No. 24-____

IN THE

Supreme Court of the United States

KARIN WENG,

Petitioner,

v.

JULIE A. SU, ACTING SECRETARY OF LABOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

KARIN WENG, *Pro Se*
5901 Halpine Rd.
Rockville, MD 20851
(301) 770-1886

November 12, 2024

QUESTIONS PRESENTED

This petition presents three questions pertaining to an employment discrimination plaintiff's evidentiary burden in summary judgment proceedings to prove the existence of a genuine issue for trial:

1) Whether a plaintiff must demonstrate that comparators proffered to show disparate treatment are "nearly identical," as the D.C. Circuit requires, or only "similarly situated," as most other circuits require;

2) Whether a court may dismiss as mere "opinion" a plaintiff's sworn factual rebuttals to disciplinary charges rather than accepting them as evidence of disputed facts; and

3) Whether a court must consider as material evidence of pretext facts proving that a governmental employer violated due process in removing an employee.

RELATED PROCEEDINGS

- *Weng v. Su*, No. 23-5117 (D.C. Cir.) (judgment for defendant-appellee entered on April 1, 2024; rehearing denied on August 12, 2024).
- *Weng v. Perez*, No. 1:15-cv-00504 (D.D.C.) (judgment for defendant entered on March 28, 2023).
- *Weng v. Walsh*, No. 20-5264 (D.C. Cir.) (judgment for plaintiff-appellant entered on April 8, 2022).
- *Weng v. Scalia*, No. 1:15-cv-00504 (D.D.C.) (judgment for defendant entered on July 8, 2020).
- *Weng v. Dep't of Labor*, No. 17-1367 (Fed. Cir.) (order transferring case back to U.S. District Court for the District of Columbia entered on November 16, 2017).
- *Weng v. Acosta*, No. 15-5299 (D.C. Cir.) (judgment for plaintiff-appellant, upon rehearing, entered on October 3, 2017, in light of intervening Supreme Court decision).
- *Weng v. Perez*, No. 1:15-cv-00504 (D.D.C.) (judgment for defendant entered on October 15, 2015).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution, Statutes, Regulations, and Rules

Other Authorities

INTRODUCTION

Published statistical data reveals that courts dismiss employment discrimination cases "at startlingly high rates across virtually every procedural juncture . . . much higher than the rates of dismissal for virtually any other substantive category of federal claims."[1] This petition focuses on dismissals at the summary judgment stage and three critical evidentiary issues that those dismissals raise. These issues negatively affect thousands of litigants annually, eroding trust in the judicial system.

Fact-intensive discrimination cases are particularly ill-suited to summary procedures. Yet district courts use summary judgment to dispose of most discrimination cases on the merits, often defying this Court's precedent in the process.[2] Such

---

[1] Katie Eyer, *Unequal: How America's Courts Undermine Discrimination Law* at 1, American Constitution Society (August 25, 2017) (reviews the book by Sandra F. Sperino and Suja A. Thomas refuting the view that most employment discrimination suits are frivolous; also includes an embedded link to Eyer's own law review article), available at https://www.acslaw.org/book/unequal-how-americas-courts-undermine-discrimination-law/#:~:text=Unequal:%20How%20America's%20Courts%20Undermine%20Discrimination%20Law%20%7C%20ACS (last visited Oct. 28, 2024).

[2] See, e.g., *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam) (a court must view the evidence in the light most favorable to the non-movant); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . .").

dispositions violate the Fifth Amendment's Due Process Clause when they extinguish meritorious claims without a trial.[3] In Weng's case, the trial court's gross misapplication of the summary judgment standard denied Weng her constitutional right to a jury trial.

Plaintiffs appeal to circuit courts only a small percentage of discrimination cases that district courts dismiss via summary judgment. The circuit courts, in turn, generally affirm on appeal,[4] often similarly using summary dispositions to dispense with full briefing and oral argument. In Weng's case,

---

[3] One commentator noted "the ironic result that the courts' approaches to these cases actually may lead to more discrimination in the workplace and therefore more cases." See Theresa M. Beiner, *When Courts Run Amuck: A Book Review of Unequal: How America's Courts Undermine Discrimination Law by Sandra F. Sperino and Suja A. Thomas (Oxford 2017)*, 5 TEXAS A&M L. REV. 391 (2018).

Indeed, the Equal Employment Opportunity Commission ("EEOC") reported to Congress:

> Demand for the EEOC's services continues to increase. The number of new [private sector] charges filed with the agency, which had declined during the initial years of the COVID-19 pandemic, increased from just over 61,000 in FY 2021 to more than 73,000 in FY 2022. [sic] an almost 20 percent increase. In FY 2023, EEOC received 233,704 inquiries, an almost 7 percent increase from FY 2022, and 81,055 new charges, an increase of over 10 percent compared to FY 2022.

See EEOC, *Fiscal Year 2025 Congressional Budget Justification* (March 11, 2024), *Chair's Message*, available at https://www.eeoc.gov/fiscal-year-2025-congressional-budget-justification (last visited Nov. 1, 2024).

[4] "Less than 5% of discrimination plaintiffs ever achieve any form of litigated relief." See Katie Eyer, *supra*, at 1.

the D.C. Circuit summarily affirmed on appeal, without accounting for relevant and material record evidence that should have precluded such affirmance.[5]

Not only do lower courts overuse summary procedures, in so doing, they deploy various, questionable tactics that foreclose any possibility for discrimination plaintiffs to avoid summary judgment. In this regard, Weng has identified three exceptionally important issues. [6] Her case challenging an employment adverse action thus presents the Court with a vehicle to

1) resolve a conflict among the circuits regarding the appropriate standard for assessing disparate treatment using comparator evidence, with the majority requiring comparators to be "similarly situated," not "nearly identical;"

---

[5] Some appeals courts, such as the D.C. Circuit, welcome the filing of dispositive motions. D.C. Circuit, *Handbook of Practice and Internal Procedures* at 28 (March 16, 2021) ("Parties are particularly encouraged to file dispositive motions where a sound basis exists. . ."). Others, such as the Seventh Circuit, urge restraint, on the view that such motions waste the court's resources. *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006). See Christoper S. Perry, *Summary Disposition on Appeal*, AMERICAN BAR ASSOCIATION APPELLATE PRACTICE JOURNAL, Volume 29, Number 2 (Winter 2010).

