No. 16-1386

IN THE

Supreme Court of the United States

SUSAN L. VAUGHAN, PETITIONER,

v.

ANDERSON REGIONAL MEDICAL CENTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I. REVIEW IS WARRANTED BECAUSE THE ISSUE IS A PURE MATTER OF LAW WHICH HAS RESULTED IN CONFLICTING DECISIONS ACROSS THE CIRCUIT COURTS

Respondent in opposing certiorari makes a half-hearted attempt to argue there is no circuit split on the important issue of federal law presented in the Petition. Petitioner characterizes the effort as half-hearted because Respondent cannot credibly argue otherwise. The District Court found that the "[f]ederal appellate courts to have considered the issue are split on whether the incorporation of the Fair Labor Standards Act's (FSLA) § 216(b) into the ADEA authorized compensatory and punitive damages in retaliation cases." Pet. App. 26a. The Fifth Circuit acknowledged this split when it accepted the District Court's request to certify an appeal pursuant to 28 U.S.C. § 1292(b) because the case presented a "controlling question of law as to which there is a substantial ground for a difference of opinion." Pet. App. 2a.

Respondent's contention that certiorari should not be granted as "[t]his Court has previously entered a controlling decision in *Comm'r v. Schleier*, 515 U.S. 323, 326 (1995)" Br. Opp. 6, is a thinly-veiled attempt to misdirect the Court from what is obvious—there is a split on this issue across the circuits. Simply put, had *Schleier* answered the question, there would be no need for the District Court and Fifth Circuit to note the split in the circuits, and there would not be the confusion on the issue across the circuits which now exists.[1]

[1] The Petition for Certiorari at page 5 n.1 also addresses why *Schleier* has limited applicability to the issue presented.

First, the issue in *Schleier* was "whether § 104(a)(2) of the Internal Revenue Code authorizes a taxpayer to exclude from his gross income the amount received in settlement of a claim for back pay and liquidated damages under the Age Discrimination in Employment Act." *Schleier*, 515 U.S. at 324. More importantly, Mr. Schleier's claim was for being fired when he reached the age of 60. It was not a claim of retaliation under the ADEA. The Court did not, and had no reason to, address whether the ADEA's incorporation of the FLSA's remedies in retaliation claims through the 1977 amendments authorizes compensatory or punitive damages. Further none of the cases cited by the Court in footnote 2 of *Schleier*, and listed by Respondent, Br. Opp. 7-8, discuss whether the amendments to the FLSA and their incorporation into the ADEA now authorize punitive and or compensatory damages in an ADEA retaliation case.[2] The question presented by the Petitioner is whether these 1977 amendments authorize compensatory and punitive damages in an ADEA retaliation case, not what damages are generally available in ADEA discrimination claims not raising retaliation. This explains why the courts have not accepted

[2] Of the cases listed *Fiedler v. Indianhead Truck Line. Inc*, 670 F.2d 806 (8th Cir. 1982) is the only case that even mentions a retaliation claim. In *Hermsen v. City of Kansas City*, 2017 WL 957545, *12 (W.D. Mo., March, 10, 2017) a district court recently refused to follow *Fiedler* recognizing that cases now "allow both punitive and emotional distress damages in FLSA retaliation cases." This is the same remedial provision which is incorporated into the ADEA for ADEA retaliation cases.

Respondent's contention that *Schleier* has answered the issue presented. [3]

Finally, on the split among the circuits, Respondents attempt to argue that *Moskowitz v. Purdue Univ.* 5 F.3d 279 (7th Cir. 1993) does not mean what the Seventh Circuit, and other appellate courts interpreting the case says it means. Br. Opp. 9. The Seventh Circuit was explicit on this point:

> An exception to the narrow construal of "legal relief" has been recognized for the case in which the plaintiff charges that he was retaliated against for exercising his rights under the age discrimination law. 29 U.S.C. § 623(d); *see Passer v. American Chemical Society*, 935 F.2d 322, 330–31 (D.C.Cir.1991). In *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108, 112 (7th Cir.1990), we treated this provision as creating a tort for which the usual common law damages can be obtained. *See also Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543, 551 (7th Cir.1991). . . . *Travis* and *Soto* rely on a specific amendment to the provision of the Fair Labor Standards Act regarding retaliation, an amendment that appears to make clear that Congress meant to enlarge the remedies available for such misconduct beyond those standardly available for FLSA (and ADEA) violations.

