No. __________

IN THE
Supreme Court of the United States

MANHUA MANDY LIN, Doctor,

Petitioner,

v.

ROHM AND HAAS COMPANY,
DBA Dow Advanced Materials

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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November 10, 2017

Pro Se Petitioner/Plaintiff

QUESTIONS PRESENTED

The questions presented in this petition are:

1. Should a party be estopped from defending or prevailing in a Title VII retaliation action on the basis of perjury or other fraudulent evidences, a standard enforced by the Fifth, Seventh, Eighth, Ninth and Tenth Circuits, but not enforced in the DC, First and Third Circuits?
2. The standard of but-for causation established by this Court in *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013), permits an employer to escape from liability in a Title VII retaliation action if it advances a legitimate reason for its adverse actions against an employee. Should an employer who fails to advance any legitimate reason for any crucial adverse action be permitted to escape from liability by falsely denying that it took the adverse action?

PARTIES TO THE PROCEEDING

Petitioner Dr. Manhua Mandy Lin ("Petitioner" or "**Lin**") is the plaintiff in the proceedings below, and was a senior scientist employed by Respondent from 1989 to 1999.

Respondent Rohm and Haas Company ("Respondent" or "**RH**"), is the defendant in the proceedings below, and was a publicly traded multinational corporation before merging into Dow Chemical Company ("**Dow**") in 2009, and has since become one of Dow's wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Manhua Mandy Lin, respectfully petitions for a writ of certiorari to review the Opinions and Orders of the 3rd Circuit and district courts in this case.

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OPINIONS AND ORDERS BELOW

The Judgment and Opinion of the Court of Appeals for the 3rd Circuit which affirmed the Orders and Opinions of the District Court is reprinted in Appendix-A to the Petition at pages 1-22a. The Order and Opinion of the District Court for the Eastern District of Pennsylvania which denied Lin's post-trial motions is reprinted in Appendix-B to the Petition at pages 23-51a. The Order and Opinion of the same District Court which entered Judgment in favor of RH is reprinted in Appendix-C to the Petition at pages 52-137a. The Order of the Court of Appeals for the 3rd Circuit which denied Lin's Petition for rehearing *en banc* is reprinted in Appendix-F to the Petition at pages 150-151a.

JURISDICTION

On June 13, 2017, the United States Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing *en banc* from the judgment entered on April 14, 2017 by a Panel of the Third Circuit, which affirmed the earlier judgments/orders in favor of Respondent entered on March 11, 2016 and September 29, 2015 by the United States District Court for the Eastern District of Pennsylvania. Petitioner seeks this court's review of the judgments/orders entered by the Third Circuit and the district courts. On July 10, 2017, Justice Alito granted Petitioner's Application for a 60-day extension of time to file this Petition "to and including November 10, 2017". This Court has juridical discretion to review this writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case claims employment discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which states that "It shall be an unlawful employment practice for an employer to discriminate against any of his employees … because [she] has opposed any … unlawful employment practice … or because [she] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

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STATEMENT OF THE CASE

I. Brief Summary

This might be the longest-lasting Title VII retaliation case in the U.S. history, spanning a fourteen-year period from 1997 through 2011.

In January 1999, Lin, a senior scientist at RH, filed a charge with the U.S. Equal Employment Opportunity Commission (**EEOC**) accusing RH of discrimination and retaliation. After a settlement mediated by the EEOC, Lin resigned in November 1999. In June 2000, in response to EEOC's enforcement verification initiated by Lin, RH filed a frivolous lawsuit *RH v. Lin*, which led Lin to file her second EEOC charge, accusing that *RH v. Lin* was motivated by retaliation.

In February 2002, the EEOC decided that RH violated Title VII and issued a Determination (Appendix-E), which led Lin to file first Title VII suit *Lin v. RH* (**Lin-I**) in June 2002. In 2003, due to the lack of factual evidence, RH stopped pursuing its underlying claims in *RH v. Lin*. However, from 2003 through 2008, RH escalated its retaliation to damage Lin's post-RH employment by switching *RH v. Lin* to a different subject matter. In 2004, Lin filed another EEOC charge, accusing that RH's interference of her post-RH employment was a retaliation. In 2011, the EEOC concluded that RH violated Title VII in its second Determination (Appendix-D), which led Lin to file the current *Lin v. RH* (**Lin-II**) in May 2011.

Lin-II went to trial in 2015. The district court, sitting without a jury, ruled for RH. The glaring flaw in the case was that RH did not advance any reason, legitimate or not, for three crucial adverse actions focused at trial. Instead, through testimonies and an affidavit, RH representative Vouros denied that RH took these actions. Vouros' testimonies and affidavit are self-contradicted by dozens of trial documents created at time of adverse actions, mostly by RH or Vouros himself. Vouros' denial of making an extortionate threat to harm Lin was further contradicted by testimonies of two lawyers at the scene, and negatively influenced by RH's withdrawal of a witness (a RH's lawyer at the scene) from testifying. In this case, Vouros committed a strong pattern of five counts of perjury or double perjury concerning key issues of a Title VII retaliation action.

The questions presented in this petition are whether a party can prevail in a Title VII retaliation action on the basis of perjury, particularly, not one instance of perjury, but five counts of perjury; and whether a defendant can escape from liability without advancing any legitimate reason for the crucial adverse actions by, instead, falsely denying that it took these actions?

II. Critical Facts Based on Testimonies and undisputed historic Documents in Trial Record

1. Lin's ethnicity and employment history

Lin is a female of Chinese origin. After obtaining a Ph.D. in chemistry, Lin began employment with RH as a senior scientist in 1989. Her employment at RH ended in November 30, 1999.

RH was a fortune-500 corporation before becoming a wholly owned subsidiary of Dow in 2009. RH has been a major producer of acrylic acid (**AA**) and methacrylic acid (**MAA**) in the United States. AA and MAA are two different chemicals produced through two entirely different processes. From mid to late 1990's, Lin was a group leader missioned to develop a new catalytic process for AA production. She worked diligently that RH obtained about ten patents for her inventions. During her employment with RH, Lin was never involved in anything relating to MAA research or production.

