No. 22-654

IN THE
SUPREME COURT OF THE UNITED STATES

KOLA HASANAJ,

Petitioner,

v.

DETROIT PUBLIC SCHOOLS COMMUNITY DISTRICT; STEVEN RHODES; CASSANDRA WASHINGTON; CINDY LANG; BRENDA CARETHERS; LAURI WASHINGTON,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Petition for a Writ of Certiorari ("Petition") explained how the Sixth Circuit's decision, if allowed to stand, allows incompetent and corrupt school districts to defy education-reform laws adopted pursuant to No Child Left Behind (NCLB) and similar legislation. It allows a school district who is not complying with those acts, such as Respondents, to arbitrarily remove teachers from the profession through selective application of teacher-tenure laws, in order to, as the dissenting Honorable Bernice Bouie Donald below writes, "insulate itself from its violative conduct." Dissenting Op., App. 31a.

Respondents avoid these urgent issues in their Opposition. They hide behind isolated quotes from cases recited from rote, but the principles of those cases do not apply to *the specific facts of this case, on which Respondents say nothing and can say nothing*.

Mr. Hasanaj was a devoted and highly-qualified veteran teacher. He taught as a full-time regular teacher in his home country of Montenegro for three years before fleeing the country because he is Christian. After immigrating, he started teaching in DPSCD in 1998 as a substitute teacher. He earned his teaching certificate in 2006 and attained Michigan's "Professional Teaching Certificate" (which requires extra education, extensive professional development, and years of positive evaluations) in 2012. First Amended Complaint ("FAC") ¶¶22-25, App. 73a-74a. He was a highly-qualified teacher in bilingual education and English whom students respected and looked up to; a failing school district like DPSCD should have valued, supported, and elevated him.

But DPSCD ("the District") illegally assigned him to teach outside his subject area, viewed him as a

"spare body" (FAC ¶37, App. 77a), told him to find lesson plans for science—which he was uncertified to teach—"on Google" (FAC ¶43, App. 78a), and fraudulently "evaluated" him as "Ineffective" while he was on extended FMLA leave. Every act that violated the law and harmed children's education was Respondents'. After Mr. Hasanaj filed a formal complaint about an administrator and went on FMLA leave, Respondents started to consistently rate him as "Ineffective." FAC ¶¶32-35 (App. 76a-77a). Now that Respondents have removed him from teaching, they say he should have no forum to challenge their acts because he is not tenured. This, after he had taught for 18 years and received positive evaluations, been made to believe that he was tenured, and relied on that belief to stay in the District and continue to be defrauded out of his right to tenure. The only reason he is not tenured is because Respondents illegally assigned him to teach outside his certified subject area.

The point of Teacher Tenure Laws is to create clear expectations on what rights a teacher has and does not have, incentivize good teaching, and prevent arbitrary dismissals of excellent teachers. If Mr. Hasanaj had known that he actually was not tenured and that the District would continue to mis-assign him outside his certification area (and prevent him from attaining tenure), he would have chosen to leave the District or fought to ensure that he was properly assigned. What happened instead was that Respondents benefited from his loyalty, and they now say they have no obligation to treat him fairly while removing him from teaching and depriving him of the benefit of his teaching certificate. Respondents claim that it is the purview of the State of Michigan to speak on the teacher tenure law. But States may not violate

federally-protected rights, Respondents seek to deny Petitioner a forum *anywhere*, and the Michigan Legislature already spoke by passing the laws that Respondents are unambiguously violating.

Petitioner shall rebut Respondents' arguments in order.

I. Respondents cite no case, because they cannot, where a teacher reasonably relied on the belief he or she was tenured, the employer promoted that belief, and the teacher was punished for relying on that belief.

Respondents cite cases that have no relevance to this one.

