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No. 26-605

In the Supreme Court of the United States

WILMORE LEE WASHINGTON III,

Petitioner,

v.

SCOTT BESSENT, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Wilmore Lee Washington III
Petitioner Pro Se
Rua Tomás Da Anunciação N. 88 3 Esq
Lisbon, Portugal 1350-331
(208) 719-2438
wwashing2@gmail.com

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QUESTIONS PRESENTED

1. Whether, under Title VII's cat's-paw doctrine, a plaintiff may establish causation where a second-line supervisor with established discriminatory animus initiates or influences a course of performance scrutiny and adverse evaluations that culminates in an adverse employment action, even though other managers participate in the intermediate employment decisions?

2. Whether, under Title VII, can an employer may be held liable under the cat's-paw theory when a second-line supervisor acting with discriminatory or retaliatory animus influenced the adverse employment action but was not the ultimate decisionmaker?

3. Did the Ninth Circuit err by failing to adhere to its established legal framework, as articulated in *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003), and *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626 (9th Cir. 1987), by improperly weighing evidence and not viewing the evidence in the light most favorable to the non-moving party at the summary judgment stage, thereby contradicting the principles governing the assessment of genuine issues of material fact?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Wilmore Lee Washington III.

Respondent and Defendant-Appellee below

- Scott Bessent
  Secretary Department of Treasury

LIST OF PROCEEDINGS

Judicial Proceedings

U.S. Court of Appeals for the Ninth Circuit

No. 23-3693

Wilmore Lee Washington III, *Plaintiff-Appellant*
v. Scott Bessent, *Defendant-Appellee*

Judgement entered May 12, 2026

U.S. District Court, District of Oregon

No. 3:21-cv-00333-JR

Wilmore Lee Washington III, *Plaintiff*
v. Janet Yellen, *Defendant*

Judgement: September 17, 2023

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U.S. Equal employment Opportunity Commission

Request No 2020005027 and Appeal No. 2019003131

Wilmore Lee Washington III v. Janet Yellen

Judgment: September 26, 2023 (Discrimination)

U.S. Equal employment Opportunity Commission

Appeal No. 2019003131

Wilmore Lee Washington III v. Steve Mnuchin

Judgment: July 30, 2020 (Discrimination)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner WILMORE LEE WASHINGTON III respectfully prays that this court grant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

A memorandum, not for publication, *Washington v. Bessent*, No 23-3693, U.S. Court of Appeals for the Ninth Circuit, decided on May 12, 2026. (App.1a). On June 15, 2026 an order from the Ninth Circuit Court of Appeals denied rehearing. (App.56a). On August 7, 2026 an order from the Ninth Circuit Court of Appeal denied Rehearing En Banc. (App.55a). On August 27, 2026 an order from Ninth Circuit Court of Appeals denied reconsideration. (App.53a). On September 17, 2023, Judgment and adopted findings by district court, *Washington v. Yellen*, United States District Court of Oregon, No. 3:21-cv-00333-JR. (App.7a) (unpublished). On August 7, 2023, Magistrate Findings and recommendation, *Washington v. Yellen* United States District Court of Oregon, No. 3:21-cv-00333-JR. (App.9a) (unpublished).

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2026. A timely petition for rehearing was denied on June 15, 2026. (App.56a). A petition for rehearing en banc was denied August 7, 2026. (App.55a). By letter of Clerk Rashonda Garner, Petitioner was given additional time within which to file a Rule 33.2 booklet petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2000e-2(a) of 42 of U.S.C as part of Title VII of the Civil Rights Act of 1964

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-2(m) of Title 42 of the United States Code, as part of Title VII of the Civil Rights Act of 1964,

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 2000e-3(a) of Title 42 of the United States Code, as part of Title VII of the Civil Rights Act of 1964,

(a) discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter,

> or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This case presents three critical questions for consideration:

Whether the causation standard applied by the Ninth Circuit in denying the petitioner's claims was correct? Whether the Ninth Circuit properly assessed the employer's liability in accordance with established legal principles, and whether the Ninth Circuit erred by failing to adhere to its established legal framework by improperly weighing evidence and not viewing the evidence in the light most favorable to the non-moving party at the summary judgement stage?

First Question: Under the "cat's paw" doctrine, can a petitioner establish causation if it is demonstrated that a second line supervisor, possessing discriminatory animus, initiates a series of tangible employment actions, exercises influence, and subjects the petitioner to performance scrutiny, resulting in a multitude of cumulative actions that culminate in an adverse employment action, even when intermediate managers are involved? This question arises under Section 2000e-3(a) of Title 42 of the United States Code, as part of Title VII of the Civil Rights Act of 1964. The Ninth Circuit ruled that the petitioner's retaliation claims were dismissed on causation

grounds and affirmed the summary judgment granted (App.2a).

Second Question: Under what circumstances can an employer be held liable based on the unlawful intent of officials or management, particularly a second line manager (S2), who did not formally make the decision to take the complained-of action? This question arises under Section 2000e-2(a) and Section 2000e-2(m) of Title 42 of the United States Code, as part of Title VII of the Civil Rights Act of 1964. The Ninth Circuit ruled that the "cat's paw" theory of liability invoked by the petitioner does not support liability, referencing *Staub v. Proctor Hospital*, 562 U.S. 411, 419–22 (2011). The court stated that the petitioner failed to identify evidence showing that any allegedly biased supervisor both harbored discriminatory or retaliatory animus and proximately caused the challenged employment actions, thereby affirming the summary judgment granted (App.3a).

