

No. 19-1373

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IN THE SUPREME COURT OF THE UNITED STATES

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Ming Wei,

*Petitioner,*

v.

Pennsylvania State Civil Service Commission  
(Pennsylvania Department of Health)

*Respondent.*

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*On Petition for a Writ of Certiorari  
to the Commonwealth Court of Pennsylvania*

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Petition for a Writ of Certiorari

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## QUESTION PRESENTED

Wei is a naturalized Asian American Epidemiologist who was dismissed by the Pennsylvania Department of Health ("PADOH"). His duty was to check for data errors to maintain the data integrity and keep a vigil against the Epidemic. PADOH claimed that it dismissed Wei because he failed to complete converting HIV/AIDS HARS data that it assigned him solely. Wei claimed that PADOH never assigned him the task, never gave him an opportunity to respond, and it terminated him for blocking his ongoing search for more data errors after the others converted HARS data. PADOH never gave Wei the opportunity to respond before termination, it refused to provide and present the key documents. The Commission disallowed Wei from having an interpreter in a civil service hearing, and credited all PADOH stated but discredited Wei. The state court of appeals affirmed. Wei filed a case in a federal court and uncovered the contemporaneous records later, PADOH admitted it never assigned Wei to convert HARS data in the federal court. When Wei used the records to reopen this case, PADOH insisted that it assigned Wei to convert the HARS data solely. The state court of appeals stated that it didn't believe that PADOH never assigned wei to convert HARS data and it couldn't access the federal courts' records. The questions presented are as follows:

1. Whether Wei's constitutional rights and due process rights were violated in the state proceedings
2. Whether the court of appeals erred in that PADOH didn't commit the fraud.
3. Whether the court of appeals erred in that Wei could use PADOH's records in the initial hearing

## PARTIES TO THE PROCEEDING

Petitioner is Ming Wei.

Respondent is the Pennsylvania Department of Health("PADOH"), an agency of the Commonwealth of Pennsylvania. The administrative hearing was held under the Pennsylvania State Civil Service Commission ("Commission")

## RELATED PROCEEDINGS

United States District Court (M.D. Pa.):  
*Wei v. Commonwealth of Pennsylvania et al*  
No. 11-cv-00688 (Final Judgement entered on March 28, 2019)

United States Court of Appeals (3d Cir.):  
*Wei v. Commonwealth of Pennsylvania et al*,  
No. 19-1705 (Denying rehearing on March 31, 2020)

The major reason to terminate Wei's federal case was the issue preclusion, Wei will apply to appeal the case 19-1715 (3<sup>rd</sup> Circuit Court in which a majority denied Wei's petition for rehearing on March 31, 2020 later. Since Defendants didn't release key documents until the federal case, the majority of the records cited here are from Wei's federal case but have been filed to the state tribunals for reopening.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Ming Wei ("Wei") respectfully petitions for a writ of certiorari to review the judgment of the Commonwealth Court of Pennsylvania ("Commonwealth Court").

## OPINIONS BELOW

The judgment for which the review is sought is the decision of the Commonwealth Court for *Wei v. State Civil Service Commission*, No. 1321 CD 2018 (Pa. Cmwlth, 2019) (*Wei IV*) (Appendix ("App.") C) because the Supreme Court of Pennsylvania Denied Wei's Petition for Allowance of Appeal on Jan 22, 2020 (App. A).

Wei sought this Court to review the case also because the Commonwealth Court stated Wei's key evidence to reopen was from the records of his federal case, but it couldn't access the federal courts' records and PADOH never admitted the evidence before the state tribunals. Therefore, this Court should review this case because only this Court can access the records of both the state and federal cases.

## JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Commonwealth Court.

## STATUTORY AND REGULATORY PROVISIONS INVOLVEED

The first amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

The fourteenth amendment provides "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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 OF THE CASE

### I. Factual History of the Case

1. This case involves Petitioner's claim that Respondent PADOH violated the Whistleblower law, due process, and Pennsylvania civil service act and illegally dismissed Wei with a fake cause.

2. The Commonwealth of Pennsylvania required the agencies to document their business records,



and preserve the records for the anticipating litigation(<http://www.oa.pa.gov/Policies/Pages/manual.aspx> M210.1-M210.9).

3. PADOH held the employee's duties must be written and updated in the position description (App. 47a-49a, 76a). Wei's supervisor Veronica Urdaneta ("Urdaneta") testified and wrote that she tasked Wei in writing and with follow-up date (App. 47a, AX530<sup>1</sup>).

4. PADOH has collected AIDS cases into HIV-/AIDS Reporting System ("HARS") database since 1980s.

5. With a median of 10 years from the initial HIV infection to progress into the AIDS stage, Pennsylvania started a name-based HIV reporting on Oct. 18, 2002<sup>2</sup> to collect HIV cases at early (non-AIDS) stage (App. 148a).

6. Wei, a naturalized Asian American with a pulmonary lobectomy (now at age 62), was the data manager of the HIV team in PADOH since Feb. 2001.

7. The major task of the whole HIV team which had 15 positions in 2007 and a part of Bureau of Information Technology ("BIT") were cleaning and converting HIV reports, deduplicating them into the potential cases (pre-HARS cases) (App. 50a).

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<sup>1</sup> In addition to the documents in the appendixes, Wei also cited some documents with prefix "AX" or "AR" for those filed to the Circuit Court and "DCD" for those filed to the District Court.

<sup>2</sup> Philadelphia didn't join the action but started collecting the non-name reports earlier

8. Then 16 field offices ("LMRO", App. 50a) investigated those potential cases, and entered the confirmed cases.

9. Based on PADOH's writing, Wei's job was receiving the Deloitte (BIT's contractor)'s extracts of the confirmed cases, reviewing their accuracy and completeness in PA-NEDSS (App. 51a, 142a), "his job is to analyze the data and pointout errors he finds", how to fix them wasn't his work (App. 54a-55a). Wei also instructed to inform BIT (Deloitte) when he found the errors (AX503, DCD 95-2, pp9-10). PADOH claimed that Wei must be punished strongly if he did the unassigned task.

