No. 23A487

IN THE

Supreme Court of the United States

ROBERT M. MILLER,

Petitioner,

v.

JELENA MCWILLIAMS, CHAIRWOMAN; FEDERAL DEPOSIT INSURANCE CORP.,

Respondents.

On Application for Extension of Time to File a Petition for a Writ of Certiorari to the Fourth Circuit in Case Number 21-2073

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

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To the Honorable John G. Roberts, Jr., as Circuit Justice for the Fourth Circuit:

Petitioner Robert M. Miller, *pro se*, respectfully requests that the time to file a Petition for a Writ of Certiorari to the Fourth Circuit in case no. 21-2073 be extended for sixty (60) days to and including February 5, 2023.

The Fourth Circuit issued its *per curiam* opinion affirming the memorandum opinion of the lower court in *Miller v. McWilliams*, 1:20-cv-00671 (E.D. Va.) on September 7, 2023. (see Adds. A and B, *infra*). Absent an extension of time, the Petition for a Writ of Certiorari would be due on December 6, 2023. Petitioner is filing this Application at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over the judgments under 28 U.S.C. § 1254(1).

BACKGROUND AND STATEMENT OF THE CASE

Petitioner Robert M. Miller, Ph.D. ("Miller") is an employee of the Federal Deposit Insurance Corporation ("FDIC"), a federal corporation. At the time of his suit, Miller was a 54-year-old, white, male, Republican with a 60-percent disability rating from the Veterans Administration. Miller had a lengthy history of Equal Employment Opportunity ("EEO") complaints against FDIC under Title VII of the Civil Rights Act of 1964, as amended, and the Rehabilitation Act of 1973, Pub. L. 93-112 (1973).

On or about February 13, 2019, FDIC offered a vacancy for a Senior Policy Analyst position, grade 15. Miller timely applied for the position, was interviewed, and he was not selected. FDIC selected a 31-year-old white female with no known disabilities or prior EEO activities. Selectee was the youngest candidate and the only female. The remaining four interviewees were all male, and three were over age 40. Selecting official Ashley Mihalik and interview panel members Krishna Patel and Vivek Khare are all Asian, all Democrats, all under age 40, and Patel and Mihalik are women.

Selectee was, by far, the least qualified candidate among the six interviewees. She had the least amount of total and directly relevant work experience. She had the lowest level of education. Her resume showed no awards, publications, or directly relevant job-related training. Selectee performed the worst among all candidates in the structured interview, as indicated by the interview panel's ratings according to pre-determined benchmarks.

Miller had nearly four times the selectee's experience, a Ph.D. in Economics compared to her bachelor's degree, numerous awards and publications, and

substantial job-related training. By any measure, Miller performed among the top three candidates in the structured interview. Miller was selectee's and the selecting official's instructor for a training course, and Miller provided the selecting official training on legal decisions related to economic analysis of agency rulemaking. The only qualification for which the selectee surpassed Miller was their most recent performance evaluations.

The other interviewees inside Miller's protected classes (men over age 40) were also plainly superior to the selectee. One interviewee had more relevant work experience than the selectee had been alive. That candidate had 30 years of specialized experience in law compared to selectee's three undergraduate courses in law, and he also received a performance rating of V at a higher grade level than selectee. No rational decision maker would have preferred selectee over that candidate. Another interviewee was a supervisor in the same section the selectee had her job-related experience. He was a world-recognized leader in bank regulation. He ranked among the top two candidates on the structured interview, and his interview ratings *weakly dominated* the selectee, meaning he was rated at least as high as the selectee on every question by every interviewer.

After the interviews, panel member Krishna Patel, who was a responsible management official in a previous alleged discriminatory and retaliatory nonselection of Miller, suggested that Mihalik seek the advice of manager Shayna Olesiuk because Olesiuk had supervised both Miller and the selectee. Olesiuk had a lengthy history of discriminatory and retaliatory animus against Miller. Olesiuk admitted she refused

to provide an assessment of Miller, but she provided a favorable assessment of the selectee. Importantly, FDIC's Merit Promotion Plan required Mihalik to rely solely on information contained in the application materials and interviews, and to make a record of all information relied upon. Mihalik did neither, a departure from FDIC's policies to ensure fair selections. In depositions, both Mihalik and Olesiuk claimed amnesia about their discussion. FDIC's EEO investigator knew Mihalik spoke with Olesiuk and that Olesiuk had discriminatory animus, but she never questioned this potential *cat's paw* retaliator when it was fresh in her memory. FDIC's unthorough investigation should have weighed against it in federal court.

