No. 21-1346

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JANE ROE,

Plaintiff-Appellant,

v.

UNITED STATES, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF OF PLAINTIFF-APPELLANT JANE ROE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, Appellant Jane Roe makes the following disclosure:

Appellant is not a publicly held corporation or other publicly held entity. Appellant does not have any parent corporation. No publicly held corporation or other publicly held entity owns 10% or more of the stock of Appellant. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation. Appellant is not a trade association. This case does not arise out of a bankruptcy proceeding.

Dated: August 20, 2021

/s/ Cooper Strickland
Cooper Strickland
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STATEMENT OF JURISDICTION

Plaintiff-Appellant Jane Roe (a pseudonym) filed suit alleging violations of due process and equal protection under the Fifth Amendment of the U.S. Constitution, and violations of 42 U.S.C. §§ 1985(3), 1986. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. On December 30, 2020, the District Court granted defendants' motions to dismiss and entered final judgment. Roe timely moved for reconsideration, which the District Court denied in an entry order dated January 29, 2021. Roe timely appealed on March 29, 2021. *See* Fed. R. App. P. 4(a)(1)(B), 4(a)(4)(A)(iv). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether a suit seeking equitable relief for federal officials' constitutional violations is barred by sovereign immunity.

2. Whether Roe stated a claim that federal officials violated equal protection by subjecting her to workplace sex discrimination including deliberate indifference to sexual harassment.

3. Whether Roe stated a claim that federal officials deprived her of protected property and liberty interests without due process by subjecting her to a fundamentally unfair process for resolving workplace discrimination claims.

STATEMENT OF THE CASE

Jane Roe suffered sex discrimination, including sexual harassment by her supervisor, while employed as an assistant federal public defender at the Federal Defender Office ("FDO") for the Western District of North Carolina. When she reported the misconduct, officials of the FDO, Fourth Circuit, and federal judiciary responded with deliberate indifference.

Roe diligently pursued review of her claim and requested remedies from the FDO and Fourth Circuit that would allow her to work free of sex discrimination. At every turn, she was stonewalled. The Federal Defender, to whom she first turned for help, facilitated the harassment and subjected her to sex discrimination. The Fourth Circuit's internal complaint process, known as the Employment Dispute Resolution Plan ("EDR Plan"), failed to provide a fair process, meaningful review of her claim, or remedies to stop the harassment. The design of the EDR Plan and its implementation were deeply unfair and grossly inadequate. Through the EDR process, defendants ratified, facilitated, and aggravated the hostile work environment, which became so intolerable that Roe was forced to resign and lose her career as a federal public defender.

A. EDR Plan

In 1995, Congress required the Judicial Conference to make recommendations "for legislation to provide to employees of the judicial branch

the rights, protections, and procedures under" workplace discrimination laws "comparable to those available to employees of the legislative branch." 2 U.S.C. § 1434. The Judicial Conference strongly opposed extension of employment statutes to the judiciary; it stated that "legislation is neither necessary nor advisable in order to provide judicial branch employees with protections," in part because "[t]he judiciary currently provides its employees with protections similar to those enumerated in" the statutes. *See* Jud. Conf. of the U.S., *Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995*, at 2–3 (1996) ("CAA Report") (invoking "judicial independence").

In 1997, the Judicial Conference promulgated a Model EDR Plan that recognized employees' right to be free of workplace discrimination, outlined procedures for resolving claims, and directed courts to adopt EDR Plans to satisfy Congress's antidiscrimination goals. *See* J.A. 1038, 1042. The Fourth Circuit adopted its EDR Plan based on the 1997 Model Plan, updated it in 2010, and amended it in 2013. *See* J.A. 660–74 (2013 Fourth Circuit EDR Plan).[1]

The EDR Plan applies to the FDO. EDR Plan ch. I, § 2. Chapter II grants the right to be free of "wrongful conduct," defined as "[d]iscrimination against employees based on race, color, religion, sex (including pregnancy and sexual

[1] The EDR Plan was amended again in 2018 and 2020, but this case arose under the 2013 EDR Plan.

harassment), national origin, age . . . , and disability." *Id.* ch. II, § 1. Further, "[h]arassment against an employee based upon any of these protected categories or retaliation for engaging in any protected activity is prohibited." *Id.*

The EDR Plan directs the Federal Public Defender ("Defender"), as a "unit executive," to "make reasonable efforts to see . . . that all employees are given equal opportunities for promotions by being offered," *inter alia*, "reassignments" and "job restructuring." *Id.* ch. II, § 3(A). It requires "supervisors" to "apply equal employment opportunity practices and policies," including "giving each employee a fair and equal opportunity to demonstrate his or her skills." *Id.* ch. II, § 3(B). Employees have the right to be promoted "according to their experience, training, and demonstrated ability to perform duties of a higher level" and "without regard to" sex. *Id.* ch. II, § 4(C).

Chapter IX establishes investigation and discipline procedures, encouraging employees to report "wrongful conduct . . . as soon as possible, before it becomes a [sic] severe or pervasive." *Id.* ch. IX. The "Chief Judge and/or unit executive shall ensure that the allegations . . . are appropriately investigated," and employees found to have engaged in wrongful conduct "may be subject to disciplinary action." *Id.*

Separately, Chapter X provides "Dispute Resolution Procedures" for employees alleging violations of EDR rights, which consist of several *mandatory*

stages before a complainant may request a hearing. *Id.* ch. X. A complainant must first make a "formal request for counseling" to attempt "early resolution of the matter, if possible," with the EDR Coordinator, who is also the Circuit Executive, serving as the "counselor." *Id.* §§ 8(A), (B), (C)(2). After "counseling," the complainant must engage in "mediation" with "the employing office," in order "to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution." *Id.* § 9(B)(3). Only after mediation fails to reach a resolution may a complainant request a hearing before a "presiding judicial officer." *Id.* § 10. The "employing office"—here, the FDO—"would be responsible for redressing, correcting, or abating the violations(s) alleged in the complaint." *Id.* § 10(A). Upon a finding that "a substantive right protected by this Plan has been violated," the presiding officer may provide remedies. *Id.* § 10(B)(2)(f).

In 2017, the Chief Justice of the United States convened a working group to examine workplace misconduct in the judiciary. *See* Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States 1 (June 2018) ("Working Group Report"). The Working Group found that "inappropriate conduct . . . is not limited to a few isolated instances," *id.* at 6–7, but the judiciary has a "good record for accountability," *id.* at 10. It found the EDR Plan "effective" when invoked, *id.*, and the "most significant challenge

for accountability" to be "the reluctance of victims to report misconduct" for various reasons including "fear that no action will be taken, and concerns that a complaint will subject them to retaliatory action or affect future job prospects," *id.* at 12.

B. Workplace Discrimination

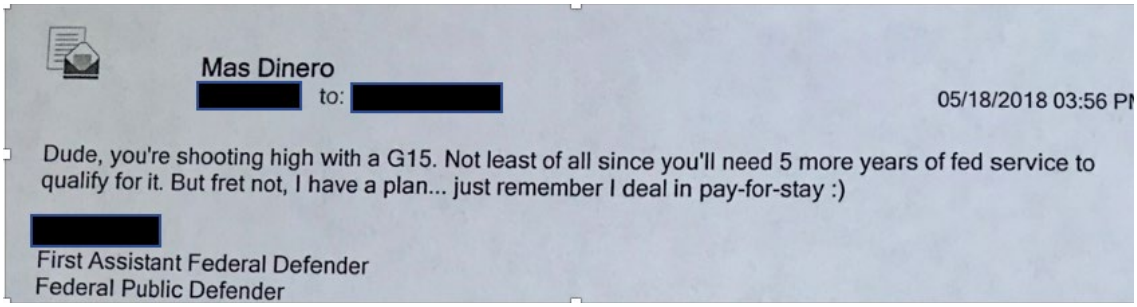
1. Sexual Harassment

Starting in law school, Jane Roe dreamed of being a federal public defender. Roe served as a law clerk on the Second Circuit, after completing two other judicial clerkships. J.A. 22–23, ¶¶ 16–20; 26, ¶¶ 36–37. She then held a prestigious federal judiciary fellowship. J.A. 23, ¶ 21. In August 2017, Roe began employment at the FDO as a research and writing attorney, on the explicit understanding that she would soon transition to an assistant federal public defender position. J.A. 26–27, ¶¶ 44–46; 551.

Upon joining the office, Roe saw FDO leaders foster a workplace culture where discrimination was casually accepted. J.A. 27–29, ¶¶ 47–62. The Defender described women in crude and derogatory language. J.A. 29, ¶ 60. Women were belittled, not taken seriously as professionals, and targeted for abusive behavior. *Id.* ¶¶ 60–61. Examples were made of employees who complained of mistreatment, through retaliation ranging from disciplinary actions and firings to vicious and false rumors. J.A. 27–28, ¶¶ 48–50.

The First Assistant ("Assistant"), the Defender's principal deputy, with authority over FDO operations and trial units, targeted Roe for unwelcome attention that was intense and obsessive. J.A. 30–39, ¶¶ 63–122. Coworkers noticed and described him as "lustful," "fixated," "sexually attracted," "smothering," and "wanting" Roe in "not such a professional way." J.A. 31, ¶¶ 73–74.

As Roe approached one year at the FDO, she was praised for excellent performance. J.A. 32, ¶ 78. When she inquired about the timeline for transitioning to assistant federal public defender, the Defender said that the Assistant would be her "mentor" in charge of her advancement. J.A. 30, ¶¶ 64–66. In May 2018, Roe told the Assistant that she planned to request a promotion for which she was eligible and, eventually, a "duty station" transfer to the FDO's other office location. J.A. 32, ¶¶ 76–79. In response, he became visibly agitated and emotional. *Id.* ¶ 77. He then sent her a quid-pro-quo email titled "Mas Dinero" (Spanish for "More Money"). J.A. 33, ¶ 82.



Mas Dinero
[redacted] to: [redacted]
05/18/2018 03:56 PM

Dude, you're shooting high with a G15. Not least of all since you'll need 5 more years of fed service to qualify for it. But fret not, I have a plan... just remember I deal in pay-for-stay :)

[redacted]
First Assistant Federal Defender
Federal Public Defender

Id. The Assistant's suggestion that Roe needed more years of service to qualify for promotion was false, as was his improper assertion that he could help her skirt such a requirement. In the context of his excessive interest in her, Roe reasonably viewed his email as quid-pro-quo sexual harassment in which he proposed a "deal" to "pay" for his inappropriate advances. J.A. 33, ¶ 83.

The Assistant's unwelcome advances intensified. *Id.* ¶ 84; 38, ¶¶ 113–14. When Roe distanced herself, he aggressively interfered with her job duties, reminded her of his control over her job, threatened disciplinary action, and called her "manipulative" and "deceitful" for seeking trial experience. J.A. 34–37, ¶¶ 87–109; 40, ¶¶ 127–28. When the Defender assigned Roe as second chair on a trial, the Assistant shook with anger that the work pulled her away from him. J.A. 35, ¶ 95. He became increasingly obsessive, lurking in hallways and waiting to corner her. J.A. 33, ¶ 86; 37–38, ¶¶ 111–13.

2. The Defender's Deliberate Indifference and Sex Discrimination

Roe asked the Defender for help, but he dismissively told her to work it out with the Assistant, and removed Roe from the trial he assigned her, despite acknowledging her excellent performance. J.A. 35, ¶ 97; 37, ¶ 109. The Defender's reaction communicated that he supported the Assistant's discriminatory

behavior. Roe suffered severe distress from the persistent sexual harassment and the Defender's acquiescence in it. J.A. 38, ¶ 116.

