No._____

In the Supreme Court of the United States

DAVID E. OLSON; ABSOLUTE ENVIRONMENTAL SERVICES, INC., AN ALASKA CORPORATION FOR THE USE AND BENEFIT OF DAVID E. OLSON,
Petitioners,

v.

MARK O'BRIEN, A RESIDENT OF ALASKA; JAMES CANTOR, A RESIDENT OF ALASKA; RICHARD WELSH, A RESIDENT OF ALASKA;
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process clause of the Fourteenth Amendment permits biased, *ex parte* communications between state agency officials which reverse an administrative hearing officer's decision without notice to the parties and an opportunity to be heard?

PARTIES TO THE PROCEEDINGS

Petitioners David Olson and Absolute Environmental Services, Inc. were Plaintiffs and Appellants below, and successors-in-interest to North Pacific Erectors, Inc. in the state court proceedings.

Respondents Mark O'Brien, James Cantor, and Richard Welsh were Defendants and Appellees below, and employees or agents of defendants State of Alaska, Department of Transportation and Public Facilities and State of Alaska, Department of Administration in the state court proceedings.

RELATED CASES

- *North Pacific Erectors, Inc. v. State of Alaska, Dep't of Admin.*, Ofc. of Comm'sr., State of Alaska, Dep't. of Trans. & Pub. Fac., Contract No. 2007-0222-6144. Judgment entered June 25, 2009.
- *North Pacific Erectors, Inc. v. State of Alaska, Dep't of Admin., et al.,* Alaska Sup. Ct. No. 3AN-09-09085CI. Judgment entered December 30, 2011.
- *North Pacific Erectors, Inc. v. State of Alaska, Dep't of Admin., et al.,* Alaska Supreme Ct. No. S-14606. Judgment entered September 6, 2013.
- *Olson, et al., v. O'Brien, et al.,* No. 3:11-cv-00245, U.S. District Court for the District of Alaska. Judgment entered August 21, 2014; judgment on remand entered July 31, 2018.

- *Olson, et al., v. O'Brien, et al.,* No. 14-35795, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 15, 2016.
- *Olson, et al., v. O'Brien, et al.,* No. 18-35727, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 5, 2019; petitions for rehearing and rehearing *en banc* denied January 13, 2020.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Absolute Environmental Services, Inc. (AESI) states that there is no parent corporation or any publicly-held corporation that owns 10% or more of AESI's stock.

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PETITION FOR A WRIT OF CERTIORARI

David Olson and Absolute Environmental Services, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

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OPINIONS BELOW

The decision of the Ninth Circuit, reported at 786 Fed.Appx. 717 (9th Cir. 2019) (Mem.), is reprinted in the Appendix at 1a-3a. The District Court's opinion, reported at 2018 WL 3639828, is reprinted at App. 4a-31a.

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JURISDICTION

The court of appeals entered its judgment on December 5, 2019. App. 1a-3a. Petitioners' motion for rehearing and rehearing en banc was denied by the Ninth Circuit on January 13, 2020. App. 35a. Per this Court's order dated March 19, 2020, "any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying timely petition for rehearing." This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983

Every person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceedings for redress.

U. S. CONST. AMEND. XIV.

The Fourteenth Amendment, § 1 to the United States Constitution provides that: "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."

INTRODUCTION

A fair trial in a fair tribunal – for fifty years nearly, this Court has applied this simple, unalienable requirement of Due Process to state administrative hearings. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (citing *In re Murchison*, 349 U.S. 133, 136 (1955); *Gibson v. Berryhill* 411 U.S. 564, 579 (1973)).

Now, fifty years later, every area of activity in the United States seems subject to administrative regulation.[1] There is no authoritative enumeration of federal government agencies; FOIA.gov lists 118 separate executive agencies, while USA.gov lists over 600 government departments and agencies.[2] Likewise, state government agencies employ over five million persons,[3] have doubled in number since the 1950s, and are impossible to count because they "can quickly be created and transformed."[4] The 21st century "may thus see an ever-growing federal and state administrative judiciary that will dwarf the

