No. 09-400

In the Supreme Court of the United States

VINCENT E. STAUB, PETITIONER

v.

PROCTOR HOSPITAL

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, and in what circumstances, an employer may be liable under the Uniformed Services Employment and Reemployment Rights Act of 1984, 38 U.S.C. 4301 *et seq.*, based on the anti-military animus of supervisors who did not take an adverse employment action themselves, but whose anti-military animus was a motivating factor for that action.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In the Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA), 38 U.S.C. 4301 *et seq.*, Congress sought "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" and "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. 4301(a)(1) and (3). To that end, 38 U.S.C. 4311(a) provides that "[a] person who is a member of * * * a uniformed service shall not be denied initial employment, reemployment,

retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." *Ibid.*

An employee who has suffered discrimination in violation of USERRA may bring an action against his or her employer for damages and equitable relief. 38 U.S.C. 4323. The employee can establish a prima facie case of discrimination by showing that a protected status or activity—such as the performance of military service, see 20 C.F.R. 1002.22—was "a motivating factor in the employer's action." 38 U.S.C. 4311(c)(1). If the employee makes such a showing, the employer may avoid liability by establishing that "the action would have been taken in the absence of" the employee's military status. *Ibid.*

2. Petitioner, a member of the United States Army Reserve, was employed by respondent as an angiography technologist. Pet. App. 2a-3a. Janice Mulally, who was second in command of the department where petitioner worked, was openly hostile to his reserve duties. *Id.* at 3a-4a. For example, she "scheduled him for additional shifts without notice," saying that the extra shifts were a way for him to "pay[] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." *Id.* at 4a (brackets in original). The head of petitioner's department, Michael Korenchuk, was also critical of petitioner's military weekend duty obligations, which he called "a b[u]nch of smoking and joking and [a] waste of taxpayers['] money." *Ibid.* (brackets in original). After petitioner returned from active duty in early 2003, Korenchuk knew "that Mulally was 'out to get' [petitioner]," but he did nothing to stop her. *Id*. at 4a-5a.

In January 2004, petitioner was ordered "to report for 'soldier readiness processing'" in anticipation of another call to active duty. Pet. App. 6a. Korenchuk was concerned about the expense of having to hire a temporary replacement for petitioner. *Ibid.* A few weeks later, Mulally gave a written warning to petitioner for not being at his work area. *Ibid.* According to Mulally, employees in petitioner's unit were supposed to report to the diagnostic imaging services unit whenever they were not working with a patient in the angiography unit. *Id.* at 6a-7a. Petitioner disputed that such a policy existed or that he had violated it, but Korenchuk signed Mulally's warning to petitioner in order "to get her off of his back." *Id.* at 7a. Under the terms of the warning, petitioner was required to report to Korenchuk or Mulally whenever he did not have any patients and whenever he needed to leave his work station. *Ibid.*; see Def. Exh. 3 (Jan. 27, 2004) (Corrective Action: Written).

In April 2004, Angie Day, a former co-worker of petitioner's, met with Korenchuk, Vice President of Human Resources Linda Buck, and Chief Operating Officer R. Garrett McGowan to complain that Korenchuk had failed to address her concerns that petitioner was "abrupt" in dealings with her and that petitioner would "absent himself from the department." Pet. App. 8a, 51a. McGowan ordered Buck to create a plan to solve petitioner's availability problems. *Id.* at 8a-9a. Before Buck did that, however, Korenchuk reported to Buck on April 20, 2004, that he was unable to locate petitioner and that petitioner had failed to report in as instructed. *Id.* at 9a-10a; see *id.* at 9a n.3. Based on that report and a review of petitioner's personnel file, Buck decided that petitioner should be discharged. *Id.* at 10a-11a; 1/7/08 Tr. 62, 105-106.

