No. 11-1055

IN THE

Supreme Court of the United States

REBECCA ATTARD,

Petitioner,

v.

CITY OF NEW YORK and BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Respondents, the City of New York and the Board of Education, rely upon the factual presentation in the District Court's opinion, which considered the facts in the light most favorable to petitioner (App. B3-B10, *see also* City's 2d Circuit Resp. brief, dated June 2, 2011, pp. 4-31). In contrast, petitioner's factual presentation (Pet. 2-10) takes liberties with the record. For example, she contends that she followed through on "everything" her supervisors recommended following their classroom observations (Pet. 5), when the record shows that she admitted that: she stopped reading the reports, observed only one of three teachers and only reviewed lesson plans a few times (*see* A594; JA357 3020-a Tr. at 575-577; Pl. Dep. I at JA812-814; *see also* App. B7).

Petitioner has affirmatively dropped her purported disparate impact claim (Pet. 3 n.1). Respondents note that such claim was unpreserved, given that it was not included in her EEOC complaint, as the District Court held (App. B21). In any event, even if, *arguendo*, she had preserved the claim, the Second Circuit correctly found that such claim lacked merit on this record (App. A6-A7).

REASONS WHY THE PETITION SHOULD BE DENIED

This case was correctly decided and does not conflict with this Court's precedent. Petitioner's alleged issues are either not presented on this record or do not present issues worthy of review by this Court. As the Circuit Court held, dismissal of

petitioner's disparate treatment claim brought pursuant to the Age Discrimination in Employment Act ("ADEA"), 19 U.S.C. § 621 *et seq.*, was warranted under controlling precedent, *see Gross v. FBL Fin. Servs.*, 557 U.S.167, __, 129 S. Ct. 2343, 2352 (2009), because petitioner could not prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action.

(1)

Petitioner's alleged question for review (Pet. Question Presented and 11-15) is not presented in this case. Not only was there an independent arbitration decision upholding petitioner's termination as a teacher, which is properly considered under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), but also there was more (App. A5). As the Second Circuit expressly held (App. A5):

> Contrary to Attard's assertion, the District Court did not "beg[in] and end[]" its analysis with the adverse arbitration decision. Rather, the District Court surveyed the evidence of discriminatory motive, including the critical comments of her supervisor and the statistical data that Attard cited to bolster her age discrimination claim. Although the District Court did not couch its analysis in the language of "pretext," it is clear that the District Court considered the evidence of a "discriminatory state of mind," … without which there could be no finding of pretext under the final

McDonnell-Douglas prong. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." (emphasis omitted)).

Accordingly, "substantially for the reasons stated by the District Court," the Second Circuit agreed that petitioner failed to adduce sufficient evidence to support the conclusion that age discrimination was the "but-for" cause of the Department's decision to terminate her employment (App. A5).

Notwithstanding the above, petitioner attempts to frame a convoluted issue based upon the Circuit's reference to *Collins v. N.Y. City Transit Auth.,* 305 F.3d 113, 119 (2d Cir. 2002) (Pet. App. D1-D13) and the fact that a single Circuit decision, *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1211 (10th Cir. 2011), *amended on unrelated grounds*, 2011 U.S. App. LEXIS 11454 (10th Cir. 2011), has indicated some disagreement with some of the language of *Collins* (Pet. 8-9; Pt. I, 11-15). What petitioner overlooks is the Tenth Circuit's recognition that the *Collins* decision actually recognized a Court's discretion to accord weight to an arbitral decision on a case-by-case basis, as articulated in *Alexander*, 415 U.S. at 60 n.21. Moreover, in this case, as detailed above, both the Circuit and District Courts looked not only to the arbitral decision but also well beyond. Accordingly, on this record, petitioner's exhortation for this Court to exercise its

"supervisory powers" (Pet. 15) is unavailing. The correct result was reached in this case applying this Court's precedent, including the strict requirement set forth in *Gross*.

(2)

Petitioner also erroneously contends that the decision conflicts with *Staub v. Proctor Hospital*, 562 U.S. __, 131 S.Ct. 1186 (2011) (Pet. 9-10; Pt. II, 16-19). In *Staub*, this Court addressed a "cat's paw" theory of liability, finding that, under certain circumstances, a subordinate with discriminatory intent could induce a supervisor to rubber stamp his decision. However, in order to support such a theory, the supervisor must, in fact, have been in a position to be simply a "rubber stamp."

Obviously, the instant situation is very different than *Staub*. As even petitioner acknowledges (Pet. 17), an arbitrator, chosen and mutually agreed to by both parties,[1] is not an agent of the employer and does not act as a rubber stamp. Unlike a supervisor/subordinate relationship, petitioner and the DOE supervisors at issue here had equal standing before the arbitrator, who acted as an independent decision-maker in assessing whether DOE met its burden of proof in support of its determination and did not blindly rely on DOE's information.

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[1] *See* N.Y. Educ. Law § 3020-a(3)(b)(ii) ("[T]he employing board and the employee . . . shall by mutual agreement select a hearing officer . . . .").

Finally, reduced to its essence, petitioner attempts to reargue and recast the facts of her case (*see*, *e.g.*, Pet. Pt. II, 17-19).[2] This Court does not sit to review claims of erroneous factual findings. In any event, her vigorous protestations as to her prior service notwithstanding, she cannot circumvent the factual record which contains overwhelming evidence of over two years of unsatisfactory evaluations from immediate and independent supervisors, which culminated in an independent arbitrator's decision

[2] Among other things, petitioner claims that she demonstrated that, statistically, older persons were significantly more likely to be brought up on charges of discrimination, which she claims the Circuit Court recognized as evidence of intentional discrimination (Pet. 18, citing App. A6). However, the only thing the Circuit noted, in its disparate impact discussion, was that petitioner's claimed higher statistical "preference" of disciplinary charges against older teachers was not a neutral practice but possible evidence of intentional discrimination (App. A6). Moreover, the District Court recognized (App. B18-B19), as respondents had demonstrated (*see* Resp. 2d Circuit brief, pp. 50-52), that petitioner's actual statistics were inadmissible, infirm or irrelevant on multiple grounds, including that the statistics she offered did not go to the issue of whether the adverse employment action she suffered (termination) was more likely to be taken against older teachers, nor were they accompanied by any attempt to assess whether there were other lawful explanations (App. B18-B19).

upholding her termination (*see* summary in District Court opinion at App. B3-B10).[3]

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
March 22, 2012

Respectfully submitted,

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[3] Under N.Y. Educ. Law § 3020-a(4)(b), the DOE had no choice but to implement the decision. Also, in the comprehensive 52-page arbitration decision (JA99-JA151), the independent hearing officer rejected petitioner's claim that, because she had a prior satisfactory teaching record, that somehow evidenced that the subsequent supervisory observations were contrived or manufactured in order to "get rid" of her (JA150).