No. _____

In The
Supreme Court of the United States

MICHAEL WIGGINTON, JR.,

Petitioner,

v.

THE UNIVERSITY OF MISSISSIPPI, CHANCELLOR DANIEL W. JONES, PROVOST MORRIS H. STOCKS, DEAN JOHN Z. KISS, DEAN VELMER BURTON, and CHAIR ERIC LAMBERT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit's grant of qualified immunity to the state actors named in the instant matter was violative of Supreme Court precedent established in *Hope v. Pelzer* and congressional intent in enacting 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

The University of Mississippi; Former University of Mississippi Chancellor Daniel W. Jones; Former University of Mississippi Provost Morris H. Stocks; Former University of Mississippi Dean John Z. Kiss; Former University of Mississippi, School of Applied Sciences Dean Velmer Burton; Former University of Mississippi, School of Applied Sciences, Department of Legal Studies Chair Eric Lambert; J. Cal Mayo, Jr., Attorney for Defendants; Paul B. Watkins, Jr., Attorney for Defendants; J. Andrew Mauldin, Attorney for Defendants; Michael Wigginton, Jr.; Keith L. Flicker, Attorney for Michael Wigginton, Jr.; Thomas E. Lamb, Attorney for Michael Wigginton, Jr.; Mike Farrell Attorney for Michael Wigginton, Jr.; Sam Begley Attorney for Michael Wigginton, Jr.; The Honorable Neal B. Biggers, Jr., Chief United States District Judge for the Northern District of Mississippi; and The Honorable Roy Percy, United States Magistrate Judge.

RELATED CASES

- *Wigginton v. Univ. of Miss.*, No. 3:15CV093-NBB-SAA, United States District Court for the Northern District of Mississippi, Judgment entered April 1, 2019.
- *Wigginton v. Jones*, 964 F.3d 329, United States Court of Appeals for the Fifth Circuit, Judgment entered July 1, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Wigginton Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit is available at 964 F.3d 329 and is reproduced in the appendix attached hereto at 1a. The District Court's memorandum opinion and order denying Defendants' motion to dismiss was unreported, but is enclosed with this petition in the appendix attached hereto at 63a. The District Court's memorandum opinion and order denying Defendants' motion for summary judgment was unreported, but is enclosed with this petition in the appendix attached hereto at 57a. Finally, the memorandum opinion and order denying Defendants' motion for judgment as a matter of law was unreported, but is enclosed with this petition in the appendix attached hereto at 22a.

JURISDICTION

The judgment of the Court of Appeals was filed on July 1, 2020. The time to file this petition was extended by General Order of the Court to November 28, 2020 and by Supreme Court Rule 30.1 to Monday, November

30, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides, in relevant part:

> 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 laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

The Fifth Circuit's overly restrictive approach to determining whether a constitutional right is "clearly established" is inconsistent with the direction of this Court and distinguishable from the approach taken by the plurality of circuit courts. Given the inappropriate nature of the lower court's qualified immunity analysis and the split amongst and within the circuits, it is respectfully submitted that it is necessary for this Court to grant review and issue an opinion which sets the level of factual similarity with past precedent necessary to determine that a right is clearly established.

During the week-long trial for this matter, the individual Defendants pointed to their respective tenure and promotion review letters and argued that they demonstrated that they had not deprived Michael Wigginton, Jr. (hereinafter "Petitioner") of a constitutionally protected property interest by failing to exercise professional judgment, i.e. making arbitrary and capricious decisions in considering his application for tenure and promotion. Petitioner argued that despite the perfunctory tenure and promotion review letters produced by each individual Defendant, the evidence as a whole demonstrated that each individual Defendant had made irrational decisions as a result of an improper motivation to remove Petitioner from his post or as a result of general apathy from administrators in higher positions who could not be bothered to exercise professional judgment.

Following a review of the documentary evidence presented, the District Court found that there was a sufficient evidentiary basis to determine that Petitioner's employment agreement with the University of Mississippi incorporated University, School, and Department Guidelines for Tenure Policies and Procedures, which created a contractual property right to a tenure and promotion process free from arbitrary and capricious decision making, in a manner which was free from irrationality.

Following their consideration of the testimony of nine witnesses and hundreds of pages of documentary evidence, the jury determined that each individual Defendant had unlawfully deprived Petitioner of his

contractual property interest by making decisions which were "literally irrational–in that there was no rational connection between the known facts and the decision or between the found facts and the evidence."

Despite these findings, the Fifth Circuit determined that each individual Defendant had exercised sufficient discretion in reviewing Petitioner's application for tenure and promotion. They also stated that a non-tenured employee had no property interest in continued employment (a point which had not been contested by Petitioner) and ultimately concluded that each individual Defendant was entitled to qualified immunity because clearly established law did not recognize the contractual property interest asserted by Petitioner.

As exemplified in this case and several other recent qualified immunity cases in the Fifth Circuit, the Fifth Circuit Court has taken it upon itself to enforce a qualified immunity standard which requires an exceedingly high level of factual similarity with past precedent to defeat qualified immunity. Despite this Court's direction that lower courts should focus their clearly established inquiry on whether the state of the law [at the time of the action giving rise to the claim] gave respondents fair warning that their conduct was unconstitutional, the Fifth Circuit requires plaintiffs to identify factually identical precedent to defeat qualified immunity at a level which is inconsistent with this Court's guidance and the plurality of circuit courts' approach.

It is respectfully submitted that this case and conflicts amongst and within the circuit courts demonstrate the necessity for this Court to exercise its supervisory authority and issue an opinion which clarifies what level of factual similarity with past precedent is required to demonstrate that a right is "clearly established."