Third Question: Did the Ninth Circuit err by failing to adhere to its established legal framework, as articulated in *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003), regarding the admissibility of evidence for trial, and *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626 (9th Cir. 1987), by improperly weighing evidence and not viewing the evidence in the light most favorable to the non-moving party at the summary judgment stage, thereby contradicting the principles governing the assessment of genuine issues of material fact?

Pro Se Petitioner Washington was employed as a Grade 11 Revenue Agent with the Department of Treasury at the Phoenix, Arizona location during the period relevant to these claims. Washington received

an annual appraisal with a Critical Job Element (CJE) score of "3.6" and a rating of "Exceeds Fully Successful" for the period from November 1, 2014, to October 31, 2015, as evaluated by First Line Manager Damaris Pimentel (hereinafter "S1 Pimentel") (App.160a-164a). In October 2016, Washington submitted an application for promotion to a Grade 12 position across four different territories: Arizona, Colorado, Oregon, and Hawaii, utilizing this annual appraisal (App.25a, App.67a). Washington successfully made it to the Best Qualified List for the promotions with an Applicant Ranking Score (ARS) of 95.88 points (App.25a).

In November 2016, Washington received an annual appraisal with a CJE score of "3.8" and a rating of "Exceeds Fully Successful" for the evaluation period commencing on November 1, 2015, and concluding on October 31, 2016, as assessed by S1 Pimentel (App.164a-167a).

On December 6, 2016, Second-line Manager/ Territory Manager John Murphy (hereinafter "S2 Murphy") communicated via email with First Line Manager Christopher Eippert (hereinafter "S1 Eippert") regarding the matter involving Washington. In this correspondence, S2 Murphy inquired, "What was the fault in this case and where does that fault lie? What was done that should not have been done? . . . How many more cases like this are out there?" (App.229a-234a). Subsequently, on December 7, 2016, S2 Murphy dispatched a high-importance email to S1 Pimentel concerning Washington (App.234a-235a). The contents of this email stated:

> " . . . I am not comfortable at all with him being assigned to work these cases I

> would think that there has been enough communication around this issue that one would be able to infer that our highly qualified agents with good investigative, procedural, and analytical skills should be assigned to work these cases. I really question how and why you would ever assign these cases to Washington. I have informed Chris Eippert that I would like these cases to be reassigned to Megha Dholakia . . . "

(App.235a).

Additionally, S2 Murphy issued a memorandum dated December 7, 2016, to S1 Pimentel, outlining concerns regarding S1 Pimentel's directions (App.236a-240a).

> "(Wilmore Washington WW)
>
> . . . The problem is that you control a case in which the proper actions were not taken at the onset of the examination . . . and the TEFRA procedures were not followed."

(App.236a)

> "Whistleblower Inventory - (Washington Washington WW)
>
> I have serious concerns with your assignment of any whistleblower inventory to WW. Although these are high priority cases with deadlines, assigning them to an agent who is not able to identify issues, properly follow procedures, and timely manage their inventory is not conducive to program results . . . " (App.239a)

Washington received a failed case review on December 5, 2016, conducted by S1 Pimentel (App.189a-191a), followed by another failed case review on December 30, 2016, conducted by S1 Eippert (App.191a-194a). Subsequently, whistleblower cases were reassigned from Washington to another agent by S1 Eippert.

On January 10, 2017, S1 Eippert conducted an additional case review of Washington at the request of S2 Murphy, stating, "As requested, . . . " (App.242a)

On January 17, 2017, S1 Eippert sent an email to S2 Murphy, providing a recommendation to reassign the case from another agent due to concerns. In response, S2 Murphy advised maintaining the case with the current agent, emphasizing the need to equip the agent with the necessary tools to succeed, and suggested discussing the concerns involving Washington during the upcoming monthly meeting (App.243a-244a).

> " . . . You have my approval for it to remain with Dan. I feel confident that you will guide him to do the right things and take the proper actions. Remember, give him the tools to succeed and let him tell you what he thinks he needs to do first. Then take any corrective actions and re-direct him as needed . . . . " *See* (App.243a)

On February 16, 2017 S2 Murphy sent an email response to Washington on why he did not get the promotion (App.28a)

> "I will say that in the selection process several items are considered including the type of inventory one has worked and handled (such as complex issues, TEFRA

> procedures and the identification of multi-related entities); their inventory management skills; details they have been on; experience they have with the OJI position; and if they have been an instructor/taught workshops, etc. I have reviewed your application and perhaps we should take an in-depth look at your application package altogether." (App.28a).

Washington reported S2 Murphy for discrimination promotion non-selection based on race and sex to the employer's Equal employment Opportunity (EEO) agency. Washington first contacted the Defendants' EEO counselor on February 17, 2017, waived anonymity, and attributed discriminatory intent to S2 Murphy (App.130a-132a).

Between February 17, 2017, and February 28, 2017, the Plaintiff participated in three protected activities (App.134a-135a).

On March 3, 2017, S1 Eippert issued a failed review for Washington in five cases (App.207a-228a). Subsequently, on March 7, 2017, S1 Eippert failed Washington's workload review (App.194a-207a) and communicated these reviews to S2 Murphy, raising concerns regarding Washington's declining performance (App.245a-246a). On March 13, 2017, S2 Murphy engaged in a discussion with S1 Eippert and S1 Pimentel regarding the departure ratings of Washington (App.247a-250a).

On March 14, 2017, S2 Murphy communicated a briefing to Area Director/ Third-line Manager Shelley Foster (herein-after "S3 Foster"), proposing the

immediate realignment of Washington to establish S1 Eippert as his permanent manager (App.252a-253a).

