No: 23-7331

IN THE SUPREME COURT OF THE UNITED STATES

CAROL ANN MCBRATNIE

Petitioner

v.

DENIS RICHARD MCDONOUGH, U.S. Secretary of Veterans Affairs

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Carol Ann McBratnie,
1130 Larkmoor Blvd.
Berkley, MI 48072
(248) 546-5945
cammsnnp@gmail.com

pro se Petitioner

REASONS FOR GRANTING REHEARING

The original certiorari petition asked the Supreme Court to exercise its Supervisory Powers over the lower courts regarding clear legal error. The lower courts, the VA and McBratnie all agree that McBratnie was a pre-offer job applicant subject to 42 USC §12112(d)(1 and 2). The lower courts in an employment disability discrimination case, applied the standard for disabled employees returning to work (42 USC §12112(d)(4)), to a new hire job applicant (42 USC §12112(d)(2)), legislating from the bench the authority to make "medical inquiries" of physicians as the first qualifying criteria for every new hire job applicant. This was accomplished by citing case law precedents that did not disclose where the authority for "medical inquiries" of physicians originated. Statute 42 USC §12112(d)(2) is specific in that all "medical inquiries", including those of physicians, are prohibited. The VA and lower courts identify the Declaration of Health as a Medical Inquiry. Statutory language is very clear by 42 USC §12112(d)(1 and 2):

42 USC §12112(d)(2) App.72a-App.73a:

> (1) In general
> The prohibition against discrimination as referred to in subsection (a) shall include medical (examinations and inquiries). [Scalia: Series Qualifier Canon]

Job-Applicant standard

> (2) Preemployment
> (A) Prohibited examination or inquiry
> Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

Employee, Business-Necessity standard

> (4) Examination and inquiry
> (A) Prohibited examinations and inquiries
> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Two findings of facts necessary for the resolve were not articulated in the lower courts:

- whether McBratnie was a former employee (neither party alleged such), and
- whether the VA was a joint-employer, not disputed by the VA but priorly ascertained as true by the EEOC Office of Federal Operations. There is no doubt that the VA had the ability to choose which job applicant was hired, was in a position to discard a job applicant's application, and per the OFO the job applicants were to be supervised by a VA physician and were subject to at-will termination by the VA.

Blatant employment disability discrimination occurred, based on the timing of the requested "medical inquiry" as documented by the job application forms and written instructions. Part of the VAs argument has been the assertion that McBratnie should 'read into' what the VA wrote. What was meant was: they wanted the lower courts to 'read into' what the VA wrote in the Declaration of Health. Per *A. Scalia & B. Gamer*, Reading Law: The Interpretation of Legal Texts §8 "Omitted Case Canon" at 167:

> Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.
>
> "[The judge] must not read in by way of creation." quoting Felix Frankfurter
>
> "Nor should the judge elaborate unprovided-for exceptions to a text"
> "to supply omissions transcends the judicial function." citing *Iselin v United States*, 270 U.S. 245, 251 (1926)

All of the cited Canons by *A. Scalia et. al.*, here and in *the Writ*, were ignored by the lower courts which allowed misapplication of case precedents negating the written statutes prohibitions against "Medical Inquiries" codified in 42 USC §12112(d)(1 and 2).

McBratnie's case is straightforward. Per 42 USC §12112(d)(2) "medical inquiries" of a new-hire job applicant, where the employer has no knowledge of disability status are prohibited. The VA has articulated that if a job applicant is disabled enough to require accommodations, they cannot provide "high quality care" as a criterion of 'business necessity'. The VA thereafter discards disableds job applications as the first step of the job application process before references or any other qualifications are acquired or considered. The VA and the lower courts ignored the fact that 'business necessity 'medical inquiries' are for 'employees' not 'job applicants'.

The Federal Government is not "*thee Model Employer*" when they discriminate, or cover such up by litigational abuse, by misapplication of case law to contravene the plain language of a written statute. This creates the appearance that a two-tier justice system prevails favoring the Federal Government, in that the Federal Government can violate the law without accountability.

When all Courts deny *pro se* litigants the opportunity for hearings or to speak and be heard, all courts have prejudiced decisions in favor of the other litigant. When the other litigant is the Federal Government, this bias allows the Federal Government the ability to manipulate the legal system against the citizen to deprive them of Constitutional protections. The *Due Process clause* requires a fair trial in a fair tribunal.

McBratnie seeks to be heard, and to have the Supreme Court Justices read *the Writ* themselves at a minimum and articulate the basis of Supervisory Powers denial.

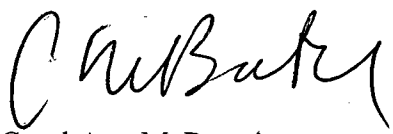
The Supreme Court by failing to exercise Supervisory Powers has colluded and granted the Federal Government to be above the laws of this Country instead of holding them accountable to the one-standard for all called "The Rule of Law".

CONCLUSION

For the reasons and logic contained in *the Writ of Certiorari*,

- *the Writ* should be granted, or
- a *Summary Reversal for settlement*, should issue or
- vacate and remand, for the lower courts to conclusively establish the unarticulated two facts of the case that heretofore have not been disputed, for a decision in alignment with the written statute: 42 USC §12112(d)(1 and 2) prohibiting "Medical Inquiries" to correct for clear legal error.

Respectfully submitted,



Carol Ann McBratnie,
1130 Larkmoor Blvd.
Berkley, MI 48072
(248) 546-5945
cammsnnp@gmail.com

pro se Petitioner