No. 19-580

IN THE

SUPREME COURT OF THE UNITED STATES

Jun Xiao,

Petitioner,

v.

Regents of the University of Minnesota, et al.,

Respondents.

PETITION FOR REHEARING

on Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

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To all who have supported me during the past years of bringing justice to the professors who publicly humiliated me, made one shameless lie after the other that resulted in dismissing me from the University at the time that I almost graduated;

For all whose careers were ruined by Raquel Rodriguez, Todd Johnson, and the like.

Jun Xiao
February 5 , 2020

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Pursuant to Sup. Ct. R. 44.2, Jun Xiao respectfully petitions for rehearing of the Court's order denying certiorari in this case.

GROUNDS FOR REHEARING

I

THIS COURT SHOULD GRANT REHEARING BECAUSE *TWO* CLEAR COURT SPLITS AROSE AFTER THIS COURT DENIED CERTIORARI; JUSTICE REQUIRES THIS COURT TO RESOLVE THESE SPLITS

Rehearing a petition for a writ of certiorari, which was denied, is appropriate when, as has occurred here, there have been "intervening circumstances of a substantial or controlling effect" relative to the petition. R. 44.2. Here *two* intervening splits arose among different state supreme courts on the very question presented in the *Xiao* petition:

- Can student pursue a cause of action at the court to recover "money damages" when students were wrongfully deprived of their educational rights?
- Can students sue universities for breach of contract?

These new court splits create substantial nationwide uncertainty as to the educational rights that this Court held for students after schools abused their authority. *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969). State-owned universities are considered as state government agents. The substantial nationwide uncertainty put public university students at the mercy of powerful state government officials who are continually pushing the boundaries of their authority and encroaching on the property rights and liberties of everyday Americans. It is imperative, therefore, that this Court safeguards public university students to challenge state

university employees', also known as government officials', erroneous application of the law to encroach on students' educational rights.

I-1. Split One

This Court established that educational right is a property right (public school students "have property and liberty interests" in their education), *Goss*, 419 U.S. 565 (1975), and students do not "shed their constitutional rights" at the schoolhouse door, *Tinke*, 393 U.S. 503, 506 (1969).

The Minnesota Court of Appeals in *Gebremeskel v. Univ. of Minn.*, No. C9-02-183 (2002) and in *Xiao v. Regents of Univ. of Minn. et al.*, No. A18-0646 (2019), held that "a writ of certiorari to the Court of Appeals is the appropriate method of reviewing an administrative body's quasi-judicial decisions." This conclusion substantially affects all students throughout the Country. Students cannot pursue a cause of action at the district court to recover damages when students are wrongfully deprived of their educational rights because the administrative procedure is the *only* avenue to protect their rights. "[C]ertiorari pursuant to Minn.Stat. § 606.01 (1998) is the only method available for review of a university decision." *Shaw v. Regents of Univ. of Minn.*, 594 N.W.2d 187, 191 (Minn. Ct. App. 1999). However, universities' policies prohibit students from being able to recover "monetary damages" through the administrative procedure, e.g., "may not award (students) monetary damages, or direct disciplinary actions against any employee of the university."[1] This is a Catch-22 tactic that allows universities to deprive students of their constitutional rights at no cost. Furthermore, it is almost impossible for universities with conflict of interest to declare that they themselves violated their

1. Addressing Student Academic Complaints, https://policy.umn.edu/education/studentcomplaints (last accessed August 15, 2018).

students' rights even if the facts clearly demonstrated so.[2] Therefore, the Minnesota Court of Appeals does "shed (students') constitutional rights" at the schoolhouse door as Petitioner contends in this case.

