No.

IN THE
Supreme Court of the United States

LEILA HERNANDEZ, PETITIONER

v.

GUY BAILEY; HAVIDAN RODRIGUEZ; DAHLIA GUERRA; THE UNIVERSITY OF TEXAS–PAN AMERICAN; THE UNIVERSITY OF TEXAS SYSTEM; THE UNIVERSITY OF TEXAS RIO GRANDE VALLEY

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Whether Fourteenth Amendment due process rights should be denied to tenured professors when two universities (The University of Texas-Pan American and The University of Texas at Brownsville) merge?

II. Whether the requirement that tenured professors at the merged higher education institution (The University of Texas Rio Grande Valley) not have any disciplinary record within seven years of application is rational under an equal protection analysis?

III. Whether the phrases "as many" and "prudent and practical" in the Act that provided "the board of regents shall facilitate the employment at the university created by this Act of as many faculty and staff of the abolished universities as is prudent and practical" are unconstitutionally vague on their face?

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Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is not reported, but is available at 2018 U.S. App. LEXIS 115 (Pet. Apx. 1a-15a). The opinion of the district court is not reported, but is available at 2016 U.S. Dist. LEXIS 145336 (Pet. Apx. 16a-31a).

Jurisdiction

On January 3, 2018, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the district court's judgment. *Hernandez v. Bailey*, No. 16-41565, 2018 U.S. App. LEXIS 115 (5th Cir. 2018) (Pet. Apx. 1a-15a). On February 6, 2018, the United States Court of Appeals for the Fifth Circuit denied Hernandez's Petition for Rehearing. (Pet. Apx. 32a). This Petition has been timely filed within 90 days of that order. Sup. Ct. R. 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The district court had subject-matter jurisdiction of this civil action arising under the Constitution and laws of the United States pursuant to 28 U.S.C. § 1331.

Constitutional and Statutory Provisions Involved

U.S. CONST. amend XIV, § 1

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

I. Hernandez's Employment with UTPA and UT System.

In August 2003, Hernandez was offered employment by The University of Texas-Pan American ("UTPA") and UT System with the rank of Assistant Professor in the Department of Art in the College of Arts and Humanities as a graphic design educator. She accepted the offer. On September 1, 2003, Hernandez began her employment with UTPA and UT System. ROA.19.

On September 1, 2008, Hernandez was promoted to Associate Professor and she received tenure. ROA.19, 226, ¶17.

On March 7, 2014, Havidán Rodríguez, Provost and Vice President for Academic Affairs of UTPA, notified Hernandez that he was recommending that Hernandez be promoted to Full Professor. (33a)

On May 27, 2014, Robert Nelsen, President of UTPA, wrote a Memorandum to Hernandez with copies to Dahlia Guerra, Dean of the College of Arts and Humanities, and Rodríguez, and stated that he concurred with the recommendation that Hernandez be promoted from Associate Professor to the rank of Full Professor. He stated the promotion is effective September 1, 2014, and will be funded upon the UT System Board of Regents' approval of the FY 2015 budget in August. ROA.20, 228, ¶28.

In August 2014, the UT System Board of Regents approved Hernandez's promotion from Associate Professor to Full Professor, effective September 1, 2014.

On September 1, 2014, Hernandez was promoted to the rank of Full Professor at UTPA. ROA.21, 229, ¶31.

II. Hernandez's Denial of Employment with UTRGV and UT System.

A. Phase I Hiring.

The 2013 legislation creating the new university later to be named The University of Texas Rio Grande Valley ("UTRGV") stated: "In recognition of the abolition of The University of Texas-Pan American and The University of Texas at Brownsville as authorized by this Act, the board of regents shall facilitate the employment at the university created by this Act of as many faculty and staff of the abolished universities as is prudent and practical." *See* Act of June 14, 2013, 83rd Leg., R.S., ch. 726, § 5©, 2013 Tex. Sess. Law Serv. 1846, 1850 (West). ROA.20, 227, ¶22.

On May 15, 2014, the Board of Regents of UT System met and approved a hiring policy for hiring tenured and tenure-track faculty members from UTPA and The University of Texas at Brownsville ("UTB") to UTRGV known as Phase I hiring. ROA.228.

On September 4, 2014, Hernandez applied for Phase I hiring with UTRGV. ROA.21, 229, ¶32.

Rodríguez[1] and Guy Bailey[2] were the decision makers for Phase I hiring at UTRGV. ROA.27-28, 229, ¶33.

On October 6, 2014, Bailey sent an email to Hernandez which stated that Hernandez was denied

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[1]Rodríguez had dual roles at the time as President Ad Interim at UTPA and Provost of UTRGV. ROA.18, 21.

[2]Bailey was the President of UTRGV. ROA.20.

employment for Phase I hiring by UTRGV. This was only 36 days after she had been promoted to the rank of Full Professor at UTPA with full approval from UT System. The email stated that Hernandez did not fulfill the hiring criterion of 4.1© which was "no disciplinary action for the past seven years." Bailey stated that Hernandez could request reconsideration of the denial no later than 5:00 p.m. on October 20, 2014. Hernandez contended that she had not been disciplined in the last 7 years. As earlier stated, Hernandez had recently been promoted to the rank of Full Professor. There was no notation anywhere in the recommendations for the rank of Full Professor made by the Department Chair, Dean, Provost or University President that Hernandez had been disciplined. ROA.21, 229, ¶34.

Section 4.1(c) of the hiring policy upon which the employment decision was made states in part that the President of UTRGV will not recommend that the UT System Board of Regents transition and/or hire and grant tenure to an individual who was tenured at UTPA if in the past seven years, UTPA has issued the individual a disciplinary action that could have been grieved under UTPA's faculty grievance policy or reviewed under other approved procedures of the Board of Regents, UTPA or UT System, and the disciplinary action is now final. ROA.228, ¶27, 248.

On October 6, 2014, Hernandez sent an email to Rodríguez and stated she had no idea what the October 6, 2014, Bailey email was about. She further said she could not understand how she could have been made "full professor" and then told a few weeks later that she did not have a job. ROA.22, 230, ¶35.

