No. _____

IN THE

Supreme Court of the United States

DONALD SHOOTER,

Petitioner,

v.

KIRK ADAMS and JAVAN MESNARD,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this case present an important question not previously decided by the Supreme Court in which an elected member of the Arizona Legislature engaged in exposing corruption by the Executive Branch was ambushed with a sexual harrassment allegation and summarily expelled without due process of law and having no private state constitutional cause of action, based upon a third party report edited illegitimately and deceptively by the proponent of expulsion to remove exculpatory material to the elected representative and containing false statements, instead of having a public Committee hearing involving, *inter alia*, opening statements, presentation of documents, examination and cross-examination of witnesses and confrontation of accusers?

2. Does the Ninth Circuit's qualified immunity decision in this case, which relied upon cases involving police law enforcement, that a constitutional right is not "clearly established" for a damages action under 42 U.S.C. §1983 where there is an absence of a specific case on the facts of this case conflict with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730, 740-741 (2002), that in determining whether there was "reasonable warning that the conduct then at issue violated constitutional rights," "general statements of the law are not inherently incapable of giving fair and clear warning" and "a general constitutional rule already

identified in the decision law may apply with obvious clarity to the specific conduct in question"?

3. Does the Ninth Circuit's decision in this case create a conflict with other Circuits which recognize a due process interest of a legislator in having a public hearing before a Committee of peers, *McCarley v. Sanders*, 309 F.Supp. 8 (M.D. Ala. 1970), and *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 158 (2d Cir. 2010)?

4. Does the Ninth Circuit's qualified immunity decision, which effectively immunizes a deliberate effort to prevent anti-corruption inquiries, raise an important federal constitutional due process question that the U.S. Supreme Court should consider and call for the exercise of this Court's supervisory power?

5. Does the Ninth Circuit's rationale for rejecting an equal protection claim—the intent to stop anti-corruption efforts precluded finding a required intent to discriminate based on sex—constitute an important federal constitutional due process question that the U.S. Supreme Court should consider and call for the exercise of this Court's supervisory power?

6. Does the Ninth Circuit's departures from established principles, stated by this Court and other courts of appeal, of deciding motions to dismiss—(a) when ignoring statements of material fact and treating as true a document not attached to the Complaint but rather that is referenced in the Complaint as misconceived and erroneous and (b)

when denying leave to amend the original Complaint—constitute an important federal constitutional due process question and an issue of appellate review that the U.S. Supreme Court should consider and call for the exercise of this Court's supervisory power?

PARTIES

Plaintiff-Appellant-Petitioner Donald Shooter ("Shooter") was a Republican member of the Arizona Senate from 2010 to 2016 and was a member of the Arizona House of Representatives from 2016 until his expulsion on February 1, 2018. In the period 2010 to February 1, 2018, Shooter also was, at various times, Chairman of the Senate Appropriations Committee, Chairman of the House Appropriations Committee and Chairman of the Joint Legislative Budget Committee. (50a-51a, 54a, 57a.)

For all periods relevant to the Complaint in this case, Defendant-Appellee-Respondent Kirk Adams ("Adams") was Chief of Staff to the Governor of Arizona, and Defendant-Appellee-Respondent Javen Mesnard ("Mesnard") was Speaker of the House. (50a.)

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The Ninth Circuit affirmed the District Court's grant of a Rule 12(b)(6) motion to dismiss without leave to amend. The Ninth Circuit's opinion and order is reprinted in the Appendix (1a-27a) and is reported at 4 F.4th 955. The District Court granted the motion to dismiss the Complaint without leave to amend and is reprinted in the Appendix (28a-48a) and its decision is unofficially reported at 2019 WL 2140808 (June 7, 2019).

STATEMENT OF JURISDICTION

This Court's jurisdiction is established by 28 U.S.C. § 1254(1) and Article III, Section 2 of the U.S. Constitution. The Ninth Circuit's opinion was issued July 22, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution states in pertinent part:

> 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.

Title 42 of the U.S. Code, section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Article II, § 4 of the Arizona Constitution states:

> No person shall be deprived of life, liberty, or property without due process of law.

