

No. 18- _____

**In The
Supreme Court of the United States**

MICHELLE L. MCGUIRK

Petitioner

v.

SWISS RE FINANCIAL SERVICES CORP., et.al.,

Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW: R14.1(A)

- I. Do State administrative agencies have authority to adjudicate Federal laws when they do not comply with Federal rules of evidence or procedure? If so, do State agencies have jurisdiction for claims arising in Federal laws if party, or related entity, is regulated by the State? Did District and Circuit Courts deferral to agency orders violate Due Process or Equal Protections?
- II. If U.S. District Courts did not comply with Due Process or Supremacy Clause by misapplying rule of law, precedent or procedure on hostile work claims per Title VII (ADA, Privacy Rules, GNA; *see* Statutes) are they allowed to shift job burdens to Circuit Courts? If so, does 'stepping into shoes' of a party merit independent review of breached protocols, conflicts or compliance-reporting?
- III. Does gender-hate speech on employer premises violate First Amendment or §5 of Fourteenth if it involves threats? If so, does VAWA grant mechanism for statutory relief on inference of compelling State interest in workplace safety? If not, should it apply to acts in agency proceedings?
- IV. If Health Insurance Portability and Accountability Act and Privacy Rule do not prohibit individual right of action among private parties is true, then is it reasonable to use fines for covered entities as victim recourse? Can privacy theft give rise to Title VII hostile claim post-firing? Which forum is proper?

QUESTIONS PRESENTED FOR REVIEW (cont.)

- V. Does the N.Y. Constitution for Equal Protection breach Federal constitutional rights by excluding gender, family status, genetic factor or disability?

PARTIES TO PROCEEDINGS – RULE 14.1(B)

All parties **do not** appear in the caption of the case. A list of all parties to the proceedings is:

1. Michelle L. McGuirk, Petitioner-Appellant. Former Head of Credit Risk Management, Asset Management & Insurance Business.

2. Swiss Financial Services Corp. (“SRFSC”), Respondent. SRFSC is a Delaware entity registered in New York; ultimate parent Swiss Re Ltd. (Lux.).

3. Swiss Reinsurance America Corp. (“SRAC”), Respondent. SRAC is a N.Y. property and casualty company and subsidiary of Swiss Reinsurance Co.

4. Swiss Re Financial Products Corp. (“SRFPC”), Respondent. SRFPC is a Delaware entity regulated by the SEC; ultimate parent Swiss Re Ltd. (Lux.).

Individual Respondents:

5. Walter B. Kielholz, Chairman of Swiss Re.

6. David J. Blumer, Chief Investment Officer (fmr), Swiss Re Asset Mngt.

7. Christian Mumenthaler, Chief Risk Officer (fmr), Swiss Re. Chief Executive Office, Swiss Re.

8. Charlotte Gubler, Head of Communications & Human Resources (fmr).

9. Kanwardeep Ahluwalia, Head Financial Risk Management (FRM)(fmr)

PARTIES TO PROCEEDINGS (cont.)

10. David Godfrey, Head of Credit & FRM (fmr),
Swiss Re London.

11. Erika Ozer, General Counsel (fmr), SRFSC.

12. John Does, to be named (various roles).

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PETITION FOR WRIT OF CERTIORARI

1. Petition for Writ of Certiorari ("Petition") follows U.S. Court of Appeals for the Second Circuit ("COA-2C") panel's Oct. 26, 2017 Summary Order affirming U.S. District Court, Southern District of New York's ("SDNY") judgment of a June 17, 2016 Memorandum Decision & Order Granting Motion to Dismiss ("MDO") on causes of action for employer discrimination, hostile environment and retaliation.

2. COA-2C's Oct. 26, 2017 decision denied relief to vacate and remand, conflicting with Supreme Court cases and its own Circuit, leaving lack of uniformity of precedent and questions of exceptional importance for equal protection of laws.

3. Petition presents irrational Orders that rely on improper State agency authority as evidently partial forum, egregious procedural errors including Fed.R.Civ.Pr.12(b)(6) and disrespect for rule of law. Constitutional rights for Due Process, Equal Protection and Privacy are in controversy from hostile environment claims and retaliation toward a whistleblower.

PRECEDING OPINIONS AND ORDERS

4. Decisions: i) COA-2C Oct. 26, 2017 Summary Order and Judgment in Case 16-2542, affirming dismissal of SDNY Case 14-cv-9516 and denying remand [App.1-4]; ii) SDNY June 20, 2016 Judgment dismissing Case 14-cv-9516 related to MDO without signature of judge [App.5-6]; iii) SDNY June 17, 2016 MDO directing Clerk to reopen an administratively closed case, docket decision, enter judgment in favor

of Respondents, dismiss Complaint (prejudice added) to close case with judge's stamp [App.7-69]; iv) SDNY Sept. 9, 2015 Order Administratively Closing Defendants' Motion to Dismiss [App.70-71]; iv) SDNY June 23, 2015 Order via Memo Endorsement granting Motion for Extension of Time by Magistrate Judge to serve International Defendants [App.72-76]; v) COA-2C Dec. 20, 2017 Order by Clerk of Court denying Petition for Panel Rehearing or Rehearing *En Banc* in Case 16-2542cv [App.77-78].

BASIS FOR JURISDICTION

5. Subject matter jurisdiction is employment discrimination, retaliation and ongoing acts of harm under Federal and N.Y. City laws, with jurisdiction of SDNY per 28 U.S.C. §1391(b)(2) as district in which a substantial part of events occurred. Forum jurisdiction is sufficiently pled claims by *pro se* party on twenty-one causes of action, with entry granted by EEOC Aug. 27, 2014 right-to-sue letter. Notice of valid, timely claims and amendments to Complaint for EEOC infers no preclusion to Federal court. Respondents waived improper venue by failing to plead. COA-2C's authority is to review SDNY's dispositive and earlier orders.

CONSTITUTIONAL, STATUTES AND REGULATORY PROVISIONS

6. Due Process Clause of the Fourteenth Amendment, for procedural due process violations in unfair proceedings in U.S. District and Circuit Court.

7. Equal Protection Clause, Fourteenth Amendment, Civil Rights Act of 1886, 14 Stat. 27-30,

on violating equal justice under laws in U.S. District and Circuit Court. Also, First Amendment rights for protected speech in the workplace.

8. Health Insurance Portability & Accountability Act of 1996 ("HIPAA") 110 Stat. 1936, for violations of the Privacy Rule [45 CFR §164.502,.508,.512,.520].

9. Supremacy Clause, Article VI, Clause 2, the supreme law of the land for State/Federal courts, for Constitutional violations and treaties made under it.

10. Statutes to consider: i) Title VII, Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§2000e-2000e-17, *et seq*; ii) Title I of Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §12101-12117; iii) Genetic Non-discrimination Act ("GNA") 122 Stat. 881; iv) Violence Against Women Act, 42 U.S.C. §13701-§14040 ("VAWA").

11. Other statutes: i) Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq*; ii) Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. §2000e-5(e)(3 ; iii) Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-624; iv) NYC Human Rights Law, Admin. Code §§8-101-131; v) Family and Medical Leave Act of 1993, 29 U.S.C. §2601-§2612 *et seq*; and vi) Equal Pay Act of 1963, 29 U.S.C. Ch. 8 §206(d).

