No. _____

In the
Supreme Court of the United States

CHIXAPKAID DONALD MICHAEL PAVEL,

Petitioner,

v.

UNIVERSITY OF OREGON; DOUG BLANDY; PENELOPE DAUGHERTY; RANDY KAMPHAUS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) When a tenured professor at a public university is accused of sexual harassment, and vigorously disputes the allegations, do his due process rights include confronting and cross-examining his accuser?

2) Does the Due Process Clause preclude termination of such a professor when he had no prior warning that discipline for a single sexual harassment charge could include termination, and no tenured professor at that university had ever been fired?

3) When a professor at a public university gains tenure, and later his department unionizes, are his post-termination due process rights limited to the union's discretion whether to pursue or decline arbitration?

4) For purposes of a substantive due process claim, is it clearly established that, in a large bureaucratic university, the person who terminates an employee need not be the same person who publicly issued stigmatizing information about the employee?

LIST OF PARTIES

The name of the Petitioner is:

Chixapkaid Donald Michael Pavel

The names of the Respondents are:

University of Oregon; Doug Blandy; Penelope Daugherty; and Randy Kamphaus.

CORPORATE DISCLOSURE STATEMENT

University of Oregon is a government entity. No other party is a corporation.

RELATED CASES

- *Pavel v. University of Oregon, et al.*, No. 6:16-cv-00819-AA, U.S. District Court for Oregon. Judgment entered March 15, 2018.

- *Pavel v. University of Oregon, et al.*, No. 18-35287, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 29, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Chixapkaid Donald Michael Pavel, petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Ninth Circuit (entered May 29, 2019, with rehearing denied July 9, 2019), affirming the District Court's Order and Judgment in favor of defendants.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (N.R. Smith, Watford, and R. Nelson, Circuit Judges) is not reported, and is set forth in the Appendix at App. 1a through App. 7a. The relevant Orders of the United States District Court for the District of Oregon (Aiken, J.), granting defendants' Motions for Summary Judgment and dismissing plaintiff's case with prejudice, are not reported, and are set forth in the Appendix at App. 8a to 42a and App. 43a to 73a. The District Court's Judgment is not reported and is set forth in the Appendix at App. 74a through 75a. The Ninth Circuit Order denying the petition for rehearing is not reported, and is set forth in the Appendix at App. 76a through App. 77a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 29, 2019.

App. 1a-7a. The Ninth Circuit denied petitioner's petition for panel rehearing and rehearing *en banc* on July 9, 2019. App. 76a-77a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution (*U.S. Const. Amend. V*) provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section I of the Fourteenth Amendment to the Constitution (*U.S. Const. Amend. XIV*) provides, in relevant part:

> 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 . . . .

STATEMENT OF THE CASE

In this historic "Me Too" era, it is tempting to allow, without comment or scrutiny, the "civil death" of the livelihood of public employees who are accused of sexual harassment. This Court has the opportunity to scrutinize the appeals that are bound to come before it regarding the intersection of due process rights of public

employees and the rights of people who charge those employees with sexual harassment.

Plaintiff was the only Native American fully tenured professor at the University of Oregon. He was accused of sexual harassment and was fired. It is undisputed he is the only tenured professor at the University of Oregon *ever* fired, for any reason, in its 143-year history.

Plaintiff was told he was being fired only one working day before the termination took effect. He was never allowed to read a written explanation of the allegations against him. He was not allowed to confront and cross-examine his accuser. The allegations were stated to him verbally in a hostile, accusatory manner, and the investigators told him they were certain they would find a "pattern" of harassment. He had no prior discipline in his personnel file. Numerous other University of Oregon tenured professors had previously had sexual harassment accusations sustained against them, but none were fired.

To make matters worse, the University disclosed the allegations to the local newspaper, naming Dr. Pavel.

Dr. Pavel filed suit for violations of substantive and procedural Due Process; Equal Protection; First Amendment retaliation; and racial and gender discrimination. Defendants filed a motion for partial summary judgment on plaintiff's due process claims, which was granted. Defendants then filed a motion for summary judgment on the remaining claims, which was

granted.

