No. _____

IN THE

Supreme Court of the United States

EDINA HARSAY,
Petitioner,

v.

UNIVERSITY OF KANSAS,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A special "academic deference," based on the concept of academic freedom, which in turn is based on the First Amendment of the U. S. Constitution, is almost invariably invoked in federal civil rights cases which involve claims of discrimination and thus require subjective judgment for resolution. This "rule" was applied in a judicial review case that was restricted to state agency records and which could be objectively decided, so that rules prescribing degrees of deference were neither necessary nor appropriate.

The question is:

Whether a rule-like application of federal case law that accords a nearly-insurmountable level of deference to academic administrators in breach-of-contract or other academic disputes, such that other applicable laws are rendered ineffective and courts depart from the accepted and usual course of judicial proceedings, violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the U. S. Constitution.

LIST OF PARTIES AND PROCEEDINGS

All parties in this case, and in all related proceedings, appear in the caption of the case on the cover page.

List of related proceedings:

Case No. 2012CV625, District Court of Douglas County, Kansas. Opinion filed June 24, 2015

Case No. 15-114292-A, Court of Appeals of the State of Kansas. Opinion filed July 29, 2016.

Case No. 15-114292-S, Supreme Court of the State of Kansas. Opinion filed November 21, 2018.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Edina Harsay, respectfully prays that a writ of certiorari issue to review the judgment of the Kansas Supreme Court filed on November 21, 2018.

OPINIONS AND ORDER BELOW

The opinion of the Kansas Supreme Court was published at 430 P.3d 30 (2018) and is in Appendix A. The opinion of the Kansas Court of Appeals is unpublished and is in Appendix B. The Kansas Supreme Court's order denying rehearing or modification is unpublished and is in Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The opinion of the Kansas Supreme Court for which petitioner seeks review was issued on November 21, 2018 (Appendix A). Petitioner's timely motion for rehearing or modification was denied on February 28, 2019 (Appendix C). This petition was initially timely submitted on May 29, 2019 but returned for correction on June 3, 2019, with a 60-day window allowed for submitting a corrected petition, pursuant to Supreme Court Rule 14.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the U. S. Constitution's Fourteenth Amendment, and the standards of review under the Kansas Judicial Review Act, Kan. Stat. Ann. § 77-621 *et seq.*, are reproduced in Appendix D.

STATEMENT OF THE CASE

A. Introduction

This case started as a Kansas state case involving a challenge to a Kansas state university decision, pursuant to Kansas state law for judicial review, the Kansas Judicial Review Act (KJRA), Kan. Stat. Ann. (K.S.A.) § 77-601 *et seq*. The case could have been, and should have been, easily resolved in a Kansas state court, with reliance solely on Kansas law. The Kansas Supreme Court, however, turned the case into a federal matter by relying on federal law and by largely disregarding the appropriate Kansas law in reaching its decision.

Although this case involves an employment dispute between the University of Kansas (Respondent) and me, the legal issues before this Court have little to do with the specifics of that initial dispute. This Court is not being asked to evaluate the University's decision. The fundamental issue in this case now is a denial of a "right to be heard," and the abuse of power in our courts when a litigant is proceeding *pro se* and thus appears powerless to fight back against that abuse. This was not a frivolous case, and the Kansas Court of Appeals ruled in my favor in a *per*

curiam decision (unpublished opinion, Appendix B). It also was not a complex case, and it could have been adjudicated objectively without need of special (or academic) expertise. Yet from the earliest stages of the case I struggled to be taken seriously and treated lawfully.

The district-court stage of my case most clearly demonstrates the harm that can result from the assumption that an employment case such as mine is un-winnable (or by default, unworthy) and therefore not deserving of a court's attention. The district court took nearly two years to render an opinion after briefing for the case had been completed (Br. Aplt., at 4), even though it typically takes months at most, not years, to render an opinion. The long, unexpected, wait caused very serious financial and professional harm for me (Aplt. Mot. Rehear. Modif. Kan. Ct. Appeals, at 2), as well as daily distress for a very extended period. The delay violated Kansas state law (K.S.A. § 60-102: right to a "speedy and inexpensive determination"), the Kansas Supreme Court's rules for district courts (rule 4: "No case should be permitted to float in the system....") and the Bill of Rights of the Kansas Constitution (§ 18: "All persons, for injuries suffered in person, *reputation or property*, shall have remedy by due course of law, and justice administered without delay" (emphasis added)).

The Kansas Supreme Court Opinion made no mention at all of the district court's long delay and mentioned only my delay at the initial stages of this case (Opinion, App. A, at 11a). But that initial delay

and an improper dismissal of my case (on the court's own motion) was also due to mishandling of my case (Aplt. Rspnse to Apee Mot. Rehear. Modif. Kan. Ct. Appeals, at 13-15; also, Request for Judicial Notice, Nov. 27, 2017, not granted).

The exclusive state remedy for me or any professor who claims either wrongful termination or breach of contract against a Kansas state university, including the University of Kansas (Respondent), is judicial review under the KJRA. See *Gaskill v. Ft. Hays State Univ.*, 31 Kan. App. 2d 544, 546, 70 P.3d 693 (2003). Judicial review is also the sole formal procedural mechanism that allows the University to remedy an improper review for tenure once a final decision on tenure is rendered by the Chancellor. Thus, judicial review can have a crucial role in a tenure-review case when a faculty member and administrators are not aware of critical errors or misrepresentations during the review process until after a final decision is rendered by the Chancellor, as was the situation in this case.