[3] Even the dicta quoted by Respondent, Br. Opp. 6-7, notes that in *Schleier* Respondent had not contested the issue of whether compensatory damages were then available in the circuits. As the Petition at pages 9-14 explains, some circuits hold that these damages are available in ADEA and FSLA retaliation cases. Further the EEOC takes the position these damages are available in age retaliation cases.

Moskowitz, 5 F.3d at 283-284. [4] Other circuits have followed the Seventh Circuit in finding that either compensatory or punitive damages are available under the FSLA's remedial provision which is expressly incorporated into the ADEA in cases alleging retaliation. See Pet. Cert. 9-13. The Petition outlines in detail the split and confusion across the circuits and will not be repeated here.[5]

[4] Petitioner is confused by the point made by Respondent that "[o]ther courts in the Seventh Circuit have refused to adopt" *Moskowitz*. Br. Opp.10. Respondent cites to two Iowa District Court opinions. Br. Opp. 10. Iowa is in the Eighth Circuit. More significantly, as noted in footnote 2 of this Reply, a recent district court opinion in the Eighth Circuit recognizes this is an open issue, and that the FLSA appears to permit punitive and compensatory damages in FSLA retaliation cases. Similarly, *Knight v. Nash-Finch Co.*, 2014 WL 12576235*3 (D. Neb. Feb. 5, 2014) discussed the split in district court opinions, and the split in the circuits generally, finding that punitive and compensatory damages are available in FSLA retaliation cases. Rather than counseling against a grant of certiorari, these cases reinforce the confusion both across and within the circuits.

[5] Respondent mischaracterizes Petitioner's point regarding the intra-circuit split. Br. Opp. 10-11. The Petition at pages 7-16 is clear that the basis for granting certiorari is the split across the circuits, and the fact that the federal agency charged with enforcing the ADEA has taken a position opposite of that taken by some of the circuits. The intra-circuit split discussion at page 10 of the Petition was used to vividly demonstrate how confusing the analysis of this issue is even within a circuit.

II. RESPONDENT'S OTHER ARGUMENTS GO TO THE MERITS OF THE ISSUE PRESENTED, NOT WHETHER CERTIORARI SHOULD BE GRANTED, OR OTHERWISE HAVE NO RELEVANCE TO THE ISSUE PRESENTED.

Perhaps because Respondent recognizes the confusion across the circuits, it attempts to deflect the Court's attention from the important issue presented in the Petition by raising arguments that either go to the merits of the issue presented, or which have no relevance to the Court's determination as to whether this is a matter where the Court should grant certiorari.

A. WHILE INTERLOCUTORY, THIS ISSUE IS PROPERLY PRESENTED TO THE COURT BECAUSE IT PRESENTS A CONTROLLING ISSUE OF LAW OVER WHICH THE CIRCUIT COURTS HAVE SPLINTERED.

Respondents argue that this is an interlocutory appeal, Br. Opp. 4-5, and it certainly is. But that is not a reason to deny certiorari. Rather it presents a classic example of when this Court's review is appropriate. The only authority for Respondent's argument is the 1893 case, *Am. Constr. Co. v. Jacksonville, T.& K.W. Ry. Co.*, 148 U.S. 372 (1893). Respondent's argument fails to acknowledge that in 1958 the Interlocutory Appeals Act was enacted to allow the appeal of non-final district court orders to the courts of appeals when the district court certifies that the issue is one

"involving a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Here the District Court made this certification, and the Fifth Circuit accepted the appeal on that basis. In passing the Interlocutory Appeals Act, Congress recognized the importance of permitting the appellate courts to resolve controlling issues of law that ultimately expedite the litigation. The Supreme Court has accepted petitions for certiorari in numerous cases involving interlocutory appeals in many substantive areas of the law. *See, e.g. Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393 (1968) (The Court granted certiorari in an interlocutory appeal under 28 U.S.C. § 1292(b) "to consider an important issue under the Copyright Act of 1909."); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) ("We granted certiorari believing that resolution of this basic issue should be made at this stage of the litigation, and not postponed until after a trial under the Court of Appeals' decision."); *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 167-69 (1989) (Court granted certiorari in interlocutory appeal under § 1292(b) of a discovery order, and order for further notice in ADEA class action "[t]o resolve disagreement among the Courts of Appeals."); *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 18-22 (2004) (Court granted certiorari in interlocutory appeal under § 1292(b) to determine whether liability limitations clause capped damages recoverable from railroad.); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003) (Court granted certiorari in interlocutory appeal to resolve circuit split on whether § 216(b) of the FLSA prohibited removal from state to federal court) and *Ash v. Tyson Foods*,

Inc., 546 U.S. 454, 455 (2006) (The Court granted certiorari in an unpublished, non-precedential decision from the Eleventh Circuit where the Eleventh Circuit in a race discrimination case had affirmed in part and remanded for a new trial on other issues.).