STATEMENT OF FACTS

As will be discussed in the Argument Point G below, the Ninth Circuit departed from well-established rules for treating the facts on a motion to dismiss. The Ninth Circuit's treatment of the facts begins properly, but then omits key allegations of the Complaint as if they did not exist and veers into error when purporting to consider materials incorporated into the Complaint—specifically the Sherman & Howard report—without regard to the pleaded allegations in the Complaint that made clear the Sherman & Howard report had been surreptitiously and deceptively edited before its release and contained false statements. The following statement of facts follows the law in accepting as true the allegations of the Complaint.

A. Shooter's Investigation Into Executive Branch Expenditures On Technology.

When then Senator Shooter was Chairman of the Senate Appropriations Committee, he discovered questionable practices relating to State expenditures on technology. Shooter learned that the Arizona Department of Administration data center had a significant investment in Hewlett Packard while the then Arizona State Chief Information Officer held himself out to be a member of the Hewlett Packard National Advisory Board. Shooter further learned that the State of Arizona misused "Competition not Practicable" and "Sole Source" contracts for large technology purchases, which meant that vendors were able to dictate price and service level contract terms. Shooter's investigation found a concerted effort at the Department of Administration to direct work to specific out-of-state companies and to avoid competition at the expense of Arizona workers and taxpayers. (51a-53a.)

B. Shooter's Proposed Legislation SB 1434; Surveillance of Shooter.

Armed with his discoveries, then Senator Shooter formulated legislation in SB 1434 that would include an oversight provision requiring a state agency, when investing in an information technology project anticipated to cost more than $2.5 million, to request at least two bids before entering into a contract. Shooter introduced SB 1434, which

passed both the Arizona House and Senate but was vetoed by the Arizona Governor. Shooter reintroduced the bill the next session, and while representatives from the Governor's Office informed Shooter that the bill would be vetoed again, Shooter persisted in his efforts to get the bill passed. (53a-55a.)

Coinciding with Shooter's legislation efforts, Shooter was subjected to surveillance, including having Shooter followed by a private investigator. Each time that Shooter objected about the harassment to the Governor's Chief of Staff Kirk Adams, local television reporter Dennis Welch would show up at the Arizona Legislature, follow and film Shooter, and then run a story derisive of Shooter. (55a-57a.)

C. Upon Learning of Shooter's Plan To Use Subpoena Power, Adams Arranges For Representative Ugenti-Rita To Misrepresent Her Past Friendship With Shooter To Make Allegations Of Sexual Harassment.

On November 2, 2017, then Representative Shooter, in a meeting with Adams, informed Adams "that he [Shooter] planned to use his subpoena power as Chair of the House Appropriations Committee, to gain additional insight into the irregularities in the procurement process at the start of the next legislative session unless there was some movement to address the continued improper use of expensive, no bid contracts." Shooter also said to Adams that he (Shooter) pre ferred that the Gover-

nor's Office clean-up its own house. Shooter made clear that he was not going to stop his efforts to bring state procurement and the procurement no-bid process to light and obtain reform. (57a-60a.)

On November 7, 2017, five days after Shooter's meeting with Adams, local television reporter Dennis Welch interviewed Arizona Representative Michelle Ugenti-Rita, who claimed her past friendship with Shooter was sexual harassment. Ugenti-Rita, at the time of the interview, was engaged to a lobbyist who previously worked for Adams in the Governor's Office, and Shooter believed that the reporter's actions resulted from collaboration with Adams. (60a-61a.)

D. Shooter Pressured By Mesnard To Resign, But Shooter Asks Arizona House For Investigation Of Sexual Harassment Allegations.

Within days of the November 7, 2018 interview given by Representative Ugenti-Rita accusing Shooter of sexual misconduct, Mesnard (Speaker of the House) began to pressure Shooter to resign. Shooter, instead of bowing to pressure to resign, called for a complete investigation by the House of the sexual allegations made against him. Shooter also called for an investigation of allegations concerning malfeasance and sexual misconduct by Representative Ugenti-Rita. Shooter's expectation was that the parliamentary and procedural norms would be followed in an investigation conducted by the House Ethics Committee whose members were

peers of Shooter and who had not publicly or privately taken a position on the allegations. (61a-62a.)

E. In Lieu of An Ethics Committee Investigation and Hearing, Mesnard Appoints Committee Of His Staff To Investigate and Committee Hires Sherman & Howard To Conduct The Investigation.

