No. _____

In the Supreme Court of the United States

JANE DOE,

Petitioner,

v.

OBERWEIS DAIRY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under what circumstances does a Plaintiff in a Title VII case, who seeks compensatory damages under Title VII for emotional distress, waive the psychotherapist-patient privilege that this Court recognized in *Jaffee*? Guidance is needed to resolve the split in the circuit courts and in the more than sixty district courts that have reported their decisions.

PARTIES TO THE PROCEEDINGS

Petitioner

Jane Doe was a minor citizen of the United States when she filed her lawsuit. She was sexually harassed by her supervisor in violation of Title VII. Doe was the Plaintiff in the District Court and the Appellant in the Seventh Circuit Court of Appeals.

Respondent

Oberweis Dairy is a corporation which is privately owned. Petitioners are unaware of any publicly traded company that owns ten (10%) percent or more of said corporation's stock. Respondent Oberweis Dairy was the Defendant in the District Court and the Appellee in the Seventh Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the decision of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Seventh Circuit order denying the timely petition for rehearing and rehearing en banc is at App A. The Seventh Circuit opinion, App. B, is reported at *Doe v. Oberweis Dairy,* 456 F.3d 704 (7th Cir. 2006). The District Court opinion regarding the limits of Doe's testimony in lieu of not submitting her psychiatric records, is at App. C.

JURISDICTION

The opinion of the United States Court of Appeals was issued on July 28, 2006. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing en banc on August 31, 2006.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII, as amended by the 1991 Civil Rights Act, 42 U.S.C.A. § 1981a, states as follows:

(a) Right of recovery
(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

STATEMENT OF THE CASE

Jane Doe was a sixteen-year-old high school student working as an ice cream scooper in her first job. During the course of Plaintiff's eight months of part-time employment with Defendant, she was sexually harassed and sexually assaulted by her twenty-five-year-old manager. In fact, the twenty-five-year-old manager, who regularly harassed and touched the young women working under him at the store, had sexual relations with several of his employees, at least one other of whom was also a minor. The manager was found liable for the criminal sexual abuse of Plaintiff, served jail time and is now a registered sex offender. Plaintiff filed suit against her employer, Oberweis Dairy under Title VII for sexual harassment and related claims under state law for assault and battery, negligence, and willful and wanton misconduct.

During the course of discovery, the district court ordered the Plaintiff to produce her psychiatric records despite the fact that Plaintiff only sought "garden-variety" damages for emotional pain and suffering, was not seeking damages for a

psychiatric condition or treatment, and did not intend to call her therapist as a witness. Plaintiff's mother and sister (Jane Roe 1 and 2) attempted to intervene to protect the records which included sessions with them, and after the court refused to allow them to intervene, they appealed. The district court later ordered that Plaintiff did not have to produce the records if her testimony was limited regarding the distress caused by the Defendant. (App. C)

On January 21, 2005, Plaintiff and Defendant filed cross-motions for summary judgment. On April 6th, 2005, the district court granted Defendant's Motion for Summary Judgment on Plaintiff's Title VII sexual harassment claim finding, among other things, that the minor Plaintiff "welcomed" the conduct and dismissed the supplemental state law claims. The court also denied Plaintiff's Motion for Summary Judgment on the *Faragher/Ellerth* affirmative defenses and liability as to the Title VII claim. Plaintiff filed a timely appeal of the summary judgment decision on that same day and moved her state claims to state court. The appeal regarding the psychological records was consolidated with the appeal of the Summary Judgment order.

The Seventh Circuit panel reversed the lower court's dismissal of the sexual harassment claim, but held that Plaintiff must produce all of her psychotherapy records, except that the records regarding Plaintiff's mother and younger sister should be redacted. *Doe v. Oberweis Dairy,* 456 F.3d 704 (7th Cir., 2006) (App. B)

Plaintiff therefore, timely petitioned for rehearing and rehearing *en banc*, which was denied on August 31, 2006. (App. A)