On October 8, 2014, UTPA Provost and Vice President for Academic Affairs, Ad Interim Cynthia Brown provided Hernandez the alleged disciplinary

action that Rodríguez asked her to send to Hernandez. The alleged disciplinary action was a Memorandum dated May 30, 2011, from Guerra to Hernandez. ROA.22, 230, ¶36.

In the May 30, 2011, Memorandum, Guerra stated that on August 25, 2010, Hernandez filled out a request for outside employment to teach two art classes at South Texas College. Guerra further stated that the request was approved for Fall 2011, only with the condition that such outside employment was not to be approved again for Spring 2011. Guerra stated that on December 10, 2010, Hernandez sent another request for outside employment for the Spring semester 2011, which Guerra and UTPA Provost Rodríguez denied. Hernandez's request was to teach one class at South Texas College ("STC"). ROA.22, 230, ¶37.

There were a number of professors in the Art Department that had outside employment that were hired by UTRGV. These employees included Robert Gilbert, Maria Elena Macias, Susan Fitzsimmons, and Reynaldo Santiago. Macias was hired even though she had unapproved outside employment. ROA.230, ¶38, 237, ¶63.

In the May 30, 2011, Memorandum, Guerra stated that Hernandez continued with her employment at STC, despite not being authorized by UTPA to do so. Guerra wrote, "I must inform you that employees who engage in such conduct are subject to disciplinary action, up to and including termination." Despite the aforementioned language, the Memorandum did not mention that Hernandez was being disciplined in any way. No disciplinary actions were taken against Hernandez at that time or since then. ROA.22, 231, ¶39.

When Hernandez obtained a copy of her UTPA personnel file, the Guerra May 30, 2011, Memorandum was not contained within the file. ROA.23, 231, ¶41.

On or about October 8, 2014, Hernandez sent an email to Brown and addressed the Memorandum provided by Brown in her October 8, 2014, email. Hernandez said there was an error made by UTRGV because the May 30, 2011, Guerra Memorandum does not indicate that any disciplinary action was taken against Hernandez. Hernandez asked Brown what were the "next steps" to correct this error. ROA.23, 231, ¶42.

On October 8, 2014, Brown responded to Hernandez's October 8, 2014, email concerning the alleged error by stating that Hernandez could file an appeal no later than 5:00 p.m. on October 20, 2014. ROA.23, 231, ¶43.

On October 9, 2014, Hernandez sent an email to Brown and Rodríguez requesting a letter from UTPA stating that an error had been made on its part in its reporting the May 30, 2011, Memorandum to UTRGV in order for her to appeal the job denial. ROA.23, 231, ¶44.

On October 13, 2014, Hernandez sent a follow-up email to Brown and Rodríguez as she had received no response to her October 9, 2014, email. She wrote, "I need UTPA's support in this matter." She further stated, "Therefore, I respectfully request at this time a letter from UTPA indicating that an error was made on its part in its reporting and that in fact, this situation does not apply to me." ROA.23, 232, ¶45.

On October 13, 2014, Brown responded to Hernandez's October 13, 2014, email with her own email copied to Rodríguez reminding Hernandez of the deadline to appeal. ROA.24, 232, ¶46.

Hernandez sent another email to Brown and Rodríguez on October 13, 2014, which stated that she did not read the May 30, 2011, Guerra Memorandum as a disciplinary action, but she needed to know from UTPA how the Memorandum was viewed because it would dictate what information she provided for her appeal. ROA.24, 232, ¶47.

Brown responded to the October 13, 2014, Hernandez email with a copy to Rodríguez about whether or not the May 30, 2011, Memorandum was a disciplinary action and stated, "The committee reviewing the faculty applications for transition to UTRGV during Phase I considered the letter you received to be disciplinary action." ROA.24, 232, ¶48.

On October 16, 2014, Rodríguez sent an email to Hernandez telling her "that UTRGV is reasonably implementing the Phase I policy and remains committed to correctly evaluating each faculty member that submitted a letter of interest." He reminded her of the deadline to submit her request for reconsideration. ROA.24, 232, ¶50.

On October 20, 2014, Hernandez appealed the denial of employment and requested her application be reconsidered. In her letter to the UTRGV Phase I Hiring Committee, Hernandez outlined her disagreement with the May 30, 2011, letter being characterized as a disciplinary action. Hernandez asserted the letter was not a disciplinary action, but was rather the warning of a potential disciplinary action in the future, in the event she engaged in unauthorized outside employment. Hernandez provided a letter of support from Guerra who wrote the May 30, 2011, Memorandum that UTRGV erroneously characterized as a disciplinary action. (34a)

On November 6, 2014, Hernandez was denied employment by UTRGV after her request of reconsideration. The decision makers included Rodríguez and Bailey. ROA.25, 233, ¶52.

B. Phase II Hiring.

During Phase II hiring, Hernandez applied for the position of Art: Open Rank of Graphic Design with UTRGV. ROA.25, 233, ¶53.

On May 18, 2015, Hernandez was denied employment by UTRGV during the Phase II hiring process. Hernandez received notice that the position was closed and that it remained unfilled. ROA.25, 233, ¶54.

Hernandez's tenured employment with UTPA and UT System terminated on August 31, 2015. ROA.25, 233, ¶54.

On September 1, 2015, all tenured professors who were allowed to transition to UTRGV as tenured professors began their employment at UTRGV. ROA.77.

III. Procedural History.

On August 28, 2015, Hernandez filed suit in the 206th Judicial District Court of Hidalgo County, Texas against Guy Bailey, Havidán Rodríguez, Dahlia Guerra, UTPA, UT System, and the UTRGV ("University Defendants"). ROA.17.

On September 30, 2015, University Defendants removed this case from state court to the United States District Court for the Southern District of Texas, McAllen Division. ROA.6. In their Notice of Removal, University Defendants claim a question of law was

presented: "whether a tenured professor at UTPA has a protected property interest in employment at UTRGV?" ROA.7, ¶ 2.