The relatively apolitical nature of this claim presents a unique opportunity to this Court to reexamine its approach to qualified immunity without unintended ideological influences associated with police brutality claims. Further, the factually simple and legally straightforward nature of this case presents a unique procedural vehicle for the Court's review of the clearly established prong of the qualified immunity standard.

FACTUAL BACKGROUND

Petitioner was hired as an assistant professor in a tenure-track position in the Department of Legal Studies in 2008. ROA.3084. The terms of Petitioner's 2008 Employment Agreement and every subsequent agreement did not include any language which excluded external documents, and all parties agreed that the tenure and promotion review process was governed by the University, School, and Department guidelines. ROA.2526-2573.

The University Guidelines set forth the procedure for applying and reviewing tenure applications, and

also provides broad criteria for what may be considered in evaluating a professor's teaching, service, and research/scholarship. ROA.2526-2541. The School of Applied Sciences and Department of Legal Studies Guidelines were designed to supplement the University's Guidelines and provide more specific guidance as to what criteria would be used to evaluate a professor's application for tenure and promotion within the School and specific Department.

The University Guidelines required all tenure-track professors to complete a five-year probationary period in order to be eligible for tenure. ROA.3084; ROA.2526-2541. The University Guidelines further stated that "the sixth year shall be the year of formal review. . . . A person who is not awarded tenure during his . . . sixth year of service shall be given a terminal contract for his . . . seventh year of service . . . Consideration for tenure shall be mandatory except in the event that the faculty member has submitted a written resignation to become effective no later than the end of the year in which the faculty member is to be reviewed." ROA.2527; ROA.2530; ROA.2532.

Once a professor became eligible for tenure and promotion, he was to be notified in writing of his eligibility for tenure by no later than May 15th of that year. ROA.2559. The Chair of the Department and the applicant were to meet by no later than July 1st of that year to discuss the application's submitted "dossier" and for the applicant to provide the Chair with a list of five external reviewers, from which the Chair would

select three persons and select two external reviewers from his or her own list. *Id.*

Once the Chair had confirmed the external reviewer's willingness to evaluate the applicant's materials and provide a recommendation, the applicant was to submit his dossier by no later than September 1st of that year. *Id.*

Once the dossier is submitted, the tenured and associate professors meet and vote as to whether the applicant should be granted tenure and promotion respectively. The vote is provided to the Chair of the Department who provides his recommendation. The recommendation of the Chair is passed to the Dean's Advisory Board, who vote on whether the applicant should be granted tenure and promotion. The vote is provided to the Dean of the School of Applied Sciences, who provides his recommendation to the Provost of the University. Following the Dean's recommendation, the dossier is reviewed by the Dean of the Graduate School. ROA.2526-2567. At the same time that the dossier is submitted to the Provost for his review and recommendation, the review process is evaluated by the Tenure and Promotion Review Committee to determine whether appropriate procedures are being followed and that no prior recommendations were arbitrary and capricious, amongst other issues. ROA.2534. The Tenure and Promotion Review Committee's report is submitted to the Provost, who then issues his recommendation. The applicant then has five days from his receipt of the Provost's negative recommendation to file an appeal and request for hearing

before the Tenure and Promotion Appeals Committee, in order to further assess whether the negative recommendations were based on impermissible grounds, including being arbitrary and capricious. ROA.2537. Following a formal hearing, the Tenure and Promotion Appeals Committee's Decision is sent to the Chancellor, who makes his final recommendation.

In accordance with the University, School, and Department Guidelines, Petitioner prepared a dossier which summarized his relevant teaching, service and scholarly activity to demonstrate why he should be granted tenure and promotion. Within his dossier, Petitioner included five years of glowing reviews which confirmed that he had met and exceeded the requirements necessary to be awarded tenure and promotion. ROA.2575-2597; ROA.3094; ROA.3095. The tenured members of the Department of Legal Studies met and voted in favor of the grant of tenure 5 to 2, and in favor of promotion 4 to 2 (one tenured professor was an assistant professor as opposed to an associate).

Despite his clear qualifications for the grant of tenure and promotion and the majority Departmental vote, Defendant Lambert recommended against granting tenure and promotion by applying arbitrary standards and intentionally omitting relevant considerations. ROA.2599-2604. His recommendation was considered by the Dean's Committee who voted 3 to 2 in favor of granting tenure and promotion, and Defendant Burton recommended against the grant of tenure and promotion by applying the same arbitrary standards and

omitting the same relevant information as Defendant Lambert. ROA.2606-2609.

Petitioner's dossier was then passed to Defendant Kiss who recommended against the grant of tenure and promotion by applying the same arbitrary standards and echoing Defendant Lambert and Burton's omission of relevant information. ROA.2611-2612.

Following Defendant Kiss' recommendation, the matter was reviewed by the Tenure and Promotion Review Committee, who explicitly acknowledged that the recommendations of Defendants Lambert, Burton and Kiss were made arbitrarily and capriciously. ROA.2614-2615. Despite the Tenure and Promotion Review Committee's express acknowledgment of arbitrary and capricious recommendations, Defendant Stocks recommended against the grant of tenure and promotion by applying the same arbitrary standards and omitting relevant information as Defendants Lambert, Burton, and Kiss had done. ROA.2617.

Petitioner filed a request for hearing with the Tenure and Promotion Appeals Committee, who held a formal hearing and found that previous recommendations were arbitrary and capricious and had been made on impermissible grounds. ROA.2619-2620. Despite the Tenure and Promotion Appeals Committee's determination that Petitioner's tenure and promotion review process had been performed in an arbitrary and capricious manner, Defendant Jones recommended against tenure and promotion by applying the same arbitrary standards and omitting relevant information as the Defendants who reviewed the dossier before

him. ROA.2622-2623. Defendant Jones then issued a letter on June 17, 2014 informing Petitioner that he would be terminated on May 10, 2015.