[6] Employment discrimination is a perennially important area of the law, given that most non-retired adults must work for a living. Moreover, the share of cases alleging "reverse discrimination" is rising. See, e.g., *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822 (6th Cir. 2023), cert granted, No. 23-1039 (S. Ct. Oct. 4, 2024). Anyone can be a victim of discrimination.

2) rule that, with respect to discrimination claims, no heightened standard applies in summary judgment proceedings that precludes a plaintiff's testimony alone from establishing evidence of disputed facts; and

3) rule that facts proving a public employer's due process violations in removing an employee are significant evidence of pretext.

Resolving these issues in Weng's favor would restore her right to fully brief her appeal in the D.C. Circuit, in accordance with equal justice under law. Published guidance from the Court would also improve the quality of lower courts' employment discrimination claim adjudication. Accordingly, the Court should grant this petition and reverse the judgment.

ORDERS AND OPINIONS BELOW

The D.C. Circuit's order of summary affirmance is unreported but available at 2024 U.S. App. LEXIS 7686 and reprinted in the Appendix ("App.") at 1a. The district court's opinion is unreported but available at 2023 U.S. Dist. LEXIS 52212 and reprinted at App. 4a. The D.C. Circuit's order denying panel rehearing is unreported but available at 2024 U.S. App. LEXIS 20237 and reprinted at App. 27a. The D.C. Circuit's order denying rehearing en banc is unreported but available at 2024 U.S. App. LEXIS 20239 and reprinted at 28a.

JURISDICTION

The D.C. Circuit entered judgment on April 1, 2024 and denied a rehearing on August 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION & RULE

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Civ. P. 56 provides in pertinent part:

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

. . .

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

. . .

(e) If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or

(4) issue any other appropriate order.

. . .

STATEMENT OF THE CASE

A. Factual Background.

Weng, an Asian woman from Taiwan, was a tenured, career, federal employee with the Department of Labor ("DOL" or "agency"), Employee Benefits Security Administration ("EBSA") from 1995 to 2012. On March 7, 2012, the DOL terminated Weng from her Employee Benefits Law Specialist (GS-13) position, effective March 9, 2012, for alleged "unacceptable performance." Weng claims that the DOL discriminated against her on account of her race, national origin, and sex, and/or in retaliation for her prior protected Equal Employment Opportunity ("EEO") activity, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").

Eric A. Raps and Lyssa E. Hall, Weng's supervisors in EBSA's Office of Exemption Determinations ("OED"), were, respectively, the proposing and deciding officials who effectuated Weng's removal as a performance-based disciplinary action pursuant to Title 5, Chapter 43 ("Chapter 43") of the Civil Service Reform Act of 1978 ("CSRA"). 5 U.S.C. § 4301 *et seq.*; 5 U.S.C. § 1101 *et seq.* Record evidence, however, demonstrates the true motives behind her termination, given that OED

management officials engaged in a clear pattern of discriminatory behavior against Weng, extending back to her first year on the job. For example, Weng's first supervisor Laurence G. Lux dubbed her "the Chinker." Other OED management officials, including Director Ivan L. Strasfeld, adopted Lux's moniker for her. Indeed, Director Strasfeld routinely referred to Weng as "the Chinker." On one such occasion when Hall was present, Weng's co-worker Janet Schmidt observed Raps laugh in response. R.76-9, Schmidt Aff.[7]

Nevertheless, Weng's work record was unblemished until Strasfeld effected his friend Raps' non-competitive transfer to OED (in violation of Merit Staffing principles) from another EBSA office in 2004. Strasfeld appointed Raps a Section Chief, despite his lack of Exemptions or management experience. All three of Raps' female employees, including Weng, proceeded to file EEO complaints against him.[8] Reprisal ensued, requiring Weng to

---

[7] The letter "R" refers to the record in the district court and is followed by the pertinent docket number.

[8] Janet Schmidt and Ekaterina Uzlyan began filing EEO complaints in 2004. Weng filed her first EEO complaint – naming Raps, Hall, and Strasfeld as alleged discriminating officials – in April 2006. All three women, about 25% of the professional staff in OED, were subsequently terminated and replaced with White American males. Schmidt won at trial. *Schmidt v. Solis*, 891 F.Supp.2d 72 (D.D.C. 2012). As part of its 2012 settlement of Uzlyan's wrongful termination suit, the agency raised her Unsatisfactory performance rating to Highly Effective. Stipulation of Settlement and Dismissal, *Uzlyan v. Solis*, No. 1:09-cv-01035 (D.D.C.) (Doc. 49). Weng filed two Title VII suits, as discussed, *infra*.

respond with a stream of harassing conduct complaints, EEO complaints, and labor grievances over a six-year period from 2006-2012. Hall unfailingly sided with Raps to Weng's detriment, which Hall compounded by favoring employees of her own race.