On April 4, 2016, University Defendants filed their Rule 12(c) Motion for Judgment on the Pleadings. ROA.72. Five grounds were asserted. ROA.75. They were: (1) Hernandez's claims against UTRGV, UTPA, and UT System are barred by Eleventh Amendment immunity (ROA.82); (2) Hernandez's claims against the individual Defendants fail to state a claim (ROA.83); (3) the legislative process that led to Hernandez's loss of her property interest was all of the process she was due (ROA.84); (4) Hernandez did not have a property interest in UTRGV employment (ROA86); and (5) the individual defendants are protected by qualified immunity because Hernandez cannot establish the violation of a clearly identified right (ROA.90).

On April 25, 2016, Hernandez filed her Response in Opposition to University Defendants' Rule 12(c) Motion for Judgment on the Pleadings, or In the Alternative, Motion for Leave to Amend Pleadings. ROA.106.

On July 12, 2016, Hernandez filed her Motion for Leave to file First Amended Complaint. ROA.128. Attached to the Motion was the proposed pleading. ROA.131.

On October 6, 2016, Hernandez filed her Amended Motion for Leave to File First Amended Complaint. ROA.219. Attached to the Motion was the proposed pleading. ROA.223.

On October 20, 2016, the district court granted University Defendants' Rule 12(c) Motion for Judgment on the Pleadings and denied Hernandez's Amended Motion for Leave to File First Amended Complaint. ROA.264.

On October 20, 2016, the district court entered Final Judgment. ROA.276.

On November 18, 2016, Hernandez filed a Notice of Appeal from the Final Judgment and all orders entered that pertained to entry of the Final Judgment, including the Order which granted University Defendants' Rule 12(c) Judgment on the Pleadings and denied Hernandez's Amended Motion for Leave to File First Amended Complaint. ROA.277.

On January 3, 2018, the Fifth Circuit affirmed the District Court and stated "we agree that Hernandez failed to state a plausible claim for relief." Pet. Apx. 12a.

Reasons for Granting the Petition

A. The Lower Court's Decisions Trample Upon 14th Amendment Protections Afforded Tenured Professors.

The Fifth Circuit and the United States District Court for the Southern District of Texas, through their decisions in this case and their decisions in the *Edionwe* case[3], have greatly eroded the protections afforded tenured university professors that no "state deprive any person of life, liberty, or property, without due process of law" under the Fourteenth Amendment. U.S. CONST. amend XIV, § 1.

The Fifth Circuit's decision in this case is in conflict with this Court's decisions in *Board of Regents v. Roth* and *Perry v. Sindermann*. *Board of Regents v.*

[3]*Edionwe v. Bailey*, 860 F.3d 287 (5th Cir. 2017), *cert. denied*, 138 S.Ct. 687 (2018).

Roth, 408 U.S. 564 (1972); *Perry v.Sindermann*, 408 U.S. 593 (1972).

In *Board of Regents v. Roth*, this Court said: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. The UT System put a policy in place that allowed for tenured professors of UTPA such as Hernandez to transition to the merged higher education institution, UTRGV, and Hernandez pleaded that she met all of the requirements to transition. Based upon this Court's precedent, Hernandez had a property interest or a reasonable expectation of continued employment and was entitled to substantive and procedural due process which the UT System, UTRGV and UTPA denied to her.

The Fifth Circuit ignored its own precedent on the subject having previously held that a university professor has a protected property interest if she can demonstrate a reasonable expectation of continued employment. *Coates v. Pierre*, 890 F.2d 728, 732 (5th Cir. 1989). Hernandez's pleadings to be taken as true as the case was decided under Rule 12(c) established that she met all requirements to transition to the merged higher education institution and thus, demonstrated a reasonable expectation of continued employment.

Hernandez was promoted to Full Professor from Associate Professor at UTPA mere days before she was denied transition to UTRGV without due process. ROA.21, 229, ¶29. It is incomprehensible that the UT System Board of Regents could have promoted Hernandez to full professor at UTPA and only 36 days

later denied Hernandez employment at the merged higher education institution. There is no rational basis for the result.

This Court should grant certiorari to prevent the Fourteenth Amendment from being eroded.

B. The Lower Courts' Decisions are not in Accord With *Iqbal* and *Twombly*.

The Fifth Circuit and the United States District Court for the Southern District of Texas, McAllen Division's decisions conflict with *Ashcroft v. Iqbal* and *Bell Atl. Corp. v. Twombly*. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A plaintiff, they instruct, must plead sufficient facts to show that her claim has substantive plausibility." *Johnson v. City of Shelby*, 135 S.Ct. 346, 347 (2014). The decisions give lip service to the two cases. This Court should grant certiorari to explain in greater detail the pleading standard so that courts such as the Fifth Circuit and the United States District Court for the Southern District of Texas, McAllen Division cannot summarily label pleadings conclusory to the detriment of parties bringing meritorious claims.

The factual allegations in Hernandez's Original Petition and First Amended Complaint were sufficient to survive a motion to dismiss.

II. The Fifth Circuit Erred When It Affirmed the District Court's Order Granting the Motion to Dismiss.

A. Standard of Review.

A district court's decision to grant a Rule 12(c) motion for judgment on the pleadings is reviewed de

novo, using the same standards applicable to a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Phillips v. City of Dallas*, 781 F.3d 772, 775–76 (5th Cir. 2015); *Gentilello v. Rege*, 627 F.3d 540, 543-44 (5th Cir. 2010). The complaint therefore "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

B. Texas Senate Bill 24 Did not Extinguish Hernandez's Procedural and Substantive Due Process Claims.

The district court dismissed Hernandez's procedural due process claim on the ground that the legislative process afforded all the due process that Hernandez was entitled to receive. ROA.271. The bill in question was Texas Senate Bill 24. ROA.265; *See* Act of June 14, 2013, 83rd Leg., R.S., ch. 726, § 5(c), 2013 Tex. Sess. Law Serv. 1846, 1850 (West).

The Fifth Circuit adopted its reasoning from the *Edionwe* case that the property rights accumulated due to service at one university do not transfer to the others. Pet. Apx. 5a-7a; 860 F.3d at 292-293.

In its decision to dismiss the procedural due process claim, the district court cited the *McMurtray* case for the proposition that "when a legislature extinguishes a property interest via legislation that affects a general class of people, the legislative process provides all the process that is due." *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993).