A judicial review case under the KJRA is very different from cases involving academic employment disputes that are initiated in federal courts. Those cases involve primarily claims of discrimination and civil rights violations, and courts in such cases are asked to determine the motives behind the employment decision based on testimony and often voluminous records. Such cases inevitably require subjective judgment, and they are difficult and very laborious, so federal case law that explains why courts are reluctant to consider these types of cases should not

be translated to a KJRA case. Judicial review in a KJRA case is restricted to the standards of review pursuant to K.S.A. § 77-621 *et seq.* (Appendix D), and it is restricted to the state agency Record of Review. It typically involves primarily objective analysis.

The rights claimed and defended in a KJRA case are also different. First and foremost, I had a right to adjudication under the KJRA, which is a state-granted "property interest" that I am now defending. Cf. *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."). And while I had only an expectation of (and therefore not a property interest in) tenure and promotion, I was entitled to a tenure review pursuant to the University's rules and my department's formally-approved standards. I was also entitled to a tenure and promotion *decision* based on those rules and standards. (The University's rules do not state otherwise, and the standard practice in Kansas public universities is that tenure-track professors who meet the guidelines for tenure are granted tenure; see *infra*, at 30.) These entitlements, too, are "property interests," which I defended under the KJRA. Cf. *Stop the Beach Ren. v. Fla. Dept. of Env. Prot.*, 130 S.Ct. 2592, 2615, 560 U.S. 702 (2010). ("[P]roperty interests protected by the Due Process Clauses are those that are secured by existing rules or understandings." (Citations and internal quotation marks omitted.)) (Kennedy, J., concurring in part and in the judgment).

B. Summary of the case prior to judicial review

My department (Department of Molecular Biosciences) recommended tenure and promotion for me, and it provided a detailed, lengthy, expert review by a departmental review committee and by the department chair, with a rating of "Very Good" for all review criteria (teaching, research, and service) (Br. Aplt., at 17; R. Vol. 2, at 184). To help ensure fairness and adherence to formal rules and standards, tenure review is a multi-stage process. Following the Department's review, there was subsequent review by a committee at the College of Liberal Arts and Sciences ("College") and finally at the University level. There was only one natural scientist involved in the review process subsequent to the Department-level of review, and this individual was a member of the College review committee. Because he was not an experimentalist and worked in a field that was not related to mine, the academic expertise (deserving of "academic deference") in my case was primarily at the Department-level of review (Br. Aplt., at 10; R. Vol. 2, at 163, 166). All other reviewers from the College and University had expertise in the humanities, social sciences, arts, business, and so forth.

The College-level of review did not recommend tenure for me, but this decision (and thus the unanimous committee vote counts against me) was justified by factually inaccurate statements that were not consistent with my record. The explanation given for the negative decision was that I had insufficient research productivity: only "two smaller grants" and "two articles" (Br. Aplt., at 19-20; R. Vol.

2, at 172, 173). But in fact I had five grants (which were not "small") and three papers, which my department correctly acknowledged and judged as meeting the expectations and formally-approved standards in my department (Br. Aplt., at 7-26). This was described in detail and then summarized in the Departmental committee's decision letter:

> Dr. Harsay has also been *successful at obtaining significant grant support* for her research. She has been funded by the Cancer Experimental Therapeutics COBRE as a project PI, and by an American Heart Association grant. Her high throughput screening and characterization of the compounds she identified has been funded by an NIH R03 award, an NIH X01 Resource Award, and is currently funded by an NIH R21.... Given the comprehensive nature of Dr. Harsay's three papers [while at KU], their expected high impact, and *the judgment by most of the external reviewers that Dr. Harsay's work is of very high quality*, the P&T committee considered that Dr. Harsay's research program had met the expectations of our department. The committee voted for an evaluation of "Very Good" for Dr. Harsay's research. (Emphases added.)
> (Br. Aplt., App. A; R. Vol 2, at 181-183.)

Two brief letters from the College-level of review were sent to University-level reviewers to explain the negative decision, one from the College Commit-

tee[1] and one from the Interim Dean of the College. Both letters stated the factually inaccurate assessment of the quantity of my research productivity as the reason for not recommending tenure (Br. Aplt., at 19-20; R. Vol. 2, at 172, 173). There was no mention of the quality or importance of my work and no mention of the teaching or service components of my evaluation. Thus the decision letters did not accurately represent the Department's findings or my record. No explanation was given for the discrepancies, either in the University's Record of Review or in court filings.

Letters that were nearly identical to those sent to the University-level reviewers were sent to me at the same time, but the letters to me omitted the factually incorrect statements, so I was not aware of this issue until I filed my petition for judicial review and obtained my review records (Br. Aplt., at 17-26; R.Vol. 2, at 174, 176). I was thus not able to properly defend myself during the review process.

The University's Record contains no indication whatsoever that administrators subsequent to the College level were aware of the lack of care and accuracy in the College Committee's review, or of the lack of careful supervision of the review by the Interim Dean. The University-level reviewers, just as the Interim Dean, had access to my entire voluminous record along with the records of >50 other faculty

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[1] The letter was signed by the Committee Chair to indicate that it was from the Committee, but she did not write it and was not responsible for the inaccuracies; she did not participate in the review at the College level (Br. Aplt, at 8).

members under review for tenure and promotion during my year, so I cannot claim that they were for certain unaware of the inaccuracies. But I believe they would have taken corrective action, had they been aware of the issue.

