
**In The
Supreme Court of the United States**

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DUNG QUOC PHAM,

Petitioner,

versus

BENNY BLAYLOCK, in his official capacity as Dean of the College of Pharmacy, University of Louisiana at Monroe; KEITH JACKSON, individually and in his official capacity as Faculty Chairperson of the Board of Ethics of the College of Pharmacy, University of Louisiana at Monroe; TIBB JACOBS, individually and in her official capacity as the Faculty Chairperson of the Board of Ethics of the College of Pharmacy, University of Louisiana at Monroe; MICHAEL COCKERHAM, individually and in his official capacity as Associate Dean for Academic Affairs of the College of Pharmacy, University of Louisiana at Monroe; KHALID EL SAYED, individually and in his official capacity as Professor of the College of Pharmacy, University of Louisiana at Monroe; ERIC A. PANI, individually and in his official capacity as Vice President for Academic Affairs, University of Louisiana at Monroe; SHERRY CARRADINE, individually and in her official capacity as In-House Counsel, University of Louisiana at Monroe; UNIVERSITY OF LOUISIANA SYSTEM BOARD OF SUPERVISORS,

Respondents.

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

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**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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LINDA LAW CLARK
Counsel of Record
DECUIR, CLARK & ADAMS, L.L.P.
732 North Boulevard
Baton Rouge, LA 70802
Phone: (225) 346-8716
Fax: (225) 336-1950
linda@decuirlaw.com

Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

- (1) Whether this Court has established that a public university student has a protected liberty or property interest in “post-high school education,” such that the lower federal court should apply the appropriate due process analysis to the circumstances of this case.
- (2) Whether the ULM School of Pharmacy Code of Ethical and Professional Conduct is “irrelevant” to the due process analysis, as stated by the District Court and Fifth Circuit.
- (3) Whether the lower federal courts need guidance in fashioning and applying appropriate due process tests for cases involving student expulsions from public universities.
- (4) Whether the Fifth Circuit has so far departed from the due process analysis approved by this Court that its ruling should be reversed for failing to mention “fair” or “reasonable” when upholding ULM’s expulsion of Pham, when violating no less than nineteen (19) university rules governing student disciplinary proceedings.

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**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Undersigned counsel is admitted to the Bar for the United States Supreme Court and served at trial and appellate counsel at the District Court level and at the Fifth Circuit Court of Appeals. Mr. Wirtz' writ application attacks the District Court and Fifth Circuit Court procedures in applying Due Process law. This matter does not meet the high burden set by the Supreme Court to grant same. The Supreme Court's review of a writ of certiorari is not a matter of right but a judicial discretion, granted only for compelling reasons. Pursuant to United States Supreme Court Rule 10, though not controlling the Court's discretion, the following are the character of the reasons the Court will consider such:

(a) A U.S. Court of Appeals has entered decision in conflict with a decision of another U.S. Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; has so far departed from the excepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for the exercise of the court's supervisory power.

(b) A state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or a U.S. Court of Appeals.

(c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been but should be settled by the court or has decided an important federal question in a way that conflicts with relevant decisions of the court.

Further, pursuant to United States Supreme Court Rule 10, a writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Supreme Court Rule 15(2) states the opposition brief must address any perceived misstatement of fact or law that bears on what issues are properly before the Court if certiorari were granted. It imposes an obligation to let the Court know of any perceived misstatements and that any objection to consideration of the question presented on what occurred may be deemed waived unless called to the attention of the Court. Counsel is reticent in having this Court believe all the statements made by Mr. Wirtz in his writ of certiorari are true and supported by the evidence, record and law. Counsel asserts facts have been misrepresented, not fully addressed by the record and solely the conclusions of Mr. Wirtz, not of the Court or the record regarding the case before this Court.

Respondents respectfully pray and herein appear to argue that a writ of certiorari should be denied in reviewing a judgment by the United States Court of Appeals for the Fifth Circuit and the United States District Court, Western District of Louisiana, in this case.



