NO. _____

In The
Supreme Court of the United States

MARECIA BELL,

Petitioner,

v.

Secretary,
DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII requires that "all personnel actions effecting employees or applicants for employment … in executive agencies as defined in Title 5 … shall be made free from any discrimination based on race, color, religion, sex or national origin." *See* 42 U.S.C. § 2000e-16(a)) (emphasis added). *Babb v. Wilkie,* 589 U.S. 399 (2020) examined that language and its syntax under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a). The Eleventh Circuit subsequently held that *Babb v. Wilkie* is applicable to Title VII. *Babb v. Sec'y,* 992 F.3d 1193 (11th Cir. 2021).

The questions presented are:

1. Whether a failure to follow federal rules relating to pay without credible explanation that results in a protected class receiving less pay than other protected classes for the same duties and responsibilities can be enough to create a genuine issue of material fact preventing summary judgment in a Title VII claim under 42 U.S.C. § 2000e-16(a).

2. Whether *Tolan v. Cotton,* 572 U.S. 650 (2014), is applicable to federal employee Title VII claims.

Subsidiary questions are whether the language and syntax of Title VII should be interpreted as it was under the ADEA, and whether such language bans retaliation in federal employment.

PARTIES

The petitioner is Marecia Bell.

The respondent is the Secretary, Department of Veterans Affairs.

RELATED PROCEEDINGS

- *Bell v. McDonough, Sec'y of the Dep't of Veterans Affairs*, No. 8:20-cv-01274-VMC-CPT, United States District Court for the Middle District of Florida. Judgment entered June 16, 2022.
- *Bell v. McDonough, Sec'y of the Dep't of Veterans Affairs*, No. 22-12698, United States Court of Appeals for the Eleventh Circuit. Judgment entered April 4, 2024

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This case presents the Court with an opportunity to provide further necessary coherence and clarity to the statutory framework applicable to federal-sector discrimination and retaliation claims. It comes at a time when federal employees' rights make clarity important and it involves legal issues necessary for proper resolution of federal employees' Title VII claims. By applying *Tolan v. Cotton,* 572 U.S. 650 (2014) to a Title VII case, it can help the necessary factual approach to this form of civil rights action at the summary judgment stage.

Federal employees' Title VII rights are determined under a statute which requires that "all personnel actions affecting employees or applicants for employment … in executive agencies as defined in Title 5 … shall be made free from any discrimination based on race, color, religion, sex or national origin." 42 U.S.C. § 2000e-16(a).

Babb v. Wilkie, 589 U.S. 399 (2020) interpreted the "shall be made free from any discrimination" language while considering the statutory syntax in the context of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a(a). Yet, federal employees filing claims under Title VII with the same critical language and statutory syntax face, at best, differing standards depending on where they file, and very likely a denial of *Babb's* legal principles and a factual analysis essential to the just determination of their

claims. The only post-*Babb* federal appellate courts to consider and resolve the textual differences between the private- and federal-sector Title VII provisions have held that the "shall be made free from any discrimination" language in Title VII cases has the same interpretation as the one this Court determined in *Babb v. Wilkie*. *See Babb v. Sec'y,* 992 F.3d 1193 (11th Cir. 2021); *Kocher v. Sec'y, U.S. Dept. of Veterans Affairs,* No.23-1108, 2023 WL 8469762, at*1 (3d Cir. Dec. 7,2023); *Huff v. Buttigieg,* 42 F.4th 638, 644-46 (7th Cir. 2022). One Sixth Circuit district court has partially applied *Babb* to the injunctive relief portion of a retaliation claim under Title VII, but a pretext standard to full relief. *See e.g., Zickefoose v. Austin, III, Sec'y, Dept. of Defense,* 2:22-cv-1935 2023 WL 7167001 (October 31, 2023). Conversely, several District Court cases have refused to apply *Babb v. Wilkie* to Title VII cases. *See e.g., Hoang v. Wilkie,* 1:18-cv-01755 RM-KLM 2020 WL 6156563, at *9 (D. Colo. Oct. 21, 2020); *Johnson v. McDonough,* 1:19-cv-01568-APM, at *3-5 (D.D.C. Nov. 11, 2021).

However, even where it is recognized that *Babb* should control, many courts grant summary judgment based on a failure to establish differential treatment, often using a modified *McDonnell Douglas* comparator analysis, and failing to analyze circumstantial evidence which creates a jury question concerning differential treatment. This case and *Terrell v. Secretary, Department of Veterans Affairs,* 98 F.4th 1343, 1353 n.3 (11th Cir. 2024) purport to apply *Babb,*

but fail to properly determine differential treatment and in *Terrell* denied federal employees burden shifting if they establish differential treatment. It expressly rejected this Court's reliance upon *Texas v. LeSage,* 528 U.S. 18 (1999) and *Mt. Healthy Cnty. Bd. Of Ed. v. Doyle,* 429 U.S. 274 (1997) when discussing its remedial scheme. The Panel maintained that *Mt. Healthy* and *LeSage* only apply "in constitutional cases, not Title VII cases" despite this Court's decisions in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 246-249, 254-255, 277-279 (1989); s*ee also N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393, 400-402 and several footnotes (1983) (Interpretation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act).

In this case the Petitioner was the only black assistant nurse manager (ANM) or nurse manager (NM) in the Spinal Cord Injury Polytrauma and Rehabilitation Service (SCI). She was used by management to perform important nurse manager's duties which justified nurse manager's pay, but denied that pay. She accepted these duties after having been told by both her first and second-line supervisors, who had the authority to select a nurse manager, that she would receive a nurse manager's pay and position. She was also the only nurse performing duties of the type she was asked to perform that did not receive a nurse manager's position or pay. Every other nurse who previously (and subsequently) performed the duties she

performed was at least a nurse manager and management promised Bell she would receive a nurse manager's position and pay. A central issue was whether this full-time extended use without promotion or pay was based on her race or at points on EEO activity. Despite case law for unequal pay cases under Title VII focusing upon the duties and responsibilities performed, the panel made its decision based on the title and duties of Petitioner's original position (ANM) which was changed after 30 days. The Opinion failed to address the defendant's rules requiring a two-step increase in pay for performing nurse manager's duties or being detailed to such a position, but rather maintained Bell failed to show that other ANMs were given nurse manager's pay for performing nurse manager duties. App. 12a-13a. Bell was attempting to show differential treatment, not a *McDonnell Douglas* comparator.