On July 2, 2018, Roe notified the Defender that because the Assistant was behaving inappropriately and she was leaving work early to avoid him, she would be "drawing boundaries." J.A. 39, ¶¶ 124–25. She requested confidentiality and said she was not yet making a formal complaint of sexual harassment because she was trying to manage the situation informally. *Id.* When she spoke to the Assistant, he unleashed a tirade that sounded like a rejected suitor rather than a work supervisor, and Roe feared that he would disparage her to the Defender. J.A. 40–41, ¶¶ 127–33.

To her chagrin, the Defender then called Roe to meet with him and the Assistant to discuss the matter. J.A. 41, ¶ 135. There, the Defender compared her harassing male supervisor's authority over her to a "marriage," requiring "compromise" where a couple must "meet in the middle." J.A. 42, ¶ 140. Roe reiterated that the Assistant was "interfering with her ability to do her job and that she felt threatened by him." *Id.* ¶ 143. The Defender told Roe that, as her supervisor, the Assistant had "the right" to talk to her, and demanded that she stop taking notes during the meeting, which intimidated her. J.A. 41–42, ¶¶ 136, 139. The Assistant berated Roe in front of the Defender, which he did nothing to stop. J.A. 43, ¶ 144.

Saying he did not want Roe to feel "uncomfortable" or "unsafe," the Defender promised she would no longer have to work under the Assistant's supervision. J.A. 43, ¶¶ 144, 148. But days later, the Defender reassigned Roe to work directly on the Assistant's trial team and announced that Roe would no longer have her own trial cases. *Id.* ¶ 150. Immediately, the Assistant demanded to meet alone. J.A. 45, ¶ 156. Because he now had even more supervisory control, Roe felt unsafe and scared for her career, and she suffered severe nausea. J.A. 38, ¶ 116; 45, ¶ 157.

On July 23, 2018, Roe sought guidance about both supervisors' conduct from the Fair Employment Opportunity Officer ("FEOO") in the Administrative Office of the U.S. Courts ("AO"), the "civil rights office" for courts. J.A. 45, ¶¶ 157–58. The FEOO said the behavior was "classic sexual harassment." *Id.* ¶¶ 159–60. She said Roe was "highly credible" but it would be less risky to find another job than seek redress through the EDR Plan, because the cards were "stacked" against a complainant and in favor of management. *Id.* ¶ 161. The FEOO encouraged Roe to call in sick "to protect herself." J.A. 46, ¶ 162.

The FEOO spoke to the AO's Chief of Defender Services, who advised the Defender to address the sexual harassment by immediately transferring Roe to the FDO's other location and considering her for an open appellate position so she would not be supervised by the Assistant. J.A. 49–50, ¶¶ 187–90, 193–94. The

Defender did none of these things. Instead, he angrily berated Roe for going to "some other party," and said he was being "blamed" and "attacked" for something that was not his "fault." J.A. 51, ¶ 199; 54, ¶ 233. He downplayed the sexual harassment, saying, "but there was no physical contact." *Id.* ¶ 202.

Next, the Defender worked to control the complaint process to protect himself from liability. He contacted officials at the Fourth Circuit and the AO's Office of General Counsel ("OGC"). J.A. 54–56, ¶¶ 222–35. Officials including the Circuit Executive, Chief Judge, AO Deputy Director, OGC official(s), and the FEOO discussed the situation. J.A. 55, ¶¶ 227–30; *see also* J.A. 1219, ¶ 3. The FEOO later told Roe that defendants decided that OGC, "management's representative," would take over the matter, remove the FEOO from any involvement, and limit any investigation of wrongful conduct to the Assistant. J.A. 54–55, ¶¶ 222–30; *see also* J.A. 579–81, 987. The FEOO said that defendants designed the process for the Defender to control even though he was an alleged violator of the EDR Plan. *See id.* Defendants prohibited Roe from seeking guidance from the FEOO. J.A. 55, ¶ 231; 581. The Circuit Executive, whom the EDR Plan designated as the EDR Coordinator, criticized Roe for engaging in protected activity, saying it was not "helpful" that she reported discrimination to the AO because "barriers go up" and "people are 'on guard.'" J.A. 60, ¶ 266.

The Defender diminished Roe's job duties and targeted her for discriminatory treatment that facilitated the Assistant's continuing harassment. *See, e.g.*, J.A. 43, ¶ 150; 46, ¶¶ 165–66; 56, ¶¶ 236–38. The Defender announced in a humiliating office email that Roe would report to another research and writing attorney supervised by the Assistant. J.A. 46, ¶¶ 165–67. The Defender's Appellate Chief, who had encouraged Roe to apply for an open appellate position, now discouraged it. J.A. 47, ¶¶ 169–70. The Defender refused to consider Roe for the open appellate position, remove the Assistant from supervising her, or transfer her to a different duty station—despite the Chief of Defender Services' urging. J.A. 53–54, ¶¶ 215–20. During this period, Roe was terrified that she would be fired for resisting the Assistant, who was having other employees "keep tabs" on her and report back to him. J.A. 47–48, ¶¶ 172, 179; *see* J.A. 73–74, ¶¶ 340–43 (describing the Assistant's sudden interest in appeals after Roe sought to join the appellate unit). Despite notice of sexual harassment, the Defender was bent on keeping Roe supervised by her harasser. J.A. 53, ¶ 216; 57, ¶ 244.

After one year at the FDO, despite her recognized excellent work, Roe did not receive any performance evaluation and was not considered for a promotion for which she qualified. J.A. 56–57, ¶¶ 242, 245. The Defender also refused to apply a non-discretionary salary increase and stripped her of a locality adjustment to which she was entitled as a federal employee. *Id.* ¶¶ 242–46; *see also* J.A. 571,

655. Instead, "with the approval of the court," the Defender authorized an "administrative reclassification" of title, which was backdated to the day before she became eligible for a promotion. J.A. 56–57, ¶¶ 239–43; 655, 1183. Despite Roe's new title of "Assistant Federal Public Defender," the Defender treated her unlike other attorneys in the position, eliminating her prospects for receiving her own cases and relegating her to researching for other attorneys. J.A. 57, ¶ 244.

The Defender's refusal to consider the promotion for which Roe was eligible was a discriminatory capstone to his Assistant's quid-pro-quo sexual harassment in the "I deal in pay-for-stay" email. J.A. 33, ¶ 82. That email, of which the Defender became aware when Roe reported it, proposed that she could get a promotion if she acquiesced to sexual advances—but not if she didn't accept the "deal." The Defender made good on that threat.

C. Federal Officials' Grossly Inadequate Response

Notwithstanding the FEOO's warning that the cards were stacked against a complainant, Roe decided to pursue claims under the EDR Plan to seek remedies allowing her to work safely. On September 10, 2018, Roe filed a report of wrongful conduct against the Defender and the Assistant under Chapter IX of the 2013 EDR Plan, which provided for investigation and disciplinary action. J.A. 62, ¶ 274. Roe also filed a Chapter X claim of "a denial of the rights granted under" the EDR Plan and, as required, initiated the proceeding with a formal "request for

counseling." *Id.* She requested "[a]n environment free of harassment, retaliation, and discrimination, the opportunity for merit-based advancement, and any other appropriate relief." *Id.* ¶ 275. The EDR Plan invited a request to disqualify an "employee or other person involved in a dispute," and Roe made a written request that the Chief Judge disqualify the Defender from exercising authority in the EDR process. EDR Plan ch. X, § 7; J.A. 62, ¶ 276.

Over the next six months, the Circuit Executive, Chief Judge, and AO officials kept Roe on telework while making no meaningful efforts to stop the harassment so she could return to the office. J.A. 73, ¶ 338. This lengthy period of telework isolated Roe from her co-workers, who, led by a supervising Team Leader, openly mocked her and spread disparaging rumors. J.A. 75–76, ¶¶ 349–54.

During this period, defendants failed to conduct an appropriate investigation. Despite his conflict of interest, the Defender was allowed to appoint the Investigator. J.A. 956, ¶ 81; 987. The Investigator told Roe that her allegations of the Defender's violations of the EDR Plan were *not* being investigated because the EDR Coordinator/Circuit Executive excluded them from the investigation. J.A. 68–69, ¶¶ 318–19. Roe's witnesses were never interviewed. J.A. 68, ¶ 317. The Investigator confessed she lacked training to make findings and conclusions, and yet, the EDR Coordinator asked her to make findings and conclusions. J.A. 69,

¶ 320; 77, ¶ 363. The Investigator said the EDR Coordinator, in consultation with the Chief Judge, would make "final decisions," even though the EDR Plan did not give the EDR Coordinator that role. J.A. 69, ¶ 320; EDR Plan ch. IX. After the investigation was completed, the EDR Coordinator told Roe that she would not see the investigation report or its findings because it would "make it difficult to resolve the matter informally." J.A. 83, ¶ 398. He said that even if the investigation found wrongdoing, no disciplinary action would be taken until Roe ended her dispute resolution process—which, at this rate, could add months. J.A. 84, ¶ 400.

Meanwhile, the Chief Judge said he would not decide Roe's request to disqualify the Defender until the investigation was complete. J.A. 78, ¶ 370. But the Investigator told Roe that her allegations against the Defender were not being investigated. J.A. 68–69, ¶¶ 318–19. The EDR Coordinator emphasized that the Chief Judge was "taken aback" by Roe's request to disqualify the Defender, and said that if the Defender were disqualified, then "no one" could represent the "employing office" in the EDR process. J.A. 63, ¶ 285; 79, ¶ 371. After four months, the EDR Coordinator told Roe that the Chief Judge "intended to" deny Roe's request to disqualify the Defender; the EDR Coordinator said that the Chief Judge made the decision before the investigation report was complete, but later flipped and said he made the decision afterward. J.A. 83, ¶¶ 395–96. Roe never received an explanation for the decision. J.A. 92, ¶ 453.

Because the Defender was not disqualified, Roe was forced to negotiate with the Defender, the accused party, acting on behalf of the employing office in the EDR process. J.A. 78–79, ¶¶ 370–71; 92, ¶ 453. When Roe repeatedly requested concrete steps to abate the continuing hostile work environment, the EDR Coordinator said: "Reiterating that you want a safe workplace free of harassment isn't helpful because [the Defender] already believes he's done and is doing all he can to provide such a workplace for you." J.A. 71, ¶ 332. The Defender made clear that he would have Roe return to the Assistant's duty station no matter the outcome of the EDR process. J.A. 70, ¶ 327. Roe therefore requested that the Fourth Circuit assist with a transfer to a different FDO in the circuit, where neither the Defender nor the Assistant would have supervisory authority over her. J.A. 76, ¶ 355; 85, ¶¶ 405–10. She explained: "This situation has irreparably damaged my relationships with the Federal Defender and my colleagues, and I believe I am no longer welcome in that environment." J.A. 76, ¶ 355. Even after repeated requests, she was not transferred. J.A. 77, ¶¶ 359–61; J.A. 92, ¶ 454.

On January 30, 2019, nearly five months after Roe filed her claim, she proceeded to mediation, a mandatory stage before she could request a hearing. J.A. 85, ¶ 411. The Chief Circuit Mediator, a Fourth Circuit employee, told Roe that the Defender was the "decision maker," but that he was from a generation that doesn't "get" sexual harassment, and if Roe proceeded to a hearing, the presiding

officer would not "micromanage" the Defender. J.A. 86, ¶ 415. The Mediator explained that the judiciary lacked statutory authority to implement remedies and said "you give up a lot" as a judiciary employee. *Id.* ¶ 416. Because the Defender was the "decision maker," neither mediation nor a hearing could produce a remedy that the Defender resisted, and he was expected to resist because he didn't "get" sexual harassment. *Id.* ¶¶ 415–16.

