No. 24-3086

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONICA GRAY,
Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE AND JOE KYLE
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Ohio
The Honorable Algenon L. Marbley, Presiding
Case No. 2:20-cv-06038

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITION FOR REHEARING OR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-3086 Case Name: Gray v. State Farm Mutual Auto Ins. Co.

Name of counsel: Benjamin M. Flowers

Pursuant to 6th Cir. R. 26.1, Chamber of the Commerce of the United States of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on August 21, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Benjamin M. Flowers

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. *See* Motion for Leave. The panel's decision in this case will adversely affect the Chamber's members who operate within the Sixth Circuit. It will negatively affect their customers and employees, too. The Chamber files this brief to urge reconsideration of the panel's decision.

INTRODUCTION

In business, as in football, "you win with people." Woody Hayes, *You Win With People* 185 (1973). You lose with them, too. Every employer knows this. And every successful employer acts accordingly. They work hard to attract, retain, and promote good employees. And they work equally hard to find and part ways with those who drag down the enterprise—not because of indifference to weak links' well-being, but because failing to remove bad employees hurts the company, its customers, and the hard-working employees (and shareholders) who depend on the company's success to support themselves and their families.

Yet the panel's decision in this case announces a rule that penalizes employers who fire bad (even criminal) employees for good reasons—contradicting Supreme Court and Sixth Circuit precedent along the way.

By way of background, Monica Gray, a former employee of State Farm Automobile Insurance Company, stole from State Farm by recording hours she did not work.

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* No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. And no one, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief. See Fed. R. App. P. 29(a)(4)(E)(i–iii).

A supervisor, Joe Kyle, found three such occurrences and reported them to higher-ups. The human-resources department investigated, confirmed Kyle's findings, and identified numerous additional *and more serious* violations—for example, the investigation established that Gray billed for time during which she was not even in the building. In light of the investigation's results, State Farm fired Gray. Gray then sued, alleging that she was illegally terminated in retaliation for assisting another employee in objecting to violations of the Americans with Disabilities Act, or "ADA."

The District Court granted summary judgment to State Farm, but a divided panel of this Court reversed. The panel agreed with the District Court that Gray could not establish retaliation by any decisionmaker at State Farm. But it held that she was entitled to a jury trial on a "cat's paw" theory that Gray never raised. Specifically, the Court said that Gray was entitled to a jury trial based on evidence that Kyle—the tipster who prompted State Farm to conduct an independent investigation—reported Gray in retaliation for her assisting another employee with ADA-related complaints.

The panel's decision "conflicts" with decisions from this Court and the Supreme Court. Fed. R. App. P. 40(b)(2)(A)–(B). Under those decisions, employers are not liable under a cat's paw theory when, in response to wrongdoing reported by a supervisor with an allegedly discriminatory motive, "the decisionmaker conducts an investigation that 'results in an adverse action for reasons *unrelated to* the supervisor's original biased action.'" *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 380 (6th Cir. 2017) (quoting *Staub v. Proctor Hospital*, 562 U.S. 411, 421 (2011)); *see also Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 836 (6th Cir. 2012). Here,

State Farm undisputedly conducted such an investigation and terminated Gray based on severe misconduct, including misconduct other than that reported by the allegedly biased supervisor, Kyle. In allowing Gray to proceed to trial anyway, the panel threw the law of the Sixth Circuit into uncertainty.

Rehearing is further justified by the predictable consequences of the panel's decision. Fed. R. App. P. 40(b)(2)(D). The decision makes it harder for businesses to operate: Under the panel's decision, employers will face the prospect of litigation and liability whenever they fire an employee following an investigation spurred by a tip from another employee, *even if* the investigation turns up evidence of serious misconduct the tipster neither knew about nor reported. If nothing else, that will increase the cost of, and so decrease the demand for, labor. Beyond that, the panel's decision will encourage employers to prolong and deepen their investigations, subjecting good-faith tipsters to scrutiny for any sign of evidence that the bad-acting employee might later use to suggest the tipster had a retaliatory motive. Should the employer uncover such evidence, it will often face a no-win situation: either fire the bad actor and face a jury trial under the panel's precedent, or refuse and face a potential lawsuit from the tipster.

For these reasons, and for the others laid out in Judge Readler's dissent and the petition for rehearing, the Court should reconsider the panel's decision.

ARGUMENT

I. The cat's paw theory requires proof that the employee suffered adverse action proximately caused by a non-decisionmaker's discriminatory act.

In 1990, Congress passed and President Bush signed the Americans with

Disabilities Act. The Act "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). To that end, it "prohibits certain employers from 'discriminat[ing] against'" disabled employees. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360–61 (2001) (alteration in original) (quoting 42 U.S.C. §12112(a), 12111(2), (5), (7)). And, more relevant here, the ADA prohibits retaliation against employees who object to employers' non-compliance with ADA protections. 42 U.S.C. §12203(a).