In December 2010, Weng filed her first Title VII suit against the DOL. *Weng v. Solis*, No. 1:10-cv-02051 (D.D.C.) ("*Weng I*"). The instant action is Weng's second Title VII suit and seeks redress for her removal from federal service. *Weng v. Perez*, No. 1:15-cv-00504 (D.D.C.) ("*Weng II*"). Not long after she filed *Weng I*, Raps unjustifiably rated Weng Unsatisfactory at her 2011 mid-year review, which was followed by taking her off complex cases without cause and placing her on a Performance Improvement Plan ("PIP"). Raps and Hall, who was promoted to Acting Director in February 2012 (when Strasfeld retired), went on to commit numerous other violations of law in Weng's removal process. In her Oral and Written Reply, Weng rebutted the criticisms of her work product as specified in the notice of proposed removal. Pending at the time of her March 2012 discharge were *Weng I*, a consolidated arbitrations hearing on 11 of her grievances, and a harassing conduct investigation.

In November 2013, the parties reached settlement in *Weng I*. The settlement agreement required the DOL, among other things, to revise Weng's 2006-2008 Minimally Satisfactory annual performance ratings of record to Highly Effective for all official purposes. Earlier that year, in February 2013, Arbitrator Ezio E. Borchini issued his Opinion and Award, which sustained eight out of 11 of

Weng's grievances, including her 2009 and 2010 performance appraisal grievances; he also found that the agency violated the Rehabilitation Act of 1973 in denying Weng's 2009 request for reasonable accommodation.

B. Procedural History.

Administrative Proceedings. Weng commenced her discriminatory removal case in March 2012 via a labor grievance, which the arbitrator dismissed as non-arbitrable on the ground that Weng resigned via email on the effective date of her removal. Weng then filed a "request for review" of the adverse arbitration award as a "mixed case"[9] with the Merit Systems Protection Board ("MSPB" or "Board"). On March 12, 2015, the MSPB issued a final order, without a hearing, to dismiss Weng's appeal for lack of Board jurisdiction, based on her supposed failure to meet her burden of articulating nonfrivolous allegations that her resignation from the agency was involuntary.[10]

Weng II. On April 7, 2015, relying on *Kloeckner v. Solis*, 568 U.S. 41 (2012), Weng brought this action under Title VII, seeking judicial review of the MSPB's final order. On October 15, 2015, the district court dismissed Weng's suit for lack of subject matter jurisdiction holding that because the MSPB had dismissed her appeal for lack of Board jurisdiction, she did not have a mixed case and that the Federal

---

[9] 29 C.F.R. § 1614.302(a)(2); 5 U.S.C. § 7702(a)(1).

[10] On July 8, 2020, the district court found that ". . . Plaintiff was effectively terminated prior to the sending of this [resignation] email." R.83 Order at 5.

Circuit, not the district court, had exclusive jurisdiction to review her removal claim.

First Appeal & Remand. Weng appealed [No. 15-5299] and was the first non-party beneficiary of this Court's ruling in *Perry v. MSPB*, 137 S.Ct. 1975 (2017),[11] which clarified its *Kloeckner* ruling. In light of *Perry*, the D.C. Circuit, on October 3, 2017, granted Weng's petition for rehearing and remanded her case.

On first remand, the DOL filed a second dispositive motion. Weng responded with her combined opposition and cross-motion for partial summary judgment under the CSRA. On October 31, 2019, the district court dismissed one of Weng's claims but otherwise denied both parties' motions. The district court, without reaching the MSPB's decision, denied Weng's cross-motion on the technical ground that she had not pleaded a CSRA cause of action.

The DOL then filed its third dispositive motion. On July 8, 2020, the district court granted summary judgment to the DOL on res judicata grounds, without reaching Weng's merits case.

Second Appeal & Remand. Again, Weng appealed [No. 20-5264], and, on April 8, 2022, the D.C. Circuit reversed and remanded. *Weng v. Walsh*, 30 F.4th 1132, 1138 (D.C. Cir. 2022) (holding that, by an express carveout, Weng had not released any

---

[11] In *Perry*, the Court held that, notwithstanding the MSPB's dismissal of Perry's appeal on jurisdictional grounds, he had a mixed case such that the proper review forum, as in *Kloeckner*, was district court. *Perry*, *supra*, at 179-80, 1985.

removal-related Title VII claims by the settlement agreement in *Weng I*). On March 28, 2023, however, the district court granted summary judgment to the DOL on the merits of Weng's retaliation claim. App. 4a. The district court also found that she had not exhausted admistrative remedies for her status-based discrimination claims, which Weng disputes.

Third Appeal. Again, Weng appealed [No. 23-5117], but, on April 1, 2024, the D.C. Circuit summarily affirmed the district court's judgment. App. 1a. Weng then filed a petition for panel rehearing and rehearing en banc, which the D.C. Circuit denied on August 12, 2024. App. 27-28a.

REASONS FOR GRANTING THE WRIT

A. Circuit Courts Are Divided Over Whether Comparators Must Be "Nearly Identical" Or Only "Similarly Situated" To Prove Disparate Treatment.

The D.C. Circuit has acknowledged that "[e]mployers ordinarily are not so daft as to create or keep direct evidence of discriminatory purpose." *Figueroa v. Pompeo*, 923 F.3d 1078, 1082 (D.C. Cir. 2019). It further noted that an employee may "make her case through circumstantial evidence." Id., citing *McDonnell Douglas Corp. v. Green* , 411 U.S. 792, 802-05 (1973). One way an employee challenging an adverse action can prove discrimination through circumstantial evidence is with comparator evidence, i.e., she can show that her employer treated other similarly situated employees outside of her protected class more favorably. Comparator evidence is also one way the employee can meet her burden of demonstrating pretext at step 3 of the *McDonnell Douglas* burden-shifting framework.