REASONS FOR GRANTING THE PETITION

The 1991 Civil Rights Act created the right to compensatory damages for the emotional distress caused by discrimination in Title VII claims. The question of whether psychological records have to be produced in order to be compensated for any level of emotional distress, even "garden-variety," where the Plaintiff does not seek to introduce her psychiatric records or bills, has gone unresolved for fifteen years. This uncertainty has resulted in at least three circuit court opinions and more than sixty divergent district court opinions have been reported. The Supreme Court should hear this case not only to resolve the split in the circuits, but perhaps as importantly, to provide much needed guidance to the district courts, which must deal with the issue constantly while receiving little guidance from the appeals courts since the issue often times is lost during the appellate process. In *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996), this Court confirmed the existence of a psychotherapist privilege by holding that a party in litigation has a privilege against disclosure of such records because the privilege serves the public interest by facilitating the provision of appropriate mental health treatment. Prior to *Jaffee* some courts were applying a balancing test to determine if the need for disclosure of the records outweighed the privilege. However this Court in *Jaffee* specifically rejected a balancing approach, holding that an uncertain privilege or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. *Id.*

In order to provide meaning to this privilege and to protect the public policy acknowledged by this Court in recognizing the privilege, certiorari should be granted.

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE PROPER STANDARD FOR WAIVER OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AND THERE ARE WIDELY DIVERGENT STANDARDS APPLIED BY THE DISTRICT COURTS.

Three circuits have had the opportunity to review the issue of the waiver of the psychotherapist-patient privilege in Title VII cases, and each one has set a different standard. Here, the Seventh Circuit ordered all psychological records be turned over because they saw no distinction between turning over all of the psychological records (regardless of subject matter and time) and the taking of a one-time Rule 35 independent psychological exam. (App. B) The Eighth Circuit has gone even further, finding that *whenever* a victim of discrimination seeks damages under Title VII for emotional distress, the claims place plaintiff's psychiatric condition at issue and she has waived the psychotherapist-patient privilege. *Schoffstall v. Henderson*, 223 F.3d 818 (8th Cir. 2000) The Fifth Circuit, on the other hand, does not require that mental anguish damages be proved through medical testimony or records, therefore the mere assertion of a garden-variety claim for mental anguish damages does not put the plaintiff's mental condition "in controversy" and the records need not be turned over. *Patterson v. PHP Healthcare,* 90 F.3d 927 (5th Cir. 1996); *Farpella-Crosby v. Horizon Health Care,* 97 F.3d 803 (5th Cir 1996)

Whether the Plaintiff has waived her psychotherapist privilege and must as a result produce her records from counseling usually comes up in the discovery stage and is most often mooted by the time the case is on appeal. However, this is an issue which trial courts constantly face and where guidance from this Court is sorely needed. There

are many district courts that have addressed the issue and the district courts have, for the most part, adopted one of three alternatives: the so-called narrow approach (holding that the records only need to be turned over if the party is seeking to use the testimony of the therapist or otherwise relies on the diagnosis of the provider), the broad approach (psychiatric records must be turned over if a party is seeking compensatory damages for emotional distress allowable under any statute), and the middle ground approach (a balancing test for parties that are usually seeking something more than "garden-variety damages," but which requires severely limiting the testimony plaintiff can present in support of her claims).

The broad approach to waiver, which has been adopted by at least thirty-one district courts in the country,[1]

[1] *See, e.g., Moore v. Chertoff,* 2006 WL 1442447 (D.D.C. May 22, 2006) (race discrimination against government agency); *Kalinoski v. Evans*, 377 F. Supp. 2d 136, 137-38 (D.D.C. 2005) (Title VII); *Williams v. NPC Intern., Inc.*, 224 F.R.D. 612 (N.D. Miss. 2004) (sex discrimination suit); *Victoria W. v. Larpenter,* 2001 WL 674156 (E.D. La. June 14, 2001) (Sec. 1983 claims and intentional and/or negligent inflection of emotional distress); *Doe v. City of Chula Vista,* 196 F.R.D. 562 (S.D. Cal. 1999) (ADA); *Price v. County of San Diego*, 165 F.R.D. 614, 622 (S.D. Cal.1996) (Sec. 1983 action); *LeFave v. Symbios, Inc.*, 2000 WL 1644154, *2 (D. Colo. Apr. 14, 2000) (sexual harassment, hostile work environment and religious discrimination claimed); *Fox v. Gates Corp.*, 179 F.R.D. 303 (D. Colo. 1998) (ADA); *Anderson v. City of New York*, 2006 WL 1134117 (E.D.N.Y. Apr 28, 2006); *Cuoco v. U.S. Bureau of Prisons*, 2003 WL 1618530 (S.D.N.Y. Mar 27, 2003) (Federal Tort Claims Act & *Bivens)*; *McKenna v. Cruz,* 1998 WL 809533 (S.D. N.Y. Nov. 19,1998) (Sec. 1983 illegal arrest/excessive force); *Sidor v. Reno,* 998 WL 164823 at *1 (S.D.N.Y. April 7, 1998) (Rehabilitation Act); *Kerman v. City of New York,* 1997 WL 666261 (S.D. N.Y. Oct 24, 1997) (Sec.