STATEMENT OF THE CASE

Relevant Proceedings Below

The case in chief was filed on April 6, 2016 in the Western District Court, State of Louisiana before Judge James seeking a Temporary Restraining Order (“TRO”), Preliminary and Permanent Injunctive Relief and monetary damages under 42 U.S.C. § 1983 for violation of Pham’s Fourteenth Amendment Due Process rights in his expulsion from a post-graduate professional program at University of Louisiana at Monroe (“ULM”), a State university. After the filing of an opposition by the Respondents, the Court denied the TRO finding it unlikely to succeed on the merits. Defendants filed a Federal Rules of Civil Procedure Rule 12(b)(6) motion on May 11, 2016 to dismiss all claims, raising qualified immunity as to the named individual defendants. The Court deferred the qualified immunity issue until further proceedings were conducted but granted dismissal of all claims with the exception of prospective injunctive relief. The Court conducted a two-day bench trial on June 7 and 8, 2016. On July 13, 2016, the Court dismissed all claims against all defendants. Petitioner timely appealed to the Fifth Circuit. The Fifth Circuit on October 17, 2017 affirmed the lower Court’s judgment. Pham timely filed this application for certiorari.

Relevant Facts

Petitioner’s Appendix I contains the rulings by the District Court and the Fifth Circuit. The facts

identified by the courts properly and succinctly identify the facts. District Court – Petitioners’ Appendix I, pp. 63-68; Fifth Circuit Appellate Court – Petitioner’s Appendix I, pp. 87-89.



REASONS FOR DENYING THE PETITION

I. REQUIRED DUE PROCESS GIVEN

(1) While it has never been specifically ruled as to whether there is a protected liberty of property interest in post-graduate college education, the Fifth Circuit has recognized that there is some type of interest which should be regarded in its review. *Dixon v. Al. State Board of Education*, 294 F.2d 150 (5th Cir. 1961). The Fifth Circuit therefore reviews university appeal cases before the court by assuming one does exist to err on the side of a full Due Process review.

At the university level, Academic decisions are given greater deference and require little due process while disciplinary actions require more, as discussed *supra*. Judge James of the Western District Court specifically stated this action was reviewed as a Disciplinary appeal, not an Academic appeal as categorized by ULM, and that it required greater due process than an Academic appeal.

Both Courts clearly addressed that, whether Pham had a “contract” with ULM to pursue a post-graduate degree and whether that was breached, a contractual dispute was barred from proceeding in

federal court by the Eleventh Amendment of the U.S. Constitution.

ULM, the Board of Supervisors and the individuals named as Defendants are State agencies or State officials acting in their official capacities and are not “persons” under law for purposes of a §1983 violation seeking monetary damages. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 69-71 & n.10 (1989); *Washington Legal Fd. v. Texas Equal Access to Justice, Fd.*, 94 F.3d 996, 1005 n.52 (5th Cir. 1996), *aff’d sub nom.*; *Scott v. Board of Supervisors*, 336 F.2d 557 (5th Cir. 1964); *Richardson v. Southern University*, 118 F.3d 450, 452-56 (5th Cir. 1997); *Olivier v. Scott*, 276 F.3d 736, 742 (5th Cir. 2011). When individuals are named in their personal capacity, qualified immunity may apply. Eleventh Amendment law is clear. Such monetary actions are barred in Federal court unless specifically abrogated by Congress pursuant to its legal authority under Section 5, Fourteenth Amendment or consented to by the State. *Seminole Tribe of Florida v. Florida, et al.*, 116 S. Ct. 1114 (1996); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). Pursuant to Article XII, § 10, of the Louisiana Constitution of 1974 and La. R.S. 13:5106, the State of Louisiana consents solely to be sued in State court which is not a consent to be sued in federal court and is not a waiver of its Eleventh Amendment immunity. *Citrano v. Allen Correctional Center*, 891 F. Supp. 312 (W.D. La. 1995); *Kiper v. Louisiana State Board of Education*, 592 F. Supp. 1343, *aff’d*, 778 F.2d 789 (5th Cir. 1985). An unconsenting State is immune from suits seeking monetary damages

by either citizens from her own state or citizens from another state. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1355 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). State Law claims, including breach of contract, are barred by sovereign immunity. Raising a State Law claim is outside the jurisdiction of the Court. The Court properly dismisses State law claims, both state tort claims and breach of contract disputes. *Richardson v. Southern University, supra*; *Hughes v. Savell*, 902 F.2d 376 (5th Cir. 1990); *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183 (5th Cir. 1986); *Cantu v. Rocha*, 77 F.3d 795 (5th Cir. 1996); *Vermett v. Howell*, 606 F. Supp. 732 (W.D. Mich. 1994).