On February 14, 2019, Roe met with the new Judicial Integrity Officer ("JIO"), J.A. 88, ¶ 427, whom the AO had recently appointed "to provide counseling and assistance regarding workplace conduct to all Judiciary employees." Working Group Report at 37. The JIO said that the way Roe's complaint was being handled was "unusual," and that the Circuit Executive should never be the EDR Coordinator because of "inherent conflicts of interest." J.A. 88, ¶ 429. She said a presiding officer would not "meddle" in the FDO, and regardless of the hearing outcome, the presiding officer could not order remedies, because Article III judges did not have authority to "manage" a federal defender office. J.A. 90, ¶¶ 438–39. She called the issue "jurisdictional." *Id.*; *see also* J.A. 646–48.

Roe then understood that a hearing would be futile because it could not lead to an order of remedies to address the hostile work environment at the FDO. J.A. 91, ¶ 447. She had initiated the process to seek a remedy such as "placement . . . in

a position previously denied," "placement in a comparable alternative position," "prospective promotion to a position," or "priority consideration for a future promotion or position," in hopes of retaining her career as a federal public defender. EDR Plan ch. X, § 12. But having suffered harassment for nearly a year, and informed by two judiciary officials that the FDO would not be ordered to remedy the continuing harassment, Roe grasped that the EDR process would not remedy the violations of rights granted in the EDR Plan. J.A. 86, ¶ 415; 90–91, ¶ 445. Without the prospect of remedial action, Roe concluded that leaving the FDO was the only means of ending the hostile work environment. She was pushed out by months of workplace discrimination that officials of the FDO, Fourth Circuit, and AO showed no willingness to remedy; a deeply biased and unfair EDR process; and an acknowledged inability of the EDR process to provide remedies. Roe thus expressed to the Mediator that she was being constructively discharged. J.A. 92–94, ¶¶ 454–55, 462.

The Mediator, Chief Judge, and EDR Coordinator then worked to shoehorn Roe into a Fourth Circuit clerkship. J.A. 93, ¶¶ 456–59. Roe had previously served as a law clerk to a Second Circuit judge and two other judges, so leaving her permanent dream job for a temporary clerkship was a big step backward. J.A. 98, ¶ 487. But given her observation of FDO leaders vindictively spreading false rumors about employees who complained of unlawful conduct, she accepted the

clerkship in hopes of mitigating officials' attempts to ruin her reputation and career. J.A. 28, ¶ 50; 93, ¶ 456.

On June 4, 2019, almost a year after Roe first reported her concerns and several months after her constructive discharge, the EDR Coordinator informed her that "disciplinary action was taken last week as a result of your report of wrongful conduct." J.A. 97, ¶ 484. She was not allowed to know the discipline imposed or whom it was against, nor was she shown the investigation report. *Id.* During this litigation, defendants revealed that the Chief Judge disciplined the Defender, and the Defender disciplined the Assistant. J.A. 958–59, ¶¶ 99, 101–03. Despite the apparent findings of wrongful conduct in violation of Roe's rights, she remained without remedies, just as the JIO told her would be true even had she continued to a final hearing.

D. Ongoing Harm

The events at the FDO severely damaged Roe's career, while her male supervisors stayed in their positions. J.A. 98–99, ¶ 486–93.[2] After her clerkship ended, Roe tried but failed to secure employment comparable to her previous

[2] On April 19, 2021, the Fourth Circuit announced the Defender's request for reappointment and solicited comments. Notice of Reappointment, https://tinyurl.com/4ttazn34. On August 12, 2021, the Fourth Circuit posted a vacancy for his position, which suggests that he was not reappointed. Notice of Vacancy, https://tinyurl.com/f5n8ux9e.

position. *Id.* ¶ 487. When Roe inquired about several open positions at an FDO in an adjacent district, the Federal Defender who led that office was openly hostile, demanding discussion of why she left her former office. J.A. 98, ¶ 491. In seeking employment, Roe cannot provide references from her former office because her supervisors discriminated against her and spread false rumors about her sexual harassment complaint. J.A. 96, ¶ 476. Roe learned that her Team Leader spread rumors that she "made up" being sexually harassed so that she could work at a different duty station and that co-workers spread rumors that she "lost." *Id.* ¶ 477; 99, ¶ 492. The North Carolina Board of Law Examiners flagged Roe's EDR complaint as an area of concern and questioned her about it during her Character and Fitness interview for admission. J.A. 99, ¶ 490.

Roe has been working in temporary and substantially lower-paying positions. J.A. 98, ¶ 488. Because defendants' unlawful actions in conjunction with her constructive discharge resulted in continuing reputational damage, it is extremely unlikely that she will secure a position with terms and compensation comparable to the one she held. *Id.*

E. District Court Proceedings

Roe filed suit alleging that officials of the FDO, Fourth Circuit, and federal judiciary violated her Fifth Amendment equal protection right by subjecting her to sex discrimination and violated her Fifth Amendment due process right by denying

her fair procedures for resolving her discrimination complaint. J.A. 1491. The case was subject to an intercircuit transfer. J.A. 122–23.

1. Official Capacity Defendants: Due Process and Equal Protection

Roe named several federal entities and officers in their official capacities, seeking declaratory and prospective injunctive relief to remedy due process and equal protection violations. J.A. 1491–92. The Official Capacity Defendants are: the Defender, who was deliberately indifferent to sexual harassment and engaged in sex discrimination; the FDO, Fourth Circuit, Chief Judge, and Circuit Executive,[3] who were deliberately indifferent to sexual harassment and denied Roe basic fairness in the EDR process; the Fourth Circuit Judicial Council, responsible for adopting the unconstitutional EDR Plan; the Judicial Conference and its Committee on Judicial Resources Chair, responsible for promulgating the Model EDR Plan and imposing it on the Circuits; the AO and its Director, responsible for implementing the EDR Plan and providing guidance on the EDR process; and the United States. J.A. 23–24, ¶¶ 23–27; 24–25, ¶¶ 30–35; 99–101, ¶¶ 494–505.

[3] The District Court misidentified the Official Capacity Defendants, omitting the FDO, Chief Judge, and Circuit Executive. J.A. 1491–92.

2. Individual Capacity Defendants: Equal Protection and Statutory Claims

Roe additionally named three of the official capacity defendants—the Defender, Circuit Executive, and Chief Judge—in their individual capacities. J.A. 24–25, ¶¶ 32–33, 35. And Roe named, in their individual capacities only, the AO's General Counsel and John Doe(s) officials in the OGC, who were deliberately indifferent to sexual harassment, interfered with Roe's rights, approved a discriminatory denial of promotion, and refused to disclose investigative findings and take timely action.[4] J.A. 24, ¶¶ 28–29; 55–58, ¶¶ 227–51; 83, ¶¶ 398–99. Against the Individual Capacity Defendants, Roe brought claims for damages under *Bivens* for equal protection violations,[5] and under 42 U.S.C. §§ 1985(3), 1986, for conspiring to violate her constitutional rights and neglecting or refusing to prevent such violations. J.A. 54–58, ¶¶ 222–51; 148.

3. District Court Decision

The District Court dismissed Roe's suit in its entirety. J.A. 1490–527. The court held that Roe's constitutional claims against the Official Capacity

[4] The District Court mistakenly identified John Doe(s) in OGC as Official Capacity Defendants. J.A. 1492.

[5] Contrary to the District Court's understanding, J.A. 1513–19, Roe did not assert procedural due process claims against the Individual Capacity Defendants.

Defendants were barred by sovereign immunity, J.A. 1506–11, and that her claims against the Individual Capacity Defendants failed to state a claim, J.A. 1512–26.

The District Court rejected the application of several statutory waivers of sovereign immunity including the Administrative Procedure Act ("APA"), J.A. 1509–11, and the Back Pay Act ("BPA"), J.A. 1508–09. The court held that the APA's general waiver of federal agencies' sovereign immunity does not apply to the FDO because the APA's exemption for "courts of the United States" covers the FDO. J.A. 1509–11. The court also held that the BPA's waiver of sovereign immunity for Roe's back pay claim does not apply because no "appropriate authority" had found that she suffered an unwarranted and unjustified personnel action. J.A. 1508.

In dismissing Roe's equal protection claim, the District Court relied on the Fourth Circuit's decision in *Wilcox v. Lyons*, 970 F.3d 452 (4th Cir. 2020), which held that a claim of "pure" retaliation for reporting sex discrimination, which is cognizable under Title VII, is not cognizable under the Fourteenth Amendment's Equal Protection Clause. *Id.* at 460–61. The District Court held that Roe did not state an equal protection claim because "the Fourth Circuit has not held that courts must apply Title VII standards to free-standing Fifth Amendment claims," and "only theories of traditional class-based discrimination are cognizable under the Fifth Amendment Equal Protection Clause [sic]." J.A. 1522–24.

In dismissing Roe's due process claim, the District Court did not reach the issue of whether unfair procedures within the federal judiciary for investigating and resolving an employee's workplace discrimination complaints violate due process. Rather, as a threshold matter, the court held that Roe lacked a constitutionally protected liberty or property interest. J.A. 1513–19. The District Court rejected the idea that judiciary employees' interest in being free from workplace discrimination is a constitutionally protected liberty interest. J.A. 1515–16. The District Court also rejected the idea that the EDR Plan's terms as a condition of employment creates a protected property interest, reasoning that the Due Process Clause protects against deprivation of substantive interests rather than an interest in process in itself. J.A. 1518–19.

The District Court summarily denied Roe's motion to reconsider. J.A. 1530.

SUMMARY OF THE ARGUMENT

The Fifth Amendment provides federal employees protection against workplace sex discrimination, including sexual harassment and deliberate indifference to sexual harassment. It also requires the government to provide fair procedures in resolving employees' workplace sex discrimination complaints. The District Court erred in dismissing Roe's suit alleging equal protection violations for workplace sex discrimination and due process violations for unfair procedures to investigate and resolve discrimination claims.

First, sovereign immunity is not a defense to equitable claims against federal officials for constitutional violations, because those claims clearly fall within the *Larson-Dugan* exception to sovereign immunity.

Second, the District Court erred in dismissing Roe's equal protection claim under *Wilcox*, which held that "a pure retaliation claim is not cognizable under the Equal Protection Clause" because retaliation "imposes negative consequences on an employee because of the employee's report, not because of the employee's sex." 970 F.3d at 455, 460. The District Court severely mischaracterized Roe's claim as depending upon a theory of discrimination that is recognized under Title VII but not under equal protection doctrine. To the contrary, Roe's claim is firmly grounded in Fourth Circuit equal protection precedent that was recognized in *Wilcox* itself and holds that a "mixture" of retaliation and continued sexual harassment, even when it is partly in response to a report of harassment, makes out an equal protection claim. Roe alleged precisely that mixture.

Roe's complaint also satisfied the elements of deliberate indifference to sexual harassment, which states an equal protection claim under Fourth Circuit precedent. Officials knew of the harassment and responded in a clearly unreasonable manner. And their downplaying of the harassment and refusal to stop it suffice to show discriminatory intent. Roe's equal protection claim, based

in deliberate indifference, an established theory of unconstitutional sex discrimination, should not have been dismissed.

Third, the District Court dismissed Roe's due process claim on the mistaken belief that Roe lacked a protected property or liberty interest. As a condition of her employment, the EDR Plan granted Roe a property interest in the right to be free of workplace discrimination. Roe had a liberty interest in pursuing her chosen career, of which defendants deprived her by stigmatizing her reputation and damaging her ability to obtain employment in her field.

