No. 24-408

In the Supreme Court of the United States

JO SPENCE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS AND DENIS MCDONOUGH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 18, 2024
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QUESTIONS PRESENTED

1. Whether the Court's issuance of a ruling stating that the liberal pleading standard does not invariably apply to *pro se* attorneys without first addressing the district court's failure to consider the attorney's complaint in light of all filings, as required by the Court for Rule 12(b)(6) reviews was premature and a departure from precedent.

2. Whether the Department of Veterans Affairs acted in accordance with the Veterans Affairs Accountability and Whistleblower Protection Act which required the Special Counsel's approval for the removal, demotion or suspension of covered individuals.

3. Whether courts should be permitted to dismiss claims and challenges to administrative agency decisions for failure to meet Fed. R. Civ. P. 8(a)(2)'s short and plain statement requirement without identifying the claims and/or challenges deemed to be noncompliant.

PARTIES TO THE PROCEEDINGS

Petitioner (plaintiff-appellant in the court of appeals) is Jo Spence.

Respondents (defendants-appellees in the court of appeals) are the United States Department of Veterans Affairs and Dennis McDonough, in his official capacity as Secretary of the United States Department of Veterans Affairs.

LIST OF PROCEEDINGS

United States Merit Systems Protection Board
Spence v. U.S. Department of Veterans Affairs, et al.,
No. DC-0714-19-0123-I-1 (May 31, 2019)

United States District Court (D.D.C.)
Spence v. U.S. Department of Veterans Affairs, et al.,
No. 19-1947 (August 12, 2022)

United States Court of Appeals (D.C. Cir.)
Spence v. U.S. Department of Veterans Affairs, et al.,
No. 22-5273 (July 23, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jo Spence respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at *Spence v. Department of Veterans Affairs, et al.*, No. 22-5273 (D.C. Cir. July 23, 2024) and is reproduced in the Appendix ("Pet.App.") at 1a.[1] The opinion of the District Court for the District of Columbia is reported at *Spence v. Department of Veterans Affairs, et al.*, No. 19-1947 (JEB) (D.D.C. August 12, 2022) and is reproduced at Pet.App.21a. The decision of the Merit Systems Protection Board, Docket No. DC-0714-19-0123-I-1 (May 31, 2019) is reproduced at Pet.App.51a.

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[1] "Pet.App." refers to the appendix to this petition.

"App." refers to the appendix filed in *Spence v. Department of Veterans Affairs, et al.*, D.C. Cir. No. 22-5273.

"ECF" refers to Electronic Case File, *Spence v. Department of Veterans Affairs, et al.*, D.D.C. No. 19-1947.

JURISDICTION

The D.C. Circuit entered judgment on July 23, 2024. (Pet.App.1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat. 862 was enacted in part to provide improved protections for whistleblowers. To this end, 38 U.S.C. § 714(e)(1) states,

> In the case of a covered individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in section 2302(b) of title 5, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

Other relevant statutory provisions and pertinent judicial rules are reproduced in the Appendix at Pet. App.107a-112a.

STATEMENT OF THE CASE

As it comes to this Court, the case presents three separate and distinct questions of exceptional legal importance. The first question discusses the D.C. Circuit's ruling that the liberal pleading standard does not invariably apply to the pleadings of *pro se* licensed attorneys. This is the first time the D.C. Circuit has considered the applicability of the liberal pleading standard to *pro se* attorneys. The D.C. Circuit's ruling represents a departure from this Court's precedent holding that *pro se* complaints are to be liberally construed. The circuits are split on the question of whether the pleadings of *pro se* attorneys are entitled to be liberally construed, with some circuits extending liberal construction to the pleadings of *pro se* attorneys and others declining to do so for varying reasons. Included in the discussion is a synopsis of circuit court opinions that have dealt with this question. The discussion also includes the D.C. Circuit's failure to consider its precedent that a district court reviewing a Rule 12(b)(6) motion must consider the *pro se* litigant's complaint in light of all filings and the district court's refusal to apply the Court's mandate to Spence's pleadings.

Instead of considering the facts alleged in Spence's response to Respondents' motion to dismiss in its Rule 12(b)(6) review, the district court limited its review to Spence's complaint. As a result, the district court dismissed Spence's Count I claims alleging discrimination and retaliation on the basis of her race, sex and age and her Count II claims alleging whistleblower reprisal for failure to state a claim.

The district court held that Spence's claims did not provide any facts that could give rise to an inference that any of the actions taken against her by the VA were due to intentional race, sex, or age discrimination. (Pet.App.34-35a). The district court also held that Spence failed to specify the dates on which she made her whistleblower disclosures. (Pet.App.40a.) Instead of addressing the district court's refusal to consider all of Spence's filings which provided the facts needed to support her Count I and Count II claims, the D.C. Circuit's decision focused solely on whether the pleadings of *pro se* attorneys were entitled to liberal construction. This issue not only impacts all licensed lawyers who represent themselves in the courts of the District of Columbia, it also impacts *pro se* litigants who are not attorneys.