The Ninth Circuit opinion does not acknowledge that the Complaint alleges that for the first time in the Arizona Legislature's history, rather than convene the Ethics or Special Committee to evaluate conduct complaints against members Representative Shooter and Representative Ugenti-Rita, the Speaker appointed a "special investigation team" consisting only of his staff and not of elected members/peers as was required by tradition as well as the parliamentary and procedural norms and expectations. At the direction of Mesnard, his staff member team promptly on November 15, 2018, hired Sherman & Howard to conduct an investigation into the allegations against Shooter and Ugenti-Rita. The Ninth Circuit opinion fails to recognize that the Complaint alleges that Sherman & Howard refused to disclose its retainer letter and that Mesnard approved payment to Sherman & Howard of over $250,000 for the investigation. (63a-64a, 72a-76a, 80a.)

F. Tradition, History and Parliamentary Expectation That A Committee of Elected Peers Will Decide Serious Misconduct Allegations Against A Member Of The Arizona Legislature.

The Ninth Circuit opinion ignores that the Complaint alleges that all serious misconduct allegations against a member of the Arizona Legislature, by tradition as well as parliamentary and procedural expectations, have been handled by a committee of elected peers such as a Special Committee or an Ethics Committee. The Ninth Circuit opinion also fails to recognize that the Complaint alleges that the Arizona Legislature had not previously attempted the expulsion of a member without convening a special or ethics committee consisting of elected members. The Ninth Circuit omits to recognize that the Complaint alleges that in United States history, no state legislature has expelled a member without the convening of a committee of elected members (even during the American Civil War, when certain members of the U.S. Congress did not return but instead joined the Confederate government). (67a-68a, 89a)

G. The Due Process of An Ethics Committee Hearing.

The Ninth Circuit opinion omits the fact that the Complaint alleges that the Arizona House Ethics Committee had presided over every serious miscon gated and which required an Ethics Hearing in a

committee of elected peers, the historical norm of duct allegation of misconduct by a member, including complaints against legislators who were caught on videotape accepting bribes in the AzScam scandal. The Ninth Circuit opinion omits that the Complaint alleges that it is the function of the House Ethics Committee to investigate complaints and charges against members of the Arizona House and if necessary, to report the results of the investigation with recommendations for further action. The Ninth Circuit opinion omits that the Complaint alleges that even the AzScam legislators received the due process of an Ethics Committee hearing that included opening statements, the presentation of witnesses and documents, cross-examinations, and follow up questions by the special prosecutor and Committee members. The Ninth Circuit opinion omits that the Complaint alleges that Senate or House Ethics Committee hearings into member misconduct were held for the AzScam legislators in the 1990s, Representative "Chuy" Higuera (1991) and Representative Sue Laybe (1991), and then more recently as to Senator Scott Bundgaard (2012) and Representative Daniel Patterson (2012). The Ninth Circuit opinion omits that the Complaint alleges that by Mesnard, Ugenti-Rita and Shooter serving in the Arizona Legislature at the time during which allegations of misconduct were investian Ethics Committee hearing was effectively modeled for Mesnard, Ugenti-Rita and Shooter and reinforced expectations of due process. (68a, 70a-72a.)

The Ninth Circuit opinion omits that the Complaint alleges that the requirement of due process and the process of an ethics committee of elected peers is supported by the National Council of State Legislatures, which extensively tracks state legislatures. The Ninth Circuit opinion omits that the Complaint alleges that the National Council of State Legislatures publishes a nationally recognized research tool which collects responses to comprehensive surveys of legislative clerks and secretaries of all 50 state legislatures, and states "Modern court cases establish that a legislator who is subject to disciplinary proceedings has the right to due process." (72a.)