The panel also made credibility determinations which it found had legal significance when it accepted the Associate Director over Nursing, Laureen Dolorescо's claim that she never knew that Plaintiff, who was an assistant nurse manager performing nurse manager's duties and responsibilities, wanted a nurse manager's position and pay. App. 23a. Yet, contradictory emails, and evidence admissible before a jury, including under Federal Rules of Evidence 801(d)(2)(D) and 404(b) , and other evidence, contradict Dolorescо's claim of a lack of knowledge. *See e.g.*, *Tolan v. Cotton,* 572 U.S. 650 (2014);

Anderson v. Liberty Lobby, 477 U.S. 272 (1986). The panel decision conflicts with relevant decisions of this Court; and those of other Circuit Courts of Appeal. Factors determining whether to grant certiorari are whether a Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(a)(c).

Petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered on April 4, 2024 upholding errors by the District Court and resolve these important questions.

OPINIONS AND ORDERS BELOW

The April 4, 2024 opinion of the Court of Appeals, which was not designated for publication, is set out at pp.1a-19a of the Appendix. We have filed several requests for rehearing and for rehearing en banc on these issues and determined it would be futile to do so here.

On February 17, 2022 Order by District Court granting a Motion for Summary Judgment pp. 20a-47a.

On June 15, 2022 Order by District Court granting Motion to Dismiss pp. 48a-58a.

JURISDICTION

The decision of the Court of Appeals was entered on April 4, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964 (hereafter, "Title VII"), 42 U.S.C. § 2000e-16(a), provides in pertinent part: "All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

Petitioner, Dr. Marecia Bell commenced this action on June 3, 2020 in the Middle District of Florida, alleging that she was subject to discrimination (race-black), retaliation, and a retaliatory hostile work environment in violation of Title VII of the Civil Rights Act applicable to federal employees. She alleged that she was the victim of retaliation because of her protected EEO activity and a retaliatory hostile work environment, in violation of the same statutory law.

On February 17, 2022, the District Court granted summary judgment in part and denied it in part as it related to certain racial discrimination claims that

occurred in the Home Based Primary Care (HBPC) Service. The Secretary moved to dismiss the claims as not timely filed and on June 15, 2022 the District Court dismissed the remaining counts.

A. Factual Background

Dr. Marecia Bell was the only black nurse manager (NM) or assistant nurse manager (ANM) in the Spinal Cord Polytrauma and Rehabilitation Service ("SCI"). There were none before she came or after she left. Bell had a number of important roles, including leading a successful effort to reduce injuries due to slip and falls throughout the facility. She was hired into the ANM position by Julia Lewis, the Assistant Chief Nurse of SCI (ACN) and Kathy Michel, the Acting Chief Nurse (CN). Dr. Bell was hired with limited non-supervisory duties in October 2016. In November 2016 she was asked by Lewis, her first-line supervisor and Michel, her second-line supervisor, to become the first-line supervisor of the SCI Resource Pool which had 15 employees of SCI's 107, including 5 registered and other nurses. Both Lewis and Michel told Bell that as a result of the new and increased duties she would be paid as a nurse manager and be placed in a nurse manager's position. On December 27, 2016 an email identifying Bell and her new responsibilities was sent to SCI employees. Michel and Lewis had the written authority to make these decisions, but they had to discuss it with

Laureen Doloresco, Associate Director over Nursing.[1] Later, Bell was told Doloresco was allowing the new Chief Nurse Mary Alice Rippman, to make the decision. These 801(d)(2)(D) . statements corroborated Doloresco's knowledge and involvement in what was happening to Bell. Bell handled this new role for nearly 18 months with Doloresco's knowledge but no pay.

The requirements and duties for a nurse manager (NM) are contained in VA Handbook 5007/34, Part III, Chapter 8. Higher Rates of Pay for Assignment of Head Nurse [(Nurse Manager)] or Possession of Specialized Skills (HB 5007). Paragraphs 1.a. and 1.b. state:

> a. Restrictions. Individuals in head nurse [/nurse manager] assignments must exercise first line supervisory responsibility over a [patient care team] which contains at least the equivalent of three full-time subordinate [patient care team members] (registered nurses, licensed practical nurses[,] nursing assistants[, technicians, clerks or other licensed/certified clinicians). At least two of the patient care team members must be in a nursing position (i.e. registered nurse, licensed practical nurse, nursing assistant).]. A

[1] Exhibit N to the Response to Motion for Summary Judgment was a March 6, 2018 email from Doloresco to all Chief Nurses confirming that: "Chief Nurses are the selecting officials for nurse managers," but asked them to contact her so she could "review your recommendation and provide feedback".

[patient care area] is defined as a geographic location or program with patient care delivery of responsibilities across the continuum of care.

b. Head Nurse[/Nurse Manager] Supervisory Responsibilities. The head nurse[/nurse manager] is responsible for ensuring that subordinate [patient care team] personnel provide timely nursing care which complies with generally accepted standards of clinical practice. This includes the authority to accept, amend or reject the work of subordinates. In addition, to be eligible for head nurse[/nurse manager] pay, individuals in the assignment must have continuing responsibility for all of the following functions:

(1) Planning work to be accomplished by subordinates, setting priorities and preparing schedules for completion of work;

(2) Assigning work to subordinates based on priorities, selective consideration of the difficulty and the requirements of the assignments, and the capabilities of subordinates;

(3) Evaluating the performance of subordinates;

(4) Making recommendations for appointments, advancements or reassignments of subordinates;

(5) Giving advice, counsel, or instruction to subordinate personnel on work and administrative matters;

(6) Hearing and resolving complaints of subordinates and referring more serious complaints not resolved to higher level supervisors;

(7) Recommending and/or taking disciplinary action where appropriate; and

(8) Identifying developmental and training needs of subordinates and providing or making provision for such development and training. (Emphasis added.)