The University-level of review provided no additional explanation for its decision to deny tenure (Br. Aplt., at 6, App. F; R. Vol. 2, at 144, 169). Therefore, judicial review of the tenure decision can be based only on the decision letters from the College and Departmental levels of review, and whether the findings and reasoning in those letters were supported by evidence in the record (Br. Aplt., at 32-41; Supp. Br. Aplt., at 1-4, 7-14; Kan. Ct. Appeals Opin., App. B, at 20b-21b).

C. Preservation of the issues for the Question Presented

My claim under the Due Process Clause arose from the final Opinion of the Kansas Supreme Court. The court used an old "substantial evidence standard" that had been explicitly invalidated by the Kansas legislature in 2009 amendments to the KJRA and by subsequent binding precedent (see *infra*, at 14). The amendments include rules that now constrain the standards of review, and these rules were disregarded by the court in this case. Although I could not yet claim a due process violation in my briefs, my briefs do preserve the arguments that explain how the current rules that constrain the "substantial evidence" standard apply to my case (Br. Aplt, at 31-41; Sup Br. Aplt., at 1-4, 7-14).

The Kansas Supreme Court did not acknowledge the existence of my key arguments in its Opinion, much less address them in any way. In a Motion for Rehearing or Modification, I requested that the court either apply the correct standard of review as it is now restricted by rules under the KJRA, or explain why it refused to do so by addressing my arguments. I also requested that the court correct the many factual inaccuracies in its Opinion, because the Opinion misrepresents my tenure review and is thus severely harmful to my reputation (Aplt. Mot. Rehear. Modif. Kan. Sup. Ct., at 15-16). The court denied my motion without any explanation (Appendix C). Therefore, this Petition for Certiorari fully preserves the due process issue for this Court. See, *e.g.*, *Saunders v. Shaw*, 244 U.S. 317, 320 (1917); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930).

I believe that the Kansas Supreme Court was aware that it incorrectly did not apply the required review standards in my case, and I believe that it did not address my arguments because it did not wish to set binding precedent in which it was obviously refusing to apply the correct law. Most likely, this was also the reason, rather than malicious intent to harm me, for why the court did not present my tenure review fairly and why it refused to correct the factual inaccuracies in its Opinion (see *infra*). However, if I am incorrect, and the issue is conflicting interpretation of the law, I still would have a federal case. The court cannot counter clear legislated intent, and it cannot make a sudden, dramatic change in its interpretations, such that the law is "unpredictable in terms of the relevant precedents." Cf. *Hughes v.*

Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). If the court intends to pick-and-choose when to fall back to the pre-2009, invalidated, version of the KJRA standards, any such unpredictable change "inevitably presents a federal question for the determination of this Court." *Id.*, at 297 (citations omitted).

My claim under the Equal Protection Clause likewise arose from the Kansas Supreme Court's Opinion. I believe that the court failed to apply the correct review standards as required by the KJRA because my case involves an academic employment decision. This is unlawful differential treatment due to my status as an academic. To explain its approach to my case, the court stated that the tenure decision was a subjective one "based in part on the business judgment of the University,"[2] and then referred to federal civil rights tenure denial cases that were cited in *Romkes v. University of Kansas*, 317 P.3d 124, 136-137 (Kan. App. Ct. 2014) (Kan. Sup. Ct. Opin., App. A, at 19a). The quotes in *Romkes* from the cited cases make clear that all those cases invoked a special academic deference, and thus the court's approval of academic deference was the purpose of the citation, although the court did not use such terminology or further explain the citation. The concept of special academic deference has evolved into a rule-like application of a nearly-insurmount-

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[2] The University's rules do not state such a thing. The decision is based on defined standards for each department that are officially approved by the University. (Br. Aplt., at 2, 23; R. Vol. 1, at 56-58.)

able level of deference to university administrators in employment decisions (see *infra*, at 27), and because of its frequent use, it needed no further explanation. The Respondent cited similar federal case law in its Response to my Supplemental Brief (Apee Rspnse to Supp. Br. at 14-16), but at that time the Kansas Supreme Court rules did not permit me to submit a Reply to that brief. I did, however, address this issue in my Motion for Modification or Rehearing (at 21).

The special academic deference is derived from the much more noble concept of academic freedom and is rooted in the First Amendment of the U. S. Constitution. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589, 603 (1967). This constitutional link is the reason for a very high level of deference that is much greater than the typical deference for expertise. Academic deference is therefore federal case law. The Kansas Supreme Court did not cite *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) to claim that federal case law served as merely guidance that did not compel its decision for this case, and its handling of the case (disregarding the statutory rules that explicitly constrain the review standards that applied to this case; see *infra*, at 14-23) further indicates that federal case law, rather than the applicable Kansas law, led to the court's decision in this case.

The district court and the Kansas Court of Appeals did not explicitly indicate that a special academic deference influenced their decisions. However,

I preemptively addressed the issue, and insisted on equal protection under the law, in my brief to the Court of Appeals because the district court seriously mishandled my case, and I suspected that this was due to the fact that I challenged an academic employment decision:

> Academics can make errors and are prone to the same biases and human failings as is anyone else, including jealousy and territorial instincts, which often impact tenure evaluations. The Petitioner argues that a fair judicial review of the University's tenure decision will help to ensure that academic agency decisions are made with the same care and accuracy as are the decisions of other state agencies.
> (Br. Aplt., at 42, 49-50).