H. Mesnard's Actions During The Investigation Against Shooter And To Help Ugenti-Rita.

Throughout the investigation, Mesnard prejudiced Shooter and gave more favorable treatment to Ugenti-Rita. Mesnard suspended Shooter from his position as Chairman of the House Appropriations Committee. The Ninth Circuit opinion omits that the Complaint alleges that Speaker Mesnard stated publicly that Shooter could not properly fulfill his obligations as Chairman of the House Appropriations Committee until the investigation was concluded; the suspension thus eliminated Shooter's ability to issue subpoenas to investigate corruption. Meanwhile, Mesnard refused to suspend Ugenti-Rita from her position as Chair of the House Ways and Means Committee. The Ninth

Circuit opinion omits that the Complaint alleges that Speaker Mesnard stated publicly that making any pre-determination as to Ugenti-Rita would be premature. Mesnard repeatedly asked Shooter to resign, but did not ask Ugenti-Rita to resign. Mesnard also paid Ugenti-Rita's attorney 25% more than he paid Shooter's attorneys. (64a-66a.)

I. Mesnard's Unilateral Creation of A "Zero-Tolerance" Policy For Retroactive Application.

The Ninth Circuit opinion omits that the Complaint alleges that Speaker Mesnard stated publicly that the Arizona House had historically looked to state employment law and had policies in place regarding equal treatment of men and women in the workplace. The Ninth Circuit opinion does note that in November 2017, after Ugenti-Rita's allegations, Mesnard unilaterally created a "zero-tolerance" policy related to sexual harassment that was applied retroactively. The Ninth Circuit opinion omits that "zero-tolerance," a strict-liability policy, was far more restrictive than the Arizona employment law standard. The Ninth Circuit omits to recognize that the Complaint alleges that Mesnard did not have the authority to create a new sexual harassment policy for elected members without a vote of elected members; a vote by the members was necessary to adopt any new policy and the new policy was announced only after Ugenti-Rita had made her sexual misconduct allegations against Shooter. (66a-67a, 74a-77a.) In sworn deposition

testimony, Mesnard conceded that the policy by which Shooter was judged was not adopted until after Shooter was expelled, but then only on a temporary basis and does not exist now.

J. Sherman & Howard's Directed Investigation; Speaker Mesnard's Editing of Draft Report.

Sherman & Howard was directed to conduct an investigation into Shooter that was framed by Mesnard's new, unilaterally imposed "zero-tolerance" policy. The investigation report issued under the name of Sherman & Howard would state that the investigation was conducted in light of the House's expansive "zero tolerance" policy. The Ninth Circuit opinion omits to recognize that the Complaint alleges that the "zero tolerance" policy was different from whether someone might be able to state and prove a claim for workplace harassment, discrimination or hostile work environment in a court or administrative proceeding. (73a, 77a-78a.)

The Ninth Circuit opinion states that Sherman & Howard interviewed 40 people. The Ninth Circuit opinion omits that the Complaint alleges that there were interviews with anonymous sources; that there were documents and photographs submitted to the investigators that did not come out with the report; that Shooter's requests to Mesnard for those documents and photographs were rebuffed; and that exculpatory information about Shooter made known to the Sherman & Howard investigation

team would not be included in the report. (77a-79a, 81a.)

The Ninth Circuit omits to recognize that the Complaint alleges that a copy of what was to be the report was provided to Mesnard nine days before Mesnard actually released the report to the public as final, and that during the nine days, Mesnard materially changed the report to remove exculpatory information about Shooter. (73a, 77a-79a.) Mesnard later admitted this action in a deposition in another case.

K. The Report Edited By Speaker Mesnard.

The Ninth Circuit opinion omits that the Complaint alleges that the edited Sherman & Howard investigation report that was released determined that a majority of the allegations against Shooter did not constitute sexual harassment even under Mesnard's specially created "zero-tolerance" policy. (72a-74a, 77a-81a.)

The Ninth Circuit opinion states that Sherman & Howard reported that Shooter had created a hostile work environment by engaging in a pattern of unwelcome and hostile conduct toward other members of the Arizona Legislature and others who had business at the Legislature. The Ninth Circuit opinion omits that the Complaint alleges that while the Mesnard edited investigation report used the employment law terminology of "hostile work environment" to fault Shooter, Mesnard's new "zero tolerance" policy had a lower subjective (instead of

objective) standard than would be applied under employment law. The Ninth Circuit opinion also omits that the Complaint alleges that had existing House policies at the time been applied instead of Mesnard's new "zero-tolerance" policy, Shooter arguably would not have been found to create a hostile work environment. (69a, 75a-76a.)