The District Court *did* find that the Due Process clause required the University to provide plaintiff with more procedural protections, and that plaintiff had presented a due process claim sufficient to proceed to a jury. However, the court chose to let the defendants off the hook on "qualified immunity." Plaintiff's due process rights were clearly established at the time of his termination, so that result was in error. Even if prior case law had not already made clear that more process was due, the University's own precedents precluded involuntary termination of a tenured professor under these circumstances, without clear notice of a change in policy and practice.

In the last year, deep thinkers from both the left and right have advocated for a revisiting, and indeed, a revision, of the judicially created doctrine of "qualified immunity." *See, e.g.*, http://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html

However, even without revisiting that doctrine, this Court should reverse the Ninth Circuit's decision upholding the dismissal of plaintiff's claims.

REASONS FOR GRANTING THE WRIT

Supreme Court review is appropriate because the Ninth Circuit's decision conflicts with this Court's precedent in *Greene v. McElroy,* 360 U.S. 474, 496- 97,

79 S. Ct. 1400 (1959); *Peters v. Hobby*, 349 U.S. 331, 351, 75 S. Ct. 790 (1955); *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559, 76 S. Ct. 637, 641 (1956); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487 (1985); and *Staub v. Proctor Hosp.*, 562 U.S. 411, 131 S. Ct. 1186 (2011). Consideration by the Supreme Court is therefore necessary to secure and maintain uniformity of the court's decisions.

In addition, there is a split in the circuits on the due process issues presented in this case, with the Sixth Circuit recently holding in two cases that students at public universities who are accused of sexual harassment have the right to cross-examine their accusers, whereas the Ninth Circuit rejected petitioner's argument on that point, in the context of a fully tenured professor accused of the same type of behavior. *Doe v. Cincinnati*, 872 F.3d 393 (6th Cir. 2017); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

Furthermore, this case involves a question of exceptional importance. To petitioner's counsel's knowledge, this is the first case in which a full tenured professor at a publicly run university has been terminated for issues not related in any way to his qualifications as a professor. Underscoring the importance of this case is that petitioner was not granted the full due process rights (including the right to cross-examination) which this Court held sixty years ago, in *Greene*, is required before terminating a public employee based on disputed allegations.

ARGUMENT

I. THE NINTH CIRCUIT MISAPPLIED THE RELEVANT CASE LAW PROTECTING THE RIGHTS OF TENURED PROFESSORS AT PUBLIC UNIVERSITIES

A. The Ninth Circuit's Ruling

It is undisputed that plaintiff was a tenured professor at a public university the University of Oregon), therefore undisputedly entitled to the highest level of due process rights before terminating his employment and thereby (based on the facts taken in the light most favorable to plaintiff) destroying plaintiff's career.

The Ninth Circuit correctly set forth the applicable case law, stating:

> The base "requirement of the Due Process Clause is that a person deprived of property be given an opportunity to be heard at a meaningful time and in a meaningful "manner." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*", 149 F.3d 971 (9th Cir. 1998)] at 984 (internal quotation marks omitted). "The tenured public "employee is entitled to oral or written notice of the charges against him, an "explanation of the employer's evidence, and an opportunity to present his side of ""the story." *"Cleveland Bd. of Educ. v. Loudermill*", 470 U.S. 532, 546 (1985).

The Ninth Circuit then, however, proceeded to erroneously find that:

> Pavel has not presented any closely corresponding factual and legal precedent to the circumstances where a formal administrative and police complaint had been made by a student about a tenured professor who had access to a robust post-termination process. Those due process requirements which are clearly established were satisfied here: Pavel received oral communications about the charges made against him, as well as a written summary of the findings from the "University's investigation, and was given opportunities to respond. These facts balanced with the robust post-termination process available to him, satisfy the clearly established requirements of due process. The additional and nuanced due process rights which Pavel desires are not clearly established in the law. Consequently, the individual defendants merit qualified immunity.

First, to perhaps state the obvious, because tenured professors generally do not get fired, there is no on-point case law. If there was such case law, presumably defendant would have presented it front and center.

Second, plaintiff did actually present the case law his counsel was able to locate, which makes clear that a tenured public university professor has a property interest in his position, and thus cannot be deprived of that position without due process. *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559, 76 S. Ct. 637, 641

(1956). In *Slochower*, this Court held that a public university violated the Due Process Clause when it summarily discharged a tenured professor accused of being a communist.