> "In light of the performance deficiencies within EG1507, I would like to immediately realign two employees in that group and have them swap manager with 2 in EG1147. I feel it is in the best interest of the employees, the managers and the organization to have Randy Hardin (GS-11) and Wilmore Washington (GS-11) realigned under EG1142 Acting GM Chris Eippert . . . " (App.252a).

Protected activities from Washington's discrimination non selection claim occurred 3/20/2017 and 3/21/2017. (App.135a-136a).

On March 22th, 2017 S2 Murphy informed S3 Foster of speaking to Union president for realignment. (App.254a-256a):

> "I just finished talking with NTEU President Doug DeSoto and he has no problems with the proposed reassignment . . . So now all that is left is your approval." (App.255a).

Protected activities from Washington's discrimination non selection claim occurred 3/24/2017 and 3/28/2017. (App.136a-137a).

On March 28th, 2017 S3 Foster was interviewed by Defendant's EEO regarding Washington's discrimination non selection claim. (App.137a).

On March 28th, 2017 S3 Foster approved S2 Murphy proposed realignment of Washington and expressed it was slightly outside the provisions of Article 15 of the Contract. (App.254a). On the same

day S2 Murphy sent the email of immediately reassigning Washington. (App.256a-258a).

Washington received Departure rating of "Exceeds Fully Successful" by S1 Pimentel for the period beginning November 1, 2016 and ending December 10, 2016. (App.259a-260a).

Protected activities from the related discrimination non selection claim occurred 3/31/2017, 4/14/2017, 4/17/2017 and 4/26/2017. (App.138a-139a)

A mediation was conducted on 4/26/2017 related to the discrimination Nonselection claim with S3 Foster, in Washington in affidavit dated 2/16/21 explains what happened (App.95a-96a)

> "I met with her by telephone in a mediation on 4/26/17 on my first case, race non-promotion. I think John Murphy was with her. She already knew all about that EEO activity. The EEO Counselor report states that she was informed about my retaliation complaint on March 20, 2017. Ms. Foster told the EEO Counselor that she would resolve my complaint and offer me a GS-12 position in Hawaii where I had applied . . . Then she responded to my complaint with the exact same talking points as John Murphy had used about my current performance under Chris (not my promotion numbers), which really depressed me since it made me realize that they were acting together. Chris and John were pretending I was a terrible performer suddenly and Ms. Foster was using that to say I did not deserve a promotion. Ms. Foster supports John Murphy

> (and Chris) and lets John do what he wants with his employees. She could have intervened to stop the discrimination and retaliation, but she did not." (App.95a).

On May 17, 2017, Washington filed a formal complaint alleging discrimination, a protected activity, attributing responsibility to his Territory Manager, S2 Murphy, and S3 Foster (App.147a-154a).

On May 31, 2017, S1 Eippert issued a memorandum to Washington regarding declining performance. Subsequently, on July 5, 2017, S1 Eippert issued a failed mid-year evaluation for Washington (App.168a-172a).

In a sworn affidavit to the Equal employment Opportunity (EEO) counselor, Washington detailed all adverse actions taken by S2 Murphy since Washington applied for a promotion in October 2016. (App.69a-70a):

> "During the end of October, was given 4 overage cases from agents that left that were not developed and I was given new 3-4 whistleblower cases (with directives from my Territory manager). I felt like I was set up for failure because I had my own cases and it caused me to look as if I can't control my inventory then after I was able to do all of the directives and save the statutes my Territory Manager took the easy whistleblowers telling my GM I can't handle my work and gave it to a person that eventually was selected for the GS-12 The 4 overage cases 3 of them had statute issues which is a very negative and I took care of that" (App.69a).

In a sworn affidavit dated July 6, 2017, Washington speaks about retaliation due to reporting S2 Murphy (App.65a)

> "Currently he has been scrutinizing more, and very critical of my work, I do believe because of my complaint, my TM (John Murphy and my Group Manager) are trying to bring my annual down" (App.65a).

In a sworn affidavit dated July 6, 2017, Washington speaks on certain actions of S2 Murphy towards him (App.71a-72a).

> "I was in Group meeting in February 2016, and John Murphy my territory manager at the time told me that I will never have the same opportunities as Elyse Katz Then a had another incident John Murphy in 2013 when I thought I won a prize because of a game picking the superbowl team and he had torn up a pizza box and gave me a prize it was humiliating, have not seen him do that with anybody else all this has been at work" (App.71a-72a).

List of things S1 Eippert did placing Washington on Performance Improvement Program along with Biweekly meetings Starting 8/7/2017-10/23/17. (App.179a-188a).

In the affidavit for retaliation and harassment claim dated 4/5/2018, Washington explains what the biweekly meetings did to affect his case work and other actions Eippert would do including not closing his cases. (App.76a-77a, App.83a-85a).

> "Each day I was in the office from February 2017 and ongoing, Christopher Eippert would come by my desk and watch over my computer, ask me same questions everyday about case work, I shared my calendar with Christopher J. Eippert so he would see what I am working on and then I started work from home a lot more to stay away from him because of his constant coming over and he would walk past my desk and act like he is going to see another agent but walk right back and look at my computer, I have had agents tell me he comes to my desk when I am not even there." (App.76a-77a).

> "August 2017 starting (Aug 7 or Aug 14th) November 2017, they were two hours and they got in my way of case work, i have the calendars printed showing the bi weekly meetings, the felt as if my case work slowed down because of it I cancelled an appointment I had scheduled a month ago" (App.84a).

> "No, It was very stressful and it was counterproductive, there were a couple of cases he kicked back that is why my Inventory was overage, instead not let me close cases even if I did everything he mentioned. In all reviews prior I always got good review on detailed case work but instead of focusing on clearing inventory he tried to make it worse." (App.85a).