McMurtray was comprised of three separate suits wherein the district courts granted the state officers' summary judgment. *McMurtray*, 11 F.3d at 500. The Fifth Circuit affirmed finding that no genuine

issue of material fact existed as to whether the legislative act extinguished the appellants' property interest. *Id.* at 503.

The issue in this case was not whether the legislature extinguished a property interest but whether there was a reasonable expectation of continued employment. *See Hagan v. Quinn*, 838 F.Supp.2d 805, 812-13 (S.D. Ill. May 19, 2014) (finding that plaintiffs had stated a plausible claim for violation of due process despite defendants' contention that legislature's modification or extinguishment of the right gave plaintiffs all the process that is due).

The Act was not intended to extinguish the property rights of tenured professors at UTB and UTPA. If it had, there would have been a mass uprising to the bill by faculty from both universities. There was no such uprising. Support for the Act was quite impressive and nearly unanimous. The Act passed the Texas Senate with 31 Yeas and 0 Nays and the Texas House of Representatives with 143 Yeas and 2 present not voting.

UTRGV is a merger of two existing UT System institutions, UTB and UTPA, where Hernandez was a tenured professor. S.J. of Tex., 83rd Leg., R.S. 454 (2013) (address of Juan "Chuy" Hinojosa) ("Senate Bill 24 creates a new university in South Texas and what it does, it merges two existing universities: One is The University of Texas-Pan American located in Edinburg, the other one is The University of Texas located in Brownsville...This university would also allow for it to qualify for PUF funds, under the Permanent University Fund...On the contrary, this merger and creation of a new university will save anywhere of six to seven million dollars because of efficiency in the administration of a new university.");

S.J. of Tex., 83rd Leg., R.S. 456 (2013) (address of Judith Zaffirini)("This academic merger was granted access to the Permanent University Fund, enabling the new institution to pool resources that would enable the Valley Region to serve more residents, therefore more families."). The legislative history makes it clear– UTRGV is the academic merger of UTPA and UTB, different in name only to enable access to PUF as a "new" university.

The Act mandated that UTRGV transition "as many faculty and staff" as was "prudent and practical" from UTPA and UTB. *See* Act of June 14, 2013, 83rd Leg., R.S., ch. 726, § 5©, 2013 Tex. Sess. Law Serv. 1846, 1850 (West). After Senate Bill 24 passed, the UT System adopted a policy for transitioning tenure and tenure track professors from both institutions. ROA.247. In "A Message from the President" dated August 6, 2015, on UTRGV's website, UTRGV President Bailey said that 97 percent of all faculty and staff at UTPA and UTB transitioned to UTRGV. *UT / A Message from the President*, http://www.utrgv.edu/en-us/about-utrgv/office-of-the-president/presidents-message/2015/a... (last visited March 25, 2017); ROA.116. On August 27, 2015, Bailey made a public statement that UTPA and UT Brownsville's faculty were being merged into UTRGV. ROA235, ¶60.

Those tenured faculty who transitioned to UTRGV did so without having to comply with Regent Rule 31007 for tenure at a University of Texas System institution and were given credit for their years of service at UTPA and UTB suggesting the Act did not extinguish property interests of tenured faculty and that tenure at UTPA or UTB is the equivalent of tenure at UTRGV. Regent Rule 31007 requires a

probationary period for tenure. ROA.99. Section 4 of Regent Rule 31007 states "[p]rior service at other academic institutions, whether inside or outside the U.T. System, shall not be counted toward fulfillment of the required probationary period unless specifically permitted under the provisions of an institution's Handbook of Operating Procedures" (ROA.99-100) and UTRGV's Handbook of Operating Procedures ADM 6-505 states "[a]ny prior service at other academic institutions, whether inside or outside the UT System, shall not be counted toward fulfillment of the required probationary period."*UTRGV HOP ADM 06-505*, http://www.utrgv.edu/hop/policies/adm-06-505.pdf (last visited Jan. 18, 2017). Thus, prior service at UTPA or UTB could not be considered for UTRGV. Yet, professors have been granted tenure at UTRGV with a credit for years of service at UTPA or UTB. ROA.235, ¶60.

Again, the following facts give rise to a reasonable expectation of continued employment at UTRGV:

1. Provision in S.B. 24 that "as many faculty and staff" as was "prudent and practical" from UTPA and UTB transition or be hired;

2. UT System policy adopted for "Hiring of Tenured and Tenure-Track Faculty Members to The University of Texas Rio Grande Valley";

3. Statement from UTRGV president that 97 percent of all faculty and staff at UTPA and UTB transitioned to UTRGV; and

4. Statement from UTRGV president that UTB and UTPA were being merged.

C. Tenure.

Rule 31007 of the UT System Rules and Regulations of the Board of Regents denotes tenure as "a status of continuing appointment as a member of the faculty at an institution of The University of Texas System." ROA.96, 2(Sec. 1).

Rule 31008 of the UT System Rules and Regulations of the Board of Regents states that termination of a tenured faculty member by an institution except as provided in Rule 31007, Section 5 and *Texas Education Code* Section 51.943, or by resignation or retirement, will only be for good cause shown. ROA.17.

UTPA Handbook of Operating Procedures Section 6.2.6 states that tenured faculty shall remain tenured until retirement or resignation unless terminated because of abandonment of academic programs or positions, financial exigency, or good cause in accordance with Rule 31007, Section 1 of the UT System Rules and Regulations of the Board of Regents. ROA.165, ¶ 15.

The AAUP issued a report in April 1981 on Institutional Mergers and Absorptions wherein the AAUP provided the following guidance to public colleges and universities:

> "The merger of two institutions of relatively equal strength, when the affiliation is not mandated by financial exigency, need not affect the commitments to term and tenure

> appointments that the respective institutions had made to the members of their respective faculties. This kind of merger was contemplated in a resolution of the Association's Thirty-Seventh Annual Meeting in 1951, calling attention to the problems of academic tenure which arise when colleges or universities merge or come under new control, with continuance of previous programs. In such circumstances the tenure rights of members of all affected faculties should be respected."