The district court did not address the factually inaccurate reasoning that explained the University's decision, and it based its ruling in favor of the Respondent on the false notion that the decision on promotion and tenure is a financial one "in this time of governmental and institutional financial crisis," (Br. Aplt., at 46; R. Vol. 1, at 123-124), rather than a decision that was to be based solely on established rules and formally approved review criteria for evaluating teaching, scholarship and service (Br. Aplt., at 2; R. Vol. 1, 54-58). The Respondent had not explicitly claimed that the tenure decision was a financial or "business" decision.

D. The Kansas Supreme Court applied federal law in this case and denied the right to Kansas judicial review

The scope of review under the KJRA, K.S.A. § 77-621 *et seq.* (Appendix D), was modeled after the judicial review standards under the federal Administrative Procedure Act (APA), so it will be familiar to this Court.[3] The court below applied an old interpretation of the "substantial competent evidence" review standard that predates the APA (and KJRA) and had been explicitly invalidated by the Kansas legislature in 2009 amendments to the KJRA. The amendments make clear a requirement that courts consider both "detracting" and "supporting" evidence (K.S.A. § 77-621(c)(d), Appendix D, at 2d-3d), correcting an earlier interpretation of the KJRA that held that courts "must accept as true the evidence and all inferences to be drawn therefrom which support or tend to support the findings of the factfinder and must disregard any conflicting evidence or other inferences...." *Jones v. Kansas Sate University*, 106 P.3d 10, 20 (Kan. 2005) (Br. Aplt., at 37). As I argued in my briefs, the new interpretation of the law applies to my case (Br. Aplt., at 37-38; Supp. Br. Aplt., at 7-17; Mot. Rehear. Modif. Kan. Sup. Ct., at 2-12).

The Kansas Supreme Court summarized the significance of the 2009 amendments in a subsequent opinion, which is binding precedent for my case. Importantly, the new case law, which I cited in my

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[3] For history of the KJRA, see Ryan, *The New Kansas Administrative Procedure and Judicial Review Acts*, 54 J.K.B.A. 53, 64 (1985).

briefs, made clear that the law now "requires review of the agency's explanation as to why the evidence supports its findings." *Redd v. Kansas Truck Center*, 239 P. 3d 66, 72 (Kan. 2010) (Br. Aplt., at 37-38). Yet, the court largely followed *Jones* in my case, although it did not cite this invalidated case law. The district court did cite *Jones*, making clear its use of incorrect law (Br. Aplt. at 37-38). I point this out because the same error, made by the same district court judge, had been helpfully addressed by the Kansas Court of Appeals in *Romkes*—the only Kansas appellate court opinion that I am aware of (besides mine) in which a tenure-review case had been decided based on merits rather than a deadline or similar technical issue:

> [Dr. Romkes] contends the district court used an incorrect standard of review in reviewing the University's decision. The University concedes that the district court used a standard of review which had been modified in 2009. But on appeal to our court we treat the issues for which Dr. Romkes sought judicial review in the district court as though they had been initially directed to us. See *Powell*, 290 Kan. 564, Syl. ¶ 1, 232 P.3d 856. We are capable of reviewing the evidence before the district court using the appropriate standard of review, which is found in K.S.A. 2012 Supp. 77-621.
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> *Romkes v. University of Kansas*, 317 P.3d 124, 135 (Kan. App. Ct. 2014).

I pointed out the district court's error in my brief (Br. Aplt., at 37-38), but the error and its correction is not mentioned in court opinions for my case.

The 2009 amendments to the KJRA have a second, related, significance. Prior to the amendments, the addition of the words "record as a whole" to the "substantial competent evidence" standard under K.S.A. § 77-621(c)(7) was misinterpreted to mean that courts are to scour the whole record for any evidence which, when viewed in isolation, supported the agency decision. This was inconsistent with the intent of the law, and it was inappropriate also because the task of explaining an agency decision has been delegated to the agencies, not to the courts (or to agency attorneys, in *post hoc* explanations in court filings years after the agency decision was made; Supp. Br. Aplt., at 3-4). Citing the evidence that led to a decision is a critical component of explaining the reasons for a decision, and it is the agency's explanation *in the agency record* that the courts are to review. K.S.A. § 77-621(a)(2) (Appendix D, at 1d) states that "the validity of agency action shall be determined in accordance with the standards of judicial review provided in [K.S.A. § 77-621 *et seq.*] as applied to the agency action *at the time it was taken.*" (Emphasis added.) This is consistent with the long history of American judicial review: "[A]gencies are reviewed only on the basis of their actual reasoning at the time they made their decisions, and they must offer rational explanations for their actions." Meazell, *Deference and Dialogue in Administrative Law*, 111 Colum. L. Rev. 1722 (2011) (citing the landmark cases *SEC v. Chenery Corp.*, 318 US 80

(1943); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US 402 (1971)). See also Ryan, *Judicial Review of Administrative Action—Kansas Perspectives*, 19 Washburn L. J. 423, 431 (1980) (Sup. Br. Aplt. at 9).