This was the job Bell performed for nearly 18 months (500 days). She was given an Executive Career Field (ECF) evaluation, something given to nurse managers, and it showed she performed every responsibility of a nurse manager and did so outstandingly. Her proficiency report, signed on 11/25/2017 by Lewis, states in part:

> Ms. Marecia Bell joined the SCI/ Polytrauma/Rehab team this rating period as the Staffing Coordinator/Assistant Nurse Manager amid sweeping leadership changes.

Ms. Bell hit the ground running in an effort to take on some of the administrative and leadership tasks left with several vacant positions. In addition, with almost no assistance, she shouldered full responsibility for the SCI Resource Pool to include hiring, coaching/mentoring, educating and even disciplining staff when needed. Further, when needed, she transitioned to work evening shifts routinely to provide a stabilizing leadership presence in-house during that work time. Due to her efforts, many staff members have commented that the work environment on that shift has greatly improved. Ms. Bell has diligently and consistently provided a positive, focused role model for two employees who were under performing to their potential. One of them has enrolled and is succeeding in a nursing program as a result of her efforts. Ms. Bell was selected as one of three 0.1 FTEE nursing supervisors this rating period. She has parlayed this position into an ambassadorship to help with patient placement and troubleshooting between the main hospital and SCI. Her efforts have made numerous difficult admissions into positive experiences for the patient as well as the staff. In my role as a new assistant chief nurse, it is hard to imagine that I would have had a very good year without the assistance

> and teamwork of Ms. Bell. Her input and view of situations is always sound and insightful and I have learned with and from her as we both grow in our new leadership roles. I look forward to the coming year with her on our team. (Emphasis added).

Under VA rules, a first-line supervisor of Registered Nurses (RNs) has to be a nurse manager. Chief Nurse Michel told Doloresco and the other Chief Nurses that Bell "is in fact the first-line supervisor, not Julie." Bell was announced to all of SCI as being in that position effective on December 22, 2016.

Because Bell was asked to do this job and it was one that had the essential nurse manager duties and responsibilities, it was addressed in an email stream which included Lisa Jensen, the VA Central Office representative over nursing in May 2017. It also included Doloresco. The key takeouts of the stream are: (1) Doloresco, Rippman, Michel and Lewis all knew Bell was the first-line supervisor of the Resource Pool; (2) there can be only one first-line supervisor; (3) Jensen, the VACO expert confirmed that first-line supervision is key to a nurse manager's pay; (4) Bell's job justified a nurse manager's pay under HB5007; and (5) they all wanted Bell to perform the job.

If one meets the requirements of a nurse manager position by meeting the duties and responsibilities, one should be a nurse manager. The only exception is in ¶(c)(4) which applies to employees detailed to a

nurse manager position. That provision specifically references ¶6(a)(2) which requires the person receive manager's pay after 30 days.[2] It is another way Bell was, by VA rules, entitled to nurse manager pay. Referring to Bell's first-line supervision for the Resource Pool, Rippman admitted this is an anomaly in the facility. She "does not know of any other ANMs in this position." However, Doloresco and SCI management never gave Bell nurse manager pay despite Michel and Lewis telling Bell she would receive it. They never gave Bell pay equal to others who performed these duties. They never recognized that she was at least detailed to a nurse manager position for more than 30 days. Bell was the only black. Bell was not included on the May 2017 email stream and she did not receive NM's pay and was not made a nurse manager or allowed to obtain or be promoted to open MN positions (there were 8 to 9 nurse manager positions in SCI). She also was never told management was not going to give her a nurse manager's position or pay. Instead, Bell was led to believe, including in writing, that it would all happen if she just waited.

Referring to the Resource Pool itself, the Secretary claimed below that positions have to be competitive. However, Bell was never allowed to compete for a

[2] "An individual detailed to a [head nurse] assignment [ ] or who serves in such an assignment in an acting capacity [shall receive a two-step adjustment in pay effective the beginning of the first full pay period after serving 30 consecutive days in the assignment . . . .]"

position she performed outstandingly. Moreover, declarations were presented stating that under Doloresco several nurse manager and chief nurse positions were filled without competition. In any event, the rules required that Bell receive NM pay without competition because she was placed in this position for more than 30 days.[3]

The District Court's Order recognized that when Bell was first hired, she would not be supervising people in her ANM position. App. 22a. The Order also recognized that there were no other ANMs in the Tampa VA who were first-line supervisors of any staff. *Id.* The Order recognized that Bell was told that her new duties would result in a promotion with a pay raise which would occur, but they first had to get Laureen Doloresco, the Nurse Executive in charge of nursing, to "sign-off" and "process the paperwork." App. 23a.

The order recognizes that Wanda Soto-Hunter (WSH) created a hostile work environment (HWE)

[3] In her 30 years as a nurse, Bell had never filed any EEO claim until another nurse manager openly disrespected her by criticizing her while stating she understood there were "cultural changes" in SCI, but she did not like how Bell allocated resources. Bell filed that as a harassment claim in April 2017. Doloresco, who rose to her position in 2010, had been CN in SCI, and Rippman and Lewis were told, including in writing, on June 17, 2017 just before Bell's reassignment to the evening shift.

and the hostile remarks and vulgarity that Bell was receiving from WSH were racially-based. App. 24a-25a. WSH's conduct continued and in April 2017, Bell told Rippman and Lewis she was planning to file an EEO complaint. *Id.* The Order recognized that shortly thereafter Bell was reassigned to work night shifts from 3:30 to midnight. App. 25a. The Order recognized that Lewis testified that Bell "worked the evening shift for a period of time over several months and was the representative of the management team in that role in the evenings." *Id.* Rippman, the new Chief of SCI, admitted that Bell was the only Assistant Nurse Manager who worked the late shift every day. *Id.* Bell maintained that this was the result of her race and EEO activity of which management became aware two months before in April 2017. *Id.* The Order recognized that Bell again complained about WSH in June 2017 when she said WSH "continues to demean me and my job as an Assistant Nurse Manager and as a staffing coordinator and is very disruptive to my staffing coordinator work duties and bullies me to assign SCI resource staff to the SCI unit she manages." *Id.* The Order recognized Bell documented this, however, the Order did not address that these complaints went to Rippman, Lewis and Doloresco and were opposition to discrimination in the same month she was assigned to always work the evening shifts.