In dismissing plaintiff's pre-termination procedural due process claim on qualified immunity grounds, the District Court stated:

> Procedural due process requires a fact-specific and mercurial inquiry. *See Gilbert [v. Hamar]*, 520 U.S. [924], 930 [(1997)] (explaining any categorical rule in the procedural due process context is "indefensible"). As the Ninth Circuit has explained:
>
> > [F]or all its consequence, due process has never been, and perhaps never can be, precisely defined. Rather, the phrase expresses the requirement of fundamental fairness, a requirement whose meaning can be as opaque as its importance is lofty. As a result, deciphering and applying the Due Process Clause is, at best, an uncertain enterprise . . . . After all, unlike some legal rules, due process is not a technical conception with a fixed content unrelated to time, place and circumstances, . . . One cannot accurately predict how any specific case will be decided.
>
> *Brewster [v. Bd. of Educ. of Lynwood Unified Sch. Dist.]*, 149 F.3d [971,] 983-84 [(9th Cir. 1998)] (quotation marks and citations omitted). As such, procedural due process claims "can rarely be

> considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." *Baker v. Racansky,* 887 F.2d 183, 187 (9th Cir. 1989) (quotation marks omitted).

App 32a.

Applying the *Baker* case to plaintiff's pre-termination claim would eviscerate the procedural due process clause, by depriving virtually all public employees of pre-termination procedural rights, granting their employers qualified immunity. Given the facts presented, it is hard to imagine a case where such rights could be enforced under this view of *Baker*.

The case law is clearly established regarding plaintiff's pre-termination due process rights. The question of whether the process provided during the investigation was adequate is a disputed question of fact.

B. The University's Process in Firing Dr. Pavel

The process provided to petitioner prior to termination was deeply flawed, and this issue should be submitted to a jury. *See, e.g.*, *Weinberg v. Whatcom County*, 241 F.3d 746, 750 (9th Cir. 2001) (holding that the question of whether process provided was adequate is a question of fact); *Turrado-Garcia v. I.N.S.*, 933 F.2d 1016 (9th Cir. 1991) (same).

The District Court focused on what it labeled "five days" plaintiff had between the meeting in which he

was told he was being terminated, and the date of termination. App. 21a. But that was in fact only one business day, due to intervening weekend and holiday – Dr. Pavel was told on a Friday he was being terminated, with the termination date being the following Tuesday after the holiday. Given the enormity of being stripped of his entire career, one business day can hardly be considered sufficient time to evaluate options, and then to carry out a strategy (such as negotiating a resignation in lieu of termination).

As the Ninth Circuit noted in its opinion, plaintiff did not submit a written statement. But he was unable to meaningfully respond because he was never given a written copy of the complaint, was never given the details of the allegations to review and respond to, and was not given the evidence gathered by the University. The University made clear from the very beginning that it was not interested in cooperating with Dr. Pavel but rather that it would find "a pattern" and find him to be liable.

The University did not act in good faith. The University did not inform Dr. Pavel prior to the meeting that it would be documented only with handwritten notes, and that no written allegations would be shared with him. An oral denial to sharply confrontational questions from the investigator was all Dr. Pavel could offer. Providing a meaningful written response would have required seeing the actual complaint, or some other substantial and verifiable version of the complainant's allegations, rather than the personal interpretations the biased investigator shared during

the interview. The pre-termination process was polluted by the biased and malicious nature of the investigative report.

Plaintiff was then called to a second meeting, where he was told he was being fired, only one working day before the termination took effect. He was still not given a written explanation of the allegations against him, and was never allowed to confront and cross-examine his accuser.

As discussed *infra*, there was no prior notice to Dr. Pavel that he could be terminated based on a single disciplinary decision regarding alleged sexual harassment; and no other tenured professor had ever been fired, for any reason.