In 2000, Lin incorporated EverNu Technology (**EverNu**), a limited liability company. From 2002 to 2008, with Lin as the principal investigator and under the federal Small Business Innovation Research (**SBIR**) program, EverNu was contracted by the US Department of Energy (**DOE**) to develop four proprietary technologies with energy saving potentials. The SBIR grants money from the DOE had been EverNu's only revenue. Except the MAA technology, RH has no business in three other technology development projects Lin/EverNu started.

2. First EEOC Charge and Settlement

Lin filed her first EEOC complaint in January 1999. Among other factual bases for this complaint was that her supervisor referred to Lin as a monkey to justify the denial of her promotion in 1997. The EEOC mediated a settlement in Lin's favor in November 1999, which provided that "In exchange for the promise made by [RH] … [Lin] agrees not to institute a lawsuit under Title VII…". Specially, RH "agreed that there would be no discrimination or retaliation of any kind against [Lin]" and agreed to fourteen "terms of settlement" requested by Lin, including a term that "[Lin] will be able to publish" her prior AA research subject only to trade secret review by RH; and Lin agreed to "a one year non-compete in [AA]" and to assist RH's patent filing of her AA inventions. The agreement did not restrict Lin from working on MAA anywhere/anytime. There was *no* mention of MAA anywhere in the agreement

3. Filing of RH v. Lin, Second and Third EEOC Charges, first EEOC Determination and Lin-I

In March 2000, based on publication term of the EEOC settlement, Lin submitted to RH for trade secret review a 20-slide presentation of her AA research for a presentation pre-approved by RH at an American Chemical Society (**ACS**) conference. RH approved and instructed Lin to present 19 of the 20 slides, but harassed to destroy her future employment if she dared to present one slide, which highlighted data of her invention already published in 1999 by RH in a patent application. In April, Lin requested the EEOC to stop the harassment. In May 2000, the EEOC contacted RH to verify the alleged harassment.

In June 2000, RH filed *RH v. Lin* in Pennsylvania state court, in response to the EEOC verification. RH asserted that Lin made unauthorized disclosure of AA "trade secret" in ACS conference, and that she stole the AA-data used in the 20-slide without RH's knowledge or approval. The legal Complaint has nothing to do with the MAA-research Lin and

EverNu started two years later (2002), and has no word MAA in it. This lawsuit prompted Lin to file her 2nd EEOC charge three weeks later.

In August 2001, Lin also filed her 3rd EEOC charge, when RH refused to perform a timely trade secret review and caused her to cancel another ACS presentation scheduled that month in Chicago.

In March 2002, the EEOC issued a Determination (Appendix-E), in which a list of reasons advanced by RH as causes for filing *RH v. Lin* were analyzed one-by-one. The EEOC concluded that all of RH's reasons were inconsistent and/or contradicted by written evidences, and that RH's filing of *RH v. Lin* was motivated by retaliation and violated Title VII, because ***none of the reasons advanced by RH was legitimate***.

In June 2002, based on the above EEOC Determination, Lin filed Lin-I in the District Court for the Eastern District of Pennsylvania. In Lin-I, RH recycled essentially all of the reasons it used at EEOC, to justify its filing of *RH v. Lin* and moved for Summary Judgment. In November 2003, the district court denied RH's motion for summary judgment, finding "that the temporal proximity and ***the apparent inconsistency in the Defendant's decision to sue Plaintiff*** establish a sufficient causal connection to sustain Plaintiff's prima facie case of retaliation." This finding was never revisited. Nonetheless, the court in Lin-I granted summary judgment to RH in January 2004 on the narrow ground that the damage Lin suffered was not "employment damage." The legal precedents guiding district court to dismiss Lin-I were later abrogated by this Court in *Burlington Northern v. White*, 548 U.S. 53 (2006).

4. The cause of 2004 EEOC Charge and three crucial adverse actions took by RH and Vouros from 2003 to 2008

Vouros has directed all adverse actions against Lin at all time since 2000, as RH's in-house lawyer managing *RH v. Lin*[1]. In 2001, RH obtained a preliminary injunction against Lin by fraudulent testimonies. However, without any factual evidence to back up, RH could not and did not proceed further to prove the underlying AA-claims. Instead, in 2003, RH switched the subject of *RH v. Lin* from the claimed AA trade secret to "a different subject" in MAA trade secret[2], and did so without suing EverNu and without adding MAA to the underlying claim, because RH had nothing to claim about MAA.

In May 2004, Lin filed her 4th EEOC charge accusing RH of damaging her, EverNu, and her employment at EverNu. In February 2011, the EEOC rejected all justifications advanced by RH, and issued its second Determination (Appendix-D), concluding that RH pursued Lin in a "different and unrelated" matter "to disrupt [Lin's] business, and to ultimately impose an undue financial burden upon [Lin]", and that "established a violation of Title VII".

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[1] To date, RH still keeps *RH v. Lin* open in court to harass Lin.
[2] In final decision issued in March 2010 *in RH v. Lin*, the PA Superior Court concluded that: EverNu is a non-party; MAA-subject is "a different subject" from AA-subject; and vacated all injunctions relating to MAA or EverNu. RH didn't appeal.

The twitched MAA trade secret protection was the most RH could stretch as a disguise to damage Lin's post-RH employment at EverNu. But, from 2003 to 2008, the three crucial adverse actions took by RH could not be justified by the MAA-disguise.

The **first** crucial adverse action was pursuing **unlimited discovery and sanctions** from 2003 through 2008. In 2003, RH started by serving unlimited discovery and subpoena of all proprietary information and technology EverNu developed under the SBIR program funded by the DOE. RH crafted the unlimited discovery so that Lin and EverNu (or any company) couldn't comply with the incessant and unreasonable demands. Next, from 2004 to 2008, RH relentlessly demanded and enforced the unlimited discovery sanction of $200/day, to crush Lin/EverNu[3].

The **second** crucial adverse action was **making extortionate threat in 2007** to influence the DOE cutting Lin and EverNu's SBIR funding – the lifeblood of EverNu. In 2007, frustrated by Lin's continuing resistance in *RH v. Lin* and EEOC's refusal to dismiss Lin's 2004 EEOC charge, Vouros made a "global settlement proposal" for Lin to drop *all claims*[4], with the above extortionate threat to cut off EverNu's lifeblood.