The second question discusses whether Spence's termination was in accordance with law and whether the MSPB's decision was supported by substantial evidence. This is Count V of Spence's complaint. Section 714(e)(1) of the VA Accountability and Whistleblower Protection Act of 2017 requires that the VA Secretary obtain the approval of the Special Counsel before removing, demoting or suspending employees who sought corrective action from the office of Special Counsel based on an alleged prohibited personnel practice. (Pet.App.109a). This issue impacts VA's workforce of nearly half a million employees, including a large number of veterans.

The third issue discusses the district court's dismissal of Spence's entire 41-page challenge to the MSPB's decision for failure to meet Rule 8(a)(2)'s short and plain statement requirement. (Pet.App.110a). This is Count VI of Spence's complaint. The D.C.

Circuit did not identify any claims or challenges it deemed to be noncompliant. Yet, the D.C. Circuit affirmed the district court's dismissal of Count VI. This issue impacts every pleading filed in the District of Columbia courts.

A. Legal Precedents

1. U.S. Supreme Court Precedent

In 1972, this Court held in its landmark decision, *Haines v. Kerner*, 404 U.S. 519, 521 (1972), that the allegations of a *pro se* complaint, "however inartfully pleaded" are to be held to "less stringent standards than formal pleadings drafted by lawyers." *See Estelle v. Gamble*, 429 U.S. 97, 107 (1976), holding that the *pro se* complaint is to be liberally construed. *See also Erickson v. Pardus*, 551 U.S. 89, 95 (2007) (quoting *Estelle*, 551 U.S. at 106, "A document filed *pro se* is 'to be liberally construed' and 'a *pro se* complaint, however, inartfully pleaded must be held to less stringent standards than formal pleadings drafting by lawyers,' *ibid.* (internal quotation marks omitted.)"

2. D.C. Circuit Precedent

In 1997, the D.C. Circuit held, "When deciding a Rule 12(b)(6) motion, the court may consider only the complaint itself, documents attached to the complaint, documents incorporated by reference in the complaint, and judicially noticeable materials." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Since 1998, the D.C. Circuit "has permitted courts to consider supplemental material filed by a *pro se* litigant in order to clarify the precise claims being urged." *Anyanwutaku v. Moore*, 151 F.3d 1053, 1054 (1998). Citing *Anyanwutaku* in 1999, the D.C.

Circuit held that the district court abused its discretion in failing to consider the plaintiff's complaint "in light of" his reply to a motion to dismiss." *See Richardson v. United States*, No. 98-5176, 98-5236 (D.C. Cir. 1999). The D.C. Circuit noted in *Richardson* this Court's holding that courts must construe *pro se* filings liberally and allegations contained in a *pro se* complaint must be held to "less stringent standards than pleadings written by counsel." *Haines*, 404 U.S. at 520-21. The D.C. Circuit explained in *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015), "We have held that a district court errs in failing to consider a *pro se* litigant's complaint 'in light of' all filings, including filings responsive to a motion to dismiss." This has been the D.C. Circuit's holding since *Richardson* was decided 25 years ago.

B. Proceedings Below

1. Merit Systems Protection Board Appeal

After 11 years as Senior Attorney for the Department of Veterans Affairs (VA), Spence was removed on October 30, 2018 for alleged failure to perform. Spence appealed her removal to the Merit Systems Protection Board (MSPB) which upheld the removal in a decision that became final on May 31, 2019. (Pet.App.51a).

2. District Court

On June 28, 2019, Spence filed a lawsuit against the VA that contained five counts.[2] App.51, ECF No.

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[2] Count I alleged discrimination on the basis of race, sex and age in violation of Title VII of the Civil Rights Act, the Whistleblower Protection Act (WPA), and the Age Discrimination in Employment Act. Count II alleged reprisal in violation of the WPA. Counts

1. Respondents filed a Motion for Summary Judgment on June 4, 2021. App.48, ECF No. 20.

On July 27, 2021, Spence filed a Motion for Leave to File an Amended Complaint to add Count VI and a 234-page proposed Amended Complaint[3]. App.47, ECF No. 22. Spence's motion was denied without prejudice on July 30, 2021 and the district court imposed a 50-page limit. App.47, ECF Minute Order.

Spence filed a timely second Motion for Leave to File an Amended Complaint on August 31, 2021 and a 148-page proposed Amended Complaint which included the original 98-page Complaint plus 50 pages for Count VI. App.47, ECF No. 23. Spence's Motion was denied without prejudice on September 2, 2021 "for violating the Court's Minute Order of July 30, 2021, which limited her Amended Complaint to 50 pages."[4] App.47, ECF Minute Order.

III and IV are not included here. Count V alleged harmful procedural error in violation of the Department of Veterans Affairs Accountability and Whistleblower Protection Act and the WPA. Count VI is in footnote 3.