While the Secretary argued Bell's ANM job had envisioned her working evenings, it ignored all of that changed in November 2016. After Bell was hired,

Michel and Lewis made her permanent work schedule 7:30 am- 4:00 pm (M-F). Bell later became the only "ANM" to work the evening shift virtually all the time from July 2017 until she left. By July 2017 she opposed discrimination against her race and engaged in EEO activity by that opposition and filing a HWE EEO claim. Once the change occurred, Bell not only supervised the Resource Pool, but as the District Court's Order notes she supervised all units in SCI in the evening. Bell's testimony is corroborated by SCI staff who worked that shift and submitted declarations. In short, she had considerably more responsibilities than other ANMs or NMs. According to management, all SCI ANMs had to work those shifts two days a week, but Bell never saw them do that and neither did the employees submitting declarations. Despite request the Secretary did not produce records corroborating its claim. None of these facts are addressed in the orders or opinion.

Bell was not only kept in the dark for many months, in August 2017 she asked Lewis what was going on and Lewis emailed her confirming what Bell had been told all along. Just hang in there.

The Order continued by addressing important issues such as Bell being the first-line supervisor, and preparing the evaluations of all the Resource Pool employees. App. 26a-27a. However, as Bell pressed for action in October 2017, Lewis told her Doloresco wanted Lewis to be the one who was listed as performing the evaluations and signing them, even

though she had no basis to make the evaluations and had not replaced Bell as first-line supervisor. Bell objected because she believed that was her job and HR sided with Bell. Bell maintained first line managers not only do the evaluation but sign the evaluation as the person performing it. While Bell was not on the email stream, in May 2017 it was resolved that Bell was the first-line supervisor and signed the evaluations. Unquestionably nursing management, including Doloresco, wanted and agreed she should do that job, but subsequently had not made her a manager or paid her for her work.

Decisions affecting pay, promotions or details are personnel actions. 5 U.S.C. § 2302(a)(A) §§ (i)(ii)(iv) (ix)(xiii). While Bell may not have known all of the facts, Doloresco and Lewis did. That raises a question of the basis for the way or process of making decisions affecting a promotion to nurse manager, a detail or pay. Later events make their intent clear because they tried to cover-up that she was the first-line supervisor. For 500 days she was not given NM pay despite doing the work other racial groups did as nurse managers receiving nurse manager pay. Management's recognition this could be considered disparate treatment was shown when they sought to place Bell under someone so it could be argued she was not the first-line supervisor, thus undermining the basis of any claim she might make for a nurse manager position and pay. However, none of these facts were addressed by the Order and did not come to light for

Bell until the beginning of 2018. On February 20, 2018 Bell had her last conversation with Rippman and Lewis about changing her position to a Nurse Manager position. Bell was asked to be on the interview panel for SCI-DR Nurse Manager position and Bell asked if that would be a conflict because she was applying for that position. At that point Rippman said she did not think Bell was ready to be a Nurse Manager. On February 22, 2018 Bell immediately began the EEO process.

Under 42 U.S.C. § 2000e-16(f) incorporating § 2000e-5(e)(3) Bell was entitled to back pay recovery for two years prior to filing the charge.

On March 5, 2018 Bell met with Doloresco and complained about racial discrimination, how things were going, hostile work environment and retaliation. Approximately two hours later, Lewis told her "your position has been eliminated and your destiny is in your own hands and I'm sure you are out there looking for some other job." Perhaps reality set in quickly for management because on March 6, 2018 efforts were made to have Bell accept an Assistant Nurse Manager's position under Lynette Carballo in which Bell would retain the Resource Pool duties and responsibilities but protect management by placing her under a NM who could signoff or obscure the rules violations.

Bell and Carballo had a good working history. Both worked on facility-wide projects. Bell had become the

expert in the facility for hospital falls. Bell had done the substantial research and made all presentations throughout the hospital on the subject. Due to its success in reducing falls, in 2017 Doloresco wanted a presentation on the subject to be done for people including some outside the facility. Through a subordinate CN, she asked Carballo to do it, but not with Bell. Carballo refused to do that and supported Bell doing it. In the end, Bell and Carballo did it together. Bell believed Doloresco did not want a black person to be the face of the facility on this issue. Yet, neither opinion considered this evidence in assessing the basis for Doloresco's actions concerning pay and a nurse manager's position.

When Bell was advised that she was not ready to be a nurse manager and told that she would be working under Carballo, she spoke with Carballo. Bell and Carballo agreed Doloresco and SCI management were creating a structure to protect them from her claim that she should get paid as a manager. Bell believed that she was going to be doing the exact same job she had been doing but that she was being forced to do it as an Assistant Nurse Manager while giving management the ability to force her to have Carballo sign evaluations and be the "Nurse Manager". In other words accept discrimination and retaliation while helping management provide a pretext. Again, no decision addressed these facts.

With Carballo's support, Bell escaped SCI by taking a staff position in Home Based Primary Care (HBPC) that paid her less money than the assistant nurse manager position. Bell and Carballo had believed the attempted assignment under Carballo was being done to cover-up discrimination. Yet, once management learned of Bell's plans to take a staff position in HBPC, Carballo, while crying, told Bell that Rippman was trying to harm her efforts to leave. Carballo told her that Rippman, Lewis and Raina Rochon, the CN over HBPC and another direct report to Doloresco, were trying to get Carballo to give Bell a bad reference which would have scuttled Bell's simultaneous effort to get a staff position in HBPC. None of this evidence was addressed in any order or opinion, despite its relevance to identities and an improper basis for management's actions.[4]

B. Other Evidence of Racial and EEO Animus

Rippman was a central player in Bell's discriminatory treatment and there is other evidence of Rippman's racial animus. Rippman had engaged in

[4] This evidence involving Carballo was material in the District Court and on appeal to show who was involved and that race was a constant consideration and supported her claim a jury could find differential treatment was based on race or EEO activity. All of this evidence seems to have been ignored by the Panel who asserted we waived the decisions which were simultaneous and inextricably intertwined with the denial of pay, detail and NM position. Moreover, this was all part of the HWE.