C. As a Tenured Professor at a Public University, Disputing an Accusation of Sexual Harassment, Petitioner Was Entitled to an Opportunity to Confront and Cross-Examine His Accuser

Under this Court's precedents, the situation presented in this case invokes the right to confrontation and cross-examination. In *Greene v. McElroy*, this Court explained sixty years ago:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the

> individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny. *E.g.*, *Southern R. Co. v. Virginia*, 290 U.S. 190[, 54 S. Ct. 148 (1933)]; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292[, 57 S. Ct. 724 (1937)]; *Morgan v. United States*, 304 U.S. 1, 19[, 588 S. Ct. 773 (1938)]; *Carter v. Kubler*, 320 U.S. 243[, 64 S. Ct. 1 (1943)]; *Reilly v. Pinkus*, 338 U.S. 269[, 70 S. Ct. 110 (1949)].

360 U.S. 474, 496- 97, 79 S. Ct. 1400 (1959).

A few years earlier, in the context of loss of government employment, Justice Douglas (in a concurrence) set forth the importance of cross-examination to fundamental principles of due process:

> Confrontation and cross-examination under oath are

> essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work-things more precious than property itself.

Peters v. Hobby, 349 U.S. 331, 351, 75 S. Ct. 790 (1955). In *Peters*, the context was the federal debarment of a professor of medicine who had served as Special Consultant in the United States Public Health Service of the Federal Security Agency. He was debarred after being accused of disloyalty to the government. As Justice Douglas noted:

> Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross- examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.

Id. at 350-51.

Although Dr. Pavel was told who his accuser was, like Dr. Peters he was given no opportunity to cross-examine or otherwise confront the evidence against him.

These strongly-worded Supreme Court cases arose out of the McCarthy era, when public employees lost their jobs overnight due to accusations of "disloyalty" or "communism." In the present era, we are challenged instead with the sensitive issues surrounding the "me-too" movement, where the mere whisper of alleged sexual harassment is increasingly a career death sentence. In the context of a tenured professor at a public university, these Supreme Court cases from the 1950s are highly instructive as to the care that must be exercised before destroying these employees' careers without any right to confront and cross-examine the evidence that is alleged.

The Sixth Circuit did recently address these rights in the more recent "me too" context. That court held that the opportunity to cross-examine a complainant and the complainant's witnesses is required as part of due process when a public university student accuses another *student* of sexual harassment or assault, if credibility is at issue. *Doe v. Cincinnati*, 872 F.3d 393, 401-02 (6th Cir. 2017). In that case, the court noted that credibility disputes are more likely to arise in sexual misconduct proceedings than in other types of disciplinary investigations. *Id.* at 406.

It would be perverse to allow cross-examination when one student accuses another; but not to allow it when a student accuses a tenured professor, with the utmost property interest at stake.

Even more recently, the Sixth Circuit clarified in another case the circumstances under which

"credibility" issues require the opportunity for cross examination. In *Doe v. Baum*, the Court noted that cross-examination is required not only in a "he said/she said" situation, but even where there are witnesses who corroborate one or the other version of the facts – that is, in any situation where there are "competing narratives." 903 F.3d 575, 581 (6th Cir. 2018).

In *Doe v. Baum*, the accused was allowed to review the accuser's statement, and was allowed to submit a response identifying any inconsistencies he saw – much more than Dr. Pavel was allowed in the instant case. But even that was held to be insufficient. The university argued that those steps provided sufficient due process. The court disagreed, noting:

> In *University of Cincinnati*, we explained that an accused's ability "to draw attention to alleged inconsistencies" in the accuser's statements does not render cross-examination futile. *Id.* at 401-02. That conclusion applies equally here, and we see no reason to doubt its wisdom. Cross-examination is essential in cases like Doe's because it does more than uncover inconsistencies – it "takes aim at credibility like no other procedural device." *Id.* Without the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. *Id.* at 402. Nor can the fact-finder observe the witness's demeanor under that questioning. *Id.* For that reason, written statements cannot substitute for cross-examination. *See* Brutus Essay XIII, in The Anti-Federalist 180

> (Herbert J. Storing ed., 1985) ("It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross-examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing. . . ."). Instead, the university must allow for some form of live questioning in front of the fact-finder. *See Univ. of Cincinnati*, 872 F.3d at 402-03, 406 (noting that this requirement can be facilitated through modern technology, including, for example, by allowing a witness to be questioned via Skype "without physical presence").