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[3] For example, RH twice unlawfully entered money judgments in 2006 and 2008 and forced banks to freeze EverNu's accounts to shut down its operation. Both unlawful judgements were subsequently stricken by courts in 2007 and 2008 respectively.

[4] In 2007, Lin's only claim against RH was the fourth EEOC charge.

The **third** crucial adverse action was **executing the extortionate threat in 2008**. After Lin notified RH management in 2007 and demanded that Vouros be disciplined for making the extortionate threat, Vouros sent seven letter/emails[5] to DOE in May-Aug. 2008, to make good of his threat.

The above three adverse actions are the focus of the Lin-II trial. RH didn't advance any justification. Instead, Vouros falsely denied taking these actions, because even the twisted MAA-disguise could not justify any of the three crucial adverse actions.

5. Vouros committed one-count of perjury by testifying that RH did not pursue unlimited discovery and sanctions

At trial in Lin-II, RH admitted that its MAA discovery demand constituted an adverse action, but alleged that the MAA-discovery was justified to prevent Lin from misappropriation its so-called MAA trade secrets. But, even if Lin was exposed to the alleged MAA trade secret, and even if she misappropriated the alleged MAA trade secret, the MAA-disguise could not justify for **unlimited** discovery and sanctions RH pursued from 2003 through 2008. RH took the path to deny pursuing Lin and EverNu with unlimited discovery, instead of advancing any justification for it.

In 2013, in an sworn affidavit, Vouros falsely declared that "RH did not specifically identify any

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[5] Vouros executed the extortion and contacted the DOE behind EverNu and Lin's back. RH didn't produce these documents Vouros sent to the DOE in discovery. Instead, Lin obtained them directly from the DOE under Freedom of Information Act.

[non-MAA] grants for discovery; did not file any motion addressing any [non-MAA] grants; and did not seek any relief from the Court concerning any [non-MAA] grants" JA755/¶13 At trial, Vouros falsely testified that "We were looking specifically for -- the DOE MAA grant" and that "we weren't looking to stop other projects, it was completely focused on the methacrylic acid [MAA]." JA462-463/p182, p185.

The above testimony and affidavit are directly contradicted by not one, not two, but dozen of written trial records created by RH and/or Vouros himself from 2003 to 2008. These unimpeachable records of unlimited discovery and sanctions include: 1) the discovery RH served Lin on 4/8/03 for "all grant application…any application submitted to DOE" JA1111; 2) the subpoena RH served EverNu on 8/20/03 for "all documents … all government grants" JA1044; 3) multiple written court records created by RH in 2004-2008 period, in which RH specifically identified and pursued EverNu's MEK project by grant number DE-FG02-03ER83652 <u>five times</u> for discovery and sanctions; 4) multiple court filings by RH in 2007-2008 period, in which RH pursued and obtained the default judgment and injunction against Lin, with the specific language to prohibit Lin from "any (a) presentation or proposal, (b) publication, (c) application or proposal for research grant"; 5) the email Vouros sent to the DOE on 7/18/08, in which Vouros urged the DOE to "stop all funding to Dr. Lin…EverNu" and "stop paying Dr. Lin/EverNu all money under any DOE funded project". JA670

Vouros' denial of pursuing unlimited discovery and sanction was further contradicted by testimonies of two attorneys in good standing. Attorney Chesney testified that: "[RH] was making repeated motions for sanctions based on orders that were not limited to [MAA] … orders that required EverNu to turn over everything that it had that was proprietary. And Rohm and Haas insisted on that throughout the case." JA342/p72 Attorney Hutchison testified that "[RH] was trying to get everything without regard to whether or not Dr. Lin had been involved with it before, … the discovery responses to EverNu were globally for anything and everything". JA363/p40.

6. Vouros committed two counts of perjury by denying that he made and executed the extortionate threats to have the DOE cutting off EverNu's lifeblood

On March 2, 2007, together with RH's outside counsel Mari Shaw, Vouros made a "global settlement proposal" to Lin's attorney, Hugh Hutchison, and EverNu's attorney, John Chesney to end *RH v. Lin*, on the condition that (a) EverNu grants RH free access to its future technologies developed under the federal SBIR program, and (b) Lin agrees to drop all claims against RH, including EEOC complaints. Vouros threatened to have the DOE stop funding all of EverNu's SBIR projects[6], if Lin and EverNu did not agree to this "settlement proposal."

On March 21, 2007, Hutchison documented the extortion with a certification. JA839. In May 2007,

[6] Vouros meant to cut off EverNu's lifeblood, since EverNu had disclosed in *RH v. Lin* that SBIR grants from the DOE had been its sole revenue.

Lin wrote to RH's board demanded that Vouros be disciplined for committing extortion. JA173 From May to August 2008, Vouros executed the extortion by bombarding the DOE with seven letter/emails. JA997, JA649 In his email dated July 18, 2008, exactly as he had threatened, Vouros urged the DOE to "stop all funding to Dr. Lin and her company EverNu" and "stop paying Dr. Lin/EverNu all money under any DOE funded project"[7]. JA670,

At trial, Vouros firmly testified that he never threatened "to get the DOE to take back all the money … on March the 2nd, 2007". JA227/p98. Since Vouros denied that he made the extortionate threat, he subsequently denied that he ever executed any extortionate threat in 2008.

Vouros' testimony denying making the threat was contradicted by both Hutchison's certification and Lin's letter to RH board. His denial of making threat was further contradicted by attorneys Chesney and Hutchison. Chesney testified firmly that Vouros threatened "to make sure that EverNu was not able to do business with the Department of Energy", "if EverNu did not accept" the proposal. JA338/pp53-54. Chesney was not challenged. Hutchison testified that Vouros threatened "to go to the Department of Energy and make sure that [Lin] or EverNu's relationship with the [DOE] is disrupted and that EverNu or that the [DOE] be asked to require EverNu to disgorge all of the monies that had been paid to EverNu. So, it was like this is your last

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[7] At trial, RH was caught secretly removed the most damaging 7/18/2008 email out of the designated folder in trial record.

chance. Give up or we're going to come after you and crush you financially with the [DOE].” JA564/p71.