In November 2017, Washington received an annual appraisal with a reduced CJE score of "3.6" and was demoted from a rating of "Exceeds Fully

Successful" to "Fully Successful" for the evaluation period commencing on November 1, 2016, and concluding on October 31, 2017, as assessed by S1 Eippert (App.176a).

According to the NTEU contract, a rating of "Exceeds Fully Successful" awards Washington 47 points, whereas a rating of "Fully Successful" awards 17 points. (App.265a).

In February 2018, Washington filed a formal complaint alleging retaliation and harassment, attributing responsibility to S2 Murphy and S1 Eippert. (App.155a-159a).

According to the U.S. Department of Treasury EEO counseling report, retaliation case #IRS 18-0161, both Director S3 Foster and Territory Manager S2 Murphy disagreed with reversing Washington's (CL) rating even before First Line Manager S1 Eippert had the Opportunity to review Washington's rebuttal. Furthermore, S3 Foster denied Washington's claims of discrimination and harassment. It was noted that Washington was the only employee under the supervision of S1 Eippert whose appraisal was lowered, while others experienced an increase. (App.128a)

> " . . . The Counselor provided the Aspects of the CJE ratings changed from Exceed to Meets. The Director stated she has had a discussion with the TM and finds that the annual appraisal will not change . . . EEO Counselor shared with the Director based on the review of all employee's evaluation issued by manager Eippert Based on the review all employees in the group annual

> appraisal ratings increased and the CL's was lowered . . . EEO Counselor also stated that the first line manager received the CL's rebuttal and he stated Counselor also stated that the first line manager that he has not read it yet . . . Shelley stated there is no discrimination based on retaliation and harassment (no-harassment) against the CL . . . . " (App.128a).

Washington detailed the actions of harassment by S1 Eippert in an affidavit dated February 16, 2021 (App.98a-110a).

On July 30, 2020, the United States Equal employment Opportunity Commission (EEOC) determined that Washington faced discrimination in non-selection for positions in Arizona, Oregon, and Colorado, based on prima facie evidence (App.23a-52a). Washington attributed the discrimination in non-selection based on race and sex to TM S2 Murphy and AD S3 Foster (App.25a).

The Defendants requested reconsideration of the EEOC's decision regarding Washington's discrimination claim solely for the state of Oregon (App.59a). In Washington's affidavit for discrimination dated July 6, 2017, it was stated that both S2 Murphy and S3 Foster were stationed in Arizona at the time of the claims (App.66a).

Washington submitted a sworn affidavit from S1 Pimentel, dated March 17, 2021. S1 Pimentel, Washington's initial first-line supervisor, detailed directives issued by S2 Murphy concerning Washington's workload. The affidavit also addressed the labeling of Washington and alleged discriminatory animus

exhibited by S2 Murphy, attributed to Washington's status as an African American (App.114a-120a).

S1 Pimentel's affidavit provides insights into the actions and attitudes of S2 Murphy towards Washington (App.116a-117a)

> "I heard through management's "grape vine" that the territory had hired 3 African Americans (Wilmore was one of them) on the last round of hires and they were working on getting rid of them . . . Wilmore was tagged as a bad employee . . . After I met Wilmore, I realized that he was good employee . . . he was not allowed to do certain work . . . Mr Murphy was strongly biased against Mr. Washington and directed me on a few occasions to take work away from him and assign to better agents . . . I strongly believe that Mr. Murphy was discriminating against Mr. Washington due to his race/color African American. Mr Murphy perceived Mr Washington as incapable or unworthy of doing challenging work and argued with me about giving him assignments and challenges to grow him as a revenue agent to his fullest potential . . . Based upon my personal knowledge and information, I believe Mr. Murphy will work with certain favorite managers and specifically direct them to treat certain employees poorly, decrease their performance and force them to quit like Mr. Washington" (App.116a-117a).

Washington filed a complaint in the district court alleging harassment based on race, sex, color, retaliation, and/or prior Equal employment Opportunity (EEO)

activity (App.143a-146a). During the discovery phase, Washington's court-appointed attorney, designated specifically for discovery, stated (App.270a-271a):

> "As the foregoing indicates, plaintiff has been diligent to the point of ad nauseum attempting to get complete discovery from defendants. It appears that defendants' intent is to stonewall on discovery and push the MSJ forward." (App.271a).

In a spoliation response from Defendants about the instant messages(OCS) between S2 Murphy and S1 Eippert related to Plaintiff. (App.272a).

> "... Further, IRS did not destroy any instant messages ... As part of its search in this matter, IRS reviewed instant messages saved by the three custodians during the relevant time period." (App.272a).

Washington did not receive messages OCS records from S2 Murphy related to him starting Oct 2016 using internal OCS messaging system during discovery and Defense Counsel stated this ignoring discrimination and harassment which started October 2016 when Washington Applied for promotion. (App.273a).

> "In sum, Plaintiff does not establish that IRS had an obligation to preserve instant messages during the period of alleged retaliation; that any instant messages were destroyed with a culpable state of mind; or that any instant messages were relevant because a reasonable trier of fact would find they supported his claim." (App.273a).

The District Court of Oregon rendered a judgment granting the Defendant's motion for summary judgment and denying Washington's request for an adverse inference (App.6a-22a). The court's findings indicated that Washington's discrimination claim remained under adjudication, stating, "That complaint is still under adjudication at the administrative level" (App.11a). The decision was reached without considering the evidence submitted by Washington, as noted: "In recommending the grant of summary judgment, this Court has not considered inadmissible evidence plaintiff purports supports his claims of retaliation and discrimination. (App.14a)

On September 26, 2023, the Equal employment Opportunity Commission (EEOC) issued a final decision on reconsideration regarding the state of Oregon, ruling in favor of Washington concerning discrimination in non-selection. Subsequently, Washington supplemented the record with this decision in the court of appeals. (App.57a-62a).

