

No. _____

In the
Supreme Court of the United States

WAYNE A. JONES, ED.D.,
Petitioner,
v.

VIRGINIA STATE UNIVERSITY;
MAKOLA M. ABDULLAH, PH.D.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a non-tenured, but tenure-eligible, professor at a public university has a minimal property interest in a fair tenure review process under the Fourteenth Amendment to the United States Constitution, as has been recognized by the Sixth Circuit in *Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996).

PARTIES TO THE PROCEEDINGS

Petitioner is Wayne A. Jones, Ed.D. (“Dr. Jones”). Respondents are Virginia State University (“VSU”) and is Makola M. Abdullah, Ph.D (“Dr. Abdullah”).

STATEMENT OF RELATED PROCEEDINGS

- *Jones v. Virginia State University, et al.*, 20-1522 (4th Cir.) (opinion issued and judgment entered on February 4, 2021).
- *Jones v. Virginia State University, et al.*; 3:19cv467 (E.D. Va.) (order granting motion to dismiss on April 6, 2020).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wayne A. Jones Ed.D respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's decision is unpublished but is reproduced App at 1-2. The District Court's final order granting Respondents' motion to dismiss under Fed.R.Civ.P. 12 is unreported and is reproduced at App. at 16-17. And the District Court's opinion supporting its dismissal order is unreported and is reproduced at App. at 3-15.

JURISDICTION

The Fourth Circuit entered its opinion and judgment order on February 4, 2021. This Petition is timely filed within timely filed within 150¹ days of this denial, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in relevant part,

¹ This time period is the extended period set by this Court due to COVID-19.

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV.

STATEMENT OF THE CASE

This case involves Dr. Jones' Section 1983² claim for wrongful denial of tenure. Unlike similar such cases, this case does not involve the thorny and often subjective questions of academic judgment. Instead, it is purely about process – namely, the failure of Dr. Abdullah to constitutionally process Dr. Jones' application for tenure. We submit that Dr. Abdullah, the President of VSU and an individual defendant, was required under Section 1983 to provide Dr. Jones with a fair tenure and impartial review process. But he did not. To the contrary, he said Dr. Jones' application for tenure was untimely, even though at exactly the same time, VSU had twice indicated that Dr. Jones was eligible to apply for tenure under its tenure process. The following summary sets forth the facts related to these events, together with the facts related to his lawsuit and the District Court's decision to grant Respondents' motion to dismiss.

² "Section 1983" refers to 42 U.S.C. § 1983.

A. Statement Of Facts Relevant To The Issues.

At all relevant times from 2004 through September 1, 2018, Dr. Jones was a full-time employee of VSU. JA17.³

At no point during his entire period of employment was Dr. Jones ever an at-will employee at the University. *Id.* at JA17-18. Instead, Dr. Jones at all times worked pursuant to written contracts with defined periods of employment. *Id.* at 18.

Dr. Jones began his VSU employment in 2004 as an Assistant Professor in the Department of Political Science and Public Administration. *Id.* He had an office in Colson Hall. *Id.*

At that particular time, Dr. Jones was employed pursuant to a “restricted appointment” contract which stated in part: “Notwithstanding any representations to the contrary, this appointment will not be extended or renewed.” *Id.* Even so, VSU renewed Dr. Jones’ “restricted application” employment twice, once in 2005 and again in 2006. *Id.*

In 2007, Dr. Jones became employed in a tenure track position at VSU. *Id.* As before, he worked an Assistant Professor in the Department of Political Science and Public Administration. *Id.*

In 2010, Dr. Jones applied for tenure. *Id.* He did so, based on his belief that his pre-VSU employment in higher education satisfied the “years of service” requirement for tenure. *Id.* His application was

³ “JA” refers to the Joint Appendix filed in the Fourth Circuit.

rejected, however, as premature. *Id.* According to the P&T Committee⁴, Dr. Jones' pre-VSU employment did not count for purposes of qualifying him to apply for tenure. *Id.*

In 2010, at the request of Weldon Hill, Ph.D. ("Dr. Hill"), the Provost of VSU, Dr. Jones became employed at VSU as the Coordinator of Individualized Studies. *Id.*