Most critically for my case, K.S.A. § 77-621(d) (Appendix D, at 2d-3d) now also clarifies that findings of an intermediate-level of review are to be considered. This is especially important when those findings and decisions detract from the final agency decision, and when the earlier step of review has more appropriate expertise and was in a position to make in-person observations. See *Hudson v. Bd. of Directors of the Kansas Pub. Employees Ret. Sys.*, 388 P.3d 597, 603-05 (Kan. App. Ct. 2016). This interpretation of "substantial competent evidence" and "whole record" review is also stated in a report by the Kansas Judicial Council that advised the legislature for amending the KJRA.[4] Thus, the 2009 amendments clarify that "whole record review" has the same meaning in the KJRA as it does in the federal APA, as it was helpfully explained by Justice Frankfurter in *Universal Camera v. NLRB*, 340 US 474 (1951).

The above explanation of the "substantial competent evidence" standard is the only logical interpreta-

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[4] Report of the Judicial Council Administrative Procedure Advisory Committee, 2008. The *Report* states that the purpose of the amendments was "to make judicial review more available and meaningful as a check on the fairness of agency decisions...," and it stresses that consideration of a contradictory intermediate-level decision makes it more important for agencies to carefully explain their decisions (*Report*, at 5, 6).

tion of the 2009 amendment to the KJRA, which instructs courts to consider both supporting and detracting evidence, and yet "not reweigh the evidence or engage in de novo review" (K.S.A. § 77-621(d), Appendix D, at 3d). In order to not reweigh the evidence in determining which decision-maker was correct, the court below needed to assess only the accuracy and quality of the explanations that decision-makers have provided in the record. If the court instead considers only evidence that supports the College- or University-level of review, including evidence not presented in decision letters, and if the court disregards the strong detracting evidence from the department's expert review, then its review is no different at all from the old "substantial evidence" review standard that has been explicitly invalidated.

In my situation, the "detracting," "intermediate" decision was explained in decision letters from the Department's tenure-review committee and from the Department Chair. The Departmental findings and explanations deserve much deference not only because of the level of detail and care and accuracy of the review that was documented in the record, but also because the department had appropriate knowledge and expertise that all subsequent reviewers lacked.

Rather than following the corrected interpretation of "whole record review," the court below applied the old, invalid, meaning, and scoured the record (with assistance form the Respondent's briefs) in search of evidence against granting tenure, in order to make up for the complete lack of factually correct

evidence cited in the University- and College-level decision letters that explained why I should not be granted tenure. Even worse, the court below misrepresented my tenure review, and thus harmfully misrepresented me, in its *published* Opinion that is now readily available to the world on the internet. The court did not acknowledge the existence of strong evidence that supported me and contradicted the court's "new findings," and it made numerous misleading and inaccurate statements. I will list some of these misleading or inaccurate statements. My key point is not any particular fact or statement, but the consistency and extent of misrepresentation.

The court's Opinion described the inaccuracies at the College-level of review as being just a "single inaccuracy" that was "one feature of one criterion in the three-criterion evaluation process" (Kan. Sup. Ct. Opin., Appendix A at 21a). This incorrectly implies that there were additional criticisms of my performance, but there were not. Only "quantity" was an issue, and the "quantity assessed" was inaccurate. My teaching and service were praised and there is no evidence that they contributed to the decision to deny tenure (Br. Aplt., at 4-5). And the third criterion, research, has two "features": quantity and quality. The quality of my research was praised by both external reviewers and by my department (Br. Aplt., at 21-22). And it is untrue that there was just a "single inaccuracy." One of my papers and three of my research grants were not acknowledged to exist in two decision letters. The court misleadingly implied that the status of my third paper was "rejected" at the time when my Chair updated the College com-

mittee, and it incorrectly stated that the college evaluators were correct on my paper counts (Kan. Sup. Ct. Opin., App. A, at 6a,8a). I clarified the status of this paper in my briefs (Br. Aplt., at 10-11; Reply Br. Aplt., at 3-5). The Respondent never explained why my third paper was not "counted" and never countered my explanations. By the time of the College review, the third paper had been favorably reviewed by a second journal that *never rejected it* and eventually published it during my review year (Br. Aplt, at 11; R. Vol. 2, at 163). All three of my papers were to "count" according to University rules, and College-level reviewers had copies of all three papers (Br. Aplt., at 11-12).

The court below also misrepresented the assessments of the external reviewers by citing only their outdated assessment of "quantity," when most reviewers focused their evaluations on the quality and importance of my work.[5] A Professor of Biology at Vanderbilt University stated: "In my view, Dr. Harsay's contributions are highly significant and offset concerns about productivity." (Br. Aplt, at 21; R. Vol. 2 at 367-368.) The Chair of the Department of Biology at Johns Hopkins University (now Dean) stated: "While the quantity of Dr. Harsay's work is not great, its quality is very high." (Br. Aplt. at 22; R. Vol. 2, at 371.) A Group Leader at the MRC Laboratory of Molecular Biology in Cambridge, England,

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[5] As I explained in my briefs (Br. Aplt., at 11), and as mentioned in the Department's evaluation letters (R. Vol. 181-182), the external reviewers did not have a copy of my third manuscript because I was required to send them my materials in the summer before my review year.

stated: "I would like to give support to Edina's promotion as I consider her to be a high quality scientist working on an important and interesting problem." (Br. Aplt., at 22; R. Vol. 2,, at 364.) The George Palade Endowed Chair in the Department of Cellular and Molecular Medicine at the University of California, San Diego, started his letter by stating, "It is a pleasure to write in strong support of Dr. Edina Harsay's promotion to a tenured position." He described my research accomplishments and their significance in great detail, and stated, "Her work is both very careful and very creative... and [she] will continue to produce important and novel contributions to the field of membrane traffic." (Br. Aplt., at 22; R. Vol. 2, at 373-374.)