Miller initiated a formal complaint alleging discrimination on the basis of age, sex, race, disability, hostile work environment, and retaliation. FDIC investigated, it issued a Report of Investigation ("ROI"), and it issued a final decision finding no discrimination or retaliation. Miller timely filed suit in the Eastern District of Virginia on June 15, 2020, alleging discrimination based upon his protected classes, retaliation, discrimination on the basis of political affiliation, and conspiracy to interfere with civil rights.

Miller's suit also requested a stay of agency personnel actions in the absence and inadequacy of the Merit Systems Protection Board ("MSPB" or "Board") for ongoing and impending whistleblower retaliation because of his November 13, 2019 and January 9, 2020 disclosures. The court denied the motion, claiming it lacked jurisdiction and that Miller failed to satisfy his burden for preliminary relief. At issue

in this Petition is whether the court had jurisdiction to grant a stay when there were no sitting MSPB members who could do so.

The district court abused its discretion when it dismissed Miller's complaint sua *sponte*, purportedly for being too lengthy, based upon a misinterpretation of Fed. R. Civ. P. 8 ("Rule 8"). The complaint contained a lengthy, factual history of FDIC's discriminatory and retaliatory animus against Miller since 2011, lending support to his discrimination complaints. All of Miller's factual allegations were simple, concise, and direct as required by Fed. R. Civ. P. 8(d).

Miller filed a *First Amended Complaint* ("FAC"). FDIC's *Answer* to the FAC falsely claimed to lack information to admit at least twenty-one factual allegations, when that information was included in FDIC's own Report of Investigation. FDIC falsely denied thirteen allegations it knew to be true, including the fact Miller was a 60% disabled veteran. The district court abused its discretion denying sanctions under Fed. R. Civ. P. 11, erroneously finding FDIC was merely "disputing facts" and finding "there exists reasonable support for virtually every response Defendant provides in its answer," which was obviously untrue. Defense counsel committed numerous additional Fed. R. Civ. P. 11 violations in her opposition to sanctions, including accusing Miller of Rule 11 violations without using the safe harbor provision. *Tu quoque* or "glass house" allegations are a frivolous defense because any purported Rule 11 violations by Miller are no defense to opposing counsel's violations. Defense counsel admitted she knew Miller had *at least* a 30 percent disability rating from the Veterans Administration, but she did not make that partial admission in

her Answer. In classic *boomerang* fashion common in federal courts, the district court turned Miller's meritorious Rule 11 motion into an attack against him.

The district court abused its discretion denying Miller's request to conduct a discovery survey, i.e., written depositions, of FDIC employees to gather statistical evidence of political discrimination and to discover *me-too* instances of political discrimination. After Defendants failed to meet their burden to challenge discovery as unduly burdensome and overbroad with a sufficient affidavit, the magistrate and district court judges leapt from their benches to defense counsel's table to argue in Defendants' favor. The district court improperly viewed the discovery survey as an unwarranted invasion of personal privacy when information about protected classes is routinely gathered in discrimination cases. How else could Miller prove a corporate-wide policy or practice of political discrimination?

Depositions were delayed for several reasons beyond Miller's control. FDIC had unlawfully suspended Miller on August 5, 2020 in whistleblower retaliation, and he could not afford to pay for depositions. Miller had substantial difficulties finding a deposition reporting service that would work with *pro se* litigants. FDIC deliberately delayed and underpaid Miller damages from a prior judgment of discrimination and retaliation. FDIC witnesses were on vacation from December 2020 to January 2021.

Miller deposed four FDIC witnesses remotely. FDIC counsel *refused* to share Miller's exhibit – the ROI – with the deponents. She demanded that Miller extract pages from the ROI, email them to her, then she would review them and forward them by email to the deponents. This substantially disrupted and impeded Miller's

examination of the witnesses, and this certainly would not have been tolerated at trial. See Fed. R. Civ. P. 30(c)(1).