Before and at the beginning of the trial, RH twice promised that attorney Shaw would testify and prove that Vouros did not make any threat on March 2, 2007. However, RH withdrew Shaw from testifying.

7. Vouros committed two counts of double perjury by denying his involvement in pre-2004 EEOC charges, and denying having knowledge of 2004 EEOC charge before Spring 2007

RH acted through its representative Vouros in all legal matters against Lin[8]. Beside denying that RH took the above three crucial adverse actions, Vouros took the position that he could not possibly have any retaliatory intent before Spring 2007, because he was not involved in Lin’s pre-2004 EEOC charges and he was not aware of Lin’s 2004 EEOC charge until Spring 2007.

The cutoff in Spring 2007 is important, because RH needs to cut off the linkage of retaliatory intent to the event on March 2, 2007, in which Vouros made the extortionate threat, in the event Vouros was found making the threat.

In his sworn affidavit in support of RH's motion for summary judgment in 2013, Vouros declared that “I am …intellectual property attorney… no RH

[8] At trial, Vouros admitted that he is RH’s in-house attorney deciding every adverse actions RH took in *RH v. Lin* since 2000; that he was involved in Lin-I from 2002-2004; and that he manages the current Title VII action Lin-II since 2011.

intellectual property lawyers … responding to any of Dr. Lin's EEOC charges filed in 2000, 2001, or 2004." And "I have no recollection of being aware of the 2004 EEOC charge until about three or so years after the [2004] charge was filed." JA752¶1,¶27,¶29

At trial, Vouros repeated the affidavit and testified that he "[was] not a part of that EEOC matters were handled" and "I had knowledge of the 2004 EEOC claim …in the spring of 2007." JA402/p154, JA215/p6

Vouros' affidavit and testimonies on these two matters were self-contradicted by six documents created by RH or Vouros himself. These documents include: 1) a fax cover sheet reveals Vouros's direct involvement in Lin's 2000 EEOC charge. The fax cover sheet was addressed to EEOC investigator Karen Porter in July 2001, which has Vouros' signature and notes on it. J.A.0796 The notes described conversations between Vouros and Porter concerning Lin's 2000 EEOC charge. The document faxed to the EEOC is a sealed court Opinion, to support Vouros' request to dismiss Lin's 2000 Charge; 2) four letters revealed Vouros' intimate involvement to have Lin's 2004 EEOC charge dismissed in 2004-2005 period. JA746, JA750, JA760, JA771 The four letters were from RH's external counsel Kresge to EEOC in 2004-2005, all of which urged the EEOC to dismiss Lin's 2004 charge, and all of which contain sealed proceedings in *RH v. Lin* gatekept by Vouros[9];

[9] Before the Philadelphia Inquirer obtained access to most of the seal records in 2007, RH had the entire proceedings in *RH v. Lin* sealed from the public. Kresge was not a counsel in *RH v. Lin*, and did not have access to the sealed court proceedings.

3) A privilege log entry reveals that Vouros wrote about Lin's 2004 EEOC charge on 4/4/2005. JA745 In the 4/4/2005 email to Shaw[10], Vouros wrote a "short reference to request for reconsideration before EEOC". Vouros eventually admitted at trial that he wrote about Lin's 2004 EEOC charge in that 4/4/2005 email. 4) Two letters from Kresge to the EEOC dated 3/30/2005 and 4/6/2005 reveal that Vouros coordinated Shaw to assist Kresge to attack Lin's 2004 EEOC charge. In the letter dated 3/30/2005, Kresge requested the EEOC to reconsider a decision in Lin's favor. Two days after Vouros wrote to Shaw on 4/4/2005, on 4/6/2005, Kresge attached Shaw's copy of a sealed court document to support his request for reconsideration at the EEOC. Apparently, Vouros' email on 4/4/2005 coordinated Shaw to support Kresge at the EEOC.

The above six documentary evidences are solid proofs that Vouros committed two counts of double perjury by denying his involvement in Lin's pre-2004 EEOC charges and denying his knowledge of Lin's 2004 EEOC charges before the spring of 2007.

III. Proceedings Below

On May 13, 2011, Lin filed Title VII complaint *Lin v. RH* (No. 11-cv-03158, Lin-II) in the District Court for Eastern District of Pennsylvania. The

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Vouros was RH's gatekeeper for the sealed proceedings at all time through 2007. Vouros was the only person from whom Kresge could obtain sealed proceeding used in his four letters.

[10] Shaw is external counsel handling *RH v. Lin*. Vouros manages Shaw at all time.

Judgments and Orders of the 3rd Circuit and the district courts in Lin-II are the subject of this appeal.

On March 26, 2012, the District Court denied RH's motion for dismissal with respect to claims of retaliation in violation of Title VII and Pennsylvania Human Relations Act, arising out of events subsequent to the 2003 discovery requests. On April 14, 2014, the District Court denied RH's motion for summary judgment, also with respect to the above claims. On Jan. 13, 2015, the District Court granted RH's motion in limine precluding Lin from claiming damages suffered by EverNu as the result of RH's adverse actions.

On Sep. 29, 2015 and after a ten-day trial, the District Court entered judgment and Opinion for RH. On March 11, 2016, the District Court denied Lin's post-trial motions for reconsideration or new trial. Lin appealed to the Court of Appeals for the 3rd Circuit. The Appellate Clinic of UVA Law School represented Lin *pro bono* at the 3rd Circuit. On April 14, 2017, the 3rd Circuit affirmed the District Court. On June 13, 2017, the 3rd Circuit denied Lin's Petition *En Banc*.

Despite the patterns of five counts of perjury, the district court credited each and every self-serving testimony of Vouros over dozens of undisputed documents and over testimonies of two attorneys, both officers of the court. The 3rd Circuit affirmed the district court.