10. PADOH also assigned Wei in charge of the security within the HIV secured area (AX306).

a. Wei found the incompleteness in converting HARS data

11. PADOH in 2002 initially declared its BIT (and BIT's PA-NEDSS team with 42 IT staffers and \$8-10 million budget annually (App. 59a)) to convert HIV lab reports. However, it assigned HIV team doing the work as a temporary solution (AX-515-6).

12. The HARS data were the last format (AR5) of HIV/AIDS cases because the Federal and all states used HARS as the sole tool to communicate and count HIV/AIDS cases.

13. In April 2004, PADOH decided to use BIT's PA-NEDSS to replace HARS as the active database for Pennsylvania HIV/AIDS cases (AX220). In the initial Charter (App.60a), BIT should convert all HIV lab reports then using new BIT format for HIV

reports since Feb 2005 (App. 60), it also converted the all HARS cases into PA-NEDSS by July 1, 2005, and then HARS remained as a passive database only (App. 60a,146a). However, BIT didn't complete either tasks on time.

14. Since 2006, Wei identified many inaccuracies and incompleteness after the others converted HARS data, the ongoing fixing saved Pennsylvania \$ multi-million annually. For example, his finding led to correct HIV-onset date errors in 38,000 cases (80% of total HARS cases) (App. 63a).

15. However, in 2006, Urdaneta revoked Wei's right accessing PA-NEDSS (App. 52a), it impeded Wei's duty of checking the data errors in PA-NEDSS but the revocation was partially reversed later.

16. PADOH claimed: it ordered several other staffers to convert the Philadelphia HARS data, they converted 362 records only in 4 months, the task was incomplete due to the heavy workload (App. 64a).

17. Wei identified about 10% of HARS converted errors in some variables among these cases (App. 65a).

18. In 2006 - 2007, Wei found many errors in the HARS converted data, for example, one was in race field (App. 66a). After PADOH dismissed Wei, it stated that it didn't fix the error yet (App. 67a).

19. Wei worked hard to maintain the data integrity. Urdaneta and Godwin Obiri ("Obiri" was Wei's supervisor from Aug 2005 to Nov 2006 and Urdaneta's subordinate) have admitted that Wei

correctly identified the data errors (App. 68a-69a).

b. Wei identified the incompleteness of converting HIV reports.

20. PADOH wrote under oath: on Oct. 28, 2005, it assigned Wei to spend 2 months exclusively to help cleaning HARS data for conversion; while other staffers to unify (convert) 2005 reports until "By November 22, 2005, it became apparent to PADOH that the conversion of the backlogged HIV lab data was interfering with the conversion of HARS data" (DCD,70-1,p7). They restarted with a plan that BIT develops a format first so that the HIV team converts raw reports directly into the format (App. 62a, 72a).

21. Once Wei completed cleaning, he returned to his major task of checking for the completeness and accuracy of the cases weekly; PADOH instructed Wei also to review the completeness of HIV reports in PA-NEDSS (App. 51a). Wei wrote to Obiri that he didn't see any backlog reports in PA-NEDSS yet on Dec 22, 2005 (App. 75a).

22. In May 2006, Wei indicated the incompleteness in processing both 2005 and 2006 reports, he asked BIT's lab report manager Robert Giallo ("Giallo") and cc Obiri about their progress (App. 78a).

23. Giallo responded that they fell behind in processing them, but he had discussed the issue with Obiri, and was drafting an updated Charter for the 2005 reports but "the project was bigger

than originally anticipated, it required a complete PA-NEDSS team effort for the project" (App. 78a).

24. When Wei re-indicated the incompleteness of processing 2005 lab reports in November (App. 76a), Giallo wrote to Obiri that they would present the updated Charter in the upcoming meeting to respond Wei's question when and how they would complete 2005 reports.

25. Then PADOH held a Dec. 2006 BIT meeting, Giallo stated they didn't complete the task because it was too big. The meeting accepted the Charter but wanted: (1) HIV team did an estimate based on an upcoming BIT draft format, then (2) the group has next meeting to decide the formal format for the conversion (App. 91a) .

26. About 600,000 raw reports yearly were sent to PADOH from 2003 to 2005 (App. 148a). The HIV team processed up to 480,000 records annually (App. 147a), while the PA-NEDSS team processed up to 330,000 reports annually (App. 58a). New Jersey needed 6 full-time employees ("FTE") to process 60,000 HIV reports annually (App. 98a). Therefore, the meeting decided the work would be completed in 2008.

27. BIT and others circulated the draft format since Jan 25 2007 (DCD 300-2, p26). Although PADOH has claimed others were in charge of cleaning, no one cleaned the reports for the format. However, to do an estimate, a part of reports needs to be cleaned, converted, and deduplicated.

28. Wei worked days and nights, did all steps and got 158 potential cases (about 8% total cases) for estimate. Then Giallo did a test and updated

email about the meeting to Wei was sent after the meeting (AX279). Wei reported the discrimination and defamation to the PADOH's Equal Employment Office ("EEO"). PADOH has admitted that the other staffers including Urdaneta missed some meetings. It has admitted no other staffer was disciplined for missing a meeting (AX536).

34. Wei also reported that PADOH violated its compensatory time policy (AX262) and denied his compensatory hours for his overtime work while others got the compensatory time (DCD 358-1). EEO contacted his supervisor then told Wei that Wei mustn't work for the PA government after 5 PM, but PADOH wouldn't compensate him for his previous extra hours.

35. Urdaneta on April 9, 2007 suddenly ordered Wei to complete converting all 2005 lab reports into the draft format (AX297-8) though she in March 2007 had defined the draft format as being for estimation only but useless for conversion (App. 91a).

36. PADOH has expended HIV team from 8 staffers in 2004 to 15 positions in 2007 (DCD 207-5) while the data management reduced to Wei lonely from 2.75 positions when PADOH defined the data management as having "severe staffing shortfalls" (App. 101).