During depositions, FDIC counsel made twenty-nine lengthy speaking objections. Counsel made thirty-one improper relevance objections that were automatically preserved. Counsel coached witnesses with argumentative and suggestive objections and answered questions for witnesses. She made twenty asked-and-answered objections, most of which were neither asked nor answered. She objected to compound questions that were not compound. She made eight improper objections to "overbreadth." FDIC counsel advised deponents five times to not answer questions, and deponents refused to answer seven questions, without any motion to terminate. FDIC counsel held an unlawful witness conference with Mihalik after Miller had asked her a question but before she answered, with no issues of privilege involved. FDIC counsel shouted at Miller as he struggled to understand counsel's inarticulate and incoherent objections.

FDIC counsel's behavior in discovery was also atrocious. FDIC counsel did not produce any of fifteen separate document requests. After she admitted that it was "not possible at this point" to produce certain requested records and Miller inquired further about potential spoliation, Defense counsel shouted at Miller about "putting words into" her mouth. Counsel denied requests for admission that were obviously true.

As Miller patiently addressed the many gaps in discovery production, FDIC counsel verbally demonstrated bad faith in the meeting and conference saying:

> I'm not going to change any of my answers, so we are wasting our time going over these answers. I went to great lengths to write these answers. I didn't just write them at the top of my head. I'm a minority. I know discrimination personally. I oppose discrimination against anyone, Black, White, whatever. I would not be fighting this if I thought the FDIC discriminated. I don't think we are getting anywhere asking if I'm changing my answers. I'm not changing anything. I don't see where we are going. My answer still stands.

Betraying awareness of her rule violations, FDIC counsel then said: "I hope you're not recording, which is illegal in Virginia. This is especially true with an attorney. All my answers stay the same in the objections. Are you recording me because I'm going to send this to the judge. I've already told you what my synopsis is." FDIC counsel berated Miller saying, "You're thinking of yourself more important than you actually are." Counsel stopped herself short of another insult saying, "Your problem is ... I'm not going to tell you. If you think the court is gonna get us to describe this, go ahead. Bring it to the court."

Miller moved to file oversized and separate motions to compel for depositions and discovery, which the court granted. That motion summarized all of the discovery violations stated above. Two days prior to the end of discovery, Miller requested the court extend the discovery period 90 days based on Defendants' discovery obstruction. Additionally, the COVID-19 emergency was ongoing. Defendants opposed a 90-day extension but consented to a 45-day extension. The district court abused its discretion denying the motion, finding no good cause. That same day, the district court delayed

the hearing indefinitely because of COVID, indicating Miller's extension request would not have disrupted case scheduling.

Miller filed motions to compel (MTC) depositions and discovery requests. The district court denied both motions, claiming they were untimely filed after the close of discovery. Miller, a *pro se* litigant, was never put on notice of an MTC deadline. Nothing in the federal rules of civil procedure, the local rules of the Eastern District of Virginia, or the orders of the court set a deadline for motions to compel by the close of discovery. In fact, the district court's Rule 16(b) Scheduling Order set a deadline for nondispositive motions no later than the final prehearing conference. ECF 32 ¶11(b); Miller's MTCs were timely filed before that. Defendants and the district court relied on inapposite authorities in which parties were, in contrast to Miller, specifically put on notice of MTC deadlines.

The parties filed duelling motions for summary judgment ("MSJ"). For the first time in their MSJ, Defendants raised a completely new reason for their selection: that the selectee was a "better fit" for the position because her job title was "analyst" and the position to be filled was an "analyst" position, while Miller's position was entitled "economist." The selecting official had never claimed this was a reason for her selection. Defense counsel never produced the job descriptions supporting this attorney-argued reason in discovery though they were requested, and they were not in any part of the record. Arguments of counsel are not evidence.

To rebut Miller's plainly superior education, defense counsel lied in her MSJ claiming from the vacancy announcement that "there is no substitution of education

for the experience of this position." ECF 92-1 at 4. That statement referred to the minimum specialized experience requirement for the position, not an assessment of job qualifications for selection. Mihalik *admitted* considering education in her selection, and FDIC's Merit Promotion Plan *required* her to consider job-related education.