[3] Count VI alleged that the decision of the MSPB was (1) arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; (2) obtained without required procedures being followed; and (3) unsupported by substantial evidence. App.98-99, D.C. Cir. No. 22-5273.

[4] The alleged violation was unintentional. Spence interpreted the district court's limit of 50 pages as being applicable to Count VI and not the entire complaint. Prior to Spence's request to the district court to amend her complaint to add Count VI, Spence's original 98-page complaint had been with the district court for two years. It was therefore not unreasonable for Spence to believe that the district court's order stating "50 pages" was intended for Count VI. Fifty pages was an austere limit for a suit that contained 19 claims of discrimination and retaliation

Spence filed a timely third Motion for Leave to File an Amended Complaint and a 50-page Amended Complaint with three MSPB submissions attached as exhibits A, B and C intended for background information on September 16, 2021. App.47, ECF No. 24. Spence's Motion was granted on October 27, 2021. App.46, ECF Minute Order.

On February 2, 2022, respondents filed a Motion to Dismiss for Repeated Violations of This Court's Order and Rule 8. App.52. Spence filed a Memorandum in Opposition on March 23, 2022. App.62.

On March 30, 2022, the district court concluded that Spence's third proposed Amended Complaint incorporated by reference a 57-page "Statement of Facts" [Exhibit A] which rendered her "Third Proposed Amended Complaint 107 pages in length." App.82.[5]

On April 12, 2022, Spence filed a timely fourth Motion for Leave to File an Amended Complaint and a 50-page Amended Complaint (App.84) which was accepted by the district court on April 14, 2022. App.45, ECF Minute Order.

On May 25, 2022, respondents filed a Motion to Dismiss and for Summary Judgment. App.144. Spence

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under Title VII and the ADEA, multiple WPA reprisal claims, and challenges to the MSPB's 42-page decision.

[5] Exhibit A was not incorporated by reference. It was identified in the third proposed Amended Complaint as an attachment, along with two other exhibits identified as Exhibit B and Exhibit C. Without explanation, the district court determined that only Exhibit A, a "Statement of Facts" from the MSPB record, had been incorporated by reference. Exhibit A was submitted as background information. The relevant facts from that document were included in Count VI.

filed a Memorandum in Opposition on June 29, 2022. App.169. Respondents filed a reply on July 12, 2022. App.210. On August 12, 2022, the district court issued a Memorandum Opinion granting respondent's Motion to Dismiss with prejudice as to Counts I, II, III, IV, and VI and granting summary judgment for respondents on Count V. (Pet.App.21a).

3. D.C. Circuit

On October 11, 2022, Spence filed a Notice of Appeal with the U.S. Court of Appeals for the D.C. Circuit. App.247. On July 23, 2024, the D.C. Circuit issued its Opinion affirming the district court's dismissals of Counts I, II, IV, and VI and grant of summary judgment on Count V. (Pet.App.1a). This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT AMONG THE CIRCUITS OVER THE APPLICATION OF THE LIBERAL PLEADING STANDARD TO THE PLEADINGS OF *PRO SE* ATTORNEYS.

A. The D.C. Circuit's Decision That the Liberal Pleading Standard "Does Not Invariably Apply to Licensed Attorneys" Represents a Departure from This Court's Precedent.

The D.C. Circuit held "that the liberal pleading standard for *pro se* litigants, 'does not invariably apply' when the litigant is a licensed attorney." (Pet.

App.7a).[6] The liberal pleading standard is governed by Federal Rule of Civil Procedure 8(a) and requires "a short and plain statement of the claim showing that the pleader is entitled to relief."

Citing to cases from the Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, the D.C. Circuit stated that there was unanimous consensus of the other circuits that have addressed the question of whether the liberal pleading standard applied to *pro se* attorneys. (Pet.App.7a). The truth of the matter is that there is no unanimous consensus of the other circuits. There is a split among the circuits on this question and the circuits which have dealt with this question have issued incongruent decisions.

Some of the circuits have afforded some degree of liberal construction to the pleadings of *pro se* attorneys. Other circuits have afforded no degree of liberal construction to the pleadings of *pro se* attorneys. Those circuits that have not issued opinions on the application of the liberal pleading standard to the pleadings of *pro se* attorneys generally construe the pleadings of *pro se* litigants liberally, regardless of whether the *pro se* litigant is an attorney or not. A synopsis of the positions of the circuits that have addressed whether the liberal pleading standard applies to *pro se* attorneys is set forth below.

Second Circuit. The Second Circuit held in *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010),

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[6] The D.C. Circuit also held "that the requirement to afford a liberal construction to a *pro se* plaintiff's pleadings 'does not apply' to *pro se* attorneys." (Pet.App.18a) It appears the D.C. Circuit intended to state that liberal construction "does not invariably apply" to *pro se* attorneys.

