No. 04-___

IN THE
Supreme Court of the United States

Carol Stavropoulos,
Petitioner,

v.

Evan Firestone et al.

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

PETITION FOR A WRIT OF CERTIORARI

David C. Ates
Miller, Billips & Ates
730 Peachtree St.
Suite 750
Atlanta, GA 30308

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

February 11, 2005

QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve the entrenched three-way circuit split regarding the type of employer conduct that constitutes actionable retaliation against a public employee under the First Amendment and 42 U.S.C. 1983?

2. Should this Court grant certiorari to resolve the circuit split regarding the type of employer conduct that constitutes an "adverse employment action" in a Title VII retaliation suit under 42 U.S.C. 2000e-3(a)?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties appeared below and are respondents here: William Squires, W. Robert Nix, and the Board of Regents of the University Systems of Georgia.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carol Stavropoulos respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The relevant opinions and orders of the district court (Pet. App. 19a-65a; *id.* 71a-83a) and court of appeals (*id.* 1a-18a; 361 F.3d 610 and Pet. App. 68a-70a) are reproduced in the Appendix, as is the Eleventh Circuit's order denying rehearing and rehearing en banc (Pet. App. 66a-67a).

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2004, and the court of appeals denied rehearing and rehearing en banc on October 14, 2004. Pet. App. 18a, 66a-67a. On January 4, 2005, Justice Kennedy extended the time to file this petition to and including February 11, 2005. App. No. 04-568. This court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Petition Appendix. See Pet. App. 84a-85a.

STATEMENT

This is a case brought under 42 U.S.C. 1983 and Title VII alleging that respondents retaliated against petitioner for exercising her protected First Amendment rights. Respondents' acts of retaliation included a written reprimand, a negative performance review, false allegations of mental illness, an internal investigation designed to gather exclusively negative information about petitioner's work, and a decision not to renew petitioner's contract. These acts forced petitioner to spend tens of thousands of dollars simply to retain her job. But the Eleventh Circuit held that respondents' conduct neither qualified as "adverse employment actions" under Title VII nor constituted actionable retaliation under Section 1983. Pet. App. 12a, 18a. This Court should grant certiorari to resolve circuit conflicts

over both the statutory and constitutional issues, and to bring needed clarity and uniformity to this important area of law.

1. In 1993, petitioner was hired as an assistant professor in the University of Georgia's School of Art, where she was employed pursuant to a series of one-year contracts. Pet. App. 2a. She received excellent performance evaluations in 1993, 1994, and 1995. *Id.* 2a-3a.

At the beginning of 1995, petitioner served on a committee to recommend a candidate for a vacant position at the School of Art. Pet. App. 2a. Although petitioner believed – and the school's deans later agreed – that a female candidate was the best qualified, other committee members voted to recommend a male candidate, and the faculty accepted that recommendation. Pet. C.A. Br. 6-8. Petitioner and another committee member then filed a dissent from the recommendation and voiced concerns regarding the role of gender discrimination in the search process. Pet. App. 3a. Petitioner also assisted the female candidate in a complaint to the university regarding possible gender discrimination. *Ibid.*

In March 1995, immediately after the submission of the dissenting report, respondent Firestone – who served as the director of the School of Art – sent a memorandum to petitioner in which he chastised her for filing the dissent. Copies of the reprimand were sent to the school's deans. Pet. C.A. Br. 7. Respondent Firestone also verbally warned petitioner to curtail her "upstart attitude" and cautioned her to "hope for the best" in the tenure process, given her lack of "collegiality." *Id.* 7-9.

In June 1995, petitioner learned that the faculty had voted not to renew her contract. Pet. App. 3a. Petitioner complained to the dean of the School of Art that she had been treated unfairly during the non-renewal vote because she had voiced concerns about gender discrimination. *Ibid.* The dean agreed, and he asked respondent Firestone to explain the non-renewal vote, particularly in light of petitioner's three excellent performance reviews. See Pet. C.A. Br. 13. In response, Firestone embarked on an internal investigation of

petitioner, during which he solicited exclusively negative comments about her work. *Ibid.* Respondent Firestone submitted this "separate personnel file" to the deans, who expressed suspicion that the reliability of his findings had been tainted by the hiring committee incident. *Id.* 14-15. Consequently, the deans declined to accept the faculty vote, and petitioner's contract was renewed. Pet. App. 4a.

In March 1996, petitioner received her first negative performance evaluation from respondent Firestone, who later admitted that the evaluation may have been influenced by petitioner's actions during the hiring committee incident. Pet. C.A. Br. 19. That spring, petitioner was also the subject of a "third-year review," an evaluation, conducted by a committee, that is intended to gauge a professor's tenure prospects. Pet. App. 4a. Firestone appointed respondent Squires to chair the committee, which reviewed a variety of information related to petitioner's job performance. *Ibid.*

During the review process, Squires composed a memorandum – entitled "Understanding the Role Played by Illness Relative to Carol Stavropoulos' Performance of her Duties as a Faculty Member" – which falsely alleged that petitioner suffered from mental illness. Pet. App. 5a. The memorandum was distributed and read aloud at a review committee meeting, and committee members subsequently questioned petitioner about the allegations. Pet. C.A. Br. 22-23. Although petitioner vigorously denied that she suffered from a mental illness, the committee's report cited the allegations as "an exacerbating factor in [petitioner's] working relationships with others." Pet. App. 5a. The report concluded that "persistent and ongoing problems in the areas of teaching and service are jeopardizing Dr. Stavropoulos' progress towards promotion and tenure." *Id.* 6a.

In June 1996, the faculty, based on the third-year review committee's report and Firestone's "separate personnel file," voted not to renew petitioner's contract. Pet. C.A. Br. 26. Petitioner filed a grievance with the faculty senate, whose

grievance panel held a hearing in June 1997. Throughout the grievance process, petitioner was forced to retain counsel at her own expense. Pet. App. 6a. The grievance panel determined that the non-renewal vote was based on "retaliation for [petitioner's] conduct in connection with the 1995" hiring process. *Ibid.* Petitioner thus retained her job, although she was never compensated for the substantial financial losses that she suffered as a result of the retaliatory conduct. Pet. C.A. Br. 3, 31.

2. Petitioner subsequently filed this lawsuit. At issue here are two separate claims. The first, brought pursuant to the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, was dismissed on summary judgment on the ground that respondents' conduct did not amount to an actionable "adverse employment action" under Eleventh Circuit precedent. Pet. App. 39a.