Furthermore, the court below is misleading in counting up the number of external reviewers who explicitly made a statement on granting of tenure. As the Respondent's brief to the district court had stated, and as I explained in my Supplemental Brief to the court (Sup. Br. Aplt., at 5-6), external reviewers were intentionally not asked to state a recommendation on tenure, but simply to evaluate my research, and thus not all reviewers made an explicit statement on tenure. They were not "voters" in this process. This is because criteria for tenure are very different at different institutions. In Europe, where two of my external reviewers worked, tenure is granted at a much more senior stage of one's career, as was mentioned by the Departmental committee in its evaluation documents, to explain why one European external reviewer may have stated that he did not favor tenure (R. Vol. 2, at 277).

Another clear example of failure to consider "detracting" evidence is the court's citing of an external reviewer's pessimistic comment concerning my prospects for future funding (Kan. Sup. Ct. Opin., App. A, at 5a). This quote was mentioned for the very first time only in a brief to the court below (Apee Rspnse to Supp. Br., at 11), in response to my argument that the likelihood of funding in the "foreseeable" future, rather than non-stop funding, is the formal and allowed tenure-review standard in my department, because most faculty members in my department experience gaps in external funding[6] (Br. Aplt., at 24; Supp. Br. Aplt., at 13; R. Vol. 2, at 167). The court failed to acknowledge in any way the existence of significant evidence that detracted from its statement, including a contradicting comment from another external reviewer who stated that he was "bullish on [Dr. Harsay's] potential for future funding," even though this comment was quoted in the departmental committee's decision letter and in my briefs (Br. Aplt., at 25; Sup. Br. Aplt., at 13; R. Vol. 2, at 183). This optimistic conclusion concerning future funding was consistent with other findings and ex-

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[6] The level of funding is not an indicator of faculty quality. Obtaining funding has been "hyper-competitive" for over 16 years. Early-career (assistant professor) investigators frequently struggle to obtain funding. See Daniels, *A generation at risk: Young investigators and the future of the biomedical workforce*, 112 Proc. Natl. Acad. Sci. U. S. A. 313-318 (2015) (Despite efforts to help early-career investigators, "the trajectory of our science funding away from young scientists has only continued," in part because "the NIH open review process is a 'networked system' that favors insiders and the familiar and disfavors the unknown and the innovative [citations omitted].").

planations made by department-level reviewers (Br. Aplt., at 24-25). Thus, the court below misrepresented the evaluation of my funding prospects.

There are additional examples of misleading statements in the court's Opinion, but I wish to clarify just one more—that I complained about not getting proper credit for my work (Kan. Sup. Ct. Opin., App. A, at 7a). Stating the context of my comments is important, because otherwise it appears as if I am blaming my former mentors for taking credit for my work. In fact the opposite was true. Because of a letter from my former mentor, which the Departmental committee cited in its decision letter (Br. Aplt. App. A; R. Vol. 1 at 182), my department gave me more credit for my independence than did at least some external reviewers. The Chair of my department also explained this in his decision letter in support of tenure, which quoted from my mentor's letter and which I cited for the court below (Sup. Br. Aplt. at 6; R. Vol. 1 at 179): "I can assure you and your colleagues at Kansas that this paper and the approach that led to it were entirely Edina's inspiration and labor." My comment was a reference to grant proposal reviewers, who improperly credited my former mentors for my very independent research. This issue is important because it is one of the numerous ways in which my department had the most information and expertise to evaluate me fairly, and it shows why the Department's "detracting" review needed to be addressed in the Opinion below, as required by the KJRA (K.S.A. § 77-621(d)).

REASONS FOR GRANTING THE PETITION

A. Limits on state court power serves the public good

This Court most often will defer to a state court's judgment on whether or not due process in a state court case was sufficient and whether or not state law was properly construed and applied. The Constitution does not impel this Court to "train a skeptical eye on a state court's portrayal of state law." *Bush v. Gore*, 531 U.S. 98, 140 (2000) (Ginsburg, J., dissenting). But there are limits to state court power even in what is (or should be) a thoroughly state matter. "The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power." *Stop the Beach Ren. v. Fla. Dept. of Env. Prot.*, 130 S.Ct. 2592, 2614, 560 U.S. 702 (2010). (Kennedy, J., concurring in part and in the judgment). The manner in which my case was handled below—regardless of whether state law or federal law was most critical for the judgment—should qualify my case as a federal matter.

Clearly, I was not outright denied a "process" of some form. But "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). And a hearing "must be a real one, not a sham or a pretense." *Palko v. Connecticut,* 302 U.S. 319, 327 (1937) (citing *Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935)). The "opportunity to be heard" in my case surely ought to mean more than

just an opportunity to file briefs and motions and (presumably) have them read by all judges who participated in my case. (There was no oral argument at any stage in this case, and so my briefs were my "voice" that should have been "heard.") In my case, a "real" and "meaningful" hearing ought to have meant having my side of the issues fairly considered and fairly represented when there is a published court opinion. This did not happen, and because of that, I was harmed by more than just the judgment.

Not every inaccuracy, omission, or unnecessary violation of privacy in a published court opinion will qualify as a "liberty infringement." But in my case the court's published opinion did reach that level, because it misrepresents my case, it severely harms my reputation, and it obviously harms my career and employment prospects. It was not merely harmful; it was unjust. "[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being— a concept at the root of any decent system of ordered liberty.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion)). And the court's reliance on invalidated rather than current law—with no response to my objections that it was doing so—is not "within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hurtado v. California*, 110 U.S. 516, 535 (1884). The court's treatment of my case was thus a violation of my substantive due process rights.