disparate, demeaning treatment of blacks which Bell observed and complained about to Rippman, Lewis and others. This also amounted to EEO activity by opposing discrimination. Rippman also harassed Claudette Harrison, a 62-year-old, African American decorated veteran, by telling her, "I need you to show Mr. Harold some leg because I need some chairs moved and don't mind pimping you out." Rippman admits this conduct occurred but claims it was a "joke". Yet, offensive sexual comments occurred on other days. Bell was told by Rippman to order black nurses on injury or disability related light duty to clean food and gum from underneath patients' bedside tables and to clean out a common use refrigerator. Bell again objected. They were RN's on RN light duty, being unnecessarily asked to do housekeeping employees' duties. This happened on three separate occasions. Bell and the other employees had a good faith belief it was racial discrimination. EEO's were filed by employees. Bell also complained to Rippman about WSH creating a racially based hostile work environment (HWE) for her. Emails show WSH would complain about Bell at meetings and try to exclude her from meetings affecting her job. The HWE involving WSH, Rippman and management's inaction was brought to Lewis, Rippman and Doloresco in April, June and August 2017. While management reassigned WSH to the same nurse manager's position in another department that does not remove Bell's good faith opposition to discrimination which was EEO activity.

Doloresco also had a history of racial animus including not hiring or in other cases wrongfully demoting black nurse managers. Declarations and transcripts were filed about Dennis McLain's efforts in 2015 to fight the fact that only 5 of 51 managers, including ANMs were black and 2 of those had been appointed by CN Dr. Inez Joseph (black) who had been appointed prior to Doloresco becoming the Associate Director over Nursing. Joseph approved them without getting Doloresco's approval because CNs and ACNs had that authority. This action and Joseph's opposition to disability discrimination against Dr. Carol Rueter impaired Tammie Terrell's (Black) efforts to become CN of the CLC. Joseph retired and Doloresco made the selection. Terrell finished first all three times the position was announced, but first a white was selected, but when she declined the job, two more rounds were conducted and hiring guidelines designed in part to help minorities, were violated and she never was accepted. Doloresco sought to obscure knowledge in that case.

At first, Doloresco only used non-black subordinates to help her discriminate or retaliate. Lewis told Bell she needed to do what Doloresco wanted to get ahead even if she was being asked to lie to deny an employee workers compensation she was entitled to receive.

Bell refused to take actions against employees which, after investigation, she believed were factually wrong and discriminatory including mistreatment of

light-duty blacks. When the Order addressed what may well have been a significant fact affecting Doloresco, it downplayed its significance even though it had relevance for the basis for her actions in this case.

Opposing what one believes in good faith is discrimination is EEO activity. Eleventh Circuit Standard Jury Instruction 4.22. Bell has engaged in EEO activity of which management was aware. On April 16, 2017 she initiated contact with an EEO counselor in relation to WSH and Rippman. Nevertheless, the order rejected retaliation claims regarding nurse manager pay and position because the court found that Bell accepted the position in 2016, even though the denial of the promise of position and pay was not conveyed to Bell indirectly or directly until February and March 2018.

HBPC. Bell left SCI and took a non-management staff position in Home Based Primary Care (HBPC) because of the separate and not equal treatment she was receiving in SCI which included not giving her what she earned, Rippman and Lewis's actions, no protection from Doloresco and Carballo telling her what management was doing. After she obtained the HBPC job, Dr. Julie Leland took actions to prevent her from going to HBPC until the Chief of HR and an African-American nurse manager in HBPC (Terrell) established that she was officially selected and had accepted the job. Leland was a jogging friend of

Doloresco and one of the ones trying to get Carballo to derail Bell's move to HBPC. Before HR got involved, Leland added Doloresco's assistant Fran Grewe to the email chains. A declaration from an employee who worked in the Executive Offices next to Doloresco's office swore Grewe subsequently intentionally lost Bell's LWOP paperwork multiple times.

Regardless, once Bell was in HBPC, there was evidence Bell was racially discriminated and retaliated against by Leland. The District Court found that Bell was treated disparately by Leland in several areas based on Terrell's testimony. App. 39a. The Court agreed this created a jury question on racial discrimination by Leland in HBPC in assignments, parking privileges and with her opposition to Bell's hiring into HBPC, but did not recognize this evidence's tie-in to Doloresco, Rippman, Raina Rochon as Carballo said. *See id.* The District Court did not consider a carryover from SCI of Rippman, Lewis and Rochon asking Carballo to give Bell a bad write up to scuttle her move. There is obvious animus and the only basis is race or EEO activity. The Panel seems to claim this evidence was waived because we did not challenge the District Court's decision to dismiss untimely claims. App. 11a-12a.

Later Bell was also denied leave without pay (LWOP) despite particular need and considerable notice, and the fact that Bell submitted evidence from the Director that the LWOP requested was of the

same type and duration which had been given to and approved for all other nurses who requested it. Bell knew she would need LWOP to care for her husband, who was seriously injured in an accident requiring multiple surgeries, and for her own medical treatment and education beginning in August 2019. Therefore, in January 2019, Bell sought approval of a temporary position in a service in which she previously worked, the Emergency Department, not HBPC. That department, which is in nursing approved her for a .2 FTE position. Terrell supported it from HBPC's standpoint. The leave would not have been needed for months and Bell's HBPC position could be back-filled by another nurse. Terrell advised Rochon of her approval. Nursing (Doloresco and Rochon) never agreed. The purported reasons ignored the eight months' notice and back filling and even worse was based on factually false reasons. Doloresco and Rochon's actions were helped by sworn testimony that Bell's paperwork was intentionally "lost" several times by Grewe and once again refiled with Doloresco. In June 2019 Bell had to again request the LWOP. Rochon purportedly determined that it would put a strain on HBPC's ability to engage in patient care. Others maintained that they concurred based on her recommendation. However, this recommendation was contradicted by hard facts of which a jury could find Rochon knew. The alleged reason for the denial Rochon gave was that it would increase waiting lists which would require overtime or overhires. It was purportedly based on Jessica Knebel's email of June

28, 2019. However, a memorandum by Medical Director Leland, dated, September 21, 2018, 3-months before Bell's January 30, 2019 email and Terrell's approval of that request, showed that HBPC was actually overstaffed and did not have enough patients (93 patients short) for the staff they had. Leland reluctantly explained those facts in deposition testimony filed in opposition to the MSJ. None of this evidence was discussed in any order. Bell received the FMLA limit of leave but remained out for the reasons originally requested and did not come back until June 2020. The staffing situation at worst remained the same or more likely overstaffing increased. There was no backlog or electronic waiting list issue when Bell returned from LWOP in 2020.