Unlike his prior employment, Dr. Jones' position was under the auspices of the Office of Continuing Education and Individualized Studies. *Id.* Dr. Jones, in turn, moved his office out of Colson Hall to 4th Avenue. *Id.* at 19. In this position, Dr. Jones' primary job was to oversee VSU's Bachelor of Individualized Studies ("BIS") program. *Id.*

Dr. Jones remained the Coordinator of Individualized Studies for two years, from 2010 to 2012. *Id.* Then, for the 2012-2013 academic year, Dr. Hill "place[d]" Dr. Jones in a full-time tenure track position with "3 years counted toward Promotion/Tenure." *Id.*

The meaning of this designation, however, was unclear. *Id.* Did it mean, for example, that Dr. Jones was considered to be in his fourth year of teaching as of the 2013-2014 academic year? *Id.* Or did it mean that Dr. Jones had three years counted to tenure, *plus* the years he had already worked at VSU (2007, 2008; 2008-2009), which meant that Dr. Jones was in his sixth year of teaching at VSU as of 2013-2014? (which means he would have been *de facto* *ineligible* for tenure the minute

⁴ "P&T Committee" refers to VSU's Promotion & Tenure Committee.

he started teaching that year). *Id.* Or, more realistically (and as VSU itself initially believed), did it mean that Dr. Jones' completion of the 2012-2013 year would *start* his third year of credit, which means that his 2013-2014 year would be his third year of teaching at VSU? *Id.*

In any event, from 2012 through 2016, Dr. Jones worked continuously at VSU and at no point from 2013 through early 2016 did VSU ever tell Dr. Jones that he was eligible to apply for tenure. *Id.*

This silence is significant, because VSU has an obligation under its own rules and policies to notify those members of its faculty who are eligible for tenure *at the time* they are so eligible. *Id.*

This notice, in turn, lets faculty members make a knowledgeable and informed choice about whether they want to seek tenure. *Id.*

Relevant here, the VSU document titled “Timetable for Promotion/Tenure Review Process 2016-2017 Academic Year” states the following:

“Office of the Provost reviews the ***Certification of Tenure Track/Tenure Eligibility Status Form*** and releases to Academic Deans a ***list of faculty eligible to apply for tenure. Academic Deans send written notification to each eligible faculty member and provide a copy to the faculty member’s chair.***”

(emphasis added). *Id.* at 19-20.

Also according to this document (which is identical to the “Timetable for Promotion and Tenure” section of the

VSU Faculty Handbook), this review is supposed to occur between April 1 and May 1 of the applicable calendar year. *Id.* at 20.

On information and belief, the guidelines set forth in this particular timetable document are identical to those that were set forth and utilized in both the 2013-2014 and 2014-2015 academic years. *Id.*

Pursuant to the above timetable, during Spring Break 2016, Dr. Andrew Kanu, the Dean of the College of Humanities and Social Sciences (the VSU college in which Dr. Jones worked), came looking for two professors in his college: a Dr. Brown and Dr. Jones. *Id.* Although he did not locate either of the professors in person, Dr. Kanu told their secretary to tell them to apply for promotion and tenure. *Id.*

Upon information and belief, Dr. Kanu took these actions because both Dr. Jones and Dr. Brown were listed on the “Certification of Tenure Track/Tenure Eligibility Status Form” that he had just received as faculty who were eligible to apply for tenure. *Id.*

Also upon information and belief, Dr. Jones had ***never before*** been listed on any prior “Certification of Tenure Track/Tenure Eligibility Status Form” documents. *Id.*

In other words, Dr. Jones’ inclusion on the 2016 document was the ***first time*** VSU identified him as eligible for tenure and, as well, the ***first time*** it ever notified him of such eligibility. *Id.*

The following week, Dr. Jones met with his Chair, Gary Baker, to discuss the message from the Dean and

to determine whether it was time to apply. Baker said to follow the Dean’s instructions. *Id.* at 21.