On Institutional Mergers and Absorptions, 67 AAUP Bulletin p. 83-85 (Apr., 1981). It is clearly the AAUP's position that upon the merger of two institutions, in the absence of financial exigency, tenure appointments of the respective institutions should not be affected. *See id.* Senate Bill 24's merger of UTPA and UTB should not have affected Hernandez's tenure and Hernandez should have transitioned to UTRGV.

D. Hernandez Had a Reasonable Expectation of Continued Employment.

1. Introduction.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Roth*, 408 U.S. at 576.

"A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may

invoke at a hearing." *Sindermann*, 408 U.S. at 601. Where there is a "legitimate expectation of entitlement," there is a property right. *Roth*, 408 U.S. at 577. Moreover, "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*, 455 U.S. 422 (1982).

A constitutionally protected interest has been created when procedural requirements are intended to be a significant substantive restriction on decision making. *Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984).

A university professor has a protected property interest in his position if tenure has been granted or if she can demonstrate a reasonable expectation of continued employment. *Coats*, 890 F.2d at 732; *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

Hernandez set forth at least seven sets of factual allegations supporting a reasonable expectation of continued employment. They appear below.

2. Length of Service and Tenure at UTPA.

Hernandez had been employed with UTPA as a professor 12 years prior to her termination of employment and tenured for the last 7 years. ROA.19, 25. Her length of service certainly gave rise to the expectancy of a transition to UTRGV. *See Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970) (finding that a professor's "long employment in a continuing relationship through the use of renewals of short-term contracts was sufficient to give him the necessary expectancy of re-employment that constituted a protectible interest").

3. Legislation Requiring the Employment of as Many Faculty From the Former Universities as is Prudent and Practical.

The mandate in the 2013 legislation merging and/or abolishing UTPA and UTB that stated "the board of regents shall facilitate the employment at the university created by this Act of as many faculty and staff of the abolished universities as is prudent and practical" created an expectancy of transition. *See Bishop v. Wood*, 426 U.S. 341, 344-345 (1976); *Yates v. Board of Regents of Lamar University System*, 654 F.Supp. 979, 981 (E.D. Tex. 1987) (a property interest in employment may be found in an express contract, or in a state statute, rule, or regulation).

4. Hiring Policy Adopted by UT System Board of Regents for Tenured Faculty Members of UTPA.

The hiring policy for tenured and tenure-track faculty members from UTPA and UTB to UTRGV was formally adopted by the Board of Regents for the UT System at their meeting on May 15, 2014. ROA.228, ¶25-26. It has the force of law and is a state created right. *See James v. Wall*, 783 S.W.2d 615, 619 (Tex. App.–Houston [14th Dist. 1989, no writ) (finding that Rules and Regulations of the Board of Regents of the UT System have the same force as would be a like enactment of the Texas Legislature); *Foley v. Benedict*, 55 S.W.2d 805, 807 (Tex. Comm'n App. 1932, holding approved).

The hiring policy was attached as Exhibit No. "1" to Hernandez's proposed First Amended Complaint (ROA.247) which the district court denied Hernandez leave to file. ROA.269. There are eight criteria for hiring under the UT System hiring policy. ROA.269. University Defendants admit in their opposition to Hernandez's motion for leave to amend that the Board of Regents created a hiring policy. ROA.168. They also claim Senate Bill 24 delegated "the specific hiring procedures to UT System." ROA.170.

5. Public Statement by UTRGV's President that Two Schools were Merging.

On August 27, 2015, prior to the abolishment of the two schools, UTRGV President Bailey made a public statement that UTPA and UTB's faculty were being merged into UTRGV. ROA.27, 235, ¶60. This statement evidences an understanding on the part of university officials that Hernandez's employment would continue.

6. UTRGV FAQ Statement on Hiring Tenured UTPA Faculty Members.

On July 18, 2014, UTRGV issued, "Hiring of Tenured and Tenure-Track Faculty Members to the University of Texas Rio Grande Valley **Frequently Asked Questions**." ROA.191. The FAQ Statement stated: "If you are eligible to apply in Phase I, UTRGV will invite you to indicate your interest in available positions through an online portal, and to submit appropriate forms." ROA.191 at No. 2. The document

further stated: "If you currently work in a UTB or UTPA academic unit that corresponds with an academic unit that will exist when UTRGV begins, you will be offered a tenured or tenure-track position as long as you meet the other hiring criteria." *Id.* Hernandez position was that she met all requirements under Phase I. ROA.21, 229, ¶32, 34, 61. The FAQ Statement issued by UTRGV created an expectancy of transition given Hernandez met all hiring requirements.

7. UTRGV Tenured and Tenure-track Faculty were Given Credit for Years of Service at UTPA.

Tenured and tenure-track faculty at UTPA that were transitioned to UTRGV were given credit for their years of tenure or tenure-track at UTPA and their "tenure clock" did not restart at UTRGV. ROA.235, ¶60. Tenure at UTPA or UTB is the equivalent of tenure at UTRGV for all practical purposes. This shows essentially a defacto merger and expectancy of transition.

E. The Fifth Circuit Acted Prematurely in Affirming Dismissal of this Case at the Pleadings Stage.

The Fifth Circuit acted prematurely in affirming dismissal of this case on the basis that Hernandez did not have a property interest. (Pet. Apx. 6a-7a). As will be discussed below, whether or not a property interest exists is generally a fact question. Also, the pleadings had not closed and no discovery had been conducted. ROA.69, 71.

The Federal Rules of Civil Procedure only required Hernandez to provide in a pleading "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e). The legal standard is such that a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The "plausibility" standard requires the complaint to state "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements." *In re So. Scrap Material Co.*, 541 F.3d 584, 587 (5th Cir. 2008) (quoting *Twombly* at 556). It is not akin to a probability requirement. *Iqbal*, 556 U.S. at 678.

A Rule 12(c) motion only tests the adequacy of the pleadings. *McCarty v. Hillstone Restaurant Group, Inc.*, 2015 WL 7076474, *5 (N.D. Tex. Nov. 12, 2015). Matters of proof are not to be considered by the court. *Id.* A claim may not be dismissed based solely on a court's supposition that the pleader is unlikely to find evidentiary support for her allegations or prove her claim to the satisfaction of the factfinder. *Twombly*, 550 U.S. at 564.