The second claim, brought pursuant to 42 U.S.C. 1983, alleges that respondents Firestone, Squires, and Nix retaliated against petitioner – in violation of her First Amendment rights – because she had voiced concerns about gender discrimination in the hiring process. The district court rejected respondents' motion to dismiss on the basis of qualified immunity. Pet. App. 78a. It determined that petitioner's speech regarding the incidents of gender discrimination survived the *Pickering* test for protected activity by public employees: her speech clearly addressed a "matter of public concern" and was not disruptive to the workplace. *Id.* 74a-76a. The court thus allowed petitioner to proceed with her Section 1983 First Amendment retaliation claim against respondents in their individual capacities. *Id.* 83a. The Eleventh Circuit affirmed that holding on appeal. *Id*. 68a-70a. After discovery, respondents again moved for summary judgment, which the district court granted. It ruled as a matter of law that if petitioner had not suffered an adverse employment action for Title VII purposes – because she ultimately retained her job – then she also necessarily

failed to establish the required actionable retaliation to sustain her Section 1983 First Amendment claim. *Id.* 47a.

3. On appeal, the Eleventh Circuit affirmed. Like the district court, it reasoned that petitioner's Title VII claim was precluded because she had not suffered a cognizable "adverse employment action." Pet. App. 12a. The court also affirmed the dismissal of petitioner's Section 1983 retaliation claim. Acknowledging that its holding diverged from this Court's decision in *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 75 n.8 (1990), and holdings in several other circuits, the court rejected petitioner's contention that any action that is likely to chill an employee's exercise of constitutionally protected speech qualifies as "actionable retaliation" in the First Amendment context. Pet. App. 12a-18a.[1] Rather, the court held that, "[t]o be considered [actionable retaliation] * * * the complained-of action must involve an important condition of employment." *Id.* 13a. Under this strict test, petitioner's claims were dismissed. *Id.* 18a.

The court of appeals also briefly addressed whether respondents should be accorded qualified immunity on the Section 1983 claim. Reasoning that prior circuit precedent had not addressed what kinds of retaliation would give rise to Section 1983 liability, the court of appeals concluded that qualified immunity was appropriate because respondents' liability was not "clearly established." Pet. App. 18a.[2]

---

[1] The court of appeals also indicated, Pet. App. 8a, that petitioner had waived any reliance on a theory of "retaliatory harassment," see *infra* Part I.A.2. (discussing Second Circuit standard). That holding is incorrect. But in any event, petitioner was subjected to retaliation in the form of several discrete acts, any one of which could individually qualify as actionable retaliation under the lesser standard adopted by five other circuits. See *infra* Part I.A.3.

[2] The issue of a causal connection between petitioner's speech and the retaliatory acts to which she was subjected remains to be determined on remand. The district court considered this issue only

The court of appeals denied rehearing and rehearing en banc. This petition followed.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Resolve The Entrenched Three-Way Circuit Conflict Over What Acts Constitute Actionable Retaliation Under The First Amendment.

There is an entrenched and widely acknowledged circuit conflict over what constitutes actionable retaliation for the purposes of a First Amendment claim under Section 1983. In the wake of this Court's decision in *Rutan*, the courts of appeals have adopted three inconsistent legal standards, which are outcome determinative in a large body of cases. Because the question determines the rights of public employees throughout the United States, such a conflict is untenable. This case presents the ideal vehicle to resolve the question presented because the Eleventh Circuit's ruling on whether the respondents' acts constituted actionable retaliation dictated the case's ultimate result. Finally, certiorari is also warranted because the decision below is wrong on the merits.

A. The Courts of Appeals Are Intractably Divided Over the Question Presented

As the Eleventh Circuit and other courts have acknowledged, the circuits are split over the threshold of harm that must be alleged to prevail on a First Amendment retaliation claim.[3] See Pet. App. 14a n.8; *Pierce* v. *Texas*

---

in the narrow context of the 1996 denial of petitioner's request for early tenure and promotion, see Pet. App. 51a-52a, and the court of appeals bypassed the question entirely, instead directly addressing whether the individual respondents' actions constituted actionable retaliation. *Id.* 12a-18a.

[3] Although opinions in all of the circuits sometimes use the term "adverse employment action" in First Amendment retaliation cases, the courts define that term very differently. Compare, *e.g.*, *Coszalter* v. *City of Salem*, 320 F.3d 968, 970 (CA9 2003)

Dep't of Crim. Just., 37 F.3d 1146, 1149 & n.1 (CA5 1994) (noting that its standard for actionable retaliation conflicts with that of D.C. Circuit); *Lybrook* v. *Members of Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1340 n.2 (CA10 2000) (noting conflict between the circuits on magnitude of harm required to be actionable); *Cole* v. *Me. Sch. Admin. Dist. No. 1*, No. 03-205-B-W, 2004 U.S. Dist. LEXIS, at *20-*24 (D. Me. Dec. 3, 2004) (noting conflict between the Seventh, Ninth, and Fifth Circuits on what actions are sufficient to constitute an actionable wrong).

1. Three circuits have adopted a particularly rigorous, pro-defendant standard. The Eleventh Circuit held in this case that "[t]o be considered an [actionable retaliation] in a First Amendment retaliation case, the complained-of action must involve an *important condition of employment*." Pet. App. 13a (emphasis added) (citation omitted).[4] The court listed

---

("'adverse employment action" is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech), with *Pierce*, 37 F.3d 1146, 1150 (CA5 1994) ("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands."). This petition thus focuses on the kinds of retaliatory conduct that will support a First Amendment retaliation claim – or, put another way, what constitutes "actionable retaliation" for First Amendment purposes.

[4] Although the decision below suggested that conduct "likely to chill the exercise of constitutionally protected speech" would also be actionable, the court never applied this standard to the respondents' conduct. Pet. App. 12a. Indeed, it later indicated that "an employee complaining of First Amendment retaliation must show more than her subjective belief that the employer's action was likely to chill her speech." *Id.* 15a. Taking their cue from the latter language, district courts in the Eleventh Circuit have followed the major holding of the decision below – *viz.*, that conduct is actionable only when an important condition of employment is altered. See *Alexander* v. *Chattahoochee Valley Cmty. Coll.*, 345 F. Supp. 2d 1306, 1308 (M.D. Ala. 2004); *Portera* v. *State of Ala. Dep't of Fin.*, 322 F. Supp. 2d 1285, 1291 (M.D. Ala. 2004).

"discharges, demotions, refusals to hire or promote, and reprimands" as examples of actions that would meet the threshold for actionable retaliation. *Id.* 14a. The court further held that employers are shielded from liability so long as their actions have "no impact on an important condition of [the employee's] job, such as * * * salary, title, position, or job duties." *Id.* 17a. Finally, the Eleventh Circuit clearly acknowledged that some retaliatory actions might not survive summary judgment "even though they may have had the effect of chilling [the employee's] speech." *Id*.

The Fifth and Eighth Circuits apply the same rule. See, *e.g.*, *Pierce*, 37 F.3d at 1149-50 (limiting actionable retaliation to "discharges, demotions, refusals to hire, refusals to promote, and reprimands" and noting that some conduct may not be actionable even if it "may have had the effect of chilling * * * protected speech"); *Jones* v. *Fitzgerald*, 285 F.3d 705, 713 (CA8 2002) (actionable retaliation "requires a tangible change in duties or working conditions that constitutes a material disadvantage" to the employee (citation and internal quotation marks omitted)).