While I am claiming a violation of substantive due process rights, the nature of that violation in this case clearly overlaps with a denial of procedural due process. There is a possibility for procedural remedy in this case. The substantive aspects of my due process claim, as well as my claim that the court below improperly relied on federal law, should justify the need to scrutinize whether or not the court below applied the proper standard of review and procedural due process. There is in addition a "historical context" for this case, as well as "recalcitrance" by state courts, that justifies scrutiny in my case. Cf. *Bush v. Gore*, 531 U.S. at 140-52 (Ginsburg, J., and Breyer, J., dissenting opinions).

We live at a time in which people of ordinary means are increasingly denied access to our courts, especially when they wish to challenge employer abuses. See, *e.g.*, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). Even when court rulings do not explicitly preclude access to our courts, it is rare for an employee to prevail in a legal challenge to an employment decision. I am not aware of any KJRA case in which an employment decision was successfully challenged. The refusal to abide by the legislated amendments to the KJRA—amendments that are typically required for making judicial review effective—may be a systematic problem, as this was an issue in *Romkes* as well (see *supra*, at 15-16). The Kansas legislature intended for the KJRA to provide a remedy and accountability in university employment disputes. The ineffectiveness of judicial review in employment disputes is a wrongful denial of justice and only serves to funnel these types of cases to

civil actions in federal courts, thereby increasing the time, effort, and cost of resolving the cases.

I had clear legal rights in this case, and the courts had a duty to protect my rights. The failure to do so was especially likely to happen in my case, because I was a *pro se* litigant. There is a systematic problem of courts failing to meet the needs of litigants who cannot afford an attorney:

> "Many of the lower courts... can be lawless. When lawyers are present on both sides of cases, courts act more like courts, following the rules they have made to guide their own activities..... Courts, already paid for by public taxpayer dollars and empowered to act by the public they are supposed to serve, have the responsibility to solve this problem." Sandefur, *Access to What?* Daedalus (Winter 2019). https://www.amacad.org/publication/access-what

B. Case law prescribing the rule-like application of the special "academic deference" is controversial and lacks rational basis

Courts frequently invoke a special "academic deference" standard to justify differential treatment of discrimination claims in which an employment dispute involves an academic decision, such as denial of tenure. See Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 Seattle U.L. Rev. 549, 555 (2009). The notion that academic judgment deserves its own special deferen-

tial standard is not universally held. It has been criticized for its harmful effects:

> [T]he penchant of many courts to dismiss employment discrimination claims based on 'academic deference' is misguided in a host of ways. It threatens to leave academia an island of civil rights lawlessness, essentially exempt from Title VII — a dangerous outcome for a society in which there is such gender inequity in academia.
> Scott A. Moss, *Against Academic Deference: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 Berkeley J. Emp. & Lab. L. 1, 5 (2006).

And it has been criticized for having no logical basis:

> [W]e do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many areas of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases.
> *McConnell v. Howard University*, 818 F.2d 58, 69 (D.C. Cir. 1987).

The special treatment of academic decisions especially when they involve tenure is also controversial:

> I do not see a qualitative distinction between a tenure decision and any other employment decision. The subjective esteem of colleagues and supervisors is often the key to any employment decision. ... Indeed, subjective esteem is more important in certain blue-collar contexts, where, for example, lives may depend on the employee's performance and good judgment. [Citations omitted.]
> *Namenwirth v. Board of Regents of Univ. of Wisconsin*, 769 F.2d 1235,1244 (7th Cir.1985). (Swygert, J., dissenting.)

Tenure is not a highly unusual employment situation and it does not mean a "guaranteed job for life." It does not protect incompetence or sloth. It protects academic freedom and it protects due process rights. Tenured faculty members undergo annual performance evaluations, and termination of a tenured faculty appointment due to performance or other issues can and does occur in Kansas and elsewhere. Tenure at the University of Kansas, according to its *Faculty Code of Rights, Responsibilities, and Conduct* (Supp. Br. Aplt. at 22) means the following:

> Tenured faculty may be removed only for cause, in cases of program discontinuation, or in cases of bona fide financial exigency consistent with Faculty Senate Rules and Regulations (FSRR) 6.1.2. The University will follow the University Senate Code, Faculty Senate Rules and Regulations,

> and University Senate Rules and Regulations as applicable in such cases.
> (Faculty Code, Article III, Section 15.)

Furthermore, University's rules do not indicate that tenure is a special honor bestowed on a select few who go through the review process. Some universities do follow such policy (most notably Harvard). But the standard practice in Kansas public universities is that tenure-track professors who meet the guidelines for tenure are granted tenure. I was not demanding special treatment by pursuing this case; I was asserting that the tenure decision for me should have been made according to the same rules and expectations that were applied to other faculty members in my department.

Not being granted tenure means the loss of a job and often the loss of a career and work that had been the center of one's life for many years, sometimes decades. It can mean the loss projects and reagents that took many years, and much public expense, to develop, and which were an investment intended to last for many years or future work. In my case, I had hundreds of strains and cell lines and reagents that I created or collected since I was a graduate student in the nineties (Aplt. Mot. Rehear. Modif. Kan Ct. Appeals, at 7), and I had long-term ongoing projects that I developed as a graduate student and post doc and brought with me to Kansas. Those projects and reagents did not belong to the University; they belonged to the public. The University was merely a caretaker, and it owed the public, and it owed me, far

more care in safeguarding years of work by conducting a proper and careful tenure review.