An identical Catch-22 occurred in a recent case of this Court: "The takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning." *Knick v. Township of Scott, Pennsylvania*, No. 17-647, 588 U.S. ____ (2019). In this case, this Court overruled the portion of *Williamson County* decision that required those

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2. Just two examples here: a) The University policy clearly states, "No more than *three days* of professional leave or vacation may be taken during any one rotation. Students can request professional leave via 'Time Tracking' function in E*Value." However, even without Xiao's request, the University illegitimately assigned *four days* of professional leave to Xiao for a rotation and illegitimately assigned an "F" to this rotation. This illegitimately placed Xiao on academic probation, which led to dismissing Xiao from the University. The Committee of the administrative procedure even concluded that the University "did not violate any University rule, policy" in this regard.

b) On January 2, 2013, Haeg, Director of Student Services informed Rodriguez by email (rodre001@umn.edu) that Xiao had successfully repeated 7211 ("[Xiao's] grade in 7211 is showing as an 'A'"). However, at the Committee meeting on August 7, 2013, after Rodriguez made her false accusation ("[Xiao] never repeated 7211"), Heag testified that Xiao had not repeated 7211. This false accusation of Rodriguez's directly resulted in Xiao's dismissal, and again, the Committee concluded that the University "did not violate any University rule, policy" in this regard.

seeking legal action for takings-compensation to seek state litigation first. Real estate and education are two big investments in every household. Therefore, this Court should, in light of the case below, similarly rule that students may bring a claim to a district court for the deprivation of their educational right.

In conflict with the Minnesota Court of Appeals, however, the California Court of Appeals recently held In *Bikkina v. Mahadevan*, Cal. Ct. App. A156582, January 14, 2020[3], that students can pursue a cause of action at the district court to recover damages when students could not fully enjoy their educational rights. This conflict is particularly noteworthy because the facts in *Bikkina* and this case are nearly identical and the California Court of Appeals relied on this Court's decision in *Baker v. General Motors Corp.* 522 U.S. 222, 233 (1998).

Bikkina, a doctoral student at the University of Tulsa, sued Mahadevan, a faculty member of the University, for falsely stating that Bikkina had fabricated various research results and plagiarized several academic works.

Like Bikkina, Xiao was also a doctoral student at the respondent school; like Mahadevan, Rodriguez and Johnson were also faculty members, and also made multiple false accusations against Xiao. But unlike Bikkina, who was granted a jury trial and granted compensatory damages in California, *Xiao* was dismissed in its entirety in Minnesota.

In *Bikkina*, the trial court entered the Judgment (*Bikkina v. Mahadevan,* No. RG14717654 (Alameda County Super. Ct., 2018)) as below:

> The Judgment is entered in favor of plaintiff, Prem Bikkin, and agaianst defendant, Jagan

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3. The California Court of Appeals issued this opinion on January 14, 2020 after this Court denied Xiao's Petition for a Writ of Certiorari on January 13, 2020.

> Mahadevan, in the amount of $776,000.00 (Seven Hundred Seventy Six Thousand and 00/100 dollars) as and for compensatory damages and $14,256.88 (Fourteen Thousand Two Hundred Fifty Six and 88/100 dollars) as and for allowable case cost, for a total Judgment of $790,256.88 (Seven Hundred Ninety Thousand Two Hundred Fifty Six and 88/100 dollars).

Mahadevan appealed to the California Court of Appeals. Regarding the trial court's subject matter jurisdiction, Mahadevan contended the trial court never had subject matter jurisdiction. The California Court of Appeals found that none of these contentions has merit, and affirmed the trial court's decision. *See* Appendix 1.

I-2. Split Two

Students' educational rights are factually protected by the contract with their schools. "A contract is created with the state which, by its very nature, incorporates constitutional principles of due process." *Anderson v. Regents of Univ. of Cal.*, 22 Cal. App. 3d 763, 770, 99 Cal. Rptr. 531, 535 (1972). The catalogs, bulletins, circulars, and institution regulations given to the student form part of the contract. *Zumbrun v. University of S. Cal.*, 25 Cal. App.3d 1, 101 Cal. Rptr. 499, 504 (1972).

The Minnesota Court of Appeals in *Redden v. Minneapolis Community & Technical College*, No. A03-1202, WL 835768 (2004), and in *Xiao* held that students could not sue universities for breach of contract ("this court rejected on policy grounds a claim for educational malpractice." in *Redden*; "certiorari pursuant to Minn.Stat. § 606.01 (1998) is the only method available for review of a university decision" in *Xiao*). This conclusion substantially

and negatively affects students throughout the Country because a legally binding contract can effectively protect students' educational rights, and universities could breach this a legally binding contract at not cost.