Applying this stringent standard, the Eleventh Circuit deemed several retaliatory acts not actionable despite their detrimental effects. For example, in retaliation for petitioner's report of gender discrimination in the 1995 hiring process, respondent Firestone sent her a disparaging letter, compiled a dossier of critical letters, and encouraged "faculty members with negative things to say" about petitioner to speak with the committee responsible for her third-year review. Pet. App. 16a. Furthermore, respondent Squires falsely alleged that petitioner suffered from mental illness and that this ailment hindered her job performance. *Id.* 6a.

The Fifth and Eighth Circuits have rejected equally substantial claims. The Fifth Circuit has held that subjecting an employee to investigations, videotaping, polygraph tests, transfers, and disciplinary measures did not constitute actionable retaliation, *Pierce*, 37 F.3d at 1148-50; nor did

negative performance reviews and a failure to grant merit-based raises, *Harrington* v. *Harris*, 118 F.3d 359, 365 (1997). Similarly, the Eighth Circuit has held that involuntary transfers, negative reports in a personnel file, and two internal investigations do not constitute actionable retaliation. *Fitzgerald*, 285 F.3d at 714-15. That court also held that denial of a merit-based bonus and the placement of an employee on "secret probation" were not actionable. *Bechtel* v. *City of Belton*, 250 F.3d 1157, 1162 (2001).

2. The Second Circuit has adopted a unique rule: it holds that actionable retaliation may be demonstrated not only by "the classic examples of discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand," but also by showing that "using an objective standard," "the total circumstances of her working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace." *Phillips* v. *Bowen*, 278 F.3d 103, 109 (2002). Under this retaliatory harassment theory, "otherwise minor incidents that occur often and over a longer period of time may be actionable if they attain the critical mass of unreasonable inferiority," *ibid.*, such that plaintiffs may prevail on an actionable retaliation claim by showing an aggregation of incidents that individually fall short of demotion, termination, or the like.[5]

3. By contrast, the majority rule – followed by eight circuits – is that any non-trivial retaliatory action will support a First Amendment claim. See, *e.g.*, *Smith* v. *Fruin*, 28 F.3d

---

[5] For example, one district court sustained a First Amendment retaliation claim that alleged a cover-up, unwarranted negative job evaluations and disciplinary notices, and the "implanting of a false charge against plaintiff in the mind of a high-ranking school district official." *Branch* v. *Guilderland Cent. Sch. Dist.*, 239 F. Supp. 2d 242, 244 (N.D.N.Y. 2002). Recently, another district court held that a negative evaluation and a written reprimand could individually constitute actionable retaliation. *Kantha* v. *Blue*, 262 F. Supp. 2d 90, 103 (S.D.N.Y. 2003).

646, 649 n.3 (CA7 1994) ("even minor forms of retaliation can support a First Amendment claim"); *Rivera-Jiménez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (same); *Tao* v. *Freeh*, 27 F.3d 635 (CADC 1994) (retaliatory action "need not be as significant as the denial of a promotion to raise a constitutional claim"); *Ulrich* v. *City and County of San Francisco*, 308 F.3d 968, 977 (CA9 2002). These courts often formulate this standard as an inquiry into whether the retaliatory acts threaten to chill, inhibit, or deter employee speech.[6]

Thus, the Seventh Circuit has held that giving an experienced police officer a sham surveillance assignment was sufficient to constitute actionable retaliation. *Fruin*, 28 F.3d at 649. The Ninth Circuit has found a variety of employer actions to constitute actionable retaliation, including investigations, *Ulrich*, 308 F.3d at 977; temporary suspensions, *Anderson* v. *Cent. Point Sch. Dist. No. 6*, 746 F.2d 505 (1984); reassignment to a different position, *Allen* v. *Scribner*, 828 F.2d 1445 (1987); and rescinding an appointment to a new post, *Salem* v. *Terhune*, 72 Fed. Appx. 670 (2003). Courts in other circuits applying the majority rule have been equally sensitive to the deterrent effects of adverse and retaliatory conduct by employers.[7]

---

[6] See, *e.g.*, *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000); *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (CA4 2000); *Farmer* v. *Cleveland Pub. Power*, 295 F.3d 593, 602 (CA6 2002); *Spiegla* v. *Hull*, 371 F.3d 928, 941 (CA7 2004); *Coszalter*, 320 F.3d at 974-75; *Andersen* v. *McCotter*, 100 F.3d 723, 727 (CA10 1996).

[7] See, *e.g.*, *Cole*, 2004 U.S. Dist. LEXIS at *25-*26 (written reprimand and letter threatening termination suffice for actionable retaliation); *Suppan*, 203 F.3d at 234-35 (harassment and retaliatory promotion rankings held actionable retaliation); *Saleh* v. *Upadhyay*, 11 Fed. Appx. 241, 256 (CA4 2001) (threat to professor's tenure satisfies standard for actionable retaliation); *Farmer*, 295 F.3d at 602 (suspensions, reduction of duties, denied transfers, and

B. The Court's Intervention Is Needed to Resolve This Entrenched and Intolerable Circuit Split.

This Court's intervention is necessary because the courts of appeals' competing legal rules are well developed and unlikely to converge in future litigation. The Seventh Circuit first articulated its test ("whether the adverse action taken by the defendant is likely to chill the exercise of constitutionally protected speech") in 1979 and has consistently applied that rule for a quarter-century. See, *e.g.*, *McGill* v. *Bd. of Educ. of Pekin Elementary Sch.*, 602 F.2d 774, 780 (1979); *Spiegla* v. *Hull*, 371 F.3d 928, 941 (2004). Similarly, for more than ten years the Fifth Circuit has repeatedly applied a contrary rule, holding that retaliatory actions are not adverse employment actions even when they have the effect of chilling protected speech. See, *e.g.*, *Pierce*, 37 F.3d at 1150; *Breaux* v. *City of Garland*, 205 F.3d 150, 157 (2000). Several other circuits have also repeatedly adhered to their positions on this issue.[8]

Only this Court's intervention can bring uniformity to the law for the further reason that the disagreement rests on fundamentally inconsistent interpretations of this Court's precedent. In *Rutan*, this Court held that the First Amendment prohibits public employers from taking adverse action against public employees because of their political affiliations. 497 U.S. at 65. The Court reasoned that because

---

negative performance evaluations could constitute actionable retaliation); *Schuler* v. *City of Boulder*, 189 F.3d 1304, 1309-10 (CA10 1999) (reprimands, involuntary transfers, and bad performance evaluations constitute actionable retaliation).