On May 12, 2026 The U.S. Court of Appeals for Ninth Circuit affirmed the District Court decision of granting the defendant's summary judgment (App.1a-5a) and concluded that "Washington's retaliation claim may be disposed of on causation grounds." (App.2a).

> "Washington also invokes a "cat's paw" theory of liability, but the record does not support liability on that basis. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 419–22 (2011). Washington identifies no evidence that any allegedly biased supervisor both harbored discriminatory or retaliatory animus and proximately caused the challenged employment actions." (App.3a).

On June 15, 2026, Washington's petition for rehearing was denied. (App.56a).

On June 26, 2026 Washington filed a petition for rehearing en banc and on August 7, 2026 Washington petition for rehearing en banc was denied as untimely. (App.55a).

On August 27, 2026 Washington's motion to reconsider the petition for rehearing en banc was denied. (App.53a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred in its interpretation of the legal framework concerning the evidence required to establish liability under the "cat's paw" theory, as well as the causation grounds. Additionally, the Ninth Circuit failed to properly evaluate the evidence presented by Washington for purposes of summary judgment, The Ninth circuit states:

> "Washington also invokes a "cat's paw" theory of liability, but the record does not support liability on that basis. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 419–22 (2011). Washington identifies no evidence that any allegedly biased supervisor both harbored discriminatory or retaliatory animus and proximately caused the challenged employment actions" (App.3a).

Washington has submitted the Equal employment Opportunity Commission (EEOC) decision, which affirms the presence of racial discrimination in the

non-selection process. Within this decision, Washington identifies the influence of Second-line Manager John Murphy (hereinafter "S2 Murphy") as a contributing factor to the adverse decision concerning Washington's promotion (App.25a). The decision was rendered in Washington's favor, establishing a prima facie case of discrimination, it establishes discriminatory animus by S2 Murphy. (App.23a-52a).

Furthermore, Washington has provided an affidavit from First Line Manager Pimentel (hereinafter "S1 Pimentel"), which details S2 Murphy's animus towards Washington due to his African American race (App.116a-117a), this also establishes discriminatory animus by S2 Murphy. S1 Pimentel also attested to S2 Murphy's history of utilizing managers to force employees out. (App.116a-117a). Additionally, Washington has presented an email dated December 2016, wherein S2 Murphy communicated to S1 Pimentel, characterizing Washington as lacking in skills, investigative ability, and analytical capacity, subsequent to Washington's application for promotion (App.234a-235a), this establishes a causation grounds and animus, this was during Washington promotion application October 2016– January 2017.

Lastly, on February 17, 2017, during this communication, Washington waived his anonymity and explicitly identified S2 Murphy as the cause of his non-selection (App.130a-132a), this action establishes retaliatory animus.

The aforementioned evidence establishes S2 Murphy as a biased supervisor harboring discriminatory and/or retaliatory animus

In Washington's affidavit, he describes interference with his caseload following his application for promotion in October 2016, an action initiated by S2 Murphy (App.69a). In December 2016, S2 Murphy initiated an investigation into Washington's cases, bypassing Washington's direct manager, S1 Pimentel, and instead selecting S1 Eippert, who reports directly to S2 Murphy. (App.231a-234a). S2 Murphy sought to identify fault and directed S1 Eippert to evaluate additional cases handled by Washington. (App.230a). During this period, S2 Murphy characterized Washington as an inadequate employee to S1 Pimentel and instructed S1 Eippert to assess Washington's cases in December 2016 and January 2017, and also interfered in Washington's inventory. (App.229a-230a, App.234a-235a, App.242a). The aforementioned actions constitute the proximate cause of the adverse employment action initiated by S2 Murphy.

S1 Eippert began managing Washington, despite Washington still being under the supervision of S1 Pimentel until March 2017, acting under directives from S2 Murphy. The actions of S1 Eippert were not independent, as they were initiated by S2 Murphy, resulting in a negative evaluation of Washington in December 2016. (App.191a-194a). At S2 Murphy's request, S1 Eippert continued to reevaluate Washington's cases in January 2017. (App.242a).

In an email exchange between S2 Murphy and S1 Eippert, an agent named Dan was discussed. S1 Eippert did not consider Dan top-notch and suggested sending the case elsewhere. However, S2 Murphy instructed S1 Eippert to retain the case with Dan, providing him with the necessary tools to succeed and allowing him to express his needs, unlike the

treatment of Washington. This demonstrates S2 Murphy's influence and the lack of independence in S1 Eippert's actions. (App.243a-244a).

Upon being informed of his non-selection for promotion in January 2017, Washington contacted the Defendant's Equal employment Opportunity (EEO) office on February 17, 2017. During this communication, he waived his anonymity and identified S2 Murphy as the cause of his non-selection. (App.130a-132a). This action constitutes a protected activity under employment discrimination laws. S1 Eippert, who reports directly to S2 Murphy, was aware of Washington's engagement in these protected activities concerning the discrimination non-selection and the fact that Washington attributed his non-selection to S2 Murphy. (App.74a-75a). Following the protected activities undertaken by Washington on February 17, 2017, and February 28, 2017. (App.134a-135a), a number of adverse actions occurred. S1 Eippert, whose investigation into Washington was initiated by S2 Murphy in December 2016, failed Washington in five cases on March 3, 2017. (App.207a-228a). This was accompanied by an unsatisfactory evaluation of Washington's workload review. (App.194a-207a). Consequently, S1 Eippert reported Washington's declining performance to S2 Murphy. (App.245a-246a). S2 Murphy then used this information to advocate for appointing S1 Eippert as Washington's permanent manager, involving S3 Foster in the decision-making process. (App.252a-258a).