Hernandez pleaded that she had a property interest that entitled her to procedural and substantive due process along with facts in support of her assertion that she had a property interest. In regard to whether Hernandez had a constitutionally protected property interest, the Fifth Circuit stated that "[s]uch action, however, still does not establish that 'UTRGV *itself*, through the board of regents, adopted a policy that guaranteed employment for all faculty from UTPA."

Pet. Apx. 6a. Hernandez pleaded that she met the criteria for hiring. ROA.21. Therefore, the only issue was whether she was guaranteed a job. The hiring criteria said after the UTPA president makes the recommendation that "the award of tenure is subject to the approval of the Board of Regents." ROA.159. That statement is not the end of the story though.

Hernandez should have been allowed to develop the facts of the case to show that everyone recommended by the UTPA president to the Board of Regents would be hired and therefore, employment was guaranteed. Indeed, the Chairman of the Board of Regents, Paul Foster, testified in another case on December 20, 2016, that since 2007 when he began serving on the Board, he could not recall a single tenure recommendation from a UT System institution or school that was not approved by the Board of Regents. His testimony sure showed that no discretion was ever exercised in the granting of tenure by the Board and employment was guaranteed.

Hernandez met the simplified notice pleading standard and the case should not have been dismissed on the original state court pleading. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations). Hernandez pleaded sufficient facts to state a claim that was plausible on it face. *Twombly*, 550 U.S. at 570.

Whether or not Hernandez has a property interest in continued employment is a fact question that should not be decided at the pleadings stage. *See Heneghan v. Northampton Community College*, 493 Fed. Appx. 257, 260 (3rd Cir. 2012) ("The District Court determined that Heneghan's fleeting tenure

appointment created a question of fact as to whether he had a protected property interest in his employment."); *Green v. City of Hamilton, Housing Authority*, 937 F.2d 1561, 1563 (11th Cir. 1991) ("Because we conclude Green's allegations and supporting affidavits raise questions of fact regarding a property interest in continued employment under Alabama law, we VACATE the summary judgment and REMAND for further proceedings."); *Anglemeyer v. Hamilton County Hosp.*, 58 F.3d 533, 537 (10th Cir. 1995) (whether an implied contract exists thereby creating a property interest in employment is normally a question of fact for the jury to decide); *Yates*, 654 F.Supp. at 981 ("Nevertheless, this court cannot rule as a matter of law that plaintiff had no property interest in continued employment. Plaintiff has produced some evidence of an understanding on the part of university officials that non-probationary employees could only be dismissed for cause. A genuine issue of material fact remains as to whether plaintiff enjoyed a property interest because of prevailing custom and practice at Lamar University.").

Hernandez asserts that a Rule 12(c) motion cannot be granted until the pleadings have closed and the pleadings had not closed at the time of the filing of the motion. *See* Fed. R. Civ. P. 12(c). The Scheduling Order set a deadline of August 12, 2016, for Hernandez to amend pleadings which was vacated nine days after it was entered. ROA.69, 71. The University Defendants' Rule 12(c) Motion for Judgment on the Pleadings was filed on April 4, 2016, when there was no deadline to amend pleadings. ROA.69, 71-72. In this case, no federal pleadings were filed. ROA.2-5. The Rule 12(c) motion should have been dismissed as premature. *United States of Am. & State of Texas v. Auslin Radiological Ass'n*, Cause No. A-10-CV-914-

LY, 2012 WL 12850249, at *1 (W.D. Tex. May 17, 2012) ("Insofar as Defendant Austin Radiological Association presently seeks judgment on the pleadings pursuant to Rule 12(c), the court dismisses the motion as premature without prejudice to refiling at the close of pleadings.").

F. Sufficient Facts Alleged to Establish a § 1983 Claim for Procedural and Substantive Due Process Violations.

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1) a violation of a right secured by the Constitution and laws of the United States; and (2) the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

A tenured professor is entitled before she may be dismissed to: (1) be advised of the cause for her termination in sufficient detail so as to enable her to show any error that may exist; (2) be advised of the names and the nature of the testimony of the witnesses against her; (3) a meaningful opportunity to be heard in her own defense within a reasonable time; and (4) a hearing before a tribunal that possesses some academic expertise and an apparent impartiality toward the charges. *Levitt v. University of Texas at El Paso*[4], 759 F.2d 1224, 1227-28 (5th Cir. 1985).

To state a Fourteenth Amendment due process claim under Section 1983, a plaintiff must first identify a protected life, liberty, or property interest and then show a governmental action resulted in a deprivation of that interest. *Gentilello*, 627 F.3d at 544.

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[4] The University of Texas at El Paso is a component institution of the UT System.

Hernandez's Original Petition filed in state court states in relevant part as follows:

1. "On or about September 1, 2008, **HERNANDEZ** was promoted to Assistant Professor and she received tenure." ROA.19.

2. "Rule 31008 of **UT SYSTEM**'s Rules and Regulations of the Board of Regents states that faculty members who have been granted tenure may only be terminated for good cause shown." ROA.19.

3. "**HERNANDEZ**'s tenured employment with **UTPA** and **UT SYSTEM** will terminate on August 31, 2015." ROA.25.

4. S.B. 24 required the board of regents to facilitate the employment at the university created by the Act as many faculty and staff of the abolished universities as is prudent and practical. ROA.27.

5. Hernandez met all requirements for transitioning to UTRGV. ROA.28.

6. "As further evidence of the property right, on August 27, 2015, **BAILEY** made a public statement that **UTPA** and UT Brownsville's faculty were being merged into **UTRGV**."

7. "She was denied by **BAILEY** the right to notice and a hearing prior to the deprivation of her property right." ROA.28-29.

8. "**RODRIGUEZ** had the opportunity to provide some type of adequate pre-deprivation remedy and failed to do so." ROA.29.

These statements establish a cognizable claim for violation of Hernandez's Fourteenth Amendment right to procedural due process.

A tenured employee has alleged a cognizable violation of his or her Fourteenth Amendment right to substantive due process if the individual has alleged that his or her public employer's decision to termin ate his or her property interest in continued employment was arbitrary or capricious. *Mills v. Garcia*, 614 Fed.Appx. 174, 178-79 (5th Cir. 2015); *Lewis v. University of Texas Medical Branch*, 665 F.3d 625, 630 (5th Cir. 2011).