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[1] Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (May 2003).
[2] JENNIFER L. SELIN AND DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES at 12 (Administrative Conference of the United States, 2nd ed.) (Oct. 2018).
[3] RICHARD G. NIEMI AND JOSHUA J. DYCK, GUIDE TO STATE POLITICS AND POLICY 243 (2013).
[4] JON RICHES AND TIMOTHY SANDEFUR, CONFRONTING THE ADMINISTRATIVE STATE at 7 (Goldwater Inst., 2020) (citing NIEMI AND DYCK, *supra* n. 3 at 248).

traditional judiciary in the courts."[5] More than ever, administrative judicial integrity should be "a state interest of the highest order."[6]

David Olson, a longtime asbestos removal contractor with state agencies, discovered that this rapid growth of state administrative law outsped traditional notions of fair play. Olson's claim for additional compensation—*twice* granted by a hearing officer after a 5-day trial—ignited a series of *ex parte* emails between Mark O'Brien and other Alaska bureaucrats who "couldn't live" with the officer's conclusions. These emails disclosed actual bias, and it was clearly prejudicial to Olson because these same bureaucrats *twice* rewrote the hearing officer's decision and *twice* stiffed Olson to meet their own policy goals. Under the Due Process clause, Olson had a right to notice and an opportunity to be heard before being deprived of compensation, and the emails established a triable claim for the purposes of 42 U.S.C. § 1983.

The District Court ignored these emails, and instead adopted previous state court findings issued prior to discovery of this evidence. The Ninth Circuit then affirmed the District Court's adoption of the Alaska state court findings as "harmless error." This was the wrong test to use for actual bias. Moreover,

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[5] Bernard Schwartz, *Administrative Law in the Next Century*, 39 OHIO STATE L. J. 805, 822 (1978).
[6] *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009).

a circuit split exists on the burden required to rebut the presumption of an impartial decisionmaker, and it is likely that the Sixth Circuit would have found for Olson under its existing case law. Whatever the burden, however, Olson's evidence of bias meets it, and this Court can use his case to provide needed clarification to Circuit Courts.

Too, this Court's case law prescribes that *ex parte* communications, coupled with a showing of prejudice, are not subject to a harmless error ruling. But the District Court again chose to adopt the Alaska state court findings, and held that, because the *ex parte* communications were not "traditional," they therefore did not implicate Due Process concerns. The Ninth Circuit ratified this "traditional" descriptor, and its case law, along with the Federal Circuit's, is inconsistent on the definition of *ex parte* communication and the application of the harmless error test. With Olson's case, this Court can clarify *ex parte* communication and the application of the harmless error test.

Administrative adjudications often lack "two of the most ancient and hardy maxims"[7]: *Nemo judex in causa sua* ("[N]o one can be a judge in his own case," *In re Murchison*, 349 U.S. 133, 136 (1955)); and *Audi alteram partem* ("Hear the other side," *cf. Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a

[7] ROBERT EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 43 (2020).

hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.")). The facts of this case squarely implicate both maxims, and give this Court an ideal vehicle to ensure that state administrative agencies observe these core principles of Due Process when passing judgment on private parties' property rights.

STATEMENT OF THE CASE

The District Court dismissed this case on a summary judgment motion. Therefore, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Petitioner David Olson is a business owner who specializes in removing asbestos in the Pacific Northwest. Olson and his company, Absolute Environmental Services, Inc. (collectively "Olson"), were subcontractors of, and now successors-in-interest to, North Pacific Erectors, Inc. ("NPE"). App. 7a.

In 2007, NPE won a contract bid to remove asbestos from the eighth floor of the State Office Building in Juneau, Alaska. *Id.* On the first day of removal, Absolute's work revealed "embossed" or "dimpled" pan-deck, which required significantly

more labor time, including scrubbing asbestos from the dimples with toothbrushes. App. 9a, 12a, 17a; *N. Pac. Erectors, Inc. v. State of Alaska, Dep't of Admin.*, 337 P.3d 495, 497 (Alaska 2013). NPE claimed additional compensation, but was denied by the State of Alaska, Department of Administration ("DOA"). App. 8a. Per Alaska Procurement Code,[8] NPE appealed to DOA's sister agency in the State of Alaska's executive branch, the Department of Transportation and Public Facilities ("DOTPF"). App. 8a. Mark O'Brien, DOTPF's Chief Contracting Officer, hired a private attorney, William Bankston, to act as a hearing officer for DOTPF. App. 9a.