"a lawyer representing himself ordinarily receives no solicitude." The Court clarified its holding by stating that "the appropriate degree of special solitude is not identical to all *pro se* litigants. We have sometimes suggested that a court should be particularly solicitous of *pro se* litigants who assert civil rights claims." *Id.* at 102. The Court noted that the district courts in the Second Circuit had developed a practice of withdrawing solicitude if a *pro se* litigant was "deemed to have become generally experienced in litigation through participation in a large number of previous legal actions." *Id.* at 101.

Fifth Circuit. In *Olivares v. Martin*, 555 F.2d 1192, 1194 n.1 (5th Cir. 1977) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)), the Fifth Circuit held that it could not afford the *pro se* litigant "the advantage of the liberal construction of his complaint normally given to *pro se* litigants, because he was a licensed attorney."

Sixth Circuit. The Sixth Circuit held in *Puckett v. Cox*, 456 F.2d 233, 236 (6th Cir. 1972), "a *pro se* complaint . . . requires a less stringent reading than one drafted by a lawyer." In *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 633 (6th Cir. 2008), the Sixth Circuit held it was not an abuse of discretion to deny practicing lawyers special consideration on the basis of their *pro se* status. The denial was not related to the lawyers' pleadings. It pertained to the lawyers' request for a jury demand.

Seventh Circuit. The Seventh Circuit held in *Godlove v. Bamberger, Foreman, Oswald & Hahn*, 903 F.2d 1145, 1148 (7th Cir. 1990), "a *pro se* lawyer is entitled to no 'special' consideration." *Godlove* did not involve the liberal construction of a *pro se* attorney's

pleadings. It involved the court's dismissal of the case as a sanction for the attorney's misconduct.

Ninth Circuit. In the Ninth Circuit, the district courts are divided on the proper pleading standard for a *pro se* litigant who is also a licensed attorney. The Central District of California does not afford leniency to *pro se* attorneys. The courts in the District of Hawaii and the Southern District of California liberally construe the filings of attorneys who appear *pro se*. *See Huffman v. Lindgren*, 81 F.4th 1016, 1021 (9th Cir. 2023).

Tenth Circuit. In *Mann v. Boatright*, 477 F.3d 1140, 1148 n.4 (10th Cir. 2007), the Tenth Circuit held, "While we generally construe *pro se* pleadings liberally . . . the same courtesy need not be extended to licensed attorneys." *See also Tatten v. City and County of Denver*, 730 Fed.Appx. 620, 623-24 (10th Cir. 2018).

This Court addressed the Tenth Circuit's departure from the liberal pleading standards in *Erickson,* 551 U.S. at 89. Quoting *Estelle*, 429 U.S. at 106, this Court held that a document filed *pro se* is "to be liberally construed" and "a *pro se* complaint, however, inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Id.* at 95. *See Haines,* 404 U.S. at 520.

This Court's language in *Haines* seems to suggest that *pro se* pleadings are entitled to some degree of liberal construction, with pleadings not drafted by lawyers being entitled to a greater degree than those drafted by lawyers.

Some of the circuits, however, have interpreted this Court's language to mean that the pleadings of

pro se attorneys are not entitled to any degree of liberal construction. The decisions of the circuits that have afforded no degree of liberal construction to the pleadings of *pro se* attorneys represent a departure from this Court's precedents. The D.C. Circuit's decision that "the liberal pleading standard for *pro se* litigants does not invariably apply when the litigant is a licensed attorney" also represents a departure from this Court's precedents. The D.C. Circuit's decision leaves the door open for the courts to determine whether the liberal pleading standard applies to a *pro se* attorney's pleadings with no guidance and no set criteria or parameters for making such determinations. (Pet.App.18a).

If a court has the ability to subjectively pick and choose which *pro se* attorneys will be entitled to have their pleadings liberally construed, this will inevitably lead to disparate and inequitable treatment of *pro se* attorneys and their pleadings. Such treatment would not only contravene Federal Rule of Civil Procedure 8(e) which states that pleadings must be construed so as to do justice, it would be antithetical to this Court's holding that a *pro se* complaint must be held to "less stringent standards than formal pleadings drafted by lawyers." *See Haines*, 404 U.S. at 521. *See also Estelle*, 429 U.S. at 107 and *Erickson*, 551 U.S. at 95.

B. The D.C. Circuit's Disregard of Its Holding That a District Court Reviewing a Rule 12(b)(6) Motion to Dismiss Errs When It Does Not Consider the *Pro Se* Litigant's Complaint in Light of All Filings Is a Departure from Long-Standing D.C. Circuit Precedent.