Dr. Jones did so and prepared his tenure dossier over the next few months. *Id.* He submitted it in September 2016. *Id.* According to VSU’s timeline in its “Timetable for Promotion and Tenure” in its Faculty Handbook, this application was due on September 1, 2016, a deadline with which Dr. Jones complied. *Id.*

At this stage, according to the “Timetable for Promotion and Tenure” section of the Faculty Handbook, the Department Chair is supposed to “**confirm**” the candidate’s **eligibility** and consult with the candidate regarding the completeness of the application.” *Id.* Upon information and belief, Dr. Jones’s Department Chair complied with this directive and did indeed confirm his eligibility for tenure. *Id.*

Next, after reviewing his tenure dossier, Dr. Jones’ Department Committee recommended him for tenure on December 2, 2016. His Department Chair, Mr. Baker, likewise did so on December 2, 2016. *Id.*

Finally, on January 4, 2017. Dr. Jones’ Dean, Dean Kanu, recommended that Dr. Jones be granted tenure. *Id.*

In short, by early January 2017, everything was in place for a substantive consideration of Dr. Jones’ tenure application, which had been unanimously endorsed by those who supervised him and those who worked with him. *Id.* Moreover, at least twice during the review process, VSU, through the Office of the Provost and through Dr. Jones’ Chair, had deemed him eligible to apply for tenure. *Id.* **At no point prior to March 7,**

2017 did anyone at VSU ever tell Dr. Jones that he was not eligible to apply for tenure because of submitting an allegedly late application. *Id.* at 21-22 (emphasis in original).

Unfortunately, on March 7, 2017, Dr. Jones received a letter from VSU’s Provost, Dr. Palm, telling him that his tenure application had been denied as untimely. *Id.* at 22. According to Dr. Palm’s letter, Dr. Jones should have applied in either the 2013-2014 or 2014-2015 academic years. *Id.* It said nothing, however, about the fact that VSU did not notify Dr. Jones of such eligibility in either of those years and, instead, for the first time, made such notification in the Spring of 2016. *Id.*

Dr. Jones timely appealed the decision set forth in Dr. Palm’s letter, but his appeal was denied by Memo dated May 22, 2017. *Id.* The memo largely echoed Dr. Palm’s initial letter. *Id.* It also conspicuously omitted any reference to the timetable and notice requirements applicable to VSU’s eligibility actions. *Id.*

Soon thereafter, Dr. Abdullah, the President of VSU, affirmed the May 22, 2017 decision. *Id.* As with all other communications, Dr. Abdullah made no mention of VSU’s timetable and notice requirements for tenure eligibility. *Id.*

Also, at no point during Dr. Jones’ *entire* period of employment with VSU did the University provide Dr. Jones with a “third year review,” as required under the terms of VSU’s Promotion and Tenure Review Process. *Id.* See VSU Faculty Handbook, Section 2.6. According to the Handbook, “[t]he particular focus of this [third year] review is the faculty member’s *progress* toward

achieving tenure, and therefore must *specifically address the criteria for tenure.*" (emphasis added). *Id.*

In other words, at no point did VSU ever identify for Dr. Jones *when* his third year of eligibility was so that he could know when his eligibility "clock" would finally expire. *Id.* at 23. To the contrary, the absence of a third-year review to discuss Dr. Jones' "progress toward tenure" left him unaware as to what the University believed to be the proper timetable for his tenure eligibility. *Id.*

After believing he had no other options left, Dr. Jones sent a final appeal letter to Dr. Abdullah in October 2017 regarding the tenure eligibility decision. *Id.* He took this action because the VSU Faculty Handbook provides one last appeal to the President if all other avenues of appeal have been unsuccessful. *Id.* To date, however, Dr. Jones has received no response to his letter. *Id.*

As a result of Dr. Abdullah's and VSU's decisions about Dr. Jones' tenure eligibility, Dr. Jones was given a terminal contract for the 2017-2018 academic year and his employment was terminated effective September 1, 2018. *Id.*

Dr. Jones was shocked that his application for tenure was denied without a substantive review of his application. *Id.* Indeed, based on VSU's recent practices in awarding tenure, Dr. Jones had a reasonable expectation to the effect that if his application had been reviewed on the merits, he would have been granted tenure. Specifically, in 2009, VSU granted tenure to at least nine (9) professors; in 2010; VSU granted tenure to

at least three (3) professors; in 2011, VSU granted tenure to at least three (3) professors; in 2012, VSU granted tenure to at least four (4) professors; in 2013, VSU granted tenure to at least four (4) professors; in 2014, VSU granted tenure to at least one (1) professor; and in 2016, VSU granted tenure to at least one (1) professor. *Id.* at 23-24. In total, then, between 2009 and 2016 (the year before Dr. Jones applied for tenure), VSU has awarded tenure to at least twenty-five professors (25) at the University. *Id.* at 24.

