is not final absent an order by the district court..." (Appendix D, p. 26) However, in the lower court's paperless order to stay the briefing schedule stated that "[b]ecause the issue being appealed could potentially dispose of the entire case, the Court will grant the stay." (Appendix L, p. 81, ED 115).

Although the ruling claimed that Powers had 21 days to dispute it, the mandate to remand was issued the same day as the dismissal, rendering further appeal moot (Appendix E, p. 29). Powers still requested the court's reconsideration and asked for the mandate to be recalled. Neither action was granted before the remanded claims were dismissed below.

Remand and Order to Reply to Late Answer

Upon remand, USDCSFL cited the dismissed appeal as its approval to extend Opposition's missed deadline which triggered the appeal. In Paperless Order 119 (Appendix L, P. 81), the district court ordered Powers to reply to Respondent's late-filed and unexcused answer to the amended claims. The certificate of service and proof of mailing showed that the response was timely served to Respondent. However, due to mail slowdowns at the time, it was not docketed until after the date established by the court (Appendix P, p. 284 and 285).

The answered objection to the order addressed the court instead of Opposition as ordered. The objection reasoned that if the court needed to resolve the matter of merit to rule on her motion for summary judgment then the court must have had several ways to do so that did not include responding to Respondent's answer which was procedurally barred until she incorporated it by reference as the court was ordering her to do. (Appendix P, p. 279).

Powers reiterated that the court had not ruled on ED 102, which summarized the merits of the claims in support of Petitioner's motion for summary judgment. Moreover, ED 82-88 argued matters of merit that the court had still not ruled on. Finally, Petitioner asked the court for an order that did not involve her direct acceptance of Respondent's otherwise inadmissible motion.

Dismissal for Contempt

On December 10, 2021; *sua sponte,* USDCSFL dismissed all of Powers' claims for contempt on the authority of *FRCP 41b* and *Local Rule 7.1(c)1* (Appendix C, p. 20 and p. 25). The ruling stated that

Powers' objection was the last acceptable act in a pattern of contempt towards the court. The ruling held that the court could no longer tolerate Powers' disrespect and that it must act to protect itself and opposition from the effects of Powers' contempt.

The referenced pattern of disrespect was: Powers' three appeals (Appendix C, p. 26), including the April 2021 reinstatement of her claims; the objection itself because it lacked legal basis and ran afoul of Eleventh Circuit precedent which allows the court to "dismiss a plaintiff's action for failure to comply with The Federal Rules of Civil Procedure or **any** order of the Court" (Appendix C. p. 24); that the objection was late (Appendix C, p. 20) although it was not (Appendix P, p. 285); and that Powers' objection to responding to the late answer meant that the answer must be accepted as factual. (Appendix C, p. 23)

Powers requested reconsideration. In Appendix Q, she again summarized the issues that were already argued and settled before the claims were amended, including the previous ruling by USDCNG (Appendix Q, p. 286). She pled for the court to rule on the matters of merit that were timely filed before the opposition filed its latest request for dismissal (Appendix Q, p.287), reiterated that Opposition had not explained nor requested an extension for the late filing (Appendix Q, p.284), and that the court's extension was contradictory to Federal Rules of Civil Procedure (Appendix Q, p. 285). It was denied by paperless order 124 (Appendix L, p. 81, ED 124).

Fourth Appeal

Powers filed this fourth appeal before the US Court of Appeals for the Eleventh Circuit. In Brief, she argued that USDCSFL abused its discretion when it (1) unilaterally extended Respondent's expired deadline to answer the amended claims, (2) refused to rule on timely-filed merit-supporting matters before it, (3) then used that refusal to dismiss all claims as requested by Respondent's unsanctioned late

answer (4) based on *Local Rule7.1(c)1* but failed to explain how the rule authorized dismissal without warning or how (5) *Fed Rul Civ Pro 41b* grants the right to involuntarily dismiss all claims *sua sponte.*

In their appeal brief, Respondent helpfully provided that maybe the judge below intended to refer to *USCSFL Local Rule 7.1*; not *7.1(c)1* as his authority to dismiss all claims. However, the most severe sanction prescribed by the excerpted passage is the dismissal of specific motions not supported by a timely-filed memorandum of law (attached after the conclusion of this document). None of the referenced motions that must be supported by a Memorandum of Law were in consideration at the time of dismissal.

United States Court of Appeals for the Eleventh Circuit still found that the United States District Court for the Southern District of Florida was empowered to dismiss all claims for a pattern of willful delay, although a pattern was not necessary if a single action warranted dismissal allowable by local rule. It found that *Local Rule 7.1*; not *7.1(c)1*; grants exactly that authority. Its cited authority is the excerpt provided by Respondent in their brief where: "failure to answer to another party's motion 'may be deemed sufficient cause for granting the motion by default.'" Appendix B, p. 10.

However, the quote is not found in *Local Rule 7.1* either. Even if it were, the decision to affirm the lower court's dismissal is an unsustainable time for the court to cite it as the grounds for dismissal of claims when the district court never ruled as such. The opinion further held that the interpretation of local rules is judicially discretionary ***and*** that the Court's interpretation also serves as fair notice to warrant dismissal without further warning.

Additionally, the petitioned opinion (Appendix B, p. 6) ruled that the district judge was within their right to extend the expired deadline because Respondents had diligently defended their claims beforehand. The court did not mention that Respondent had abandoned its claims *after* the missed

pleading deadline nor about Powers' sustained vigorous, unassisted, and timely defense of her claims for six years before unilateral dismissal by the lower court.

Finally, although Powers was a tenured employee, the courts below avoided all considerations of merit or due process deprivation by materially changing the scope of Petitioner's civil service employment. Instead, they repeatedly cited that the Petitioner was only employed by the Respondent for nine months instead of the entire scope of the Petitioner's 2+ years of civil service employment.