Rochon claimed, that in making her decision, she did not speak to the two most knowledgeable people, Leland or Terrell. Rather she obtained a conclusory email from a new employee, Knebel, who was an RMO in hostile action toward Bell of which Bell complained.

While Bell was out, Henshall, the acting nurse manager replacing Terrell, placed Bell on AWOL which remained in her file and could have been used against her in a disciplinary action. Bell was also given letters of concern and demands to return while on leave relating to medical conditions of her husband and herself. After receiving a number of AWOL threats Bell returned early on June 29, 2020. Henshall pulled her aside as they were going down in

an elevator. When they exited the elevator Henshall asked her to come around the corner with her so that they could talk in private. Henshall told her that she was sorry for what had been done to her that she did not want it to happen "but she had to answer people that are higher than her." "Raina and Laureen Doloresco told her to do these things to me and she's trying to move up, you know."[5]

EEO Activity. The facility, including Doloresco had an historic animus not only to race but toward EEO activity. Statements of Managers admissible under FRE 801(d)(2)(D) reflect Doloresco's EEO hostility including EEO retaliatory animus. Gina and Dennis McLain engaged in EEO activity. On December 6, 2015 a service chief, Samuel Dorsett told Gina McLain that Doloresco told a meeting of chiefs about Dennis McLain and his wife's EEO activity and she wanted to get rid of them both. In early 2016, Mrs. McLain received an admonishment approved by

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[5] This evidence shows Doloresco being involved in the actions of subordinates concerning Bell. *See Ercegovich v. Goodyear Tire & Rubber, Co.* 154 F.3d 344, 355-57 (6th Cir. 1998). Doloresco and Rochon were involved together in trying to stop Bell's transfer to HBPC, LWOP issues and pushing AWOL actions Henshall was ashamed of, but this was never considered in the orders in analyzing the basis of what happened to Bell and why, let alone for the retaliatory HWE claim. On appeal this evidence which was raised below, and in briefs seems to have been "waived."

Doloresco from Chief Nurse Elaine Cohen who wrote McLain used EEO's as a platform and there was great concern about that. A subsequent EEO was filed and the admonishment withdrawn. On May 26, 2015, Cohen wrote about Dennis McLain representing Heidi Salem. Days before Chief Nurse Kathy Michel was leaving to take a promotion, Doloresco directed Michel to give a counseling letter raising a "bully" concern to Mrs. McLain even though her conduct had been praised for several years. She was also told by other nurse managers Doloresco was out to get her and her husband. Mrs. McLain and three other nurse managers testified that Doloresco's conduct at a meeting of all nurse managers and chief nurses in which she identified her and her husband having applied for a position and laughed about it, on May 18, 2015. It is improper to publicly identify applicants for a position and violated VA policy. 5 U.S.C. §2302(b). McLain was denied three positions and Doloresco stacked panels with bias. Many of the legal issues and 404(b) issues in this case occurred in McLain's case.

Terrell v. Sec'y, Dep't of Veterans Affairs, 98 F.4th 1343 (11th Cir. 2024) also involves Doloresco and involved race, EEO activities, and unaddressed stacked panels, violations of hiring (minority) guidelines and many of the legal issues and 404(b) issues which occurred in this case. Claudette Patricio who was denied an ANM position and in settlement helped with guidelines to stop hiring problems for minorities, also had these issues when she was denied

a NM position. In both cases and McLain, Doloresco denied Key knowledge in the case.

When an assistant manager position opened, Heidi Salem (white) competitively applied for it and was the No. 1 applicant. Chief Nurse William Messina and his NMs wanted to hire her, but Doloresco said she had to approve. When Messina told Doloresco, she yelled at him over the phone that Salem would never be allowed to be a manager while she was there. It was loud, Salem was in the room and heard her. When Doloresco refused to even talk to Salem, she filed a reprisal complaint which related back to earlier EEO activity Salem had against Doloresco. As a result of the EEO, Doloresco told Messina "you've won. Heidi is the Assistant Nurse Manager". Messina testified Doloresco was vindictive against him as a result of Salem's actions (her second EEO) including disciplining him, harming his pay, and harming his ability to run his service.

Indeed, the facility had a long problem with EEO activity. In late 2013 a Radiology Service Chief, Stephen Stenzler and later an Assistant Chief of Social Services Carol McFarlane were told that Medical Center Director Kathleen Fogarty would not let people who engaged in EEO activity advance. Those managers told that to Erin Tonkyro, and Dr. Carol Reuter, respectively. Each had engaged in EEO activity and did not advance.

This evidence supports that a jury could find that race and EEO activity were bases in differential treatment in the process of making various personnel actions against Bell.