12. N.Y. State Constitution, Article I, Bill of Rights §11 Equal Protection is unconstitutional allowing gender, family, disability or genetic factor discrimination.

STATEMENT OF CASE AND NATIONAL IMPORTANCE

13. All U.S. salaried employees, including those with advanced degrees, are at high-risk of harassment by firms hiring via friends/family/fraud/favors, reducing value of higher education and experience. Case centers on work ethic and **fundamental rights to enjoy equal protection of laws in harassment-free workplace.**

14. Respondents unlawfully discriminated against Petitioner, a salaried employee without contract, union or similar job-protections, in an ongoing pattern and practice in violation of federal laws by changing terms and conditions of her employ; retaliated by demoting her, denying compensation and benefits; harassed and created a hostile work environment; and terminated employ as pretext for reporting unlawful practices. Acts infer discriminatory animus toward her protected classes from employ, to termination and ongoing, as proximate cause for Petitioner's physical and emotional manifestation of harm (four diagnosis of disease and others).

15. Petitioner was Head of Credit Risk Management, Asset Management & Insurance, reporting directly to D. Godfrey in London, who reported to the Chief Risk Officer, Mumenthaler in Zurich. Her authority was two levels below Executive Committee members (EC-2). Duties were spread across Property & Casualty; Life & Health; non-traditional re/insurance; CM&A; SRFPC and SRAC, requiring frequent travel to London and Zurich, and working unconscionable hours to 2 a.m. or later.

16. Swiss Re retaliated for audacity of returning to work after giving birth in 2004 and 2008. Post-demotion, Petitioner ranked EC-4 to EC-5. Executives relied on her expertise yet denied equal value, withholding pay, bonus, title and benefits. Women offering sex got *quid-pro-quo* benefits, promotion, higher pay and transfers.

17. Petitioner was denied constitutional rights in: State/Federal agencies; State and Appellate Courts; and Federal U.S. District and Circuit Courts. Yet, there is unwavering belief reporting unfair practices will not end in further retaliation. A positive message is that Petitioner is capable of **filings likely to benefit millions of people such as those with history of or suffering from disease**, silent voices overwhelmed with grief, sadness, hopelessness, fear of death and little strength to survive let alone do painstaking filings, shadowing fear of losing jobs, insurance, housing and disability benefits. Courts demand deep subordination of her interests, time, money and career over fourteen years.

18. She admits *extraordinary circumstance* to survive a fifth diagnosis of disease, contrary to Swiss Re and its agents' message to such individuals they should curl up and die or face wrath of disreputable counsel and H.R., manipulating laws into swords to destroy good governance...and people.

**Background and Proceedings for Decisions of the
U.S. District Court (SDNY)**

19. On Dec. 14, 2010, Petitioner filed a Verified Complaint with N.Y. State Division of Human Rights ("DHR") for Equal Employment Opportunity

Commission asserting SRFSC engaged in unlawful pattern and practices of discrimination on basis of sex (pregnancy), marital status, age and retaliation for reporting it, clarified in July 2011 Rebuttal. DHR ignored five requests to amend complaint 2011-4.

20. Petitioner was consumed by surviving a second, third, fourth and fifth diagnosis of disease starting Oct. 2010 with many surgeries, tests and treatments.

21. In frenzied retaliation for Petitioner seeking proof of claims, counsel decided to violate a victim's privacy and seek to extort medical data starting in May 2013, filing non-public items in Supreme Court of N.Y. to evade R.202.5-bb(d)(3)(iii).

22. Supreme Court of N.Y. Justice Kern demanded parties not leave Court in July 2013 in Index 155741/13 until settlement of Respondents' subpoena request. Petitioner relied on counsel's promise to non-disclose. Forty medical authorizations were offered with *limited disclosure* to comply with HIPAA. Despite letter to cease privacy invasion, counsel violated medical privilege in SDNY and health providers. Hon. Kern denied Petitioner subpoena as overbroad/irrelevant and refused merits.

23. EEOC abused its authority i) added defendant without consent; ii) sent notice to non-Defendant (#16G-2011-01066); iii) failed to correct notice; iv) denied letter to Petitioner and notice of forum rights; and v) failed to disclose conflicts.

24. DHR abused its authority: i) failed to conduct any known investigation of Petitioner claims; ii)

failed to communicate; iii) refused parties' right to settle; iv) recommended public hearing on Probable Cause; iv) demanded proof then denied affidavits in hearing; v) ignored subpoena *duces tecum* applications; vi) accepted SRFSC Answer lacking valid notary; vii) failed to compel SRFSC to produce items per subpoena; viii) held untimely hearing without waiver; ix) denied notice of forum rights; and x) did not disclose conflicts yet allegedly used her work for settlements.

25. At untimely public hearing in Jan. 2014, ALJ: i) used violent imagery toward Petitioner; ii) denied her admissible proof; iii) granted inadmissible proof for Respondents; iv) refused cross-exam; v) evaded ADA motion and vi) denied conflicts.

26. ALJ Recommended Findings of Fact, Opinion & Decision was rubber-stamped by Commissioner June 3, 2014 as Final Order dismissing case without prejudice. EEOC issued Aug. 27, 2014 Dismissal and Notice of Suit Rights, adopting DHR findings without Petitioner objections. Petition to review DHR Final Order in Supreme Court of N.Y. Index 100809/14 filed Aug. 2014 and Order to Show Cause to stop counsel threats was transferred to State Appellate; judge noted DHR tactics.

27. SDNY case 14-cv-9516 was filed within ninety days by Nov. 28, 2014. Counsel did not file to appear per LR 25.1(b)(1) leaving fictitious filings. Law firms tied to Swiss Re then filed discrimination cases for over a hundred million dollars.

28. Petitioner was not served Rule 12(b)(6) Motion to Dismiss by Jan. 2015 conference with premature

oral dismissal of many claims, promising leave to amend later yet denied. **EEOC permits to clarify claims or related acts [29 CFR§1601.12(b)]**

29. Respondents failed to plead Rule (b)(7) inferring no defense to join/add parties and did not plead Rule 12(b)(1) lack of subject matter jurisdiction; 12(b)(2) lack of personal jurisdiction; 12(b)(3) improper venue or 12(b)(4) insufficient process.

30. Petitioner Motion for Default Judgment was not docketed until denied. A revised version elicited premature “[motion] will be denied” on Memo Order. Upon claim of not being served, time was granted to serve international parties [App.72-76].

31. SDNY denied various Petitioner relief i) no redaction of transcript for counsel’s offensive remarks; ii) time to reply to ¶28 for loss of housing; iii) disclosure of conflicts; iv) denying *pro bono* relief to Respondents by revising *in forma pauperis* motion and v) notice of health issues revoking right to file anything. Petitioner’s work to retain privacy was futile as Judge ordered seal of only certain records¹.

32. SDNY ‘administratively closed’ motion [App. 70-71] for Rule 12(b)(6) relief on Sept. 9, 2015, a non-statutory act to signal favor to Respondents with pending AD1D case. Petitioner sought transfer to SDNY to consolidate as Swiss Re’s U.S. Pension Plan

¹ Petitioner did not grant consent to disclose/redisclose private medical data in violation of HIPAA or New York State laws per OCA Form 960, with a portion of filings redacted. Petitioner’s requests to seal certain records were denied over her objections as violating privilege/privacy laws.

denied equal treatment for marital status, a class not upheld by N.Y.'s Constitution.