In early December 2008, Bankston presided over five days of hearings, took testimony from over 15 witnesses, and heard oral legal argument between NPE and DOA. App. 9a. Complaint, *Olson, et al. v. O'Brien, et al.*, 3:11-cv-00245-JWS, Dkt 1 at 6 (D. Alaska Dec. 12, 2011). A month later, Bankston issued a recommendation for an award of $158,821 in NPE's favor, and sent the decision to O'Brien to relay to the DOTPF Commissioner and the parties. App. 9a. O'Brien sat on Bankston's recommendation for four days, then emailed Bankston an *ex parte* request for the parties' briefing. App. 9a. Six days later, O'Brien sent another *ex parte* email, querying whether NPE might have "waive[d] their claim" by failing to attend a prebid meeting. App. 9a. Bankston's *ex parte* reply email stated that the State had offered a prebid site inspection; all parties later

[8] ALASKA STAT. 36.30.550-695.

conceded that Bankston's statement was plain error. App. 9a-11a. *See also N. Pac. Erectors, Inc.*, 337 P.3d at 501.

On January 26, 2009, O'Brien forwarded Bankston's decision to Chief Assistant Attorney General for Transportation James Cantor, regretting that "I received this recommended decision, but I have some real heartburn with its conclusion. *While I hate to spend any more of DOA's money on legal fees, I guess I'm going to need you to assign someone to help me out. (Jeff Stark is representing DOA).* I'm thinking I may need to either reject or remand this back."[9] App. 11a. Cantor assigned Assistant Attorney General Richard Welsh to O'Brien, and Welsh crafted a remand decision. App. 12a-13a. Neither Welsh nor O'Brien reviewed hearing testimony or transcripts. App. 13a.

On March 5, 2009, DOTPF Commissioner Leo von Scheben signed Welsh's remand decision; O'Brien did not send Bankston's initial recommendation to the Commissioner or the parties. App. 13a.

On May 8, 2009, Bankston again found for NPE in a revised remand decision, awarded damages

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[9] The italicized sentence, submitted as evidence of bias in Olson's Motion for Partial Summary Judgment, was excised from the District Court's written opinion. *Compare* App. 36a-37a *with Olson, et al. v. O'Brien, et al.*, 2018 WL 3639828 at *3 (D. Alaska 2018).

of $163,173.42, and emphasized the deference owed to fact-finders on evidentiary matters. App. 13a. *See also* M. for Part. S. J., *Olson, et al. v. O'Brien, et al.*, 3:11-cv-00245-JWS, Dkt 139-1 at 22-24 (D. Alaska Mar. 23, 2018). O'Brien again intercepted Bankston's decision and forwarded it to Welsh. Welsh thought it not robbery to indulge in the first person plural, referring to DOA's witness as "*our consultant*." App. 47a. He then opined that, by allowing Bankston's second decision to stand, "*[i]n the short term, I recognize it could be cost effective for the State to simply pay the H.O.'s recommended damage award. However, by doing so, the State would be creating bad precedent*."[10] App. 47a-48a.

On June 8, 2009, suspicious of delay, but ignorant of O'Brien's legerdemaine, NPE moved to recuse von Scheben and O'Brien. App. 13a, 49a-52a. Von Scheben recused himself, but O'Brien refused.[11] App. 49a-52a. Welsh crafted a second substitute decision and presented it to von Scheben's deputy, Frank Richards. pp. 13a. Richards, without seeing Bankston's decision, nor consulting any materiel other than Welsh's written work and O'Brien's voiced opinions, signed the substitute decision. App. 13a-14a. O'Brien distributed the substitute decision to

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[10] The italicized text, submitted as evidence of bias in Olson's Motion for Partial Summary Judgment before the U.S. District Court, was omitted from the District Court's written opinion.

[11] This fact, submitted as evidence of bias in Olson's Motion for Partial Summary Judgment before the U.S. District Court, was omitted from the District Court's written opinion.

the parties, and simultaneously blind-copied DOA Chief of Procurement Vern Jones, prompting this exchange:

> MO: Please see attached Final Decision. Thanks Mark
>
> VJ: Right on!
>
> MO: Not very often we have to throw out the Hearing Officer's Decision and write our own. We just couldn't live with his conclusions.[12]

App. 53a.