Before ruling on the liberal pleading standard's application to Spence's complaint, the D.C. Circuit should have considered its holding in *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015) that "a district court errs in failing to consider a *pro se* litigant's complaint 'in light of' all filings, including filings responsive to a motion to dismiss." Hundreds of district court and circuit court opinions have cited *Brown* for this proposition. In *Miller v. Brady*, 639 F. App'x 827 (3d Cir. 2016), the Third Circuit quoted *Brown*'s holding "that a court must consider a *pro se* litigant's complaint 'in light of all filings,' including filings responsive to a motion to dismiss." The D.C. Circuit's failure to address its holding in *Brown* and the district court's refusal to follow *Brown* represented a departure from the D.C. Circuit's precedent and from its usual course of judicial proceedings.

The D.C. Circuit's focus on the liberal pleading standard's application to *pro se* licensed attorneys without considering the Court's ruling in *Brown* as a separate issue was wrong. It was also tantamount to putting the cart before the horse. Unlike the liberal pleading standard which ensures that defendants are given fair notice of plaintiffs' claims, the D.C. Circuit's decision in *Brown* ensures that the lower courts consider the *pro se* litigant's pleadings *"in toto"*

in their reviews of a complaint's sufficiency in Rule 12(b)(6) motions. *Id.* at 152. The D.C. Circuit's consideration of *Brown* was necessary to determine the pleadings for the D.C. Circuit's de novo review.

The D.C. Circuit erred when it concluded that "the district court did not abuse its discretion when declining to consider Spence's additional submissions" and limited its review to Spence's complaint. (Pet. App.8a). The D.C. Circuit also erred when it considered only the allegations in Spence's complaint in its de novo review of the district court's dismissals.[7] (Pet. App.9a). Had the district court properly considered all of Spence's filings in its Rule 12(b)(6) review, it would have found that the materials contained sufficient factual matter that plausibly established the elements of Spence's claims.[8]

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[7] The D.C. Circuit held the only adverse action Spence pleaded was her termination, she failed to plead any facts showing the causal link between her termination and her protected activity, failed to show facts sufficient to state a claim for retaliation under Title VII or the ADEA for Count I, and did not plead facts to plausibly suggest her complaints were a contributing factor for her termination for Count II. (Pet.App.11a-12a). Spence's opposition filings contained factual matter that plausibly established the elements of her claims. They identified numerous adverse employment actions, including the loss of a monetary award which resulted from the reduction of Spence's performance rating from "Outstanding" to "Fully Successful." In a footnote, the D.C. Circuit stated Spence did not challenge the district court's dismissal of her Count I discrimination claims and forfeited any challenge on appeal. (Pet.App.9a). Spence did challenge the dismissal. *See* Appellant's Br. at 2, 9,12-17, *Spence v. United States Department of Veterans Affairs, et al.*, D.C. Cir. No. 22-5273.

[8] Spence's opposition memorandum includes 15 pages of facts taken directly from the official Equal Employment Opportunity

Certiorari should be granted because the district court erred when it failed to consider Spence's "external materials" in its Rule 12(b)(6) review. This is according to the D.C. Circuit which held in *Brown* that "a district court errs in failing to consider a *pro se* litigant's complaint 'in light of' all filings, including filings responsive to a motion to dismiss." *Id.* at 152.

The D.C. Circuit's departure from its precedent and the district court's refusal to follow D.C. Circuit precedent will have serious consequences not only for *pro se* litigants who are licensed attorneys, but also for *pro se* litigants who are not licensed attorneys. Without this Court's intervention, consideration of a *pro se* litigant's complaint in light of all filings will be at the discretion of the district court. This is contrary to *Brown* which makes the courts' consideration for *pro se* litigants mandatory.

Brown makes no distinction between *pro se* litigants who are licensed attorneys and those who are not. Further, there is no indication from the text of *Brown* that the D.C. Circuit's decision was intended to exclude any group or class of individuals from *Brown's* application. It was therefore an overreach for the district court to exclude Spence from *Brown's* application, because of her status as an attorney. It was a greater overreach for the D.C. Circuit to ignore its own precedent.

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affidavit she was requested by respondents to provide. The facts support Spence's 19 claims of discrimination and retaliation under Title VII based on her race, sex and age. Because this is a mixed case, Spence's affidavit is in the MSPB record at App.62, *Spence v. Department of Veterans Affairs, et al.*, D.C. Cir. No. 22-5273.

II. THE REMOVAL OF PETITIONER WITHOUT OBTAINING THE PRIOR APPROVAL OF THE SPECIAL COUNSEL WAS NOT IN ACCORDANCE WITH LAW.

The VA Accountability and Whistleblower Protection Act of 2017, P.L. No. 115-41(6/23/17) and 38 U.S.C. § 714(e)(1) states,

> In the case of a covered individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in section 2302(b) of title 5, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(Pet.App.109a).