ADA retaliation claims come in two flavors: direct and vicarious. Employers are directly liable for the actions they take. Most businesses act through agents—individuals delegated authority to make decisions on their behalf. Thus, businesses are directly liable when a decisionmaker at the company fires or otherwise punishes an employee in retaliation for the employee's reporting ADA violations.

Vicarious liability implicates the so-called "cat's paw theory." The theory takes its name from "a fable conceived by Aesop." *Staub v. Proctor Hosp.*, 562 U.S. 411, 416 n.1 (2011). "In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire." *Id.* "After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." *Id.* In a cat's paw case, the employer plays the role of Aesop's cat: "a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Marshall v. The Rawlings Co. LLC*, 854 F.3d 368, 377 (6th Cir. 2017) (quotation omitted). "A plaintiff alleging liability under the cat's paw theory" thus "seeks 'to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate

employment decision'" but who induced the decisionmaker to act as he did. *Id.* (quoting *Staub*, 562 U.S. at 415).

Critically, the cat's paw theory requires proof that the "biased recommendation" played a proximate causal role in the employer's decision. *Id.* at 380. That is because, in "a cat's paw case, the allegation is that a biased subordinate intentionally manipulated the decisionmaker," and a "supervisor who conducts an in-depth and truly independent investigation is not being manipulated by biased lower-level supervisors, but rather making a decision based on an independent evaluation of the situation." *Id.* Thus, for example, if "the decisionmaker conducts an investigation that 'results in an adverse action for reasons *unrelated to* the supervisor's original biased action … then the employer will not be liable.'" *Id.* (alteration in original) (quoting *Staub*, 562 U.S. at 421). This rule reflects "the traditional tort-law concept of proximate cause." *Staub*, 562 U.S. at 420; *accord Marshall*, 854 F.3d at 380. That traditional concept requires proof of "some direct relation between the injury asserted and the injurious conduct alleged," excluding links that are "too remote, purely contingent, or indirect." *Staub*, 562 U.S. at 419 (quotation omitted).

Some examples illustrate how the proximate-cause requirement works. Consider the case of one potentially biased "fire department supervisor" who "filed charges with the Board of Fire and Police Commissioners, the ultimate decisionmaker, requesting that the Board terminate a fire department employee." *Marshall*, 854 F.3d at 381 n.4 (citing *Woods v. City of Berwyn*, 803 F.3d 865, 868, 870 (7th Cir. 2015)). Although the charges got the ball rolling, the ultimate decisionmaker broke the causal chain by deciding to terminate the employee based on testimony presented by a

witness "who did not harbor any discriminatory animus." *Id.* (citing *Woods*, 803 F.3d at 871). In that situation, the terminated employee could not collect under a cat's paw theory. *Id.*; *accord Woods*, 803 F.3d at 871.

Similarly, if an "employer verifies the facts" alleged by the biased subordinate "and does not rely on their biased source," the cat's paw plaintiff fails to establish proximate cause. *Lobato v. New Mexico Environment Dept.*, 733 F.3d 1283, 1294 (10th Cir. 2013). Along the same lines, an employer is not liable under a cat's paw theory if an employer's subsequent investigation uncovers *additional* evidence that, independently of the biased tip, justifies the adverse action. *See Romans v. Michigan Dept. of Human Services*, 668 F.3d 826, 836 (6th Cir. 2012). This follows from *Staub*, which held that, when an "employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action … then the employer will not be liable." *Staub*, 562 U.S. at 421. It therefore is unsurprising that, in one post-*Staub* case, this Court rejected a cat's paw theory where the ultimate decisionmaker's independent investigation proved that the employee "had violated four work rules, only one of which was related to" the allegedly discriminatory "report," where "each" of the violations "would have individually supported a termination." *Romans*, 668 F.3d at 836. This investigation and evidence, the Court held, "br[oke] the causal chain." *Id.*

II. The panel's decision imperils legitimate employment decisions within this Circuit by substantially weakening the proximate-cause requirement of the cat's paw theory.

The panel's decision in this case disregards, and sows confusion regarding, the

proximate-cause requirements.

1. Return to the undisputed facts. The events that led to Monica Gray's termination began when a fill-in supervisor, Joe Kyle, looked at Gray's timesheets and identified "three instances when she reported time while logged off of her computer." Op.3. Kyle informed his own supervisor, who instructed him that company policy required alerting the human-resources department. *Id.* A human-resources official "launch[ed] an investigation" in which she "reviewed Gray's timesheets, computer activity, and building-entry records." *Id.* That official "found more errors, including seven instances when Gray reported returning from lunch before she had re-entered the building." *Id.* Worse, Gray repeatedly "claimed a false lunch break of exactly 49 or 50 minutes—immediately under the 51-minute disciplinary cutoff." Dissent at 16. This was significant, because if Gray had properly recorded her time, "she would have received enough [disciplinary] points to be terminated." *Id.*

Assuming Gray raises a vicarious-liability theory, *but see id.* at 18–28; Reh'g Petn.15–16, it rests on the alleged motives of Joe Kyle. Although Gray cannot show that any decisionmaker at State Farm discriminated against her, Gray claims that Kyle reported the initial misconduct in retaliation for Gray's previously assisting an employee in making an ADA claim.