NPE appealed to the state superior court, an intermediate court which bifurcated its function by holding a trial *de novo* on due process issues against both DOA and DOTPF, and reviewing legal issues against DOA as an appeal court. App. 14a-16a. During this litigation, DOTPF conceded that evidence of O'Brien's *ex parte* contact or actual bias would be wrongful conduct, but denied that this occurred. App. 55a. The state superior court subsequently found for both DOA and DOTPF on all issues. App. 16a.

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[12] This email exchange, submitted as evidence in Olson's Motion for Partial Summary Judgment before the U.S. District Court, was omitted from the District Court's written opinion.

In December 2011, NPE's successors-in-interest, Olson and AESI, filed a 42 U.S.C. § 1983 suit against O'Brien, Cantor, and Welsh (collectively "O'Brien defendants") in the United States District Court for Alaska. Complaint, *Olson, et al. v. O'Brien, et al.*, 3:11-cv-00245-JWS, Dkt 1 (D. Alaska) (Dec. 21, 2011). The District Court stayed the action while NPE appealed the state superior court's decision to the Alaska Supreme Court. *Id.* at Dkt 37 (Jun. 13, 2012). The Alaska Supreme Court affirmed the state superior court, but specifically declined to reach procedural issues. App. 16a-18a; *N. Pac. Erectors, Inc.*, 337 P.3d at 509.

In August 2014, following the Alaska Supreme Court opinion, the District Court granted O'Brien's motion to dismiss on *res judicata* grounds. *See Olson, et al., v. O'Brien, et al.*, 2014 WL 4182835 (D. Alaska 2014). Olson appealed, and the U.S. Court of Appeals for Ninth Circuit reversed the District Court's *res judicata* ruling and remanded for further proceedings, holding that Olson "did not have a full and fair opportunity to litigate [his] claims in the prior state court proceeding." *Olson, et al., v. O'Brien, et al.*, 668 Fed. Appx. 253, 254 (Mem.) (9th Cir. 2016); App. 32a-34a.

Discovery and depositions on remand revealed (1) further emails indicating O'Brien and Welsh's bias and manipulation, and (2) a 2006 internal ethics memorandum sent to O'Brien and Cantor, which

warned O'Brien that a public officer cannot attempt to influence the outcome of an administrative hearing "unless the contact is made part of the administrative record." App. 37a-39a; 47a-54a; 40a-46a.

Following depositions, Olson and the O'Brien defendants moved and cross-moved for summary judgment. App. 4a-5a. The District Court granted summary judgment for the O'Brien defendants, regurgitating the state superior court's findings that the factual errors were "harmless" and that "there was no traditional *ex parte* contact because the communication did not involve a party to the case." *Olson, et al., v. O'Brien, at al.*, 2018 WL 3639828 at *6-*7 (D. Alaska 2018); App. 15a, 27a. Despite the newly unearthed emails and deposition testimony, the District Court also found that Olson "presents no new evidence here to demonstrate bias." *Id.* at *7. App. 24a.

Olson appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the District Court in a three-page order. *Olson, et al., v. O'Brien, et al.*, 786 Fed.Appx. 717 (Mem.); App. 33a. The Ninth Circuit denied Olson's petitions for rehearing and rehearing *en banc* on January 13, 2020. App. 35a.

Olson timely petitions for a writ of certiorari.

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REASONS FOR GRANTING THE PETITION

Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. *Williams v. Pennsylvania*, 579 U.S. __, 136 S.Ct. 1899, 1909 (2016). "The fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

By condoning the District Court's findings, Ninth Circuit sanctioned both the appearance and reality of partisan agency adjudication. This offends Due Process, and gives this Court an opportunity to resolve Circuit conflict regarding bias and *ex parte* communication.

I. The Ninth Circuit's Decision Conflicts With Existing Supreme Court Precedent Regarding Bias.

A. Under Ward, Due Process Requires a Neutral, Detached Judge in the First Instance.

Due process requires a "neutral and detached judge in the first instance." *Ward v. Monroeville*, 409 U.S. 57, 62 (1972). This Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in

his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, 579 U.S. __, 136 S.Ct. 1899, 1905 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, (556 U.S. 868, 872 (2009)).