PROCEDURAL HISTORY

Immediately following the arbitrary denial of his application for tenure and promotion, Petitioner appropriately exhausted all administrative remedies available to him prior to filing suit in the Northern District of Mississippi on June 11, 2015. Following the commencement of this action, Defendants immediately filed a pre-answer motion to dismiss, which was denied. Discovery was conducted in this matter and Petitioner and each of the five individual Defendants named provided testimony by deposition. Following the completion of discovery, Defendant's motion for summary judgment was denied by the Court. After almost three years of prolonged litigation and unnecessary motion practice, the matter was set for trial on October 23, 2017.

During the trial, evidence was presented which adequately demonstrated that Defendants Kiss, Stocks, and Jones were plainly incompetent and that Defendants Lambert and Burton knowingly deprived Petitioner of a constitutionally protected property interest in a tenure and promotion review free from arbitrary and capricious decision making. Specifically, testimony was presented to demonstrate that Defendant Burton's negative recommendation was the result

of an improper motivation to remove Petitioner from his post, including testimony which demonstrated that Defendant Burton wanted to remove "practitioners" from his Legal Studies Department (*see* ROA.3263-3264; ROA.3424-3426); that he wanted to replace the faculty in the Legal Studies Department (ROA.3448); and that law enforcement professionals were less capable than applicants with minimal real world experience (ROA.3714; ROA.3701-3703).

Testimony was also presented to suggest that Defendant Lambert prepared his negative recommendation in an arbitrary and capricious manner at the behest of Defendant Burton. *See* ROA.3316; ROA.3494-3495; ROA.3424; ROA.3539-3541.[1] Documentary evidence was presented which suggested that Defendant Lambert's recommendation was irrational and motivated by a desire to appease Defendant Burton. *See* recommendations prepared by external reviewers approved by the School of Applied Sciences, ROA.146-158; Petitioner's annual performance reviews, ROA.2575-2597; and his nomination for the Thomas E. Crowe Award (which celebrates and recognizes a professor's meritorious engagement in scholarship, teaching, and service), ROA.1238.

Testimony was presented which demonstrated that Defendant Jones failed to exercise professional judgment and make rational decisions because he was

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[1] Notably, Defendant Lambert did not testify. His deposition testimony suggests this was a strategic decision. *See* ROA.1245; ROA.1249.

too busy to comprehensively review professor's applications before recommending that they be terminated (ROA.3785) and that his basis for rejecting the recommendation of the Tenure and Promotion Appeals Committee was irrational and/or fabricated. ROA.3809-3810.

Further testimony was presented which suggested that each Defendant's repeated description of majority voting results as "split" or "mixed" defied logic. The tenured faculty members of the Department of Legal Studies met to discuss Petitioner's application for tenure and promotion and voted to recommend tenure and promotion by a 5 to 2 and 4 to 2 vote respectively. ROA.2599. Despite the overwhelming majority vote, Defendants Lambert, Burton, and Kiss referred to the Legal Studies Department vote results as "split" in their recommendations. ROA.2599-2612. Further, Defendant Stocks refers to the Legal Studies Department vote as "mixed" in justifying his recommendation. ROA.2617. Based upon the testimony and the evidence provided, it follows that a reasonable juror could conclude that the Defendants failed to exercise professional judgment and simply parroted the claims of the reviewer before him. Finally, each individual Defendant relied upon citation analysis according to Google Scholar in their assessment of his scholarship, without being able to point to the University, School, or Department Guideline which required Petitioner to maintain a favorable Google Scholar citation record. ROA.3415; ROA.3488; ROA.3532; ROA.3191; ROA.3391.

Documentary evidence and testimony was presented which established that the University of Mississippi created two administrative bodies (the Tenure and Promotion Review Committee and the Tenure and Promotion Appeals Committee) for the specific purpose of ensuring that the tenure and promotion review process is free from arbitrary and capricious decision making.

Following a weeklong trial, Defendants' counsel renewed their motion for a directed verdict. Based upon existing Fifth Circuit case law, the Court denied their motion and submitted the matter to the jury.

After considering the evidence presented, the jury found that each individual Defendant had deprived Petitioner of a constitutionally protected property interest in the fair administration of his tenure and promotion review. The jury further found that Petitioner had established through his testimony that he had been caused to suffer damages in the form of pain and suffering and awarded $100,000 for past pain and suffering, and $100,000.00 for future pain and suffering.

Defendants filed a post-trial motion for judgment as a matter of law which argued (despite Petitioner's concurrence that there is no constitutionally protected property interest *in the expectation* of tenure) that Petitioner had no constitutionally protected property interest in the expectation of tenure; that Defendants were entitled to qualified immunity despite the existence of significant case law supporting the Court's

previous denials of their dispositive motions; that the jury was confused by the jury instructions which they essentially crafted; and that there was an insufficient evidentiary basis for an award of pain and suffering damages.

Defendants' motions were denied by the District Court on April 1, 2019. ROA.2741-ROA.2767. Defendants' subsequently appealed and this matter was reversed by decision of the Fifth Circuit on July 1, 2020.

LEGAL BACKGROUND

Qualified Immunity

In 1871, the Legislature enacted the Ku Klux Klan Act (also referred to as the Civil Rights Act of 1871) as part of Reconstruction Era efforts[2] to prevent state officials who sympathized with the Klan from depriving private citizens of liberty or property interests under color of state law.[3] In passing this act, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity,

[2] *See Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) *(*Congress sought to respond to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States") (*quoting Briscoe v. LaHue*, 460 U.S. 325, 337 (1983)).