33.100809/14 was fully briefed and scheduled to argue before counsel got *ex parte* extension, denying Petitioner right to appear. DHR did not appear at Apr. 7, 2016 argument to 'rest its case'. Briefing had 'substantial proof' of ALJ abuses, yet panel focused on conflicts of SRAC to DHR and sister entity DFS. Its May 19, 2016 Opinion affirmed dismissal *without prejudice* as "Plaintiff failed to establish that the administrative hearing was not fair". FOIA transcript request was denied.

34. On May 23, 2016, during period to reconsider or appeal ¶32, counsel begged SDNY to evade rules to reopen case without motion, causing SDNY to issue fifty-page June 17, 2016 DMO and judgment three days later to foreclose recourse.

35. Irrational MDO has substantive errors: i) **statute of limitations** offset by fact-intensive complaint; ii) **evident partiality** from improper reliance on State administrative proceedings with forum conflict to Department of Financial Services' ("DFS") overseeing Swiss Re entities; iii) **election of remedies**, defying Congressional intent of Federal courts as final adjudicator for employment cases, with no notice of rights; iv) **claim preclusion and/or res judicata**, yet only applies if DHR judgment was dismissed with prejudice and no one pled improper forum; v) **advocates for Respondents** by defying R.12(b)(6), ignoring *pretext for discrimination* to cover-up a hostile environment and discriminatory practices; and vi) **HIPAA/privacy violations**.

**Proceedings and Decisions of U.S. Court of Appeals
for the Second Circuit (COA-2C)**

36. Petitioner timely filed **paid appeal** of June 20, 2016 Judgment of MDO from U.S. District Court, SDNY No. 14-cv-9516. Hon. McMahon, Chief U.S. District Judge with stamp signature on June 17, 2016 Order [App.7-69] and no signature on Judgment [App.5-6]. Certified transcript of Jan. 30, 2015 proceedings filed Dec. 28, 2016 is not docketed.

37. COA-2C stayed proceedings Aug. 5, 2016 in Fed.R.App.Pr.4(a)(4) notice pending AD1D Index 100809/14. Petitioner filed updates in Sept.-Nov. 2016. Motion to extend stay pending AD1D named SRAC conflicts, with Respondents late-filing to oppose. Petitioner reply was timely yet rejected for defects. Stay was lifted Oct. 21, 2016, striking reply during cure period and denying reconsideration Nov. 18, 2016.

38. Petitioner's motion to amend briefing was opposed by Respondents yet granted to Feb. 9, 2017. Appellant's Brief and Joint Appendix I, II were filed Feb. 8; Appellees' Brief was extended to May 11. Reply Brief was extended to June 9, 2017.

39. AD1D Index 155741/13 briefing noted Respondents do not deny HIPAA or Public Health Law §18 violations. Petitioner received AD1D Oct. 7, 2016 letter on Nov. 1 declaring it non-enumerated for argument. Panels granted motion to dismiss appeal Nov. 22, 2016 [M-4729] and denied reconsideration Mar. 2, 2017 [M-6595]. Another panel denied Petitioner's right to appeal such Orders on Feb. 28, 2017.

40. COA-2C's panel that lifted stay (Hons. Kearse, Jacobs and Pooler) was selected by Calendar team despite conflicts to prior Swiss Re case². Hon. Pooler was also assigned to hear argument. After filing allegedly defective notice of appearance, Respondents' counsel *forfeited right to appear* after no reply to Sept. 11, 2017 notice of hearing. Female counsel allegedly attended covertly, yet did not disclose to panel.

41. Petitioner argued Oct. 10, 2017 and answered panel questions. Motion to file transcript was denied as **moot**, yet granted upon reconsideration Nov. 17. Prepaid audio CD was not ready for weeks, and had *no audio on it*.

42. COA-2C acted swiftly, affirming dismissal Oct. 26, 2017 in a Summary Order [App.1-4] despite ¶41 pending and Petitioner claims covering fourteen years of work for Swiss Re. *Pro se* cases from Oct. 10, 2017 argument were treated similar by summary dismissal, while Gibson, Dunn and Boise, Schiller case remained open.

43. **COA-2C Order omits statutes, rules or laws, a corollary to inadequate pleading, and misstates facts:** i) affirms DMO that relies *ad nauseam* on DHR Final Order in evidently partial forum dismissed without prejudice; ii) fails to state issues on appeal; iii) lacks rational basis to dismiss by cause of action; iv) fails to establish veracity of time-barred or precluded

² *SR International Business Insurance Co., Ltd. v. World Trade Center Properties, LLC*, 467 F.3d. 107 (2006). U.S. Court of Appeals, Second Circuit, decision October 18, 2006 by Hons. Walker, Cabranes and Pooler in Docket Nos. 04-4500-cv(L), 05-3167cv(L) and consolidated.

claims; v) ignores counsel' clear error standard; vi) alleges defect of not exhausting remedies for hostile claims yet ignores futility; vii) omits Judgment lacks judge's signature; viii) ignores veracity of tolling; and ix) says counsel appeared. This is surprising as not a wild-west Ninth Circuit of highly improbable valuation of social media and internet bubbles. Panel rehearing or *en banc* review was denied Dec. 20, 2017 [App.77-78]. Petition must be mailed by Mar. 20.

ETHICAL DUTIES: POTENTIAL CONFLICTS

44. Petitioner raised concern of potential conflicts not limited to oversight of SRAC by DFS, Governor authority for DFS, State/Appellate judges and DHR. DFS Superintendent Lawskey, clerk for Hon. Jacobs and EDNY Hon. Amon, eleven years with Cuomo. Married clerk of Hon. Walker and SDNY Hon. Cote (case 10-7626), father founded Schulte, Roth & Zabel, and counsel partnered with Swiss Re in 2016.

45. Hon. McMahon, Chief Judge, SDNY: Ohio State/Harvard Law, twenty years at Paul Weiss defending insurers. Alleged ties to Petitioner's medical facility.

46. Hon. Rosemary Pooler, Circuit Judge, was District Judge, NDNY; U. of Michigan Law/Brooklyn College, ≈20 years' work at N.Y. entities and federal judge.

47. Catherine O'Hagan Wolfe, COA-2C Clerk of Court in 2007, College of Holy Cross/Fordham Law, AD1D Clerk twenty six years with electronic filing duty.

48. Respondent counsel denied conflicts, refusing requests for disclosure, failing to state Seyfarth counsel Lipnic was an EEOC Commissioner (2010-7).

49. Clerks must comply to rules³, with undisclosed ties to Respondents.

REASONS TO GRANT THE PETITION

50. Between 1998-2017, this Court granted certiorari an average of 3.46% of all paid-for petitions submitted to an average of 0.16% of all *in forma pauperis* ("IFP") petitions. The Court retained an average of 16% of paid-for petitions post-disposal compared to 12.3% for IFPs. Of those retained, the Court granted certiorari an average of 21.7% for paid-for petitions compared to 1.29% of IFP. Of granted certiorari, 86.9% were paid-for and 13.1% IFP. Probability that a paid-for petition is granted certiorari is 1-in-29 odds while IFP cases are 1-in-630 odds, leaving a >21x merit differential. Petitioner verified that paid *pro se* cases are not counted as *IFP* cases. Yet, this Court informs *IFP* filers only ≈1.0% of cases are granted certiorari.