Defendants deprived Roe of these protected interests without adequate procedural protection. The EDR Plan's procedural design was facially defective and unfair due to its lack of a neutral decisionmaker and inability to order promised remedies. And in implementing the EDR process in Roe's case, defendants deepened the lack of basic fairness by allowing the accused party to be a decisionmaker and denying her the opportunity to know and respond to the investigative findings. Because Roe sufficiently alleged that she was deprived of constitutionally protected property and liberty interests without fair procedures, the District Court erred in dismissing her due process claim.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's ruling on sovereign immunity. *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008). This Court

also reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim. *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 685 (4th Cir. 2018). In conducting this review, this Court is "obliged to accept the complaint's factual allegations as true and draw all reasonable inferences in favor of the plaintiffs." *Id.*

ARGUMENT

I. Sovereign Immunity

The District Court erred in holding that all of Roe's constitutional claims against the Official Capacity Defendants were barred by sovereign immunity. *See* J.A. 1511. Roe's equitable claims against the Official Capacity Defendants are not barred by sovereign immunity because they fall squarely within the *Larson-Dugan* exception to sovereign immunity. But even if a waiver of sovereign immunity is needed, the APA provides that waiver for Roe's claims against the United States and judicial branch defendants who are not "courts." The BPA waives sovereign immunity for Roe's back pay claims against the defendants who were her employer.

A. Roe's suit seeking equitable relief for constitutional violations is not barred by sovereign immunity.

When federal officials violate the Constitution, sovereign immunity poses no bar to suits seeking equitable relief. *See Bell v. Hood*, 327 U.S. 678, 684 (1946)

(sustaining "the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"). The federal government must generally consent to be sued, but the Supreme Court has provided "recognized exceptions" to this principle, for suits seeking to enjoin *ultra vires* or unconstitutional official conduct. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 701–02 (1949) ("[T]he action of an officer of the sovereign . . . can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."); *Dugan v. Rank*, 372 U.S. 609, 621–22 (1963) (accord). Providing a forum for the vindication of constitutional rights has long been the province of federal courts. *See Ex parte Young*, 209 U.S. 123 (1908); *United States v. Lee*, 106 U.S. 196 (1882).

1. The *Larson-Dugan* exception applies to Roe's claims.

Ignoring Roe's claims for equitable relief, the District Court erroneously concluded that sovereign immunity bars Roe's constitutional claims against the Official Capacity Defendants. *See* J.A. 1506–11. Because Roe brought claims for equitable relief, the *Larson-Dugan* exception to sovereign immunity applies and no waiver of sovereign immunity is needed.

Many circuits have recognized that the *Larson-Dugan* exception applies to employment cases in which federal employees seek equitable relief for

constitutional or statutory violations. *See, e.g.*, *Dotson v. Griesa*, 398 F.3d 156, 179 (2d Cir. 2005); *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996). Judiciary employees have an established right to sue for injunctive relief for constitutional violations. *See, e.g.*, *Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (holding that sovereign immunity did not bar suit for injunctive relief alleging unconstitutional judiciary policy); *Guffey v. Duff*, 459 F.Supp.3d 227, 256 (D.D.C. 2020) (enjoining enforcement of an AO policy that violated the First Amendment); *Golinski v. U.S. Off. of Pers. Mgmt.*, 824 F.Supp.2d 968, 1002 (N.D. Cal. 2012) (granting judiciary employee injunctive relief for equal protection violations).

2. Roe requested prospective equitable relief.

Roe repeatedly indicated that she was seeking prospective equitable relief. J.A. 101–02 (complaint), 375–401 (equitable briefing), 1287–301 (surreply), 1329 (dismissal hearing), 1534–38 (motion to reconsider). The District Court's opinion never mentioned these requests. The District Court's erroneous ruling on sovereign immunity appears to have rested on not understanding that Roe was seeking prospective equitable relief—or, possibly, an unspoken and unexplained surmise that Roe's explicit request for equitable relief was effectively a request for damages.

Among the relief Roe sought was reinstatement to a position of assistant federal public defender: the District Court directly asked Roe's counsel during the

dismissal hearing what equitable relief Roe was seeking, and counsel clearly stated that "the minimum" would be "reinstatement." J.A. 1329; *see also, e.g.*, J.A. 391–92 (arguing that a request for reinstatement is not barred by sovereign immunity); J.A. 1296 (stating that the relief requested includes "reinstatement and other appropriate equitable remedies"); J.A. 1534 (stating that Roe "is presumptively entitled to reinstatement"); Fed. R. Civ. P. 54(c) ("Every . . . final judgment should grant the relief to which each party is entitled . . . , even if the party has not demanded that relief in its pleadings.").

Reinstatement is an equitable remedy. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). The Fourth Circuit recently stated: "Every circuit, including this one," has held that claims for reinstatement are not barred by sovereign immunity. *Biggs v. N.C. Dep't of Pub. Safety*, 953 F.3d 236, 243 (4th Cir. 2020); *Dronenburg v. Zech*, 741 F.2d 1388, 1390 (D.C. Cir. 1984).

Likewise, front pay in lieu of reinstatement is a prospective equitable remedy. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847 (2001) (holding that "front pay is not an element of compensatory damages, but rather a replacement for the remedy of reinstatement in situations in which reinstatement would be inappropriate"); *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991) (holding that because "front pay may serve as a substitute or a complement" for reinstatement, and reinstatement is "clearly an equitable remedy," the "award

and amount [of front pay] is one for the court sitting in equity to consider"). Courts look to the substance of the remedy, rather than merely its label, to determine whether it is prospective. *See Papasan v. Allain*, 478 U.S. 265, 279 (1986). Where a money award is characterized as "front pay" but is not intended to halt an ongoing violation of law, courts have held that that the award is not prospective, because it is directed toward a past violation. *See, e.g.*, *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698 (3d Cir. 1996). By contrast, reinstatement is a prospective remedy, intended to remedy an ongoing violation of law. Therefore, where front pay is awarded in lieu of reinstatement because reinstatement is infeasible, it is also a prospective remedy. *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1210 (7th Cir. 1989); *Reneau v. Wayne Griffin & Sons, Inc.,* 945 F.2d 869, 870 (5th Cir. 1991).

Accordingly, courts in the Fourth Circuit have held that front pay in lieu of reinstatement is not barred by sovereign immunity. *See, e.g.*, *Pickering v. Va. State Police*, 59 F.Supp.3d 742, 747 (E.D. Va. 2014); *White v. Va. Bd. for People with Disabilities*, No. 18-CV-360, 2019 WL 413546, at *3 (E.D. Va. Feb. 1, 2019). This sensible conclusion ensures that relief is available when an employer continues to create a hostile work environment that makes reinstatement to that

workplace inappropriate.[6] *See Pollard*, 532 U.S. at 853 (noting that denying front pay when reinstatement is infeasible would lead to the "strange result" of subjecting the "most egregious offenders . . . to the least sanctions"). Sovereign immunity does not bar that prospective equitable relief merely because it results in "fiscal consequences." *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 667–68 (1974) (stating that "an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*"); *Milliken v. Bradley*, 433 U.S. 267, 289–90 (1977) (accord).

Roe additionally requested declaratory and injunctive relief for ongoing constitutional violations. J.A. 101. At bottom, Roe's claims are constitutional challenges to the EDR Plan and process, which she could not have brought through the EDR process itself. *See* Report of the Proceedings of the Judicial Conference of the United States, at 25 (Sept. 2010) ("JCUS") (noting that "judges in the EDR context have no authority to declare . . . statutes or regulations unconstitutional or invalid"); J.A. 1029. The unavailability of any judicial review by an Article III court for Roe's constitutional claims would raise serious constitutional concerns.[7] *See Webster v. Doe*, 486 U.S. 592, 603 (1988).

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[6] Factual developments including the Defender's non-reappointment, *supra* 19 n.2, may make reinstatement more feasible.

[7] The EDR Plan says it is the "exclusive" remedy for violations of rights covered by the Plan, ch. I, § 1, and that EDR decisions "shall not be judicially

Because Roe sought prospective equitable relief against federal officials, her constitutional claims against them fall squarely within the *Larson-Dugan* exception and are not barred by sovereign immunity.

B. Defendants' sovereign immunity is also waived by statutes.

In addition to erroneously believing that Roe needed a waiver of sovereign immunity, the District Court erred a second time in finding no waiver here. Congress waived sovereign immunity for Roe's claims against the United States and non-court defendants in the APA, and for her back pay claim against her employer in the BPA.

1. The Administrative Procedure Act waives sovereign immunity for the non-court defendants.

The APA broadly authorizes judicial review of agency action or inaction, including by an officer or employee, and waives sovereign immunity for suits "seeking relief other than money damages." 5 U.S.C. § 702. The APA's waiver of

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reviewable on appeal or otherwise," ch. X, § 11(H). If this provision forecloses judicial review of constitutional challenges—as defendants argued below—it would be blatantly unconstitutional. *See Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986). Defendants also argued below that the EDR process *is* judicial review conducted by judicial officers, *see* J.A. 471–73, which is an absurd contention. *See* Legal Effect of Federal Judge's Order as Hearing Officer Under Court's Employment Dispute Resolution Plan, 34 Op. O.L.C. 25, 30 (2010) (concluding that the EDR presiding officer was "acting in an administrative capacity" and "not exercising the Article III authority to resolve a case or controversy").

sovereign immunity "is not limited to APA cases." *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006). The APA states that "the United States may be named as a defendant," 5 U.S.C. § 702, and that an "'agency' means each authority of the Government of the United States" but does not include "the courts of the United States." 5 U.S.C. § 701(b)(1).

In determining whether an entity falls within the APA's "courts" exemption, courts have looked to whether the functions performed by the entity are "functions that would otherwise be performed by courts." *See Wash. Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994); *see also Goldhaber v. Foley*, 519 F.Supp. 466, 480–81 (E.D. Pa. 1981). The judicial branch is not synonymous with "courts," and offices or officials do not become "courts" simply by being placed in the judicial branch. *See, e.g.*, *Hubbard v. United States*, 514 U.S. 695, 700 n.3 (1995) (expressly reserving the question "whether any other entity within the Judicial Branch might be an 'agency'"). The "courts" exemption would likely cover the Fourth Circuit, and the Chief Judge and Judicial Conference when they perform judicial functions. Other defendants—the FDO, Defender, AO, AO Director, Circuit Executive, and Fourth Circuit Judicial Council—are organizationally in the judicial branch but are not "courts." And, at minimum, the APA undoubtedly waives the sovereign immunity of "the United States." 5 U.S.C. § 702.

a. Federal public defenders

An FDO is not one of the "entities within the judicial branch that perform functions that would otherwise be performed by courts." *Wash. Legal Found.*, 17 F.3d at 1449. Federal defenders serve an independent Sixth Amendment criminal defense function. *See* 18 U.S.C. § 3006A. So, when Congress created FDOs, it did not see them as directed by the judicial branch. S. Rep. No. 91-790, at 18 (1970) ("It would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm."); *see also Polk Cnty. v. Dodson*, 454 U.S. 312, 321 (1981) ("[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior."). Given federal defenders' obligation to advocate for clients before the courts, *see* Code of Conduct for Federal Public Defender Employees Canon 1, it would denigrate FDOs' integrity and independence to deem the FDO a court or to blur its functions with those of courts.