Due process applies to state administrative agencies which adjudicate as well as to state courts. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

Yet the Ninth Circuit gave its benison to the District Court's ruling, which "encompassed the entirety of [Olson]'s constitutional due process claim. To the degree it mentioned the Alaska courts' holdings, it did so to explain that any factual error made in the administrative proceedings was harmless." *Olson, et al. v. O'Brien, et al.*, 786 Fed.Appx. 717, 717-18 (9th Cir. 2019) (Mem.).

Under this Court's precedent, the "harmless error" yardstick is the incorrect standard of measurement when considering matters of bias. Federal and state courts alike are required to "ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable."

Rippo v. Baker, __ U.S. __, 137 S. Ct. 905, 907 (2017) (citing *Withrow*, 421 U.S. at 47).

Further, to the extent the District Court and Ninth Circuit relied upon the Alaska state superior court's *de novo* findings, this too was error in relation to Olson's claims of bias. "Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator." *Concrete Pipe and Prod. of Calif., Inc., v. Constr. Lab'rs. Pens. Tr. for So. Cal.*, 508 U.S. 602 (1993) (citing *Ward v. Monroeville*, 409 U.S. 57, 61 (1972) ("[A]ppeal and trial *de novo* . . . does not guarantee a fair trial in the mayor's court.")).

By granting certiorari here, the Court can clarify that the harmless error rule, while intended by this Court and Congress for a broader application, has no place when reviewing claims of bias. There is no such thing as harmless bias; "an impartial decisionmaker is essential." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

B. There Is a Circuit Split Regarding the Weight of Evidence Necessary to Overcome *Withrow*'s Presumption of Honesty and Integrity.

Under *Withrow v. Larkin*, 421 U.S. 35, 55 (1975), state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of

its own circumstances." (quoting *United States v. Morgan* (*Morgan IV*), 313 U.S. 409, 421 (1941)). Plaintiffs seeking to prove unconstitutional bias have a "difficult burden":

> a claim of administrative bias must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow, 421 U.S. at 47.

But the burden is not insuperable. The Sixth Circuit holds that this "difficult burden" is met when a litigant demonstrates the loss of "the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality." *Utica Packing v. Block*, 781 F.2d 71, 77 (6th Cir. 1986). The *Utica Packing* court reversed an agency head that removed a judge for "rendering a decision which displeases the appointer." *Id.* at 78. Judge-swapping is a direct assault on due process because

> [t]here is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer. Yet that is exactly what occurred in this case. . . . . It is of no consequence for due process purposes that Fenster and Utica were unable to prove actual bias on the part of Franke or Davis. The officials who made the revocation and redelegation decision chose a noncareer employee with no background in law or adjudication to replace Campbell. They assigned a legal advisor to the new Judicial Officer who worked under an official who was directly involved in prosecution of the Utica case. Such manipulation of a judicial, or quasi-judicial, system cannot be permitted. The due process clause guarantees as much.

Id.

"Manipulation bias" sounds similar to the "institutional bias" decried by legal academe[13] and,

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[13] Kenneth Culp Davis, *Institutional Administrative Decisions*, 48 COLUMBIA L. REV. 173, 195 (1948) (quoting Dean Acheson at length on "amorphous[ness]" of institutional decisions); FRANK

at least implicitly, by this Court. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427-29 (1995) (reversing for institutional bias because the United States was not "allowed to be a judge in [its] own cause, because [its] interest would certainly bias [its] judgment, and not improbably, corrupt [its] integrity") (quoting THE FEDERALIST No. 10 at 79 (C. Rossiter ed. 1961)). *See also id.* at 448-49 (Souter, J., dissenting) (opining that "at this point the possibility of institutional self-interest has simply become *de minimis*").

Institutional bias is an apt description of what happened in Olson's case: O'Brien appointed a hearing officer, who twice decided in favor of Olson; O'Brien then requested a legal advisor, Welsh, who wrote a decision which "pleased the appointer." Even without the bias disclosed in the emails, if these underlying events had occurred in the Sixth Circuit, and not the Ninth, precedent would have found the O'Brien defendants' actions to be impermissible "manipulation of a judicial, or quasi-judicial system." *Utica Packing*, 781 F.2d at 78.

The Ninth Circuit test for institutional bias is "whether the official motive is strong so that it reasonably warrants fear of partisan influence on the judgment." *Alpha Epsilon Phi Tau Chap. Hous.*

E. COOPER, 2 STATE ADMINISTRATIVE LAW 439 ("[I]t is a basic requirement of fair procedure . . . that nothing should be taken into account in arriving at a decision on a contested issue of fact that has not been introduced into the record and exposed to refutation or explanation by the parties.") (1965).