The rulings also omitted that the Petitioner is a preference-eligible veteran who remains banned from federal civil service because of Respondent's actions and that the dismissal caused the permanent seizure of the associated rights and benefits of preferential civil service employment to which Petitioner is entitled.

Petitioner has never been granted a hearing by the courts despite repeated requests.

VII Jurisdiction

The date on which the United States Court of Appeals for the Eleventh Circuit decided the case was July 19, 2023; and appears at Appendix B, p. 5. A timely petition for hearing was denied by the United States Court of Appeals of the Eleventh Circuit on October 23, 2023; and a copy of the order denying hearing appears at Appendix A, p. 1. Jurisdiction is invoked under 28 USC § 1254(1).

The petition comes before the Court, in accordance with *US Supreme Court Rule 10(a),* the United States Court of Appeals for the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings, [and] sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power[.]" Because of the (in)actions of the petitioned court, " adequate relief cannot be obtained in any other form or from any other court" *US Supreme Court Rule 20(1)*. Every question posed in this petition was raised on appeal, in the petition for *en banc* or panel hearing,

formal and informal complaints of a pattern of judicial bias that was dismissed without review, and in the Request for Reconsideration before final dismissal at the district level. None of the judges below saw fit to intervene.

VIII Statement of the Case

The petitioner is a preference-eligible disabled veteran and tenured federal civil service employee who is also African-American (Appendix M, p.100(III)). She was fired without due process on December 7, 2015. At that time, she had completed over two years of federal civil service, including a previous initial probationary period (Appendix, p. Appendix M, p. 100(II)) and five years of active military service, including deployments in support of Operation Enduring Freedom and Operation Iraqi Freedom.

In the period of service that led to these actions, Petitioner was employed by US Homeland Security's Office of the Inspector General as an Auditor. Her role provided regulatory oversight and accountability of US Homeland Security's agencies and programs, including those related to prohibited personnel practices; the very causes for the claims below.

Background

As the petitioned opinion incredulously highlighted, the 14 claims below were instigated within nine months of employment with US DHS. However, that period of employment was only the Petitioner's most recent employment period with the federal government. Before working for USDHS, Petitioner was employed for (a) 1.75 years of competitive federal civil service (Appendix M, p. 100(II)), including satisfactory completion of the only valid probation period (Appendix M, p.92(II)) (b) *and* five years of honorable active military service which led to a (c) compensable disability rating by the US Department of Veterans Affairs that guaranteed preferential consideration for hiring and retention (Appendix M, p.92(IIB)).

(d) But Respondent USDHS terminated her employment without verified cause or warning due to racial harassment (Appendix M, p. 100(III)) and whistle-blower retaliation (Appendix M, p. 94(B) and p. 104(IV) then (e) denied access to legislated timely redress because she was erroneously categorized a probationary employee, (f) impeded her right to apply for worker's compensation benefits (Appendix M, p. 106(C)), and (g) banned Petitioner from competing for federal civil service rehire without notice or opportunity to appeal the action (Appendix M, p. 106 B). As a result of Respondent's actions, Petitioner's property and liberty interests remain withheld after eight years.

However, the courts below only acted to further hinder the restoration of Petitioner's rights when they obfuscated Powers' constitutional protections in the ruling to dismiss for contempt and then to uphold that dismissal. The petitioned ruling is different from what the record shows in (Question 1) omission of due process considerations. The Court of Appeals for the Eleventh Circuit then (Question 2) allowed the *sua sponte* extension of Opposition's time to act outside *Fed Rules of Civil Procedures 6(b)*.

Next, the court below used the unsanctioned extension to ignore (Question 3) the United States District Court of Southern Florida's refusal to rule on timely-filed and adjudicated matters of merit before it. The Court of Appeals of the Eleventh Circuit further upheld the dismissal of all claims for contempt, citing (Question 4) non-frivolous appeals and timely-filed answers to three of the court's orders as part of a pattern of willful delay.

Finally, the petitioned ruling ignored the Constitutional pitfalls of the dismissal that was (Question 5) s*ua sponte* and without warning or viable opportunity to refile and based on (Question 6) a nonexistent local authority which the ruling claimed was fair warning.

Causes for the Claims Below

On October 27, 2015, Powers' immediate supervisor certified Powers' annual performance appraisal for the performance year that ended September 30, 2015 (Appendix M, p. 106 (3)). In the

report, the supervisor attested that Powers performed adequately and that she represented the agency well. Before the supervisor finalized the appraisal, HR pointedly asked the supervisor if she had any verifiable reasons to recommend that Powers not be retained by the agency. The supervisor did not. She recommended Powers' retention (Appendix M, p. 104(IV.A2)). However, two weeks later, the supervisor suddenly demanded Powers' termination for a pattern of misconduct (Appendix M, p.104(IVA1)).

After reviewing the performance appraisal, Powers noted that her work had not been fully or fairly attributed (Appendix M, p.104(IVA)). At 08:11 on November 17, 2015, Powers requested that her secondary-level supervisor review and accurately credit her work (Appendix M, p. 104(IVA)). Powers' immediate supervisor, who is White and the subject of the complaint, was included in the email. At 10:10 AM that same day (Appendix M, p. 104(IVA1)), the immediate supervisor asked HR to terminate Powers' employment with [DHS] for a pattern of disrespect (Appendix M, p. 104(IVA1)).

The secondary supervisor declined Powers' request to review her work. Since the subject of the complaint was related to Powers' annual performance appraisal, the supervisor directed Powers to file a grievance instead. However, contrary to the USD*HS Office of the Inspector General Grievance Manual,* the second line supervisor directed Powers to file the informal grievance with the supervisor against whom she was aggrieving the disparate treatment (Appendix M, p. 105(6.)).