At the time Korenchuk was unable to find petitioner, petitioner was in the cafeteria having lunch with one of his coworkers, Leslie Sweborg. Pet. App. 9a. When petitioner returned from lunch, he told Korenchuk that he and Sweborg had looked for him earlier and had left him a voice mail regarding leaving for lunch. *Ibid.* Korenchuk then escorted petitioner to Buck's office, where he was given his termination notice. *Id.* at 10a. The notice stated that petitioner was being discharged for failing to follow the terms of the January warning, which required him to inform Korenchuk or Mulally before leaving the general diagnostic area. Def. Exh. 5 (Corrective Action: Termination); Pet. App. 10a. The notice stated: "To date, [petitioner] has ignored that directive." Def. Exh. 5. Similarly, Buck's documentation of her meeting with Korenchuk stated that her termination decision was "[b]ased on the disciplinary action done in January and the continuing problems." Pl. Exh. 47 (Buck's Narrative Regarding Termination Decision). When petitioner arrived in Buck's office, Buck did not ask him about the January warning or whether he had reported in as directed. 1/8/08 Tr. 362. Buck simply asked him to sign the termination notice, and a security guard immediately escorted petitioner out of Buck's office. Pet. App. 10a; 1/8/08 Tr. 362.

Petitioner thereafter unsuccessfully challenged his termination through respondent's grievance process. Pet. App. 11a. Although petitioner argued in his grievance that Mulally had fabricated the basis for the January warning, "Buck did not follow up with Mulally about this claim * * * and she did not investigate [petitioner's] contention that Mulally was out to get him because he was in the Reserves." *Ibid.* Buck's investigation consisted solely of discussing the January warning with

another Human Resources employee who received information from Mulally and was present when the warning was given, but not when the alleged misconduct occurred. 1/7/08 Tr. 65; Pet. App. 8a.

3. Petitioner brought this action against respondent in the United States District Court for the Central District of Illinois, alleging that his termination violated USERRA. With the parties' consent, the district court referred the case for a jury trial before a magistrate judge. Pet. App. 23a. As required by *Brewer* v. *Board of Trustees of the University of Illinois*, 479 F.3d 908, 917 (7th Cir.), cert. denied, 552 U.S. 825 (2007), the court instructed the jury that "[a]nimosity of a co-worker toward the [petitioner] on the basis of [petitioner's] military status as a motivating factor may not be attributed to [respondent] unless that co-worker exercised such singular influence over the decision-maker that the co-worker was basically the real decision maker." Pet. App. 16a. The court also instructed that "[i]f the decision maker is not wholly dependent on a single source of information but instead conducts its own investigation into the facts * * * , [respondent] is not liable for a non-decision maker's submission of misinformation or selectively chosen information or failure to provide relevant information to the decision maker." *Ibid.*

The jury returned a special verdict in which it found that petitioner "proved by a preponderance of the evidence that [his] military status was a motivating factor in [respondent's] decision to discharge him" and that respondent failed to prove that petitioner "would have been discharged regardless of his military status." 1:04-cv-01219 Docket entry No. 102 (C.D. Ill. Jan. 10, 2008) (special verdict form). The jury awarded $57,640 in damages. Pet. App. 23a. The magistrate judge subse-

quently denied respondent's motion for judgment as a matter of law or for a new trial. *Id.* at 23a-31a.

4. The court of appeals reversed. Pet. App. 1a-21a. The court began by stating that the case involved what it described as the "'cat's paw' theory" of liability, a term derived from a La Fontaine fable in which a monkey persuades an unwitting cat to pull chestnuts out of a hot fire. *Id.* at 1a. Under that theory, "the discriminatory animus of a nondecisionmaker is imputed to the decisionmaker where the former has singular influence over the latter and uses that influence to cause the adverse employment action"—in other words, where the decisionmaker is the dupe, or cat's paw, of the employee with a discriminatory motive. *Id.* at 2a. The court emphasized that liability under the cat's paw theory requires "a blind reliance, the stuff of 'singular influence.'" *Id.* at 21a.