A. ORDERS VEER OUTSIDE CIRCUIT: R.12(B)(6)

51. Standards of Governing Law are breached when "sufficient factual matter" is deemed 'plausible on its face' as in Petitioner's complaint and judge's first impression. The standard of review is "all reasonable inferences in favor of the Petitioner", *Rothstein v. UBS AG*, 708 F.3d 82,90 (2d Cir.2013).

³ Guide to Judiciary Policy, Vol.2 Part A Ch. §310 Code of Conduct for Judiciary Employees; 8/2/2013.

The MDO [App.7-69] defies rule of law, statute and precedent as SDNY advocates for Respondents by stepping into their shoes to add individual defenses by cause of action, covering their defects.

52.Hons. Cabranes, Sack and Shadur (District Judge, N. Illinois) in Harris v. City of New York, et.al., 186 F.3d 243 (1999) affirmed in part and reversed with remand on statute of limitations for ADA, Title VII, etc., Id 246, noting “Rule 12(b)(6) movant for dismissal faces a difficult (though not insurmountable) hurdle”. Bolt Elec. Inc., v. City of New York, 53 F.3d 465,469 (2d Cir.1995). This supports reversal, with Order admitting Petitioner’s hostile claims are well-pled [App.1-4]:

“...the court must accept as true the factual allegations in the complaint, and draw all reasonable inferences in favor of the *Plaintiff*. The district court should grant such motion only if, after viewing Plaintiff’s allegations in this favorable light, it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Id. 247.

53.Fed.R.App.Pr. 28(a)(9) requires following rule of law, statutes and authorities yet MDO said “[Petitioner] alleges no facts...that would have indicated a desire to retaliate against her for complaining about employment discrimination”, contrary to judge’s first impression [“a very, very, thick, fact-intensive thorough complaint”] and its own declared clause for retaliation: reporting unlawful practices.

54. In support of Petition, Roth v. Jennings, 489 F.3d 499 (2007) verified it may consider Petitioner's knowledge of events but must "refrain from assessing the weight of the evidence". Id. 503. Panel of Hons. Kearse, Cabranes and Katzmann opined **Rule 12(b)(6) is "not an occasion for the court to make finding of fact"**, see Leonard F. v. Israel Discount Bank of N.Y., 199 F.3d 99, 107 (2d Cir.1999). Rule 12(b)(6) motion "is a ruling of law", DeJesus v. Sears Roebuck & Co., 87 F.3d 65, 69 (2d Cir.)(cert.den), 519 U.S. 1007, 117 S.Ct. 509, 136 L.Ed. 2d 399 (1996), Id. 510.

55. Order rejects Petitioner's facts on Rule 12(b)(6) motion as "rule of law", instead citing Tr. of Upstate N.Y. Engineers Pension v. Ivy Asset Mgmt., 843 F.3d 561,566 (2d Cir. 2016), omitting Id. 566 and citation City of Pontiac Policemen's & Firemen's Ret.Sys. v. UBS AG, 752 F.3d 173,179 (2d Cir.2014) (UBS' general counsel worked with Petitioner at Swiss Re). A panel of Hons. Kearse, Jacobs and Pooler confirmed dismissal on failing to state a claim and lack of standing after amending complaint, discovery and agreeing on undisputed facts. Id 567 [Ftn.1]. Here, right to amend was denied contrary to EEOC regulations, with no stipulation of facts.

56. Viti v. The Guardian Life Ins. Co. of America, 817 F.Supp.2d 214 (SDNY,2011) granted leave to amend four months after filing on denied long-term disability by ERISA per Rule 12(b)(6) "[p]laintiff's factual allegations must be accepted as true, and all reasonable inferences are drawn in [her] favor." Cleveland v. Caplaw Enters., 448 F.3d 518,521 (2d Cir.2006), Id. 222-3, in support of Petition.

B. ORDERS VEER OUTSIDE CIRCUIT: TITLE VII HOSTILE CLAIMS

57. COA-2C held in *Silver v. Mohasco Corp., et.al.* 602 F.2d 1083 (1979) “[i]n view of the strong federal policy in ensuring that employment discrimination is redressed, [we] consistently eschewed rigid construction of Title VII’s procedural mandates.” *Egelston v. State University College at Geneseo*, 535 F.2d 752,754 (2d Cir.1976); *Voutsis v. Union Carbide Corp.*, 452 F.2d 889,892 (2d Cir.1971), 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972). Id. 1087. Courts look “not merely to the four corners of the often inarticulately framed charge...but scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination”, *Smith v. American Pres. Lines*, 571 F.2d 102,107 n.10 (2d Cir.1978) for “allegations of ‘continuing discrimination’ that occur even after” filing. Id. 1090. This conflicts to COA-2C Order on what can be reasonably investigated by agency.

58. COA-2C avers hostile claims are not ‘reasonably related’ to other claims so agency did not investigate. This is presumptive, excusing agency failure to do its job and defective form with no hostile box (unbearable condition was named).

59. *Tsai v. The Rockefeller University*, 137 F.Supp.2d 276 (SDNY,2001) said **timeliness of claim** is “to give prompt notice to the employer thereby encouraging conciliation where possible”, *Snell v. Suffolk County*, 782 F.2d 1094, 1101 (2d Cir.1986)(quot. *Zipes v. Trans World Airlines*, 455 U.S. 385,393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) with flexibility as “technicalities are particularly

inappropriate in a statutory scheme in which laymen unassisted by trained lawyers initiate the process.” Love v. Pullman Co., 404 U.S. 522, 527, 92 S.Ct. 616, 30 L.Ed. 679 (1972). Id. 281. **Tsai equitably tolled for post-traumatic stress disorder** to defeat untimeliness as EEOC filings were deferred until her physical condition improved. Id. 282. Failure to check a box did not bar claims as **reasonably related** to initial charge within investigation scope. Butts v. City of N.Y. Dep’t. of Housing, Pres. and Dev., 990 F.2d 1397,1401 (2d Cir.1993). This lower court decision supports Petition.

60.COA-2C Order cites Williams v. New York City Housing Authority, 458 F.3d 67,70 (2d Cir.2006) (quoting “EEOC” for “agency” and “discrimination on both basis” as “unexhausted claims”), omitting it cites Deravin v. Kerik, 335 F.3d 202 (2d Cir.2003) and Id.70. That case **vacated dismissal** of discrimination on sex and retaliation for filing a State claim as adequate notice to EEOC. Id 68. **COA-2C held ‘reasonably related’ as “focus should be on the factual allegations made in the [EEOC] charge itself**, describing discriminatory conduct”. Deravin, Id. 70. It infers due process violations as EEOC/Respondents had notice in fact-intensive complaint.