37. PADOH required that the cleanup must be done before converting (App.74a, AX246:2). However, when Wei asked PADOH to arrange the others doing their jobs and give him an assistant (AX298), it rejected his requests (DCD 312, ¶131) but ordered him to "set aside 2 hours" daily (App.

107a) from his routine to converting the lab data at a May 2007 Pre-discipline conference ("PDC"). It banned Wei to email the big file (App. 109a) and required him to send the note to report his progress (App. 106a), Wei did so.

38. PADOH in the updated Charter requires that BIT develop the format first, and then the HIV team converts "all raw files" of HIV lab reports into the format (App. 72a, #3.2)". Since the formal format was not available yet, converting the lab data into the draft format was useless.

39. So Wei did the cleaning work first and then converted. Wei worked extremely hard and got sick and had a hearing problem (App. 110a).

40. Urdaneta's supervisor Stephen Ostroff ("Ostroff") instructed Wei that he was no longer a part of the solution for the backlog lab data on July 2, 2007 (App. 111a). He should focus on his own job of checking for data errors.

41. PADOH documented that Wei completed 400,000 reports by July 3, 2007 (App. 112a). Wei also reported his processing of 550,000 reports in an August 27, 2007 email to PADOH (App. 119a).

#### c. Other Events

42. Wei found the annually collected HIV (non-AIDS) cases since 2006 substantially decreased after excluding 1,600 pre-HARS cases before 2005 (App. 126a) and Philadelphia cases.

43. According to the other states' experiences, the cumulative HIV (non-AIDS-stage) cases should

dramatically increase in the first 5 years of HIV reporting. Although the 2005 reports hadn't been processed and PADOH had cumulatively collected 6,237 cases by Nov. 2005 (App. 124a), the cases were 6,218 only by Dec. 2007 (App. 128a)<sup>3</sup>.

44. On Aug 13, 2007, Wei reported that BIT and others processed about 60,000 raw HIV lab reports between Jan 2006 and Aug 10, 2007. He was concerned that 50% of the collected living cases had no HIV reports during this period, though the AIDS cases were requested to test for virus load and T lymphocyte CD4 quarterly (App. 129a). PADOH never responded.

45. While PADOH didn't fix the birthplace errors that Wei identified in March, Wei indicated the other birthplace errors on July 30 (DCD 300-1, p759) and Aug 22 (AX286). PADOH never responded but separated Wei from the data permanently 2 days later.

46. PADOH held an Aug 24, 2007 PDC. PADOH had not informed Wei that it was dismissing Wei in the PDC (App. 131a-133a).

47. Instead, after Urdaneta [Dr. U] accused Wei of failing to complete the task assigned in a Dec. 2006 BIT meeting (App. 131a) and Wei disputed, the HR official Tiffany Burnhauser ("Burnhauser") orally suspended Wei for investigation.

48. Burnhauser instructed Wei to send an email about his performance on or before Aug. 29, 2007 (App. 133a). She stated that Wei should leave his

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<sup>3</sup> about 3.5% HIV (non-AIDS) cases advanced into AIDS stage annually in Pennsylvania (DCD 207-5, pp9-10) and about 2% other attritions.



personal belongings in his office because this was for an investigation only but not termination. In 2004, PADOH launched an investigation against Wei but ended with an apology letter to him (App. 134a).

49. Wei reported his work in both handling the data management and processing 550,000 reports in an Aug. 27, 2007 email to Burnhauser and her supervisor HR Director Kim Strizzi (App. 119a).

50. Before mailing the termination letter on Sept 4, 2007, PADOH only communicated with Wei one time: it mailed him a confirmed suspension letter but the letter didn't list any facts (App. 144a). PADOH wrote a vague cause of the backlog data in the termination letter (DCD 300-2, pp4-5), but it clarified the removal cause was failing to convert the backlog HARS data (App. 130a) assigned at Dec. 2006 BIT meeting later.

## II. Procedural History of This Case

51. Wei appealed PADOH's dismissed decision to the Commission; he requested to allow an interpreter based on Pennsylvania law (App. 135a), but the Commission denied his request (App. 136a).

52. The Commonwealth has documented "Wei is Asian and his English is very broken" (AX250). In the deposition of Wei's federal case, the District Court required Wei to hire an interpreter to deposit the Defendants PADOH et al.

53. Wei subpoenaed key PADOH's documents for the hearing. PADOH filed a quash motion to

refused to release the documents (AX419). When Wei asked the issue during the hearing, the Commission stated that it considered later but never ruled the issue.

54. PADOH refused to exchange evidence. It didn't start returning Wei's belongings in his office that contained emails and documents until June 2009 but never returned his notebooks (AX251-4). Many documents that Wei filed to reopen wasn't available at the 2007 Commission hearing.

55. PADOH insists "the uncompleting assignment from Dr. Urdaneta and which resulted in his discharge was not given to him until December of 2006 [BIT meeting]" (DCD 343-1, p3). "In December 2006, Veronica Urdaneta, Wei's supervisor, assigned Wei the task of converting the HARS HIV/AIDS data files" "The task was solely Wei's responsibility" *Wei v. State Civil Serv. Comm'n*, 961 A.2d 254 (Pa. Commw. Ct. 2008) (*Wei I*, (App. E).

56. "Wei was terminated for not completing the HARS HIV/AIDS assignment by July 31, 2007. While the Department maintains that Wei was given ample resources and time within which to complete the assignment" but "Wei claims that it was not his responsibility to convert the 2005 HARS HIV/AIDS data files" *Wei I*.

57. Although PADOH bears the burden of proof and the Pennsylvania government has required to preserve the business records in anticipation of litigation, PADOH supported its removal cause based on the oral testimonies with the "facts" never talked to Wei even never exist in its records. Both

sides disagreed on almost everything, but the Commission credited PADOH only.

58. After hearing, Wei provided the additional documents and applied for reconsideration, PADOH claimed these documents were unverified, the Commission struck his documents (App. 150a) and denied his application (App. 44a).