In its conclusion (App.21a), the Third Circuit recited and accepted six excuses RH advanced in background, but not for any of the three crucial adverse actions focused in Lin-II. The Excuses-1 and 2 were advanced by RH to justify its filing of *RH v. Lin* in 2000 before the EEOC in 2000-2002 and before the Lin-I court in 2003. Both excuses were rejected by the EEOC in 2002 and by Lin-I court in 2003 as "the apparent inconsistency in the Defendant's decision to sue Plaintiff". The Excuses 3 to 6 were advanced by RH before the Pennsylvania Superior Court in *RH v Lin* to justify its pursuit of EverNu in MAA-discovery from 2003 to 2008. Based on review of thousands of pages of records on the subject matter, the PA Superior Court ruled that EverNu was a non-party and MAA subject was a different subject, and vacated all injunctions relating to MMA or EverNu.

The issues determined by Lin-I court in 2002 and PA Superior Courts in 2010 are not the issues in trial in Lin-II. Neither the Third Circuit nor district court in Lin-II has the associated factual evidences to decide the truthfulness of the 6 excuses RH lost in two previous cases. Even if the Third Circuit and the district Courts are willing to credit RH's excuses, all of six excuses are irrelevant to any of the three crucial adverse actions at trial in this case, otherwise. If any of these excuses are relevant to the three crucial adverse actions discussed in Section II above, RH and Vouros should have no need to deny taking these adverse actions by committing perjury.

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REASONS FOR GRANTING THE PETITION

IV. Can an employer be permitted to prevail in a Title VII retaliation action on the basis of perjury concerning retaliatory intent or crucial adverse action(s)?

1. The circuits split on whether a party should be subjected to severe sanction when defrauds the court with perjury or fraudulent evidence

A circuit split exists on whether a party should be subject to severe sanction of dismissal (on a plaintiff) or default (on a defendant) when a party deliberately tries to defraud the court with perjury or other fraudulent evidence in a Title VII retaliation action. This case presents the ideal vehicle for resolving this split.

Five circuits have held that parties can't prevail in civil rights actions sounding in retaliation by basing their positions on perjury. *See Secrease v. Western & Southern Life Ins. Co.*, 800 F.3d 397 (7th Cir. 2015) (affirming dismissal of plaintiff's Title VII retaliation case for attempting to defraud court by submitting an self-serving phony contract); *Brown v. Oil States Skagit Smatco*, 664 F.3d 71 (5th Cir. 2011) (affirming dismissal of Title VII action due to plaintiff's perjured testimony during deposition); *Klen v. City of Loveland, Colo.,* 661 F.3d 498 (10th Circuit 2011) (reversing summary judgment entered in favor of defendant in First Amendment retaliation case because defendant had used a perjured affidavit in the defense); *Leon v. IDX Systems Corp.*, 464 F.3d

951 (9th Cir. 2006) (affirming dismissal of plaintiff's Title VII retaliation action due to plaintiff's deletion of 2,200 files from computer); *Martin v. Daimler Chrysler Corp.*, 251 F.3d 691(8th Cir. 2001) (affirming dismissal of plaintiff's Title VII retaliation suit as sanction for her perjury at deposition, where she "twice testified that she had never been a party to another lawsuit," when in fact she was plaintiff in previous lawsuit).

In contrast to the decisions catalogued above, the DC and First circuits were willing to excuse perjury or deceptive practice by the employers in defending the Title VII retaliation claims from ultimate sanction if a lesser sanction will sufficiently punish and deter the abusive conduct. *See Sheperd v ABC,* 62 F.3d 1469 (D.C. Cir 1995) (remanding default judgment against employer, in Title VII retaliation action, imposed by district court as sanction for employer's document alteration); *Fontanillas-Lopez v. Cartegena*, 136 F.Supp.3d 152 (D.P.R. 2015) (denying Plaintiff's requests to reconsider dismissal of her Title VII discrimination and retaliation claims, despite false statement submitted by Defendants under penalty of perjury) and citing *George P. Reintjes Co., Inc. v. Riley Stoker Corp.,* 71 F.3d 44, 48-49 (1st Cir. 1995) (1st Circuit has consistently found that <u>perjury alone</u> has never been sufficient basis for an independent attack upon a valid and final judgment; "The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination, and, where warranted, motion for relief from judgment to the presiding court"). And, of course, in the present case, the Third Circuit permitted RH to defend, prevail and escape all liability in a Title VII retaliation action by committing multiple counts of perjury or double perjury through one self-serving representative- Vouros. on material issues such as retaliatory intent or crucial adverse action.

In view of this split, the lower courts require guidance as to whether a party can prevail in a Title VII case, and in current case, whether a defendant can escape liability, by conjuring perjured testimony.

Perjury pervades the record in this case—so much so that it is difficult to believe that the district court was willing to find against Lin. Vouros was a deeply flawed witness, and the entirety of his testimony illustrates that it was unreasonable to credit him to the extent that the district judge did. He had a horrible memory: testifying that he did not recall, did not know or had no recollection a total of 190 times on material issues while he was on the witness stand. He had a personal interest in the outcome: as RH's in-house counsel responsible for directing every adverse action against Lin since 2000, he had every incentive not to remember anything that would be unfavorable to him or RH.

In this case, Vouros' testimony and affidavit concerning retaliatory intent or crucial adverse actions are material and center in Title VII retaliation action, were self-contradicted by dozens of historic documents created mostly by RH and/or himself, and have created a jaw-dropping pattern of five counts of perjury and/or double perjury.

His self-serving testimony which denied making extortionate threat was also contradicted by two well-respected members of the Bar, Messrs. Chesney and Hutchison. And his testimony in this regard was not even supported by RH's outside counsel, Mari Shaw. There is no reason for such a purveyor of false information on such a critical matter to be viewed as truthful on other occasions.[11] After assuming that Vouros lied when he denied making the critical extortionate threat, the district judge went on and credited every fraudulent testimony, in the face of dozens of contradicting historic documents created mostly by RH and/or Vouros. The pattern of five counts of perjury and double perjury and dozens of self-contradicting evidences in this one case are more than combined total of that in the seven cases referenced above.