The court of appeals held that the jury instructions were "not technically wrong" because they told the jury that it could "only consider nondecisionmaker animosity in the case of singular influence, and even then that the employer is off the hook if the decisionmaker did her own investigation." Pet. App. 17a. But the court added that if there is insufficient evidence to support a finding of "singular influence," then the district court "has no business admitting evidence of animus by nondecisionmakers." *Ibid.* In this case, the court of appeals concluded, the magistrate judge had erred in admitting evidence of Mulally's animus—"the strongest proof of anti-military sentiment"—without first "making a threshold determination of whether a reasonable jury could find singular influence." *Id.* at 18a-19a.

The court of appeals went on to hold that, based on the evidence presented at trial, respondent was entitled

to judgment as a matter of law. Pet. App. 19a. The court stated that Buck, who made the decision to fire petitioner, was "free of any military-based animus," and "a reasonable jury could not find that Mulally (or anyone else) had singular influence over Buck." *Id.* at 20a. Instead, the court found, "Buck looked beyond what Mulally and Korenchuk had said" about petitioner. *Ibid.* Although her "investigation could have been more robust," the court continued, the decisionmaker need not "be a paragon of independence" so long as she "'is not wholly dependent on a single source of information' and conducts her 'own investigation into the facts relevant to the decision.'" *Id.* at 20a-21a (quoting *Brewer*, 479 F.3d at 918). The court therefore concluded that "a reasonable jury could [not] have concluded that [petitioner] was fired because he was a member of the military." *Id.* at 21a.

DISCUSSION

By requiring a subordinate employee's discriminatory animus to exert "singular influence" over the ultimate decisionmaker in order to warrant liability, the court of appeals disregarded the text of USERRA. The statute specifically provides for liability where a person's military status is "a *motivating factor* in the employer's action." 38 U.S.C. 4311(c) (emphasis added); see 42 U.S.C. 2000e-2(m) (similar Title VII "motivating factor" provision). The decision of the court of appeals also conflicts with the decisions of all but one of the eleven other courts of appeals to have addressed this issue. The question presented in this case is important and recurring, and this Court's review is therefore warranted.

A. The Question Presented Is Important And Warrants This Court's Review

1. The decision below warrants this Court's review because it undermines the enforcement of USERRA, frustrating the congressional objective of "encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(2). As the Tenth Circuit aptly observed in *EEOC* v. *BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (2006), cert. dismissed, 549 U.S. 1334 (2007), a "functional decisionmaker" standard like that adopted by the court below would "undermine[] the deterrent effect of subordinate bias claims, allowing employers to escape liability * * * on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.* at 487.

The decision will also affect the enforcement of other federal anti-discrimination statutes, including Title VII. In addition to its basic non-discrimination provision (42 U.S.C. 2000e-2(a)), Title VII of the Civil Rights Act of 1964, like USERRA, contains language making it an unlawful employment practice for an employer to take an adverse action when an improper consideration is a "motivating factor" for that action. 42 U.S.C. 2000e-2(m); see *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). Certain other anti-discrimination statutes permit relief based not upon a showing that the prohibited consideration was a "motivating factor" for the adverse employment practice, but only upon a showing of "but-for" causation. See *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349-2350 (2009) (to prove a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, "but-for" causation must be shown).

But in either case, the court of appeals' stringent "singular influence" standard is incorrect for the reasons explained below.

2. The decision below is in accord with *Hill* v. *Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), petition for cert. dismissed, 543 U.S. 1132 (2005). But as petitioner notes (Pet. 15-32), it is inconsistent with the decisions of ten other courts of appeals, which have imputed liability to an employer when a biased subordinate influenced, but did not herself take, the adverse employment action. See *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Rose* v. *New York City Bd. of Educ.*, 257 F.3d 156, 161-162 (2d Cir. 2001); *Abramson* v. *William Patterson Coll.*, 260 F.3d 265, 286 (3d Cir. 2001); *Russell* v. *McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000); *Madden* v. *Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 677 (6th Cir. 2008); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-1323 (8th Cir. 1994); *Poland* v. *Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007); *BCI Coca-Cola*, 450 F.3d at 487; *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); *Griffin* v. *Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998).