59. Wei appealed to the Commonwealth Court. PADOH insisted it assigned Wei converting HARS data solely but the conversion was incomplete. The Commonwealth Court affirmed *Wei I*.

60. Under the tremendous defamation, Wei was severely ill. PADOH has continued to campaign that Wei was insubordinate in failing to convert HARS data. Once he got better, he approached the EEOC then the federal court to try getting PADOH's contemporaneous records and he got them.

61. From 2014 to 2016 to 2018, Wei filed three motions to reopen the cases according to the after-discovered evidences that PADOH released and verified in the federal court *Wei v. State Civil Service Commission* (Pa. Cmwlth. No. 263 C.D. 2015 (*Wei II*), and *Wei v. State Civil Service Commission*. No. 1902 C.D. 2016 (*Wei III*), and *Wei IV*.

62. In the state case, PADOH has insisted that it assigned Wei to convert HARS data solely (App. 130a). it provided sufficient time to Wei to convert HARS data but the conversion was unfinished yet *Wei I*. In the federal case, However, it admitted BIT and other staffers rather than Wei were assigned to convert HARS data; it never assigned

Wei to convert HARS data (App. 151). Indeed, it actually assigned Wei to check the errors after the others converted HARS data (App. 51a, 54a-55a).

63. In the state case, PADOH claimed "Wei was charged with collecting and reporting HIV/AIDS data accurately" *Wei I*. In the federal case, its documents show Wei was charged with reviewing the completeness and accuracy of the collected data while others were charged with collecting and reporting HIV/AIDS data accurately (App. 51a, 54a-55a).

64. In the state case, PADOH stated that Wei didn't send the email about his performance by Aug 29, 2007, then it decided to dismiss him (App. 137a:16-25). In the federal case, however, its documents show that it received Wei's email on Aug 27, 2007 in which Wei updated his processed reports from 420,000 (App. 112a) to 550,000 (App. 119a) and routine data management.

65. PADOH has admitted the others started to clean and convert HARS data since 2004, the converting 44,000 HARS records wasn't Wei's business. It documented that the HIV team processed up to 480,000 HIV reports yearly (App. 147a); PA-NEDSS team processed up to 330,000 reports yearly (App. 58a).

66. In the state case, PADOH claimed Wei stated that "he was refusing to do it" in May 16, 2007 PDC. *Wei I*. In the federal case, PADOH documented Wei stated that "I will try" in the PDC minute (App. 107a).

67. In the state case, PADOH claimed "Urdaneta transferred some of Wei's job responsibilities to

other staff members" *Wei I*. In the federal case, no her email to transfer Wei's duty to others was found. Instead, she emailed to assign more tasks to Wei (AX343-9) and Wei completed all of them. For example, Wei trained Obiri three times until Aug. 2007 (DCD 207-4, pp63-67).

68. In the state case, PADOH claimed "the employer could not continue to wait for the claimant [Wei] to make excuse and to stall the progress of the project", so it terminated Wei (App. 138a). In the federal case, however, PADOH has admitted that it didn't complete its priority of 2005 HIV reports by Sept. 2010 (App. 139a); it had no record that the work was completed. PADOH also claimed that it destroyed all hardware of 2007 computers (App. 150a).

69. In the state case, Urdaneta testified she shared a story in July 3, 2007 PDC: After her receiving Wei's July 2, 2007 5:23 email, she walked [250 feet and open two secured doors] to Wei's office, "he opened the computer and he showed me just different files and different formats that he had", but couldn't show a sample of 2007 draft format (DCD 300-1, pp506-11). Then they asked him during the PDC to show the converted data, and he wasn't able to do that (DCD 300-1, pp509). In the federal case, neither PADOH's PDC minutes nor any records documented Urdaneta's visiting story, her order, or PADOH's order. Instead, PADOH documented that Wei had completed 400,000 records (App. 112a). It has admitted no such story or order in the PDC (App. 141a). In one testimony, Urdaneta admitted "I never saw the document

[Wei's email]" (App. 140a). In another testimony, she admitted that she had no evidence to present in Wei's office after 5:25 PM in the day (DCD 208-1, p34).

70. In the state case, PADOH claimed when Wei wanted Giallo testing 158 potential cases, "In a response, Giallo informed Wei that he was getting too deep into the process and reminded him that the layout would probably change. Urdaneta also testified that she never instructed Wei to test the draft layout..." to portray Wei's insubordination *Wei I*. In the federal case, However, PADOH in its updated charter required to test a small sample first (App. 74a, para. 7), Indeed, Giallo updated draft guidelines ("format") to ask for "more detail" (also cc to Urdaneta (App. 96a), no error even for a comma "[The message constructions rules] must be carefully adhered to in order for messages to be interpreted correctly" (App. 156). However, he changed the tone after Wei redid "more detail" as he suggested.

71. In the state case, PADOH claims that e-mails show that Wei was insubordinate in refusing for six months to accept the duty of converting HARS data. In the federal case, neither email nor record show Wei refused to do so.

72. In the state case, PADOH claimed that Wei could bring the data out of HIV secured area freely. In the federal case, based on Pennsylvania law and CDC HIV guidelines, HIV policy and requests must be in writing, and the papers with identities couldn't be brought out of the HIV secured area (App. 153a -154a).

73. However, PADOH has insisted its initial false story such as it assigned Wei converting HARS data solely in the state tribunals. *Wei I to Wei IV* (App. 130a).

74. The Commonwealth Court affirmed in *Wei I to Wei IV*. In *Wei III*, the Commonwealth Court chose to believe PADOH indeed assigned Wei to convert HARS data by citing a PADOH's 2017 brief "Because it is a well-established fact that Wei was tasked with converting HARS HIV/AIDS files..." It also stated it couldn't access the documents of the federal court so it treated Wei's statements as the bald claims (footnote 8, *Wei III*).