The Ninth Circuit opinion omits that the Complaint alleges that the Mesnard edited investigation report wrote in a conclusory manner that there was no credible evidence that Ugenti-Rita had violated the sexual misconduct policy, even though a former staffer and known victim of Ugenti-Rita came forward and was interviewed by Sherman & Howard; the victim provided her own account, documentary evidence (lewd and nude texting) and corroborating contemporaneous witnesses to sexual harassment that rose to the level of sexual harassment under federal and state law. The Ninth Circuit opinion further omits that the Complaint alleges that the 75-page report had 65 pages dedicated to the allegations against Shooter, with only 1½ pages concerned the allegations against Ugenti-Rita, that the report excluded the physical evidence and testimony of sexual misconduct by Ugenti-Rita that was far more egregious than any allegation against Shooter, and that Ugenti-Rita was never disciplined. (77a-78a.)

While omitting major material allegations of the Complaint noted above, the Ninth Circuit invoked the law on considering documents incorporated into the Complaint to recite what the edited report pur-

portedly said, even though the Complaint did not attach the edited report to the Complaint and the Complaint's allegations made clear that negative statements about Shooter were untrustworthy. (5a, 8a, 67a-89a.)

The Ninth Circuit's summary of the edited report is neither fair nor just. Eleven accusers were interviewed; most of the allegations, including most allegations by Ugenti-Rita, were found not credible; some of the allegations found credible included: Shooter's leaving a business card with a note "Thinking of You"; accompanying Ugenti-Rita to her car when Ugenti-Rita said she wanted Shooter to keep his distance; giving Ugenti-Rita a Christmas card with Kenny Chesney song lyrics; telling a female at a Fun Caucus (an official social) event about shaking dice; and telling a new House representative that she "made a pretty addition to the House." (96a-271a.) None of these accusations would meet the legal standard of sexual harassment under Arizona law.

The three examples found credible and cited by the Ninth Circuit were relatively the worst. *First*, the alleged comment to Ugenti-Rita' about her breasts (which was whether they were fake or real) was allegedly made when Shooter stopped by Ugenti-Rita's office to tell her why he opposed her election bill, and Shooter flatly denied it happened, saying she had told him she obtained breast implants. *Second*, the alleged behavior of grabbing and shaking his crotch while with the Deputy Director of the Governmental Affairs for the

Arizona Supreme Court, which Shooter said he did not recall at all but it probably did not happen and the accuser was very liberal while he is a Republican. *Third*, the alleged prolonged embrace with a female intern making her feel uncomfortable, which Shooter denied and said that while he may have hugged the accuser because he is a hugger (he cited hugging Arizona Governor Jan Brewer), he would not have done so in a way that was inappropriate. With respect to the third alleged incident, the report held against Shooter a general apology he made for any actions that made people feel uncomfortable. (96a-271a.)

The Ninth Circuit opinion thus cites statements in the corrupted report as facts, disregarding the allegations of the Complaint concerning the document.

L. Shooter's Expulsion From The Arizona House With No Hearing; No Opportunity For Shooter To Reply To Mesnard Edited Report Before Expulsion .

On February 1, 2018, Mesnard compelled House members to vote for its first expulsion in 70 years just four days after the release of the Mesnard edited investigation report. The Ninth Circuit opinion omits that the Complaint alleges that the report was released without an opportunity for Shooter to respond in writing to the report and without an opportunity for Shooter to defend himself in a hearing before his peers. The Ninth Circuit opinion omits that material and exculpatory information

was not made available to the public or to the members of the Arizona House at the time the report was released and the vote was taken. (73a-74a, 84a.)

The Ninth Circuit opinion omits that the Complaint alleges that Shooter had been assured both orally and in writing, during the investigation and including on the day the report was made available to Shooter and the public, that Shooter was entitled to five days to provide a written response to the Mesnard edited report. The Ninth Circuit omits to recognize that the Complaint alleges that the Mesnard edited report contained multiple factual errors, that Mesnard withheld exculpatory information and that material evidence obtained by the investigation team regarding Ugenti-Rita. The Ninth Circuit opinion omits that the Complaint alleges that Mesnard's insistence on an expulsion vote almost immediately after dissemination of the report meant that Shooter was deprived of "the opportunity to meaningfully defend himself in a hearing before his peers" and that Mesnard intended to preclude Shooter from raising the serious defects of the report prior to the expulsion. The Ninth Circuit opinion omits that the Complaint alleges that without a due process Committee hearing, Shooter's peer legislators were denied the time, opportunity and information to evaluate objectively the facts, evidence and appropriate policies and were denied the opportunity to hear Shooter's responses and rebuttals. (73a-74a, 84a.)