Out of the at least 25 professors who have been awarded tenure between 2009 and 2016, Dr. Jones compares more favorably – from an objective standpoint – to at least two. *Id.* As such, based on VSU’s past practices with regard to awarding tenure, it was more likely than not that Dr. Jones would have been awarded tenure if his application had been allowed to proceed on the merits. *Id.* Indeed, Dr. Jones is not aware of any VSU professors (i) who have been recommended for tenure by both their Department and their School and (iii) whose applications have been considered on the merits who have not been granted tenure at the University. *Id.*

B. The Underlying Litigation.

Following his denial of tenure – and subsequent termination – by VSU, Dr. Jones filed a Section 1983 lawsuit in the Eastern District of Virginia against both VSU and Dr. Abdullah. JA2; 4-12. In his Complaint, Dr. Jones raised one claim – a procedural due process claim – and as part of that claim, he specifically alleged that “[a]s a tenure-eligible professor at VSU, [he] had a minimal property interest in applying for tenure and

had a due process right under the U.S. Constitution to receive a fair review tenure as to his application for tenure.” *Id.* at 10, ¶ 33.

Respondents moved to dismiss, raising various arguments in support. *Id.* at 2, 13-14. The District Court did not address that motion, however, because Dr. Jones filed his FAC, which included additional factual allegations. *Id.* at 2. As before, however, Dr. Jones expressly alleged in his due process claim that “[a]s a tenure-eligible professor at VSU, [he] had a minimal property interest in applying for tenure and had a due process right under the U.S. Constitution to receive a fair review tenure as to his application for tenure.” *Id.* at 24.

Respondents again moved to dismiss. *Id.* at 28-29. This time, the District Court *did* address the motion and granted it. *Id.* at 58.

The basis for the District Court’s dismissal was its belief that Dr. Jones did not “allege a deprivation of a protected property interest.” *Id.* at 57. Relying on an unpublished decision from the Fourth Circuit (*Davis v. Rao*, 583 F. App’x 113 (4th Cir. Sept. 5, 2014) (per curiam)), a district court decision, and *dicta* from the Fourth Circuit’s decision in *Siu v. Johnson*, 748 F.2d 238 (4th Cir. 1984), the District Court explained that:

- “Jones does not have a protected property interest in the tenure review process;”
- “[t]enure review procedures, without more, do not give rise to a protected property interest;”

- “VSU’s alleged failure to follow its tenure review process does not give rise to a cognizable due process claim;” and
- “Jones does not plead facts showing that a common law right to tenure exists”

JA56-57 (internal quotations and citations omitted).

Believing that the District Court’s ruling was wrong, Dr. Jones appealed to the Fourth Circuit. *Id* at 69-60. The Court of Appeals, however, summarily affirmed the District Court’s decision. In a two-page unpublished per curiam opinion, the Fourth Circuit affirmed “for the reasons stated by the district court.” App at 2.

This Petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents An Important Question Of Federal Constitutional Law On Which There Is A Conflict Between Circuit Courts.

This case presents an important question of Constitutional law: does a non-tenured, but tenure-eligible, professor at a public university have a minimal property interest in a fair tenure review process. The Sixth Circuit has expressly answered this question “yes.” *Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996). But, in affirming the District Court’s dismissal decision on this issue, the Fourth Circuit said “no.” A clear conflict between circuit courts exists on this important issue, and guidance from this Court is critical.

The District Court’s decision below is legally incompatible with this Court’s decision in *Perry v. Sindermann*, 408 U.S. 593 (1972). There, in remanding the plaintiff’s claim back to the lower court, this Court held that he had “alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment” sufficient to defeat summary judgment. *Perry*, 408 U.S. at 602. These rules and understandings included guidelines from the Texas College and University System and allegations about a “de facto tenure program,” *Id.* at 600.