Justice Alito observed last Term that the courts of appeals "disagree about the proper standard" governing "the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate officials who influence but do not make the ultimate employment decision." *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2688 (2009) (Alito, J., concurring). The Court attempted to resolve the issue by granting review in *BCI Coca-Cola* and by inviting the Solicitor General to file a brief ex-

pressing the views of the United States concerning whether certiorari should be granted in *Hill*. In both cases, however, the petitioners withdrew their petitions before the Court was able to address the merits. See *BCI Coca-Cola Bottling Co.* v. *EEOC*, 549 U.S. 1334 (2007) (No. 06-341); *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 543 U.S. 1132 (2005) (No. 03-1443). The circuit conflict has persisted and continues to warrant resolution.

B. The Court Of Appeals Erred In Requiring Petitioner To Show That The Employee With Discriminatory Animus Had "Singular Influence" Over The Adverse Employment Action

1. USERRA makes it unlawful for an employer to discharge an employee if that employee's membership, service, or obligation for service in the uniformed services "is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, * * * service, * * * or obligation for service." 38 U.S.C. 4311(c)(1). The statute defines "employer" to include any "person * * * that has control over employment opportunities" and any "person * * * to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i).

The statutory definition of "employer" reflects long-established agency law, under which "principals or employers" are "vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her

employment." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 756 (1998). And it applies regardless whether the employer authorized or knew about the acts of the agent. *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). Employees act within the scope of their employment whenever they are "exercising the authority delegated to [them.]" *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909).

Consistent with those established principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities—such as assigning work, monitoring an employee's performance, deciding whether to report a matter for discipline, gathering the facts relating to that matter, or making a recommendation on what action should be taken—a supervisor's exercise of that authority falls within the scope of the supervisor's employment. Accordingly, when delegated authority of this kind is exercised in a discriminatory manner and causes an adverse employment action in violation of USERRA, the employer is liable under agency principles and Section 4303(4)(A)(i).[*]

2. In this case, the jury made a specific finding that petitioner's military status was a motivating factor in his termination. That finding established a prima facie case of liability under Section 4311(c)(1), and the evidence at

[*] By contrast, an employer would not be vicariously liable if a customer or an independent contractor, acting with a discriminatory motive but not exercising authority delegated from the employer, falsely reported that an employee engaged in misconduct and that report caused the employee to be discharged, as long as the employer had no reason to suspect that the report was fabricated because of discriminatory animus. For similar reasons, neither would an employer be vicariously liable if an ordinary (non-supervisory) employee acting with a discriminatory motive falsely reported another employee's misconduct, and that report caused the employee's discharge.

trial fully supports it. To be sure, the evidence was conflicting. But viewing the evidence in the light most favorable to petitioner, the jury could have found that Mulally's efforts to have petitioner discharged were motivated in large measure by his military obligations. Indeed, the court of appeals noted that there was "abundant evidence of Mulally's animosity." Pet. App. 18a; see *id.* at 19a (discussing "the strongest proof of anti-military sentiment"). And both the termination notice given to petitioner and Buck's trial testimony show that Mulally's January 2004 disciplinary action against petitioner was a significant factor in causing his dismissal. *Id.* at 10a; Def. Exh. 5. There was similar evidence of Korenchuk's anti-military animus, and he too played a role in petitioner's dismissal. Pet. App. 4a, 9a-10a.

Under USERRA, respondent may be held liable for Mulally's, Korenchuk's, and Buck's actions in relation to petitioner's termination. A termination decision is a paradigmatic adverse action triggering vicarious employer liability under the employment discrimination laws, including USERRA. See *Burlington*, 524 U.S. at 760-763; *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 790 (1998); *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 70-71 (1986). Moreover, Mulally, Korenchuk, and Buck were all acting within the scope of their delegated authority when they took the actions contributing to petitioner's dismissal. See *Burlington*, 524 U.S. at 756; *Faragher*, 524 U.S. at 793. The three of them were petitioner's superiors and had authority to direct his day-to-day work activities. Mulally acted within her authority when she gave petitioner a formal warning for "Failure to Follow Instructions" and "Lack of Cooperation." Def. Exh. 3; Pet. App. 6a. Korenchuk acted within his authority when he gave Buck the false report that peti-

tioner had not complied with the January 2004 directive. 1/7/08 Tr. 47-48; Pet. App. 9a-10a. And Buck acted within her authority when she terminated petitioner without attempting to hear his side of the story. *Id.* at 10a-11a.