[3] *See generally* Section 1 of the Ku Klux Klan Act, now codified at 42 U.S.C. § 1983; *see also* Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 CORNELL L. REV. 482, 485 (1982) (citations omitted).

whether they act in accordance with their authority or misuse it." *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974). This Court further acknowledged that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (*quoting Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

Following almost a century of relatively uniform enforcement, the Supreme Court considered what defenses were available to state officials named in Section 1983 actions in *Pierson v. Ray*, 386 U.S. 547 (1967). In *Pierson*, the Court concluded that, because "the defense of good faith and probable cause" applied to "the common-law action for false arrest and imprisonment," it was available as a defense to the Section 1983 suit. *Id.* at 557. Ultimately, the court reasoned that, in enacting Section 1983, Congress did not "abolish wholesale" then-existing "common-law immunities." *Id*. at 554.

In *Scheuer v. Rhodes*, 416 U.S. 232, 245–248 (1974), the Court reasoned that judicial and legislative immunity doctrines formed a basis for the Court to allow immunity for police officers and/or state officials (*id*. at 239 n.4). The Court explained that its decision was driven by "policy consideration[s]," notably the risk that officials may "fail to make decisions when they are needed" or may "not fully and faithfully perform the duties of their offices." *Id*. at 241–242. From there, the

Court concluded that "[t]hese considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government." *Id*. at 247. The Court drew from their opinion in *Pierson* and concluded that "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief." *Id*. at 247–248.

Qualified immunity was fully formed in *Harlow v. Fitzgerald*. 457 U.S. 800, 802 (1982). In that case, the Court clarified that qualified immunity protects state actors "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[4] *Id*. at 818.

Qualified immunity entails a two-step analysis: first, determining whether "the facts that a plaintiff has . . . shown . . . make out a violation of a constitutional right," and second, "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223,

[4] The Court identified intended policy goals relating to litigation against public officials which served as the basis for their interpretation of 42 U.S.C. § 1983, namely: "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. In an attempt to streamline the enforcement of this defense, the Court jettisoned the subjective good faith requirement it had adopted in *Scheuer* and other cases. *Id*. at 816–817.

231 (2009) (*quoting Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

A right is clearly established if "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

However, as this Court made abundantly clear in *Hope v. Pelzer*: "[T]he salient question that the Court of Appeals ought to [ask] is whether the state of the law [at the time of the action giving rise to the claim] gave respondents fair warning that their alleged treatment of [the plaintiff] was unconstitutional." 536 U.S. 730, 739–741 (2002). Further, in the context of the facts presented in *Hope*, the Court elaborated that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.*

The Court has also clearly stated that the absence of analogous precedent does not guarantee immunity for constitutional violations. *See*, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hope v. Pelzer*, 536 U.S. 730, 741, 745–46 (2002); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377–78 (2009); *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019).

This Court originally created a mandatory sequencing standard in which lower courts were

required to first determine whether the defendant violated someone's constitutional rights, and then, if necessary, determine whether those rights were clearly established. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). However, the Court subsequently reversed *Saucier* and held that lower courts have the discretion to grant qualified immunity on the ground that the law was not clearly established without actually deciding the threshold question of whether the law was violated in the first place. 555 U.S. 223, 236 (2009).[5]

Substantive Due Process & State Employment Related Property Interests

With regard to the specific property interest examined by the lower court in this matter, the Fifth Circuit has recognized that "the protections of the Due Process Clause, whether procedural or substantive, only apply to deprivations of constitutionally protected property or liberty interests." *Klingler v. Univ. of S. Miss.*, 612 Fed. Appx. 222, 227 (5th Cir. 2015). "Without such an interest, no right to due process accrues." *DePree v. Saunders*, 588 F.3d 282, 289 (5th Cir. 2009). A successful claim for deprivation of substantive due process requires two showings in the context of public employment: (1) that the plaintiff possessed the aforementioned property interest or right and (2) that the

[5] *See* Stephen R. Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever-Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 MICH. L. REV. 1219 (2015).

public employer's depriving of that interest was arbitrary and capricious. *Stark v. Univ. of S. Miss.*, 8 F. Supp. 3d 825, 841 (S.D. Miss. 2014) (*citing Lewis v. Univ. of Tex. Med. Branch at Galveston*, 665 F.3d 625, 630 (5th Cir. 2011)). This Court has held that in order "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it [or] . . . a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court has also held that a "person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

This Court has acknowledged that an implied contract right precluding arbitrary state interference may qualify as a property interest protected by the Due Process Clause[6] but has also made clear that "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Roth*, 408 U.S. at 577.

The Fifth Circuit has held accordingly, stating that "[c]onstitutionally protected property interests are created and defined by understandings that stem from an independent source such as state law" or contract. *Klingler*, 612 Fed. Appx. at 227; *Martin v. Mem.*

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[6] *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 220–21 (1985).

Hosp. at Gulfport, 130 F.3d 1143, 1147 (5th Cir. 1997). The Fifth Circuit has stated, "[i]n general, we have recognized that a property interest is created where the public entity has acted to confer, or alternatively, has created conditions which infer, the existence of a property interest by abrogating its right to terminate an employee without cause." *Muncy v. City of Dallas, Tex.*, 335 F.3d 394, 398 (5th Cir. 2003). The court noted, "[t]his abrogation may take the form of a statute, rule, handbook, or policy which limits the condition under which the employment may be terminated." *Id.* (*citing Henderson v. Sotelo*, 761 F.2d 1093, 1096 (5th Cir. 1985)). "Ultimately, however, the question of whether a property interest exists is an individualized inquiry which is guided by the specific nature and terms of the particular employment at issue and informed by the substantive parameters of the relevant state law." *Id.*