61.COA-2C Order says exhausting administrative remedies is required but not a jurisdiction requirement, omitting exceptions of futility, **evident partiality** or misconduct. Its cited case, Fowlkes v. Ironworkers Local 40, 790 F.3d 378,384 (2d Cir.2015), with Hon. Walker’s former clerk ordered *pro bono* two years into appeal after **three** briefs were filed and rejected. Despite filings non-

conforming to claims, it vacated dismissal per 28 U.S.C. §1915(e)(2)(B) to screen *in forma pauperis* claims, *sua sponte*, holding failing to exhaust remedies deprived jurisdiction with remand to resuscitate case for 'premature Title VII claim' [Ftn.9]. Id 380. Dedicated Court resources in that case infer inconsistent treatment toward *pro se* filing compliance.

62.In Elmenayer v. ABF Freight System, Inc., 318 F.3d 130 (2003) the EEOC filed *amicus curiae* brief supporting plaintiff. COA-2C relied on 'continuing violations' in Bazemore v. Friday, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986): "each time an employer paid an employee less than other employees because of a discriminatory reason...each weekly paycheck was deemed to give rise to a new claim of an unlawful employment practice". **New charge filing is prohibited by DHR so withholding equal pay is a 'continuing violation' until cured like a loan covenant.**

C. ORDERS VEER OUTSIDE CIRCUIT: ADA AND TOLLING

63.In Torres v. Pisano, et.al., 116 F.3d 625 (1997) COA-2C notes **"the law requires harassment to be severe and pervasive before it [is] actionable** does not mean employers are free from liability in all but the most egregious of cases" Harris. "Title VII comes into play before harassing conduct leads to nervous breakdown. Harassed employees do...[not have to] nobly turn the other cheek and remaining unaffected in...constant degradation." Id. 631-2. Employers will be liable for supervisors if: i) sufficiently high level of firm; or ii) used actual or apparent authority to

further harassment or by *agency* relationship; or iii) no reasonable avenue for complaint or iv) knew or should know of harassment and did nothing. Kotcher v. Rosa and Sullivan Appl. Ctr., Inc., 957 F.2d 63 (2d Cir.1992). Id. 634. It supports Petition addressing firm policies denying equal protection rights to VAWA.

64.MDO uses false claim Petitioner vigorously worked on case Dec. 2010-Aug. 2014 despite many months to recover post-surgeries, tests and treatments. It avers “[she] offers no viable explanation for her delay in seeking recourse”, inferring no review of docket or records under seal, facts or Privacy Memo with known impact of disease on work, concentration, immune system, breathing, walking, etc., **under reasonable person test**. Acts spit on disease survivors by not meriting limitations.

65.In support of ADA rights, in Brown v. Parkchester South Condo., 287 F.3d 58 (2002), COA-2C vacated dismissal and remanded for evidentiary hearing if *pro se* medical condition warrants equitable tolling. It requires highly case-specific inquiry, Boos v. Runyon, 201 F.3d 178, 184 (2d Cir.2000) and may cure defects. “If claimant proves that she was incapacitated for **any length of time during [relevant] period**, a district court can determine whether, considering all circumstances ...tolling is warranted.” Canales v. Sullivan, 936 F.2d 759 (2d Cir.1991).

66.COA-2C remanded in Weixel v. The Board of Education of the City of New York, 287 F.3d 138 (2002) on “whether an individual has a disability for purposes of the ADA and Section 504, we applied the

three-step approach taken by the **Supreme Court** in Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed. 2d 540 (1998). See Colwell v. Suffolk Police Dep't, 158 F.3d 635,641 (2d Cir.1998). Id 147. Since **SDNY ignored the Supremacy Clause qualifying Petitioner for tolling**, demanding added public disclosure of condition puts in controversy right to privacy.

67.COA-2C avers **equitable tolling** applies as “[p]laintiff actively pursued judicial remedies but filed a defective pleading during the specified time period”, *Brown* at 60 (int.quot.omit) A litigant must act with reasonable diligence and extraordinary circumstances to review for abuse of discretion. Id. 81. Here, DHR and SDNY’s appear to ignore ADA rights by failing to respond to or retaliating for reasonable accommodation requests.

68.COA-2C Order relies on non-employment cases to assess **plausibility or credibility**: *Bell Atlantic Corp. v. Twombly* (omitting Id. 1960) and *Ashcroft v. Iqbal* (omitting Id. 1940) taken from first page of Respondents’ argument, to deny merits, piggybacking DHR and lower court as *a priori* over statutes [42 USC §2000e].

69. Hills v. Praxair, Inc., et.al., U.S.D.C., W.D.N.Y., No. 11-cv-678S (2012) has similar claims to Petitioner related to privacy and termination of employ. Yet, **the non-precedent case** refers to this Court for survival of claims it “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face”. Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1945, 173 L.Ed. 2d 868 (2009)(quoting Bell Atl. Corp. v. Twombly, 550

U.S. 544, 127 S.Ct. 1955, 1966, 167 L.Ed. 2d 929 (2007) and nudges a claim “across the line from conceivable to plausible”. *Twombly* at 570. MDO avers ADA imposes no individual liability yet not excluded. COA-2C tossing out rule of law is like tossing a baby out with bathwater.

70. Employee Retirement and Income Security Act (“ERISA”), 29 U.S.C. Ch. 18, §1001, *et.seq.*, was named in Complaint yet denied leave to amend. COA-2C Order relies on adding case, *Leon v. Murphy, et.al.*, 988 F.2d 303, 308 (2d Cir.1993) with defendants NYC Retirement Plan and Housing Authority, omitting *Citrus Mktg. Board of Israel v. Lauritzen A/S*, 943 F.2d 220, 223 (2d Cir.1991). Panel affirmed dismissal on summary judgment for **constitutionally protected property interest in pension**, Id 305-7, post-discovery, asserting any basis in record can be used to affirm decisions, so must apply in equal force here to remand for ERISA.

D. SUPREME COURT CONFLICTS: STATES defer to FEDERAL AUTHORITY

71. *Bell Atlantic* was reversed and remanded for dismissal. It supports Petition by highlighting sufficiency of Fed.R.Civ.Pr. 8(a)(2) to “give the Respondent fair notice of what the...claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, L.Ed. 80 (1957). Id 1965. Complaint filed in Dec. 2010 gave Respondents and EEOC healthy notice of claims so rights preserved.

72. Within Order’s four corners are improper substantive decisions that Petitioner’s arguments were considered and discredited, contrary to Rule

12(b)(6) as a technical motion. It adopts preclusion or *res judicata* from MDO, relying on DHR authority to adjudicate federal claims. It fails to take claims and related acts at face value, alleging if not precluded, it lacks sufficient pleading yet without right to cure.

73. In *Ashcroft* this Court held Fed.R.Civ.Pr. 8(a)(2) relies on pleaded facts and plausibility as “context specific, requiring a reviewing court to draw on its experience and common sense.” *Twombly* at 556. After leave to amend, it reversed discrimination claim dismissal, Id. 1941, contrary to decisions here. Petitioner argued **no basis to deny equal protection of laws** after panel alleged her “very fine rate of pay”, a leading, prejudicial and ***discriminatory*** opinion lacking relevance.