75. In 2018, Wei filed his third motion to reopen with the attached the copies of PADOH's documents and admissions at the federal court, the Commonwealth Court stated that it held the same reasons as in *Wei III* and it disbelieved PADOH admitted that it never assigned Wei to convert HARS data *Wei IV*.

76. PADOH has distributed that Wei engaged in disobedience and unsatisfactory work performance in failing to complete converting HARS data to block Wei's employment opportunity (AX507).

## REASONS FOR GRANTING THE PETITION

### I. Wei's constitutional rights and due process rights were violated in the state proceedings

Wei had raised the issue that his constitutional rights were violated in his initial appeal to the Commonwealth Court. However, PADOH denied

so and said Wei had no evidence to support his claims. After Wei acquired the PADOH's contemporaneous documents uncovered from his federal case, he appealed to reopen the case. Unfortunately, the Commonwealth Court erred in ignoring the material evidence.

This Court held the Public employee had a property interest in the position and determined that "[t]he point is straightforward: The Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedure ". He (or She) is entitled to the notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

PADOH didn't start returning Wei's belongings with some emails until June, 2009, and it never returned Wei's notebooks (AX251). Therefore, he could not use them at the 2007 hearing. It infringes Wei's rights of due process guaranteed by the Fourteenth Amendment. However, even based on PADOH's own records, it clearly violated the due process Clause to terminate Wei:

The last meeting that PADOH with Wei was an Aug.24, 2007 PDC, based on the PADOH's minute: "Dr. U" [Urdaneta] accused Wei of failing to finish the task of the Dec. 2006 BIT meeting (App. 131a), Wei disputed her because the accusation was false. Then Burnhauser decided to orally suspend Wei to conduct an investigation.



Before dismissing Wei, PADOH communicated Wei by mailing a letter for an investigation to formalize the suspension only but the letter didn't list any facts (App. 144a); It never gave Wei the opportunity to present his side of the story before termination, so it violated the *Loudermill*.

Then, PADOH sent a letter to terminate him with vague cause of the backlog data though it clarified as backlog HARS data later. However, the backlog data included HARS data, pre-HARS data and HIV lab data and so on, the vague violated the Pennsylvania law that the just cause must be unambiguous *Lewis v. Civil Service Commission*, 518 Pa. 170, 175, 542 A.2d 519, 522 (1988).

PADOH has insisted that the assignment was converting 2005 backlog HARS data in this case (App. 130a) *Wei I-IV*. Then the state tribunals believed so. Therefore, all of Wei's defenses must be futile.

However, in the federal court, PADOH has admitted that it assigned the BIT and others to convert the HARS data but never assigned Wei to do so (App. 151a). His job was checking the errors after they converted HARS data. In addition, if Wei converted the HARS data or claimed that he converted HARS data, PADOH had stronger reason to fire him *Wei III*. Clearly, it infringes upon Wei's rights of due process and equal protection guaranteed by the Fourteenth Amendment.

PADOH refused to release the key documents that Wei subpoenaed. It refused to exchange evidence with Wei. So, many key documents that Wei filed in his motion to reopen weren't available

for the 2007 Commission hearing.

As a foreign-born naturalized American with limited English proficiency, Wei was entitled to have an interpreter for pre-hearing conference and hearing (App.135a). Nevertheless, the Commission denied his request to allow an interpreter (App. 136a). So, Wei's meanings weren't documented correctly. It violated Wei's free speech right to express what he wanted under the U. S. Constitution's first amendment and prejudiced Wei.

For example, the Commission claimed Wei agreed that all documents would be concluded by the end of the hearing day, it struck Wei's additional evidence (App.150a) for impeaching and rehearing. However, Wei's understanding and agreeing was that the day's testimony in the Commission hearing was concluded.

Furthermore, asking a limited-English layman this question after about 4-hour hearing with full adverse testimonies is illogical. Since Wei asked to force PADOH to release the key documents during the hearing and the Commission stated that it would consider the matter later and Wei also indicated that PADOH lied under oath, he certainly waited for PADOH's documents and tried to find the documents to support his claim later.

Moreover, the Commonwealth documented "Wei is Asian and his English is very broken" (AX250). When Wei wanted to deposit the defendants in the federal court, the Judge ordered his hiring an interpreter.

However, the Commonwealth Court erred in agreement with PADOH's argument that the Commission wasn't a federal court, so it could disallow an interpreter to Wei because it didn't require the same standard as that in the federal court. *Wei I*.

PADOH made several key falsifications in the Commission's hearing that neither questioned Wei nor were in its records before his termination. This was in violation of *Loudermill*. For example, PADOH has insisted that because it didn't receive his email after Aug 24, 2007 PDC, then it made the decision to terminate him (App. 137a). PADOH insisted so in the federal court too until 2016 Wei identified the same email among its documents (App. 119a).

Another example: Urdaneta testify she shared a story in July 3, 2007 PDC: After her receiving Wei's July 2, 2007 5:23 email she visited Wei's office and met Wei on the night of July 2, 2007, but Wei could not show her a sample, then PADOH ordered Wei to show the data during the PDC. However, neither the PADOH's PDC minute nor any other records documented Urdaneta's visiting story or PADOH's order, PADOH has admitted that neither Urdaneta told her story nor PADOH ordered Wei for the data in the PDC (App. 141a). Indeed, PADOH recorded that "400,000 were completed" (App. 112a).

Even based on PADOH's new story in the federal case, Wei's state case must be reopened. If a deciding official is exposed to information affecting the outcome without the public employee being given the opportunity to present a defense against

it before the termination, then any opportunity to respond is fundamentally flawed and fails to meet the requirements set in *Loudermill*, see also *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir.1999).

Nevertheless, the Commonwealth Court ignored the important evidence of that Wei's opportunity to respond was deprived; this conflicts with the holding of this Court on the due process issue in *Loudermill*.

In *Loudermill*, "the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal". Then he appealed to the Commission but failed. This Court held the termination violated the due process.