Miller's MSJ argued that Defendants failed to meet their burden in Step 2 of *McDonnell Douglas* because nearly all their proffered reasons for selection were *declarative* statements of the selectee's qualifications (all of which Miller also possessed), not *comparative* statements demonstrating why the selectee was "preferred" to Miller, as required in *Tex. Dept. of Cmty. Affairs v. Burdine* ("*Burdine*"), 450 U.S. 248, 254 (1981). The sole comparative legitimate, non-discriminatory reason for the selection was the selectee's most recent performance evaluation of V, compared to Miller's most recent evaluation of III; this could not possibly have motivated the hiring decision. "The explanation provided must be legally sufficient to justify a judgment for the defendant." *Id.* at 255. As stated in *Burdine*, the purpose of requiring employers to proffer such reasons is to put plaintiffs on notice and give them a full and fair opportunity to prove pretext. *Id.* at 256. No plaintiff can rebut a declarative statement.

For the pretext analysis, Miller's MSJ argued his qualifications were "plainly superior" to the selectee's, with far greater experience, education, awards, training, knowledge, skills, abilities, and interview performance. Miller also argued that Defendants' proffered reasons were not entitled to credence because four other

candidates inside Miller's protected classes were also plainly superior to the selectee in every respect that Defendants claimed the selectee was superior to Miller; Defendants' reasons could not have motivated the hiring decision because the selectee could not have been preferred over the other candidates for those reasons.

Defendants' opposition claimed Miller's MSJ applied Miller's own selection criteria instead of the selecting official's criteria, e.g., Miller's superior education, awards, and training. Miller proved this false by showing the criteria he raised were in the position description and FDIC's Merit Promotion Plan *required* the selecting official to consider the position description, education, awards, and training. An unreasoned departure from policy is probative of pretext. *Christian Legal Soc. Chapter v. Martinez*, 561 U.S. 661, 737 (2010); *National Lbr. Rel. Bd. v. Rock Hill P. Fin*, 131 F.2d 171, 174 (4th Cir. 1942).

Miller's MSJ provided evidence showing FDIC discriminated against him (age and sex) and retaliated for EEO activities in ***two*** prior nonselections. Miller produced an FDIC Inspector General report showing statistical evidence FDIC favors women in selections and performance evaluations. Miller proffered evidence FDIC held a career advancement workshop *exclusively* for women, and FDIC's Diversity, Equity, and Inclusion (DEI) program and policy discriminates against white men in favor of women and minorities with direct threats of adverse treatment of managers or manager candidates who do not show evidence of concern and action for diversity, equity, or inclusion. Miller demonstrated FDIC failed to thoroughly investigate his complaint by not seeking evidence from a potential "cat's paw" retaliator.

The district court denied Miller's MSJ and granted Defendants' MSJ in a *Memorandum Opinion* in which nearly every line contained erroneous facts, law, logic, and inference. The *Mem. Op.* is littered with misrepresentations of Miller's arguments as *straw men* and designed to cast Miller as a white supremacist.

The district court claimed that Miller "conjectures" that the selecting official spoke with a person with discriminatory and retaliatory animus, when Defendants *admitted* they had done so. The judge falsely claimed, "Miller acknowledges that Ms. Olesiuk said nothing to Ms. Mihalik about him or his former EEO activities," *Mem. Op.* at 5, which Miller never acknowledged, he strenuously disputes, Defendants resisted answering in discovery, and the judge failed to compel. The *cat's paw* standard does not require that Olesiuk mention any prior EEO activity. It only requires that a person with discriminatory and retaliatory animus influenced an adverse personnel action.

The district court erroneously concluded "Ms. Mihalik did not discuss [the selectee] with Ms. Olesiuk other than to inform Ms. Olesiuk that [the selectee] was being considered for the position." *Mem. Op.* at 6. This remains a genuinely disputed material fact, and Mihalik admitted that she asked Olesiuk about the candidates' job performance.

The district court accepted Defendants' false argument that seeking opinions from other managers was Mihalik's "standard practice" when this was Mihalik's first selection as a manager, i.e., no prior history of this "practice," and FDIC's Merit

Promotion Plan expressly forbade her from making a selection based on material outside the selection process.

Defendants attempted to rely *both* on interview panel member Patel's and Khare's reasons for preferring the selectee *and* claiming they played no role in the selection to rebut their discriminatory and retaliatory motives. The district court deliberately misconstrued Defendants' contradictory argument by attributing that argument *to Miller* and claiming, "Miller cannot have his cake and eat it too. Either non-selecting panelists are irrelevant, or they can discriminate against him. Not both." *Mem. Op.* at 7. Again, the *cat's paw* analysis does not require that Patel or Khare played any part of the selection; it requires only that they had discriminatory or retaliatory animus, and they adversely influenced Miller's nonselection.