The incidents aggrieved by the Petitioner included attribution of credit for Powers' documented work to a White coworker (Appendix M, p102(F)), habitually singling Powers out by name during meetings (Appendix M, p. 102(D)), suddenly changing the level of scrutiny for Powers' work (Appendix M, p. 102 E, G, I), withholding training credit and opportunity(Appendix M, p. 104(K, L)), delaying pay records (Appendix M, p. 105(5.)), and a death threat (Appendix M, p.106). The disparate treatment began after Powers wore her hair in its natural state, an Afro, to work for the first time at the end of August 2015 (Appendix M, p.100).

In the weeks afterward, the supervisor repeatedly contacted HR to determine if she could fire Powers for any reason and then tried to fabricate a pattern of poor performance. The supervisor's sudden push for Powers' termination at the end of the performance year was precisely why HR asked her directly to formalize her observations on Powers' performance appraisal (Appendix M, p. 101(1)). Absent any verifiable proof of performance or conduct deficiency, on September 30, the final day of the performance year, the immediate supervisor failed to instigate an argument in front of witnesses (Appendix M, p.103)). When Powers walked away instead, she ordered Powers to attend a meeting where no witnesses would be present the next day.

At the warning of a coworker and wary of what she saw as a quickly escalating series of actions that threatened her employment, Powers invited her secondary supervisor and the agency's administrative/performance coordinator to participate in a meeting. The immediate supervisor was included in the invitation email. After the meeting, the immediate supervisor told Powers that including the managers was an act of disrespect, that she had been blindsided by it, and threatened Powers (Appendix M. p. 106).

Even in light of those events, Powers trusted that the agency would take its anti-abuse mission ' seriously enough to at least pretend to review her grievance and protect her from her abusive supervisor. The assumption cost the Petitioner her entire career. The supervisor rejected Powers' informal grievance on November 30, 2015(Appendix M, p. 105(6.)). As directed by the agency's *Grievance Manual,* on December 3, Powers formally filed the grievance with her secondary supervisor and the agency's administrative coordinator.

Despite management and HR's awareness of previous similar complaints against Powers' immediate supervisor (Appendix M, p.92(C1)), no member of management responded to the formal

grievance (Appendix M, p.92(C2)). Instead, the very issues that Powers aggrieved were reversed and cited as the causes for her termination (Appendix M, p.105).

The agency's compounding of the primary supervisor's retaliation did not end after Powers was fired. Despite Powers' preferential hiring status, the supervisor barred Powers' right to compete for Federal civil service employment when she falsified, signed, and filed an employment suitability report that claimed that Powers was ineligible for rehire (Appendix M, p.106(B)). The report was never provided to Powers but it remains in her permanent employment record and continues to disqualify Powers from competitive federal hiring (Appendix M, p.106(B)).

In 2016, Powers timely appealed to the US Merit Systems Protection Board to reverse her dismissal under whistleblower protections. For the Board to exercise its limited jurisdictional authority over her claims, Powers needed to prove that the agency would not have taken the same actions regardless of the grievances that Powers filed before the termination. In response, the immediate supervisor submitted signed and verifiable falsehoods (Appendix M, p.106(9)) which the board accepted as factual and dismissed the claims as outside its jurisdiction (Appendix M, p.135).

In August 2018, Powers applied for worker's compensation. Powers was forced to submit the application that detailed the extent of her financial and mental injuries and the associated physical symptoms to the former immediate supervisor who caused the injuries. The supervisor withheld the application until Congressional intervention forced its release in December 2018 (Appendix M, p. 106(C)). According to Worker's Compensation law (18 USC 1922), the application must have been forwarded for processing within 10 working days of its receipt (20 CFR 10.110). Powers submitted a separate application for payment of worker's compensation benefits to the supervisor in 2019. The application has never been forwarded to USDOL (Appendix M, p. 107).

<u>On Timing and Jurisdiction of Claims Below</u>

Mixed Case Claims: Powers received a Notice of Right to Sue from USEEOC in January 2019. The related claims were for racial harassment and whistle-blower retaliation. The action was timely filed (Appendix K, Appendix M, p.90B; Appendix O) in the United States District Court of Northern Georgia.

Federal Tort Claims Act Claims *(FTCA)*: A claim for worker's compensation related to the injuries that led to these actions was timely filed and denied by Respondent USDOL in January 2020 (Appendix M, p. 91). Per 5 USC 8116(c), claims for work-related injuries to federal workers must first be presented to USDOL before attempting to recover elsewhere.

After USDOL denied Powers' worker's compensation claims, Powers became eligible to recover damages through the *FTCA*, 28 USC 2679(a) (Appendix M, p. 91). Powers' *FTCA* claims remain timely due to equitable tolling exceptions as allowed in *US v Kwai Fun Wong*,135 S. Ct. 1625 (2015) (Appendix M, p. 90(D)) since injured federal employees may only recover through the *FTCA* as a secondary resort.

As required by 28 USC 2675(a), *FTCA* claims for injuries caused by negligent supervision related to prohibited personnel practices were presented to USDHS in October 2021. They were filed in the District Court six months after the agency was notified (Appendix M, p.90D, 91, and 99).

Similarly, USDOL was notified six months before *FTCA* claims for injuries related to their failure to provide adequate notice were brought before the court (Appendix M, p. 90II and 107).

Title V Claims: *Civil Service Reform Act* (5 USC 7701(c)(2)) claims related to Powers' termination without due process were added in the Second Amended Claims, Appendix M after the claims were presented to and denied by the US Merit Systems Protection Board in July 2021 (AppendixM, p.92(II) and 100(II))

Upon dismissal of the claims below, Petitioner became time-barred from refiling most of her claims, including recovery of lost wages and benefits dating back to the time of her termination from

DHS (5 USC 5596(b)(4) *Back Pay Act*. Although detailed in the pleas to reconsider dismissal and in brief below, none of Powers' losses were addressed by the district court, on dismissal-reconsideration, or in the petitioned opinion.