In this case, PADOH falsified that Wei failed to convert the HARS data as its just cause though it never informed Wei of this cause in any of the PADOH's meetings. PADOH also has no record of accusing Wei of doing so. This was in violation of the laws set by *Loudermill*.

## II. The Commonwealth Court erred in that PADOH didn't commit the fraud

### a. The violation of Whistleblower Law

In the initial proceeding, Wei claimed that PADOH violated the Whistleblower Law by suspending his PA-NEDSS password and dismissing him for impeding his review of the

data errors especially the errors of the converting HARS data.

PADOH argued that this wasn't Wei's business, PADDH assigned Wei to convert HARS data at the Dec. 2006 BIT meeting solely so it could terminate him for its incomplete conversion. Wei claimed the meeting task was for the estimate and Wei completed the task.

Now PADOH has admitted that the Dec. 2006 BIT meeting's assignment was for "an estimated number" only (AX410) and documented "Estimate was given by Dr. Wei" (App. 83) at the federal court.

PADOH's documents show that PADOH tasked Wei checking the completeness and accuracy of PA-NEDSS data (including those converted from HARS data) (App. 51a) and Wei did so weekly (App. 61a) but it never assigned Wei to convert HARS data.

Urdaneta in 2007 wrote Wei's job was to do quality control, "his job is to analyze the data and point-out errors he finds", how to fix these errors wasn't his duty (App. 54a-55a). She didn't write that Wei had any duties on converting HARS data or any data.

Urdaneta defamed Wei for harassing BIT and criticizing the errors in PA-NEDSS to the local health departments. This shows that PADOH terminated Wei for the purpose of blocking his checking errors. Nevertheless, PADOH admitted that Wei correctly identified the data errors (App. 68a-69a). Therefore, Wei's actions weren't harassing but were fulfilling his duty: maintaining

data integrity and providing vigilance against the potential epidemic.

b. PADOH used an unassigned task to be the removal cause

PADOH banned Wei to do the unassigned task. PADOH wrote that it would have stronger reason to terminate Wei if he did an unassigned task rather than un-finish an assignment *Wei III*. However, it used the task assigned to the others terminate Wei in this case.

Pennsylvania Section 807 of the Civil Service Act 71 P.S. § 741.807, provides that no regular employee in the classified service shall be removed except for just cause. The appointing authority bears the burden of proof to show just cause for the removal of the employee and, in addition, the substance of the charges underlying the removal. *Long v. Commonwealth, Pennsylvania Liquor Control Board*, 112 Pa. Commw. 572, 535 A.2d 1233 (1988).

The Pennsylvania Supreme Court held that the function of an appellate court in reviewing the discharge of a civil service employee is to ensure that just cause for dismissal exists both factually and legally. *In re Baker's Appeal*, 409 Pa. 143, 185 A.2d 521 (1962). That is consistent with *Loudermill*.

As the initial decision of the Commonwealth Court restated the PADOH's statement "In Dec 2006, [Urdaneta] assigned Wei the task of converting the HARS HIV/AIDS data... The task was solely Wei's responsibility", "Wei was

terminated for not completing the HARS HIV/AIDS assignment by July 31, 2007." But, "Wei claims that it was not his responsibility to convert the 2005 HARS HIV/AIDS data files" *Wei I.*

However, PADOH has admitted it assigned the BIT and other staffers rather than Wei to convert HARS data before the federal court (App. 151a). As PADOH wrote, Wei's duty was providing quality control after they converted HARS data; and they rather than Wei had the duty to fix the errors that he found (App. 51a, 54a-55a). So, PADOH should terminate them rather than Wei.

Therefore, PADOH betrayed the public's trust of the government, and created a false cause without any evidence. It infringes Wei's rights of due process and equal protection guaranteed by the Fourteenth Amendment.

Although the Commission, as a part of the Defendants in the federal case, has known that PADOH never assigned Wei to convert HARS data, it failed to correct the material fact in the Commission's decision (App. D). Therefore, it violated Wei's rights of due process and equal protection.

Wei repeatedly indicated that PADOH made the false statements, the Commonwealth Court chose to believe PADOH by citing a PADOH's 2017 brief "Because it is a well-established fact that Wei was tasked with converting HARS HIV/AIDS files... If Wei was not given this assignment, and instead chose to access private HIV/AIDS files without

the direction of his supervisors, the Department's case for just cause becomes even stronger" *Wei III*. It also stated it couldn't access the documents of the federal court (footnote 8, *Wei III*).

However, when Wei provided a copy of that PADOH's documents and admissions in his third motion to reopen, PADOH still claimed Wei was assigned to convert the HARS data solely in its 2019 response brief (App. 130). The Commonwealth Court stated that "Wei again asserts that the Department admitted in the federal case that he was never assigned the task of converting HARS HIV/AIDS data files, We specifically rejected this argument in *Wei III* and we do so again here for the reasons articulated in *Wei III*" *Wei IV*.

Therefore, this Court should review this case because only this Court can access the documents in both the state and federal cases.

c. The law to reopen the case

The Commonwealth Court also erred in siding with PADOH in that Pennsylvania had no law to reopen the administrative case and "the appropriate remedy for such was to file a petition for rehearing" in the Commission after initial decision.

First, under the Pennsylvania law Section 105.17 of the Rules of the Civil Service Commission, "(e) The procedure for reconsideration contained in this subsection does not alter or replace any procedures provided elsewhere for the timely filing of appeals of Commission adjudica-



tions to appellate courts”.

Second, Wei has filed additional documents and a rehearing petition after the initial hearing to the Commission but the Commission denied the reconsideration (App. 44a).

Third, PADOH claimed that the Commission's decision could be used to issue preclusion before the federal court and has succeeded in doing so. Therefore, the Commission's decision must be allowed to reopen if it had material error. It should be similar to other tribunals that have the power to make the judgement. Otherwise, the unconstitutional situation encourages the party perjuring or concealing the evidence in the Commission proceeding.