A. *Purisch v. Tennessee Technological Univ.*

Twenty-four years after *Perry*, the Sixth Circuit, in *Purisch v. Tennessee Technological Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996), relied on these very same

sentiments and expressly recognized that a Tennessee Tech professor eligible for tenure consideration had “some minimal property interest in a fair tenure review process” for purposes of his procedural due process claim under Section 1983. It held that the university had “clearly promulgated rules and fostered mutual understandings regarding entitlement to a merit-based tenure review,” and thus it “may not deny a candidate tenure without some degree of impartial inquiry into his or her qualifications.” *Id.*

Purisch has been widely followed throughout the Sixth Circuit. *See, e.g., Weeks v. Kentucky State Univ.*, 468 Fed. Appx. 515, 521 (6th Cir. 2012) (holding that nontenured professor at Kentucky State University had minimal property interest in a fair tenure review process); *Ragozzine v. Youngstown State Univ.*, 2 F. Supp.3d 1051, 1070 (N.D. Ohio 2014) (applying *Purisch* and *Weeks* to tenure-eligible educator at Youngstown State University in Youngstown, Ohio); *Saha v. Ohio State Univ.*, 2007 WL 9760443 at *8 (S.D. Ohio Feb. 1, 2007) (applying *Purisch* to tenure eligible educator at Ohio State University). *Cf. Wysocki v. UNLV*, 2008 WL 11452341 at *2 (D. Nev. Sept. 25, 2008) (denying Rule 12(b)(6) where record was incomplete as to whether the tenure applicant had a minimum due process property right for purposes of his procedural due process claim) (applying pre-*Twombly* standard of review).⁵

⁵ A similar analysis has been followed by West Virginia. *See, e.g., State ex. Rel. McLendon v. Morton*, 249 S.E.2d 919, 925-27 (W.Va. 1978) (holding that professor had right to minimal due process in tenure review).

Purisch's analysis also makes sense. It is well established that once a public university professor reaches the top of the tenure mountain (i.e., he obtains tenure), he has a property interest worthy of constitutional protections. But in seeking to actually *ascend* that mountain, many courts, including the District Court below, say he does not. This is illogical. Why should the effort to attain tenure receive less – or even no – constitutional protection than the effort to keep it? The answer is it should not. At the very least, it should receive *minimal* constitutional protection and should be reviewed to ensure an impartial process.

The failure of both the District Court and the Fourth Circuit to follow *Purisch* was outcome determinative. Indeed, if the District Court and the Fourth Circuit had followed *Purisch*⁶, they would have had no choice but to conclude that Dr. Jones, on the facts alleged in his amended complaint, *did possess* a minimal property interest in a fair tenure review process at VSU. As is plausibly clear from the documents that Respondents submitted to the District Court (at JA42-46; pages of the VSU Faculty Handbook), VSU has established policies, regulations, and mutual understandings that create the “entitlement to a merit-based tenure review.” *Purisch*, 76 F.2d at 1423. Thus, *at the motion to dismiss stage of the case*, Dr. Jones stated facts that plausibly showed his minimal property interest. Since this was the only basis upon which the District Court dismissed his Section

⁶ Indeed, even though Dr. Jones directly raised the holding of *Purisch* in his opposition to Respondents' motion to dismiss, the District Court conspicuously failed to mention it, much less address it, in its dismissal opinion. *See, e.g.*, JA48-57.

1983 claim, Dr. Jones should have been permitted to proceed forward.

B. Conflicting Fourth Circuit Jurisprudence.

In direct conflict with *Purisch*, the Fourth Circuit's jurisprudence has clearly signaled over the years that there is no such minimal property interest for non-tenured, but tenure-eligible, public professors. See, e.g., *Davis v. Rao*, 583 F. App'x 113 (4th Cir. Sept. 5, 2014); *Siu v. Johnson*, 748 F.2d 238 (4th Cir. 1984); *Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981). None of these cases, however, align with *Perry*. Moreover, no case in the Fourth Circuit – district or appellate – has ever examined the property interest question of non-tenured public professors in light of the analysis provided by *Purisch*. Nor has any case even cited or discussed *Purisch*. In other words, neither the Court or Appeals nor any of its lower courts have ever tried to address the arguments that Dr. Jones raised.

II. This Case Is An Excellent Vehicle To Resolve The Question Presented.

This case presents an excellent vehicle through which to resolve the circuit conflict between the Fourth and the Sixth Circuits. It raises a purely legal issue, and it has squarely placed the property interest issue before both the District Court and the Fourth Circuit.

CONCLUSION

In conclusion, for all the reasons stated herein, the petition should be granted, the Fourth Circuit's decision affirming the dismissal of Dr. Jones' amended complaint should be vacated, and the case should be remanded to allow Dr. Jones to proceed in the District Court.

Respectfully submitted,

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