B. Legal Issues Involved

Title VII Differential Treatment. The evidence shows Bell was entitled to the same pay as other nurse managers because she performed the key nurse manager supervisory duties, especially those duties affecting pay as set forth in VA Handbook 5007. Moreover, she did it for roughly 500 days and was entitled to nurse manager's pay even if her position involving nurse manager duties was viewed as a detail lasting more than 30 days. However, she was denied that pay. A jury can find it was based on race because Bell was the only black ANM and NM in SCI and she was the only person paid less for the job she actually did. Under Title VII, in order to establish a prima facie case of unequal pay, a plaintiff must show that she is a member of a protected class and that the job she occupied was similar to higher paying jobs occupied by individuals outside of her protected class. *Tademe v. Saint Cloud State University,* 328 F.3d 982, 989-90 (8th Cir. 2003) (lack of equal pay/race discrimination claim, relying on sex based principles, but note it was before 42 U.S.C. § 2000e-16(f) (incorporating § 2000e-5(e)(3)); *Miranda v. B & B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1528 (11th Cir. 1992). "[T]his circuit has ruled that Title VII has a 'relaxed standard of similarity'" for jobs occupied by individuals inside of

and outside of a protected class. *EEOC v. Reichhold Chems, Inc.* 988 F.2d 1564, 1570 (11th Cir. 1993); *see also Miranda v. B & B Cash Grocery Store, Inc.,* 975 F.2d 1518, 1529, 1531 (11th Cir. 1992) (citing *Internat'l Broth. of Teamsters v. U.S.*, 431 U.S. 324, 335 n. 15 (1977)). The facts show each of these elements exist in this case except Bell was doing the same or more duties other nurse managers were doing. Significantly, all nurse managers are paid an extra amount no matter what service they are in or how many employees they supervise above three as long as they perform the key supervisory duties which Bell did with 15 employees. See ¶3;¶s1a,1b,Handbook 5007.

Bell repeatedly asked to be given the nurse manager position Lewis and Michel told her she would get, but one never came and NM positions that opened for one reason or another she was not considered for.

When an employer prevents an employee from obtaining, competing for or knowing about a position, or withholds facts to avoid hiring them for an open position or disqualifies them from a position for retaliatory or discriminatory reasons that is an adverse action, or in this case recognition of a detail. *Cones v. Shalala,* 199 F.3d 512, 521 (D.C. Cir. 2000) (failure to allow an employee to compete); *Coleman v. Duke,* 867 F.3d 204, 214-215 (D.C. Cir. 2017) (failure to advertise a position); *see Wilson v. Brennan,* 213 F. Supp.2d 934, 936 (S.D. Ohio 2016) (making a position unavailable); *Davis v. Fidelity Technologies Corp.*, 38

F. Supp. 2d 629, 633-634 (M.D. Tenn. 1998) (refusal to hire or recommend hiring); *McGarry v. Bd. of C'nty Comm'rs of County of Pitkin,* 175 F.3d 1193, 1201-02 (10th Cir. 1999) (failure to let an employee know of a position's availability or to consider the employee for the position); *Hasan v. U.S. Dept. of Labor,* 545 F.3d 248 (3rd Cir. 2008) (failure to hire someone for a position); *see also Teamsters v. United States,* 431 U.S. 324, 363-66 (1977); *Shackleford v. Deloitte & Touche, LLP,* 190 F.3d 398, 406 (5th Cir. 1999). Doloresco is the policy maker and her statements and actions have made it clear an outstanding employee was unwelcome. *Ercegovich, supra* at 355-57. Cold and calculating denouncements seeking to ruin a career may be as successful as obscene tirades. *Blackwell v. City of Bridgeport,* 238 F. Supp.3d 296, 308 (D.C. Conn. 2015).

In *Babb v. Wilkie,* the Court noted U.S.C. § 2000e-16(a) gives employees greater rights than non-federal employees. 589 U.S. at 411-413. However, the *Bell* decision rejects that. The District Court's decision and the panel's decision failed to analyze Bell's rule-based claims. They both criticized her for not identifying another assistant nurse manager who was paid nurse manager's pay for doing nurse manager's duties. Their approach avoids the facts of this case and denies a federal employee of a basic right to equal pay that all employees should have. Bell made a showing which more than matched the showing in *Bowen v. Manheim Remarketing, Inc.,* 882 F.3d 1358 (11th Cir. 2018). Yet

in Bell's case, there is no discussion of these facts or this law.

Statements in the District Court opinion about the Court not being a personnel office and the Panel's acceptance of Doloresco's self-serving denials, notwithstanding contradictory evidence and the prior cases where she did that, suggests different rules are being applied for a government leader. Civility for leaders in Agencies does not justify discrimination or retaliation let alone insulating disparate pay. This case involves taking advantage of a career long outstanding employee by not following case law or rules. Federal employers cannot be given special treatment while claiming Bell is only a personnel issue and not a Title VII issue for a jury. This is a dangerous notion. Federal employees increasingly feel they are being intimidated by Agencies. When an agency violates or undermines its rules by taking advantage of employees, its motives must be capable of being challenged. If not, courts will open a door which will obstruct efforts to correct conduct by Agency personnel even worse than retaliation for EEO activity or whistleblowing. But more importantly for present purposes, it is necessary to avoid application of assumptions to benefit people who facts show should have to explain themselves in courts of law.

Under *Babb v. Wilkie,* Bell only had to establish race or EEO activity was a consideration in the differential treatment concerning pay. Case law indicates her showing would have met the higher

burden under prior law. It is respectfully submitted it showed differential treatment based on race and EEO activity. Both courts in this case have either rejected or missed the key to liability under 42 U.S.C. § 2000e-16(a) under *Babb v. Wilkie.*

Both courts also ignored documents, declarations and sworn testimony admissible under Fed. R. Evid. 404(b) and 801(D)(2)(D) which contradict Doloresco and others and tended to prove that race and EEO activity were a consideration in the way or process of making the decisions in this case and basis for differential treatment and provided further relevant evidence of identity and absence of mistake. The Panel accepted and repeatedly referenced Doloresco's denial of knowledge of Bell's situation despite a contradictory 801(d)(2)(D) statements in December 2016 and later about Rippman deciding things, and emails in May 2017, reaffirmed in August 2017 and other evidence.[6] Neither court had the authority to make a credibility decision in Doloresco's favor.

Petitioner's argument at each stage of the case was that the *Babb* decision created an inextricably intertwined, but separate two-part framework: (1) differential treatment and (2) if that is shown, full relief. Each part requires the plaintiff to establish "but-for" causation. The Eleventh Circuit held it was applicable to Title VII claims. In contrast to *Gross* and

[6] The other evidence was from other cases showing Doloresco often denies key knowledge.