Many circuits, including the D.C. Circuit, ordinarily leave for the jury the issue of whether employees are similarly situated. For example, the Seventh Circuit held, "Whether a comparator is similarly situated is usually a question for the fact-finder, and summary judgment is appropriate only when no reasonable fact-finder could find that plaintiffs have met their burden on the issue." *Coleman v. Donahoe*, 667 F.3d 835, 846-47 (7th Cir. 2012) (internal quotation marks and citation omitted); *George v. Leavitt*, 407 F.3d 405, 414-15 (D.C. Cir. 2005).[12] In Weng's case, the district court, citing D.C. Circuit precedent, adjudged two of Weng's proffered comparators "not valid" and the other [six], not "persuasive," as discussed further below. *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 301 (D.C. Cir. 2015). The D.C. Circuit agreed, finding that Weng's comparators were not "nearly identical" to her in "all relevant aspects of [her] employment situation," again citing *Burley*." Id.; App. 2a. Because the D.C. Circuit defines "similarly situated" to mean "nearly identical," it is a difficult standard to meet, which, in turn, makes it difficult to survive summary judgment on this issue. Id.

Other D.C. Circuit cases inconsistently define a comparator as someone "similarly situated," without qualifiers, to the plaintiff in nearly all "material" respects. *Barnett v. PA Consulting Grp., Inc.*, 715 F.3d 354, 359 (D.C. Cir. 2013); *George, supra*, at 414. With the line of cases in which the D.C. Circuit

---

[12] See also *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2nd Cir. 2000; *Bobo v. U.P.S., Inc.*, 665 F.3d 741, 757 (6th Cir. 2012).

narrowed the definition of "similarly situated" to mean "nearly identical" in "all relevant aspects," the D.C. Circuit joined the Fifth and Eleventh Circuits among the minority of circuits that apply a "nearly identical" standard for comparators.[13] The rest of the circuits, however, have not adopted that strict standard.[14] See, e.g., *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 916 (7th Cir. 2010) ("T]he similarly situated co-worker inquiry is a search for a substantially similar employee, not for a clone."); *Bobo v. U.P.S., Inc.*, 665 F.3d 741, 751 (6th Cir. 2012) (". . .Bobo was not required to demonstrate an exact correlation between himself and others similarly situated; rather, he had to show only that he and his proposed comparators were similar in all relevant respects. . .").

There are sound reasons for this Court to endorse the majority rule among circuit courts that comparators proffered to challenge an adverse action as discriminatory need only be similar, not

---

[13] See, e.g., *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. 1982) (holding that the female plaintiff had the burden of showing "that the misconduct for which she was discharged was nearly identical to that engaged in by a male employee" who was retained); *Rioux v. City of Atlanta*, 520 F.3d 1269, 1279-80 (11th Cir. 2008) ("quantity and quality of the comparator's misconduct [must] be nearly identical") (citation and internal quotation marks omitted). Requiring "nearly identical" misconduct does not comport with the broader "comparable seriousness" standard from *McDonnell Douglas*, *supra*, at 804.

[14] Koski, Matthew C., *Cracking The Comparator Code* at 12, The Employee Rights Advocacy Institute For Law & Policy (December 2012).

identical. The word "similar" has a commonly accepted meaning, which is distinct from that of the word "identical." In the discrimination-action context, where the D.C. Circuit redefined a commonly used word to give it a more restrictive legal meaning at variance from the circuit majority, it gives the appearance of contriving to disadvantage plaintiffs. Such plaintiffs already have a heavy burden to prove their employer's illegal intent.

Comparator evidence is important in other contexts, as well, including whistleblower cases. See, e.g., *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1372-75 (Fed. Cir. 2012). In *Whitmore*, the Federal Circuit overruled the MSPB's finding that Whitmore's comparator was not similarly situated on account of not being "nearly identical" to him. The Federal Circuit's reasoning as to why the narrowed standard is overly restrictive applies equally to employment discrimination cases:

> One can always identify characteristics that differ between two persons to show that their positions are not "nearly identical," or to distinguish their conduct in some fashion. [The relevant analysis], however, requires the comparison employees to be "similarly situated" – not identically situated – to the whistleblower. To read [the analysis] so narrowly as to require virtual identity before the issue of similarly situated non-whistleblowers is ever implicated effectively reads this factor out of our precedent.

Id. at 1373. The Federal Circuit further stated regarding comparator evidence: "[I]ts importance and utility should not be marginalized by reading it

so narrowly as to eliminate it as a helpful analytical tool." Id. at 1374.

This Court, too, has addressed the proper measure of comparators in the context of a "*Batson*" challenge,[15] which requires proving "discrimination by the prosecutor in selecting the defendant's jury." *Miller-El v. Dretke*, 545 U.S. 231, 236 (2005). Thus, *Miller-El* defense counsel compared Black potential jurors that the prosecutor struck via a peremptory challenge with the White jurors allowed to serve. The Court opined:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . .A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Id. at 247. In fact, the Sixth Circuit has held that the *Miller-El* reasoning quoted above "applies with equal force to the employment-discrimination context." *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 710 (6th Cir. 2006). The Sixth Circuit viewed *Miller-El* as validating its rule that a "plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly situated.'" Id. at 709-10 (citation omitted).

---

[15] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Here, comparator evidence was Weng's trump card because there were some truly low- or non-performing employees in her small work unit who were at the same grade level and doing the same work as she, yet Weng was treated more harshly than they in performance evaluation. Weng's standards rated her on productivity, and, based on the OED Case Tracking System data obtained in discovery, Weng ranked fourth out of nine GS-13 Employee Benefits Law Specialists with respect to case-closure rate – nowhere near the bottom. App. 24a. Moreover, she had previously identified co-workers AP and BC in her complaint as marginal employees. R.38 at ¶ 95. The OED Case Tracking System data confirmed this fact, showing that, in FY 2011, AP closed zero cases, while BC closed three cases, all coded C2E (Withdrawn Application), signifying that not much work on them was required. R.76-5.