Count V of Spence's complaint alleged that a harmful procedural error occurred when respondents terminated her without the approval of the Special Counsel.[9] The D.C. Circuit's decision affirming the district court's grant of summary judgment for respondents on Count V warrants this Court's review for the following reasons:

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[9] Spence raised this claim before the MSPB, as an affirmative defense to her removal. The MSPB administrative judge (AJ) dismissed the claim prior to the MSPB hearing. The AJ also denied Spence's requests that six witnesses whose testimony was critical to her defense of the claims against her appear at the MSPB hearing. *See* App.100, 106, 109, 116, 125, *Spence v. Department of Veterans Affairs, et al.*, D.C. Cir. No. 22-5273.

A. Substantial Evidence Did Not Support the MSPB's Decision.

The MSPB's only reference to Spence's harmful procedural error claim in its decision consists of one sentence. The MSPB stated, "... pursuant to 38 U.S.C. § 714(e), the agency's Office of Accountability and Whistleblower Protection issued an email notifying the agency that its inquiry into the appellant's proposed removal is complete and neither they nor the Office of Special Counsel will hold the proposal from proceeding." (Pet.App.82a). The D.C. Circuit held that substantial evidence supported the MSPB's decision because "the email came from the OAWP, an office with frequent interactions with the Office of Special Counsel, and the OAWP explicitly stated it received approval from the Special Counsel to move ahead with Spence's termination." (Pet.App.15a-16a).

The D.C. Circuit was under a misconception that the statute permitted respondents to speak for the Special Counsel. Congress did not explicitly state that the VA could speak for the Special Counsel and Congress did not delegate authority to the VA to act on behalf of the Special Counsel. If Congress had wished to delegate such authority to the VA, it would have done so expressly. *See King v. Burwell*, 574 U.S. 473 (2015) and *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (quoting *Brown v. Williamson*, 529 U.S. 120, 160 (2000)).

The D.C. Circuit misapprehended the substantial evidence standard. The substantial evidence standard requires such "evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 139 S.Ct. 1148, 1154 (2019) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The MSPB's one sentence is hardly the type of evidence that a reasonable mind might accept as adequate to support a conclusion. If the MSPB's sentence was worthy of any weight, the conflicting accounts provided by the MSPB, the D.C. Circuit and respondents regarding the contents of the OAWP email detract from that weight.

The email was not related to an inquiry about Spence's proposed removal, as claimed by the MSPB. The email did not explicitly state that the OAWP received the Special Counsel's approval, as claimed by the D.C. Circuit. Respondents initially claimed the email stated, "[t]he inquiry is complete. Neither OSC nor [his office] will continue to hold the action proposed under 714. The proposal is clear to proceed . . . ." [10] Respondents subsequently claimed the email stated, "[t]he inquiry is complete. Neither [the Special Counsel] nor [his office] will continue to hold the action under 714. The proposal is cleared to proceed . . . ." [11]

The OAWP email had nothing to do with respondents' receipt of approval from either the OSC or the Special Counsel. The email was in response to an inquiry from the VA Office of General Counsel regarding whether Spence had a retaliation claim pending

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[10] App.163, *Spence v. Department of Veterans Affairs et al.*, D.C. Cir. No. 22-5273.

[11] Appellees' Br. 23, *Spence v. U.S. Department of Veterans Affairs, et al.*, D.C. Cir. No. 22-5273.

with the OSC. (Pet.App.14a). Spence submitted claims with the OSC and the OAWP.[12] The MSPB's decision was not supported by substantial evidence. The D.C. Circuit erred when it did not hold unlawful and set aside the MSPB's decision, as required by 5 U.S.C. § 706(E).

B. The D.C. Circuit Did Not Review the Whole Record, as Required by 5 U.S.C. § 706.

The D.C. Circuit claimed Spence did not raise any factual dispute about the VA OAWP email. (Pet.App.15a). Spence did raise a factual dispute about the VA OAWP email. Spence's memorandum in opposition to respondent's motion to dismiss stated,

> . . . Defendants rely solely upon a single email dated October 24, 2018 which was sent by an unidentified employee of the VA Office of Accountability and Whistleblower Protection (OAWP) to an unidentified VA recipient(s) wherein the sender purports to speak for OSC which is an independent agency . . . absolutely no evidence showing such approval by OSC was provided. . . .[13]

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[12] The subject line of the OAWP email stated "RE: J.S. Action - Verification of OSC Claim. The email stated, "The inquiry is complete. Neither OSC nor VA's Office of Accountability and Whistleblower Protection will continue to hold the action proposed under 714. The proposal is clear to proceed." Electronic Case File (ECF) No. 20-11, *Spence v. United States Department of Veterans Affairs, et al.*, D.D.C. No. :19-cv-01947-JEB.

[13] App.203, *Spence v. U.S. Department of Veterans Affairs, et al.*, D.C. Cir. No. 22-5273.