They offer *Ryan v. Aurora City Board of Education*, 540 F.2d 222 (6th Cir. 1976) for the homily that a non-tenured teacher has "no expectancy" of continued employment "where there exists a statutory tenure system." (Respondents' Brief, p. 5) They ignore the fact that the teachers in *Ryan* knew that they were nontenured, making *Ryan* irrelevant to this case. Respondents also unwittingly cite the criteria for becoming tenured in Michigan, which include being "rated as highly effective on 3 consecutive annual year-end performance evaluations." *Id*., p. 5-6. Thus, the teacher-tenure statute relies on the teacher-evaluation law Section 1249 being properly administered; and the teacher-evaluation law is incorporated into Michigan's teacher-tenure statute. App. 58a-64a. The court below concedes that "Michigan's teacher evaluation requirements and procedures only apply to teachers assigned to teach a subject endorsed on their teaching certificate. App. 5a-6a (citing Mich. Comp. Laws. §§380.1249, 38.83a).

As explained in the Petition, this case is on all fours with *Soni v. Board of Trustees*, 513 F.2d 347 (6th Cir. 1975). Respondents attempt to distinguish from *Soni* by observing that the state law limiting tenure to U.S. citizens when the university promised Dr. Soni he would later receive tenure, no longer prevented him from getting tenure after he became a U.S. citizen. (Respondents' Brief, p. 6-7) But Dr. Soni's property interest existed as soon as the university's relevant acts took place, *before* he acquired U.S. citizenship. Dr. Soni knew he could attain tenure, not yet *but at a future time*. Mr. Hasanaj has a stronger case than Dr. Soni: the Detroit school officials made Mr. Hasanaj believe that he *already* had tenure, while simultaneously preventing him from gaining tenure by illegally assigning him outside his subject area.

II. "We did not get caught" is not a defense to assigning Petitioner outside his subject area.

In their brief, Respondents argue that they did not commit a crime under MCL §388.1763(6) (App. 58a-59a) because the State of Michigan did not first notify them that they were obviously breaking the law by assigning Petitioner outside his subject area. (Respondents' Brief, p. 7) The onus is not on the State of Michigan to track teacher assignments in districts across the state; it is on the agency responsible for assignments—the Respondents themselves—to make sure that they comply with the statute.

Respondents' argument is not a defense: the criminal penalty for assigning teachers outside their subject area law still shapes the parties' expectations, and Mr. Hasanaj had every right to expect not to be mis-assigned and punished for the Respondents' illegal acts.

Respondents' brief underscores their fundamental position: that they do not have to follow the law.

III. Respondents' argument "this is for state courts to decide" is a disingenuous ruse to allow them to continue to defy Michigan law in state *and* federal courts.

Respondents argue that their acts under Michigan's teacher-tenure law should be reviewed in state courts instead of federal courts. (Respondents' Brief, p. 7)

First, if a teacher-tenure law violates Federal rights, then the Federal courts must intervene. No State can violate Federal rights.

Second, Respondents' position is also that no *Michigan* body can review their termination of Petitioner because he does not have tenure. Respondents, after telling him to appeal his termination to the State Teacher *Tenure* Commission and stipulating that he was tenured (FAC ¶¶54, 62, App. 80a-82a), supported the Commission's dismissal of Petitioner's case on the basis that he was not tenured. Respondents now argue: "Hasanaj… *was an at-will employee* and thus lacked a protected property interest in his job." Respondents' Brief, p. 6 (citation omitted). Now that they are made to answer in Federal Court, they say he must bring his case to a Michigan court, where they would again try to deny him a forum based on their claim that he is not tenured. Respondents' position is that Petitioner shall have *no forum* (1) to challenge his termination or (2) to ensure that the Teacher Tenure Act and the teacher-evaluation statute it incorporates are actually followed.

Third, *it is Petitioner who is trying to implement Michigan's Teacher Tenure Act*. In contrast to Respondents, who want the prerogative to pick and choose which Michigan laws they will follow, Mr. Hasanaj wants the entirety of Michigan's Teacher Tenure Act to be implemented, to (1) require teachers be assigned to their certified subject area, (2) award teacher tenure in accord with the Legislature's mandated statewide teacher-evaluation system in Section 1249, and (3) provide professional development and support to teachers through the teacher-evaluation system.