In Mississippi, "employee manuals become part of the employment contract, creating contract rights to which employers may be held." *Klinger*, 612 Fed. Appx. at 227 (*citing Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 345 (5th Cir. 2006)); *Stark*, 8 F. Supp. 3d at 840. Mississippi courts have held that when an employer "publishes and disseminates to its employees a manual setting forth the proceedings which will be followed in the event of an employee's infraction of rules, and there is nothing in the employment contract to the contrary, then the employer will be required to follow its own manual in disciplining or discharging employees." *Bobbitt v. The Orchard, Ltd.*, 603 So. 2d 356, 357 (Miss. 1992). The substantive component of the Due Process

Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Under Mississippi law, non-tenured employees' "contract rights do constitute enforceable property interests." *Klingler*, 612 Fed. Appx. at 227 (*citing Univ. of Miss. Med. Ctr. v. Hughes*, 765 So. 2d 528, 536 (Miss. 2000)). Finally, the Fifth Circuit has recognized that a plaintiff may have a property interest in a rational application of a university merit-based policy. *Harrington v. Harris*, 118 F.3d 359, 368 (5th Cir. 1997).

Relevant to the instant matter, the Fifth Circuit has recognized that a state employee has a substantive due process right to be free from arbitrary and capricious deprivations of state employment related property interests for well over thirty years. *See Honore v. Douglas*, 833 F.2d 565, 568 (5th Cir. 1987). This well-established principle was built upon five years later, when the Fifth Circuit explicitly recognized that the substantive due process owed to tenure applicants with a property interest is the "exercise of professional judgment in a non-arbitrary and non-capricious fashion." *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992).

Drawing from this Court's opinion in *Roth*, the Fifth Circuit recognized that a public employee may demonstrate a constitutionally protected property interest by showing that it is founded on a "legitimate claim of entitlement based on mutually explicit understandings." *Honore*, 833 F.2d at 568 (*quoting Roth*, 408 U.S. at 577). The existence of such an interest must be

determined by reference to state law. *Muncy v. City of Dallas*, 335 F.3d 394, 398 (5th Cir. 2003).

Finally, the Fifth Circuit has long recognized that "non-tenured employees do not have a legitimate expectation of continued employment; [b]ut their contract rights do constitute enforceable property interests, and employee manuals become part of the employment contract, creating contract rights to which employers may be held." *Klingler v. Univ. of S. Miss.*, 612 Fed. Appx. 222, 228 (5th Cir. 2015) (*citing Whiting v. Univ. of S. Miss.*, 451 F.3d 339, 345 (5th Cir. 2006)) (*citing Robinson v. Bd. of Trs. of E. Cent. Junior Coll.*, 477 So. 2d 1352, 1353 (Miss. 1985)).

BASIS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner's employment agreement with Defendant University incorporated the University, School, and Department Guidelines for Tenure Policies and Procedures which created a contractual property right to a tenure and promotion application process free from arbitrary and capricious decisions.[7] A unanimous jury considered the evidence presented and determined that each individual Defendant deprived Petitioner of that contractual property right to a tenure and promotion application process free from arbitrary and capricious decision making. The Fifth Circuit

[7] *See Whiting v. Univ. of S. Miss.,* 451 F.3d 339 (5th Cir. 2006).

performed their own interpretation of the facts presented and concluded (against the legal backdrop set forth above) that the individual Defendants were entitled to qualified immunity because Petitioner had not demonstrated that the contractual property interest he claimed was clearly established.

Aside and apart from the Fifth Circuit's misapplication of the *de novo* standard applicable to their review of the denial of a motion for judgment notwithstanding the verdict following a unanimous jury verdict, review in this case is warranted because the Fifth Circuit's erroneous requirement of precisely congruent past precedent to defeat qualified immunity conflicts with this Court's opinion in *Hope v. Pelzer* and the emphasis that the focus of the clearly established inquiry should focus on "fair warning" to state officials. Further, the courts' utilization of an overly restrictive "clearly established" analysis has resulted in immunity for state officials who deprived private citizens of a property interest in direct contradiction to Congress' intent in enacting the Civil Rights Act of 1871.

Review of this claim would also allow the Court to provide much needed guidance to each of the circuit courts. As demonstrated by a review of relevant cases, confusion amongst circuit courts over precisely what degree of factual similarity must exist for the law to be clearly established has resulted in qualified immunity's amorphous and unpredictable application nationwide. It is respectfully requested that this Court grant review of the instant matter to issue an opinion which

sets the standard of factual similarity with past precedent required for a right to be clearly established.

ARGUMENT

I. The Fifth Circuit Erred in Determining That Petitioner's Right to be Free from the Arbitrary Deprivation of a State Employment Related Contractual Property Interest was not Clearly Established

It is undisputed that Petitioner and University Defendant entered into an employment agreement. It is undisputed that that employment agreement incorporated University Guidelines for Tenure Policies and Procedures. Finally, it is indisputable that the Fifth Circuit and Mississippi State Courts have recognized that employment agreements may create enforceable property interests. *See Klingler v. Univ. of S. Miss.,* 612 Fed. Appx. 222, 228 (5th Cir. 2015) (*citing Whiting v. Univ. of S. Miss.,* 451 F.3d 339, 345 (5th Cir. 2006)) (*citing Robinson v. Bd. of Trs. of E. Cent. Junior Coll.*, 477 So. 2d 1352, 1353 (Miss. 1985)) (*recognizing that* "contract rights do constitute enforceable property interests, and employee manuals become part of the employment contract, creating contract rights to which employers may be held"). Plainly stated, the Fifth Circuit and the Courts of the State of Mississippi have recognized that a public employer is required to fulfill contractual obligations.