[8]Courts in the Fourth, Sixth, and Ninth Circuits have consistently applied the majority rule, see, *e.g.*, *Goldstein*, 218 F.3d at 356; *DiMeglio* v. *Haines*, 45 F.3d 790, 806-07 (CA4 1995); *Farmer*, 295 F.3d at 602; *Bloch* v. *Ribar*, 156 F.3d 673, 678 (CA6 1998); *Coszalter,* 320 F.3d at 975; *Thomas* v. *Carpenter*, 881 F.2d 828, 829-30 (CA9 1989), while courts in the Eighth Circuit have continued to apply the minority rule, see, *e.g.*, *Fitzgerald*, 285 F.3d at 713-15; *Bechtel* v. *Belton*, 250 F.3d 1157, 1162 (CA8 2001);

"deprivations less harsh than dismissal" could "nevertheless press [public] employees and applicants to conform their beliefs and associations to some state-selected orthodoxy," such deprivations were impermissible. *Id.* at 75. As the Court noted, the First Amendment "protects state employees * * * from even an act of retaliation as trivial as failing to hold a birthday party for a public employee when intended to punish her for exercising her free speech rights." *Id.* at 75 n.8 (quoting *Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 954 n.4 (CA7 1989)) (alteration and internal quotation marks omitted). Accordingly, even minor acts that stem from a forbidden animus are actionable under the First Amendment.

Despite the guidance provided by this Court in *Rutan*, some circuits (including the Eleventh Circuit in this case) deem *Rutan*'s description of the threshold for retaliation to be dicta and continue to rely on their pre-existing precedent applying a more rigorous standard. See, *e.g.*, Pet. App. 14a n.8; *Pierce*, 37 F.3d at 1146, 1150 & n.1. By contrast, other circuits have relied on *Rutan*'s broad deterrence language to establish a lower threshold for actionable retaliation. See, *e.g.*, *Tao*, 27 F.3d at 639 (citing *Rutan* as holding that minor forms of retaliation can be actionable), *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 450 n.8 (CA4 2004) (citing *Rutan* for the proposition that "it is well established that even minor retaliation can have a chilling effect on future expression"); *Fruin*, 28 F.3d at 649 n.3 (noting that "minor forms of retaliation * * * may have just as much of a chilling effect on speech as more drastic measures").

Uniformity is particularly important when, as here, constitutional rights are involved. The First Amendment should provide the same protection to government employees everywhere. But as a result of this circuit split, government employees in Atlanta enjoy substantially less protection than those in Chicago, solely because of where they happen to live. Certiorari is warranted to resolve this disparity.

C. Petitioner's Case Is an Ideal Vehicle for Determining the Contours of Actionable Retaliation.

The number and variety of undisputed retaliatory acts taken against petitioner makes her case an ideal vehicle for establishing a uniform threshold for actionable retaliation.

Under the majority rule, petitioner states a claim under Section 1983 if she alleges *any* non-trivial "deprivation * * * that is likely to deter the exercise of free speech." *Power* v. *Summers*, 226 F.3d 815, 820 (CA7 2000). In fact, petitioner has alleged at least *five* such acts by respondent, see *infra*, each of which would individually qualify as actionable retaliation under the majority rule, yet the Eleventh Circuit held that none was actionable. The question of what constitutes actionable retaliation is thus squarely outcome determinative in this case.

Moreover, the case presents an ideal record on which to decide the question presented. Each of the acts alleged by petitioner is clearly established in the record and undisputed by respondents. Because the case delineates four types of employer conduct that the district courts regularly confront, it provides an excellent opportunity for this Court to illustrate concretely when such conduct is actionable under Section 1983. By contrast, the Court in *Rutan* dealt largely in hypotheticals that some circuits dismissed as dicta.

1. Respondent Firestone committed an act of actionable retaliation by sending petitioner a letter in which he chastised her for dissenting from the hiring committee's decision and making accusations of gender discrimination. The letter was copied to petitioner's supervisors to alert them to what Firestone considered petitioner's "inappropriate" behavior, and it was accompanied by verbal threats that petitioner could only "hope for the best" in the tenure process, given her lack of "collegiality," and that she should curtail her "upstart attitude." Pet. C.A. Br. 7-9. The Eleventh Circuit held that the letter was not actionable retaliation because it had "no

impact on an important condition of [petitioner]'s job, such as her salary, title, position, or job duties." Pet. App. 17a.

By comparison, such written warnings would be actionable under the majority rule because they have "the potential to 'press state employees * * * to conform their beliefs and associations to some state-selected orthodoxy.'" *Aquavia* v. *Goggin*, 208 F. Supp. 2d 225, 233 (D. Conn. 2002) (alteration in original) (quoting *Rutan*) (formal reprimand, placed in personnel file, constitutes actionable retaliation).[9] See also *Schuler* v. *City of Boulder*, 189 F.3d 1304, 1310 (CA10 1999) (written warning constitutes actionable retaliation); *Glass* v. *Dachel*, 2 F.3d 733, 742 (CA7 1993) (same); *Cole*, 2004 U.S. Dist. LEXIS 24746, at *26 (warning letter can constitute actionable retaliation).

2. Respondent Firestone also engaged in actionable retaliation when he compiled a "separate personnel file" about petitioner, ostensibly to address Assistant Dean Morrow's concern that a faculty vote not to renew petitioner's contract had been motivated by dislike for petitioner's criticism of the department. Pet. C.A. Br. 13. Firestone's internal investigation consisted of soliciting exclusively negative statements about petitioner's past work in an admitted attempt to justify the non-renewal vote and ensure that petitioner was fired. *Id.* 15. After reviewing the file, Morrow determined that the file's negative portrayal of petitioner was "colored by intervening events" and that the "discrepancy" between petitioner's positive evaluations and the results of Firestone's investigation could be explained by "the whole issue of the [1995 hiring] search." *Id.* 14-15. Because the "separate personnel file" did not have an "impact on an important condition of [petitioner]'s job," the court below held that the file did not amount to actionable retaliation. Pet. App. 17a.

---

[9] "Reprimands" are included on the short list of acts that qualify as actionable retaliation under the minority rule. However, no court in any of the minority circuits has ever held that a written reprimand, standing alone, qualifies as actionable retaliation.

By contrast, under the majority rule, an "investigation" designed to "revoke * * * privileges" is "more than trivial" and constitutes actionable retaliation. *Ulrich* v. *City and County of San Francisco*, 308 F.3d 968, 977 (CA9 2002). See also *Salem* v. *Terhune*, 72 Fed. Appx. 670, 672 (CA9 2003) (investigation based on false accusations constitutes actionable retaliation); *Rivera-Jiménez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (internal investigation constitutes actionable retaliation); *Gumm* v. *Flickenger*, No. 03-C-8174, 2004 U.S. Dist. LEXIS 19700, at *29 (N.D. Ill. Sept. 29, 2004) ("invasive and extensive investigations" constitute actionable retaliation).