The Ninth Circuit opinion further omits to recognize that the Complaint alleges that after the expulsion, Representative Kelly Townsend, the representative who had advocated on the House floor to expel Shooter from the Arizona House, later stated on the floor of the Arizona House that "in retrospect it was the wrong process to remove Shooter without an ethics hearing." (62a.)

M. Case Procedural Background.

On January 29, 2019, Shooter filed a Complaint in Maricopa County Superior Court alleging he was expelled as a result of a conspiracy to suppress his anti-corruption activities and pled causes of action for: (i) violation of Shooter's due process and equal protection rights under 42 U.S.C. § 1983; (ii) defamation and aiding and abetting and conspiracy to commit defamation; (iii) false light invasion of privacy and aiding and abetting and conspiracy to commit false light invasion of privacy; and (iv) wrongful termination. The 42 U.S.C. § 1983 claim alleged violation of due process and equal protection rights (i) to have an open hearing before a committee of his peers that provided the ability to confront and cross-examine accusers and the protections of established Ethics Committee procedures with access to the evidence against him, *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959); (ii) to not be subjected to a retroactively applied subjective standard that was at variance with legal standards and that was unilaterally promulgated by the Defendant Arizona House Speaker without

author *USI Film Prod.*, 511 U.S. 244, 265-271 (1994); and (iii) to be treated equally in comparison to a woman representative who was also accused of sexual misconduct at the same time, *Davis v. Passman,* 442 U.S. 228, 234–235 (1979). (49a-95a.)

Adams and Mesnard responded by removing the action to federal court on consent and, once in federal court, by moving to dismiss Shooter's Complaint per Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim albeit with documents. The State of Arizona joined in Mesnard's and Adams's motions to dismiss. Shooter opposed the motions to dismiss. (33a.)

The District Court, based on qualified immunity, granted the motion to dismiss Shooter's federal cause of action arising from Shooter's expulsion from the Arizona House brought under 42 U.S.C. § 1983 and sent Shooter's state causes of action back to the state court. The District Court premised the 12(b)(6) dismissal of Shooter's 42 U.S.C. § 1983 cause of action on qualified immunity. The District Court did not give leave to amend the Complaint despite no prior grants of leave to replead. (28a-48a.)

The Ninth Circuit affirmed, ruling that assuming a stigma-plus liberty interest of Shooter, there was not clearly established law to a due process Committee hearing to determine the accusations made against him that resulted in expulsion and thus no basis for overcoming qualified immunity. The Ninth Circuit stated that the cases cited by Shooter

were in different factual circumstances than the expulsion of a state legislator. The Ninth Circuit further invoked a federalism concern militating against recognition of a due process right of a legislator facing expulsion, seemingly finding there were a legitimate state interest in dispensing with a due process Committee hearing and allowing for the shenanigans engaged in by Mesnard and Adams to cut off Shooter's anti-corruption efforts. The Ninth Circuit also denied that the zero tolerance Policy was a retroactively applied standard and denied that there was intentional discrimination on the basis of sex in the favorable treatment of the female Ugenti-Rita as opposed to the male Shooter. (1a-27a.)

ARGUMENT

A. The Grounds for Granting the Petition.

The Court, per its Rule 10, should grant the petition for a writ of certiorari for five reasons.

1. This case presents an important question not previously decided by the U.S. Supreme Court in which an elected member of the Arizona Legislature engaged in exposing corruption by the Executive Branch was ambushed with a sexual harassment allegation and summarily expelled without due process of law and having no private state constitutional cause of action, based upon a third party report edited illegitimately and deceptively by the proponent of expulsion to remove exculpatory material to the elected representative

and containing false statements, instead of having a public Committee hearing involving, *inter alia*, opening statements, presentation of documents, examination and cross-examination of witnesses and confrontation of accusers.