The district court, however, ruled that two of Weng's proffered comparators were not "valid" because they worked for Strasfeld. App. 24a. It also ruled that Weng's [six] other comparators, who, like Weng, were under Hall, were not "persuasive." Id. The district court gave two reasons: 1) none of Weng's comparators was on a PIP, and 2) case complexity, not case closure rate, was allegedly "the metric by which DOL management measured employees." App. 24-25a. The D.C. Circuit mechanically applied the "nearly identical" standard from *Burley*, *supra*, to affirm the district court's holding.

Had the D.C. Circuit applied a straightforward "similarly situated" standard [*Barnett*, *supra*;

George, *supra*], it would have been compelled to accept Weng's comparator evidence as probative. Regarding the district court's assertion that case complexity "was the metric by which DOL management measured employees" [App. 24a], Weng showed this assumption to be false, i.e., it was entirely and erroneously based on an argument that the DOL's counsel had made up for litigation. Thus, nowhere did the notice of proposed removal or decision to remove fault Weng for having no complex cases, Raps having been responsible for illegally taking her off complex cases.[16] Weng also showed that, routinely, in any given year, not every GS-13 is necessarily assigned work under every job element, and AP also had no complex cases.

The district court also erred when it deemed as disqualifying the fact that none of Weng's comparators was on a PIP. Contrary to the district court's reasoning, the fact that BC was not on a PIP only *confirms* Hall's disparate treatment of Weng. Weng showed that in the preceding FY 2010, BC closed only one case administratively (C2E), yet she was not put on a PIP but rather rated Effective. The drop in BC's rating to Minimally Satisfactory in FY 2011 occurred only after Weng filed *Weng I* in 2010.

---

[16] Weng had never received a rating below "meets" standard for complex cases. Even assuming, *arguendo*, that her performance in this critical job element had fallen to an unacceptable level, Raps' failure to give her an opportunity to demonstrate acceptable performance violated Chapter 43 requirements. 5 U.S.C. § 4302(b)(5)-(6); 5 C.F.R. § 432.104; *Thompson v. Farm Credit Administration*, 51 M.R.P.R. 569 (1991).

On the other hand, Weng successfully challenged all her unjustified, too-low performance ratings in the preceding five years from 2006-2010. In *George*, the D.C. Circuit rejected the Government's argument that the terminated appellant's proffered comparators were not similarly situated to her as they did not have conduct and performance problems to the same degree that she did; the D.C. Circuit noted that there were genuine issues of fact as to those *allegations* [emphasis added] against her. *George*, *supra*, at 414-16. Similarly, Weng showed that there were genuine issues as to whether the imposition of her PIP was warranted or done in retaliation for her prior protected EEO activity.

In sum, whereas a reasonable jury might have difficulty finding that Weng's proffered comparators were "nearly identical" to her, they could easily find many of them "similarly situated," especially the six other GS-13s, including BC, under Hall. Whether the D.C. Circuit is applying the appropriate standard for comparators is an important issue for this Court to resolve. In some cases, the only evidence of discrimination is comparators. For the foregoing reasons, the Court should issue an opinion overruling the "nearly identical" standard used in a minority of circuits in favor of the more flexible and commonly used "similarly situated" standard for comparators in an employment discrimination case challenging an adverse action.

B. A Court May Not Mischaracterize As Mere "Opinion" A Discrimination Plaintiff's Testimonial Evidence Of Disputed Facts.

The second question presented in this petition arises from the D.C. Circuit's dismissal of Weng's proffered testimonial evidence as "inadequate to create a genuine dispute for a factfinder," citing *Walker v. Johnson*, 798 F.3d 1085, 1094 (D.C. Cir. 2015). App. at 2a. The D.C. Circuit's holding that Weng's testimony was mere "opinion" conflicts with its own precedent. See, e.g., *Greene v. Dalton,* 164 F.3d 671, 674 (D.C. Cir. 1999) (reversing summary judgment where the statements in plaintiff's affidavit, if true, sufficiently supported her claim of sexual harassment). Moreover, in *George*, the D.C. Circuit quoted a Third Circuit case: "There is no rule of law that the testimony of a discrimination plaintiff, standing alone, can never make out a case of discrimination that could withstand a summary judgment motion," *George*, *supra*, at 414 (quoting *Weldon v. Kraft, Inc.*, 896 F.2d 793,800 (3d Cir. 1990)). In this regard, it is important to emphasize that courts may not apply special rules to employment discrimination cases that they do not apply to other types of federal claims. For example, this Court has held that there are no heightened pleading rules applicable to such cases. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002). Similarly, the Court can make clear that such cases may not be subject to different legal standards in other contexts, as well – in particular, they may not be subject to heightened evidentiary requirements in summary judgment proceedings. Pertinent to Weng's case is the notion that, as in other cases, a discrimination

plaintiff's testimony alone can establish evidence of disputed facts to stave off summary judgment. See *George*, *supra*, at 414.

Under Title VII, Weng had the burden of proving her employer's discriminatory intent in firing her on purported performance grounds. As a general matter, this Court, has opined,

> [S]ummary procedures should be used sparingly. . .where motive and intent play lead roles, the proof is largely in the hands of the alleged [discriminating officials], and hostile witnesses thicken the plot. [Footnote omitted.] It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of "evenhanded justice."

Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962). As for the summary judgment standard itself, the D.C. Circuit has opined:

> In deciding whether there is a genuine issue of fact before it, the court must assume the truth of all statements proffered by the party opposing summary judgment. . .This is the standard even when the court entertains grave doubts about such a statement; like the weighing of evidence generally, the task of determining the credibility of a witness is the exclusive domain of the finder of fact.

Greene, supra, at 674 (citation omitted). Put another way, a court must view the evidence in the light most favorable to the non-movant. *Tolan, supra*, at 656-57.