Moreover, S1 Eippert's behavior changed significantly following Washington's contact with the Defendant's EEO on February 17, 2017. Adverse

actions were executed by S1 Eippert, influenced by S2 Murphy. In Washington's affidavit dated April 15, 2018, he provides a comprehensive account of the retaliation and harassment he experienced, including frequent daily visits by S1 Eippert, repetitive questioning, refusal to close Washington's cases, contradictions between verbal and written communications, false accusations of not seeking help, scrutiny when help was requested, public reprimands in front of taxpayers, deny training, and excessive micromanagement. (App.76a-77a, App.83a-85a, App.98a-110a).

These actions, including failing cases, refusal to close cases, and the behavior of S1 Eippert, qualify as materially adverse under the standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which defines materially adverse actions as those that could dissuade a reasonable worker from making or supporting a charge of discrimination. The initiation of the investigation by S1 Eippert, directed by S2 Murphy following Washington's application for promotion in October 2016, illustrates that S1 Eippert's analysis lacked independence.

Under *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007), a key Ninth Circuit decision, a subordinate employee's biased or retaliatory animus can be imputed to the employer under the "cat's paw" theory if the ultimate decision-maker is not entirely independent. In this case, S1 Eippert is not independent, as he reports directly to S2 Murphy, whose influence and directives shaped the adverse actions taken against Washington.

Following S2 Murphy's tenacious attempts to realign Washington to S1 Eippert (App.252a-258a).

Subsequently, on March 28, 2017, S3 Foster approved Washington's permanent reassignment to S1 Eippert's group. (App.254a) and S3 Foster was interviewed by Defendant's EEO on Washington's discrimination on March 28, 2017. (App.137a).

On April 26, 2017, during a discrimination mediation session concerning Washington's promotion, the Defendant's EEO counselor indicated that S3 Foster had offered a position in Hawaii. However, during the mediation, S3 Foster reiterated the same criticisms previously expressed by S1 Eippert and S2 Murphy, specifically regarding Washington's alleged inability to manage his cases, and consequently denied the promotion as part of the mediation process. (App.95a).

The significant adverse action on April 26, 2017, where S3 Foster denied Washington's promotion again, but this time based on purported case management issues, was rooted in and initiated by S2 Murphy's actions beginning in December 2016. This sequence of events establishes the proximate cause of the adverse action, linking it to the discriminatory and retaliatory animus initiated by S2 Murphy. In a formal complaint filed on May 17, 2017, (App.147a-153a) Washington alleged discrimination due to non-selection, attributing the issue to S2 Murphy. Subsequently, on May 31, 2017, S1 Eippert issued a memorandum citing a decline in Washington's performance, and on July 5, 2017, Washington received an unsatisfactory mid-year evaluation. (App.168a-172a).

Under the influence of S2 Murphy, S1 Eippert subjected Washington to biweekly meetings from August 17, 2017, to October 23, 2017. These meetings

exacerbated Washington's case management difficulties. In a sworn affidavit dated April 15, 2018, Washington detailed the stress and challenges associated with these meetings. Historically, Washington's performance reviews consistently reflected high marks for detailed case work. However, rather than facilitating the clearance of his inventory, the meeting's focus appeared to be on exacerbating the situation by contributing to an overage in his inventory. (App.83a-85a, App.179a-188a)

These adverse actions qualify as materially adverse under the standard established in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which defines materially adverse actions as those that might dissuade a reasonable worker from making or supporting a charge of discrimination. S2 Murphy initiated the investigation of Washington by S1 Eippert following Washington's application for promotion in October 2016 and adverse actions intensified once Washington reported discrimination against S2 Murphy. The analysis conducted by S1 Eippert was not independent, as it was influenced by S2 Murphy.

Under *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007), a key Ninth Circuit decision, a subordinate employee's biased or retaliatory animus can be imputed to the employer under the "cat's paw" theory if the ultimate decision-maker is not entirely independent. In this case, S1 Eippert is not entirely independent, as he reports directly to S2 Murphy, whose influence and directives shaped the adverse actions taken against Washington.

In November 2017, Washington received an annual appraisal with a reduced rating of resulting in

a demotion from "Exceeds Fully Successful" that Washington held for years under S1 Pimentel. (App.163a, App.167a, App.259a) to a rating of "Fully Successful" in November, 2017 by S1 Eippert. (App.176a).

Under the NTEU contract, a rating of "Exceeds Fully Successful" awards 47 points, whereas a "Fully Successful" rating provides only 17 points. (App.265a). The causation for this reduction began after Washington applied for a promotion in October 2016 and persisted until S3 Foster denied him the promotion in Hawaii during mediation. This denial was based on the narrative initiated by S2 Murphy, with the participation of S1 Eippert, asserting that Washington could not effectively manage his case work, which contributed to the reduction of his rating that he had maintained for years. (App.160a-167a).