In conflict with the Minnesota Court of Appeals, however, US District Court, W. D. Oklahoma just held in *Rainwater v. Regents of the Univ. of Okla.* No. CIV-19-382-R, US District Court, W. D. Oklahoma, January 30, 2020[4], that students can sue universities for breach of contract ("The Court finds, therefore, that the GTCA does not mandate dismissal of Plaintiff's tortious [breach of contract] claim against the individual Defendants."). This conflict is particular noteworthy because the facts in *Rainwater* and this case are nearly identical, but Xiao did not enjoy the same constitutional right as Rainwater, and this Court's decision will clarify to what extent students' constitutional rights should be protected.

All the three plaintiffs were students at health related programs (Rainwater, the Master program in Health Administration program; Redden, Nursing program; Xiao, Pharmacy program); all of them were dismissed from the their schools allegedly because of "poor performance"; all of them sued the respondent schools for breach of contract for depriving of their educational rights. But, while Rainwater's claim of breach of contract was granted in Oklahoma, Redden's and Xiao's claims of breach of contracts were dismissed immediately in Minnesota. Accordingly, Rainwater was granted the right to discover, during the discovery phase, whether the school "failed to provide specifically promised educational services", *CenCor, Inc. v. Tolman*, 868 P.2d 396, 398 (En Banc. 1994), while such rights of Reddens' and Xiao's were denied immediately and completely. Discovery

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4. The US District Court just issued this opinion on January 30, 2020 after this Court denied Xiao's Petition for a Writ of Certiorari on January 13, 2020.

is an extremely important watchdog because the Respondents would be forced in discovery to disclose the evidence that in favor of the students. This split among courts resulted in some students' constitutional rights being not protected.

In *CenCor*, the Supreme Court of Colorado (En Banc) held:

> when students allege that educational institutions have failed to provide specifically promised educational services, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction, such claims have been upheld on the basis of the law of contracts.

In *Rainwater*, the US District Court in Oklahoma held:

> In support of her tortious breach of contract claim against Defendants Bennett, Sanders, and Johnson, in their individual capacities, Plaintiff alleges that each individual Defendant acted outside the scope of his or her employment "intentionally, maliciously and in bad faith." (Amended Complaint, Doc.No. 8, ¶¶ 113, 114, 115). "Generally, the determination of whether an employee was acting within the scope of employment is a question of fact 'except in cases where only one reasonable conclusion can be drawn from the facts.'" *Tilghman*, 2013 WL 6092529, at 3 (quoting *Bryson v. Oklahoma County*, 261 P.3d 627, 632 (Okla.Civ.App. 2011) (internal quotation marks omitted)). "Accordingly, while this issue may be adjudicated upon consideration of a summary judgment motion, it cannot properly be determined in a motion to dismiss." *Burris v. Oklahoma*, No. CIV-13-867-D, 2014 WL 442154, *7 (W.D. Okla. Feb. 4, 2014) (quoting *Tilghman*, 2013 WL 6092529, at *3). The

> Court finds, therefore, that the GTCA does not mandate dismissal of Plaintiff's tortious interference claim against the individual Defendants.

I-3. Justice Requires this Court to Resolve the above Splits

The above court splits among states resulted in one Country, one Constitution, one set of federal laws, but two judicial interpretations in terms of students' constitutional rights and the right to access to the courts for their constitutional rights. Such an uncertainty is within this Court's power to correct reducing the uncertainty to minimum.

II

THIS COURT SHOULD GRANT REHEARING BECAUSE OF *THREE* SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED; STRONG PUBLIC INTEREST REQUIRES THIS COURT TO REVIEW THIS PETITION

Per R. 44.2, petitions for rehearing of an order denying certiorari may also be granted if a petitioner can demonstrate "other substantial grounds not previously presented." The grounds below are sufficiently substantial for this Petition to be reviewed.