The district court erroneously concluded that "Common sense dictates that the panelists had a role in the post-interview deliberative process," *Mem. Op.* at 7, when Mihalik and Patel denied having any post-interview discussions and Khare admitted the panel had post-interview discussions ranking candidates in a "top bucket." The district court relied on obvious contradictory and likely perjured testimony and drew inferences against the non-moving party.

The district court erred finding Defendants satisfied their burden at Step 2 of *McDonnell Douglas* when almost none of Defendants' proffered legitimate, nondiscriminatory reasons stated why selectee was *preferred* to Miller, and the one that did were not "legally sufficient to justify a judgment for the defendant." *Mem. Op.* at 8. *See Burdine* at 255. The district court falsely claimed that "Miller cites no

authority for this position," *Mem. Op.* at 9, n. 7, when Miller directly cited *Burdine.* The district court built a grand *straw man* by saying that Miller's argument sought "to impose on Defendants the obligation of setting forth in staggering detail the comparative statements that they have provided," subjecting employers to "an inquisition at step two that converse a burden of production into a burden of persuasion." *Id.*, n. 7. Miller argued no such thing; he merely stated that *Burdine* required Defendants to state why selectee was *preferred.* For example, the statement, "Selectee briefed the Chairman" does not provide this explanation, while saying, "Selectee briefed the Chairman, but plaintiff did not" is appropriately comparative for the *Burdine* standard. The former statement gives Miller no opportunity to prove that "the Selectee briefed the Chairman" was false and pretextual, while the latter statement enables Miller to demonstrate that he too briefed the Chairman, and the agency's reason is therefore insufficient and pretextual. Miller's arguments are clearly not a demand for excruciating detail at Step 2, and the judge's hyperbole is evidence of his profound bias and antagonism toward Miller making fair judgment impossible. *Liteky v. United States*, 510 U.S. 540, 541 (1994).

The district court factually erred by holding that the selectee had "comparatively expansive experience" when Miller had nearly four times the selectee's experience and had *at least* as much "familiarity with policymaking and interagency rules." *Mem. Op.* 8.

The district court erred finding Defendants offered "concrete examples" of selectee's work experience, all of which Miller also had. *Mem. Op.* at 9. The district

court claimed "These examples overlay the duties of the CG-15 Senior Policy Analyst position" when none of those were included in the position description for the position. *Id.*

The district court betrayed bias again saying, "Mr. Miller labors to stave off summary judgment by separating and challenging the individual bases of Defendants' decision to hire the selectee," and the judge decried Miller's approach as "piecemeal." *Mem. Op.* at 10—11. But it was *precisely* Miller's burden under well-established law to attack each of Defendants' separate reasons for their selection. *Spencer v. Town of Bedford*, 2019 WL 2305157, at *5 (W.D. Va. May 23, 2019); *Holmes v. Town of Clover*, Civil Action No.: 0:17- cv-03194-JMC, at *16 (D.S.C. Sep. 10, 2019). That is, the district court held against Miller for arguments in his opposition to Defendants' MSJ that he was required to make by law. The district court went further, claiming that Defendants were entitled to rely on a "holistic" approach, which Defendants never claimed to be doing. This underscores the injustice of courts allowing "holistic" or "totality of the circumstances" approaches in justifying unlawful employment decisions – they attempt to convert a collection of individual reasons for their actions, none of which can stand by themselves, into a subjective wall of rationalization that must be accepted as a whole. While multiple factual allegations can sometimes prove a legal contention in combination that none could do individually, courts must be wary of attempts to justify unlawful decisions with laundry lists of unrelated and *non sequitur* reasons to rely on the quantity of reasons,

not their quality. This is known as the *narrative fallacy* – building a persuasive story from a set of unrelated, insufficient, non-complementary facts.

The district court dodged Miller's "plainly superior" qualifications by relying on the misapplied authority that, "It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Mem. Op.* at 11. Each of Miller's superior qualifications were *Defendants'* selection criteria in the vacancy questions, position description, interview questions, and Merit Promotion Plan, not Miller's selected choice of his own criteria.

The district court plainly erred in concluding "Miller and the selectee both had the requisite tenure for the position. Both worked in high-grade positions at the FDIC for a similar number of years prior to interviewing." *Mem. Op.* at 12. Miller worked at grades 13-14 for ***three years*** compared to selectee's eleven months, which is not a "*de minimis*" difference.