74. This Court’s certiorari to the Tenth Circuit, *aander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) verified Title VII of CRA of 1964 was **Congress’ intent for a policy to stop discrimination to be of “highest priority”**, *Newman v. Piggie Park Enterprises*, 390 U.S. 400,402 (1968) by considering claims in several forums. Id. 47. Its “legislative history...manifests Congressional intent to allow an individual to pursue independently his rights under both Title VII *and other applicable state and federal statutes*”, Id. 48, implying SDNY jurisdiction of DHR claims. “[T]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; **deferral to [agency] decisions would be inconsistent with that goal**” noting “forums inevitably affects the scope of the substantive right to be vindicated”. *U.S Bulk Carriers v. Arguelles*, 400

U.S. 351, 359-360 (1971). Id. 56. Thus, deference to DHR is improper.

75. In Oscar Mayer & Co., et.al. v. Evans, 441 U.S. 750 (1979) this Court said on ADEA claims: “Congress did not intend to foreclose federal relief simply because state relief was also foreclosed” (int.cit.omitted), Id. 761, emphasizing “state limitations cannot govern the efficacy of the federal remedy” per 29 U.S.C. §626(d)(e) which was viewed as “supplementary, not mutually exclusive”. Id. 764. COA-2C’s dismissal violates procedural due process by deferring to conflicted State agency.

76. COA-2C Order admits **hostile environment claims**, giving merit to totality of circumstances and VAWA for threats involving deadly weapons. Order says Petitioner failed to exhaust administrative remedies, imposing a Catch-22: arguing claims exhausted gives claim preclusion, which is not true unless dismissed *with prejudice by DHR*. If not exhausted, it infers no jurisdiction, so both defy 42 U.S.C. §2000e, *et.al.* **DHR gave no notice of forum selection or foreclosed rights.**

E. SUPREME COURT CONFLICTS: VAWA AND HOSTILE CLAIMS

77. COA-2C affirmed summary judgment in McGullam v. Cedar Graphics, Inc., 609 F.3d 70 (2010) on Title VII hostile environment and harassment, relying extensively on Nat’l. R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). Disturbingly, hostile claims were barred on failure to raise issue of triable fact after alleged repeat threatening remarks of

using a gun toward plaintiff. COA-2C's *de novo* review affirmed reliance on Boy Scouts of America v. Wyman, 355 F.3d 80,90 (2d Cir.2003)(using "any ground appearing in the record"). *Nat'l R.R.* was relied on to consider earlier conduct "beyond 300-day limitations period", with *no bar to review future practices*. It held "[42 U.S.C.]§2000e-5(e)(1) precludes recovery for discrete [discriminatory acts] or retaliation that occur outside a statutory time period", contrary⁴ to related acts within two years of charge period. It merits Petition grant of equal protection and privacy rights but-for employer ties.

78. On Title VII hostile environment claims in *Nat'l R.R.* the Ninth Circuit held "a plaintiff may sue on claims that would ordinarily be time barred so long as they are either 'sufficiently related' to incidents that fall within the statutory period or are part of a systemic policy or practice of discrimination that took place...within the limitation period". *Id.* 107. This Court held "consideration of the entire scope of a hostile work environment claim, including behavior outside the statutory period, is permissible for purposes of assessing liability so long as a contributory act toward the hostile environment takes place within the statutory time period", *Id.* 105, to review all "acts" as part of the "unlawful employment practice".

79. ¶78 conflicts with DHR/EEOC forms requiring on penalty of perjury "I have not filed any other civil action, nor do I have an action pending before any administrative agency, under state or local law, based on the same unlawful discriminatory

⁴ 42 U.S.C. §2000e-5(e)(1).

practice”, to prohibit reporting of multiple acts under one policy. This is one of many agency procedural due process failures needing judicial remedy.

80. District Courts apply a ‘relatedness test’ to review if within-limitations incident satisfied the severe or pervasive standard of a hostile work environment claim. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Court review is not limited to “frequency of discriminatory conduct; severity; [if] it is physically threatening, humiliating, or mere offensive utterance; and whether it reasonably interferes with employee performance”. *Harris* at 23. Id. 79. **This puts in controversy if hate speech at companies is constitutionally protected.**

81. Petitioner was subjected to repeat severe and pervasive acts. Gender hostility toward her by Respondents violates Equal Protection of federal laws upon return-to-work without threats or retaliation. Her complaint has discriminatory acts in a hostile environment from hire, termination and ongoing, demands to partake in genetic-oriented and nearly-nude testing⁵, allegedly to select executives or cleanse a workforce⁶. She, and all return-to-work parents, must not be exposed to repeat, toxic vitriol or retaliated with threats to quit or take demotion.

82. This Court affirmed the Ninth Circuit’s view “pre- and post-limitations period incidents involve[d] the same type of employment action, occurred relatively frequently and were perpetrated by the

⁵ §2000e-5(h).

⁶ §2000e-2(a)(1),(2).

same managers” and **hostile environment claims by their nature involve repeat conduct**. See 1.B Lindemann & P. Grossman, Employment Discrimination Law 348-9 (3d Ed 1996)(“The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence”) and “occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. *Harris*, at 17,21. This Court affirmed a hostile environment claim is **“part of one unlawful employment practice”**, Id. 117, with time to file so employees “are not dissuaded from first filing with a State agency.” Id. 120.

83.In *Meritor Savings Bank, FSB v. Vinson, et.al.*, 477 U.S. 57 (1986) this Court’s petition from the D.C. Circuit opined on sexual harassment claims: “Title VII affords employees the right to work free from discriminatory intimidation, ridicule and insult”. See 45 Fed.Reg. 74676 (1980). *Rogers v. EEOC*, 454 F.2d 234 (CA5 1971)(cert.den.) 406 U.S. 957 (1972). Id 65. Title VII protections cover harassing demands as condition for promotion during or to retain employ. Id 68. The question is if avenue was available for complaint and, if used, if procedure was reasonably responsive. *Brief, U.S. and EEOC, Amici Curiae* 26. Id. 71. Petition grant will cover if firm demands to ‘strip’ for tests to get promoted is a protected act.

84.In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 128 S.Ct. 1140 (2008) this Court granted certiorari if Federal Rules of Evidence requires admission of testimony by non-parties alleging discrimination by supervisors who played no

role in adverse employment decisions. It held this evidence is not *per se* admissible or inadmissible, vacating judgment to remand, reversing Tenth Circuit decision that a District Court erred by excluding evidence from employees of other supervisors as irrelevant and not 'similarly situated' as a *per se* rule. Id. 1142.

85. Pullman-Standard v. Swint, 456 U.S. 273, 291, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) reminds us "[w]hen a court 'fails[s] to make a finding because of an erroneous view of the law, the usual rule is there should be remand for further proceedings to permit the trial court to make the missing findings'. Id. 1146. Here, ALJ rejected males similarly-situated for Petitioner's pay, errors accepted by SDNY.

F. CONSTITUTION RIGHTS of PRO SE PARTIES

86. *Pro se* rights per 28 U.S.C. §1654, Judiciary Act of 1789 §35, precursor to the U.S. Constitution are firmly held in Session I, Chapter 20 §35 as "*in all courts* the parties may plead and conduct their own cases personally" and "attorneys at law...*shall be permitted* to manage and conduct causes therein". Thus, a granted *right* recognized by Courts ranks higher in priority to a right requiring *permission*.