II-1. This Case Has a Strong Public Interest and Is of Great Social Significance[5]

Everyone is/was a student; every household has (a) student(s). Education is one of the biggest financial investments in every household and the biggest time and effort investments for students. Education is crucially important for all people. However, students' educational rights are poorly protected because professors can easily use "poor performance" as an excuse for retaliating against students[6], and courts are reluctant to intervene the evaluations of students' performance ("Courts are particularly ill-equipped to evaluate academic performance", *Bd Curators of Univ. of MO v. Hororwitz*. 435 U.S. 78 (98 S. Ct. 948, 55 L.Ed.2d 124) (1978)). While courts close the door to students' suits, courts open a big backdoor to professors and administrators retaliating against students under the guise of academic affairs. Courts should not be the onlookers of the violations of students' constitutional rights. *Xiao* is the paradigmatic example of first amendment retaliation case without involving "the nuances of educational processes and theories".[7] This Court should take *Xiao* as a warning sign to school employees acting illegally.

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5. *See* Appendixes 2 and 3; All the lies Rodriguez made and all the public humiliations and false accusations Johnson made will be uploaded to YouTube.com for general public to exam. It is unacceptable for a public university, also knew as a state government agent, to abuse general public tax money and student tuition money to defend professors to make false accusations. Professors should have been a moral model to students; not the other way around.
6. The two examples in the footnote 2 on page 3 show how easily a professor could dismiss a student.
7. The Minnesota Court of Appeals held "[c]ertain other claims brought by appellants, however, were erroneously

II-2. The Law Is Supposed to Protect the Weak and Vulnerable

One of the greatest contributions of our founding fathers is that they established our law system to limit the government's power. However, powerful state government officials are continually pushing the boundaries of their authority and encroaching on the property rights and liberties of everyday Americans, including vulnerable students. Specifically, *first*, the "administrative body" (the University) made a policy that prohibits students from being able to recover "monetary damages" through its administrative procedure when students are wrongfully deprived of their educational rights ("may not award monetary damages, or direct disciplinary actions against any employee of the university."[8]). *Second*, Minnesota courts well-established that a writ of certiorari "is the only method available for review of a university decision." *Shaw*, 594 N.W.2d 187, 191 (Minn. Ct. App. 1999). *Third*, Minnesota legislature passed Minn. Stat. § 606.01 (2018). This Catch-22

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dismissed by the district court because those claims allege that Brown failed to deliver on specific promises and representations.[3] Unlike appellants' claims challenging the quality of education provided by Brown, these claims allege "specific aspect[s] of the contract that would not involve an `inquiry into the nuances of educational processes and theories.'" Ryan, 494 S.E.2d at 791 (citation omitted).[4] Thus, the public policy considerations that discourage recognizing claims for educational malpractice are not implicated, and the district court erred in dismissing these claims." *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 472 (Minn. Ct. App. 1999)

8 Addressing Student Academic Complaints, https://policy.umn.edu/education/studentcomplaints (last accessed August 15, 2018).

tactic gives the University professors the power to illegally deprive students' constitutional rights at no cost putting Minnesota government officials above the Constitution in conflict with this Court in *Butz v. Economou*, 438 U.S. 478 (1978) ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law").

II-3. The 4th District Court Abuses its Discretion in the Summary Judgment to such an Extent that It Is Challenging District Court Practice across the Country

In its decision on the respondent's Motion to dismiss *Xiao* under Minn. Rule 12.02, the 4th District Court stated, if Rodriguez acted maliciously as described in Xiao's Complaint, Rodriguez would not qualify immunity ("If this is the case, then she was acting maliciously, which pierces her qualified immunity."), and ordered:

> Plaintiff's § 1983 claim may only continue against Dr. Rodriguez and Dr. Johnson for their alleged retaliation against Plaintiff.

See Appendix 4

During the Discovery, more evidence was disclosed to confirm the intentional and malicious actions Rodriguez did against Xiao *after* Xiao reported Johnson. *See* Appendix 5.