IX Reasons for Granting the Writ

Question 1: Claims are Subjected to Due Process Protections

Contrary to the spirit of *Brady v Maryland*, 373 US 83 (1963), the courts below materially misrepresented the extent of Powers' property and liberty interest rights to justify and uphold dismissal of the claims. The petitioned opinion only considered the nine months that Powers worked for DHS; not Petitioner's total time employed by the Federal government or other property interest factors.

Powers' combined periods of employment with the federal government granted her the property interest rights, defined by *Board of Regents et al v Roth* 408 US 564, 572 (1972) where Powers was entitled to "procedural protections against separation" and a covered employee as conveyed by 5 USC 7511(a)(1)(A)(i) where " [e]mployee defined as: '(A)n individual in the competitive service (I) who is not serving in a probationary or trial period under an initial appointment.'" Because Powers had already completed a probationary (Appendix M, p. 92(II)) before employment with USDHS, the terms of her employment would have continued indefinitely; the same conditions as the plaintiff in *Slochower v Board of Education,* 350 US 551 (1956).

However, she was deprived of that property interest without warning (Appendix M, p. 92 (II) and p.100(II)) due to harassment which started because of her immutable racial features (Appendix M, p.93(III) and p.100(III)). In retaliation for filing a complaint about the harassment which was protected from prohibited personnel practices under 5 USC 2301(b)(1) (Appendix M, p. 96(2) and p.104 (IV)), Powers fired without warning under false premises by USDHS (Appendix M, p. 96(2) and p.104(IVA)).

Additionally, administrative errors aided Powers' dismissal without due process (Appendix M, p. 93 (IIBC) and p.100(II)). However, the property and liberty interest did not end after Powers was fired. USDHS falsified an employment suitability report that banned her from competing for federal employment without warning (Appendix M, p. 96(3b) and p.106(B)) despite Powers' status as a preference-eligible veteran (Appendix M, p. 96(3c)), and withheld Powers' applications for worker's compensation (Appendix M, p.98 (3d)). Moreover, USDOL failed to provide timely notice of appeal rights when the application for worker's compensation was denied (Appendix M, p. 98(III) and p. 107(V)). As a result, Powers has been denied fair review or redress for the past eight years; and again, upon dismissal and affirmation below.

Petitioner's claims meet the balancing interests factors of *Cleveland Board of Ed v Loudermill* 470 US 532, 541 (1985): the terms and conditions of Powers' employment would have continued until retirement even if employed by a different federal agency. Moreover, Powers' preferential status as a disabled veteran would have ensured retention during force reductions and provided special hiring consideration.

Although the reasons for Powers' termination were facially transparent, the agency did not act to mitigate the harm to her. Since Petitioner was a tenured employee, 5 USC 4303 established that the firing agency must have given her 30 days notice of the proposed action, their reasons for the proposed removal, an opportunity to improve performance, and the opportunity to prove that accusations of misconduct were untrue *Cleveland Board of Ed v Loudermill* 470 US 532, 541 (1985) and *Goldberg v Kelly*, 397 US 254 (1970) reinforce the same. None of those protections were granted to Powers.

The agency compounded the effects of the harasser who retaliated and fired Powers by granting her unchecked opportunities to worsen property and liberty interest deprivations after Petitioner was

fired. As this Court held in *Joint Antifascist Refugee Committee v McGrath, supra,* 341 US 185 (1951) "to be deprived not only of present government employment but of future opportunity for it certainly is no small injury..." but that was exactly what happened to Powers when USDHS banned her from competing for Federal civil service positions through the falsified employment suitability report which it did not inform her about.

The report also had a rippling effect because Powers continued to use USDHS as a reference for private and federal civil service job applications until she became too disabled to work. The report flagged her applications as unsuitable for hire and with each passing month of unemployment, made finding a new job even harder. Part of the reason that *Roth* was unsuccessful was that there was "no suggestion that the State, in declining to reemploy the Respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents et al v Roth* 408 US 564, 572 (1972). USDHS' actions essentially trapped Powers in a period of unemployability without the opportunity to know why her applications were unsuccessful or to remove the report without legal intervention. As a result, Respondent is responsible for Powers' additional liberty interest losses, as enumerated in *Paul v Davis*, 424 US 693, 711-12 (1976).

When Powers became too disabled to work and applied for worker's compensation, the agency forced her to submit the application that detailed the extent of her medical and financial injuries to the same supervisor who harassed and fired her under false premises. I should surprise no one then that the supervisor withheld the application for worker's compensation and then Powers' application for payment under the disability scheme. A subsequent application for payment of worker's compensation benefits remains withheld by USDHS' legal officer.

Powers repeated the extent and ongoing nature of these deprivations in of her complaints, culminating in the Second Amended Complaint, Appendix M, p.83- 264. She also addressed the deprivations and continuing resulting losses to her minor children and herself in her two denied requests for injunctive relief (Appendix L, p. 76, ED 44) and (Appendix N, p. 265; supported on the merits by Appendix O, p. 274).

However, none of these deprivations were considered or addressed by the petitioned or dismissing courts. Instead, their rulings repeatedly emphasized the nine months of employment with USDHS as if no Constitutionally-protected deprivations were at issue and that *sua sponte* dismissal of the Petitioner's claims below was the only reasonable outcome versus granting the Petitioner's motion for summary judgment which was triggered by Respondent's late and unexcused answer to the amended claims.

Question 2: *Sua Sponte* Extension of Expired Deadline to Answer Amended Claims

Federal Rules of Civil Procedure 15(a)(3) establishes that for rules of amended and supplemental pleadings: "Time to respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days of service of the original pleading, whichever is later." The time calculation guidelines of *Federal Rules of Civil Procedure 6(a)* dictate that Respondent's answer to Powers' amended claims was late.