3. Petitioner also suffered actionable retaliation when respondent Squires falsely accused her of suffering from a mental illness, detailed those allegations in a memorandum that he distributed to the third-year review committee, and read aloud portions of the memorandum to the committee. The question of petitioner's mental illness was specifically raised in the committee's report, which was presented to the faculty before the 1996 non-renewal vote. Pet. C.A. Br. 23. The Eleventh Circuit held that the false accusations were "not substantial enough to be actionable." Pet. App. 17a.

Respondent Squires's false accusation qualifies as actionable retaliation under the majority rule. Several courts have stated specifically that "[l]esser retaliation, such as * * * false accusations," may constitute actionable retaliation. *DeGuiseppe* v. *Village of Bellwood*, 68 F.3d 187, 191 (CA7 1995); *Barrett* v. *Harrington*, 130 F.3d 246 (CA6 1997), cert. denied, 523 U.S. 1075 (1998) (judge's false accusations to the media that attorney investigating her bench record was stalking her established a claim of First Amendment retaliation).

4. Respondent Firestone's subjection of petitioner to a negative performance evaluation, Pet. C.A. Br. 17, also constitutes actionable retaliation insofar as he has admitted that petitioner's public accusations of gender discrimination

formed part of the basis for that negative evaluation. *Id.* 19. Although the opinion below did not directly confront the question, other courts in the Eleventh Circuit have held that a negative evaluation, standing alone, does not constitute actionable retaliation. *Merriweather* v. *Alabama Dep't of Pub. Safety*, 17 F. Supp. 2d 1260, 1275 (D. Ala. 1998).

Under the majority rule, a negative performance evaluation can be considered actionable retaliation. See, *e.g.*, *Schuler* v. *City of Boulder*, 189 F.3d 1304, 1310 (CA10 1999) (low score on performance evaluation constitutes actionable retaliation). See also *Ulrich* v. *City and County of San Francisco,* 308 F.3d 968, 977 (CA9 2002) (filing of an written adverse written report with local review board about plaintiff's job performance amounted to actionable retaliation); *Kantha*, 262 F. Supp. at 103 (negative performance evaluation constitutes actionable retaliation); *Quinn* v. *Village of Elk Grove Bd. of Fire & Police Comm'rs*, No. 01-C-8504, 2002 U.S. Dist. LEXIS 24654, at *14 (N.D. Ill. Dec. 24, 2002) ("punitive act short of discharge" sufficient to sustain a First Amendment retaliation claim); *Axel* v. *Apfel*, 171 F. Supp. 2d 522, 527-28 (D. Md. 2000) (Fourth Circuit considers poor performance evaluations actionable retaliation).

5. Finally, the instances of actionable retaliation perpetuated by Squires and Firestone directly contributed to a faculty vote not to renew petitioner's contract, and thus amounted to actionable retaliation because they imposed considerable costs on petitioner. Pet. C.A. Br. 29. Petitioner was forced to appeal the non-renewal vote to an internal grievance committee, a lengthy process that cost her "tens of thousands of dollars" in legal fees. *Id.* 3. The committee eventually vindicated petitioner – finding both the vote and the retaliation "improper" and motivated by petitioner's conduct in connection with the 1995 hiring process – but petitioner was never reimbursed for her legal fees. *Id.* 30-31. Although the decision below did not address this issue in the First Amendment context, it dismissed these costs as

"insubstantial" when discussing the Title VII claim. Pet. App. 11a.

Under the majority rule, the forced expenditure of significant amounts of time or money to obtain or retain benefits may be considered actionable retaliation. The D.C. Circuit, for example, has held that requiring an employee to re-submit new materials in support of her promotion application – which involved an additional twenty-seven hours of work – is sufficient to implicate First Amendment concerns. *Tao* v. *Freeh*, 27 F.3d 635, 639 (1994).

D. Certiorari Is Further Warranted Because This Issue Is Both Frequently Recurring and Important.

This Court should grant certiorari because the lower courts are frequently presented with First Amendment retaliation claims that require them to consider whether particular actions constitute "actionable retaliation." Under current law, these suits are governed by conflicting and uncertain standards.

The number of Section 1983 retaliation claims is substantial: over fifty cases in the courts of appeals, as well as many more in the district courts, have directly addressed this issue, often with widely varying results. See *supra* Part I.A-C. The high volume of litigation is not surprising, given that more than nineteen million Americans – almost all of whom are protected from retaliation by this Court's First Amendment doctrine – currently work for state and local government entities. *The Employment Situation*, U.S. Bureau of Labor Statistics (Dec. 2004).

Moreover, in recent years the frequency of litigation has greatly increased. In 1989, Judge Posner remarked that "claims of politically motivated personnel action in public employment abound in this circuit." *Piecyznski* v. *Duffy*, 875 F.2d 1331, 1332 (CA7 1989). Since then, the number of retaliation claims has increased, especially after this Court recognized in *Rutan* that a retaliation claim can be based upon

retaliatory actions short of firing. 497 U.S. 62 (1990). And this Court's holdings in *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668 (1996), and *O'Hare Truck Service* v. *Northlake*, 518 U.S. 712 (1996), that government contractors' speech receives the same protection as that of "traditional" government employees have further expanded the pool of employees protected from retaliation – and, thus, the number of potential retaliation claims.

The question of what constitutes "actionable retaliation" is also important because it arises in numerous contexts. The petitioner in this case was the victim of retaliation because she voiced concerns about gender discrimination and assisted a rejected job candidate in raising discrimination claims. Pet. App. 3a. Other cases have involved retaliation against employees based on their support for political candidates or parties that their supervisors opposed. See *Rutan*, 497 U.S. at 67; *Phillips*, 278 F.3d at 106-07. Still other cases were brought by employees who were retaliated against after they exposed corruption or public health hazards. See, *e.g.*, *Coszalter*, 320 F.3d at 970-71 (employee who exposed ongoing sewage discharge into residential streets); *Farmer*, 295 F.3d at 598 (employee who alleged political nepotism); *Spiegla*, 371 F.3d at 933-34 (employee who reported highly suspicious conduct by his supervisors); *Dahm* v. *Flynn*, 60 F.3d 253, 255 (CA7 1994) (employee who testified against her supervisor in an internal investigation); *Bechtel* v. *Belton*, 250 F.3d 1157, 1158 (CA8 2001) (fireman who criticized department's preparedness and condition of equipment).

Finally, this issue is important in light of its broader implications for free speech. This Court has repeatedly emphasized that a central purpose of the First Amendment is to prevent government conduct that chills expression.[10]

---

[10] See *New York Times* v. *Sullivan*, 376 U.S. 254, 279 (1964) (defamation standard that did not include a malice requirement would "dampen[] the vigor and limit[] the variety of public debate," and would lead to "self-censorship" by "would-be critics

Government conduct that chills the expression of government employees on issues of public concern is particularly undesirable, given that those employees are often in the best position to observe and report wrongdoing. See *Waters* v. *Churchill*, 511 U.S. 661, 674 (1994). In holding that many retaliatory actions will not constitute "actionable retaliation" for First Amendment purposes "even though they may have had the effect of chilling * * * speech," Pet. App. 17a (quoting *Pierce*, 37 F.3d at 1150), the minority rule applied by the Eleventh Circuit threatens to substantially curtail the free speech of government employees.