The Fifth Circuit has also recognized that a state employee has a substantive due process right to be free from arbitrary and capricious deprivations of state employment related property interests for well over thirty years. *See Honore v. Douglas*, 833 F.2d 565, 568 (5th Cir. 1987). This principle elaborated upon five years later, when the Fifth Circuit explicitly recognized that the substantive due process owed to tenure applicants with a property interest is the "exercise of professional judgment in a non-arbitrary and non-capricious fashion." *Spuler v. Pickar*, 958 F.2d 103, 107 (1992).

Following their consideration of testimony from nine witnesses and hundreds of pages of documentary evidence, a unanimous jury concluded that each individual Defendant had failed to exercise professional judgment in a non-arbitrary and non-capricious standard and further that they had deprived Petitioner of a constitutionally protected contractual property interest derived from his employment agreement.

In reviewing the District Court's decision to deny Defendants' motion for qualified immunity, the Court notes that the tenure review process is discretionary, and that because it was discretionary, the Defendants were entitled to "the flexibility to grant or deny tenure based on subjective criteria, rather than 'restrict[ing] . . . administrators' discretion by objective criteria and mandatory language.' " *See* 13a. However, their reasoning ignores the jury's finding that each of the individual Defendants had failed to exercise discretion by making decisions which were *literally irrational*.

The Fifth Circuit Court ultimately based their decision to nullify a jury's verdict and overturn the District Court upon their conclusion that the law was not sufficiently clear for every reasonable official at the University of Mississippi to conclude that Petitioner possessed some property interest in the fair administration of the tenure and promotion review process.

In order to do so, the lower Court identified thin distinctions between the instant matter and the cases relied upon by the District Court. However, the distinctions appear to have been made solely to form a basis for granting qualified immunity. They do not appear to have practically considered whether a reasonable official would have known, based upon past precedent, that failing to exercise bare discretion in depriving Petitioner of a fair tenure and promotion review was unlawful.

It is respectfully submitted that a reasonable official at the University of Mississippi, who had reviewed relevant tenure and promotion guidelines and was aware of the existence of the Tenure and Promotion Review Committee and the Tenure and Promotion Appeals Committee, would not have performed the same painstaking analysis in distinguishing the property interest in this claim from the property interests identified in past Fifth Circuit precedent.

While Petitioner relied upon *Honore* to establish that a property interest is created by "legitimate claim of entitlement based on mutually explicit understandings" *(citing* to this Court's Opinion in *Roth*), the Fifth

Circuit noted that *Honore* is distinguishable because it involved an automatic tenure process. While Petitioner relied upon *Spuler* to establish what substantive process was due a non-tenured applicant for tenure and promotion, the Fifth Circuit noted that they did not determine that the plaintiff held a clearly established property interest in that claim.

Next, while Petitioner relied upon *Klingler* to establish that employment contracts may create a clearly-established property right, the Fifth Circuit distinguished that case because they determined that plaintiff had no property interest in "satisfying criteria outlined in his employment handbook."[8]

Most egregiously, the lower court distinguished this claim from *Harrington v. Harris* by pointing out that, despite the fact that they recognized "a property interest in the rational application of the university's merit pay policy," the instant matter differed because *Harris* involved several professors, the arbitrary application of a different university policy, and that their claim of a constitutionally protected property interest in the rational application of a university policy was "stronger" because they were tenured.

In identifying narrow distinctions between the instant matter and past precedent, the Fifth Circuit ignored this Court's direction that the focus of the Court's inquiry should be whether the officials had

[8] Notably, Petitioner had fulfilled his obligations and the *consideration* of his application for tenure was *mandatory*. *See* ROA.1168.

"fair warning" that their actions were unlawful. Instead, the Fifth Circuit bent over backwards to set this case apart from past precedent and nullified a favorable jury verdict to strengthen the availability of qualified immunity for school administrators in the Fifth Circuit.

While the "extraordinary remedy" of a summary reversal of the District Court and the nullification of a jury verdict sets this case apart, recent Fifth Circuit decisions adequately demonstrate that this erroneous "clearly established" inquiry is routinely applied, and more often than not in favor of state officials.[9]

II. The Fifth Circuit's Outlier Approach is Inconsistent with This Court's Guidance and the Plurality of Circuit Courts.

The Fifth Circuit routinely demands an excessive level of "specificity and granularity" in examining whether a constitutional violation is clearly established. *Morrow v. Meachum*, 917 F.3d 870, 874–75 (5th Cir. 2019).

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[9] *See* Chung, A., Hurley, L., Januta, A., Botts, J., & Dowdell, J. (2020, August 25), REUTERS, "*Shielded: Wrong Place, Wrong Time*" (last accessed on November 23, 2020) (available at https://www.reuters.com/investigates/special-report/usa-police-immunity-variations) (Reporting that a review of 529 appellate rulings from 2005 through 2019 demonstrates that the Fifth U.S. Circuit Court of Appeals at New Orleans, granted 64% of police requests for immunity); *see also Kisela v. Hughes*, 138 S. Ct. 1148 (Sotomayor, J., dissenting).

In fact, the Fifth Circuit demonstrated the impractical and inequitable nature of their "clearly established" inquiry in *McCoy v. Alamu*, 950 F.3d 226, 231–32 (5th Cir. 2020). In *McCoy*, the Fifth Circuit concluded that a prison guard employed excessive force in violation of the Fourth Amendment when he pepper-sprayed an inmate "for no reason at all." *McCoy*, 950 F.3d at 231–32. Significantly, the court expressly rejected the guard's argument that a single spray was too insignificant to violate the Constitution, noting that this Court had "rejected that line of reasoning." *Id*. at 232 ("Injury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts." (*alteration in original*)) (*quoting Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010)).