Nassar, however, the "but-for" test for differential treatment under the ADEA or Title VII statutes does not require the plaintiff to prove differential treatment "affected" the ultimate decision(s). *Babb v. Wilkie*, 589 U.S. at 406-08. As to full relief, consistent with prior decisions, the only but-for cases cited with approval in *Babb* were *Texas v. LeSage,* 528 U.S. 18 (1999) and *Mt. Healthy Cnty. Bd. of Ed. v. Doyle,* 429 U.S. 274 (1977). *Id.* at 413. Once the statutory injury is established, here differential treatment, these cases require an employer to establish the same decision defense. If it fails, the Plaintiff has shown but-for causation. *Nieves v. Bartlett,* 139 S. Ct. 1715, 1722-23 (2019); *Hartman v. Moore,* 547 U.S. 250, 260 (2006). In *Babb* the majority stated:

> We have long employed these basic principles. In *Texas v. Lesage,* 528 U.S. 18, 21-22, 120 S. Ct. 467, 145 L.Ed.2d 347 (1999) (*per curiam*), we applied this rule to a plaintiff who sought recovery under Rev. Stat. § 1979, 42 U.S.C. § 1983, for an alleged violation of the Equal Protection Clause. We explained: "[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting [damages] relief." 528 U.S. at 21, 120 S. Ct.

> 467. Cf. *Mt. Healthy City Bd. of Ed. v. Doyle,* 429 U.S. 274, 285, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977) (rejecting rule that "would require reinstatement… even if the same decision would have been reached had the incident not occurred").

589 U.S. at 413.

Justice Thomas's dissent recognized the eight-justice majority's description of the statutory injury and criticized its principal reliance upon *LeSage* and *Mt. Healthy* for the remedial scheme. *Id.* at 418.

Petitioner argued at each stage of this case that *Babb* requires that each time an employee shows differential treatment based on a protected characteristic, an employer has to prove the same decision would have been reached regardless of the statutory injury, unless such a decision is undisputed. Yet differential treatment far more strident than the one in *Babb* and even in private sector cases was used to avoid this analysis.

Retaliation. Federal-sector retaliation claims under Title VII were unaddressed in *Gómez-Pérez v. Potter*, 553 U.S. 474, 488 n.4 (2008) and *Babb v. Wilkie.* In *Gómez-Pérez*, this Court found retaliation provisions embodied within the "free from any discrimination" language of 29 U.S.C. § 633a(a). *Id.* at 479, 487. However, there is agreement in all Courts of

Appeal that federal employees have Title VII retaliation protection. *See also Nassar*, 570 U.S. at 356 (citing *Gómez-Pérez* for the proposition that, "when construing the broadly worded federal-sector provision of the ADEA, Court refused to draw inferences from Congress' amendments to the detailed private-sector provisions"). Clearly, the denial of pay or promotion would deter EEO activity.

Retaliatory Hostile Work Environment. A hostile work environment (HWE) is a personnel action under 5 USC § 2302(a)(2)(A)(xii). *Savage v. Dep't of the Army,* 122 M.S.P.R. 612,627 ¶23 (2015); *Sistek v. Dep't of Veterans Affairs,* 955 F.3d 948,955 (Fed. Cir. 2020). Therefore, *Babb's* legal framework including differential treatment and full relief should be applicable and reflected in the causation portion of the jury instructions.

There is 801(d)(2)(D) evidence tying Doloresco, Rippman, Rochon and Lewis together in the denial of pay to Dr. Bell and her adverse treatment in SCI and HBPC. Yet, it was said to be waived because we did not challenge certain decisions when producing evidence of differential treatment based on race or EEO activity and a retaliatory HWE. What happened to Bell in SCI caused her to accept a pay cut. What happened in HBPC and SCI caused this outstanding employee to leave James Haley VA.

C. Proceedings Below

The facts established a basis for a jury to conclude EEO activity and race were considered in the process of Doloresco and her subordinates acting and failing to act. *See Ercegovich v. Goodyear Tire a & Rubber Co.,* 154 F.3d 334, 354-355 (6th Cir. 1998).

It is important to consider 404(b) and 801(d)(2)(D) evidence when litigating with giant federal bureaucracies. In discrimination cases such evidence can be pivotal. *U.S. Postal Serv. v. Aikens,* 460 U.S. 711, 714 n.3 (1983); *Goldsmith v. Bagby Elevator Co., Inc*., 513 F.3d 1261, 1285 (11th Cir. 2008)**.** Yet, this is a consistent problem in cases against the federal government for reasons which the government never explains, but which require explanation and correction.

REASONS FOR GRANTING THE WRIT

Federal employees currently filing retaliation claims under Title VII face differing standards of proof and very likely a denial of a just determination of their rights. This case presents an opportunity to correct a growing number of conflicts with the application of *Babb* to the "shall be made free from any discrimination" language in both 29 U.S.C. § 633a(a) and 42 U.S.C. §2000-e16(a) and to settle important questions of federal law that we thought *Babb* settled, but if not, should be settled by this Court.

Action by this Court at this time is necessary to the fair resolution of federal employee claims. While panels in the Eleventh, Seventh and Third Circuits have recognized *Babb* should be applied to Title VII, many district courts in other jurisdictions have not applied it to Title VII cases. Moreover, no matter which circuit a District Court is in, the Secretary continues to make arguments which conflict with *Babb*. *Bell, Terrell* and several other cases are finding ways to sidestep the fact that differential treatment does not have to affect the ultimate decisions or that the Secretary has a burden to show it would have made the same decision defense. As long as Agencies are treated as if they are above the law, real problems will follow. The individual federal employees are at a distinct disadvantage against large bureaucracies with unified defenses and protective revenues.

As noted by this Court, federal-sector retaliation claims under Title VII were unaddressed in *Gómez-Pérez*. 553 U.S. at 488 n.4. In that case, this Court found retaliation provisions embodied within the "shall be free from any discrimination" language of 29 U.S.C. § 633a(a). *Id.* at 479, 487. However, the rationale of *Gómez-Pérez* requires that where, as in 42 U.S.C. § 2000e-16(a), when Congress uses the same broad, general language applicable to the federal-sector as in 29 U.S.C. § 633a(a), it bars retaliation in addition to status-based discrimination. *Id.*

Tolan v. Cotton needs to be followed in Title VII federal employee claims.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals. We also will be requesting review of *Terrell* in two weeks.

Respectfully submitted,

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