87. This Court reviewed *pro se* rights in Hughes v. Rowe, et.al., 449 U.S. 5 (1980) as "[i]t is settled law that allegations of a complaint, 'however inartfully pleaded' have 'less stringent standards than formal pleadings drafted by lawyers' Haines v. Kerner, 404 U.S. 519, 520 (1972), Id. 10. In Taylor v. Vermont Dep't of Education, 313 F.3d 768 (2002), COA-2C held *pro se* parties "lack familiarity with formalities

of pleading requirements”. Lerman v. Bd. of Elections, 232 F.3d 135 (2d Cir.2000); 121 S.Ct .2520 (2001). Id 776. Here, SDNY denied cure of alleged defects.

88.In Zerilli-Edelglass v. NYC Transit Authority, et.al., 333 F.3d 74 (2003), COA-2C affirmed dismissal due to defects of failing to timely file EEOC complaint as mailed within statutory ninety days from right-to-sue but received by *pro se* office two days late. It shows improper dismissal in disrespect of *pro se* rights

89.In Holtz v. Rockefeller & Co. Inc., 258 F.3d 62 (2001), late claims were permitted on “sensitiv[ity] to *pro se* status”. WL1043866*,1999 U.S.Dist. LEXIS 17682 at *5, Id 82, with summary judgment for defendants vacated and affirmed in part by COA-2C for female who was threatened to quit her job, **noting “question of whether a work environment is sufficiently hostile to violate Title VII is one of fact”**. Schwapp v. Town of Avon, 118 F.3d 106,112 (2d Cir.1997). Id 75. A “rational jury could conclude from circumstances of her termination...retaliation for protected activity was a substantial motivating factor for adverse employment action” Fields v. NYS Off. for Mental Ret’n and Dev’l. Disabilities, 115 F.3d 121 (2d Cir.1997). COA-2C admitted hostile claims but acted contrary to threats to quit or be demoted.

G. VAWA and TITLE VII AFFORD EQUAL PROTECTION

90.In U.S. v. Morrison, et.al., 529 U.S. 598 (2000) the constitutionality of 42 U.S.C. §13981 (VAWA), which offers civil remedy for victims of gender-

motivated violence was struck down by the Fourth Circuit on belief Congress lacked authority. Invalidating a statute got attention of this Court which affirmed reliance on U.S. v. Lopez, 514 U.S. 549 (1995), U.S. v. Harris, 106 U.S. 629 (1883) and Civil Rights Cases, 109 U.S. 3 (1883). Id. 604. Brzonkala sued perpetrators and Virginia Tech for violating §13981 and Title IX, Education Amendments Act with U.S. intervening to defend former's constitutionality. It was dismissed against the school for failing to state claim for relief and other claims for Congress' lack of authority per Commerce Clause and §5 of Fourteenth Amendment (Brzonkala v. Va. Polytechnic and State Univ., 935 F.Supp. 779 (W.D.Va 1996). The Fourth Circuit reversed, reinstating §13981 and Title VII hostile environment claims. *En banc* review deemed sufficient claims as crime of violence driven by gender animus yet denied Congress' authority.

91. Plaintiffs viewed §13981 as regulated activity substantially affecting interstate commerce. **This Court held “[g]lender-motivated crimes of violence are not in any sense of the phrase economic activity”** a highly controversial statement. It relied on *Lopez* holding a statutory crime to own a firearm in a school zone exceeded Congress' authority per the Commerce Clause, *see* 514 U.S. at 551, noting it was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however, broadly one might define those terms.” Id at 561. This Court rejected costs of crime and national productivity arguments as affecting commerce, woefully stating **“through the mechanism of insurance, those costs are spread throughout the**

population". Id. at 563-4, an economic argument. A logical proposition is States have a compelling interest in safe working environments.

92. *Morrison* conflicts with points germane to this case; it outrageously grants employee right to threaten coworkers or employers including Courts. §13981 as part of VAWA says "[a]ll persons within the U.S. shall have the right to be free from crimes of violence motivated by gender", 42 U.S.C. §13981(b), section (c) states:

"A person (including a person who acts under color of any statute, ordinance, regulation, custom or usage of any State) **who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured**, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate".

Criminal complaint or conviction is not required, but excludes random acts unrelated to gender, with choice of Federal or State court. A crime of violence is:

"...act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a **serious risk of physical injury to another**...and "that would constitute a felony...**but for the relationship** between the person who takes such action and the individual against whom such action is taken." §13981(d)(2). Id. 606.

Congress used the Fourteenth Amendment authority to enact §13981:

§5 allows Congress to “enforce by ‘appropriate legislation’ the constitutional guarantee that no State shall deprive any person of ‘life, liberty or property, without due process of law, nor deny any person equal protection of the laws.’” City of Boerne v. Flores, 521 U.S. 507,517 (1997). Id. 619.

93. Brzonkala case No. 99-29 spawned U.S. v. Morrison, et.al., No. 99-5 via order to consolidate and grant to file *amici curiae* briefs and divided argument for Solicitor General Waxman. This Court held “prophylactic legislation under §5 must have a **congruence and proportionality** between the injury to be prevented or remedied and the means adopted to the end.” Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627,639 (1999); Flores, 521 U.S. at 526. Id. 625-6. If VAWA is not in Congress’ authority, it means *employers* can never be subsidized State actors triggering constitutional protections, which is likely false.

94.MDO said Respondents “defense...was sustained by the DHR” after administrative dismissal without prejudice, ignoring pretext of discrimination by a gang that threatened Petitioner. It held “[she] cannot bring suit under VAWA”, declining supplemental jurisdiction despite no individual exemption in the law, persuasive facts to grant Petition to review liability of so-called State actors.

95.In Vance v. Ball State University, 133 S.Ct. 2434 (2013), this Court granted certiorari affirming

employees **are supervisors if empowered** to hire, fire, promote, transfer or discipline the victim for Title VII claims. This Court rejected “remarkable ambiguity” of supervisor definition by EEOC Enforcement Guidelines for those who exercise material authority over another’s daily work, as “an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment”. For non-supervisors, if employer “failed to respond to complaints, failed to provide a system for registering complaints or effectively discouraged complaints...would be relevant”. Id. 2451-3. This mandates an effective reporting mechanism for whistleblowers like Petitioner without retaliation, with support of Petition as COA-2C’s Order admits sufficiently pled hostile claims.

96. This Court agreed Title VII prohibits creating such environment with claimant to show it was so pervasive to alter terms and conditions of employ. *Vance* highlights seminal case *Rogers v. EEOC*, 454 F.2d 234 (1971) for **declaring a hostile work environment a Title VII cause of action**. Terms, conditions and privileges of employ is an “expansive concept” inclusive of creating environments. It emphasized a qualifying **but-for relationship** “[w]hen a supervisor makes a tangible employment decision...there is assurance the injury could not have been inflicted absent the agency relation” as “an official act of the enterprise” *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) or **to fill positions**. 5 CFR §9701.212(b)(4). Id. 2443-5. Here, equal protection rights support grant of Petition.

H. CONSTITUTIONAL RIGHTS in WORKPLACE SAFETY

97. In City of Boerne v. Flores, Archbishop of San Antonio, et.al., 521 U.S. 507 (1997) this Court granted certiorari to the Fifth Circuit on decision by local zoning authorities to deny a church a building permit under Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §2000bb, *et.seq.*, 107 Stat. 148, holding Congress exceeded authority. Parties disagreed if RFRA is proper use of Congress' power 'to enforce' legislation so no State deprives a person of...equal protection of laws. *Id.* 516-7. The District Court held Congress exceeded scope of its enforcement power per §5, Fourteenth Amendment. Fifth Circuit reversed. *Id.* 512. This Court affirmed §5 prohibits State acts with no "shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1,13 (1948).