follows the harsh decision of the Eighth Circuit discussed above and holds that the making of *any claim* for emotional distress damages in a complaint constitutes waiver of the privilege and results in the turnover of all records. These courts rationalize that if a plaintiff claims emotional distress, then a defendant needs to be able to challenge that claim thoroughly. Several of those cases are clearly engaging in the

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1983); *Doolittle v. Rufo,* 1997 WL 151799 (N.D. N.Y. March, 31, 1997) (Title VII and Sec. 1983 sexual harassment and discrimination); *E.E.O.C. v. Danka Industries, Inc.*, 990 F. Supp. 1138 (E.D. Mo. 1997) (Title VII sexual harassment); *Waggaman v. Villanova University,* 2006 WL 2045486 (E.D. Pa. July 14, 2006) (ADA); *Iwanejko v. Cohen & Grigsby,* 2005 WL 4043954 (W.D. Pa. Oct. 5, 2005) (ADA); *McAllister v. Royal Caribbean Cruises*, Ltd, 2005 WL 151925 (E.D. Pa. Jan. 20, 2005); *Payne v. City of Philadelphia,* 2004 WL 1012489, *3 (E.D. Pa. May 5, 2004); *Young v. Reconstructive Orthopedic Associates*, 2004 WL 1813232 (E.D. Pa. July 21, 2004); *Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131 (E.D. Pa. 2001) (Title VII race discrimination); *Lanning v. Southeastern Pennsylvania Transp. Authority*, 1997 WL 597905 (E.D. Pa. Sept. 17, 1997); *Sarko v. Penn-Del Directory Co.,* 170 F.R.D. 127 (E.D. Pa. 1997) (citing *Topol v. Trustees of University of Pennsylvania*, 160 F.R.D. 476 (E.D. Pa. 1995) (ADA action); *Hankins v. City of Philadelphia*, 1996 WL 571755 (E.D. Pa. Oct. 4, 1996) (Title VII, PHRA and 42 U.S.C. § 1983 for employment discrimination based upon race and under § 1985 for conspiracy to discriminate on the basis of race); *Wynne v. Loyola Univ. of Chicago,* 1999 WL 759401 (N.D. Ill. Sept. 3, 1999) (ADA); *Vann v. Lone Star Steakhouse & Saloon, Inc.*, 967 F. Supp. 346 (C.D. Ill. 1997) (Title VII); *Vasconcellos v. Cybex International, Inc.,* 962 F. Supp. 701 (D. Md. 1997) (FMLA); *Owens v. Sprint/United Mgt. Co.,* 221 F.R.D. 657, 660 (D. Kan. 2004); *Garrett v. Sprint PCS,* 2002 WL 181364 (D. Kan. Jan. 31, 2002); *Walker v. Northwest Airlines*, 2002 WL 32539635 (D. Minn. Oct. 28, 2002) (race discrimination).