II. THE INTERNAL RULES IRRELEVANT IN THIS DUE PROCESS

(2) The relevant question in review of a Fourteenth Amendment Due Process claim is the determination of WHAT due process is required and whether it was provided. The District Court's ruling addressed what Constitutional "Due Process" was required. Petitioner mischaracterizes the Court's review of breach of ULM internal rules and procedures. The Court did not state that ULM rules would be irrelevant if they violated the minimal due process required by federal law. The Fifth Circuit affirmed that violation of one's internal rules does not give rise to a constitutional violation at a university level as long as the party was, in fact, given the process guaranteed by the Constitution. *Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1231 (5th Cir. 1985). Internal Rules of a State

university, if they are not impeding the required federal due process, are issues of State law outside the jurisdiction of the court under the Eleventh Amendment, discussed *supra*. A university's departure from its rules and regulations does not violate procedural due process unless the rule or regulation codifies the pertinent constitutional standard. *Kinzie v. Dallas City Hospital District*, 239 F. Supp. 2d 648 (N.D. Tex. 2003).

The District Court thoroughly reviewed what "Due Process", Substantively or Procedurally, is required in College disciplinary matters. Procedurally, in a school expulsion, the dismissal must deprive the student of a liberty or property interest. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978). Assuming there exists such an interest at the College or post-graduate level, what due process is required under the circumstances is reviewed. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Procedural Due Process for disciplinary actions requires notice of the charges and a chance to rebut them. *Goss v. Lopez*, 419 U.S. 565 (1975). The student is entitled to know the basis of the dismissal. *Dixon, supra*. However, a court-like hearing, including opportunities to cross-examine witness, is not required. The decision-maker must have details from both sides. *Dixon, id.* Additionally, while universities may notify the student with an evidence against them prior to a hearing, it is not constitutionally required. The student attending the hearing and asking questions is permissible. *Keough v. Tate City Board of Education*, 748 F.2d 1077 (5th Cir. 1984). Impartiality in due process does

not preclude common school practices. The Fifth Circuit has found that due process is not necessarily violated when a school official initiates or investigates or prosecutes charges against a student and then plays a role in the decision to suspend the student. *Brewer Dryfus v. Austin Independent School District*, 779 F.2d 260 (5th Cir. 1985). There must be a neutral and unbiased decision-maker. *Withrow v. Larkin*, 421 U.S. 35 (1975). But the courts have noticed that in a school district disciplinary context, the level of partiality required does not reach absolute neutrality as in the criminal justice system. *Riggan v. Midland Independent School District, Inc.*, 86 F. Supp. 2d 642 (W.D. Tex. 2000). There is a presumption of honesty and integrity of those serving as adjudicators. *Withrow v. Larkin, supra*. The “hearing” need not be formal, it can be an informal give and take. *Beauchene v. Miss. College*, 986 F. Supp. 2d 755 (S.D. Miss. 2013). The courts have noted that, in this informal process, there is no constitutional right to receive written findings of fact or conclusions in a discipline context. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629 (6th Cir. 2005).

Substantive Due Process is a constitutional protection against arbitrary dismissal. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985). “Substantive due process protects individuals from content that shocks the conscience.” *Rochin v. California*, 342 U.S. 165 (1952). Only the most egregious official conduct can be said to be “arbitrary” in a constitutional sense. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998). Government action, in a constitutional sense, must “shock

the conscious” and only then will the most egregious official conduct as arbitrary in the constitutional sense be recognized. *Kinzie v. Dallas City Hospital District, supra*. The District Court correctly determined the allegations identified in the Complaint do not show that they are of the nature to support a Substantive Due Process claim. The Fifth Circuit correctly held that the Substantive Due Process claim fails.

The full record reflects in the two-day bench trial, the District Court received written briefs, live testimony and evidence of the two expulsion proceedings.

Both courts properly analyzed the Federal injunction standard which requires irreparable injury, substantial likelihood of success, a balance of hardships, and no adverse effect on the public interest. *Black Firefighters Assoc. of Dallas v. City of Dallas*, 905 F.2d 63 (5th Cir. 1990). A preliminary and/or permanent injunction can be sought in federal court for non-monetary damages that prospectively take action against a State entity but requires an underlying federal constitutional violation to be addressed. Injunctive relief is an extraordinary remedy. *Miss. Power and Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618 (5th Cir. 1985) The moving party must make a clear showing as to four elements: 1) a substantial likelihood of success on the merits; 2) a substantial threat of irreparable harm if the injunction is not granted; 3) the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to defendant; and 4) granting the preliminary injunction will not disserve the public interest. *Daniel’s Health Scis., LLC v. Vascular Health*

Scis., LLC, 701 F.3d 579 (5th Cir. 2013); *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974). A “preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has ‘clearly carried the burden of persuasion’ on all four requirements.” *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 195-96 (5th Cir. 2003).