District court factually erred finding that Defendants "found [the selectee] to be overall more qualified than [Mr. Miller] because she had more extensive policy-making experience including interagency experience, and because the selectee had experience responding to Congressional requests which are a significant part of the job duties for the position." *Mem. Op.* at 12. Miller had ***eleven*** *years* of policy experience compared to selectee's ***three*** years. Miller also worked on interagency rules and responded to Congressional requests.

District court erred in relying on Defendants' false argument that "there is no substitution of education for the experience of this position," *Id.* when that statement

referred only to the minimal requirement of specialized experience, Defendants *admitted* considering and relying on Miller's and selectee's education, and the Merit Promotion Plan *required* Mihalik to consider education. The court erroneously bought Defendants' obvious pretextual argument that selection was based upon selectee taking three undergraduate courses in law and two courses in policy, when Miller had extensive work experience with relevant law, trained Mihalik in legal decisions concerning rulemaking and policy and he had far more educational courses related to public policy at the undergraduate and Ph.D. level.

The district court relied on Defendants' false argument of selectee's "superior work autonomy" when Mihalik *admitted* she never considered the selectee's work autonomy, and Defense counsel lied in discovery claiming Mihalik did not rely on answers to the vacancy questions.

District court reached the utterly ridiculous conclusion that "it makes perfect sense" the selectee outperformed Miller in the interview, notwithstanding her last-place ratings, because she demonstrated better skills in the interview. *Mem. Op.* at 12. Defendants' witnesses *refused* in depositions to state what skills selectee demonstrated in the interviews that Miller did not, and the judge accepted their conclusory claims of superior skills.

The district court categorically rejected substantial evidence of Defendants' discrimination favoring women against men, including two EEOC decisions finding FDIC liable for discrimination and retaliation against Miller, evidence of FDIC favoritism toward advancing the careers of women, women-only career advancing

workshops, and statistical evidence of women being given faster promotions and higher performance evaluations than men. *Mem. Op.* at 13—15.

The district court relied on an unsworn, unverified, and unrebutted letter Miller's manager wrote ***one year after*** the non-selection accusing Miller of making inflammatory and disrespectful comments and having discriminatory animus. *Mem. Op.* at 14. Blaming the victim, the judge said, Miller's "feelings of alienation may stem from his open hostility toward his colleagues, rather than his purported marginalization," and the court "will not ignore the alternative bases for Mr. Miller's estrangement from his workplace community." *Id.* Ironically, or perhaps not, the initial complaint the judge dismissed *sua sponte* detailed a nine-year campaign of discrimination and retaliation against Miller, and the false propositions in the letter in question were in retaliation for Miller's 2019—2020 whistleblower disclosures against the agency. Certainly, Mihalik could not have made her selection based on a letter she never saw, issued a year after her selection.

The judge rejected Miller's argument against Defendants sandbagging Miller with a last-minute, contrived defense the selectee's experience as an "analyst" was a "better fit" for the position as a "policy analyst" because Miller is an "economist." The court ignored Miller's seven years of analyst experience, cross-training as a financial analyst, job duties as an analyst, participation in the Chartered Financial Analyst program, and other indicia of Miller's vast experience in economic and financial analysis. The judge excused this blatant violation of federal rules by claiming "Defendants' attorneys are simply outlining the selectee's fit for the role, which was

always a basis for her selection." *Mem. Op.* at 15. That selectee was an analyst was *never* a reason proffered by Mihalik. It was an argument of counsel, which is never evidence in a court of law. The court referred to a statement by the EEO investigator regarding an affidavit statement by panel member Khare. *Id.* But reading that affidavit, Khare claimed selectee was a better fit because she worked in Capital Markets, not because she was an analyst. Khare's claim was perjury – nothing in the vacancy announcement, vacancy questions, position description, or interview questions indicated the position was solely related to capital markets.

The court erroneously held that Miller had no cause of action for political discrimination, falsely claiming that Miller had avenues of relief through the Civil Service Reform Act of 1978, Pub. L. 95-454 (1978) and complaints to the Office of Special Counsel, none of which apply to federal corporations like FDIC. The court completely ignored Miller's verified and unrebutted pleadings of FDIC rigging its grievance procedures in its own favor and Miller's labor union violating its duty of fair representation by not taking his grievances to arbitration.