very balancing approach this Court foreclosed in *Jaffee*. *See*, e.g., *Moore v. Chertoff*, 2006 WL 1442447; *Owens v. Sprint/United Mgt. Co.*, 221 F.R.D. 657 (D. Kan. 2004); *Garrett v. Sprint PCS*, 2002 WL 181364 (D. Kan. Jan. 31, 2002); *Walker v. Northwest Airlines*, 2002 WL 32539635 (D. Minn. Oct. 28, 2002). Some courts have gone so far as to justify their decisions on the grounds that parties could use the records to see if there might be additional sources of the emotional distress other than the defendant's conduct. *See*, e.g., *Moore v. Chertoff*, 2006 WL 1442447 (D.D.C. May 22, 2006); *Owens v. Sprint/United Mgt. Co.*, 221 F.R.D. 657 (D. Kan. 2004); *Garrett v. Sprint PCS*, 2002 WL 181364 (D. Kan. Jan. 31, 2002); *Payne v. City of Philadelphia*, 2004 WL 1012489, at *3 (E.D. Pa. May 5, 2004).

On the other hand, more than eleven district courts[2] follow the narrow approach, holding that a plaintiff must directly rely on the psychotherapist-patient communications and diagnosis before waiver applies. *See, e.g., Hucko v. City of Oak Forest*, 185 F.R.D. 526 (N.D. Ill. 1999) (Section 1983 action) In *Hucko*, the court recognized that plaintiffs should be allowed to establish their emotional distress claim

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[2] *See also, Metzger v. Francis Parker School*, 2001 WL 910443 (N.D. Ill. Aug. 10, 2001) (ADA); *Allen v. Cook County Sheriff's Department*, 1999 WL 168466, at * 2 (N.D. Ill. March 17, 1999) (Title VII); *Boyd v. City and County of San Francisco*, 2006 WL 1390423 (N.D. Cal. May 18, 2006) (ADA and Sec 1983); *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. Cal. 2003) (FHA); *Sanders v. DC*, 2002 WL 648965 (D.D.C. Apr. 15, 2002); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D. Ca. 1999) (ADA); *Morrisette v. Kennebec County*, 2001 WL 969014 (D. Me. August 21, 2001); *Burrell v. Crown Central Petroleum*, Inc., 177 F.R.D. 376 (E.D. Tex. 1997) (Title VII and 1981); *Booker v. City of Boston*, 1999 WL 734644 (D. Mass. Sept. 10, 1999); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997).

through their own testimony, without waiving the privilege. 185 F.R.D. at 531 The courts following the narrow approach generally base their reasoning upon the "primacy of the privacy interests inherent in the privilege and *Jaffee's* rejection of the balancing approach." *Fitzgerald*, 216 F.R.D. at 636 (N.D. Ca. 2003) As explained by the *Vanderbilt* court: "*Jaffee's* "no balancing" instruction drastically changes the waiver formula.... After *Jaffee,* a court cannot force disclosure of communications solely because it may be extremely useful to the finder of fact. Giving weight to the usefulness of the evidence as a factor in a decision regarding the scope of the privilege would be a balancing exercise that was barred by *Jaffee.*" *Vanderbilt,* 174 F.R.D. at 229.

Finally, there is a middle of the road approach to this issue. At least nineteen district courts[3] have followed this

[3] *See e.g., Santelli v. Electro-Motive,* 188 F.R.D. 306 (N.D.Ill. 1999) (Title VII); *Kiermeier v. Woodfield Nissan,* 1999 WL 759485 (N.D. Ill. Sept. 7, 1999) (Title VII); *Adams v. Ardcor,* 196 F.R.D. 339 (E.D. Wis. 2000); *Dominguez-Silva v. Harvey*, 2006 WL 826091 (N.D. Ga., March 23, 2006) (Sec. 1983); *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551 (N.D.Ga. 2001) (Title VII); *EEOC v. Old Western Furniture Corp.*, 173 F.R.D. 444 (W.D. Tex. 1996) (Title VII); *Neal v. Siegel-Robert, Inc.*, 171 F.R.D. 264 (E.D. Mo. 1996) (ADEA); *Ricks v. Abbott Laboratories*, 198 F.R.D. 647,648-49 (D. Md. 2001) (Title VII and ADEA); *Ford v. Contra Costa County*, 179 F.R.D. 579, 580 (N.D. Cal. 1998) (Title VII); *Bowen v. Parking Authority of the City of Camden,* 214 F.R.D. 188 (D.N.J. 2003); *Jackson v. Chubb Corp.*, 193 F.R.D. 216 (D.N.J. 2000) (race discrimination); *Gaines-Hanna v. Farmington Public Schools,* 2006 WL 932074 (E.D. Mich. April 7, 2006) (Sec. 1983, Title IX and other claims); *Jessamy v. Ahren,* 153 F.Supp.2d 398 (S.D.N.Y. 2001) (Sec. 1983); *Johnson v. Trujillo.* 977 P.2d 152 ,(Colo. 1999); *Dochniak v. Dominium,* 2006 WL 3157131 (D.Minn. Sept. 25, 2006) (Title VII); *Greenberg v. Smolka,* 2006 WL 1116521 (S.D.N.Y. Apr. 27, 2006); *Kuntsler v.*