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1. "On or about September 1, 2008, **HERNANDEZ** was promoted to Assistant Professor and she received tenure." ROA.19.

2. "Rule 31008 of **UT SYSTEM**'s Rules and Regulations of the Board of Regents states that faculty members who have been granted tenure may only be

terminated for good cause shown." ROA.19.

3. "**HERNANDEZ**'s tenured employment with **UTPA** and **UT SYSTEM** will terminate on August 31, 2015." ROA.25.

4. "**HERNANDEZ** would show that **RODRIGUEZ**, and **BAILEY** failed to exercise professional judgment, in a nonarbitrary and noncapricious manner, when depriving **HERNANDEZ** of her protected property interest." ROA.27.

5. "**HERNANDEZ** would show that she was tenured by **UTPA** and the **UT SYSTEM** and had been promoted by **UTPA** and the **UT SYSTEM** to the rank of Full Professor 36 days before being notified that she would not transition to **UTRGV**." ROA.27.

6. "**HERNANDEZ** was not disciplined by **UTPA** and the **UT SYSTEM** during the time period running from the date of her promotion of September 1, 2014 to the denial of her transition on October 6, 2014." ROA.27.

7. "**HERNANDEZ** would show that the May 30, 2011, **GUERRA** Memorandum concerning outside employment was not a disciplinary action under 4.1c of the hiring criterion for tenured professor that would prohibit **HERNANDEZ**'s transition to

UTRGV. **RODRIGUEZ** and **BAILEY**'s decisions to characterize the Memorandum as a disciplinary action were arbitrary and capricious." ROA.28.

8. "As further support of her position that the decision to not transfer **HERNANDEZ** to **UTRGV** was arbitrary and capricious, **HERNANDEZ** would show that Maria Elena Macias was the **UTPA** assistant art professor identified in a departmental audit of the Art Department dated December 11, 2008, who was 'employed with a local museum without obtaining appropriate approvals as required by University policy on outside employment.' Although Maria Elena Macias had unapproved outside employment which is what the May 30, 2011, **GUERRA** Memorandum said **HERNANDEZ** had, **RODRIGUEZ** and **BAILEY** made the decision to transition Maria Elena Macias to **UTRGV** and not **HERNANDEZ**." ROA.28.

9. "**HERNANDEZ** would show that **GUERRA** and **RODRÍGUEZ** approved outside employment to **UTPA** employees Robert Gilbert, Maria Elena Macias, Susan Fitzsimmons, and Reynaldo Santiago who transitioned to **UTRGV**. **GUERRA** and **RODRÍGUEZ** arbitrarily refused to approve outside employment to **HERNANDEZ** for the Spring semester 2011 to teach one class at

> STC. Such decision resulted in **HERNANDEZ** not transitioning during Phase I hiring of tenured **UTPA** professors." ROA.28.

These statements establish a cognizable claim for violation of Hernandez's Fourteenth Amendment right to substantive due process.

To state a claim under Section 1983, a plaintiff must show that the deprivation of the right or interest secured by the constitution and the laws of the United States occurred under color of state law. *See West*, 487 U.S. at 48.

Action taken "under color of" state law is not limited only to that action taken by state officials pursuant to state law. *Brown v. Miller*, 631 F.2d 408, 411 (5th Cir. 1980). Rather, it includes: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law..." *Id.*

Hernandez's Original Petition filed in state court states in relevant part as follows:

1. "In or about May 2014, Defendant **GUY BAILEY**, Ph.D. became the Founding President of **UTRGV**." ROA.20.

2. "In or about August 2014, Defendant **HAVIDAN RODRIGUEZ**, Ph.D. became the Founding Provost and Vice President for Academic Affairs of **UTRGV**." ROA.21.

3. "On or about October 6, 2014, **BAILEY** sent an email to **HERNANDEZ** which

stated that **HERNANDEZ** was denied employment for Phase I hiring by **UTRGV**." ROA.21.

4. "On or about October 6, 2014, **HERNANDEZ** sent an email to **RODRIGUEZ** and stated she had no idea what the October 6, 2014, **BAILEY** email was about." ROA.22.

5. "On or about October 8, 2014, **UTPA** Provost and Vice President for Academic Affairs, Ad Interim Cynthia Brown provided **HERNANDEZ** the alleged disciplinary action that **RODRIGUEZ** asked her to send to **HERNANDEZ**. The alleged disciplinary action was a Memorandum dated May 30, 2011, from **DAHLIA GUERRA**, Ph.D., Dean of the College of Arts and Humanities to **HERNANDEZ**." ROA.22.

6. "On or about October 9, 2014, **HERNANDEZ** sent an email to Brown and **RODRIGUEZ** requesting a letter from **UTPA** stating that an error had been made on its part in reporting the May 30, 2011, Memorandum to **UTRGV** in order for her to appeal the job denial." ROA.22.

7. "On or about October 16, 2014, **RODRIGUEZ** sent an email to **HERNANDEZ** telling her 'that **UTRGV** is reasonably implementing the Phase I

policy and remains committed to correctly evaluating each faculty member that submitted a letter of interest.'" ROA.23.

8. "The decisions by **RODRIGUEZ** and **BAILEY** to terminate **HERNANDEZ's** protected property interest were obviously arbitrary and capricious." ROA.28.

9. "**GUERRA** and **RODRIGUEZ** arbitrarily refused to approve outside employment to **HERNANDEZ** for the Spring semester 2011 to teach one class at STC. Such decision resulted in **HERNANDEZ** not transitioning during Phase I hiring of tenured **UTPA** professors." ROA.28.

These allegations establish the second element of a 42 U.S.C. § 1983 claim and provide a set of facts which establish Bailey, Rodríguez, and Guerra were acting under color of state law because they had the power to take the complained of action by virtue of their authority as administrators for UTPA and UTRGV and clothed with that authority took such action.

III. The Fifth Circuit Erred When it Affirmed the District Court's Denial of Hernandez's Request for Leave to File First Amended Complaint.