Weng notes that both federal anti-discrimination and civil-service laws granted her specified rights and job protections as a federal employee.[17] As previously noted, Weng filed suit under Title VII to challenge her Chapter 43 removal for alleged "unacceptable performance." 5 U.S.C. § 4303; 5 C.F.R. § 432.105. Because the MSPB dismissed Weng's appeal on jurisdictional grounds, without a hearing or adjudicating the merits, the district court performed the substantive analysis of Weng's discriminatory removal claim in the first instance. The district court's opinion, however, displayed a woeful lack of understanding of performance-based actions pursuant to Chapter 43.[18]

Under Chapter 43, the DOL had the burden of proving by substantial evidence that Weng failed a critical element of her job, i.e., her performance fell

---

[17] The CSRA also instituted collective bargaining rights for federal employees so that Weng derived additional rights from the collective bargaining agreement between the DOL and her union.

[18] For example, the district court misapplied the law when it decided that Weng's [*alleged*] failure to follow supervisory instructions ("insubordination") alone was a sufficient basis to fire her. App. 19a. Unlike Chapter 75, Chapter 43 may not be used for conduct-based actions and must be used for purely performance-based actions. *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 840-43 (Fed. Cir. 1985). Identifying every error is beyond the scope of this petition.

below the Minimally Satisfactory (retention) level.[19] The DOL, however, did not provide any declarations and affidavits in support of its briefing, whereas Weng attached several to hers. In Weng's Oral Reply and Written Reply, the latter signed under penalty of perjury, Weng had responded to the notice of proposed removal point by point, showing that Raps cherry-picked instances of her alleged "unacceptable performance" and presented them inaccurately or untruthfully. R.76-6; R.72-6. Weng also submitted a declaration addressing the DOL's so-called Statement of Undisputed Material Facts ("SUMF") [R.72-1] paragraph by paragraph. R.102-1. (Notably, the SUMF was improperly worded in a manner that required Weng to admit not to the alleged work deficiencies per se but rather that Raps or Hall *said* that she had committed them.) Nevertheless, the district court found, "Ms. Weng is unable to establish pretext by showing that her performance deficiencies were 'false'" (citation omitted). App. 21a. Moreover, the district court opinion quotes haphazardly not from the removal documents themselves but from the DOL's SUMF, in which counsel had summarized content from the notice of proposed removal, as "evidence" of Weng's supposed "performance deficiencies." App. 22a. On appeal, Weng pointed out

---

[19] As a matter of law, there was a genuine issue as to whether Weng failed a critical element because she presented evidence that her PIP performance standards had fatal defects, which rendered them invalid under the CSRA. Cf. *Cohen v. Austin*, 861 F.Supp. 340 (E.D. Pa. 1994) (summarily reversing MSPB on plaintiff's removal under Chapter 43 due to invalid performance standards and allowing Title VII claims to proceed to trial). The lower courts, however, ignored Weng's argument.

that she merely needed to show the existence of a genuine issue as to any material facts. Fed. R. Civ. P. 56(a). The D.C. Circuit, however, citing *Walker*, dismissed Weng's sworn factual rebuttals to the agency's charges as mere "opinion." *Walker*, *supra*, at 1094; App. at 2a.

The D.C. Circuit misapplied *Walker* to *Weng* because in *Walker*, the appellant pointed to only vague, generalized statements from her deposition to challenge her "fully successful" performance rating. Id. In contrast, Weng proffered detailed and specific rebuttals, submitted under penalty of perjury, to the agency's allegations of non-performance. In this form, Weng's testimony rebutting the agency's allegations constitutes *evidence* of *disputed facts*, not mere "opinion," and that evidence is a matter for the jury to weigh and decide. Although prohibited from doing so, the district court and D.C. Circuit gave greater weight to the DOL's unsworn statements than to Weng's truthful testimony. To give just one example of the contents of Weng's Written Reply to proposed removal, submitted under penalty of perjury, Weng rebutted Raps' criticism of her work in the Studley case ("blamed another employee. . .") thusly:

> . . .I allegedly did not respond properly to a question from my second-level supervisor. This is not true (see **Tab 17**). The incident involved a routine individual exemption where a question arose regarding applicability of PTE- 94-71, the field exemption. I responded to Ms. Hal that I did not have the answer to her question in front of me but that I had it in my notes from a certain Class Exemptions

> employee. From my research, I subsequently learned that the other employee had been incorrect in advising me that, because the voluntary compliance letter had been issued, the field exemption could not apply. This was incorrect, and I corrected the error for Ms. Hall. Subsequently, we learned from the New York Regional Office that they had not made use of the field exemption because it would have triggered the § 502(l) penalty, which both Ms. Hall and I had suspected.

R.72-6 at 47-48. In her Declaration, Weng also cited her Harassing Conduct Affidavit documenting this incident *in greater detail*. R.102-1 at ¶ 22, citing R.47-6, Ex. M at ECF 24-25. Weng's rebuttals to the other allegations highlighted in the district court opinion [App.22a] are in the record. Such testimonial evidence – and its relative weight versus that of the agency's unsworn statements – are factual matters that belong to the jury, not to a judge on summary judgment.

The D.C. Circuit thus mischaracterized Weng's sworn factual rebuttals to disciplinary charges as "opinion."[20] In so doing, it "clearly invaded the province of the jury." *Greene, supra*, at 674. For the foregoing reasons, it behooves the Court to provide definitive guidance that employment discrimination cases are not a special category and, as in other cases, plaintiff's testimony alone can withstand summary judgment.

---

[20] Ironically, it was the D.C. Circuit judges who based their decision in Weng's case on their own "opinion" rather than on facts and evidence.