approach, generally finding a waiver only when the plaintiff alleges what that particular court deems to be more than "garden-variety" emotional distress. Garden-variety emotional distress has been described as "ordinary or commonplace emotional distress." *Ruhlmann v. Ulster County Dep't of Soc. Servs.*, 194 F.R.D. 445, 449 n. 6 (N.D.N.Y.2000) Emotional distress that is not garden-variety "may be complex, such as that resulting in a specific psychiatric disorder." *Id.* These courts generally, but not always, have held that if a plaintiff merely alleged garden-variety emotional distress--and not "a separate tort for the distress, any specific psychiatric injury or disorder, or unusually severe distress"--she did not waive the psychotherapist-patient privilege. *Jackson v. Chubb,* 193 F.R.D. at 226 However, the definition of what is "garden-variety" emotional distress varies significantly from court to court. For example, in *Santelli v. Electromotive*, 188 F.R.D. 306 (N.D. Ill. 1999) the court held that the plaintiff did not have to turn over her psychotherapy records since she was only pursuing damages for garden-variety emotional distress. The court refused, however, to allow plaintiff to introduce "the fact or details of her treatment;...any evidence through any witness about any symptoms or conditions she suffered (e.g. sleeplessness, nervousness, depression); and... any evidence regarding a medical or psychological diagnosis." *Santelli*, 188 FRD at 309 In *Santelli* the plaintiff was permitted to testify only that "she felt humiliated, embarrassed, angry or upset because of the alleged discrimination." *Id.* The court in *Santelli*, a decision adopted by many district courts across the country, believed that a plaintiff waived the privilege by electing to inject into the

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Ashcroft, 2006 WL 2516625 (S.D.N.Y. Aug. 29, 2006) (civil rights violations) *Doe v. Oberweis,* No. 03 C 477, slip opinion (N.D. Ill Nov. 11, 2004) (App. C).

litigation either "the fact" of treatment or "any symptoms or conditions she may have experienced." *Id.*

Similarly, in *Jessamy v. Ahern*, the court distinguished between "psychiatric injury" and "garden-variety" emotional distress. 153 F. Supp. 2d at 402. Any injury requiring treatment, which included "pain and suffering, extreme fear, emotional trauma, [and] emotional distress" was considered a psychiatric injury which would waive the privilege if claimed. *Id.* However, "humiliation, embarrassment, and injury to reputation" fell under the "garden-variety" classification and did not constitute waiver. *Id.*

The widely divergent approaches and inconsistent definitions of the same terms adopted by the circuit courts and the many district courts that have addressed this issue lead to the incontrovertible conclusion that guidance from this Court is needed to establish a consistent policy across the nation.

II. THIS COURT HAS RECOGNIZED THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN *JAFFEE*, BUT TO ENSURE THAT THE PUBLIC POLICY RATIONALE BEHIND THE DECISION REMAINS PROTECTED AND ENFORCED THIS COURT SHOULD GRANT REVIEW

Prior to the sexual harassment and sexual abuse by her supervisor, the minor Plaintiff had been engaged in family counseling with her mother and younger sister regarding her parents' divorce. After the abuse occurred, Plaintiff saw the psychologist both individually and with her sister and mother dealing with issues regarding both the harassment/rape, as well as family issues. Defendant sought all of Plaintiff's psychological records, including the joint sessions, because of her claim for compensatory damages for the emotional

distress. This defense tactic has often been referred to as the "scorched earth" defense. *Jenson v. Eveleth Taconite,* 130 F.3d 1287, 1292 (8th Cir. 1997)