Ass'n v. City of Berkeley, 114 F.3d 840, 845-46 (9th Cir. 1997) (White, J. (ret.), writing for panel). It also regards "pecuniary bias"—a direct and substantial pecuniary interest held by an administrative adjudicator—to be a *per se* Due Process violation. *Stivers v. Pierce*, 71 F.3d 732, 742-44 (9th Cir. 1995). What is the distinction between institutional bias, pecuniary bias, bias "*per se*," and actual bias in the Ninth Circuit? Whatever the test, the Ninth Circuit called "harmless error" and punted in Olson's case.

Sister circuits differ. The Fifth Circuit holds that "actual bias is ordinarily required to invalidate decisions by federal agencies. An administrative decision will be overturned only when the hearing officers' mind is irrevocably closed or there was an actual bias." *DCP Farms v. Yeutter*, 957 F.2d 1183, 1187 (5th Cir. 1992) (internal citations omitted); Cf. The Seventh Circuit has held that "submission to a fatally biased decisionmaking process is in itself a constitutional injury sufficient to warrant injunctive relief, where irreparable injury will follow in the due course of events, even though the party charged is to be deprived of nothing until the completion of the proceedings." *Utd. Church of the Med. Ctr. v. Med. Ctr. Comm'sn*, 689 F.2d 693, 701 (7th Cir. 1982) (citing *Gibson v. Berryhill*, 411 U.S. 564, 571-72, 574-75) (1973)).

And there are developments. The Fourth Circuit formerly refrained from finding a due process issue unless and until "actual bias or a high probability of bias" is reached. *Marshall v. Cuomo*,

192 F.3d 473, 484 (4th Cir.) (1999) (citing *Withrow*, 421 U.S. at 46-53). But in the wake of this Court's ruling in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 879 (2009), the Fourth Circuit recently hedged that "A due process claim does not require a showing that the adjudicator was actually influenced by the alleged pecuniary interest. Instead, the question is whether sitting on that case 'would offer a possible temptation to the average judge and lead him not to hold the balance nice, clear and true.'" *Wards Corner Beauty Acad. v. Nat'l Accred. Comm. of Career Arts & Sci.*, 922 F.3d 568, (4th Cir. 2019).

Academic authority recognizes that "[t]he concept of bias has at least five meanings."[14] Is there a substantive difference between "actual bias" and the impermissible "manipulation bias" condemned by the *Utica Packing* court? *See Utica Packing*, 781 F.2d at 78; *see also In re Alappat*, 33 F.3d 1526, 1576-77 (Fed. Cir. 1994) (Mayer, J., dissenting) (finding that the Commissioner of Patent Appeals had "stacked" the board against Alappat, which would have failed even a "more deferential standard of review"). Or, per the D.C. Circuit and First Circuit, "structural bias"? *See Delaware Riverkeeper Network v. Fed. Energy Reg'y Comm'sn*, 895 F.3d 102, 111-12 (D.C. Cir. 2018) (rejecting plaintiff's structural bias claims); *cf. NO Gas Pipeline v. FERC*, 756 F.3d 764, 768 (D.C. Cir. 2014)) (recognizing

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[14] KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.7 (Neutral Decisionmaker) (6th ed. 2019).

"novel, and even creative" structural bias claims). *But see Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 146 (1st Cir. 2008) (reversing on finding of Due Process violation from structural bias because "a pecuniary interest need not be personal to compromise an adjudicator's neutrality").

Further questions could be asked.[15] Because of the actual bias present here, Olson's case demonstrates a full range of the subspecies of bias identified by the Circuits, and thus gives this Court a needed opportunity to distinguish them—or not. But this Court should clarify the law.

II. Contrary to the Ninth Circuit, Supreme Court Precedent Broadly Defines *Ex Parte* Communication.

Lawyers and lawmakers agree that finding an advocate for *ex parte* communications in formal trial-type proceedings is like "finding an advocate for sin." *Hearings on H.R. 10315 & 9868 Before the House Comm. On Gov't Opers.*, 94th Cong., 1st Sess. 248 (1975). But how are *ex parte* communications defined? With regard to Due Process, does *ex parte* communication embrace all out-of-court contact intended to influence a judge or fact-finder in a pending matter?