Respondent was served the amended claims on August 4, 2021 (Appendix M, p. 268 and p. 269). The time to respond was 14 days later, on August 18, 2020. Respondent did not file an answer until August 23, 20201. On appeal, Respondents submitted that they would have requested an extension after the fact but were not allowed to provide one. Two appellant briefs and the District Court's own ruling in Appendix L, ED 107, (Second Paragraph) all show that Respondent's answer was actually five days late.

However, none of those facts are reflected in the petitioned ruling. Instead, the court below used the date that the document was received by the court by mail as the date of service; a timing standard of its own making; to rule that Respondent's answer was actually timely (Appendix B, p.7). Essentially, the appealed ruling created its own facts and then ruled on those facts to justify the eventual dismissal of all the Petitioner's claims for *sua sponte* contempt.

At the district level, the court first ruled that the answer was timely to render Petitioner's motion for summary judgment moot by paperless order (Appendix L, p. 79, ED 103). Powers requested reconsideration and submitted the Federal Rules of Civil Procedure timing standards to support her dispute (Appendix L, p. 80, ED 105).

The court then changed its position to reflect that the answer was indeed late but that the court would hold the action open to determine merit by paperless order (Appendix L, p. 80, ED 107). Additionally, although the court again denied Petitioner's motion for summary judgment in paperless order 107, the order failed to make any mention of ED 102 (Appendix O, p. 274) which Petitioner submitted as a summary of the merits of the request for summary judgment.

Although, *Fed Rule Civ Pro 6(b)1(B)* already generously allows courts to extend the time to act even after expiration upon request by the non-compliant party, neither Respondent nor the court below bothered. The court never asked Respondents to provide a reason for their lateness nor was one provided. The United States District Court of the Southern District of Florida simply extended the expired deadline after the fact on its own authority.

The *Federal Rules of Civil Procedure* ensures that all parties are treated with the same fair access to the courts. Of course, it is the presiding judge's right to continue procedures as they see fit as long as that continuation is within the wide range of the court's discretion and not unduly prejudicial. It cannot

be at the expense of the rules as established, especially when that court has shown no such grace or consideration to the affected claimant.

Instead, the district court held one set of rules for the Petitioner and another for the Respondent. Even the Petitioner's timely responses were deemed inadmissible by the court or twisted to create contemptible offense when the clear intent was reasonable objection. Each time, it was the Petitioner's claims that were dismissed even when they were rule-compliant party.

Question 3: Unacknowledged Docketed Matters of Merit

Federal Rules of Civil Procedure 55d sets a higher standard for a summary award against the US than against other defendants. As reflected in Appendix O, p. 274, Powers acknowledged her obligation to prove merit before the court could grant summary judgment in her favor. United States District Court for the Southern District of Florida never ruled on the submission. Instead, the lower court and the Court of Appeals of the Eleventh Circuit continue to rule as if the document is not a matter of record (Appendix L, p. 80, ED 107; Appendix B, p. 13; Appendix C, p. 17, 23).

Moreover, before the claims were transferred from the United States District Court of Northern Georgia, the presiding judge ruled that the Petitioner's claims related to harassment and whistleblower retaliation were timely filed and had sufficient basis in fact to warrant transfer instead of dismissal (Appendix K, p. 56; Appendix L, p. 73, ED 22). The initial pleadings were argued for several months before the court made its decision (Appendix L, p. 71). However, the United States District Court of Southern Florida has twice dismissed those claims based on unproven merit. The first dismissal was granted before the claims were ever amended (Appendix L, p. 77, ED 62).

After the claims were amended and Respondent again moved for dismissal, Powers raised that the disputed claims were unchanged and previously adjudicated, but the court still ruled as if that was never the case. although Respondent did not raise any argument that was not already settled by the United States District Court of Northern Georgia. Even after the claims were amended to suit the court's formatting sensibilities, the supporting facts and records of the previously adjudicated claims remained unchanged. Yet when the claims were dismissed in their entirety, the courts below repeatedly asserted that Powers was demanding a summary award without first establishing merit.

If Petitioner's claims were insufficient to establish merit and award summary judgment, the United States District Court for the Southern District of Florida would have rightfully ruled as much. Instead, it simply refused to rule on the motions and completed arguments that established merit even after it allowed the re-argument of questions that were already settled by another court. The only reason that the court could not rule on merit was that it simply chose not to do so.

Power's claims are plausible per *Ashcroft v Iqbal* 556 US 662, 678 (2009), quoting *Twombly,* 550 US at 570 where "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." The amended claims (Appendix M, p. 83) with their appropriate authorities (Appendix M, p.89), supporting facts(Appendix M, p99), statement of injuries (Appendix M, p. 109), and definitive reliefs with funding authorities (Appendix M, p. 112) and supporting exhibits (Appendix M, p. 116) all support plausible merit. None were addressed by the United States District Court of the Southern District of Florida or the Court of Appeals for the Eleventh Circuit.

Instead, the courts used the factually unsound circuitous reasoning to find Respondent's late answer for dismissal as factual because they remained unanswered by Powers. That reasoning is

diametrically opposite of The Eleventh Circuit's summary dismissal standards as with *Perez v Wells Fargo* (2014) where, citing *Strategic Income Fund LLC v Spear, Leeds & Kellogg Corp.,* 305 F.3d 1295, n.8 (11th Cir. 2002), it held that the review standards for judgment on the pleadings is the same as a motion to dismiss. "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true 'to state a claim to relief that is plausible on its face.'"

Similarly, in reversing Powers' 2020 dismissal, the petitioned court, citing *Perez,* 775 F.3d. at 1335, ruled that "[i]n determining whether a party is entitled to judgment on the pleadings, we accept as true all material facts alleged by the non-moving party's pleading, and we view those facts in the light most favorable of the non-moving party (Appendix G, p. 32).