For reviews of agency actions under 5 U.S.C. § 706, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. The D.C. Circuit erred when it failed to review the whole record which included Spence's factual dispute of the OAWP email. When considering a motion for summary judgment, "[t]he evidence of the nonmovant[s] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). To survive a motion for summary judgment, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

C. The MSPB's Decision Should Have Been Held Unlawful and Set Aside.

Respondents' removal of Spence without obtaining the prior approval of the Special Counsel was not in accordance with law. The statute's mandate that the VA obtain the Special Counsel's approval was plain and unambiguous. "If the statutory language is plain, we must enforce it according to its terms." *King v. Burwell*, 574 U.S. 473 (2015). This Court held in *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), "We must enforce plain and unambiguous statutory language according to its terms." *See Jimenez v. Quarterman*, 555 U.S. 113 (2009) ("It is well established that when the statutory language is plain, we must enforce it according to its terms."); *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("Courts must presume that a legislature says in a

statute what it means and means in a statute what it says there.")

The agency's decision may not be sustained if the employee shows the decision was not in accordance with law. *See* 5 U.S.C. § 7701(c)(2). *See also* 5 U.S.C. § 706(2). The evidence in the record shows that the MSPB's decision was not in accordance with law. Therefore, it should have been held unlawful and set aside.

The VA is the second largest federal agency with nearly half a million employees, including a large number of veterans. The D.C. Circuit's holding that substantial evidence supported the MSPB's decision disregarded the plain language of the statute which required the approval of the Special Counsel. If respondents are allowed to evade the procedural safeguards Congress put in place to protect whistleblowers at the VA without showing any evidence of compliance with the statute, this will defeat the purpose of the statute. It will also create a chill on the freedom of VA's employees to bring attention to prohibited personnel practices being committed within the agency without fear of retaliation and/or reprisal. Agency employees will be reluctant to come forward to expose wrongdoing which is critical in such a large agency whose primary mission is to protect and serve the nation's veterans. The interests of the nation's veterans cannot be served without the continued protections afforded by the statute and without accountability for noncompliance with the statute. This Court's intervention is very much needed to ensure that the will of Congress is carried out and that there is accountability for respondents' failure to comply with the statute.

III. THE COURT'S DISMISSAL OF COUNT VI WAS WRONG AND CONTRARY TO THE ADMINISTRATIVE PROCEDURE ACT.

A. The D.C. Circuit Misapplied Rule 8(a)(2)'s "Short and Plain Statement" Requirement.

As indicated by its title, the purpose of Rule 8 is to establish general rules of pleading. Fed. R. Civ. P. 8(a)(2) requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), this Court interpreted this language to mean that the pleading must contain sufficient factual allegations to make the pleader's right to relief plausible. This Court stated that Rule 8 requires that the pleading "possess enough heft" to demonstrate an entitlement to relief. *Id.* at 557. *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

This Court made clear in *Conley v. Gibson*, 355 U.S. 41 (1957) that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.* at 48; *accord* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 (1986). *See Schiavonne v. Fortune*, 477 U.S. 21, 27 (1986) (noting that the "principal function of procedural rules should be to

serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts").[14]

The D.C. Circuit erroneously applied Rule 8(a)(2)'s "short and plain statement" requirement to Spence's complaint instead of to the claims in Count VI of her complaint. The D.C. Circuit stated, "Because Spence's complaint was neither short nor plain, we affirm the dismissal of Count VI. (Pet.App.16a). Both the D.C. Circuit and the district court erroneously considered the length of Count VI as a factor in their decisions. (Pet.App.16a and Pet.App.47a). This was wrong. Rule 8 does not limit the length of pleadings. Fed. R. Civ. P. 8(d)(3) states, "A party may state as many separate claims or defenses as it has, regardless of consistency." Therefore, the length of Count VI should not have been a factor in the district court's decision and the length of Spence's complaint should not have been a factor in the D.C. Circuit's decision.

B. The Court Did Not Identify Any Claims or Challenges to the MSPB's Decision That Violated Rule 8(a)(2).

The numbered paragraphs of Count VI contained short and plain statements setting forth Spence's challenges to the MSPB's decision.[15] They identified the agency actions, findings and conclusions alleged to be arbitrary, capricious, an abuse of discretion, not

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[14] For more information on Rule 8's pleading requirements, *see* Charles Alan Wright & Mary Kay Kane, LAW OF FEDERAL COURTS § 68 (6th ed. 2002).

[15] App.98-139, *Spence v. U.S. Department of Veterans Affairs, et al.*, D.C. Cir. No. 22-5273.

in accordance with law, obtained without required procedures being followed, and unsupported by substantial evidence. This was in accordance with 5 U.S.C. § 706 of the Administrative Procedure Act (APA) which defined the scope of review for courts reviewing agency actions. (Pet.App.107a).