C. Facts Proving A Public Employer's Due Process Violations Are Material Evidence Of Pretext.

Federal employees are not at-will employees. By virtue of the CSRA's merit system principles, federal employees may not be removed except for cause and thus are entitled to due process in any removal proceeding.[21] 5 U.S.C. § 2301(b); *Cleveland Bd of Ed. v. Loudermill*, 470 U.S. 532 (1985). The D.C. Circuit trivialized Weng's evidence that the DOL's removal violated due process requirements with its citation to a non-selection case. *Hairston v. Vance-Cooks*, 773 F.3d 266, 272 (D.C. Cir. 2014) ("Showing pretext. . .requires more than simply criticizing the employer's decision-making process."). App. 2a. The factors that the D.C. Circuit considered in *Hairston* are irrelevant to Weng's wrongful termination claim because *Hairston* involved a denied promotion.

Weng presented evidence below that the DOL failed to meet the legal requirements for imposing performance-based discipline under Chapter 43, the most serious violation being the denial of due process. As the DOL's denial of due process resulted in a legally unsustainable decision to remove, it was no minor breach but rather crucial evidence of pretext that foreclosed summary judgment on her Title VII claims. 5 U.S.C. § 7701(c)(2); *Brady v. Off.*

---

[21] In circumstances short of a removal, such as a demotion, the D.C. Circuit has held that a career appointee in the Senior Executive Service ("SES") of the federal government had a constitutional property interest in her rank that entitled her to due process when she was demoted out of the SES. *Esparraguera v. Dep't of the Army*, No. 22-5150, Slip Op. (D.C. Cir. May 10, 2024).

of Sergeant at Arms, 520 F.3d 490, 495 n. 3 (D.C. Cir. 2008) (pretext shown by "employer's failure to follow established procedure or criteria"). Virtually all circuit courts subscribe to some formulation of the principle in *Brady*, i.e., a showing that the employer deviated from established practice is one way to prove that such employer's stated reason for taking an adverse action against an employee is pretext.

In this regard, Weng showed that the outcome of her removal hearing was predetermined by a biased decision-maker, i.e., Hall, whom she had named as an alleged discriminating official in *Weng I*. Thus, it was not merely that she disagreed with the agency's decision-making process. *Hairston*, *supra*, at 272. Rather, she presented incontrovertible evidence that *there was no decision-making process* because her removal was *predetermined*, in violation of due process. R.47, Cross-Motion, at 26-32. First, Hall was an improper deciding official because she had already issued Weng her FY 2011 Unsatisfactory annual rating of record prior to Weng's removal hearing. Second, Hall made the remarkable admission in her discovery responses that a Supervisory Human Resources Specialist, who lacked subject matter expertise in Weng's field, prepared the decision to remove Weng. Hall also admitted that she had no recollection of having reviewed the decision to remove before issuing it.[22] R.76, Opp., at 18; *Robinson v. Dep't of Vet. Affairs*,

---

[22] The decision to remove contained the egregious error of stating that Hall found justification to sustain Raps' charge that Weng was failing four critical elements when Raps had charged her with failing only three.

923 F.3d 1004, 1022 (Fed. Cir. 2019) (finding that deciding official fully considered employee's written response) (citing, as distinguishable, *Hodges v. U.S. Postal Serv.*, 118 M.S.P.R. 591 (2012) ("deciding official's complete failure to consider the appellant's written response to the proposal notice before issuing a decision constitutes – in and of itself – a violation of minimum due process law")). Established Federal Circuit precedents hold that MSPB decisions in which appellant's removal was not done in accordance with due process requirements must be vacated. *Ward v. U.S. Postal Serv.*, 634 F.3d 1274, 1278 (Fed. Cir. 2011); *Stone v. Fed. Deposit. Ins. Corp.*, 179 F.3d 1368, 1374 (Fed. Cir. 1999).

The D.C. Circuit's dismissal of the above facts is in the same vein as its mischaracterization of Weng's testimony as mere "opinion." More important, the D.C. Circuit effectively nullified Weng's statutorily protected right to due process. Given all the public employees, state and federal,[23] having a stake in this issue, this case warrants review. It therefore behooves the Court to provide definitive guidance that, in summary judgment proceedings, courts must consider as probative evidence of pretext a showing of a public employer's denial of due process in discrimination cases challenging a removal or other serious adverse action.

---

[23] The Government is the nation's largest employer, with over 2.1 million civilian workers. Office of Personnel Management, *Goal 1: Position the federal government as a model employer*, available at https://www.opm.gov/about-us/reports-publications/agency-plans/strategic-plan/goal-1-position-the-federal-government-as-a-model-employer/ (last visited Oct. 29, 2024).

D. A Court May Not Contrive Findings That Foreclose All Possibility Of Surviving Summary Judgment.

In considering a summary disposition, the D.C. Circuit was obligated to "view the record and the inferences to be drawn therefrom in the light most favorable to" the non-movant. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987) (per curiam) (internal quotation marks and citation omitted). The D.C. Circuit, however, did the opposite. By dismissing all process-related evidence of pretext as immaterial and all testimonial evidence in rebuttal as opinion, the D.C. Circuit unreasonably eviscerated all Weng's ability to meaningfully contest her Chapter 43 performance-based discharge. The D.C. Circuit also dismissed Weng's proffered comparators by applying an unreasonable "nearly identical" standard," as discussed in Part A, above.[24]

Following this Court's ruling in *Perry*, *supra*, Weng won the right to have her mixed case reviewed in district court. *Perry* overruled the D.C. Circuit's order in Weng's appeal No. 15-5299 summarily affirming the district court's dismissal of her Title VII suit for lack of subject matter jurisdiction. With the retransfer of her case from the Federal Circuit back to district court, she could have her claims heard in a forum that provided for a jury trial. To be

---

[24] In contrast to its treatment of Weng, the D.C. Circuit was receptive to the the appeal of a White woman who alleged discrimination by her Black supervisor. *Morris v. McCarthy*, 825 F.3d 658 (D.C. Cir. 2016) (reversing summary judgment on appellant's race discrimination claim in connection with a seven-day suspension imposed by two Black management officials).

granted a trial, however, she had to survive summary judgment. Unjustly, she did not.[25] This Court has recognized that the Seventh Amendment's guarantee of a right to a jury trial is fundamental. *Securities and Exchange Comm. v. Jarkesy, et al.*, No. 22-859, Slip Op. (S. Ct. Jun. 27, 2024) (holding that the right to a jury trial applies to a defendant in a securities fraud case involving civil penalties). The right to a jury trial, however, is hollow if courts are free to make contrived findings, as shown above, that erect an insurmountable barrier to that right.