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[15] *See, e.g.*, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 893-98 (2009) (Rehnquist, C.J., dissenting, joined by JJ. Scalia, Thomas, and Alito) (conjecturing forty frailties with the *Caperton* majority's "probability of bias" standard).

Yes—according to this Court. *Ex parte* communications impinge Due Process in administrative hearings when an agency head "accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them," *Morgan v. United States*, 304 U.S. 1, 22 (1938). In criminal law, "*ex parte* meeting[s] between the trial judge and the jury foreman," *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 424 (1978), and *ex parte* communications given by victims that lead to "evidentiary products" that violate the Confrontation Clause, *Davis v. Washington*, 547 U.S. 813, 828 (2006) similarly offend Due Process. Due Process also prohibits *ex parte* communications between Indian Tribes, their Bureau of Indian Affairs trustee, and the Department of the Interior on contested water rights claims. *Dep't of Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1 (2001).

Similarly, this Court has scrutinized whether Due Process was observed when there were "*ex parte* communications between judge and juror," *Rushen v. Spain*, 464 U.S. 114, 116 (1983); *Wellons v. Hall*, 558 U.S. 220, 221 (2010). *See also Dietz v. Bouldin*, __ U.S. __, 136 S.Ct. 1885, 1897 (2016) (Thomas, J., dissenting) ("[Jurors] have long been prohibited from having *ex parte* communications with the parties

during a trial or receiving evidence in private."); *Patterson v. Illinois*, 487 U.S. 285, 302, n.2 (1988) (Stevens, J., dissenting) (reckoning that "*ex parte* communication between a prosecutor, or his or her agents, and a represented defendant" would circumvent and dilute the Sixth Amendment right to counsel); *Alford v. Florida*, 436 U.S. 935, 939-40 (1978) (Marshall, J., dissenting from denial of certiorari) (opining that Due Process question properly raised on allegations of *ex parte* contact between sentencing judge and defendant's probation officer). In sum, this Court has held that the term "*ex parte* communication" includes more scenarios than a judge meeting with a party outside of court.

But the District Court below adopted the Alaska Supreme Court's finding that "there was no traditional *ex parte* contact because the communication did not involve a party to the case." *Olson,* 2018 WL 3639828 at *7 (quoting *N. Pac. Erectors, Inc.*, 337 P.3d at 503). The Ninth Circuit eschewed to parse the meaning of "traditional" *ex parte* communication in its *de novo* review and on petition for rehearing. Ninth Circuit case law is inconsistent. *Compare Wm. Jefferson & Co., Inc. v. Bd. of Assess. & Apps. No. 3 for Orange Cty.*, 695 F.3d 960, 965-66 ("Ex parte contacts, however, are contacts between the adjudicator and an interested party, of which the other party is unaware") (citing BLACK'S LAW DICTIONARY (9th ed. 2009)) *with Ludwig v. Astrue*, 681 F.3d 1047, 1053 (holding that a non-party, non-witness FBI agent's out-of-court conversation with a Social Security ALJ about a

litigant's disability was "*ex parte* communication going to the heart of the case").

"Traditional *ex parte*" seems an innovation; our research has disclosed neither a sister federal circuit, nor a state court of last resort other than Alaska, which has used the adjective "traditional" in conjunction with *ex parte* contacts or communications. Whether innovative or no, this Court can use this opportunity to clarify whether there is a type of *ex parte* communication which merits special treatment.

Once *ex parte* communication is conceded, a plaintiff must show prejudice to escape a harmless error ruling. In *Shinseki v. Sanders*, 556 U.S. 396, 407 (2007), this Court held that the federal harmless error statute tells courts to review cases for errors of law without regard to errors that do not affect the parties' substantial rights. But the *Shinseki* Court also admonished its federal inferiors "against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." *Id.* (citing 28 U.S.C. § 2111).

The Ninth Circuit follows its sister circuits in holding that, for a Due Process violation to sound, prejudice must be demonstrated after an initial showing of *ex parte* communication. *Guenther v. Comm'r*, 889 F.2d 882, 884 (9th Cir. 1989) (noting

that an *ex parte* communication violates a party's right to due process if the party was denied the opportunity to participate in determination of the relevant issues and thereby suffered prejudice); *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (citing *Shinseki* for the proposition that "[r]eversal on account of error is not automatic, but requires a determination of prejudice . . . [the party claiming error must demonstrate] error affected his substantial rights").