Neither the district nor petitioned rulings offered any explanation for ignoring these standards; especially in light of the United States District Court of Southern Florida's refusal to even consider Powers' motion for judgment on the pleadings even after Respondent abandoned their claims.

Question 4: Factually Unsupported Pattern of Delay and Contempt

To justify the dismissal of all the claims below, the petitioned review and district framed Powers' pursuit of summary relief as part of a pattern of willful delay, graciously accommodated by the district, until the presiding district court judge had no reasonable option other than dismissal *Haji v NCR Corp.,* 834F. App'x 663, 536 (11th Cir. 2020) (Appendix C, p. 22) citing *Goforth v Owens*, 766 F. 2d 1533, 1535 (11th Cir. 1985) as its comparative bases. However, neither case included the conditions of this claim. Although *Haji* was also *pro se*, the court granted numerous warnings and opportunities to correct before dismissing the claims for contempt. The Petitioner was not given any warning before dismissal for contempt.

Goforth was materially different from the petitioned claims where (1) Goforth was represented by an attorney (2) who was given multiple warnings and opportunities to appear which led to an extensive history of delays that were prejudicial against defense (4) but still failed to respond to the court's summonses (5) and as a result, defense moved for dismissal. None of those conditions applied in this case.

The records below, supported by the mandatory certificate of service in every non-electronic filing, show that every document filed by Powers was submitted within timeframes established by order, local rules, and the *Federal Rules of Civil Procedure*. While the petitioned ruling revised the time in which Respondent answered the amended claims to erase Respondent's actual lateness (Appendix B, p. 7), the same ruling held that it was Petitioner who was actually late in answering the order which the courts claim led to the dismissal for contempt.

In brief, Powers showed that On November 24, 2021, at the end of the day before the Thanksgiving holiday and amid known mail slowdowns, the court ordered her to respond to Respondent's late answer before December 03. The objection's Certificate of Service shows that Powers served Respondent by electronic means on November 29 (Appendix P, p. 284) and expedited the document that same day. It was received by the court on December 07 and docketed on December 08, 2021 (Appendix L, p. 81, ED 21). Respondent did not argue otherwise in brief, nor did they respond to the objection in court below. However, the petitioned ruling held that Powers' response was late because it was received on December 07 (Appendix B, p.8). The district court dismissal also cited December 07 as the document's effective date in its claim that Powers was guilty of a pattern of disregard and delay that merited dismissal for contempt(Appendix C, p.17).

The petitioned ruling also asserted that the amended claims, ordered to respond in 21 days after April 14, 2021, and received by the court on May 04 by conventional mail (Appendix L, p. 78), 21 days after the order, was also late-filed at 22 days (Appendix B, p.3). Please note here that the court also erroneously found that Powers also late answered the second amended complaint. That's three separate occasions that were created to claim that Powers answered late when the record proves otherwise.

However, Respondent's actual lateness was found to be timely by the petitioned court.

One mistaken date calculation is a reasonable human error. Two errors are a little irresponsible, but courts are still human institutions and not infallible. Three such errors in a single ruling against a party that was never actually late is questionable. When the fourth error in that same ruling results in the finding that the late party was timely by the court's unique and undocumented time calculation guidelines and justifies a final ruling in favor of the non-compliant party, it becomes unreasonable for the court to continue to claim to be impartial.

Although the petitioned court went on to argue that a pattern of delay was not necessary if a single affront was severe enough to warrant dismissal and local rule allows, both courts still cited Powers' three factually unsupported latenesses and previous appeals to the United States Court of Appeals for the Eleventh Circuit as evidence of a willful pattern of delay (Appendix B, p. 8 and Appendix C, p.18, 21).

The right of appeal, exercised in good faith is constitutionally protected and therefore, cannot be considered as a delay tactic. If the court below found Petitioner's appeals frivolous and unmerited, it should have ruled as much. Instead, the petitioned ruling, as with the district court, cited Powers' two unsuccessful appeals and the nonexistent missed or delayed deadlines to justify the final dismissal of all claims without consideration of merit.

Additionally, Petitioner's objection to the order that she must answer Respondent's late-filed, unexcused, and procedurally excluded answer to her claims was ruled as contemptuous by the lower court (Appendix C, p.21) and upheld by the petitioned ruling (Appendix B, p. 14). The lower courts played both sides of the lateness issue but each concluded that Powers' claims must be dismissed for contempt after she objected to responding to the answer to her amended claims that was objectively late by the standards established in the *Federal Rules of Civil Procedure* and had not been reasonably supported by opposition or the district court.

The district court admitted that Respondent's answer to the amended claims was late, but still ordered Powers to respond to the late answer to determine merit (Appendix C, p. 24, Footnote 1) then used and a series of factually unsupported examples to find for contempt and dismiss Petitioner's claims. In contrast, the Court of Appeals of the Eleventh Circuit, using its claimant-specific time calculation standards, found that the Respondent's answer to the amended claims was timely. However, according to the petitioned court's new time calculation rules, it was the objecting Respondent who had a newfound history of late-filed amendments and answers to orders that warranted to dismissal of all claims without consideration of merit or property/liberty interest deprivation.

Finally, the district court's order to dismiss the claims for contempt when Petitioner objected to replying to the late answer violated *Federal Rules of Civil Procedure 83(b)* which holds that "no sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the violator has been furnished in the particular case of the notice of the requirement." To overcome that standard, the petitioned ruling claimed that *Local Rule 7.1* grants exactly that right (Appendix B, p. 13). The rule, cited in the district court's dismissal order as *Local Rule 7.1(c)1* (Appendix C, p.18 **and** p.23) but changed to *Local Rule 7.1* in the appealed ruling, is

attached in its entirety after the certificates of compliance at the end of this petition. It grants no such authority.