2. The Ninth Circuit's qualified immunity decision in this case, which relied upon cases involving police law enforcement, that a constitutional right is not "clearly established" for an action under 42 U.S.C. § 1983 where there is an absence of a specific case on the facts of this case conflicts with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730, 740-741 (2002), that in determining whether there was "reasonable warning that the conduct then at issue violated constitutional rights," "general statements of the law are not inherently incapable of giving fair and clear warning" and "a general constitutional rule already identified in the decision law may apply with obvious clarity to the specific conduct in question."

3. The Ninth Circuit's decision in this case creates a conflict with other Circuits that recognize a due process interest of a legislator in having a public hearing before a Committee of peers, *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 158 (2d Cir. 2010), and *McCarley v. Sanders*, 309 F.Supp. 8 (M.D. Ala. 1970).

4. The Ninth Circuit's qualified immunity decision, which effectively immunizes a deliberate effort to prevent anti-corruption inquiries, raises an important federal constitutional due process ques-

tion that the U.S. Supreme Court should consider and call for the exercise of this Court's supervisory power.

5. The Ninth Circuit's transparently deficient ground for rejecting Shooter's equal protection claim—the intent to stop anti-corruption efforts precluded finding an intent to discriminate based on sex—constitutes an important federal constitutional due process question that the U.S. Supreme Court should consider and calls for the exercise of this Court's supervisory power.

6. The Ninth Circuit's departures from established principles, stated by this Court and other courts of appeal, of deciding motions to dismiss—(a) when ignoring statements of material fact and treating as true a document not attached to the Complaint but rather that is referenced in the Complaint as misconceived and erroneous and (b) when denying leave to amend the original Complaint—constitutes an important federal constitutional due process question and an issue of federal appellate review that the U.S. Supreme Court should consider and calls for the exercise of this Court's supervisory power.

B. Expulsion Of An Elected Representative Without Due Process Of Law.

An important federal constitutional due process question that the U.S. Supreme Court should consider is posed by this case in which an elected rep resentative was expelled from a state House of

Representatives based upon a law firm report edited deceptively by Mesnard, who was seeking Shooter's expulsion, and containing what Shooter alleges are false statements. Shooter has steadfastly maintained that a due process right of a legislator facing expulsion is a public hearing by a Committee of peers involving, *inter alia*, opening statements, presentation of documents, examination and cross-examination of witnesses and confrontation of accusers. The Ninth Circuit's rejection of that right is erroneously premised on six mistakes.

First, the Ninth Circuit totally ignores key allegations in the Complaint. It is unacceptable that the Ninth Circuit opinion recites the facts and discusses the case as if the Complaint did not allege the following eight facts relevant to recognition of a due process right:

(i) All serious misconduct allegations against a member of the Arizona Legislature, by tradition as well as parliamentary and procedural expectations, have been handled by a committee of elected peers such as a Special Committee or an Ethics Committee.

(ii) No Arizona Legislature had attempted the expulsion of a member without convening a special or ethics committee consisting of elected members.

(iii) The Arizona House Ethics Committee had presided over every serious allegation of misconduct by a member, including complaints against

legislators who were caught on videotape accepting bribes in the AzScam scandal.

(iv) It is the function of the House Ethics Committee to investigate complaints and charges against members of the Arizona House and if necessary, to report the results of the investigation with recommendations for further action.

(v) Even the AzScam legislators received the due process of an Ethics Committee hearing that included opening statements, the presentation of witnesses and documents, cross-examinations, and follow up questions by the special prosecutor and Committee members.

(vi) By Mesnard, Ugenti-Rita and Shooter serving in the Arizona Legislature at the time during which allegations of misconduct were investigated and which required an Ethics Hearing in a committee of elected peers, the historical norm of an Ethics Committee hearing was effectively modeled for Mesnard, Ugenti-Rita and Shooter and reinforced expectations of due process.

(vii) The requirement of due process and the process of an ethics committee of elected peers is supported by the National Council of State Legislatures, which extensively tracks state legislatures.

(viii) The National Council of State Legislatures states "Modern court cases establish that a legislator who is subject to disciplinary proceedings has the right to due process."

The Ninth Circuit says nothing about these facts that point to the due process right of an elected representative being considered for expulsion to an Ethics Committee hearing.