IV. Respondents ignore Petitioner's case law establishing that "mandatory language" creates Property rights.

Respondents ignore the line of cases from the Petition establishing that procedures stated in "mandatory language" that limit the discretion of government officials can create constitutionally-protected property rights. (Petition, p. 12-17)

Respondents mischaracterize Plaintiff's property claim as one to the procedure itself, and not for the expectations created by such procedures. Respondents rely on *Richardson v. Twp. of Brady*, 218 F.3d 508 (6th Cir. 2000), which they quote to say that a plaintiff "can have no protected property interest in the procedure itself." *Richardson* simply stated that a plaintiff who had proposed an amendment to a county ordinance and was assured by members of the city commission that they would adopt it, did not have an expectation *in his proposed amendment* that is protected under the Due Process Clause. *Id*. at 517. Here, Plaintiff seeks no change to a law and merely wants his rights established by it to be enforced. The dissent below answered Respondents' argument: "[T]he District's

noncompliance with the statute itself is not the protected property interest; it is but another factor to consider when weighing whether Hasanaj possessed a protected property interest in his continued employment." *See* Dissenting Op., App. 35a-36a. Respondents' violation of the Teacher Tenure Act and the teacher-evaluation law it incorporates violated Petitioner's expectation in continued employment established by those procedures.

Respondents also cite *Ryan*, which *supports* Petitioner. In *Ryan*, the school board had regulations requiring that it state reasons for not renewing nontenured teachers for another year. Respondents read *Ryan* to say that teachers don't have a "property right" in such procedural protections. But the actual holding in *Ryan* is that the school board's *procedure departed from the state's teacher tenure act*. Ohio's tenure act in 1973 gave school boards *discretion* to decide whether a probationary teacher who completed his probationary period would be retained as a tenured teacher. The school board could not place a limit on its own discretion. *Ryan* held that *the state legislature's tenure law would be followed:*

> A school board may not limit its exercise of its admitted statutory power under section 3319.11 not to re-employ a teacher on limited contract, by self-imposing a requirement that it give rewritten reasons for nonrenewal… Patently no board of education has the authority or power to enlarge the limits of teacher tenure beyond those limits."

Id. at 229. In contrast, Michigan's Teacher Tenure Law takes tenure out of the hands of DPSCD and

mandates that tenure be earned *via the Legislature's teacher-evaluation law*. Ohio in 1973 had no mandatory teacher evaluation system and left decisions up to local school boards. *Ryan* supports Petitioner because it holds that a State Legislature's teacher tenure act must be followed.

V. Respondents' authorities do not permit the complete loss of the benefit of one's teacher's certificate that Petitioner has suffered.

Respondents find no authority that counters the commonsense proposition that completely depriving the benefit of one's teaching certificate must be done with Due Process. Respondents (and the lower court) must engage in contortions of logic, such as their claim that MCL §380.1249(2)(j), which requires that every Michigan school district terminate Petitioner, "says nothing about future employment" (Respondents' Brief, p. 10.)

The one case Respondents cite is *Med Corp. v. City of Lima*, 296 F.3d 404 (6th Cir. 2002). Its summary of *Med Corp.* shows that it supports Petitioner. The plaintiff in *Med Corp.* was an ambulance company that held a license from the City of Lima to provide emergency ambulance services in that city. When Lima stopped directing 911 calls to it, Med Corp. was not deprived of the benefit of its ambulance license *because it still could use its license to contract with other agencies in the City, including hospitals:* "The record contains no evidence to show that 911 dispatches constitute all, or even the majority of, Med Corp.'s business." *Id.* at 413. *Med Corp*. also involved a suspension of city dispatches for only one week. *Id.* The Sixth Circuit acknowledges that, had Med Corp.'s license had been rendered

"valueless," then it would have been a property deprivation: " '[a]ctions taken by the State which destroy the value or utility of a protected property interest constitute a Fourteenth Amendment deprivation of that interest,' even though the state does not formally deprive the owner of title to the property." *Id.* at 412. The deprivation in *Med Corp.* was partial and for one week, while Petitioner's deprivation is complete and permanent.