903 F.3d at 582-83.

The *University of Cincinnati* court explained that "[d]ue process requires cross-examination in circumstances like these because it is 'the greatest legal engine ever invented' for uncovering the truth. 872 F.3d at 401-02 (citation omitted). Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the *fact-finder* an opportunity to assess a witness's demeanor and determine which competing narrative is more trustworthy. *Id.*

Plaintiff vehemently denied the allegations. An opportunity for cross-examination was therefore

required. The Sixth Circuit's analysis and conclusions in those cases are compelling, and comport with the sixty-year-old due process case law from this Court in *Peters* and *Greene*.

D. The University Violated Dr. Pavel's Due Process Rights by Terminating Him with No Prior Notice that a Single Disciplinary Decision Regarding Alleged Sexual Harassment Could Lead to Termination

Adding another layer of due process protection was the fact that Dr. Pavel was a union member. Both union employees and tenured professors can be terminated only for "good cause." In that context, the appropriate due process test takes into account whether the employee was put on notice *before* the proscribed behavior took place, that he or she could be terminated for that behavior. Dr. Pavel was not, because there was no precedent – no tenured professor at the University had ever been fired in its 143-year history.

The Collective Bargaining Agreement requires the University to "provide written notice and an opportunity to respond prior to termination of a bargaining unit faculty member." First, the Due Process clause requires that such notice be provided far enough in advance to allow for a meaningful response, and here only one working day elapsed between that "notice" and the termination. The meeting was not to "propose" termination but to *pronounce* it, with no opportunity for response from Dr. Pavel nor any hope of reconsideration by the University.

The full seven-part test used for union employees is as follows:

> 1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
>
> 2. Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the employer's business and (b) the performance that the employer might properly expect of the employee?
>
> 3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
>
> 4. Was the employer's investigation conducted fairly and objectively?
>
> 5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
>
> 6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
>
> 7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven

> offense and (b) the record of the employee in his service with the employer?

Enterprise Wire Co., 46 Labor Arb. Reptr (BNA) 359, 362 (1966). All tests must be met for a "good cause" termination of a union employee.

The first test was not met here. In deciding to terminate Dr. Pavel, the investigators relied heavily on trying to find a "pattern" of misbehavior, despite no prior discipline in his personnel file. The District Court stated that the University's affirmative action office file included a note about a prior complaint by a student. However, it is undisputed that Dr. Pavel's personnel file contained no such documentation, and that he had never been disciplined prior to being terminated. Thus, it was error for the District Court to dismiss some comparators (tenured professors accused of sexual harassment but not fired) because they had no prior complaints.

The Ninth Circuit upheld the District Court's holding that only one other professor was a proper comparator, who had numerous, extremely serious sexual harassment accusations upheld against him. A jury question has been raised as to whether Dr. Pavel was provide with the same opportunity to resign as that sole comparator which the University admits to. With only one working day, and no written explanation of the charges against him, a reasonable jury could find that there was no such opportunity provided to Dr. Pavel. Furthermore, the fact that the University had already disclosed in the local newspaper the full extent of the

allegations against him could be deemed by a reasonable jury to have deprived him of the opportunity to gracefully "bow out" of the University and seek other professorial employment.

The anti-harassment training Dr. Pavel had received from the University did not outline any specific behavior that would lead to termination. Nor does the collective bargaining agreement explain that certain specific behavior would lead to termination.

The lack of any prior precedent or notification by the University demonstrates that the employer did not "give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct."

For similar reasons, test number 6 is not met – "Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?" As explained *supra*, Dr. Pavel was of course not the very first tenured professor to be accused of sexual harassment; other tenured professors had had such accusations upheld. Yet no other tenured University of Oregon professor has ever been terminated involuntarily.

All of these principles were clearly established at the time of Dr. Pavel's termination. The flawed, accusatory process that occurred, where plaintiff was not even allowed to read a written explanation of the allegations against him before losing his tenured position, did not meet these fundamental requirements. Plaintiff should

be allowed to present these arguments and evidence to a jury.

II. The Union's Discretion to Pursue Post-Deprivation Process Does Not Satisfy the Due Process Clause

The Ninth Circuit panel also adopted the defendants' argument that by joining a union, the University of Oregon's tenured professors have collectively bargained away their clearly applicable post-termination due process rights – that those rights have been narrowed, because they are now subject to the discretionary decision-making process within the union as to whether to arbitrate a termination. In the instant case, the union chose not to arbitrate Dr. Pavel's termination, and he had no say in that decision.