The District Court recognized that the question of whether FDOs are "courts" under the APA's § 701(b)(1) exemption is "a matter of first impression in this circuit." J.A. 1509. The District Court was "persuaded by," J.A. 1510, a sole unpublished Ninth Circuit decision that, without explanation, equated the "judiciary" with "courts," concluding that the APA "does not apply to the Federal Public Defender's Office, which is a part of the federal judiciary." *Demello v. Ney*,

185 F.3d 866, *1 (9th Cir. 1999) (unpublished table decision). The District Court reasoned that FDOs are "courts" because courts "appoint, compensate, and remove Federal Public Defenders." J.A. 1510. But it is no more logical to deem federal defenders "courts" because they are appointed by judges than to deem judges to be executive officials because they are appointed by the President. Similarly, executive officers who are appointed by judges do not become "courts." *See Ex parte Siebold*, 100 U.S. 371, 397–99 (1879).

b. Other non-court defendants

Some judicial agencies, such as the Judicial Conference and the Probation Service, are exempt from the APA because they are deemed "auxiliaries of the courts." *In re Fid. Mortg. Invs.*, 690 F.2d 35, 39 (2d Cir. 1982); *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974). Other judicial branch defendants, however, perform strictly administrative functions and cannot reasonably be considered auxiliaries of the courts.

Whether the APA's "courts" exemption covers the AO is the subject of conflict between district courts, though an appellate court has yet to squarely decide the issue. In *Goldhaber v. Foley*, 519 F.Supp. 466 (E.D. Pa. 1981), a district court was "not convinced" that "the AO is exempt from the judicial review provisions of the APA," because the AO's functions "are much more akin to those of an administrative or executive agency than to those of the courts." *Id.* at 480–81

(reasoning that considering the AO covered by the APA exemption for courts "would render the distinction between the courts and the judicial branch meaningless"); *see also Novell, Inc. v. United States*, 46 Fed.Cl. 601, 611–12 (2000) (agreeing with and relying on *Goldhaber*); *Schnapper v. Foley*, 667 F.2d 102, 107–08 (D.C. Cir. 1981) (including the AO director within the APA's sovereign immunity waiver). Other courts have concluded that the AO is exempt from the APA, reasoning that "the term 'courts' embraces the entire judicial branch." *Tashima v. Admin. Off. of the U.S. Cts.*, 719 F.Supp. 881, 886 (C.D. Cal. 1989); *see also Wacker v. Bisson*, 348 F.2d 602, 608 n.18 (5th Cir. 1965); *Novell, Inc. v. United States*, 109 F.Supp.2d 22, 26 (D.D.C. 2000) (adopting *Tashima*'s reasoning but not engaging with the D.C. Circuit's contrary ruling in *Schnapper*).

However, conflating the definition of "courts" with that of the "judicial branch" is inconsistent with the Supreme Court's approach to similar statutes. In *Hubbard v. United States*, the Supreme Court expressly rendered "no opinion as to whether any other entity [besides a court] within the Judicial Branch might be an 'agency,'" indicating that the fact that an entity is "within the judicial branch" does not automatically render it "a court." 514 U.S. at 700 & n.3.

Unquestionably, the AO "perform[s] administrative functions" and "is not an Article III entity." *Novell*, 46 Fed.Cl. at 604 (quoting *Tashima v. Admin. Off. of the U.S. Cts.*, 967 F.2d 1264, 1269 (9th Cir. 1992)). Unlike the Judicial

Conference, the AO's role is "administrative 'in the narrowest sense of that term.'" *Tashima*, 967 F.2d at 1271; *see Schnapper*, 667 F.2d at 107–08 (holding that APA § 702 waives sovereign immunity for the AO Director without even considering whether the AO is a "court").

Likewise, the Circuit Executive "[e]xercis[es] administrative control of all nonjudicial activities of the court of appeals of the circuit." 28 U.S.C. § 332(e)(1). No argument can be made that administering a budget and personnel system, *id.* §§ 332(e)(2)–(3), or "maintaining property control records and undertaking a space management program," *id.* § 332(e)(5), are judicial functions that render the Circuit Executive a "court."

Similarly, a circuit judicial council is responsible for "the effective and expeditious administration of justice" within the circuit, *id.* § 332(d)(1), and, like the AO, was created "to furnish . . . administrative machinery." *Chandler v. Jud. Council of the Tenth Cir. of the U.S.*, 398 U.S. 74, 96–97 (1970) (Harlan, J., concurring) (quoting H.R. Rep. No. 76-702, at 2 (1939)). Although a judicial council is composed of judges, it does not exercise "judicial powers" and is "an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit." *Id.* at 86 n.7; *see, e.g.*, *In re Imperial "400" Nat'l, Inc.*, 481 F.2d 41, 47 (3d Cir. 1973) (noting that the exercise of judicial powers is "a function denied to the Council"); *In re Complaint of Jud. Misconduct*,

630 F.3d 1262, 1262 (9th Cir. 2011) (stating that "the Judicial Council is not a court"). Thus, these non-court entities are not "courts" under the APA.

2. The Back Pay Act waives sovereign immunity for Roe's back pay claim.

The BPA, 5 U.S.C. § 5596, waives sovereign immunity for an employee's back-pay remedy against an agency, including an FDO. *See, e.g.*, *In re Levenson*, 587 F.3d 925, 934–37 (9th Cir. 2009) (ordering prospective back pay for deputy federal public defender who alleged discrimination in violation of the EDR Plan and the Due Process Clause); EDR Plan ch. X, § 12(B)(6) (stating that "back pay and associated benefits" are available remedies). An employee "need not bring suit under the Back Pay Act" itself, so long as the employee has a "cause of action" in federal court. *Adam v. Norton*, 636 F.3d 1190, 1196 (9th Cir. 2011).

The District Court held that the BPA's sovereign immunity waiver did not apply to Roe's back pay claim because no "appropriate authority" had determined that she was "affected by an unjustified or unwarranted personnel action." J.A. 1508 (quoting 5 U.S.C. § 5596(b)(1)). The District Court wrongly believed that the "appropriate authority" had to be an administrative forum, namely the EDR process, or the U.S. Court of Appeals for the Federal Circuit. *See* J.A. 1508. But in fact, the District Court itself is an "appropriate authority" to determine whether Roe was "affected by unjustified or unwarranted personnel action," 5 U.S.C.

§ 5596(b)(1), since a district court can rule that officials' unconstitutional conduct resulted in her constructive discharge and order her reinstated. *See Brown v. Sec'y of the Army*, 918 F.2d 214, 216 (D.C. Cir. 1990) (finding that a district court was an "appropriate authority" to find personnel actions by executive agencies "unjustified or unwarranted") (R.B. Ginsburg, J.); *Adam*, 636 F.3d at 1193 (accord); *see also* 5 C.F.R. § 550.803 ("Appropriate authority means an entity having authority . . . to correct or direct the correction of an unjustified or unwarranted personnel action, including . . . a court.").

Because the BPA waives sovereign immunity for federal employees' back pay claims, and because a district court is an "appropriate authority" to find that she was constructively discharged and order her reinstated, Roe's back pay claim is not barred by sovereign immunity.[8]

II. Equal Protection

Roe alleged that the Official and Individual Capacity Defendants violated the equal protection component of the Fifth Amendment's Due Process Clause, which confers a right to be free from sex discrimination in federal employment.

[8] Below, defendants argued that the Chief Judge was the "head" of the employing unit, J.A. 783, and had authority to discipline the Defender, J.A. 775, 1195, but at other times denied any employment relationship between federal defenders and the Fourth Circuit that would create a duty to act on harassment, J.A. 433–34, 1213–14. Roe therefore does not concede that the FDO is the only defendant who is the "employer."

See Davis v. Passman, 442 U.S. 228, 235 (1979). Relying on *Wilcox*, the District Court dismissed Roe's equal protection claim, on the grounds that equal protection doctrine, unlike Title VII, does not support a claim of "pure" retaliation. J.A. 1521. Contrary to the District Court's understanding, Roe's equal protection claim does not depend upon an attempt to "graft Title VII standards onto the Fifth Amendment." J.A. 1523. Her claim is squarely based in Fourth Circuit equal protection precedent.

The District Court erred in two respects. First, the District Court mischaracterized Roe's complaint as alleging "pure" retaliation, when in fact she explicitly alleged a mixture of retaliation and ongoing sex discrimination and sexual harassment. *See, e.g.*, J.A. 100 (alleging "harassment, retaliation, and discrimination, fail[ure] to take immediate and effective action on her complaints, and fail[ure] to provide meaningful review or remedies"); J.A. 1319 ("[T]his is not a strictly retaliation-based claim."). *Wilcox* recognized that alleging such a mixture states a colorable equal protection claim. 970 F.3d at 461.

Second, by ignoring Roe's allegations of defendants' deliberate indifference to sexual harassment, the District Court erroneously concluded that "Roe does not allege that the actions taken against her were on the basis of her sex." J.A. 1271 ("The test is whether the official's conduct was 'clearly unreasonable' or 'deliberately indifferent,' which describes defendants' conduct here." (quoting

Feminist Majority Found., 911 F.3d at 701–02)); *see also* J.A. 1320 ("[T]here was a conscious failure to act here."). Roe's allegations that defendants responded with deliberate indifference to sexual harassment support her equal protection claim independent of her allegations of mixed retaliation and continued sex discrimination under *Wilcox*.

A. Roe alleged a "mixture" of retaliation and continued sex discrimination.

The District Court fundamentally erred in its understanding of *Wilcox* and Roe's allegations. *Wilcox* held that "a *pure* retaliation claim is not cognizable under the Equal Protection Clause," 970 F.3d at 455 (emphasis added), because, unlike Title VII, the Equal Protection Clause contains no express language classifying retaliation as sex discrimination, *id.* at 463. Importantly, *Wilcox* still recognized that the Equal Protection Clause covers a situation in which there is "continued sexual harassment and adverse treatment . . . even when the sex discrimination and harassment continue after, and partially in response to, the female employee's report of prior discrimination and harassment." *Id.* at 461. In other words, retaliation claims may succeed as equal protection claims if they do not allege "pure" retaliation, but rather a "mixture" of retaliation and ongoing sex discrimination. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994).

Roe alleged a "mixture" of retaliation and ongoing sex discrimination. The Defender acquiesced in and facilitated the Assistant's sexually harassing conduct. After Roe formally reported the discrimination, defendants ratified and enabled the continuing harassment, which made the hostile work environment so unbearable that she was forced to resign. Defendants' conduct, which occurred "partially in response to" Roe's "report of prior discrimination and harassment," was not "pure retaliation." *Wilcox*, 970 F.3d at 461; *see also Beardsley*, 30 F.3d at 530. Rather, it constituted precisely the "mixture" of retaliation and "continued sexual harassment and adverse treatment" that suffices for an equal protection claim under *Beardsley* and *Wilcox*.

B. Roe stated an equal protection claim that defendants were deliberately indifferent to sexual harassment.

Equal protection "not only guards against sexual harassment" but also protects against "deliberate indifference that allows such harassment to occur and persist." *Feminist Majority Found.*, 911 F.3d at 702 (citing *Jennings v. Univ. of N.C.*, 482 F.3d 686, 701–02 (4th Cir. 2007)); *Bohen v. City of E. Chi.*, 799 F.2d 1180, 1187 (7th Cir. 1986) (holding that employer's "conscious failure" to act on sexual harassment "amounted to intentional discrimination"); *Beardsley*, 30 F.3d at 530–31 (endorsing *Bohen* and noting that "sexual harassment has long been recognized to be a type of gender discrimination"); *Cross v. Alabama*, 49 F.3d

1490, 1503 (11th Cir. 1995) (noting, in an equal protection case, that a reasonable person "could not have believed doing nothing in light of [a supervisee's sexual harassment] was lawful"). Consistent with multiple other circuits, the Fourth Circuit explained:

> To state an equal protection claim for deliberate indifference . . . a plaintiff must first allege that she "was subjected to discriminatory peer harassment." Secondly, the plaintiff must allege that the [official] "responded to the discriminatory peer harassment with deliberate indifference, i.e. in a manner clearly unreasonable in light of known circumstances." In other words, the plaintiff must allege that the [official] knew about harassment of the plaintiff "and acquiesced in that conduct by refusing to reasonably respond to it." Third, the plaintiff must allege that the [official's] deliberate indifference was motivated by a discriminatory intent.