Question 5: *Sua Sponte* Dismissal under *FRCP 41b* Bars Access to Future Recovery

The court's dismissal under this rule violates the due process protections of *In Re Murchison,* 349 US 133. 136. (1955) where "fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

Here, as with *Murchison,* the same presiding judge alone raised and found a pattern of contempt and delay (Appendix C, p.24) that was instigated by an objection that challenged the lawfulness of an order issued by the court. The pattern of contempt used by the district court and upheld by the petitioned opinion is factually unsupported by the record. However, it was still used as the court's justification to move on its own authority to not only dismiss all claims but bar future opportunity for recovery without ever actually addressing the merit of the claims using the authority of a rule that creates exactly that effect because of the conditions associated with the rule itself.

Fed Rule Civ Pro 41b "INVOLUNTARY DISMISSAL; EFFECT: If the plaintiff fails to prosecute or to comply with these rules or a court order, a ***defendant*** may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal under this rule-- except one for lack of jurisdiction, improper venue, or failure to join a party under *Rule 19*-- operates as an adjudication on the merits" bold italics added for emphasis.

Therefore, despite the district court's wording that the claims were "dismissed without prejudice" (Appendix C, p.24) and would therefore be eligible to be refiled at a future date because they had not been adjudged on the merit, *sua sponte* dismissal under *Fed Rule Civ Pro 41(b)* (1) established that the claims were adjudicated on the merit (2) and therefore cannot be refiled (3) without actually

adjudicating on merit. The judge, in this instance, acted both opposition and adjudicator to forever bar recovery of the Petitioner's Constitutionally-protected property interests, and the petitioned ruling affirmed the action.

The dismissal here also violates pre-deprivation due process standards established by *Cleveland Board of Ed v Loudermilll,* 470 US 532, 541 (1985) which held "The pre-termination [considerations] need not definitively resolve the propriety of the discharge, but should be an initial check against mistaken decisions essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." When Petitioner requested reconsideration due to the number and extent of property and liberty interest losses that the ruling would create (Appendix P, p. 284), the court simply ruled that the Petitioner was re-arguing settled matters and upheld its dismissal (Appendix L, p. 81, ED 124).

As a result, based on *Boechler, Pc v Commissioner of Internal Revenue, WL 1177496* US (2022) and *US v Kwai Fun Wong,*135 S. Ct. 1625 (2015), Petitioner is now time-barred from re-filing her claims related to (a) whistle-blower protection since claims must be filed within a maximum of 240 days after the right to file was established (Appendix M, p.90B) (b) racial harassment since *Title VII* bars claims filed older than 90 days after the Notice of Right to Sue is issued by USEEOC (Appendix M, p.90B) (c) recovery of lost wages and benefits due to 5 USC 5596(b)(4), *Back Pay Act* which precludes recovery for actions brought 6 years after deprivation, (d) and *Federal Tort Claims Act* that bars action two years after the right to sue has been established (Appendix O, p. 275). Despite the titular "dismissal without prejudice," legislative restrictions forever bar future recovery outside this action.

Petitioner had a cognizable liberty interest right to object to the unsanctioned extension of an expired deadline. It was *not* unreasonable for a party who has been barred from income and benefits by

Respondent for 6+ years to object to an unsanctioned extension of the deadline to respond to the claims after two years of avoidance, especially when rule and law granted her that right. Still, the petitioned ruling reflects no consideration of Powers' Constitutional protections afforded by the 5th and 8th Amendments, the *Federal Rules of Civil Procedure* except *Rule 41b* as it is now interpreted by the courts below but not as written, or even the Eleventh Circuit's preference for finding on the merit as it repeatedly asserts.

Here again, the courts below are contrary to this Court's precedents. *Mathews v Eldridge* 424 US 319 (1976) held that procedural due process must be evaluated by using a balancing test that accounts for the interests of the affected individual, the interest of the government in the limiting procedural burdens, and the risk of erroneously curtailing individual interests under existing procedures, as well as how much additional procedures would help reduce risk of error. Again, none of those considerations were given by the courts below.

United States v. Bajakajian, 524 US 321, 336-37 (1998) holds that the amount of sanction must be compared to the gravity of the offense that led to the sanction, and if the amount is grossly disproportional to the offense, the sanction is unconstitutional. Therefore, the petitioned sanction of dismissal for contempt which leads to permanent deprivation of property and liberty interests and based on a series of factually void assertions by the courts cannot be upheld.

Finally, *Sniadach v Family Finance Corp.* 395 US 337 (1969) held that even garnishment of wages warrants pre-deprivation hearings "...with its obvious taking of property without notice and prior hearing, violates the fundamental principles of procedural due process." pp. 395 US 339-342.

The deprivations caused by the petitioned actions are for 8 years of lost wages and benefits and future earnings that have been diminished due to untreated disability because of the Respondent's

actions. Those losses, detailed in the Second Amended Complaint and now procedurally barred from recovery outside this Court, amount to several million dollars (Appendix M, p. 112-114). Surely, such a loss requires more robust oversight and balancing consideration than a series of *sua sponte* actions by the United States District Court of the Southern District of Florida and the United States Court of Appeals of the Eleventh Circuit.

Question 6: Sanction by *Local Rule 7.1(c)1* Violates Fair Notice, *FRCP83*

In *Christopher v SmithKline Beecham Corp.* 132 US 2156, 2167 (2012), this Court ruled that an affected party must be notified in such a way that they can take reasonable action to prevent willful violation of the rule. The principle is similarly reflected in *Skilling v United States*, 130 US 2896 (2010): To satisfy due process, "a penal statute [must] define the... offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." citing *Kolender v Lawson*, 461 US 352, 357. However, to dismiss Powers' claims, USDCSFL cited *Local Rule 7.1(c)1* as the authority (Appendix C, p.18 **and** p.23). That rule does not provide even reasonable, much less fair, notice. The petitioned opinion's and the district court's interpretations of *Local Rule 7.1* are so creatively farfetched that Petitioner has attached the rule in its entirety at the end of this petition (page 52) to highlight the degree of disdain with which the courts below treat the parties that come to your hallowed institution for relief.