Further, the D.C. Circuit, instead of fulfilling the judicial branch's constitutional role of serving as a check on the executive branch, concluded that it has the power to override Congressional intent and effectively nullify all federal employee rights. With its ruling in Weng's case, the D.C. Circuit telegraphed to agencies that they may illegally rig a Chapter 43 removal and federal employees will be

---

[25] Contrary to the D.C. Circuit's findings, Weng argued below that a reasonable jury could find unlawful retaliation behind her removal, based on 1) her history of high performance evaluations prior to engaging in protected activity; 2) her testimony refuting the charges of "unacceptable performance;" 3) character evidence of her supervisors' untruthfulness; 4) her invalid PIP performance standards; 5) her comparator evidence with reference to the OED Case Tracking System data; 6) the corruption in her removal process, producing a legally unsustainable decision to remove; 7) the hostile work environment and management's deliberate attempts to undermine her; 8) the denial of reasonable accommodation; 9) the agency's refusal of her union's settlement offer allowing her to be reassigned to the Office of Workman's Compensation Programs; and 10) the success of her other EEO litigation as well as that of Schmidt and Uzlyan (showing management's pattern of behavior).

powerless to challenge the outcome. Its endorsement of the DOL's "might makes right" management philosophy is impossible to reconcile with the EEOC's claim that "[t]he Federal Government strives to serve as a model employer by promoting equal employment opportunity (EEO) and an inclusive work culture." [26] The EEOC has acknowledged, "Despite significant progress, Federal workforce data suggests that inequities persist."[27] Federal employees, however, who turn to the EEOC or MSPB to hold the Government accountable for its unlawful acts that perpetuate such inequities, seldom prevail before those administrative tribunals, which, after all, are part of the executive branch.[28] The receipt of an adverse ruling typically comes as a shock, given that federal employees must undergo at least bi-annual training regarding their EEO rights, pursuant to the NoFEAR Act of 2002. After exhausting administrative remedies, they may go to court. When courts fail to fulfill their enforcement role, as occurred with the D.C. Circuit's ruling in Weng's case, they render employee "rights" wholly illusory.

---

[26] See EEOC, *Annual Report on the Federal Workforce, Part I: EEO Complaint Processing Activity* at 5 (Fiscal Year 2020), available at https://www.eeoc.gov/sites/default/files/2023-03/FY2020%20Annual%20Report%20Workforce_Part%20I.pdf (last visited Oct. 29, 2024).

[27] Id.

[28] Data for MSPB mixed cases is not published, but, regarding the EEOC: in 2020, of 4125 final orders issued by Administrative Judges, only 135 found discrimination, about 3% of the time. In 2019, it was 2% and, in 2018, 3%. Id. at 24.

CONCLUSION

American society has made progress towards reducing discrimination, but it undoubtedly still occurs, and plaintiffs alleging employment discrimination deserve to have their claims taken seriously. Yet Weng's dystopian experience in the federal courts is far from unique. On the social media platform TikTok, an influencer known as "LadyEquity" attempts to educate those employees undertaking a federal discrimination suit, or contemplating one, on the various pitfalls that they may encounter. Although not a lawyer, LadyEquity feels called to share her own and her friends' personal experiences. In one video, she warns that compelling evidence and a top attorney to present it to the court are not enough; one must also draw "a just judge."[29] In another, she counsels, "prepare mentally for whatever the outcome," as she captures the anguish of those who receive an unjust ruling.[30] Such content conveys the high degree of skepticism with which ordinary Americans view the justice system and its actual ability to deliver justice, notwithstanding its constantly being touted as the gold standard for the rest of the world.

---

[29] The Coalition for Change, Inc., *TikTok video*, available at https://www.tiktok.com/@coalitionforchangeinc/video/7411024363698343199 (last visited Oct. 29, 2024).

[30] Id., *TikTok video*, available at https://www.tiktok.com/@coalitionforchangeinc/video/7416196596217466142https://www.tiktok.com/@coalitionforchangeinc/video/7416196596217466142 (last visited Oct. 29, 2024).

All too often in employment discrimination cases, trial court judges usurp the jury's fact-finding role, yet circuit courts summarily affirm. Of course, not all trial court judges abuse their power by infecting their decisions with a pro-employer bias, but, as this case exemplifies, circuit courts are not reliably enforcing the rule of law on review. In instances when a decision affirming summary judgment is published following full briefing and oral argument, a dissenting opinion is occasionally filed that points out the majority's "failure. . .to apply the correct legal standards." See, e.g., *Taylor v. Solis,* 571 F.3d 1313, 1323 (D.C. Cir. 2009) (Rogers, Cir. J., dissenting). This petition provides the Court with a vehicle to clarify three critical issues pertaining to evidentiary requirements in discrimination cases at the summary judgment stage, as discussed above, which should help to curtail lower courts' abuse of summary procedures in such cases, particularly those challenging serious adverse actions, as a docket-clearing tool.

For the foregoing reasons, the Court should grant the petition.

November 12, 2024

Respectfully submitted,

KARIN WENG, *Pro Se*
5901 Halpine Rd.
Rockville, MD 20851
(301) 770-1886