Feminist Majority Found., 911 F.3d at 702–03 (citations omitted). Roe alleged all three elements.

1. Roe alleged that defendants' response to sexual harassment was clearly unreasonable.

To allege sexual harassment, a plaintiff must allege that she was subjected to harassment based on her sex. *See id.* at 703; *Jennings*, 482 F.3d at 695. Roe alleged quid-pro-quo and hostile environment sexual harassment that lasted nearly a year. *See* J.A. 30–39; 43, ¶ 150; 46, ¶¶ 165–66; 53, ¶ 216; 56, ¶¶ 236–38; 57, ¶ 244; 85, ¶ 406; 98, ¶ 487.

To allege that defendants responded "in a manner clearly unreasonable in light of known circumstances," the plaintiff must allege that defendants knew of

the harassment "and acquiesced in that conduct by refusing to reasonably respond to it." *Feminist Majority Found.*, 911 F.3d at 702–03 (citations omitted). A plaintiff need not allege that the defendant was "entirely unresponsive to allegations of harassment" but rather that the defendant "did not engage in efforts that were 'reasonably calculated to end [the] harassment.'" *Id.* at 689 (quoting *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012)). "[H]alf-hearted investigation or remedial action" does not suffice to shield a defendant from liability. *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cnty.*, 819 F.3d 69, 77 (4th Cir. 2016). Moreover, the fact that a defendant "dragged its feet" and delayed before implementing remedial action shows deliberate indifference. *Zeno*, 702 F.3d at 669; *see also id.* at 669 n.13 (listing cases in which delays of up to six months constituted deliberate indifference). Even taking "an important step in seeking to rectify a sexually hostile environment" may not suffice if that step "is not a remedy in and of itself." *Feminist Majority Found.*, 911 F.3d at 690; *Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 273 n.11 (4th Cir. 2021) (noting that the provision of basic accommodations to a victim does not foreclose a finding of deliberate indifference). And once a defendant "is aware of its ineffective response," its failure to do more may be deemed to have "effectively caused" further harassment. *Zeno*, 702 F.3d at 670; *see also Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999).

Defendants failed to respond reasonably and take steps reasonably calculated to stop the harassment. First, the Defender, to whom Roe first reported the Assistant's conduct, told her to "work it out" with the Assistant, J.A. 35, ¶ 97, and then insisted on a meeting to discuss the sexual harassment in which he allowed the Assistant to berate her, J.A. 43, ¶ 144. Then on clear notice of the sexual harassment, the Defender rejected AO advice to move Roe away from her harasser, J.A. 53–54, ¶¶ 215–20, and instead placed her even more directly under her harasser's supervision, J.A. 52, ¶ 207. Facilitating the Assistant's power to harass Roe, the Defender took away Roe's trial cases and allowed the Assistant to provide input on Roe's job duties, including her request to move to appeals to get away from the harassment. J.A. 56, ¶¶ 237–38; *see* J.A. 902–03. The Defender made clear that she would work at her harasser's duty station no matter the outcome of the EDR process. J.A. 70, ¶ 327.

The Defender ratified the Assistant's harassing conduct, most significantly by refusing to consider Roe for the promotion for which she qualified—a discriminatory follow-up to the Assistant's quid-pro-quo sexual harassment. J.A. 56–57, ¶¶ 239–46. The meaning of the Assistant's harassing email was that if Roe didn't "pay" in the way he wanted, that is, sexually, she would not get the promotion. In refusing to consider the promotion—even going to lengths to *backdate* his reclassification of her title to the day before she became eligible for

promotion, *see* J.A. 1183—the Defender made good on the Assistant's threat. This response was clearly unreasonable and effectively caused further harassment.

Second, after Fourth Circuit and AO officials were put on notice of the sexual harassment and of the Defender's disregard of AO advice on stopping it, they protected the Defender rather than taking steps to end the harassment. The officials prohibited Roe from seeking guidance about her civil rights from the FEOO. J.A. 54–56, ¶¶ 222–35. The officials allowed the Defender to drive the process despite his conflict of interest: The Defender appointed the investigator to investigate the allegations, J.A. 956, ¶ 81; J.A. 987, and decided how to discipline the Assistant, J.A. 97, ¶ 484; 958–59, ¶¶ 99, 101–03. The Chief Judge refused to disqualify the Defender from acting on behalf of the employing office in the dispute resolution process. J.A. 83, ¶¶ 395–96; 92, ¶¶ 451–53. Officials failed to conduct an impartial investigation by a well-trained investigator. The Circuit Executive limited the investigation's scope to exclude the Defender's wrongful conduct. J.A. 68–69, ¶¶ 318–19. As a result, the Investigator did not fully investigate Roe's claims. *See, e.g.*, J.A. 69, ¶ 319 ("[T]he HR Specialist admitted that she *never* investigated her retaliation claim.").

Where officials did take action, they "dragged [their] feet." *Zeno*, 702 F.3d at 669. The unknown "disciplinary action" against the Defender and the Assistant was "taken almost a full year after Roe first raised her complaints," and several

months after Roe had already been forced to resign. J.A. 97, ¶ 485. The Investigator went long periods without providing Roe any updates on the investigation's progress. J.A. 67, ¶ 306; 69, ¶ 322; 81, ¶ 384. The Chief Judge delayed addressing Roe's request to disqualify the Defender for four months, saying he would wait until the end of the investigation, and ultimately, never disqualified the Defender. J.A. 83, ¶¶ 395–96; 97, ¶ 484. Even when the investigation concluded, defendants delayed taking corrective action while the hostile work environment persisted until Roe was forced to resign. J.A. 84, ¶¶ 400–01. Defendants' clearly unreasonable response led to Roe's constructive discharge.

2. Roe alleged discriminatory intent.

Allegations that a defendant "sought to downplay the harassment and threats, and . . . made no effort to stop them . . . are sufficient to state the intent element of the equal protection claim." *Feminist Majority Found.*, 911 F.3d at 703. Roe alleged that defendants downplayed the harassment and did not attempt to stop it. The Defender "trivializ[ed]" the harassment by implying that "at least[] she had not been sexually assaulted." J.A. 51, ¶ 203. He compared the relationship between Roe and her harassing supervisor to a "marriage" and ordered her to "compromise," relying on a sexist stereotype that a female employee relates to her male supervisor like a wife who must "compromise" with a husband's

demands. This attitude underscored the sex-discriminatory motivation for the Defender's unreasonable response to sexual harassment. J.A. 42, ¶ 140.

Likewise, the EDR Coordinator told Roe that "it was not 'helpful' for her to have reported her complaints to the AO." J.A. 60, ¶ 266. And in the EDR process, when Roe requested protection from continuing harassment, the EDR Coordinator said, "[r]eiterating that you want a safe workplace free of harassment isn't helpful because" the Defender, *the accused party*, "already believes he's done and is doing all he can to provide such a workplace for you." J.A. 71, ¶ 332. This grossly downplayed the harassment that Roe suffered.

Defendants not only made no effort to stop the harassment, but they also blocked Roe from seeking guidance on her rights from the FEOO, J.A. 54–56, ¶¶ 222–35, which "illegally blocked Roe from engaging in protected activities: seeking guidance about, and asserting, her employment rights," and "contradicted the Working Group's public assurances encouraging judiciary employees to seek independent guidance and advice on workplace issues," J.A. 55, ¶ 232.

C. The *Bivens* issue should be remanded.

Because the District Court held that Roe "fails to allege cognizable constitutional claims," it declined to consider whether *Bivens* affords her a cause of action. J.A. 1512. If this Court holds that Roe has a cognizable equal protection claim, this Court should remand the *Bivens* issue to the District Court to consider

in the first instance. *See Williams v. Morgan State Univ.,* 850 F.App'x 172, 174 (4th Cir. 2021) (remanding "to the district court for it to address . . . in the first instance" the "key legal issue" of whether state sovereign immunity applied); *Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006).

D. Roe stated claims under §§ 1985 and 1986.

The District Court dismissed Roe's 42 U.S.C. §§ 1985 and 1986 claims because "her theory of liability is not 'class-based, invidiously discriminatory animus,' but rather the more sweeping Title VII standards regarding sexual harassment as discrimination on the basis of sex." J.A. 1526 (quoting § 1985(3)). The District Court was mistaken for the same reasons that it mistakenly dismissed Roe's equal protection claim.

To prove a § 1985 claim, a plaintiff must show:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995). Roe has met all of these elements.

First, Roe met the element of "class-based, invidiously discriminatory animus" because she alleged that defendants engaged in sex discrimination by

being deliberately indifferent to sexual harassment. The term "animus" does not require the discrimination to be malicious. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Sex-based animus, "a purpose that focuses upon women *by reason of their sex*," is synonymous with an equal protection claim's requirement that the defendant act "because of" sex. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Roe's allegations of intentional sex discrimination meet this requirement.

In addition, Roe alleged that two or more defendants conspired to deprive her of her equal protection rights. In furtherance of the conspiracy, defendants committed numerous overt acts. The Defender, the Circuit Executive, and AO officials took active steps to prevent Roe from speaking to the FEOO about her rights, limit the investigation to exclude allegations against the Defender, delay taking corrective action, and allow the Defender, the accused party, to drive the process. Defendants also allowed the Assistant—the man alleged to have engaged in quid-pro-quo sexual harassment—to exert control over Roe's professional advancement.

These actions resulted in injury because Roe was constructively discharged from the position that was her dream job and calling. She was unable to find comparable employment, and was rejected from jobs because of defendants' false

statements spread in conjunction with her constructive discharge. *See* J.A. 98–99. She suffers emotional distress because of defendants' conduct. *Id*.

Finally, a 42 U.S.C. § 1986 claim is actionable "against any person who, knowing that a violation of § 1985 is about to be committed and possessing power to prevent its occurrence, fails to take action to frustrate its execution." *Rogin v. Bensalem Twp.*, 616 F.2d 680, 696 (3d Cir. 1980). Negligence is sufficient for a § 1986 claim. *Clark v. Clabaugh*, 20 F.3d 1290, 1298 (3d Cir. 1994). Defendants knew that Roe had reported her supervisors' discrimination and harassment but failed to stop it, which states a § 1986 claim.

III. Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Roe alleged that the Official Capacity Defendants violated due process by subjecting her to an unfair EDR process to resolve her discrimination claims. The District Court did not address Roe's claims of unfair process, however, because it held that she failed to allege any substantive property or liberty interest protected by the Due Process Clause. J.A. 1515–19.

This was fundamental error. When Roe accepted employment at the FDO, a government employer, she had a protected interest in being free from workplace

sex discrimination, including sexual harassment, and a protected interest in pursuing her career. Defendants deprived her of these protected interests without sufficient procedural protection.

A. Defendants deprived Roe of constitutionally protected property and liberty interests.

1. Roe's property interest was created and defined by the EDR Plan.

The Due Process Clause protects a person's property interest in government entitlements. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972). The Supreme Court has recognized that property interests "are created and their dimensions defined by . . . rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. These property interests may stem from the terms of an employment contract. *See Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972).