Despite recognizing Fifth Circuit precedent which expressly acknowledged that the Constitution prohibits officers from punching or tasing someone for no reason (*see id*. at 234–35 (Costa, J., dissenting in part)), the court ultimately concluded that the guard was entitled to qualified immunity because no case law specifically held that "an isolated, single use of pepper spray" qualified as excessive force. *Id*. at 233.

This confounding interpretation of "clearly established" is consistently applied in the Fifth Circuit, and often in favor of state officials.[10] *See*, e.g., *Walsh v.*

[10] *See* Chung, A., Hurley, L., Januta, A., Botts, J., & Dowdell, J. (2020, August 25), REUTERS, "*Shielded: Wrong Place, Wrong Time*" (last accessed on November 23, 2020) (available at https://www.reuters.com/investigates/special-report/usa-police-immunity-variations) (Reporting that a review of 529 appellate rulings from

Hodge, 975 F.3d 475 (5th Cir. 2020) (wherein the Fifth Circuit determined that school officials were entitled to qualified immunity despite an acknowledged violation of a terminated professor's due process rights); *McLin v. Ard*, 866 F.3d 682, 696 (5th Cir. 2017); *Cleveland v. Bell*, 938 F.3d 672, 677 (5th Cir. 2019); *Marks v. Hudson*, 933 F.3d 481, 486 (5th Cir. 2019).

Another illustration of the pervasively objectionable nature of the Fifth Circuit's qualified immunity inquiry is observed in their decision in *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019).[11] In that case, a prisoner who presented to a Texas psychiatric unit sought mental health treatment following a suicide attempt, and state corrections officers stripped him naked and left him in a cell which was covered from floor to ceiling in raw sewage for close to one week. During that time period, he could not drink water or eat for fear that the food and water would be contaminated. In determining whether the subject corrections officers were entitled to qualified immunity, the Fifth Circuit determined that a reasonable official would not have known

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2005 through 2019 demonstrates that the Fifth U.S. Circuit Court of Appeals at New Orleans, granted 64% of police requests for immunity); *see also Kisela v. Hughes*, 138 S. Ct. 1148 (Sotomayor, J., dissenting).

[11] The U.S. Supreme Court granted the petition for a writ of certiorari in *Taylor* and instructed that the Fifth Circuit erred in granting the officers qualified immunity on the basis that "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Taylor v. Riojas*, 208 L.Ed.2d 164 (2020) (*citing to Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

that their conduct was unconstitutional because he was only kept in the feces covered cell without access to food or potable water for less than a week. In determining that the plaintiff had not identified a clearly established right, the Court distinguished that claim from previous Eighth Amendment claims which involved longer periods of imprisonment in unsanitary conditions.[12]

Taylor and the instant matter demonstrate that the Fifth Circuit has applied the "clearly established" inquiry in an overly restrictive manner which demands an unnecessary level of factual similarity to past precedent and which renders hollow the protections meant to be afforded by Section 1983. While the plainly stated intent of Section 1983 was to protect the people from unconstitutional action under color of state law, the Fifth Circuit's qualified immunity inquiry runs contrary to that intent by creating a defense which exculpates state officials for misconduct based upon nominal distinctions from past precedent.

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[12] This inquiry presupposes that the officials whose conduct is being reviewed were keen to perform a similarly obtuse analysis of relevant constitutional law as opposed to considering whether every reasonable official had "fair warning" that their conduct was unconstitutional. This hair-splitting approach is distinguishable from this Court's explicit direction in *Hope v. Pelzer*.

III. There is a Split Amongst the Circuit Courts Which Requires This Court to Exercise Its Supervisory Authority and Issue a Clarifying Opinion on the Level of Specificity Required to Determine a Right is Clearly Established.

On a national level, judges and scholars have recognized that qualified immunity's key requirement—that courts determine when a particular act has violated "clearly established" law—is "a mare's nest of complexity and confusion." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?* 62 FLA. L. REV. 851, 852 (2010). The problem is that "courts of appeals are divided over precisely what degree of factual similarity must exist" for the law to be "clearly established." *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante); *see also*, e.g., *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n. 10 (D.N.M. 2018) (expressing similar concern); *Thompson v. Clark*, 2018 WL 3128975, at *12 (E.D.N.Y. June 26, 2018) (noting conflict among Supreme Court decisions on this point); *see generally Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) ("Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established.").

Leading scholars of federal jurisdiction have identified the same problem. *See* Richard Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1047–50 (7th ed. 2015) ("Hart & Wechsler"); Erwin Chemerinsky, *Federal Jurisdiction* 595 (7th ed.

2016); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018).

Confusion amongst the lower courts is understandable given the conflicting nature of this Court's qualified immunity jurisprudence. Significantly, this Court has directed lower courts "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), because immunity cannot be denied unless "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640.

As recognized by the Fifth Circuit, this Court has elaborated that while they "do not require a case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019) (*quoting Ashcroft v. al-Kidd*, 563 U.S. 731 and *Hope v. Pelzer*, 536 U.S. 730). Contradictorily, the requirement that "the facts of previous cases be materially similar" to those at issue in order to overcome immunity has been expressly rejected by this Court. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citation and internal quotation marks omitted). Instead, the lower court's inquiry should focus on whether the officer had "fair warning" that his conduct crosses the constitutional line. *Id.* at 741; *accord Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam). As Dean Chemerinsky has explained, "[t]here is an obvious tension between

Hope v. Pelzer, declaring that there need not be a case on point . . . and the subsequent cases, finding qualified immunity based on the lack of a case on point." Chemerinsky, *supra*, at 595; *see also Morgan v. Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (*acknowledging* conflicting direction *Al-Kidd* and *Hope v. Pelzer*).