In its one paragraph consideration of the psychotherapy records, the Seventh Circuit panel held that there was no greater invasion of privacy in making all of the Plaintiff's existing psychological records available to the Defendant (from both before the rape and after the rape), as opposed to allowing the Defendant to demand a one time *independent* psychological examination under Rule 35 of the Federal Rules of Civil Procedure. The court ordered Doe to turn over those records. (App. B, at 24a-25a)

The Seventh Circuit's rationale clearly undermines the intent of this Court in *Jaffee* (*Supra*), which recognized the importance of the psychotherapist-patient privilege. The plain language of *Jaffee* requires a rule that would allow for the turnover of psychological records in Title VII cases only in those situations where the plaintiff has waived the privilege by either calling her psychotherapist as a witness or by testifying to conversations with the psychotherapist, and not merely by claiming "garden-variety" compensatory damages and presenting lay testimony regarding her general symptoms of emotional distress. This Plaintiff, Jane Doe, seeks to place before the jury her claims of emotional distress and treatment without seeking to introduce the substance of her conversations with her psychotherapist.

Although the Seventh Circuit allowed for the redaction of notes from those sessions in which the mother or sister were present, the production of the Plaintiff's psychotherapy records would be a gross and irreversible violation of the Plaintiff's privacy and would make a sham of the psychotherapist-patient privilege as laid out under *Jaffee*. It

would also have a chilling effect on any victim of sexual harassment or discrimination from bringing forth her claims, for fear it would expose her entire psychotherapist-patient privilege to waiver whether related to the claim or not. This Court recognized that records of psychological and psychiatric treatment are subject to a federal common law psychotherapist-patient privilege against disclosure because:

> Effective psychotherapy...depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. *Jaffee*, 116 S. Ct. at 1928

This case emphasizes the need for the protections outlined in *Jaffee*. The sixteen year old Plaintiff, who was working in her first job, was sexually harassed and ultimately raped by her supervisor. The long lasting effects of that traumatic event will only be exacerbated by the disclosure to Defendant and others of those very private sessions. In addition to these privacy interests, this Court found that the psychotherapist-patient privilege serves the public interest by facilitating the provision of appropriate mental health treatment. *Id.* at 1929. If the privilege were rejected, this Court held, "confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation." *Id.*

In addition, under *Jaffee,* a court cannot force disclosure of psychiatric records based on their potential usefulness to the finder of fact. This Court expressly rejected a balancing approach to this privilege, because:

> ...[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege...[I]f the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'

Jaffee v. Redmond, 116 S. Ct. at 1932, quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981).

Testimony regarding the generalized symptoms and conditions that Plaintiff suffered, such as feeling nervous, having trouble sleeping, etc., would not waive the privilege under *Jaffee,* even if these symptoms were treated by a psychotherapist, because Plaintiff would not be testifying as to the substance of her communications with the therapist, such as diagnosis or treatment. For the same reason, simply stating that the Plaintiff has seen a psychotherapist should also not waive the privilege. The Seventh Circuit's decision would require this minor Plaintiff and others to choose between attempting to regain mental health or exercising their federally protected rights. Review should be granted so the Court can clarify whether this is consistent with the language and intent of *Jaffee*.

III. CONCLUSION

As is demonstrated by the cases cited above, courts all over the country are split over which approach is correct in determining when a plaintiff has waived her psychotherapist-patient privilege. This confusion, left unresolved, can only result in more decisions like the one made by the court in Plaintiff's case, especially because the one paragraph discussion by the Seventh Circuit offered no reasoning or guidance for lower courts to follow. The result of this ruling will be that all plaintiffs in Title VII actions who seek damages for the distress caused by discrimination can expect to turn over all of their psychological records, resulting in damage to the public interest that this Court sought to protect in *Jaffee*. For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, Petitioner asks this Court to grant this petition for a Writ of Certiorari, reverse the Seventh Circuit's decision on the discoverability of psychological records in Title VII cases and for such other and further relief as this Court deems just.

Respectfully Submitted,

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