2. Precedent forecloses Gray's cat's paw theory. Again, when a "decisionmaker" responds to a tip from a biased subordinate by conducting "an investigation that 'results in an adverse action for reasons *unrelated to* the'" subordinate's "original biased action … then the employer will not be liable." *Id.* at 380 (quoting *Staub*, 562 U.S. at 421). Such unrelated reasons include an employer uncovering

during an independent investigation additional, independently fireable offenses on which the decisionmaker bases its decision. *Romans*, 668 F.3d at 836.

That is precisely what happened here. State Farm independently investigated Gray's time entries after Kyle's referral and found additional and *more serious* instances of time theft. Whereas Kyle reported finding three occasions on which Gray reported working during times when she was logged off her computer, the human-resources department established that Gray recorded working during periods when she was not even present in the building, and that her falsified entries were carefully structured to avoid creating a record that could justify her termination. Because State Farm's decisionmakers conducted an investigation that "result[ed] in an adverse action for reasons *unrelated* to" Kyle's allegedly biased report, State Farm cannot "be liable." *Marshall*, 854 F.3d at 377 (quoting *Staub*, 562 U.S. at 421).

3. The panel opinion contradicts case law from both the Supreme Court and this Court. According to the majority, Gray may establish proximate cause even though (1) State Farm's independent "investigation revealed additional misconduct not identified by Kyle," and (2) "that misconduct alone justified Gray's termination." Op.14. That conclusion is irreconcilable with the Supreme Court's decision in *Staub* and this Court's decision in *Marshall*, both of which insulate from liability employers who fire employees after independent investigations that identify misconduct other than that which the allegedly biased tipster identified. It also contradicts this Court's decision in *Romans*. There, the decisionmaker initiated an investigation in response to a tip from an allegedly biased tipster. The investigation turned up additional, independently fireable instances of misconduct. The decisionmaker's independent

findings, the Court said, broke the causal chain between the tipster and the employer—despite the fact that the employer in *Romans* relied on *both* the information reported by the tipster *and* the additional information uncovered in an independent investigation. 668 F.3d at 836–37.

The panel exacerbated its error by adopting a bright-line rule under which the proximate-cause standard is "always" satisfied when an allegedly biased employee reports "true but selective information" that an investigation subsequently confirms. Op.13; *see also* Dissent at 37. As the discussion above shows, that bright-line rule must be wrong *at least* in cases where the employer, upon receiving the selective-but-true tip, conducts an investigation that uncovers additional wrongdoing. But more fundamentally, this rule would apply in nearly all cases. When reporting wrongdoing to supervisors, employees are likely to focus on what they regard as the most important information, which means even reports completely unmotivated by bias will generally be "selective." The bright-line rule will establish proximate cause in all such cases, transforming routine workplace reporting into a minefield.

Adding to these problems, the Circuit's now-inconsistent precedent leaves employers with little in the way of guidance. In response, employers will face incentives to conduct either no investigation (given the diminished value of investigations) or longer, more thorough investigations aimed at identifying anyone in the causal chain motivated by bias. Consider what that means for the employee who reports sexual harassment, threats, violence, theft, and so on: By coming forward, they will subject themselves and their supervisors to potential investigation. And what if that investigation reveals something—no matter how minor or trivial—to which the harasser

could point as evidence of retaliatory motive? What if, for example, the sexual harassment victim has also expressed frustration with the sexual harasser's objections to age or race or disability discrimination? Must the investigation cease? Should the employer punish the bad actor anyway and simply accept the risk of going to trial? The panel's decision puts employers in these no-win situations. And all that is aside from the fact that exposing employers to these risks raises the cost of, and thus decreases the demand for, employees.

Ultimately, rules like the one announced in the panel's decision will undermine the ADA. For the reasons just discussed, the panel majority's approach is unsustainable. As a result, the law's hydraulic force will exert itself, and either courts or Congress will find other ways to limit recovery—even for individuals who, unlike Gray, have been legitimately wronged. As Justice Robert Jackson presciently warned in another context, "this Court, by inflating the" ADA's coverage "beyond a sound basis, is bringing about its eventual depreciation." *Price v. Johnston*, 334 U.S. 266, 301 (1948) (Jackson, J., dissenting).

To avert these consequences, and to restore consistency to this Court's cat's paw cases, the Court should grant the petition for hearing or rehearing *en banc* and affirm the judgment of the District Court, which properly awarded summary judgment to the defendants.

CONCLUSION

The Court should grant the petition for rehearing or rehearing *en banc*.

August 20, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 2,704 words. *See* Fed. R. App. P. 29(a)(5), 32(a)(7).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

/s/ Benjamin M. Flowers
Benjamin M. Flowers

CERTIFICATE OF SERVICE

I certify that on August 21, 2025, I filed this brief electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

/s/ Benjamin M. Flowers
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