The Court's direction has resulted in circuit courts being divided among and within themselves about how to approach the "clearly established" question. While the Fifth Circuit has adopted an outlier approach, a plurality of circuits have taken a more practical approach to determining what satisfies the "clearly established" inquiry. In fact, the plurality of circuits drew directly from this Court's holding in *Hope v. Pelzer*, that "fair notice" to officers can exist absent particular precedent addressing the specific facts of the violation in question. *See*, e.g., *Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2018) (denying qualified immunity although "no other court decisions directly have addressed circumstances like those presented here"); *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017) (declining to require "a case presenting a nearly identical alignment of facts" to deny qualified immunity (citation and internal quotation marks omitted)); *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012) (denying qualified immunity to an officer who used a Taser on "nonviolent, nonfleeing misdemeanant" even though "we had not yet had an opportunity" to address a case involving such facts); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004) (no qualified immunity for school officials who punished a

student for silently raising a fist during daily flag salute; court refused to "distinguish, on constitutional grounds, between a student with his hands in his pockets or at his sides . . . and a student with his hand in the air").

In *Mountain Pure v. Roberts*, 814 F.3d 928 (8th Cir. 2016), the Eighth Circuit Court, even in affirming a finding of qualified immunity, held that courts should use a "flexible standard, requiring some, but not precise factual correspondence with precedent." *Id*. at 932 (quotation omitted). The Eighth Circuit has continued to apply this rule, including to find violations of clearly established law even in the absence of precedent directly on point. In *Z.J. v. Kansas City Bd. of Police Comm'nrs*, 931 F.3d 672 (8th Cir. 2019), the court found the use of flash-bang grenades by a SWAT team to enter a home with unknown occupants so "unreasonable" (*id*. at 683) that it violated clearly established Fourth Amendment law, even absent specific factual similarity from precedent (*id*. at 684, 689). The court applied its rule that "[a]n officer may have fair notice based on the fact his conduct is obviously unlawful, even in the absence of a case addressing the particular violation." *Id*. at 685.

The Third Circuit similarly does "not require a case directly mirroring the facts at hand." *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) (quotation and alteration omitted). Sufficiently analogous—but not identical—precedent may suffice to place officials "'on notice that their conduct violates established law even

in novel factual circumstances.'" *Ibid*. (quoting *Hope*, 536 U.S. at 741).

The Ninth Circuit also does not require "a prior identical action to conclude that the right is clearly established." *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018). So too in the Fourth Circuit, where, "[i]n the absence of 'directly on-point, binding authority,'" courts may also consider whether "the right was clearly established based on general constitutional principles or a consensus of persuasive authority." *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) (*quotation omitted*); *see also Dean v. McKinney*, 976 F.3d 407 (4th Cir. 2020) (*holding* "'[c]learly established' does not mean that 'the very action in question has previously been held unlawful,' but it does require that, 'in the light of pre-existing law the unlawfulness [of the official's conduct] must be apparent.'") (*citations omitted*).

Further, several circuits have adopted a two-track approach wherein some official actions implicate such "obvious" violations of constitutional rights that no degree of factual similarity from precedent is necessary. In *Simon v. City of New York*, 893 F.3d 83 (2d Cir. 2018), for instance, the Second Circuit held that the unlawful detention of a material witness was a violation of clearly established law without "need[ing]" to "decide" whether out-of-circuit authorities "clearly foreshadow[ed]" the decision. *Id*. at 97. "This is one of the uncommon obvious cases," the court found, "in which the unlawfulness of the defendants' conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Ibid*. (citation

omitted; alterations incorporated). The Seventh Circuit also examines whether, "[i]f no existing precedent puts the conduct beyond debate," the defendant's "alleged conduct is so egregious that it is an obvious violation of a constitutional right." *Leiser v. Kloth*, 933 F.3d 696, 702 (7th Cir. 2019). Likewise, the Tenth Circuit applies a "sliding scale" approach such that, the more "obviously egregious" the official conduct in light of "prevailing constitutional principles," the less factual specificity required from precedent. *A.M. v. Holmes*, 830 F.3d 1123, 1135–1136 (10th Cir. 2016).

CONCLUSION

In the instant matter, the District Court determined that Petitioner and Defendant University had entered into a contract which set forth the terms of Petitioner's employment. Further, the District Court determined that the terms of that contract incorporated applicable Tenure and Promotion guidelines which created a contractual property interest in the University's mandatory consideration of Petitioner's tenure and promotion application. Well-established case law in the Fifth Circuit directed that the individually named Defendants were only required to exercise bare professional judgment in their mandatory consideration of Petitioner's application, and the Court left it to the jury to decide whether each individual Defendants' conduct was so deficient as to fall below the low bar of "rationality."

While the Fifth Circuit inappropriately concluded that disingenuously preparing tenure review recommendations was sufficient to meet this low bar, the jury concluded that each individual Defendant had failed to exercise bare discretion in considering Petitioner's tenure and promotion application by making decisions which were literally irrational.

The Fifth Circuit ultimately based their decision to grant the extraordinary remedy of summary reversal of a motion for judgment notwithstanding the verdict upon the fact that there were no prior cases within the Fifth Circuit which shared identical facts with this case. This Court's past precedent however demonstrates that analysis is inappropriate and inconsistent with Congress' intent in creating a cause of action for civil damages against state officials who deprive a citizen of a property interest under color of state law. Further, a review of relevant case law throughout the circuit courts demonstrate that their analysis is inconsistent with the plurality of the circuit courts' approach.

The Fifth Circuit's continued impractical application of qualified immunity and the split amongst (and within) the circuits require this Court to issue an opinion which clearly sets forth the level of factual similarity with past precedent required to defeat

qualified immunity. Accordingly, it is respectfully requested that review be granted in this matter.

Respectfully submitted,

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