The EDR Plan granted employees certain rights as a condition of their employment. *See* EDR Plan ch. X, § 10(B)(2)(f) (discussing violation of "a substantive right protected by this Plan"); *id.* ch. X, § 12(A) (same). The EDR Plan granted the right to be free from workplace discrimination, harassment, and retaliation, EDR Plan ch. II, § 1; to "equal opportunities for promotions," *id.* § 3(A); and to promotion "according to their experience, training, and demonstrated ability" and "without regard to" sex, *id.* § 4(C). Because the EDR

Plan granted employees these rights, alongside procedures for redressing "a denial of the rights," *id*. ch. X, § 1, the EDR Plan "created and defined" a government entitlement, *Roth*, 408 U.S. at 578.

The legitimacy of an employee's claim of entitlement may be proven "in light of the policies and practices of the institution." *Perry*, 408 U.S. at 603. In *Perry*, the employee's property interest in job tenure stemmed from "agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.'" *Id*. at 602. Roe's entitlement to the EDR Plan's "rights and protections," EDR Plan ch. I, § 1, is even stronger because they were granted in a "written" policy with "explicit" provisions, *see Perry*, 408 U.S. at 601; *see also Paige v. Harris*, 584 F.2d 178, 181 (7th Cir. 1978) (stating that a federal agency handbook "provides just the type of 'rules and understandings'" that "would justify appellant's 'legitimate claim of entitlement to continued employment'").

Not every provision in an employment contract merits due process protection, but "special circumstances" may bring an understanding within the ambit of due process. *García-González v. Puig-Morales*, 761 F.3d 81, 89 (1st Cir. 2014). Such circumstances exist here, due to the judicial exceptionalism in how the thirty-thousand federal judiciary employees are protected from workplace discrimination. Unlike most federal employees, who are protected by employment statutes, *see* 2 U.S.C. § 1311, judiciary employees lack access to the Equal

Employment Opportunity Commission complaint process or the civil cause of action provided by Title VII, *see* 42 U.S.C. § 2000e-16(a).

The EDR Plan purports to fill that gap in protection through judiciary policy. *See* EDR Interpretive Guide & Handbook 5 (Jan. 2020) (J.A. 1356) (explaining that the Judicial Conference "has prohibited" conduct that would violate Title VII and other workplace laws). As the judiciary explains, "[a]lthough the courts are not required by statute to adopt the procedures reflected in the model EDR plan, once such procedures have been adopted courts should consider them to be legally binding." Memorandum from Susan T. Kattan, Assistant Gen. Couns., Admin. Off. of the U.S. Cts. 3 (Aug. 2012) (Addendum 45). Employees have "legitimately relied," *Perry*, 408 U.S. at 600, on the EDR Plan to protect against workplace discrimination, as its purpose was to grant them "rights, protections, and procedures" that are "comparable to those available to employees" covered by Title VII. 2 U.S.C. § 1434; *see also* CAA Report at 2; Guide to Judiciary Policy vol. 12, § 220; EDR Plan ch. X, § 10(B)(2)(e). Roe would never have accepted employment at the FDO in the absence of protection against workplace discrimination including sexual harassment.

Contrary to the District Court's reasoning, an employee need not claim an interest in "continued employment," *see* J.A. 1518, to allege a protected property interest. "Tenure is not the only employment benefit . . . that can be protected by

the constitutional guarantees of due process." *Clukey v. Town of Camden*, 717 F.3d 52, 56 (1st Cir. 2013). "The types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Perry*, 408 U.S. at 601 (stating that property interests cannot be limited to "a few rigid, technical forms").

The District Court was also mistaken in construing Roe's property interest as an interest in *process* as "an end in itself." *See* J.A. 1518 (quoting *Olim v. Wakinekona*, 461 U.S 238, 250 (1983)). As the Supreme Court explained, the "constitutional purpose" of process "is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim*, 461 U.S. at 250. The EDR Plan explicitly grants employees "*substantive* right[s]." EDR Plan ch. X, §§ 10(B)(2)(f), 12(A) (emphasis added). Roe's interest in the EDR Plan's grant of rights is therefore a "substantive interest," not an interest in process as "an end in itself." *Olim*, 461 U.S. at 250. An employee's right to be free from workplace sex discrimination "is at least as substantial" as rights like a horse trainer's license, utility service, or disability benefits, all of which the Supreme Court has recognized as property interests. *Logan*, 455 U.S. at 431 (listing cases).

Moreover, the substantive right to be free of invidious discrimination by the federal government is also a fundamental right protected by the Due Process

Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Federal employees thus have a fundamental constitutional right to be free from employment discrimination. *Davis v. Passman*, 442 U.S. 228, 234, 242 (1979).

In sum, as the exceptional means of protecting judiciary employees against workplace discrimination in the absence of Title VII protections, the right granted by the EDR Plan was so fundamental to the terms of Roe's employment that it warranted special constitutional safeguarding.

2. Roe had a liberty interest in pursuing her chosen career.

Due process prohibits the government from discharging an employee in a manner that unfairly imposes a "stigma" that "foreclose[s] [an employee's] freedom to take advantage of other employment opportunities." *See Roth*, 408 U.S. at 573. In particular, employer actions that "allege dishonesty and thereby impugn [an employee's] good name, reputation, honor, and integrity" are likely to affect an employee's future employment prospects. *McNeill v. Butz*, 480 F.2d 314, 320 (4th Cir. 1973).

When claiming that an employer unfairly tarnished her professional reputation, a plaintiff need not specifically describe how the harmful allegations were publicized. *See Sciolino v. City of Newport News*, 480 F.3d 642, 649 (4th Cir. 2007). A plaintiff need only allege that the employer's statements "(1) placed a stigma on [her] reputation; (2) were made public by the employer; (3) were made

in conjunction with [her] termination or demotion; and (4) were false." *Id.* at 646; *see also Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 308–13 (4th Cir. 2006).

Defendants' behavior was a textbook example of infringement on an employee's liberty interest as laid out in *Sciolino*. Defendants "placed a stigma" on Roe's reputation that they then "made public." *Sciolino*, 480 F.3d at 646. Defendants spread false rumors that Roe fabricated claims of sexual harassment. J.A. 96, ¶ 477; 99, ¶ 492. They bolstered the false rumors by visibly diminishing Roe's job duties, announcing in a humiliating office email that she would report to a research and writing attorney, which looked like a demotion, and denying her an earned promotion. J.A. 46, ¶¶ 165–66; 56–58, ¶¶ 236–51; 65, ¶ 295; 73, ¶ 338. The malicious gossip spread beyond office walls, impugning Roe's character and tainting her reputation. *See* J.A. 74, ¶¶ 344–45; 96, ¶ 477; 98–99 ¶¶ 491–92.

Defendants' stigmatizing of Roe occurred in the course of her constructive discharge, and thus was accompanied by a change in her legal status as an employee. *See Paul v. Davis*, 424 U.S. 693, 708 (1976). Defendants' biased warping of the EDR process denied Roe a fair chance to demonstrate that the rumors about her were false. *See infra* 60–71; *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an

opportunity to be heard are essential."). Roe learned from defendants' filings below that the investigation report stated that Roe "exploited" the "poor judgment and decision-making skills" of her supervisors to obtain a transfer, indicating that the report impugned Roe's integrity without giving her notice of any such allegation or an opportunity to respond. J.A. 960, 1196; *see* J.A. 1170–72, 1267–68. Then, Roe's supervisor spread those same rumors, claiming that she "lost" in her EDR proceeding because she "made up" sexual harassment allegations, J.A. 98, ¶ 492, indicating that the investigation's findings about Roe "exploiting" supervisors were shared in violation of confidentiality. EDR Plan ch. X, § 4; J.A. 90–91, ¶¶ 450–52; 904, ¶ 43. Even during this litigation, defendants violated the court-ordered pseudonym that Roe requested, in part, to protect her career. *See* J.A. 8, 103–04, 1161.

Defendants' actions prevented Roe from securing comparable employment as a federal public defender. When Roe inquired about a job at an FDO in another district, the Federal Public Defender there was "openly hostile" to her, presumably having heard false rumors about Roe's integrity and departure from the FDO. J.A. 98, ¶ 491. Roe has been working in temporary and substantially lower-paying positions, J.A. 98–99, ¶¶ 487–93, despite excellent credentials and job performance, J.A. 22–23, ¶¶ 16–22; 32, ¶ 78; 40, ¶ 128; 43, ¶¶ 144, 149.

Because defendants made and shared false claims of dishonesty, the damage to Roe's reputation and career in conjunction with her constructive discharge entitled her to constitutionally adequate procedural protections.

B. The EDR process fell far short of the process that was due.

Defendants deprived Roe of liberty and property without sufficient procedural protections by subjecting her to a fundamentally unfair EDR process. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 US. at 333. Fair procedures include "timely and adequate notice" of reasons for a decision, "an effective opportunity to defend," and an "impartial decision maker" who has not "participated in making the determination under review." *Goldberg v. Kelly*, 397 U.S. 254, 267–68, 271 (1970). The EDR process provided none of those protections, resulting in a fundamentally unfair and coercive process that gave Roe no choice but to endure a hostile environment or resign.

The due process violations here consisted of serious procedural defects in both 1) the EDR Plan's design (facial); and 2) officials' implementation of the EDR process (as applied).

1. The EDR Plan's procedural design was fundamentally unfair.

The design of the EDR Plan was fundamentally unfair because its procedures denied employees a neutral decisionmaker or the possibility of meaningful remedies.

a. Denial of neutral decisionmaker

Conflicts of interest marred the EDR Plan's ability to provide a neutral decisionmaker. *See* J.A. 1376 (listing prohibited conflicts of interest in EDR proceedings).

i. Circuit Executive

The Circuit Executive's role as the EDR Coordinator made it impossible for the EDR process to be unbiased and impartial because of what the JIO called "inherent conflicts of interest." J.A. 88, ¶ 429. Because that duality of roles is a recognized conflict of interest, the new 2020 EDR Plan prohibits any "Unit Executive," including the Circuit Executive, from being the EDR Coordinator. *See* J.A. 743; 1383–84 (EDR Handbook) (stating that unit executives have "both an actual and perceived conflict of interest in providing impartial advice and guidance to an Employee").

As the EDR Handbook states, the EDR Coordinator is supposed to be "a neutral, independent Judiciary Employee who facilitates all of the Options for

Resolution, helping to make the EDR process fair to both the Employee and the Employing Office." J.A. 1381. The EDR Coordinator informs the employee about "substantive employment and procedural rights" and the employing office about "its rights and obligations"; "provides confidential advice . . . as an honest and neutral broker"; and helps "resolve the issue" through "open dialogue." *Id.* A Circuit Executive who exercises "administrative control" of budgets and personnel systems, 28 U.S.C. §§ 332(e)(1)–(3), and therefore approves the very personnel actions at issue, cannot neutrally oversee the EDR process to determine whether those actions were discriminatory.

This inherent conflict concretely undermined the impartiality of Roe's EDR process: The Circuit Executive had participated in approving the Defender's "administrative reclassification" and denial of promotion that were subjects of Roe's EDR claim. J.A. 56, ¶ 240. As EDR Coordinator, the Circuit Executive limited the scope of the investigation to exclude the Defender's wrongful conduct. J.A. 68–69, ¶¶ 318–19. Later, without Roe's consent, he shared with the Defender information she provided on a confidential basis during mediation. J.A. 92, ¶ 451.

ii. Chief Judge

The EDR Plan also made the Chief Judge the presiding officer of the EDR process, responsible for imposing disciplinary action for wrongful conduct, deciding disqualification requests, and ordering remedies for violations of

employees' rights. *See* EDR Plan ch. IX; ch. X, §§ 1, 7, 10, 12. Because of the conflict of interest in having a circuit's Chief Judge perform those roles, the 2020 EDR Plan prohibits the Chief Judge from serving as the presiding officer. J.A. 1417 ("Chief Judges typically advise, even direct, actions by an Employing Office, [so] the Chief Judge should not act as the [presiding officer] because s/he will likely have a conflict of interest.").