E. The Eleventh Circuit's Decision Is Wrong on the Merits.

1. Certiorari is also warranted because the Eleventh Circuit's holding that "actionable retaliation" requires a change in an important condition of employment is erroneous.

First, the decision below is contrary to both the text of Section 1983 and this Court's decisions construing that vital civil rights statute. The statute creates a right of action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Notably, it does not limit such claims to instances in which the victim suffers particularly egregious injuries. This Court has thus repeatedly recognized that "[a] broad construction of § 1983 is compelled by the statutory language." *Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991) (internal citations omitted). "The legislative history of the section also suggests that as a remedial statute, it should be liberally and beneficently construed." *Ibid.* (internal quotations and citation omitted).

---

of official conduct"); *Reno* v. *ACLU*, 521 U.S. 844, 872 (1997) (noting that the Communications Decency Act had an "obvious chilling effect on free speech"); *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958) (mandated disclosure of membership lists would have an impermissible "deterrent effect" on the free exercise of members' association rights).

The decision below is also contrary to this Court's line of cases regarding government employees' speech. Those decisions are fundamentally inconsistent with the notion that retaliatory actions which admittedly chill protected speech nonetheless do not constitute actionable retaliation under Section 1983. In *Rutan*, for example, while holding that retaliation can include adverse actions short of firing, this Court focused not on the *form* of a retaliatory action, but on whether it "pressur[es] employees to discontinue the free exercise of their First Amendment rights." 497 U.S. at 79.

The Eleventh Circuit's ruling is further contrary to the purpose underlying this Court's decision in *Pickering* v. *Board of Education*, in which this Court held that government employees cannot be fired for speaking about matters of public importance and emphasized "the public interest in having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause of the First Amendment." 391 U.S. 563, 573 (1968). The Eleventh Circuit's ruling gives government officials too much latitude to retaliate against workers on the basis of their protected speech, thereby discouraging the "free and unhindered debate" that is at the core of *Pickering*.

Finally, the Eleventh Circuit is wrong on the merits because in other areas of constitutional law, this Court has never placed a heightened requirement of injury on plaintiffs in Section 1983 cases. In *Carey* v. *Piphus*, this Court held that even a plaintiff who cannot prove that he has suffered any actual damages can state a claim for deprivation of procedural due process, "because of the importance to organized society that procedural due process be observed." 435 U.S. 247, 266-67 (1978). Similarly, in *Wisconsin* v. *Constantineau*, this Court held unconstitutional a statute that, without any procedural protections, allowed city officials to prohibit liquor stores from selling to certain people. 400 U.S. 433 (1971). The plaintiff, who had been given no notice or hearing, was included in a "do not sell" notice that was sent to all liquor stores in the city. *Id.* at 435. This Court held that

the plaintiff's procedural due process rights were implicated, even though the injury was entirely nonpecuniary and only related to his "good name, reputation, honor, or integrity." *Id.* at 437. See also *Nixon* v. *Herndon*, 273 U.S. 536, 540-41 (1927) (deprivation of right to vote actionable notwithstanding lack of quantifiable injury). There is no reason to treat the First Amendment differently.

2. The courts of appeals that apply the minority rule attempt to justify their holdings on the ground that more broadly permitting retaliation claims under Section 1983 would "open the floodgates" to frivolous litigation. See, *e.g.*, *Breaux* v. *City of Garland*, 205 F.3d 150, 157 (CA5 2000). That argument is meritless. As an initial matter, there is no indication that circuits applying the majority rule face more litigation than those applying the minority rule.[11] Also, even those circuits that apply the majority rule still require plaintiffs to prove that the defendants' acts were non-trivial. See, *e.g.*, *Thomsen* v. *Romeis*, 198 F.3d 1022, 1027 (CA7 2000). Additionally, some circuits use an objective test that asks whether a person of ordinary firmness would be deterred from exercising the protected speech, see, *e.g.*, *Farmer*, 295 F.3d at 602; *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000) – a rule which ensures that government officials will not be held liable to overly sensitive employees. Finally, in the long run the majority rule may well reduce the volume of litigation by deterring retaliation and promoting better compliance by employers.

Alternatively, the decision below asserted that its high standard for "actionable retaliation" is essential to "satisfy principles of justiciability" because a contrary rule would not

---

[11] For example, in the courts of the Sixth and Seventh Circuits – which apply the majority rule – petitioner's research located thirty and fifty-four First Amendment retaliation cases, respectively. In the courts of the Eleventh and Fifth Circuits, which apply the minority rule, there were thirty-two and fifty-four retaliation cases, respectively.

satisfy the "injury-in-fact requirement of federal justiciability law." Pet. App. 15a. That argument is meritless as well. "Article III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986) (citation and internal quotation omitted). That standard is easily met in this case, because tens of thousands of dollars in attorneys' fees, allegations of mental illness, negative performance reviews, and emotional harm and damage to reputation clearly constitute "actual or threatened injury."

The Eleventh Circuit cited *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972), for the proposition that "allegations of a subjective 'chill'" are not enough to meet justiciability requirements. Pet. App. 15a. *Laird* involved plaintiffs who alleged that the "very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights." *Laird*, 408 U.S. at 13. This Court noted that the claims were merely "speculative apprehensiveness," because they involved nothing more than fears of *future* misuse of the information." *Ibid.* In contrast, this case involves tangible adverse actions by respondents that were taken in direct response to petitioner's protected speech – direct retaliation that is clearly more concrete than *Laird*'s "speculative apprehensiveness."

3. Neither the district court nor respondents' own appellate brief even implied that the individual respondents were entitled to qualified immunity on the ground that the law was not clearly established. The Eleventh Circuit, in a passing remark, nonetheless indicated that they enjoyed immunity, reasoning that respondents could not be held liable under Section 1983 because "there was no clearly established law to put them on notice that their actions were a violation." Pet. App. 18a. The Eleventh Circuit's holding, which squarely conflicts with its sister circuits, thus provides a further basis for review.