In summary, every line in the *Memorandum Opinion* demonstrates that the judge was profoundly biased against Miller, relying repeatedly on false facts, erroneous applications of law, Fed. R. Civ. P. violations, perjury, self-serving conclusory claims, misrepresentations of Miller's arguments, obstruction of discovery, hostile hyperbole, *non sequitur* reasoning, and drawing inferences against Miller and in favor of the moving party. The district court ignored genuine issues of material fact making summary judgment inappropriate.

This was the second case in a row in which the same judge dismissed Miller's discrimination complaints based upon false facts the judge invented from nothing, violating legal standards, ignoring evidence favoring Miller, relying on agency witness perjury, drawing inferences against the non-moving party, and making obviously erroneous interpretations of law. *Miller v. Gruenberg,* 1:16-cv-856 (E.D. Va. Mar. 31, 2017); No. 17-1688 (4th Cir.) (certiorari denied).

For the third time in as many appeals, the Fourth Circuit summarily affirmed lower court decisions filled with dozens of properly assigned errors, demonstrating profound bias against Miller, *pro se* litigants, whistleblowers, and against Miller's types of claims – discrimination against white men. This appeal, as well as the prior two, failed to give this reviewing Court any reasoned basis for the Circuit Court's decisions, which are arbitrary and subject to automatic remand. Miller's appeals as a matter of right are not satisfied merely by the Circuit court looking at it; the appellate court must apply reasoned judgment to its decision. While some appeals are appropriate for summary affirmance, none of Miller's appeals were.

REASONS FOR GRANTING AN EXTENSION OF TIME

1. As described above and in Miller's *Complaint, First Amended Complaint,* and appellate briefs, the facts underlying this Petition are voluminous, Defendants committed literally *hundreds* of rule violations, and the district court made *hundreds* of abuses of discretion.

2. This case presents extraordinarily important issues warranting a carefully prepared Petition. Miller will be raising several issues of first impression on Petition for Certiorari:

    a. Do regional federal district courts have jurisdiction to stay agency personnel actions taken in alleged whistleblower retaliation when there are no sitting members of the Merit Systems Protection Board to grant such a stay? If so, what criteria do the courts use to determine whether to grant a stay.

    b. Does an employer satisfy her burden under the *McDonnell Douglas* framework and *Burdine* to state legitimate, non-discriminatory reasons for her actions simply by listing positive, declarative attributes of the selectee rather than comparative attributes demonstrating a reasoned preference of the selectee over the complainant?

    c. Did the district court's and circuit court's numerous, obvious, and egregious erroneous and discretion-abusing decisions display such deep-seated favoritism or antagonism toward a *pro se* litigant as would make fair judgment impossible?

    d. Did Plaintiff demonstrate conditions for an implied cause of action for political discrimination in a federal corporation's personnel decisions?

3. There is a substantial prospect that this Court will grant certiorari and, indeed, a substantial prospect of reversal because:

a. Congress has declared that whistleblowers serve the public interest by bringing government malfeasance to light and protecting them is of paramount concern. Whistleblower Protection Act of 1989, Pub. L. 101-12, (1989) as amended by the Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199 (2012). Congress explicitly set up procedures for issuance of stays of agency personnel actions to protect whistleblowers, which can be granted by a single Board member appointed by the President and confirmed by Congress. The Merit Systems Protection Board had an unprecedent vacancy of all three seats for an extended period of time. This Court should hold that, in the absence of any MSPB board members who can grant a stay, regional federal district and appellate courts have jurisdiction under 5 U.S.C. § 703 to grant a stay.

b. In the *McDonnell Douglas* burden shifting framework, this Court previously held the "burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing ***evidence that the plaintiff was rejected, or someone else was preferred***, for a legitimate, nondiscriminatory reason." [emphasis added] *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). While this burden of production need not be persuasive, it must "raise a genuine issue of fact as to whether it discriminated against the plaintiff" by introducing "admissible evidence" that is "legally sufficient to justify judgment for the defendant." *Id.* That is, the *Burdine* standard requires that employers present either a

disqualifying factor for the plaintiff or make *comparative* statements why the selectee was *preferred.* Absent a decision from the Court, employers will simply pick truthful, favorable characteristics of the selectee giving the complainant no opportunity to contest the employer's reasons for its selection. This literally reduces the employer's burden at Step 2 to nothing.