The Federal Rules of Civil Procedure provide that a court should freely give leave to amend a complaint when justice so requires. Fed. R. Civ. P. 15(a)(2). Granting leave to amend is especially

appropriate when the trial court has dismissed the complaint for failure to state a claim. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002). In view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits, a district court should give a plaintiff at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiff advises the court that they are unwilling or unable to amend in a manner that will avoid dismissal. *Id.*; *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986) ("Dismissing an action after giving the plaintiff only one opportunity to state his case is ordinarily unjustified.").

Hernandez filed her April 25, 2016, Response to the University Defendants Rule 12(c) Motion for Judgment on the Pleadings as a "Response, . . . or In the Alternative, Motion for Leave to Amend Pleadings." ROA.106. In her Response, or In the Alternative, Motion for Leave to Amend Pleadings, Hernandez requested leave to amend her pleading "[i]f the Court is inclined to dismiss any portion of Plaintiff's complaint for failure to state a claim" "to cure the alleged pleading deficiencies identified by Defendants including, but not limited to, pleading sufficient facts to establish waiver of immunity from liability for the UDJA claims, section 1983 claims for violations of procedural and substantive due process rights, and defeating Defendants' qualified immunity defense." ROA.118-19. In her prayer, Hernandez requested the district court "deny Defendants' Rule 12(c) Motion for Judgment on the Pleadings, or in the alternative, grant Plaintiff's Motion for Leave to Amend Pleading." ROA.119.

On July 12, 2016, Hernandez filed her Motion for Leave to File First Amended Complaint (ROA.128) and attached to her Motion a copy of the proposed First Amended Complaint (ROA.132).

On October 6, 2016, Hernandez filed her Amended Motion for Leave to File First Amended Complaint (ROA.219) and attached to her Motion a copy of the proposed First Amended Complaint (ROA.224). The University Defendants had correctly pointed out that Hernandez had named the wrong Powell in the suit and the purpose of the Amended Motion and revised Complaint was to name the correct Powell. ROA.219. The University Defendants did not file a response to the Amended Motion.

A district court's denial of a motion for leave to amend a pleading or a denial to amend a judgment is reviewed for abuse of discretion. *Rio Grande Royalty Co., Inc. v. Energy Transfer Partners*, 620 F.3d 465, 468 (5th Cir. 2010); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003). When the district court's denial of leave to amend is based solely on futility, a de novo standard of review is employed. *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010).

Denial of a motion to amend is warranted for " 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [and] futility of the amendment.'" *Rosenzweig*, 332 F.3d at 864, (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962). Absent such factors, "the leave sought should, as the rules require, be 'freely given.'" *Foman*, 371 U.S. at 182.

The district court denied the Amended Motion finding that granting leave to amend "would be futile"

and the Fifth Circuit made the same finding. ROA.269; Pet. Apx. 7a-12a.

An amendment would not have been futile.

In her proposed First Amended Complaint, Hernandez pleaded an equal protection claim relating to Section 4.1(c) of the hiring policy that prohibited transition to any tenured professor who had any disciplinary action within 7 years. ROA.238-239. *See Armstead v. Starkville Municipal Separate School Dist.*, 461 F.2d 276, 280 (5th Cir. 1972) ("Starkville has created an absolute classification among the teachers seeking reemployment and among those applying for initial employment. Those who attain a minimum score on the GRE are classified as suitable for employment while those who fail to meet this mark are automatically rejected. Although Starkville may have discretion to establish an appropriate classification, the classification must not be an arbitrary one, i.e., acting without any reasonable basis.").

The Fifth Circuit held that "the requirement that professors not have any disciplinary record within seven years of application is, at a minimum, rational." Pet. Apx. 9a. The Fifth Circuit further said: "It is reasonable to conclude that professors' overall fit with UTRGV would be better, and thus the quality of the teaching higher, if professors eligible for employment at UTRGV were limited to those without a recent history of disciplinary actions." *Id.*

The Fifth Circuit failed to explain how termination or refusal to hire based on an disciplinary action within the last seven years, no matter how minor the discipline or infraction was, relates to the "quality" of public education. ROA.188. The Fifth Circuit failed to explain how a severe disciplinary action eight years prior is different from a minor infraction seven years

prior. Furthermore, any such argument is negated by UTPA and the UT System promoting Hernandez to the rank of Full Professor on September 1, 2014, after Hernandez received the alleged May 30, 2011, disciplinary memorandum for unapproved outside employment of one class at South Texas College. ROA.21-22, 188.

In her proposed First Amended Complaint, Hernandez challenged the constitutionality of Senate Bill 24 as an alternative claim. ROA.240. Hernandez asserted that the phrases "as many" and "prudent and practical" in the Act that provided "the board of regents shall facilitate the employment at the university created by this Act of as many faculty and staff of the abolished universities as is prudent and practical" are unconstitutionally vague on their face and as-applied to Hernandez. ROA.240. Persons of common intelligence must necessarily guess at the meaning of "as many" and "prudent and practical" and differ as to their application. ROA.240, ¶78.

A law is unconstitutionally vague when persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Legislatures are required to set reasonably clear guidelines for law enforcement officials and triers of fact to prevent "arbitrary and discriminatory enforcement." *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974). The concern underlying the vagueness doctrine is that citizens will not be able to predict which actions fall within the statute, leading to arbitrary and discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

The Fifth Circuit said that "[t]hough the context differs substantially from that at issue here," this

Court's *Beckles v. United States* decision is instructive. Pet. Apx. 11a; *Beckles v. United States*, 137 S.Ct. 886 (2017). In *Beckles*, this Court held that the advisory sentencing guidelines do not violate the void-for-vagueness doctrine because the twin concerns of providing notice and preventing arbitrary enforcement are not implicated. *Beckles*, 137 S.Ct. at 894. The Court said: "All of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of the court's sentencing discretion." *Id.* In the present case, Senate Bill 24 did not set boundaries or ranges.

The Fifth Circuit ignored the purpose of Senate Bill 24 which was a merger of universities that should not have affected the tenure rights of professors.

Conclusion

For the foregoing reasons, Petitioner Leila Hernandez respectfully requests that this Court grant certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit. Hernandez requests such other and further relief which Hernandez may justly be entitled.

Respectfully submitted,

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