The panel below acknowledged that this case was the Eleventh Circuit's first opportunity to decide the standard of liability on a Section 1983 First Amendment retaliation claim. Pet. App. 13a. Although at least five circuits would have held respondents' conduct actionable under a First Amendment Section 1983 claim in 1995, when respondents' retaliatory actions occurred, see, *e.g.*, *Tao* v. *Freeh*, 27 F.3d 635, 639 (CADC 1994); *Morfin* v. *Albuquerque Public Schools*, 906 F.2d 1434, 1437 (CA10 1990); *Agosto-de-Feliciano* v. *Aponte-Roque*, 889 F.2d 1209, 1218-20 (CA1 1989); *Anderson* v. *Central Point Sch. Dist. No. 6*, 746 F.2d 505, 506-08 (CA9 1984); *Yoggerst* v. *Stewart*, 623 F.2d 35, 39 (CA7 1980), while only one circuit would have held otherwise, see *Pierce* v. *Texas Dep't of Crim. Justice*, 37 F.3d 1146, 1149-50 (CA5 1994), the court of appeals asserted as a matter of law that respondents would in any event be entitled to qualified immunity, Pet. App. 18a. This result was compelled by the Eleventh Circuit's settled rule that "only Supreme Court cases, Eleventh Circuit caselaw, and Georgia [Florida, or Alabama] Supreme Court caselaw can 'clearly establish' law in this circuit." *Thomas ex rel. Thomas* v. *Roberts*, 323 F.3d 950, 955 (2003) (citations omitted)).

By contrast, other circuits reaching the question of whether the law was "clearly established" would have rejected respondents' qualified immunity claims on the basis of (i) this Court's conclusion that retaliation of the sort presented by this case gives rise to a First Amendment retaliation claim (see *supra* at 11-12), and (ii) the great weight of authority in other circuits to the same effect (see *supra* at 13–17). For example, in *El Dia, Inc.* v. *Governor Rossello*, the First Circuit determined that the government's withdrawal of advertising from a newspaper because of the paper's critical articles was "clearly established" as retaliatory conduct. 165 F.3d 106, 110 (1999). The court explained that "the location and level of the precedent, its date, its persuasive force, and its level of factual similarity to the facts before this Court may all be pertinent to whether a particular

precedent 'clearly establishes' law for the purposes of a qualified immunity analysis." *Id.* at 110 n.3. Similarly, the Tenth Circuit rejected a qualified immunity claim in *Dill* v. *City of Edmond*, holding that "the law in other circuits was clearly established" that a transfer and change in work schedule could constitute actionable retaliation. See 155 F.3d 1193, 1205 (1998). The Sixth Circuit adopted the same approach in determining whether particular speech was covered by the First Amendment. See *Bonnell* v. *Lorenzo*, 241 F.3d 800, 824 (2001). It found that "[n]o decisions from the Supreme Court, our circuit, or *any other court*, clearly establish that Plaintiff's speech in the instant case was constitutionally protected * * *." *Ibid.* (emphasis added).

More generally, the Eleventh Circuit's refusal to consider out-of-circuit precedent in determining whether a law is "clearly established" is out of step with the practices of other circuits[12] and this Court's decisions, which provide that *all* relevant precedent should shape the qualified immunity determination.[13]

---

[12] See, *e.g.*, *Boyd* v. *Benton County*, 374 F.3d 773, 781 (CA9 2004) ("[I]n the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes * * *."); *Buckley* v. *Rogerson*, 133 F.3d 1125, 1129 (CA8 1998) (same); *Cleveland-Purdue* v. *Brutsche*, 881 F.2d 427, 431 (CA7 1989) (same); *Peterson* v. *Jensen*, 371 F.3d 1199, 1202 (CA10 2004) ("A right is clearly established * * * if the clearly established weight of authority from other circuits found a constitutional violation from similar actions.") (quotation marks and citation omitted) .

[13] See *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994) (holding in Section 1983 case that "[a] court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own [and other relevant] precedents") (second alteration in original) (internal quotation and citation omitted); see also *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (upholding a grant of qualified immunity but indicating that a different result would have been reached had petitioners "identified a consensus of cases

Finally, to the extent that the court of appeals intended to accord respondents qualified immunity because it was not clearly established that petitioners' claim presented a substantial enough injury to give rise to a *justiciable controversy* (see *supra* at 21-22), its conclusion is flatly contrary to this Court's qualified immunity precedent, which considers whether the stated *constitutional right* was clearly determined, as the right asserted here clearly was: numerous decisions of this Court establish the right to be free from retaliation for engaging in protected speech. See, *e.g.*, *Rutan*, 497 U.S. at 76 n.8.

II. Certiorari Should Be Granted To Resolve The Circuit Conflict Over What Acts Constitute An Adverse Employment Action Under Title VII.

1. Title VII's anti-retaliation provision prohibits an employer from "discriminat[ing] against any of his employees * * * 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." See 42 U.S.C. 2000e-3(a). The panel below held as a matter of law that petitioner could not state a Title VII claim under that court's settled precedent, which deems retaliatory conduct unlawful only if it materially alters the employee's compensation, terms, conditions, or privileges of employment. Pet. App. 10a. Moreover, the court held that retaliatory conduct is in any event lawful so long as the employer takes corrective measures to mitigate the retaliation's adverse effects on the employee. *Ibid.* These rulings conflict with the precedent of other courts of appeals and merit this Court's review.

Although the circuits agree that "actions such as hiring, discharge, compensation [and other major employment

---

of persuasive authority such that a reasonable officer could not have believed that his actions were lawful").

decisions] constitute adverse actions," they "disagree about whether less egregious employment actions (i.e., poor performance evaluations, lateral transfers, intermediate acts of discipline and harassment) constitute adverse actions" under Title VII's retaliation prohibition. Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 321 (2002).

The Eleventh Circuit's standard is particularly strict: retaliation amounts to an actionable adverse employment action only if it is either "an ultimate employment decision," Pet. App. 15a, or "objectively serious and tangible enough to alter [the employee's] compensation, terms, conditions, or privileges of employment," *Gupta* v. *Fla. Bd. of Regents*, 212 F.3d 571, 588 (2000) (citation and internal quotation marks omitted). Under this standard, the Eleventh Circuit rejected two bases of retaliation that other circuits would have deemed actionable.

First, in response to her decision to speak out about gender discrimination in the department's hiring process, petitioner was subjected to a negative job evaluation. Pet. C.A. Br. 17-19. Several other circuits have stated that such "unwarranted negative job evaluations" can qualify as an adverse employment action. *Wyatt* v. *City of Boston*, 35 F.3d 13, 16 (CA1 1994); see also *Yartzoff* v. *Thomas*, 809 F.2d 1371, 1376 (CA9 1987); *O'Brien* v. *City of Philadelphia*, No. 04-CV-1567, 2004 U.S. Dist. LEXIS 21222, at *8 (E.D. Pa. Oct. 19, 2004) (allegations that include negative performance evaluation sufficient to survive motion to dismiss).