But the Federal Circuit's rule presumes prejudice if the *ex parte* communication contained "new and material information." Only *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice. *Stone v. Fed. Dep. Ins. Corp.*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999). Thus, "[w]hen a procedural due process violation has occurred because of *ex parte* communications, such a violation is not subject to the harmless error test." *Boss v. Dep't. of Homeland Sec.*, 908 F.3d 1278, 1282 (Fed. Cir. 2018); *see also Ryder v. United States*, 585 F.2d 482, 487-88 (Fed. Cir. 1978) (holding that "where a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay, the court has regularly taken the position that the defect divests the removal (or demotion) of legality").

Here, Olson can demonstrate clear prejudice because the hearing officer would have awarded him

$163,173.42 *but for* O'Brien's *ex parte* conduct.[16] This Court should therefore define *ex parte* communications, and enunciate whether—standing alone—an *ex parte* communication can offend Due Process absent a showing of prejudice.

III. The District Court's Departure From Usual Proceedings Make This Case An Ideal Vehicle To Resolve a Question of Surpassing Importance Regarding Due Process and the Administrative State.

The facts of this case illustrate the pathogens that attach to neglect of due process in state administrative law. When O'Brien occluded the parties from *ex parte* communication between himself and the hearing officer, an incorrect factual finding was incorporated into the decision. When O'Brien's *ex parte* communications with Cantor and Welsh twice delayed the decision's issue, Olson sensed a heavy finger on the scales of justice and moved to recuse both von Scheben and O'Brien. When O'Brien decided to recuse the commissioner, but not himself, he took refuge in anonymity, that "chief demerit of the institutional decision . . . which carries with it a dissatisfaction resulting from lack of opportunity of

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[16] O'Brien's *ex parte* conduct, and the ensuing thirteen years of litigation, have also resulted in an attorney's fee judgment of $61,676 against Olson. *See, e.g.*, Reply to M. for S.J., *Olson, et al. v. O'Brien, et al.*, 3:11-cv-00245-JWS, Dkt 166 at 27 (D. Alaska Apr. 27, 2018).

parties to try to influence directly the men who decide." Kenneth Culp Davis, *Institutional Administrative Decisions*, 48 COLUMBIA L. REV. 173, 195 (1948). And when Richards' final decision voided the conclusions—but not the findings—of the hearing officer, it gave the appearance of actual bias.

And actual bias indeed it was, as discovery revealed that O'Brien "hated to spend any more of DOA's money on legal fees," and "just couldn't live with [Bankston's] conclusions." Welsh, who crafted the two counterfeit decisions, admitted to O'Brien that "[i]n the short term, I recognize it could be cost effective for the State to simply pay the H.O.'s recommended damage award. However, by doing so, the State would be creating bad precedent." That is a policy judgment designed to protect the State's long-term pecuniary interests with private contractors, and it is a textbook example of an "adjudicator [who] has a pecuniary interest in the outcome." *Withrow*, 421 U.S. at 47.

All of these facts are sufficient to satisfy this Court's well-worn axiom that "[n]ot only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness." *Id.* Insofar as it chose to excise, omit, or ignore this evidence in its summary judgment dismissal, the District Court partook in this bias. Such a decision was a far departure from the usual and accepted course of proceedings.

"Men are more often bribed by their loyalties and ambitions than by money." *United States v. Wunderlich*, 342 U.S. 98, 103 (1951) (Jackson, J., dissenting). Without a Cato to oppose them, unelected clerks and under-officers like O'Brien and Welsh "do not submit and give way, but keep the power in their own hands, and are in effect treasurers themselves."[17] The Due Process clause and 42 U.S.C. § 1983 provide the needed mechanism to rein in state agency actors like respondents. Private litigants should receive due process in state administrative courts, and this case provides an ideal vehicle for this Court to ensure that transmission.

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[17] 2 PLUTARCH'S LIVES, *Cato the Younger*, at 279 (Dryden trans., ed. by A.H. Clough) (Modern Library Paperback ed.) (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

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