Judicial review under the KJRA was intended as a mechanism to hold state agency decision-makers, including public university administrators, accountable, and thus to promote careful decision-making. Being that this is the goal of the law, there is no rational basis whatsoever for why an important university administrative decision ought not to get a normal, proper judicial review—a proper review that takes a few months, not years; a proper review that considers the facts and legal arguments presented by both sides, and which presents the facts fairly and accurately; a proper review that uses the current standards of review, as intended by the legislature, rather than a misguided and outdated standard that had been explicitly corrected by the legislature. There is no rational basis for why my status as an academic employee should deprive me of my right to due process and equal protection under the KJRA.

C. Accountability of public university decision-makers serves the public good

Public universities in the United States are increasingly straying from a mission of serving the public good, and instead are prioritizing private good, including status and prestige (rankings of all sorts; promoting the university "brand"), money (attracting wealthy non-resident students by providing expensive amenities and supporting a party cul-

ture),[7] and pursuit of short-term goals that advance the careers of academics, even when this has harmful long-term consequences (a focus on paper count and grant count rather than on the long-term contributions of research; short terms in "stepping-stone" leadership positions).[8] This shift in mission is in part caused by a decrease in state funding and the resulting privatization of public universities. But decreases in public funding often follow, rather than precede, tuition hikes, and further funding cuts are then provoked by the willingness of university leaders to raise tuition and by their failure to put up a fight for a mission to serve public rather than private interests. This situation has been described as a "self-reinforcing devolutionary cycle," or a decline cycle.[9] The result is a decline in the quality of public education and research, while tuition and other costs keep increasing for students and their families.[10] This leads to decreased access to quality higher education, to an increasingly stratified society, and to our nation's intellectual decline. The decline of public universities, for which university leadership is partly to

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[7] Armstrong and Hamilton, *Paying for the Party: How College Maintains Inequality*, 2013.

[8] Tuchman, *Wannabe U: Inside the Corporate University*, 2009, Chapter 4; Derek Bok, *Higher Education in America*, 2013, Kindle Ed., pp. 34-38, 43-50, 74, 330, 336.

[9] Newfield, *The Great Mistake: How We Wrecked Public Universities and How We Can Fix Them*, 2016). Kindle ed., loc. 171, 381, 845.

[10] *Ibid.*, loc. 301, 528, 553, 713. Also, Brownstein, *American Higher Education Hits a Dangerous Milestone,* theatlantic.com, May 3, 2018.

blame, is a serious threat to our democracy. It is thus critically important to hold public universities accountable for decisions that are harmful, unjust, and not in accordance with formal university rules and policies that were designed to promote the public good. The discriminatory special "academic deference," and failure of courts to follow standard procedures and the law in cases involving challenges to university decisions, harmfully—and unlawfully—excludes university administrators from accountability.

D. The quality of publicly-funded research would improve if university decision-makers were held accountable when they fail to adhere to formal rules and standards for evaluating faculty scholarship

The University's rules and departmental standards for tenure and promotion do not state that "quantity" of scholarship is more prized than "quality." They do not state, or even hint, that the University's financial interests are to be considered in tenure decisions (Br. Aplt., at 2; R. Vol. 1, at 54-58). They do not specify a paper count or grant count or dollar count. They don't, and won't, specify such things because it would be shameful to do so. And if it is shameful to put a policy in writing, then it is shameful to follow it in practice. The pressure for high paper counts and grants is intense in academia, with well-known harmful consequences especially in the sciences. Numerous articles and books have been published in the past few years documenting the

high rate of irreproducible published results.[11] There is a danger that the intense pressure on academic scientists is selecting for and normalizing unethical behavior and lower quality research.[12] This is harmful for science, wasteful of public funds, and a betrayal of the public that supports academic research.

The University's rules and regulations for tenure review, and my department's official standards for tenure and promotion, support the University's stated mission to promote high-quality research (Br. Aplt., at 2; R. Vol. 1, at 54-58). I had a right, and also a responsibility, to put up a fight against a decision that was not made according to those rules and standards. The legal system, and the KJRA, was my sole permissible mechanism for doing so. The court below should not be allowed to apply a special "academic deference" to deprive me of the right to a normal judicial review, according to current law, as intended by the legislature.

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[11] Yong, *The Inevitable Evolution of Bad Science: A simulation shows how the incentives of modern academia naturally select for weaker and less reliable results.* The Atlantic, Sept. 21, 2016; Richard Harris, *Rigor Mortis: How Sloppy Science Creates Worthless Cures, Crushes Hope, and Wastes Billions* (New York: Basic Books, Hachette Book Group, 2017).

[12] Edwards and Roy, *Academic Research in the 21st Century: Maintaining Scientific Integrity in a Climate of Perverse Incentives and Hypercompetition.* 34 Environ Eng Sci. 51 (2017).

CONCLUSION

For the foregoing reasons, I request that this Court grant the Petition for Certiorari. I further request that this case be remanded to the Kansas Supreme Court with instructions to review the case according to the current standards of review pursuant to the KJRA, or for the Kansas Supreme Court to instead remand the case to the Kansas Court of Appeals, for a review either by a new panel or the same as the previous one.

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