This Court should make the law of the land that a party is not permitted to prevail in a Title VII action on the basis of perjury—a decision consistent with cases such as *Secrease, Brown, Klen*, *Leon* and *Martin*. For example, in *Secrease*, the 7th Circuit made clear that court can impose the severe sanction

[11] The *falsus in uno, falsus in omnibus* instruction is well established. *See Lambert v. Blackwell*, 387 F.3d 210, 256 (3d Cir. 2004); *United States v. Rockwell*, 781 F.2d 985 (3d Cir. 1986). That instruction, derived from O'Malley et al., Section 15.06, provides: "False in One, False in All (Falsus in Uno, Falsus in Omnibus): If you believe that a witness knowingly testified falsely concerning any important matter, you may distrust the witness' testimony concerning other matters. You may reject all of the testimony or you may accept such parts of the testimony that you believe are true and give it such weight as you think it deserves."

of dismissal (on a plaintiff) or default (on a defendant) when a party deliberately tries to defraud the court. The same principle applies here: RH should not be permitted to prevail based on the perjury. And in *Brown*, the plaintiff testified in a Title VII action that he quit his job solely because of racial harassment, but four months earlier, in a deposition for a personal injury lawsuit, he testified that he left his job solely because of back pain related to a car accident. Based on this single conflicting testimony, the district court found that Brown committed perjury and dismissed Brown's complaint with prejudice. The Fifth Circuit affirmed, holding that no lesser sanction was proper, because the plaintiff "deceitfully provided conflicting testimony in order to further his own pecuniary interests in the two lawsuits and, in doing so, undermined the integrity of the judicial process. Through his perjured testimony, Brown committed fraud upon the court, and this blatant misconduct constitutes contumacious conduct." *Id.*, 664 F.3d at 78.

Further, in *Secrease*, the plaintiff sued former employer alleging discrimination and retaliation in violation of Title VII. The district court dismissed his suit with prejudice because, in opposing a motion to dismiss, Secrease attempted to defraud the court with a phony arbitration agreement. The Seventh Circuit affirmed, reasoning that "falsifying evidence to secure a court victory undermines the most basic foundations of our judicial system. If successful, the effort produces an unjust result. Even if it is not successful, the effort imposes unjust burdens on the opposing party, the judiciary, and honest litigants who count on the courts to decide their cases promptly and fairly." *Id.*, 800 F.3d at 402. Moreover, no lesser sanction would have been sufficient or effective. *Id.* In *Leon*, the district court dismissed all of the plaintiff's claims with prejudice in a False Claims Act case after determining that he despoiled evidence by deleting 2,200 files from his company-issued laptop computer during the pendency of the litigation. Such willful spoliation was a "deceptive practice that undermined the integrity of judicial proceedings," thus warranting the harsh sanction of dismissal. *Id.*, 464 F.3d at 958.

Finally, in *Martin*, the 8th Circuit affirmed the dismissal of plaintiff's Title VII retaliation suit as sanction for her perjury at deposition, where she "twice testified that she had never been a party to another lawsuit," when in fact she was a plaintiff in previous lawsuit. The Eighth Circuit agreed with the district court that "dismissal was the only sanction that would effectively punish [the plaintiff], lessen the prejudice to [the defendant], and protect the integrity of the proceeding." *Id.*, 251 F.3d at 695.

These cases stand in stark contrast to *Sheperd, Fontanillas-Lopez,* and *Reintjes*, in which the courts were willing to excuse perjury by the employers in defending the Title VII retaliation claims, if a lesser sanction was available. *See Sheperd*, 62 F.3d at 1480 (remand of default judgment against employer, in employee's action alleging discrimination and retaliation, imposed under district court's inherent power as sanction for employer's alleged document alteration, was warranted; alleged alteration involved omission of employee's name from single memorandum listing those who attended minority employee meeting, even if memorandum was altered, it would not have provided direct evidence of discrimination, but would only have precluded employer from arguing, as partial defense to retaliation claim, that it was unaware of employee's attendance, court's decision indicated only that it thought misconduct was serious and that default judgment was appropriate, not why lesser sanction would have failed to provide meaningful punishment and deterrence, and most of court's findings of repeated misconduct were unsupported); *Reintjes*, 71 F.3d at 48-49 (perjury alone, absent allegation of involvement by officer of court, is never sufficient basis upon which to maintain untimely independent attack upon valid and final judgment; Evidence that defendant's employees may have committed perjury over two years earlier in arbitration proceeding was not "fraud upon the court" that would justify relief from judgment for defendant, which was based on arbitrator's findings; plaintiff's claims amounted, at best, to ordinary fraud that could not form basis of independent action under "savings provision" of relief from judgment rule); *Fontanillas-Lopez*, 136 F.Supp.3d at 158-59 (citing *Reintjes*) ("the First Circuit has consistently found that perjury alone has never been sufficient basis for an independent attack upon a valid and final judgment . . . The possibility of perjury, even concerted, is a common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination, and, where warranted, motion for relief from judgment to the presiding court").

This Court should grant certiorari to resolve this split of authority and to make clear that: **no lesser sanction can be available** in the case of perjury than dismissal, if the wrongdoer is the plaintiff, and an adverse judgment, if the wrongdoer is the defendant. Judgment should have been entered against RH in the present case due to Vouros' perjury, but it was not. To the opposite, RH was permitted to prevail, because the district court credited each and every perjured testimony by Vouros - a self-serving witness, and against dozens of undisputed documents mostly created by RH and/or Vouros himself and against the opposing testimony of two lawyers with good standing in court.

2. A clear pattern of five counts of perjury driven by motives to cut off linkage to retaliatory intent, or deny crucial adverse actions that the employer has no legitimate reason, and had advanced none

As illustrated in Sections II.5, II.6 and II.7, Vouros committed the following five counts of perjury at trial. Three of them are also double perjury, because the corresponding false statements were made initially in an affidavit in support of RH's motion for summary judgment filed in 2013.

1. Perjury/D**ouble**-1: denied RH's pursuit of unlimited discovery and sanctions 2003-2008
2. Perjury-2: denied making extortionate threat in 2007 to have DOE cut off EverNu's grants

3. Perjury-3: Denied executing extortionate threat to cut off EverNu's grants
4. Perjury/double-4: denied involvement in pre-2004 EEOC charges
5. Perjury/**double-5:** denied having knowledge of 2004 EEOC charge before Spring 2007

Perjury-1 was a double perjury and was self-contradicted by over a dozen of documents created by RH at the time of retaliation, and contradicted by testimonies of attorneys Chesney and Hutchison. (see Section-II.5) The motive of the perjury was to deny a crucial adverse action that was designed and enforced to crush Lin and EverNu (also see Section-II.4 and footnote-3). Vouros committed the perjury, because RH could not and did not advance any legitimate reason to justify its relentless pursuit of unlimited discovery and sanction. Rarely, a party would commit such a perjury on the face of so many self-contradicting records of its creation, and expect such a clear and convincing perjury to escape the punishment by courts.