3. The court of appeals set aside the jury's verdict because it erroneously believed that the discriminatory animus of an individual who is not the ultimate decisionmaker can trigger liability only when the individual "has singular influence over" the decisionmaker "and uses that influence to cause the adverse employment action." Pet. App. 2a, 21a. It is not enough, the court held, that a supervising employee's animus plays a substantial role in a high-level manager's decision to fire another employee; rather, "true to the fable" of the monkey and the cat, actionable discrimination exists only when the decisionmaker exhibits "a blind reliance" on the biased supervisor's opinions. *Id.* at 21a ("Decisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more; true to the fable, it requires a blind reliance, the stuff of 'singular influence.'"); see *Brewer* v. *Board of Trs. of the Univ. of Ill.*, 479 F.3d 908, 917-918 (7th Cir.) (holding that, to show "singular influence," "the employee must possess so much influence as to basically be herself the true 'functional[] . . . decision-maker'" and "[t]he nominal decision-maker must be nothing more than the functional decision-maker's 'cat's paw'") (citations omitted), cert. denied, 552 U.S. 825 (2007).

The terms "singular influence" and "blind reliance" do not appear in USERRA, and a "singular influence" standard is inconsistent with that prescribed in the statute's plain text. That text requires the plaintiff to show

nothing more than that his or her military status was a "motivating factor in the employer's action." 38 U.S.C. 4311(c)(1). As this Court has made clear, protected status or conduct is a "motivating factor" in an action when it plays a "substantial" role in bringing that action about. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle,* 429 U.S. 274, 287 (1977); see also *Gagnon* v. *Sprint Corp.*, 284 F.3d 839, 853-854 (8th Cir.), cert. denied, 537 U.S. 1001, and 537 U.S. 1014 (2002). Indeed, protected status can be a "motivating factor" in an adverse employment decision even if it is not a but-for cause of that decision. See *Gross*, 129 S. Ct. at 2350 & n.3. *A fortiori*, protected status can be a "motivating factor" in an adverse employment decision even if it does not exert "singular influence" over that decision. Where, as here, the discriminatory animus of a supervisory employee who is not the ultimate decisionmaker sets in motion and plays a substantial role in driving an adverse employment decision, that animus is a "motivating factor" even if the ultimate decisionmaker does not act in "blind reliance" on the supervisor's recommendation. The court of appeals therefore erred in holding that "singular influence" and "blind reliance" are required.

4. The court of appeals also held, as an alternative basis for its judgment, that petitioner would have been fired even "[a]part from the friction caused by his military service." Pet. App. 20a. That holding is directly at odds with the jury's special verdict that respondent had failed to prove that it would have discharged petitioner regardless of his military status. The court of appeals' holding in this regard was based on its erroneous view that Buck had conducted an "investigation," and, "exercis[ing] her independent judgment, * * * simply de-

cide[d] that [petitioner] was not a team player." *Id.* at 21a.

To be sure, an independent investigation is capable of breaking the causal chain between a supervisor's misconduct and an adverse employment action. The chain of causation will be broken by a subsequent investigation when, as a result of the investigation, the supervisor's discriminatory misuse of authority can no longer be regarded as a "motivating factor" in the adverse action. See, *e.g.*, *Poland*, 494 F.3d at 1183; *BCI Coca-Cola*, 450 F.3d at 488; *Collins* v. *New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002); *Stimpson*, 186 F.3d at 1332; *Long* v. *Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996). In addition, an independent investigation may establish that an employee would have been fired anyway, without regard to his protected status, thus creating a defense to liability under Section 4311(c)(1).