In Washington's view, S2 Murphy sought to ensure that if Washington applied for the same positions against the same peers as in October 2016, the reduction of his ratings to "Fully Successful" would result in a loss of 30 points, thereby preventing him from making the Best Qualified List and leading to a loss of opportunities. During the EEO counseling report on retaliation for the demotion, it was noted that both S3 Foster (Director) and S2 Murphy (TM) agreed not to reverse Washington's rating even before S1 Eippert (First Line Manager) had the Opportunity to review Washington's rebuttal. S3 Foster indicated that her decision was influenced by discussions with S2 Murphy, suggesting reliance on his input. Notably, Washington was the only employee under S1 Eippert whose appraisal was lowered, while others received increased ratings. (App.128a)

To illustrate that S1 Eippert is not an independent investigator, consider the following legal analysis:

Under the standards set by the Seventh and Ninth Circuits, S1 Eippert does not qualify as an independent investigator. In *Vesey v. Envoy Air, Inc.*, No. 20-1539 (7th Cir. 2021), the Seventh Circuit held that an independent, neutral investigation can sever the "cat's paw" theory of liability when the employer identifies legitimate, non-retaliatory reasons for termination. However, S1 Eippert cannot be considered independent, as he was directed by S2 Murphy and reports directly to him. Additionally, in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), the Supreme Court addressed the "cat's paw" theory of liability, which applies when a biased supervisor, such as S2 Murphy, influences an adverse employment decision, even if the ultimate decision-maker is not biased. The Court held that an employer can be held liable if a supervisor's actions, motivated by discriminatory animus, are intended to cause and do cause an adverse employment action.

Washington has demonstrated that S2 Murphy exerted influence over S3 Foster and had authority over S1 Eippert. S2 Murphy initiated the proximate cause and causal link with S1 Eippert in December 2016, which led to Washington being denied a promotion during mediation on April 26, 2017. (App.95a), and ultimately to Washington's demotion in November 2017. This sequence of events establishes a causal link between the supervisor's discriminatory and retaliatory intent and the adverse employment decisions.

The inclusion of the EEOC decisions on discrimination nonselection and S1 Pimentel's affidavit further supports this argument. The decision in *Staub v. Proctor Hospital* reinforces the claim that the employer may be liable if the biased actions of the second line supervisor were a proximate cause of the adverse employment decision.

In considering related case law, several cases provide pertinent context for Washington's situation:

In *Lui v. DeJoy*, the Ninth Circuit reversed the summary judgment on a postal employee's discrimination and hostile work environment claims, while upholding the dismissal of her retaliation claim. This case underscores the court's willingness to examine claims of discrimination and hostile work environments, even when retaliation claims may not succeed.

In *France v. Johnson*, the Ninth Circuit addressed the "cat's paw" doctrine, which permits an employee to establish discrimination by demonstrating that a biased subordinate influenced the decision-maker's adverse action, even if the decision-maker was not biased. This doctrine is relevant to Washington's case, where S2 Murphy's influence over S1 Eippert and the subsequent adverse actions taken against Washington are central issues.

Conversely, in *Metzger v. Illinois State Police*, 519 F.3d 677 (7th Cir. 2008), the court granted summary judgment in favor of the State Police, emphasizing that the State Police could not be held liable under Title VII for any alleged retaliatory animus harbored by a non-decision maker. The court noted the involvement of multiple sources in the decision-making process, which distinguishes it from Washington's situation.

In Washington's case, the decisions and investigations conducted by S1 Eippert were initiated by directives S2 Murphy, with S2 Murphy being the sole source of influence and exerting top-down pressure. (App.229a-242a). This is evidenced by Washington's assertion of being set up for failure. (App.69a) and the narrative perpetuated by S1 Eippert, including the failure to close cases, etc. (App.76a-77a, App.83a-85a, App.98a-110a).

These cases collectively highlight the applicability of the "cat's paw" doctrine in Washington's situation, where the influence of a biased supervisor, S2 Murphy, over S1 Eippert, and the resulting adverse actions, are central to the claim of discrimination and retaliatory animus.

Another case that provides a comparative framework for Washington's situation is *Vance v. Ball State University*, 570 U.S. 421 (2013). Under *Vance*, a supervisor is defined as an individual who has the authority to take tangible employment actions. In this context, S2 Murphy's actions, which led to the denial of Washington's promotion during mediation and ultimately to Washington's demotion, align with the definition of a supervisor. S2 Murphy possessed the authority to direct S1 Eippert to undertake actions affecting Washington's employment status, thereby fitting the supervisory role as defined in *Vance*. This authority enabled S2 Murphy to influence or direct S1 Eippert's actions, reinforcing the hierarchical relationship and underscoring the second line manager's influence over S1 Eippert's decisions.

S2 Murphy initiated the chain of events that resulted in Washington being denied a promotion during mediation on April 26, 2017. (App.139a, App.95a), and set in motion the actions that led to

Washington's demotion. (App.176a). The hierarchical relationship between S1 Eippert and S2 Murphy highlights the influence exerted by the second line manager, supporting the argument that S2 Murphy's discriminatory or retaliatory intent was a proximate cause of the adverse actions taken against Washington.

The principles from *Vance* and the "cat's paw" theory established in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), suggest that an employer can be held vicariously liable when a supervisor's discriminatory intent, combined with their supervisory authority, influences a subordinate's actions. In this case, S2 Murphy's intent and authority significantly impacted S1 Eippert's actions, leading to Washington's demotion and other adverse employment decisions.

The magistrate's findings characterized Washington's evidence as hearsay and inadmissible, leading to the granting of summary judgment in favor of the defendant. (App.14a). The District Court subsequently adopted these findings. (App.6a-8a). The Ninth Circuit failed to address this issue, thereby contradicting its established legal standards. (App.1a-5a). In *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003), the Ninth Circuit held that if the contents of a document can be presented in a form admissible at trial, such as through live testimony by the document's author, the potential exclusion of the document as hearsay does not justify its exclusion from consideration at the summary judgment stage. Washington provided labeled evidence and detailed its origins in App.274a-277a, demonstrating that the evidence could be admissible at trial.