Count VI stated the relevant facts and identified the evidence in the record that supported each claim. The D.C. Circuit held that Count VI included little or no explanation of how the "material" was relevant to Spence's claims. (Pet.App.16a). The D.C. Circuit's reference to "material" was overly broad. Further, the D.C. Circuit's decision did not identify any claim or challenge in the 41 pages of Count VI that required more explanation to establish relevance to Spence's claims. For its part, the district court stated,

> Spence dives into block quotes from the MSPB decision . . . then comes up for air to argue that the quoted portions of the MSPB decision are erroneous . . . The allegations linger on the minutiae of 'myriad seemingly irrelevant descriptions,' *Jiggetts v. District of Columbia*, 319 F.R.D. 408, 415 (D.D.C. 2017), of correspondence between Spence and her supervisors about particular work assignments . . . rather than providing a coherent retelling of the events underlying her termination, making it "nearly impossible to discern the essential facts that underlie Plaintiffs' legal claims.' *Jiggetts*, 319 F.R.D. at 415."

(Pet.App.48a).

The district court's assessment of Count VI missed the mark. The MSPB quotes established the grounds for Spence's challenges to the MSPB's findings and conclusions. Without them, neither the district court nor respondents would have known what Spence's challenges were based on. Spence's arguments were necessary to support her challenges to the MSPB's decision. The descriptions of correspondence about particular work assignments deemed to be "seemingly irrelevant" were not irrelevant, as Spence's termination was based on allegations that she failed to perform the work assignments described in the correspondence in Count VI.[16]

The D.C. Circuit's failure to identify anything in Count VI that required more explanation to support a determination of relevancy is contrary to the APA's directive that certain courts review agency actions. Spence was deprived of the right afforded to her by the APA to have her challenges to the MSPB's decision reviewed by the courts using the standards defined by the APA.

C. Respondents Had Fair Notice of All Claims and Responded to the Merits.

Fed. R. Civ. P. 8(a) requires that the complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. Respondents had fair notice of Spence's claims and the grounds upon which they rested. Respondents responded to the merits of five

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[16] The challenges to the MSPB's decision were presented in the chronological order of the decision to the greatest extent practicable, to avoid repetition.

of the six counts of Spence's complaint in their motion to dismiss and in their appellate brief. [17] These claims included Spence's harmful procedural error claim which was included in Count VI and stated as a separate claim in Count V. Respondents' detailed response to the harmful procedural error claim shows it had fair notice of this claim and that the respondents understood it and engaged with the claim on the merits. In addition, in a motion to the district court for an extension of time to respond to Count VI, counsel for respondents stated, "Plaintiff's Count VI is over 40 pages and includes several detailed factual challenges to the [MSPB] administrative judge's decision. . . ." [18] This shows respondents were able to discern the essential facts underlying Spence's Count VI claims.

Dismissal of Count VI based on the D.C. Circuit's erroneous application of Rule 8(a)(2) to Spence's complaint instead of to the claims in Spence's complaint and the courts' consideration of factors not prescribed by Rule 8 was an abuse of discretion. "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e)(2). Justice was not served when the D.C. Circuit affirmed the district court's dismissal of Spence's entire challenge to the MSPB's decision. Furthermore, the sweeping dismissal of 41 pages of Spence's 50-page complaint was not a proper exercise of the district court's discretion.

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[17] App.144, *Spence v. Department of Veterans Affairs, et al.*, D.D.C. No. 1:19-cv-01947-JEB.

[18] ECF 35, *Spence v. Department of Veterans Affairs, et al.*, D.D.C. No. 1:19-cv-01947.

This Court's review is necessary to protect the rights of federal workers to have their claims and challenges to administrative agency decisions reviewed by the courts, as intended by the APA. Without this Court's intervention, reviewing courts will be able to easily dispense with entire challenges to agency actions by simply alleging a Rule 8 violation and nothing more. At a minimum, the courts should be required to identify with some specificity each claim or challenge that fails to meet the requirements of Fed. R. Civ. P. 8(a)(2).

Sweeping dismissals of challenges to agency actions will allow the courts to circumvent their obligation under the APA to review agency actions. The APA was enacted by Congress "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States v. Morton Salt*, 338 U.S. 632, 644 (1950). If the courts cannot be relied upon to perform checks on agency administrators by reviewing their actions, the intent of Congress and its purpose for enacting the APA will be upended.

The decision of the D.C. Circuit affirming the district court's dismissal of Count VI in its entirety warrants this Court's review. "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment." *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 201 (1938) In *Foman v. Davis*, 371 U.S. 178, 181 (1962), this Court held that it is " . . . entirely contrary to the spirit of

the Federal Rules of Civil Procedure, for decisions on the merits to be avoided on the basis of such mere technicalities." Fed. R. Civ. P. 15(a)(2) states, "The court should freely give leave when justice so requires."

The D.C. Circuit's decision affirming the district court's dismissal of Spence's complaint with prejudice is contrary to this Court's ruling in *Conley*, 355 U.S. at 45-46. This Court held "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See also Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be provided consistent with the allegations.") As this Court held in *Foman*, "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182. This Court's intervention and guidance are needed to prevent dismissals of challenges to administrative agency decisions under the guise of technicalities. This is not justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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