98. Judicial authority to determine constitutionality of law is that "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is **written**". Marbury v. Madison, 1 Cranch 137,176 (1803). This Court said "[a]ll must acknowledge that §5 is "a positive grant of legislative power to Congress", Katzenbach v. Morgan, 384 U.S. 641,651 (1996) to "secure to all persons the enjoyment of perfect equality of civil rights and equal protection of the laws against State denial or invasion". *Id.* 518. To decide if States have compelling interest in preventing workplace violence we ask *but-for* employees entering employer premises, do illegal acts on the streets morph into lawful ones?

99. In *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) this Court reversed a Supreme Court of Minnesota's decision that a city ordinance criminalized language of 'fighting words' or "conduct that itself inflicts injury or tends to incite immediate violence", *In re Welfare of R.A.V.*, 464 N.W.2d 507,510 (Minn. 1991) and held this expression was not protected, reversing trial court dismissal that deemed a St. Paul ordinance substantially overbroad and content-based, invalidated by the First Amendment. *Id.* 380. **Excluding 'fighting words' means unprotected features of the words are essentially 'non-speech' elements of communication.** *Id.* 386. This Court held the First Amendment does not permit St. Paul's special prohibitions on speakers who express views on disfavored subjects. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S., 105,115, at 116 (1991). *Id.* 391. **"Sexually derogatory 'fighting words', among other words" may violate "Title VII general prohibition against sexual discrimination in employment practices".** 42 USC §2000e-2; 29 CFR §1604.11 (1991), *Id.* 389, **inferring constitutional rights of VAWA.**

100. *Virginia v. Black, et.al.*, 538 U.S. 343 (2003), on certiorari to Supreme Court of Virginia with U.S. as *amicus curiae* arguing for reversal, considered if the Commonwealth's statute banning cross burning with "intent to intimidate a person or group of persons", violates First Amendment rights. *Id.* 347. This Court affirmed "regardless of whether the message is a political one or...is also meant to intimidate, the burning of a cross is a "symbol of hate". *Capital Square Review & Advisory Bd. v.*

Pinette, 515 U.S. 753,770-1 (1995)(Thomas, J., concurring). Id. 357. A *prima facie* evidence provision in the statute made it unconstitutional as the Commonwealth was “insulated from a motion to strike the evidence”. Id. 364.

101. *Virginia* reiterates the First Amendment allows “Congress shall make no law...abridging the freedom of speech” to allow “free trade in ideas—even ideas the overwhelming majority of people might find distasteful or discomforting”. Abrams v. U.S., 250 U.S. 616,630 (1919)(Holmes, J. dissenting). Yet “**protections afforded by the First Amendment are not absolute**”, and “we have long recognized that the government may regulate certain categories of expression consistent with the Constitution”, see Chaplinsky v. N.H., 315 U.S. 568,571-2 (1942), as a “step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”. *R.A. V.*, at 382-3. Id. 358-9. This Court held “[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Watts v. US, 394 U.S. 705,708 (1969). Prohibiting true threats “protect individuals from fear of violence” even with no intent to carry out a threat. Id. 360. Petitioner, a target of such threats, believes it a serious, pervasive problem escalated by H.R. who say “it is not [their] problem”.

I. HIPAA SCHEMES INFRINGE on PRIVACY RIGHTS

102. HIPAA preempts any state law unless such law is more restrictive for “privacy of PHI” (45 C.F.R. §160.203(b)), enacted “to ensure the confidentiality of PHI maintained by covered entities”. In Gratton v. United Parcel Service, Inc., No. CV07-3071(TCP)(AKT) 2008 WL 4934056 at *4 (EDNY, Nov.14,2008). Id 670. PHI was obtained directly from employees’ health care providers with “adverse effect” in violation of the Privacy Act [5 USC §552a(g)(1)(D)] and destroyed confidentiality. Id 673. Relying on reasonableness of this Court’s holding in O’Connor v. Ortega, 480 U.S. 709, 107 S.Ct 1492, 94 L.Ed.2d 714 (1987) for “work-related” searches, Id at 723-24, **it decided medical records do not qualify as reasonable**, Ibid 675 as they are generally not in employer control, Id 715, even if a self-funded plan. In other words, employers do not possess greater rights to violate employee privacy post-firing.

103. COA-2C held constitutional right to privacy in personal data including medical in Doe v. City of New York, 15 F.3d 264, 267 (2d Cir.1994). When balancing government interests and privacy, it must view “adequacy of safeguards to prevent unauthorized disclosure, injury from disclosure to the relationship in which the record was generated and statutory mandate or other recognizable public interest”. U.S. v. Westinghouse Elec. Corp., 638 F.2d 570,578 (3d Cir.1980). Id. 573. MDO seeks new private data as “not a scintilla of evidence” of [her] disability, while COA-2C avers disease is not

disability per *Zerilli-Edelglass*, ignoring *Bragdon v. Abbott*.

104. Ninth Circuit held error in collecting unauthorized data in *Norman-Bloodsaw v. Lawrence Berkeley Lab*, 135F.3d 1260 (1998) as “few subject areas more personal and likely to implicate privacy rights than health or genetic makeup”. *Doe* at 267. Id 1269.

105. This Court held constitutional right to privacy in *National Aeronautics and Space Admin., et.al. v. Nelson*, 131 S. Ct. 746 (2011), which protects rights under the Privacy Act of 1974, 5 USC §552a, *NASA v. Nelson*, 751 quoting *Whalen v. Roe*, 97 S.Ct 869 (1977) with limited exceptions without “unwarranted invasion”, Ibid 762-763. For medical records, “[d]isclosure [is] “intentional or willful” only if “action [was] so patently egregious that anyone should know it is unlawful *or...* actions flagrantly disregard others’ rights.” *Andrews v. Veterans Admin.*, 838 F.2d 418 (10th Cir.1988). Employers will continue to cleanse workforces using medical data until a higher power (this Court) steps in to wisely consider harm imposed on U.S. workers.

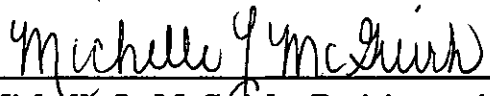
106. In *Kinneary v. City of N.Y., et.al*, 536 F.Supp. 2d 326 (2008), COA-2C held non-economic damages usually involve particularly egregious conduct, highly offensive, deliberate or violent acts or threats where emotional distress is so severe it causes physical manifestations. *McInnis v. Town of Weston*, 458 F.Supp. 2d 7,10 (D.Conn.2006). Id 331. In *N.Y. Rules of Professional Conduct 4.4(a)* Respect for Rights, a lawyer shall not use means that have no substantial purpose other than to *embarrass or harm*

a third person or use methods of obtaining evidence that violate legal rights of such a person. This prohibits threats to violate medical privilege.

CONCLUSION

107. Petitioner respectfully asks this Court to grant Petition to consider one or several constitutional questions raised. Swiss Re and its agents do not set proper “tone at the top”, creating a hostile work environment that is legally indefensible.

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