The Commonwealth Court erred in citing *Shoemaker v. State Employees' Retirement Board*, 688 A.2d 751, 753 (Pa. Cmwlth. 1997); *Fritz v. Commonwealth, Department of Transportation*, 468 A.2d 538 (Pa.1983) for deciding this case because the appellants didn't accuse opponents making the false statements in both cases. Therefore, their opponents weren't responsible for the delay action of that the appellants filed further evidence to vindicate.

Although Pennsylvania has no law to reopen an administrative case, it has no law to ban to open the administrative case too. Since PADOH clearly committed the fraud in this case, it should be under:

“equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships

which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 (1944).

"From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry". *Id.*

In *Atlas Glass*, the defendants' lawyer was the true author of the spurious publication to support their case. They therefore had a liability for which the plaintiffs would file further evidence to vindicate later. The plaintiffs brought the issue to the courts several years later and this Court held the case should be reopened.

In Wei's case, PADOH and its lawyers have falsified that converting HARS data was Wei's duty solely for terminating Wei even in their 2019 brief. Therefore, Wei could ask to reopen after he have the newly verified evidence, "The public welfare demands that the agencies of public justice be not so impotent that they must always

be mute and helpless victims of deception and fraud" *Id.*

d. PADOH's other frauds on Court

The lawyers had obligation to follow law 3.3 "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer". However, PADOH's lawyers never corrected but repeated the false statements in the state case.

If PADOH don't insist the fraud that it assigned Wei to convert HARS data solely then it terminated Wei for its incomplete conversion of HARS data; Wei should be reinstalled in 2008.

PADOH also committed several key frauds to win the case:

First, PADOH has insisted that it assigned Wei to convert HARS data during a Dec. 2006 BIT meeting. Now, PADOH has admitted the meeting task was "an estimated number" (App. 91a); and "Estimate was given by Dr Wei" (App. 83a). If PADOH was telling the truth, it had no reason to dismiss Wei.

Second, as mentioned above, PADOH falsified that Wei failed to send his Aug 27 2007 email about his performance as a key reason to dismiss him (App. 137a). If PADOH was telling the truth, the case could have been reversed.

Third. PADOH claimed "Wei was charged with collecting and reporting HIV/AIDS data accurately" *Wei I.* However, it wrote that Wei's

duty was reviewing the completeness and accuracy of the collected data and providing his finding, he had no duty to collect data or correct error (App. 51a, 54a-55a).

Fourth, PADOH has insisted that other staffers didn't clean the lab data because Wei hadn't converted the data. However, PADOH has required that cleaning must be completed before converting in the routine (see App. 146a, reconciling=cleaning) and in the updated Charter (App. 74a). If PADOH hadn't refuse to release its updated Charter, the case should have been reversed.

Fifth, PADOH has admitted that Urdaneta didn't tell her alleged story of the July 2 2007 night visiting Wei's offices and PADOH didn't order Wei to show his data during the July 3, 2007 PDC at the federal court (App. 141a). In this case, however, PADOH used the fake story as the material fact.

Sixth, while PADOH has admitted that it assigned the BIT and other staffers rather than Wei to convert HARS data in the federal court, it changed its story to "Wei failed to complete the assignment given to him of unifying [converting] into a single format file the backlog of HIV laboratory data so that it could be evaluated, cleaned, and uploaded into PA NEDSS with the rest of the HARS data" (App. 151a).

Although the new claim had no impact on Wei's Commission case because it informed Wei after his termination, however, it is false. PADOH in the updated Charter required "If there is not enough information to meet the PA-NEDSS required fields [of BIT format], the data should

not be converted" (App. 74a). So, cleaning the reports as perfect as possible must be done prior to the conversion. Indeed, once the reports converted into BIT's draft format (App. 157a), it could not clean anymore. As PADOH admitted, the other staffers were in charge of cleaning but they didn't clean the lab data yet.

PADOH has banned converting HIV lab data and any other data directly into HARS since Nov. 22, 2005 (App. 62a), only the extract from PA-NEDSS was allowed to get into HARS, this is one-way traffic (App. 146a). No 2007 HARS data was allowed to be converted into PA-NEDSS.

To retaliated against Wei, PADOH in April 9, 2007 suddenly ordered Wei to "set aside 2 hours" daily (App. 107a) converting the lab data into BIT draft format. However, checking the accuracy and completeness of the data in PA-NEDSS including the converted HARS data still was his major task. Nevertheless, Wei worked extremely hard and processed (cleaned and converted) 550,000 reports (App. 119a). Based on PADOH's records, the HIV team could process up to 480,000 records yearly (App. 147a), while the PA-NEDSS team could process about 330,000 reports annually (App. 58a). So, Wei's work was exceptional. However, PADOH falsified that it didn't receive his email of the performance report and dismissed him to interrupt the progress.

Indeed, if the data was converted into the fit format, a million records could be uploaded into the target database less than an hour. Therefore, PADOH asked Wei to convert 600,000 reports into a useless draft format was for both wasting and

harassing purpose.

PADOH has admitted that it didn't complete 2005 HIV reports by Sept. 2010 (App. 139a). it claimed it didn't start the project yet but still defamed Wei for their failure (App.152a). Indeed, PADOH required the raw reports was converted into the upcoming BIT format directly (App. 72a), any work to converting the data to other formats was unnecessary or wasting.

Finally, processing all HIV reports as completely as possible was the major duty of the HIV team and BIT, not a selection. If Wei wasn't dismissed, he would push PADOH to fix the incompleteness.

The due process clause of the Fourteenth amendment provides that no state may "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." U.S. Const. amend. XIV, § 1. *In Brady v. Maryland*, 373 U.S. 83, 87 (1963),

In this case, PADOH falsified Wei to unfinish an unassigned task for terminating Wei was a severe violation of amend. XIV, this was especially true that PADOH also wrote that it has stronger reason to terminate Wei if he did the unassigned task *Wei III*.

This Court held "Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" *Brady*.