c. This case demonstrates weaknesses in this Court's decision in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), unfairly favoring employers, requiring modification of that decision. The Court held that "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason." *Id.* at 515. The mechanics of pretext are that, after a complaint is filed or even in anticipation of one, the employer reviews applications to find any characteristic favoring the selectee or disfavoring the complainant. The employer need not even pretend these reasons motivated its hiring decision. As demonstrated in the instant case, pretextual reasons *can be* and *often are* true statements. In the pretext analysis, the relevant falsehood is that the proffered reasons are not the *real* reasons for the selection but are cover for invidious discrimination. Defendants supported their selection with a mere laundry list of declarative qualifications of the selectee, nearly all of which Miller had in abundance. Only one of those reasons was comparative – a single superior performance evaluation by the selectee.

d. *St. Mary's Honor* also errs because, as the dissenting opinion stated, proving that a proffered reason is false is probative (though not necessarily dispositive) of being cover for invidious discrimination. Falsehoods, especially when blatant and in multiplicity, can be part of a convincing mosaic of evidence undermining the credibility of the employer's reasons for its actions.

e. This is a case of first impression on whether there is an implied cause of action for political discrimination within Sections 2301-2301, Title V, United States Code. This Court's decisions in *Bush v. Lucas*, 462 U.S. 367 (1983) and *Vaca v. Sipes*, 386 U.S. 171 (1967) and the statutory exemption of federal corporations from most prohibited personnel practices depriving MSPB of jurisdiction, prevented Miller from obtaining any relief for obvious legal harms. Miller satisfied all conditions for an implied cause of action in his case: (1) as a federal employee, Miller was part of a class of persons for whose especial benefit the anti-political discrimination statute was enacted; (2) the protections against political discrimination sit right alongside protections against sex, race, age, disability, and other forms of invidious non-merit factors within 5 U.S.C. §§ 2301-2302, indicating a legislative history favoring creation of a cause of action; (3) an implied cause of action would support the underlying remedial scheme of the Civil Service Reform Act to ensure an apolitical, professional civil service hired, retained,

and promoted based solely on merit factors; (4) tort claims for political discrimination are not traditionally left to state law.

f. The district court's decisions were so numerously, obviously, and egregiously antagonistic toward Miller and unjustly favoring defendants as to make fair judgment impossible. The district court imposed non-existent rules on Miller, condoned literally *hundreds* of violations of Fed. R. Civ. P. 11, 37 and other rules, and denied Miller relief by inventing false facts, ignoring dispositive facts favoring Miller, drawing inferences against Miller – the non-moving party for motions to dismiss and summary judgment, failing to follow the summary judgment standards, choking off Miller's discovery efforts, arguing from defense counsel's table when defendants failed to meet their legal burdens, making excuses for defendants that defendants did not even make for themselves, ignoring well-established law, applying completely inapposite authorities, and issuing a memorandum opinion that contained errors of fact, law, and inference in nearly every sentence. For the third of three appeals, the Fourth Circuit summarily affirmed obviously erroneous lower court decisions, ignoring all of Miller's assignments of error. The evidence from two district court cases and three appeals demonstrates profound bias and prejudice against Miller, a *pro se* litigant.

4. Petitioner works a full-time job Tuesdays through Saturdays of more than 80 hours every two weeks.

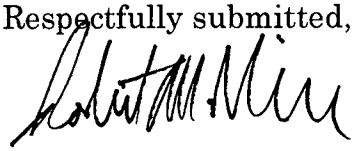
5. Conducting legal research for a U.S. Supreme Court case is exceptionally difficult and time consuming for a *pro se* petitioner.
6. Petitioner is disabled, and suffers daily from severe pain, cramps, lack of sleep, and several other service-connected disabilities that inhibit his ability to timely produce these Petitions.
7. Petitioner, *pro se*, is a plaintiff in five ongoing district court cases, three appellate court cases, and two Merit Systems Protection Board appeals.
8. No meaningful prejudice to the Respondent would arise from the extension.

CONCLUSION

For the foregoing reasons, the time to file Petition for Writs of Certiorari on appeal from the U.S. Court of Appeals for the Fourth Circuit in case should be extended sixty days to and including February 5, 2023.

By execution of this Application below, Petitioner swears under penalty of perjury that the foregoing facts are true.

Respectfully submitted,



Executed on November 24, 2023

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