A relevant Supreme Court case is *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the Court

discussed the standards for summary judgment, emphasizing that the party opposing summary judgment must present evidence that would be admissible at trial. The Court noted that the non-moving party is not required to produce evidence in a form that would be admissible at trial, but must show that there is a genuine issue for trial.

The evidence presented by Washington is admissible under the hearsay exception delineated in Federal Rule of Evidence 803(8), which pertains to public records and reports. Furthermore, pursuant to Federal Rule of Evidence 401, the evidence is deemed relevant. With proper authentication as required by Federal Rule of Evidence 901 and 902, the evidence is admissible at trial.

In a second example, the magistrate's findings failed to consider Washington's evidence supporting his claims by declaring it inadmissible while granting the defendant's motion for summary judgment. (App.14a). This decision was subsequently adopted by the District Court. (App.6a-8a), and the Ninth Circuit did not rectify this oversight, thereby contradicting its established legal standards. (App.1a-5a). In *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626 (9th Cir. 1987), the Ninth Circuit emphasized that at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Instead, it must view the evidence in the light most favorable to the non-moving party and determine whether there are any genuine issues of material fact.

Washington submitted evidence that warrants consideration, specifically the EEOC Decision regarding discrimination in the non-selection of Washington,

which involved S2 Murphy. Washington contends that S2 Murphy exerted influence over this decision. (App.25a). This record qualifies as an exception to the hearsay rule under Federal Rule of Evidence 803(8), as it constitutes a public record containing factual findings from a legally authorized investigation. Furthermore, pursuant to Federal Rule of Evidence 401, this evidence is relevant as it demonstrates discriminatory animus by S2 Murphy, which is pertinent to the issues at hand.

Also, the affidavit from S1 Pimentel regarding S2 Murphy's conduct related to Washington. (App.114a-120a) the document is admissible under Federal Rule of Evidence 803(8) along with Federal Rule of Evidence 401, and Washington's formal discrimination complaint attributing blame to S2 Murphy. (App.147a-154a). Additionally, Washington's retaliation and harassment complaint also implicated S2 Murphy. (App.155a-159a). The defendants only requested reconsideration of the EEOC decision concerning Oregon, which was ruled again in the favor of Washington. (App.57a-62a), and this case retaliation and harassment claims is directly related to the discrimination non-selection issue, and Washington provided the reconsideration decision to the Ninth Circuit.

In the legal framework established by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the role of the judge is not to weigh the evidence or determine the truth, but rather to ascertain whether a genuine issue for trial exists. This principle is contradicted in Washington's case, as exemplified through several instances. For instance court determining Washington's discrimination EEOC complaint is still under adjudication at the administrative level (App.11a) even

when Washington submitted EEOC decision ruled in the favor of Washington for discrimination in Arizona and Colorado App.23a, while the respondent only ask for reconsideration of Oregon. (App.59a).

Also, Washington requested the OCS (instant messages) records of S2 Murphy related to all claims in this case, including race, sex, harassment, and retaliation. (App.143a-146a). The defendants, however, limited their argument to the context of retaliation alone, neglecting the broader scope of discrimination that began when Washington applied for his promotion in October 2016. (App.272a-273a). The defendants' failure to provide these records should have led the court to draw justifiable inferences in favor of Washington.

Another example of lower court's weighing evidence is ignoring top down pressure applied by S2 Murphy on S1 Eippert and S1 Pimentel during November and December 2016. (App.229a-242a, App.9a). The court failed to recognize that these actions were initiated by S2 Murphy, who harbors discriminatory animus as evidenced by the EEOC Decision. (App.23a-52a). S2 Murphy initiated an investigation into Washington's cases, which served as the proximate cause prior to December 12, 2016, bypassing Washington's direct manager, S1 Pimentel, and instead selecting S1 Eippert, who reports directly to S2 Murphy. (App.229a-230a). S2 Murphy sought to find fault and directed S1 Eippert to evaluate additional cases handled by Washington. (App.230a). During this period, S2 Murphy labeled Washington as an inadequate employee to S1 Pimentel and instructed S1 Eippert to assess Washington's cases in December 2016 and January

2017, and also interfered in Washington's inventory. (App.229a-242a).

These examples underscore the necessity for the court to view the evidence in the light most favorable to Washington, ensuring that genuine issues of material fact are properly identified and addressed. *See, Tolan v. Cotton*, 572 U.S. 650 (2014), the Supreme Court emphasized that when deciding a motion for summary judgment, courts are required to view the evidence in the light most favorable to the non-moving party.

In conclusion, this case is marked by significant errors that contravene established legal frameworks and precedents. The lower courts' handling of this matter reflects substantial missteps that could have far-reaching implications on both the legal and practical approaches to similar cases in the future. Such errors risk instructing employers on how to circumvent liability, thereby undermining the integrity of employment law protections. Furthermore, permitting such conduct to remain unaddressed in this case would establish a harmful precedent, effectively sanctioning an environment where employers may conspire to retaliate against employees with the assistance of other managers, without consequence. This is fundamentally at odds with the principles of justice and fairness that are the cornerstone of our legal system and the values upon which our nation is built. It is essential that we uphold these principles to prevent supervisors from engaging in extended campaigns of retaliation against employees. Washington respectfully urges the Court to take into account these broader implications during its deliberations.

Accordingly, the Petitioner respectfully requests that the high court grant the petition for a writ of certiorari to address these critical issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s Wilmore Lee Washington III

Wilmore Lee Washington III
Petitioner Pro Se
Rua Tomás Da Anunciação N. 88 3 Esq
Lisbon, Portugal 1350-331
(208) 719-2438
wwashing2@gmail.com

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