In this case, however, Buck did nothing more than consult with Korenchuk, review petitioner's personnel file, and rely on her recollection of what the court of appeals described as other "past issues" concerning petitioner, none of which had been the subject of discipline. Pet. App. 10a-11a; 1/7/08 Tr. 86-87. She did not question petitioner himself or interview any witnesses, including Sweborg, prior to terminating petitioner. Pet. App. 10a-11a. Her mere review of a personnel file was insufficient to break the causal link between Mulally's discriminatory motives and petitioner's termination. As the Tenth Circuit reasoned in *BCI Coca-Cola* in response to similar circumstances, review of a pre-existing personnel file cannot "independently" confirm the basis for termination because "[o]bviously the file contain[s] no information about the recent incident" underlying the termination. 450 F.3d at 492-493. Here, petitioner's personnel

file contained nothing about the April 20, 2004, incident that precipitated his termination. The minimal efforts by Buck—which even the court of appeals conceded "could have been more robust" (Pet. App. 20a)— were therefore insufficient to undermine the jury's determination that respondent had failed to prove that it would have discharged petitioner regardless of his military service.

Like its erroneous conclusion that evidence of Mulally's anti-military animus was improperly admitted (Pet. App. 18a), the court of appeals' assessment of Buck's investigation was based upon its erroneous interpretation of the cat's paw theory of liability. Relying again on *Brewer*, the court of appeals found Buck's inquiry sufficient to absolve respondent of liability under USERRA because Buck was "not wholly dependent on a single source of information" but instead "conduct[ed] her 'own investigation into the facts relevant to the decision.'" *Id.* at 21a (quoting *Brewer*, 479 F.3d at 918). And it found Buck's investigation adequate to preclude employer liability under its cat's paw theory, even though it recognized that Buck "failed to pursue [petitioner's] theory that Mulally fabricated the [January 2004] write-up; [and that] had Buck done so, she may have discovered that Mulally indeed bore a great deal of anti-military animus." *Id.* at 20a. Thus, the court of appeals' reversal of the judgment in petitioner's favor rested upon its erroneous view that employer liability for the discriminatory acts of supervisors who do not take the final adverse employment action may be predicated only upon the cat's paw theory of liability.

C. This Case Is An Appropriate Vehicle For Resolving The Question Presented

This case is an appropriate vehicle for resolution of the question presented. In light of the jury's specific findings that Mulally's anti-military animus was a motivating factor in petitioner's termination, and that respondent failed to prove that petitioner would have been discharged regardless of his military service, the question of employer liability in these circumstances is squarely presented.

Respondent's arguments to the contrary are unpersuasive. First, respondent asserts (Br. in Opp. 8-13) that this case is not a good candidate for review because resolution of the question presented would not alter the outcome given Buck's "independent investigation." But the record contains substantial support for the jury's specific finding that Buck's investigation was insufficient to establish that petitioner would have been discharged regardless of his military service. See pp. 15-16, *supra*. Moreover, as explained above, the court of appeals' holding regarding the adequacy of Buck's investigation was itself infected by the court's incorrect application of the cat's paw theory of liability.

Second, respondent contends (Br. in Opp. 14-16) that this case "requires an intricate study of salient details buried in the record but unaddressed by the petition." Again, this Court need not weigh the evidence because the jury heard all of the evidence and decided the case in petitioner's favor. The only issue the Court need decide is the purely legal question addressed by the court of appeals.

Third, respondent contends (Br. in Opp. 16-21) that certiorari is inappropriate because petitioner never argued below that the Seventh Circuit's *Brewer* standard

is incorrect. Given the developed body of law in the Seventh Circuit on the cat's paw doctrine, however, it would have been futile for petitioner to argue before the district court and court of appeals for any different standard. See Reply Br. 9-12; cf. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). Thus, petitioner's failure to argue for a different standard below does not preclude a grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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