"Fraud on the court has been found in cases

where a party has perjured him or herself to the court and the court has relied upon the fabrications when reaching a judgment. See *Matter of Neitlich*, 413 Mass. 416, 423 (1992) (fraud on the court where attorney made the false statement with intent to deceive court) ..." *Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725, 737 (2006).

Because PADOH's lawyers fraudulently present facts to the court that interfere with a just and equitable decision-making process, therefore, they committed the fraud.

III. The Commonwealth Court erred in that Wei was able to use PADOH's records in the initial hearing

The Commonwealth Court erred in agreement with PADOH's argument that the Department's business records upon which he now relies were available to him at the time of the original proceeding before the Commission, and Wei was able to use these records in the initial hearing.

However, as Wei wrote in his application for the reconsideration (App. G), Wei was unable to present these records to dispute PADOH's falsifications at the original hearing. Since Aug. 24, 2007, PADOH began suspending Wei for an investigation, which permanently disallowed him from accessing his PADOH's office where Wei stored the documents.

"42. Then, PADOH sent a termination letter to Wei a week later. However, it didn't start returning Wei's belongings that contained

some key emails and documents until June 2009 through Wei repeatedly requested the returning".

"44. PADOH in Nov. 2007 filed a Motion to Quash Subpoena in part and for a Protective Order in which it not only refused to release the key documents that Wei subpoenaed but also claimed Wei wasn't allowed to present these relevant documents to the hearing (Doc. A, ¶52). PADOH also refused to exchange evidence with Wei, many key documents that Wei filed in his motion to reopen could not be obtained to be presented to the 2007 Commission hearing".

In addition, PADOH had the burden of the proof, it must present the records rather than only oral testimony to justify its just cause. The question should be: why did PADOH conceal these documents and testify about them to the opposition.

Even assuming Wei could get the documents from his friends, that would be futile too. First, the PADOH's falsifications were not presented to Wei before the hearing, and Wei wasn't prepared to dispute them before he heard the accusations. Second, the hearing was wrapped up in about four hours on the same day, with no time for Wei to return home to prepare the documents to dispute them.

Furthermore, as PADOH and the Commission admitted, Wei filed the additional documents to the Commission after the hearing, but PADOH claimed the documents were unauthentic, so the



Commission struck them from the records (App. 150a).

Moreover, as the Commonwealth Court noted, both sides disagreed on almost all of the facts. However, the Commission credited the entirety of PADOH's statements with discrediting Wei's statements. For example, Wei showed his Aug 27, 2007 email but PADOH and the Commission still insisted Wei failed to send the email. They insisted so, even in the federal court, until Wei identified the email (App. 119a) among their documents to the federal court.

Indeed, PADOH and the Commission still used "Defendants are unable to determine the authenticity of Exhibits" to deny some of the documents Wei presented at the beginning of the federal case. However, they admitted these were then documents after Wei identified them from the documents that they provided.

For above reasons, these documents certainly are "new" to this case, and Wei must have the right to present these documents after PADOH has admitted and verified them in the federal court.

However, in the petition for review to the Commonwealth Court, Wei also listed the key evidence that Wei was not aware of in the initial proceeding:

"49. (a) HR Director Kim Strizzi ("Strizzi")'s August 27, 2007 email [App. 119a]. After Strizzi and Burnhauser received Wei's August 27, 2007 email for his progress, Strizzi wrote an

instruction on the top of Wei's August 27, 2007 email to block his access to all of PADOH's data to Burnhauser, Ostroff, and Urdaneta. However, PADOH falsified that it did not receive Wei's email. It shows that PADOH not only receive Wei's email but also intentionally disallowed an opportunity for Wei to present his side of evidence and story as required in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

50. (b) Giallo's and Obiri's Nov. 3, 2006 emails [App. 76a]. It clearly stated that they arranged the upcoming Dec. 2006 BIT meeting to discuss 2006 Project Charter for answering Wei's questions [why they did not complete the 2005 reports and how they planned to complete them], rather than anything to order Wei converting HARS data.

51. (c) Urdaneta's Dec. 12, 2006 email to Obiri (AX530). Urdaneta wrote that she would assign Wei's task [in email] with the follow-up dates (Also see AX391 for follow-up date). This was consistent with Wei's statement that Urdaneta stated to use the email to assign the task to him. Therefore, the parties could easily check when and what tasks that Urdaneta actually assigned to Wei.

52. (d) Giallo's June 2007 response to PADOH [App. 81a-97a]. Giallo wrote "Estimate given by Dr. Wei" [App.83a]. Because Wei actually provided his estimated number, and no business record shows that Urdaneta or Gallio disputed the number to him, therefore

Wei must be considered to complete the Dec. 2006 task by default.

53. (e) Stephen Ostroff ("Ostroff")'s July 2, 2007 email [to HR] [App. 111a]. Ostroff [wrote that] he told Wei that Wei was no longer a part of the solution for the backlog lab data. Because Ostroff was Urdaneta's immediate supervisor and could overrule her instruction, PADOH couldn't use that Wei failed to process backlog HIV lab reports to discipline Wei after the day. Instead, they should fire the staffers that were a part of the solution. Indeed, PADOH suspended Wei without pay for a week and approved his FMLA leave without pay for 6.4 days with total 85 hours in July 2007, Wei certainly could not extract 40 hours to process backlog HIV reports but focused on the urgent current data management in July.

Because Wei was neither a receiver nor was aware of above documents, these evidences definitely to be after-discovered evidences that should be allowed to reopen the case.

Wei also wrote in paragraph 55 "If PADOH still claims that these documents were available to Wei at the time of the initial hearing, please show the evidence of who, when, where, and in which way to give Wei on or prior to Dec. 3, 2007.", PADOH didn't respond.

In addition, as PADOH and the Commission wrote in the federal court, many business records weren't available to Wei until the discovery of a federal case [App. 155a, ¶¶89-90].

PADOH has all of the documents but still falsely

testified against its records, it made Wei's reason of its fraud even stronger.

### Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted:

A handwritten signature in black ink, appearing to be 'Ming Wei', with a long horizontal stroke extending to the right.

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