Further, contrary to Respondent's argument, this case presents a perfect vehicle for the Court's review. First, the issue presented in this case is a pure matter of law. Second, contrary to Respondents contention, pursuing discovery and ultimately a trial will add nothing to this Court's analysis of whether compensatory or punitive damages are available in ADEA retaliation cases. Third, the issue is cleanly presented to the Court and is not muddled by disputes at the factual level. Addionally, while the Court's decision will resolve the issue in this litigation, it will also save substantial judicial resources which will be expended in other cases if the Court does not answer the question presented. Finally, resolving this issue will save other employees and employers, from countless hours and costs expended in discovery and in briefing in order to preserve the matter for successive appeals.

B. RESPONDENTS OTHER ARGUMENTS REGARDING EEOC DEFERENCE AND ADEA POLICY GO TO THE MERITS OF THE ISSUE RAISED IN THE PETITION, NOT WHETHER THE COURT SHOULD GRANT CERTIORARI TO END THE CONFUSION IN THE LOWER COURTS.

Respondent argues that the EEOC guidance should not be accorded any deference. Br. Opp. 12. Whether the EEOC's guidance is entitled to deference, and what level of deference it should be accorded are issues for the Court to determine after certiorari is granted. Indeed, Petitioner conceded that "a legal issue exists regarding what level of deference the government's position is owed." Pet. 15. Consistent with the views of several circuits, the EEOC has taken the position that compensatory and punitive damages are available in ADEA retaliation cases. Other circuits have taken the opposite position. If certiorari is granted, then the Court will determine what level of deference EEOC's guidance is entitled to receive. However, review by this Court is needed to avoid the confusion created when the federal agency charged with enforcing the ADEA takes a position which is directly contrary to the views expressed by some of the circuits. Because EEOC's enforcement authority is nationwide, should the Court decline to resolve the issue presented, compensatory and/or punitive damages will be available to victims of retaliation in some areas of the United States, but unavailable in other parts of the country. Review is needed to insure there is a national consistently applied standard.

Respondent also argues that providing the damages that Ms. Vaughan seeks is "contrary to the congressional purpose of the ADEA." Br. Opp. 13. Again this is an issue the Court will resolve should it grant certiorari. However, contrary to Respondent's argument, a plain reading of the statutes, Congressional intent and this Court's prior cases support providing compensatory and punitive damages in ADEA retaliation cases.[6] Respondent concludes its argument by stating that "if any change is to be made regarding the scope of ADEA remedies, it should be done by Congress." Br. Opp. 15. Yet that is precisely the point of the Petition. Congress has made changes in the remedies available in ADEA and FSLA retaliation cases. As discussed in detail at pages 7-9 of the Petition, Congress determined that employees who were victims of retaliation under the FLSA should be entitled to "legal or equitable relief" as required to secure the purposes of the FLSA retaliation protections. 29 U.S.C. § 216(b). The ADEA incorporates this remedial provision. The EEOC and several circuits have read this congressional change as allowing compensatory and/or punitive damages in ADEA and FLSA retaliation cases. Others circuits, including the Fifth Circuit in this case have read this incorporation differently finding these damages are not permitted. The Petition asks this Court to resolve the issue to provide a consistent interpretation across the nation.

[6] Because this is really a merits discussion and not relevant to whether the Court should grant certiorari, Petitioner will not provide any further response on this point. AARP and the AARP Foundation has filed an *amicus* brief urging the Court to grant certiorari which discusses the purpose of the ADEA retaliation protections in more detail.

CONCLUSION

Review by this Court is warranted. Accordingly, Petitioner respectfully requests that the Court issue a writ of certiorari to review the February 15, 2017 judgement of the United States Court of Appeals for the Fifth Circuit. Given the federal government's enforcement authority over the ADEA, the Court could consider requesting the views of the Solicitor General on this important issue.

Respectfully submitted,

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