The Chief Judge's conflict of interest destroyed the fairness of Roe's EDR proceeding. As the Defender's supervisor, J.A. 64, ¶ 287, the Chief Judge advised on actions including the Defender's "administrative reclassification" and denial of promotion that Roe alleged were discriminatory. J.A. 55, ¶¶ 227–29; 56, ¶ 240. Yet the Chief Judge also decided whether the investigation found "wrongful conduct" and what discipline was appropriate. EDR Plan ch. IX; J.A. 959, ¶ 103 (stating that the Defender was disciplined with "counseling" and was told that "harsher discipline . . . was not warranted"). The Chief Judge was "taken aback" by Roe's request to disqualify the Defender, J.A. 63, ¶ 285, refused to decide on it for months, and then did not disqualify the Defender even when the investigation found him responsible for wrongdoing, J.A. 83, ¶¶ 395–97. And if Roe did not resolve the dispute during mandatory mediation, proceeding to a hearing before the Chief Judge would mean that an official who played a role in approving the Defender's denial of promotion would adjudicate whether that denial was

discriminatory and what remedies were appropriate. EDR Plan ch. X, §§ 1(B), 10(B)(1); *see In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man can be a judge in his own case.")

Indeed, the conflicts alleged here—where officials responsible for coordination, investigation, and adjudication had participated in the alleged violation—are far more severe than conflicts that courts in this circuit have found to violate due process. *See, e.g.*, *Doe v. Rector & Visitors of George Mason Univ.*, 149 F.Supp.3d 602, 619 (E.D. Va. 2016) (holding that a decisionmaker's ex parte contact with one party without informing the other party violated due process).

b. Inability to order remedies

Judiciary officials told Roe that the presiding officer in an EDR hearing was powerless to order the EDR Plan's promised remedies, which made the availability of the EDR process a meaningless sham. *See Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) (Barrett, J.) (stating, in the context of a public university's procedures for adjudicating sexual violence allegations, that "[t]o satisfy the Due Process Clause, 'a hearing must be a real one, not a sham or a pretense'" (citation omitted)).

The EDR Plan requires the presiding officer to order an "appropriate remedy" upon determining that an employee's rights were violated. Ch. X § 12. But judiciary officials told Roe during the EDR process that an EDR presiding

officer lacks authority to order remedies. J.A. 86, ¶ 415; 90, ¶ 439; *see* JCUS at 25 (stating that EDR presiding officers may only order remedies independently authorized by statute). The governing statute for FDOs does not authorize court of appeals judges to manage an FDO, short of removing a Defender for "incompetency, misconduct in office, or neglect of duty." 18 U.S.C. § 3006A(g)(2)(a); *see supra* 35–36 (discussing the independence of FDOs).

Roe thus learned that if she requested a hearing, despite what the EDR Plan said, the EDR process would end without remedies to abate the harassment. J.A. 86, ¶ 415. The acknowledged inability of an EDR hearing to provide remedies for an FDO employee forced Roe to resign rather than proceed to a sham hearing. J.A. 94, ¶ 462; 96, ¶ 475.

2. Defendants implemented the EDR process in a fundamentally unfair manner.

In implementing the EDR process, defendants further denied Roe essential components of a fair procedure: the opportunity to be heard, a decisionmaker who was not the accused party, and access to critical information. *See Goldberg*, 397 U.S. at 267. In so doing, defendants also flouted procedural safeguards in the EDR Plan intended to protect employees' rights to an "unbiased, fair, and impartial" process. J.A. 1376; *see Rector*, 149 F.Supp.3d at 621 (holding that a university's

"accumulation" of "failures to comply" with its regulations violated due process (citation omitted)).

a. Denial of opportunity to be heard

Roe's EDR report of wrongful conduct alleged "harassment, retaliation, and discrimination" and named "both the First Assistant and the Defender as alleged violators." J.A. 62, ¶ 274. But, as the Investigator told Roe during the EDR investigation, the Circuit Executive, without explanation, limited the investigation's scope to include only the Assistant's conduct, and excluded the Defender's alleged violations of the EDR Plan. J.A. 68–69, ¶¶ 318–19. The Investigator "admitted that she *never* investigated [Roe's] retaliation claim." J.A. 69, ¶ 319. The FEOO additionally informed Roe that Fourth Circuit and AO officials decided to limit the scope of investigation to the Assistant. J.A. 54–55, ¶¶ 222–30; *see also* J.A. 987. Defendants' openly acknowledged decision to limit the investigation to exclude allegations against the Defender denied Roe a fair opportunity to be heard.

b. Refusal to disqualify an accused party

Recognizing that a conflict of interest denies fairness and impartiality, the EDR Plan sensibly provided for possible "disqualification" of an employee who is "involved in a dispute" from exercising authority in the EDR process. EDR Plan ch. X, § 7. Roe thus sought to disqualify the Defender, who was obviously

"involved in" the dispute, since Roe was alleging misconduct by him. J.A. 62, ¶¶ 276–78; 63, ¶¶ 281–83. But defendants allowed him to exercise decisionmaking authority in the process and the Chief Judge refused to disqualify him, even after he found the Defender deserving of discipline. J.A. 92, ¶ 453; 958–59, ¶¶ 101–03.

As the EDR Handbook recognizes, when a unit executive is accused of misconduct, "the personal interests of the Unit Executive likely conflict with the Employing Office's interests, and someone other than the Unit Executive should likely act on behalf of the Respondent Employing Office." J.A. 1418. Here, the Defender appointed the investigator, J.A. 956, ¶ 81; 987, even though defendants seemingly recognized the Defender's conflict of interest and designated the EDR Coordinator to "receive" the investigation report in his place, J.A. 60, ¶ 265. The Defender also acted on behalf of the employing office charged with reaching a resolution, EDR Plan ch. X, § 9, and with "redressing, correcting or abating the violation(s) alleged in the complaint," *id.* § 10(A). Roe had to negotiate a resolution with the alleged violator acting for the employing office. J.A. 21, ¶ 7; 85, ¶ 407.

In the midst of this, judiciary officials told Roe that because a presiding officer in the EDR process lacks legal authority to order remedies against the FDO, J.A. 90, ¶ 439, the Defender—the accused party—was effectively the "decision

maker" in her EDR process. J.A. 86, ¶ 415. The Defender determined whether the Assistant engaged in wrongdoing and what discipline was appropriate. J.A. 958, ¶ 99. The Chief Judge disciplined the Defender, *id.* ¶ 101, but judiciary officials told Roe that the Defender was the "decision maker" over any possible remedy. The Defender's conflict of interest, wherein the accused party exercised authority in the process, including determining discipline and remedies, denied Roe a decisionmaker who was not the accused party, let alone a neutral decisionmaker, and rendered the EDR process fundamentally unfair.

c. Withholding of investigation report

AO officials and the Circuit Executive denied Roe access to the investigation report and findings, in order to push her to "settle the matter informally" in mediation. J.A. 83, ¶ 398. An employee whose report of wrongful conduct leads to an investigation clearly needs to know the investigation's findings. *See* EDR Plan ch. X, §§ 4, 5.G. Thus the EDR Handbook provides that the Investigator "must" give the written investigation report "first to the Presiding Judicial Officer and then to the Parties, with any redactions deemed necessary by the Presiding Judicial Officer," and that "[t]he report must be completed *before* any hearing and *before* any adjudication of the Formal Complaint." J.A. 1451 (emphases added). But Defendants told Roe that even after the investigation report

was completed, she would not see it or know its findings and recommendations. J.A. 97–98, ¶¶ 483–86.

Defendants apparently believed that if Roe learned what the investigation found, she would be more likely to request a formal hearing to request remedies for violation of her rights rather than resolve the matter in the mediation. J.A. 83, ¶ 398. Defendants' withholding of the investigation report intentionally created an information asymmetry that defendants exploited in the mediation by convincing Roe that a hearing result would be a foregone conclusion. *See* J.A. 998, ¶¶ 12–15. Roe has still not seen the investigation report, even as defendants in this litigation referred to it in their filings below to support their position. J.A. 780, 1195–96; *see* J.A. 1168–69.

d. Denial of notice

Roe learned from defendants' filings below that the investigation report impugned her integrity by stating that she "exploited" the "poor judgment and decision-making skills" of her supervisors to obtain a transfer. J.A. 1170–71, 1267–68. Had Roe been given notice that such claims about her were being investigated, she would have had a chance to refute them as nonsensical and contrary to the factual record. *See Cannon v. Vill. of Bald Head Island*, 891 F.3d 489, 506 (4th Cir. 2018) (explaining that employers must afford employees "a constitutionally adequate name-clearing hearing before *publicly disclosing* false

information" that "restricted their ability to obtain new employment"); *see supra* 57–60 (describing officials' disclosure of damaging falsehoods in conjunction with Roe's constructive discharge); *see also Goss v. Lopez*, 419 U.S. 565, 581 (1975) (stating, in the context of school misconduct procedures, that due process requires "written notice of the charges," "an explanation of the evidence," and "an opportunity to present [one's] side of the story"); *Doe v. Alger*, 175 F.Supp.3d 646, 661 (W.D. Va. 2016) (finding that university violated student's due process rights by "severely limit[ing] his ability to defend himself"). By denying Roe notice of allegations that she "exploited" her supervisors, defendants damaged her reputation in conjunction with her constructive discharge and, without sufficient procedural protection, deprived her of her liberty interest in pursuing her career.

e. Coercion to forego hearing

The EDR Plan creates two separate procedures—dispute resolution under Chapter X, and investigation and discipline for wrongful conduct under Chapter IX. As the EDR Handbook explains, "[k]eeping the EDR process separate from misconduct and disciplinary actions . . . ensures that all involved (i.e. Employing Offices, Complainants, and alleged violators) have an opportunity to assert their rights through a process that takes into account all interested individuals' rights before an appropriate authority." J.A. 1423. But here, the Circuit Executive

ordered "one, unified" process under Chapters IX and X, J.A. 65, ¶ 297, which defendants then manipulated to coerce Roe into giving up her rights.

After months of inaction, the Circuit Executive announced that even if the investigation found an accused employee responsible for wrongful conduct, no disciplinary action under Chapter IX would be taken until Roe ended the Chapter X dispute resolution process. J.A. 84, ¶ 400. By withholding the investigation's findings and then explicitly conditioning any corrective action on Roe concluding her EDR process, defendants pressured her to resign to avoid further delaying accountability for those responsible for sex discrimination. *See* J.A. 86, ¶ 415; 90, ¶¶ 438–39. Ultimately, defendants' abuse of the EDR process to coerce her not to proceed to a hearing prevented Roe from being heard and resulted in her constructive discharge.

* * *

In sum, the process that Roe received was so profoundly unfair and inadequate that she effectively received no process at all.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's dismissal of Roe's claims and remand.

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves profound constitutional questions and multiple issues of first impression, with significant implications for all judiciary employees, Roe respectfully submits that oral argument should be heard under this Court's Local Rule 34(a).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), and this Court's order of July 19, 2021 granting a word limit extension of 3,500 words, Doc. 36, because it contains 16,459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a 14-point, proportionally spaced typeface.

/s/ Cooper Strickland
Cooper Strickland

CERTIFICATE OF SERVICE

I certify that on this 20th day of August, 2021, I filed this brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Cooper Strickland
Cooper Strickland