Judge James, as the fact finder, determined there was little likelihood Pham would succeed on the merits. The integrity of the Pharmaceutical Program is critically important. Pham must show irreparable injury will occur during the litigation on the injunction issues. *Rimkus Consulting Group v. Cammarata*, 255 F.R.D. 417 (S.D. Tex. 2008) and *Justin Industries, Inc. v. Choctaw Sects., LP*, 920 F.2d 262 (5th Cir. 1990). Monetary damages must be inadequate to redress the claim. The Courts have found that harm that has already occurred cannot be remedied by an injunction. *Mountain Med. Equip. v. Healthdyne Inc.*, 582 F. Supp. 846 (D. Colo. 1984). When there is no likelihood of success on the merits, there is no need to redress the remaining three requirements for any injunctive relief. If there is no underlying violation viable, the injunction itself must fail regardless of whether there is a non-monetary remedy and/or a likelihood to succeed on the merits.

The standard for issuing a permanent injunction is essentially the same for issuing a preliminary injunction. *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831 (5th Cir. 2004). In the permanent

injunction it is not dependent upon a substantial likelihood of success but an actual prevailing on the merits. When there is a determination there is no constitutional violation it would be unlikely to proceed and would not promote judicial economy. *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974). As an extraordinary remedy, it is not granted unless all four requirements are met. *Planned Parenthood Assoc. of Hidalgo Co. Texas, Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012). When a movant seeks to alter status quo versus preserve it, as in Pham who had been expelled, a preliminary injunction is particularly disfavored and is not issued unless the facts and law clearly favor the moving party. *Roark v. Individuals of Fed. Bur. of Prisons, Former and Current*, 558 Fed. Appx. 471 (5th Cir. 2014).

III. COURTS PROPERLY APPLIED REQUIRED DUE PROCESS

(3) The lower federal courts did apply appropriate procedural and substantive due process review of a student expulsion from a public university in their rulings.

The Fifth Circuit most certainly does not need guidance from the U.S. Supreme Court on what “Due Process” test should be used. The Fifth Circuit Court of Appeals is one circuit which, in evaluating post-secondary education cases, begins with the assumption the right exists for the evaluation and that the action is disciplinary to ensure a higher standard

in the review. The law relied upon by these Courts is United States Supreme Court law. Pham in this case is a post-graduate student. The due process provided in the matter met the required standard. Notwithstanding multiple hearings not required at ULM, Judge James, held after two days of hearings in which the petitioner was represented by counsel, permitted to call witnesses, cross-examine witnesses and introduce exhibits that required process was given. Judge James reviewed briefs and exhibits and dismissed the case. The first prong of an injunction review is the likelihood of success on the merits. In this matter Judge James sat not only as the determiner of the law but as the fact finder in determining the credibility of the witnesses' testimony and the submission of the facts. Pham has been provided extensively more due process than is required.

The Court did not hold Pham had no contractual right to the education but rather assumed he did. He held that action was disciplinary and examined the procedures in Pham I and Pham II and found what was required under the Due Process clause of the Constitution was provided. No "harmony" was needed.

IV. THE FIFTH CIRCUIT COURT OF APPEALS APPLIED THE DUE PROCESS APPROVED BY THE SUPREME COURT

(4) The Fifth Circuit Court of Appeals applied the Due Process analysis approved by this Court and it should be affirmed.

The fundamental requirement of Due Process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due process is not a technical conception with fixed content unrelated to time, place and circumstances; rather, it is flexible and calls for such procedural protections as a particular situation demands. The dictates of due process generally require consideration of three distinct factors: private interest that will be affected by official action; risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioner's argument that the Fifth Circuit failed to include "specific words" is, in itself, irrelevant. It is the legal standard examined. Both the District Court properly reviewed the legal question considering the facts represented to the Fifth Circuit did not include the words "fair or reasonable" but affirmed the District Court's determination that it was sufficient under federal standards.

The Petitioner questions the discretionary nature of ULM's actions resulting in the Court's application of qualified immunity. Both courts clearly identify the rationale and reasons for qualified immunity. Petitioner would have the Court say that it is unclear from the Fifth Circuit's ruling that the federal standards have been met, the record reflects otherwise. The Fifth Circuit as well as the District Court identified the fact

that whether an individual violated an integral school rule does not rise to the level expected under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The law is clear. The petitioner had to show that the evidence used in the light most favorable to him was sufficient to establish a genuine dispute (1) that the official violated a *federal statutory or constitutional right* and that the right was clearly established at the time of the challenge conduct. Petitioner and his application for writ argues that the individual faculty named in this lawsuit should have been aware of the rules in the ULM Code of Conduct and by violating them, cannot claim the protection afforded. The two are not comparable.