There is no reasonable interpretation of *Local Rule 7.1* that warns of possible dismissal of all claims. If the presiding district court judge somehow drew that conclusion, only they would have done so. Respondent's brief below was the first time that Powers was notified that the quote (Appendix, page) was the district court's justification for contempt.

Yet, contrary to *Leocal v Ashcroft, 543 US 1, 12 (2004)* which describes the need to interpret a statute that gives meaning to each word, the petitioned opinion found that *Local Rule 7.1(c)1* does grant the lower court the right to dismiss all claims without consideration of merit (Appendix B, p.13). Moreover, the court below held that the rule served as a warning to Powers that all claims were subject to forfeiture for failing to provide a memorandum of law where none was ordered or required. Lastly, the Court of Appeals for the Eleventh Circuit also expanded the authority to dismiss to *Local Rule 7.1* in its entirety, contrary to the ruling from below which explicitly cited *Local Rule 7.1(c)1* as its authority for dismissal (Appendix C, p.18 **and** p.23).

Still, no part of *Local Rule 7.1* warns of possible dismissal of all claims, likely because *Rule 7.1*, unlike most of the other local rules, has no basis in law or regulation. It is also entirely unenforceable because *Federal Rules of Civil Procedure 83(b)* limits the severity of sanctions associated with local rules that are not authorized by the Federal Rules of Civil Procedure. The courts below are essentially relying on normalized functional illiteracy to rule as creatively as their inspiration directs.

The rule is not the catchall that the United States District Court of the Southern District of Florida has used it to be. However, if it were the catchall as used by the district court to dismiss Powers' claims for the first time (Appendix R, p. 297 and Appendix L, p.77, ED 67) and then used again to dismiss for objection to a questionable order (Appendix C, p.18 **and** p.23) then it would be void for vagueness under *Chicago v Morales, 527 US 41 (1999)* where "[law] is unconstitutionally vague if an ordinary person could not understand what conduct is criminalized, and if the vagueness of the law encourages arbitrary and potentially discriminatory enforcement."

Moreover, if the rule is so vague and widely applicable that it can be used to reject timely filings (Appendix R, p. 297 and Appendix L, p.77, ED 67) as well as objections to otherwise unsanctioned

filings (Appendix C, p.18 **and** p.23), then that rule lacks the clear and actionable standards required by *FCC v Fox Television Stations, Inc.* 567 US 239, 258 (2012) and *Begay v United States,* 553 US 137 (2008). In that instance, the rule is too vague if only the courts below could reasonably conclude that the district court had the right to dismiss based on it.

Essentially, if the rule could be *reasonably* interpreted to mean both dismissal of a motion based on failure to provide a timely memorandum of law and dismissal of all claims without further consideration, then under *Skilling*, the rule is vague enough to cause arbitrary [sanctions] and therefore too vague to be constitutional. Either way, the rule must be struck down.

X Conclusion

Two years after summary relief was denied without consideration of merit and the claims dismissed for contempt based on a series of Constitutionally-confounding judicial misdirections, four years after injunctive relief was denied for indisputable deprivation of due process and ongoing mental and financial hardship to the Petitioner and her minor children, and eight years after she was fired for filing a grievance against the manager who threatened her, Ms. Powers now pleads to this court to restore her hard-earned career that was stolen out of racist spite then repeatedly withheld by the courts below without just or lawful cause. Petitioner's right to relief is clear.

As the United States District Court of the Northern District of Georgia previously ruled, the merit and timeliness of the claims related to racial harassment and whistleblower retaliation were settled for the claims that were docketed before the case was transferred to the United States District Court of South Florida. After the previously adjudicated claims were amended to suit the United States District Court of the Southern District of Florida's formatting sensibilities and new claims were added using the

same formulation and supporting facts, the court simply stopped deciding the merits of the claims while ruling that adjudication was being withheld to determine merit.

The district court so far departed from established adjudication standards that it ignored Opposition's unexcused missed deadline to respond to the amended claims, acted as opposition after they withdrew from the action, and used a nonexistent local authority to dismiss all of the Petitioner's claims *sua sponte* for objecting to the court's efforts to proceed below even after opposition abandoned the action.

Instead of addressing the pattern of abuses of judicial discretion from the court below, the petitioned court only extended the lower court's open disparagement towards Ms. Powers' right to relief. When the petitioned court *sua sponte* dismissed Petitioner's appeal to address the unsanctioned extension of the opposition's expired deadline, it set in motion a series of actions by both courts that cannot be held as arm's length or independently reviewed; essentially ensuring that without this Court's direct intervention, Ms. Powers' property and liberty interests will be forever withheld without ever having received any due process considerations.

In addition to the apparent affronts to the Constitution of the United States, and the likelihood that similar harms are being experienced by other similarly-situated Petitioners who come before the petitioned court, the Petitioner remains unduly harmed while resolution remains withheld. Petitioner implores the Court to end this needless suffering by granting the writ to vacate dismissal for contempt and grant the Petitioner's motion for summary judgment which remains unreviewed on its merits by the lower court although it is supported by an actionable triggering event in Respondent's late answer to the amended claims and the merit of Petitioner's request (Appendix N, p. 265; Appendix O p. 274) and second amended claims (Appendix M, p. 83).

Respectfully submitted,
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Certificate of Compliance

Pursuant to Rule 33-2(b) of the *Supreme Court Rules* of the Federal Rules of Appellate Procedure, I hereby certify that this petition is 40 pages, exclusive of the allowances granted by Rule 33-1(d) but inclusive of *USDCSFL Local Rule 7.1,* which is at the heart of the petition.

Certificate of Service

I HEREBY CERTIFY that on January 16, 2023, all parties were served by conventional means.

/s/ Odeiu Powers

Pro Se