Second, petitioner suffered an adverse employment action when respondent Board voted in 1996 against renewing her contract, thereby constructively dismissing her. Pet. App. C.A. Br. 26. Though the vote was eventually overturned – following an appeals process which determined that petitioner had been wrongfully terminated based on her

gender and because she had spoken out against gender discrimination that she had observed – petitioner was forced to expend "tens of thousands of dollars" to plead her case and was, for a period *longer than a year*, subjected to the constant fear that she had lost her job. *Id.* 3, 29-30. In the Eleventh Circuit, however, an employer's actions must have irreversible and final adverse consequences; subsequent corrective action shields the employer from liability. Pet. App. 10a-11a; *Gupta*, 212 F.3d at 588. Petitioner's reinstatement thus transformed her constructive termination into an action "not objectively serious and tangible enough to be [an] adverse employment action[]." Pet. App. 11a.

The Eleventh Circuit's rule directly conflicts with the Ninth Circuit's settled construction of Title VII's anti-retaliation provision. For nearly fifteen years, the Ninth Circuit has applied the same rule under Title VII that it does in Section 1983 cases: retaliatory conduct is an actionable adverse employment action if it is "reasonably likely to deter employees from engaging in protected activity." *Ray* v. *Henderson*, 217 F.3d 1234, 1243 (CA9 2000). Because the probability of adverse consequences can deter protected activity, an employee need not trace an adverse employment action to an actual harm; the potential or threat of such harm suffices to establish an employer's liability. Thus, in *Hashimoto* v. *Dalton*, 118 F.3d 671, 676 (CA9 1997), the plaintiff received a negative job reference from the defendant in retaliation for her employment discrimination complaints. And the Ninth Circuit deemed it irrelevant that the plaintiff would not have been hired, reasoning that the fact that the unlawful action "turned out to be inconsequential goes to the issue of damages, not liability." *Id.* at 676.

And in contrast with the Eleventh Circuit, the Ninth Circuit has determined that an adverse employment action is not expunged if an aggrieved employee is only threatened with, or subsequently obtains a reversal of, the retaliatory decision. The retaliation or threatened retaliation itself constitutes a cognizable adverse employment action. See, *e.g.*,

Hashimoto, 118 F.3d at 676 (negative job reference qualified as adverse employment action even when it "turned out to be inconsequential"); *Dimitrov* v. *Seattle Times Co.*, No. 98-36156, 2000 U.S. App. LEXIS 22402, at *9 (CA9 Aug. 29, 2000) (employer liable even though retaliation reversed on appeal); *Moore* v. *Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 848 (CA9 2002) (even a *threatened* act of retaliation action can constitute adverse employment action).

2. This conflict is untenable. Uniformity is essential on this issue because it deals with the anti-retaliation scheme, which is a central feature of Title VII, one of the nation's most important anti-discrimination laws. The anti-retaliation provisions of the statute should not be treated differently in different parts of the country. All employees are entitled to the same level of protection from retaliatory threats and harm. It is an intolerable state of affairs when Floridians enjoy fewer federal anti-discrimination protections than Oregonians, yet this circuit conflict creates precisely this result.

The question is moreover of great importance because Title VII retaliation claims are frequently litigated. Title VII applies not only to almost all "employers" in an "industry affecting commerce," 42 U.S.C. 2000e(b), but also to local, state, and federal government entities, *id.* § 2000e(a). According to the EEOC, over 20,000 Title VII retaliation claims were filed in fiscal year 2003. EEOC, "Charge Statistics FY 1992 Through FY 2003," *at* http://www.eeoc.gov/stats/charges.html. Indeed, claim filings have *increased* by more than 96% since 1992. *Id.*

3. The Eleventh Circuit's extremely limited conception of the acts that amount to adverse employment actions under Title VII is also wrong on the merits. Its rule is directly contrary to the text of the anti-retaliation provision, which prohibits an employer from "discriminat[ing] against any of his employees * * * 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." 42 U.S.C. 2000e-3(a). The term "discriminate[]" merely means "differential treatment." BLACK'S LAW DICTIONARY 500 (8th ed. 2004).

Title VII's anti-retaliation provision covers a broader range of employer conduct than its anti-discrimination provision. The latter provision protects an individual from discrimination only "*with respect to his compensation, terms, conditions, or privileges of employment*," based on race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a)(1) (emphasis added). This Court has held that, for purposes of this anti-discrimination provision, only extreme conduct will amount to a change in the terms and conditions of employment. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998). Yet the Eleventh Circuit has imported this requirement into Title VII's anti-retaliation provision, which contains no such limiting language. See, *e.g.*, *Davis* v. *Town of Lake Park*, 245 F.3d 1232, 1238 (CA11 2001) ("The adverse action requirement is not unique to Title VII's anti-discrimination clause. It has been imposed in cases under Title VII's retaliation clause, even though that provision is not limited to unlawful conduct with respect to the 'terms, conditions, or privileges of employment.'").

The Eleventh Circuit's high standard for "adverse employment action" is moreover contrary to Title VII's remedial purpose. "Maintaining unfettered access to statutory remedial mechanisms" is "a primary purpose of antiretaliation provisions * * *." *Robinson* v. *Shell Oil*, 519 U.S. 337, 346 (1997). "[I]t would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Id.* And a broad construction of the anti-retaliation provision is particularly important insofar as one of its purposes is to protect employees – such as petitioner – who complain about discrimination against others; the forms of mistreatment that might deter this salutary whistleblowing may be quite broad indeed, given that the complaining individual often has no stake in the employer's discriminatory behavior. However,

by permitting retaliation as long as it does not "alter the employee's compensation, terms, conditions, or privileges of employment," Pet. App. 10a, the Eleventh Circuit's rule invites precisely that impunity.

Finally, the Eleventh Circuit's decision is directly contrary to the Compliance Manual issued by the EEOC, which administers Title VII.[14] The Manual indicates that "[t]he anti-retaliation provisions are exceptionally broad," and "set no qualifiers on the term 'to discriminate,' and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment." *U.S. Equal Employment Opportunity Comm'n Compliance Manual*, § 8, at 14 (May 1998), *at* http://www.eeoc.gov/policy/docs/retal.pdf.

CONCLUSION

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

---

[14] This Court has repeatedly referred to the Manual when interpreting Title VII. Relying on the Manual, *Robinson* gave weight to the EEOC's conclusion that allowing retaliation against former employees would "deter victims of discrimination from complaining to the EEOC." 519 U.S. at 345-46 (holding that Title VII's anti-retaliation provisions also extend to former employees). See also *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 65 (1986) (guidelines are "not controlling" but "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (internal quotations omitted).

Respectfully submitted,

David C. Ates
Miller, Billips & Ates
730 Peachtree St.
Suite 750
Atlanta, GA 30308

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543[15]

February 11, 2005

[15] Counsel for petitioner were principally assisted by the following students in the Harvard Law School Supreme Court Litigation class: Jeffrey M. Harris, Christopher Houpt, Anton Metlitsky, Sharmila Sohoni, and Alixandra Smith. Class members Mark Conrad, Elissa Hart, Gregory Reilly, Won Shin, and Neel Sukhatme also participated.