Stidham v. Peace Officers Standards & Training, 265 F.3d 1144 (10th Cir. 2001), also supports Petitioner and has weaker facts than Petitioner. *Stidham* involved a police officer who did not have his policing license formally revoked. He was unable to find employment with another department because the department that had terminated him conveyed allegations about him that he had no opportunity to answer and which were disseminated by the state's police-officer licensing authority. *Stidham*, 265 F.3d at 1149. These allegations of misconduct effectively "destroy[ed] the value or utility" of the plaintiff's license and violated his Property interest. *Id.* at 1153.

Also pertinent is *Greene v. McElroy*, 360 U.S. 474 (1959), which held that "revocation of security clearance caused petitioner to lose his job with ERCO and seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field...[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the [Due Process Clause]". *Id.* at 492.

VI. Respondents ignore Petitioner's actual Liberty claim.

Petitioner has already stated that this case is about his Liberty right to contract, not because he was "stigmatized," but because Respondents' acts, through the operation of Section 1249(2)(j) mandating the termination of every teacher who has three consecutive "Ineffective" evaluations, *remove him from the teaching profession in Michigan*.

Respondents ignore Petitioner's actual Liberty claim. They repeat the Orwellian claim that Petitioner "remains as free as before to seek another teaching job" (Respondents' Brief, p. 13). It says that Petitioner's Liberty claim is about "stigmatizing statements [sic]." (Respondents' Brief, p. 12) Requesting a "name-clearing hearing" is obviously futile when one is removed from one's profession.

Federal cases have consistently drawn a line between removal from one's profession (which violates one's Liberty) and removal from a specific employer. (Petition, p. 19-21) In the landmark case *Roth*, this Court said:

> [T]here is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma *or other disability* that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, *did not invoke any regulations to bar the respondent from all other public employment in state universities*. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no

> small injury…" *Joint Anti-Fascist Refugee Committee v. McGrath*, [123 U.S. 185 (1951)] (Jackson, J., concurring). See *Truax v. Raich*, 239 U.S. 33, 41 [(1915)]. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner… that contravene[s]… Due Process," *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 [(1957)], and, specifically, in a manner that denies the right to a full prior hearing. *Willner v. Committee on Character*, 373 U.S. 96, 103 [(1963)]. See *Cafeteria Workers v. McElroy*, [367 U.S. 886,] 898 [(1961)].

Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972) (emphasis added).[1]

In *Roth*, this Court found that the plaintiff was not barred from teaching. Then, and only then, was it necessary to ascertain a "stigma" affecting plaintiff's Liberty right to find employment.

A government act or enactment that has the practical effect of preventing one from obtaining employment violates Liberty rights. In *Joint Anti-Fascist Committee v. McGrath*, this Court struck down the decision by the U.S. Attorney General of reporting three organizations as "subversive" to the country's

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[1] *Schware v. Board of Bar Examiners* involved a plaintiff who was denied admission to the New Mexico Bar and could not practice law. *Truax* struck down as unconstitutional an Arizona statute prohibiting employers from hiring more than 20 percent of workers as noncitizens. *Truax*, 239 U.S. at 35. *Greene* involved the government's termination of a cook from one military installation: "All that was denied her was the opportunity to work at one isolated and specific military installation." *Greene*, 367 U.S. at 895-96 (citations omitted).

Loyalty Review Board, as a violation of Due Process. Decisive was this act's practical effect of denying employment to members of those organizations:

> [T]he real target of all this procedure is the government employee who is a member of, or sympathetic to, one or more accused organizations. These are not discretionary discharges but discharges pursuant to an order having force of law. Administrative machinery is publicly set up to comb the whole government service to discharge persons or to declare them ineligible for employment upon an incontestable finding, made without hearing, that some organization is subversive.

McGrath, 341 U.S. at 184-85.

Here, just as in *McGrath*, the government's action removes Petitioner from his profession. The only difference is that the connection between Respondent's conduct and Petitioner's bar from employment is more direct: Respondents explicitly "invoke a regulation" (*Roth*) by relying on MCL §380.1249(2)(j) to dismiss Petitioner. Because they are responsible for rating him "Ineffective" three consecutive years which mandates termination under Section 1249(2)(j) by every Michigan district, they have removed Petitioner from teaching in Michigan.

CONCLUSION

For these reasons, the Petition should be granted.

Respectfully submitted,

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