However, in order to grant respondent's Summary Judgment Motion, the 4th District Court made up reasons:

a) "[Plaintiff] engaged in protected activity when he filed complaint with the University of Minnesota on July 22, 2013 and then again on April 30, 2014." ... "their timing occurred either before the protected activity, rendering them irrelevant, or the conduct

> was not of the type and quality definitive of a retaliatory animus, rendering them peripheral to the relevant inquiry." *See* Appendix 6.

This is not true --- Plaintiff, Xiao, engaged in protected activity when he reported Johnson directly to the school on "April 26, 2013", not "July 22, 2013" and not "April 30, 2014" (Compl. ¶72).

> b) "The Constitutional Right was not Clearly Established at the time of the Alleged Violation." ... "To be clearly established, the contours of the right must be sufficiently clear such that every 'reasonable official would have understood that what he was doing violates that right.'" *See* Appendix 6.

This is not true --- *First*, both Rodriguez and Johnson, as university professors, reasonably knew that educational right is protected by law. *Second*, during the deposition, after listening to the audio recording, Rodriguez admitted that, 1) *before* Xiao reported Johnson, she did inform Xiao that Xiao's probation would be "automatically" removed once Xiao passed 7126 at Walgreens (ended on March 29, 2013) indicating that Rodriguez had known that Xiao successfully repeated 7211 because only Xiao successfully repeated 7211 could his probation be removed; 2) *after* Xiao reported Johnson, she did give false information to the Committee, e.g., "[Xiao] never repeated 7211"[9]. *See* Appendix 5.

These facts demonstrated that Xiao's dismissal was due to Rodriguez's First Amendment retaliation against Xiao *after* Xiao reported Johnson on *April 26, 2013*, and accordingly, the Court should have not granted respondent's Summary Judgment Motion.

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9. Both the transcripts of audio recordings on Rodriguez before and after Xiao reported Johnson and the transcripts of the deposition were submitted to the Court.

Furthermore, the arguments of wrong "timing" and "[t]he [c]onstitutional [r]ight was not [c]learly [e]stablished" directly contradicted the conclusion the 4th District Court previously drew. Cf. Appendix 3 and Appendix 6.

Making up reasons to grant a summary judgment motion is challenging district court practice across the Country.

II-4. Strong Public Interest across this Country Requires this Court to Review this Petition

The Article IV, Section 2 of the Constitution state, "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states". However, as presented throughout this Petition, citizens in Minnesota do not have the same educational, liberty rights and privileges as their counterparts in other states. This Court is obligated to resolve this constitutional split.

SUMMARY

Given the newly created multiple court conflicts, *Xiao* provides the perfect case for resolving the present conflicts. The ultimate questions in this case are: a) Can student pursue a cause of action at a district court to recover "money damages" when students were wrongfully deprived of their educational rights? b) Can students sue universities for breach of contract? c) Can a district court make up reasons to dismiss a case? These are purely legal questions[10] that should be resolved here and now to prevent similar cases from coming to this Court later.

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10. No need to require an inquiry into the nuances of educational processes and theories.

Unless Xiao has the ability to challenge Minnesota government's Catch-22 tactic and the made up reasons, Xiao will never have a practical means of seek redress. Neither Xiao nor 14 millions college students in this Country should be subject to such a blatant injustice that is within this Court's power to correct. This case is the paradigmatic example of "justice delayed is justice denied." When splits among courts raise that affect citizens across this Country, or a district court deviates the court fundamentals by making up reasons in favor of one part[11], this Court should, in all fairness and justice, resolve the matter. Students should be entitled to compensatory damages when they are wrongfully deprived of their educational right (a property right) just as landowners whose lands are taken by state governments.

CONCLUSION

For the foregoing reasons, this Court should reconsider this case and grant the writ of certiorari.

DATED: February 5, 2020.

Respectfully submitted,

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11. This is very serious.

CERTIFICATE OF PETITIONER

Pursuant to Rule 44.2, Petitioner, Jun Xiao, certifies that the Petition is restricted to the grounds specified in the Rule with substantial grounds not previously presented. Petitioner certifies that this Petition is presented in good faith and not for delay.

Jun Xiao, *Pro se*

Additional material from this filing is available in the Clerk's Office.