The Fifth Circuit was clear. There was not a clearly established constitutional violation breached and the process given satisfied constitutional requirements for the circumstances presented. Therefore, the individuals had qualified immunity and were properly dismissed.

The petitioner argues that the “discretionary standard” identified in qualified immunity should apply to the ULM rules because the internal ULM College of Pharmacy rules were in writing and available for all the faculty in question. Again, the discretionary tasks of internal rules are not the issue. The full record reflects the testimony given in the bench trial shows the parties believed that the actions taken were in performance of their faculty duties which included evaluation of cheating, reporting violations, and reviewing the facts. Removal of cheating from the academic environment is of high importance at the university level

and especially in the Pharmacology post-graduate level. The Court correctly agreed. There is a significant public interest that cheating not occur, and the cheating process must be stopped to preserve the integrity of the programs. Testimony by those in the Pharmacy College stated a higher level of ethical behavior is required for pharmacists because of access to controlled substances.

Petitioner's Appendix II lifts portions of testimony from the transcript from questions by Petitioner's counsel. The transcript contains Respondent's questioning on the same issues and yields additional light on the actual events. The Judge, acting as fact finder, received the full story and could address the credibility of the parties before issuing his ruling. Should this Court wish further information, a full review of all the transcript testimony with all the basis of the Judge's ruling incorporating each full testimony and would far out exceed the words permitted in this opposition. The fact finder, Judge James, is best suited to rule on the facts and the law applied meets the constitutional standards.

Both Courts addressed the semantics of the rule violations in the debate of "use" or "possession" accurately. The Rule stated *either* during a test is prohibited and there is no dispute the material was in his possession.

There were two (2) different cheating incidents. The first one was referenced as Pham I. The second was referenced as Pham II. At times there was a

mixture of testimony and argument crossing between the two. Judge James's ruling carefully identified each.

In Pham I, two students cheating resulted in a zero on a test and both were put on probation. Later, both were allowed to retake the test, remove the zero grade and pass the course but remained on probation. In Pham II, represented by counsel, Pham denied wrongdoing. In Pham II, the committee did not allow him to cross-examine witnesses, but he was permitted to introduce evidence and did so. The law provides that no hearing is required. *Supra*.

Notwithstanding, Pham appealed, and the University conducted a second hearing allowing Pham to examine/cross-examine the witnesses and introduce exhibits, which he did. Regarding the "exhibit" viewed by the Committee, Pham urged them to obtain his graded paper and it was examined outside of his presence. In the two-day hearing before Judge James, Pham acknowledged it was his paper, and that he asked them to examine the paper because it would show that he had made no markings. In fact, that was an untruth as he had marked the paper. He acknowledged that in testimony the paper was marked by him. No hearing was required in Pham II. The first hearing received testimony. The second hearing was conducted with cross-examination, submission of evidence, and arguments of counsel.

Pham was represented by his counsel. He subpoenaed witnesses, examined/cross-examined witnesses

and submitted exhibits. Judge James' ruling, in essence, was of a dual nature. He was legal interpreter and fact finder. His rulings and analysis, included in Appendix I of the Petitioner's application, clearly shows the Federal Constitutional requirements were met. This included the distinction between procedural and substantive due process, application of qualified immunity and dismissal of both the federal and State law claims. The Courts were correct, and the writ should be denied.

The District Court assumed there was a property or liberty interest and that the decision was disciplinary in nature. A writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The Fifth Circuit ruling is not in conflict with a decision of another U.S. Court of Appeals. Its ruling does not conflict with a decision by a State Court of last resort. Neither the District Court nor the Fifth Circuit Court of Appeals rulings has decided an important federal question in a way that conflicts with decisions of this Court.

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CONCLUSION

The issues raised by the Petitioner do not merit consideration. The decisions by both the District Court and the Fifth Circuit Court of Appeals correctly applied the Federal standards for Due Process required for disciplinary actions at the higher education level.

The Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

LINDA LAW CLARK

Counsel of Record

DECUIR, CLARK & ADAMS, L.L.P.

732 North Boulevard

Baton Rouge, LA 70802

Phone: (225) 346-8716

Fax: (225) 336-1950

linda@decuirlaw.com

Counsel for Respondents