This Court has yet to address whether a tenured professor's clear right to due process can be altered in any way by the fact that the professor's department chooses to form a union and enter into a collective bargaining agreement.

The Ninth Circuit panel relied on *Armstrong v. Meyers*, in which the Ninth Circuit held that the availability of an arbitration process under a collective bargaining agreement satisfies due process, even where the union eventually declines to pursue arbitration, "provided of course, those procedures satisfy due process." 964 F.2d 948, 950-51 (9th Cir. 1992). The Ninth Circuit held in the instant case: "*Armstrong* controls here. As the district court correctly noted, Pavel's grievance with the lack of post-termination

process lies with his union and cannot be brought against defendants." App. 4a.

First, petitioner submits that *Armstrong* was wrongly decided, because (especially as interpreted in this case), it reduces the due process rights the public employees had at the time they formed the union.

In the alternative, it is unconstitutional to apply *Armstrong* to this case. *Armstrong* did not address Dr. Pavel's situation – a public employee who, when he obtained tenure, was not a member of a union. Before the union was formed, Dr. Pavel possessed the pinnacle of public employee property interests – that of a tenured professor, who (without the benefit of a union) would expect a lifelong appointment absent extraordinary good cause. The Ninth Circuit's interpretation of *Armstrong* strips him of those rights that he held prior to unionization.

Making the outcome in this case even more draconian is the fact that it is undisputed that *no* University of Oregon tenured professor had *ever* been involuntarily terminated – for *any reason* – prior to Dr. Pavel being fired. Therefore, when they decided to unionize, the University's tenured professors of course had no idea that they could now be fired, without recourse if their new union chose not to arbitrate.

Unionization – involving delegation of due process rights to a group entity – should not be deemed to have superseded and eliminated the *individual* right to due process that is guaranteed by the Fifth and Fourteenth

Amendments to the Constitution. At the time they unionized, the University of Oregon's tenured, publicly employed professors already held a due process right that could be claimed by very few Americans. The unionization cannot be interpreted to have taken away that pre-existing right. This issue is not addressed in *Armstrong* nor in the other public union post-deprivation due process case law undersigned counsel is aware of.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487 (1985), did not address the situation where the post-termination process is limited to the union's discretionary decision whether to arbitrate. Furthermore, plaintiff was not given "an explanation of the employer's evidence," nor was he given a *meaningful* "opportunity to present his side of the story." Therefore, the *Loudermill* factors were not satisfied.

III. The Ninth Circuit Erred in Granting Qualified Immunity on Substantive Due Process

In this case, the Ninth Circuit held:

> Whether the same actor must publicize the stigmatizing information and deprive the plaintiff of his protected property interest has not been clearly established in the law. As no clearly established law was violated here, qualified immunity applies.

App 4a. In situations such as this one – where a public university bureaucracy fires a tenured employee on the

basis of individual biased employees' pursuit of an investigation – causes an absurd result, where no one can be held liable. This bureaucratic shielding of the University as well as its employees cannot be what this Court intended when it set forth the elements of public employees' "stigma plus" substantive due process rights.

As this Court noted in *Staub v. Proctor Hosp.*, 562 U.S. 411, 131 S. Ct. 1186 (2011), an employer can be held liable for discriminatory conduct when an unbiased human resources director fires an employee for seemingly legitimate reasons, if a manager motivated by discriminatory motives set the termination process in motion. The Court concluded that even if the HR director conducts an independent investigation, a jury can permissibly find that the termination was tainted by the underlying discrimination, if the termination takes into account the biased supervisor's statements.

Given the fairly recent *Staub* decision, it would be inconsistent for this Court to allow preclusion of a substantive due process claim simply because the person who issued the termination was not the same person who issued stigmatizing statements. Here, the dissemination of stigmatizing statements was not some rogue act by an individual University employee, but rather was an official release by the University itself. It was similarly the University itself, through its bureaucratic process – not an individual employee – that terminated Dr. Pavel. To apply the "single actor" rule in this context results in perverse outcomes, precluding public employees from bringing substantive due process claims.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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