Perjury-2 was committed to deny making the extortionate threat on March 2, 2007, which was an adverse action in criminal nature. RH could not and did not advance any legitimate reason to justify making the threat. On RH's side, Vouros' false and self-serving oral testimony did not have any supporting evidence, and was further subjected to negative influence, since RH withdrew Shaw, its outside counsel, from testifying[12]. On Lin's side, the

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[12] RH's failure to call Shaw, despite their repeatedly stated intentions, warrants a "missing witness" instruction. "A missing

evidences against the perjury are overwhelming. (see Section-II.6) Lin has two time-stamped documents created near the time of adverse action; consistent testimonies of two officers of the court in good standing; and further, the corroboration by seven letter/emails Vouros sent to the DOE, in which he executed the threat precisely as documented by Hutchison and Lin in 2007.

It is unthinkable that such a negatively influenced oral testimony of a self-serving defendant

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witness instruction is permissible when a party fails to call a witness who is either (1) 'favorably disposed' to testify for that party, by virtue of status or relationship with the party, or (2) 'peculiarly available' to that party, such as being within the party's exclusive control." *ID Sec. Sys. Can., Inc. v. Checkpoint Sys, Inc.,* 249 F. Supp. 2d 622, 678 (E.D. Pa. 2003). "The applicability of [such] a 'missing witness' inference is based on the 'simple proposition' that if a party who has evidence which bears on the issue fails to present it, it must be presumed that such evidence would be detrimental to his cause." *United States v. Hines*, 470 F.2d 225, 230 (3d Cir. 1972). A party's attorney easily meets the "favorably disposed" and/or "peculiarly available" tests. Of course, a fact-finder has discretion to decide whether to draw such a "missing witness" inference against the party who fails to call the witness to testify. "However, such discretionary choices are not left to a court's 'inclination, but to its judgment, and its judgment is to be guided by sound legal principles.' *United States v. Burr*, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.)." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 416 (1975). In the situation here, where a party's counsel has expressly invoked the missing witness as support for the party's position on a critical issue of fact at trial and then tactically decided not to call that missing witness, there is no reason not to draw the logical adverse inference. *See Brandolini v. Grand Lodge of Pa., Order Sons of It. In America*, 56 A.2d 662, 664 (Pa. 1948).

could be more credible than testimonies of two officers of the court plus two time-stamped written documents and 7 collaborating documents!

Perjury-3, like Perjury-2, was motivated to deny a crucial adverse action in criminal nature. RH could not and did not advance any legitimate reason to justify Vouros' execution of extortionate threat in 2008. Vouros' false and self-serving oral testimony did not have any supporting evidence. But on the opposite side, Lin has the seven letter/emails Vouros sent to the DOE in 2008, the direct evidence that Vouros urged the DOE to cut off all of EverNu's grants money on all project, and the corroborating testimonies of Hutchison and Chesney. The smocking gun was the email Vouros sent to the DOE on 7/18/2008. JA670 And RH was caught secretly removed it from the designated folder at trial. It is unthinkable that such a self-serving oral testimony would be more credible than, so many direct and indirect evidences combined.

Perjury-4 was motivated to cut off Vouros' linkage to retaliatory intent. Lin's proof of the double perjury is clear and convincing. First in affidavit in 2013, then at trial in 2015, Vouros sworn that he had no involvement with Lin's pre-2004 EEOC charges. J.A.0752, J.A.0455 The direct proof of Perjury-4 was the fax cover sheet with Vouros' signature and notes on. J.A.0796 Vouros was forced to admit his signature and that he did contact the EEOC in 2001 concerning Lin's 2nd EEOC charge. Nothing can be more clear and convincing. It is unthinkable that the district would favor the shelfserving oral testimony over the self-contradicting and time-stamped documentary evidence.

Perjury-5 was motivated to cut off Vouros' linkage to retaliatory intent. Vouros sworn and testified that he had no knowledge of Lin's 2004 EEOC charge until Spring 2007. J.A.075. The timing at Spring 2007 was crucial to cut off Vousos' linkage to retaliatory intent for making the extortionate threat on March 2, 2007. The direct evidence of the perjury was his email dated 4/4/2005. JA0745 Vouros wrote to Shaw a "short reference to request for reconsideration before EEOC", which is the content of Kresge's letter sent to the EEOC on 3/30/2005. JA0750 Two days later, Shaw's copy of a sealed court order was attached to Kresge's letter to the EEOC on 4/6/2005, in support of the reconsideration RH requested on 3/30/2005. From the very surface, Vouros committed perjury about his knowledge of Lin's 2004 EEOC charge. But the contents of the three documents reveal clearly that Vouros coordinated the work of two outside counsels (Kresge at EEOC, Lin-I and Lin-II, and Shaw at *RH v. Lin*) in legal matters concerning Lin. Therefore, the perjury about not knowing Lin's 2004 EEOC charge is an intentional deception to the judicial system, with the motive to cut off linkage to rotatory intent and escape the liability of adverse actions.

However, the district offered an excuse for Vouros' double perjury here. The district court opined that Vouros was truthful about his failing memory, because the trial in 2015 "was years removed from the events," J.A.0076. This years-removed theory has serious problems in this case.

First, the perjury was originally committed in 2013, not on the stand at trial, but in a carefully crafted sworn affidavit, when Vouros has all the time necessary to gather the information for the sworn affidavit. Any material false deception with self-serving motive is intentional. Further, it was 8 years from 2005 to 2013. And Lin's 2004 EEOC charge accused the adverse actions Vouros directed as retaliation. If Vouros in 2013 honestly could not remember the email he wrote in 2005 about the 2004 EEOC charge, then Vouros' testimony in 2015 about anything on or before 2007 should be in question. In Lin-II, over 90% of Vouros' testimonies were about activities on or before 2007. If Vouros' affidavit in 2013 and testimony in 2015 intentionally deceived the judicial system about retaliatory intent in a Title VII retaliation action, this should be the most serious perjury committed in a Title VII retaliation action. The district court and the Third Circuit must disqualify 90% of Vouros' testimony, or subject him to the most serious perjury. There is no third way.

The pattern and number of perjury in Lin-II are beyond clear and convincing, if any court would take a look of the dozens of factual evidences referenced above. It is very rarely, a corporation has the guts or the confidence to mock the judicial system and expect not been caught. The Third circuit (and the district) apparently failed to review the dozens of evidences in the trial records which demonstrate a clear and convincing pattern of five counts of perjury and double perjury by Vouros concerning the subject matter of Lin-II as cited above.

Rarely, so many counts of perjury and so many contradicting evidences can be found in one Title VII retaliation case. Equally rarely, the trial records are flooded with as many as dozens of evidences for the demonstration of alleged perjury. They are more than the combined total of all other cases refenced above. Not to mention that motive for these perjuries is either to cut off the linkage to retaliatory intent, or to deny crucial adverse actions that the employer has absolutely no legitimate reason, and advance none. The 5th, 7th, 8th, 9th and 10th Circuit courts in *Secrease, Brown, Klen, Leon* and *Martin* would have imposed the default against such a clear pattern of perjury on the most important issue concerning Title VII retaliation action.

However, the Third Circuit seems to have permitted RH to defend and prevail in a Title VII action by committing five solid counts of perjury on material issues through one self-serving representative, Vouros. As a policy matter, it is blatantly against the interests of justice for parties to prevail in civil rights actions sounding in retaliation by basing their case on perjury. Yet, the circuit courts of appeal have not uniformly joined in condemning this practice. Five circuits have refused to accept it, but three, including the Third Circuit in this case, have permitted perjury to carry the day instead of the truth. This Court should grant certiorari in this case to make it clear to all lower courts that perjury has no place in our justice system.

V. Should an employer who advanced no legitimate reason for any crucial adverse action be permitted to escape from liability by falsely denying that it took the action?

The Third Circuit concluded, however, that "there is no evidence that [RH] acted in retaliation for Lin's EEOC charges" and "even if the District Court found, instead of simply assumed, that [RH] made the threat and that [RH] made good on this threat" to damage Lin at the DOE, "such findings would not establish that [RH's] actions were motivated by an intent to retaliate against Lin for filing charges with the EEOC." (App.21a)

The above decision by the Third Circuit fundamentally deviates from the spirit and decision made by this Court in *Univ. of Tex. Southwestern Med. v. Nassar* 133 S.Ct. 2517 (2013).

In *Nassar*, this Court established the but-for causation as a standard for Title VII retaliation action: "a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." This employer friendly but-for causation allows an employer to escape liability from Title VII retaliation, if it offers any legitimate reason for the adverse actions. At least one legitimate reason must be required for an employer to be permitted to escape from the liability. Because this Court is *not* likely to permit an employer to escape from liability without advancing any legitimate reason for its adverse action. As such, in this case, RH is not permitted to escape from liability without advancing any legitimate reason for any of the crucial adverse actions it took against Lin.

In another ward, *Nassar* requires that an employer can't escape liability if it offers no legitimate reason, or no reason at all, for the adverse action it took. It is not a secret that employers are never shy from justifying for its adverse actions, and often with false reasons. It is safe to say that in any situation where an employer offers no justification, the adverse action most likely, or must be, an indefensible act of retaliation.

As described in Sections II.5 and II.6, the three crucial adverse actions (1. unlimited discovery and sanction from 2003-2008; 2. making extortionate threat in 2007 to have DOE cutting off all of Lin and EverNu's funding; and 3. executing the extortionate threat in 2008) took by RH against Lin are precisely the type of indefensible act of retaliation. RH certainly did not have and did not advance any reason (legitimate or not) to justify for taking any of these crucial adverse actions. Instead, RH risked been caught for perjury and took the path to deny making unlimited discovery and sanction, and deny making and executing the extortionate threats.

Let's set aside the issue of perjury which has been discussed earlier, and just focus on the minimum requirement of at least one legitimate reason mandated by *Nassar*. If RH did take any of the above three adverse actions, even under the employer friendly but-for causation, *Nassar* would require that RH be held liable for that adverse action, if RH failed to advance a legitimate reason, or failed to advance any reason.

In this case, RH went on the path to deny taking all the three crucial adverse actions, and thus did not advance any reason, legitimate or not, to justify any of the three crucial adverse actions. The question is reduced to: did RH take any of the three adverse actions?

First, did RH make the unlimited discovery and sanctions to crush Lin and EverNu from 2003 to 2008? One would have a positive answer, by just take a look at the dozens of discoveries and subpoena RH served Lin or EverNu, or motions for sanction RH filed with the court between 2003 and 2008, or testimonies of attorneys Chesney and Hutchison, or the July 18, 2008 email Vouros sent to the DOE. This does not require any expert. Anyone who can read will find that RH relentlessly pursued the unlimited discovery and sanction to crush Lin and EverNu from 2003 to 2008.

Second, did Vouros make extortionate threat to have the DOE stopped funding Lin and EverNu in 2007? One just needs to look at the 7/18/2008 email Vouros sent to the DOE, the certification prepared by Hutchison in March 2007, the letter Lin sent to RH in May 2007, and the testimonies by attorneys Hutchison and Chesney at trial.

Third, did Vouros execute the extortionate threat in 2008? One just needs to take a look at the seven letter and emails Vouros sent to the DOE from May to August 2008. In particular the 7/18/2008 email that was once secretly removed from the designated exhibit by RH at trial.

The supporting evidences to prove that RH took any and all of the above three crucial adverse actions are over dozens, referenced in this brief and briefs filed with the Third Circuit and the district court. There is no evidence that RH did not take these adverse actions, except the self-serving affidavit and oral testimonies by Vouros. RH have failed to advance any reason to justify any of the three adverse actions. Therefore, the but-for causation under *Nassar* requires that RH is not permitted to escape from the liability of taking any or all of the three adverse actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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