Second, the Ninth Circuit seems to assume blithely, but incorrectly, that a third-party report based on privately conducted interviews is sufficient for the task of determining the facts relevant to the proposed expulsion of an elected legislator and is an acceptable substitute for a Committee public hearing involving opening statements, the presentation of witnesses and documents, cross-examinations, and follow up questions by the special prosecutor and Committee members. What happened in this case should be a warning that the Ninth Circuit's apparent assumption is wrongly conceived. Here again, it is unacceptable that the Ninth Circuit opinion recites the facts and discusses the case as if the Complaint did not allege the following ten facts:

(i) The retained firm Sherman & Howard refused to disclose its retainer letter.

(ii) Speaker Mesnard approved payment to Sherman & Howard of over $250,000 for the investigation.

(iii) Sherman & Howard was directed to conduct an investigation into Shooter that was framed by Mesnard's new, unilaterally imposed "zero-tolerance" policy.

(iv) There were interviews with anonymous sources and there were documents and photo

graphs that did not come with the report, and Shooter's requests to Mesnard for those documents and photographs were rebuffed.

(v) Exculpatory information about Shooter made known to the Sherman & Howard investigation team would not be included in the report.

(vi) A copy of what was to be the report was provided to Mesnard nine days before Mesnard released the report to the public as final and during the nine days, Mesnard changed the report to remove exculpatory information about Shooter.

(vii) While the Mesnard edited report used the employment law terminology of "hostile work environment" to fault Shooter, Mesnard's new policy had an easier lower subjective (instead of objective) standard than would be applied under employment law.

(viii) Mesnard's insistence on an expulsion vote almost immediately after dissemination of the report meant that Shooter was deprived of "the opportunity to meaningfully defend himself in a hearing before his peers" and Shooter was effectively prevented from raising the serious defects of the report prior to the expulsion.

(ix) Without a due process Committee hearing, Shooter's peer legislators were denied the time, opportunity and information to evaluate objectively the facts, evidence and appropriate policies and were denied the opportunity to hear Shooter's responses and rebuttals.

(x) After the expulsion, Kelly Townsend, the representative who had advocated on the House floor to expel Shooter from the Arizona House, later stated on the floor of the Arizona House that "in retrospect it was the wrong process to remove Shooter without an ethics hearing."

The Ninth Circuit says nothing about these facts that established the due process inadequacy of a third-party report based on privately conducted interviews and edited by a political opponent of the representative considered for expulsion instead of having an Ethics Committee hearing as the basis for the expulsion of an elected legislator.

Third, the Ninth Circuit's stated federalism concern is without merit. There is no legitimate state interest in dispensing with a due process Committee hearing and allowing for the shenanigans engaged in by Mesnard and Adams to cut off Shooter's anti-corruption efforts. Even in extreme cases of corruption, Arizona had always previously held an Ethics Committee hearing to consider expulsion of a member of the state legislature. There was no Arizona state interest that called for Shooter antagonist Mesnard to hire and arrange for the payment of a private law firm to conduct an investigation and issue a report and then to engage surreptitiously in editing the report before its issuance. Under the Arizona State Constitution, the members of the Arizona House and Senate may expel a member for disorderly behavior, Arizona Constitution, Article IV, Pt. 2, § 11, but that provision does not validate allowing the procedure for

Constitution that has its own due process clause virtually identical to the Fourteenth Amendment. Arizona Constitution, Article II, § 4. expulsion to be a law firm report edited by the Speaker instead of the traditional norm of an Ethics Committee hearing. Under the Arizona State Constitution, each house shall determine the qualifications of its members and determine its own rules of procedure, Arizona Constitution, Article IV, Pt. 2, § 8, but that provision does not authorize a lone member, Speaker Mesnard, to act on his own in setting up a committee of his staff that hired a private law firm paid for by the Speaker instead of an Ethics Committee hearing. The recognition of a due process right to an Ethics Committee hearing is completely consistent with the Arizona State

Fourth, there is no state law remedy. It was ruled in this case by the Superior Court of Maricopa County, Arizona that, as there is no Arizona equivalent to 42 U.S.C. § 1983, there is no private right of action under the Arizona Constitution's due process clause. *Shooter v. State of Arizona, et al*, CV 2019-050782 (May 20, 2020).

Fifth, the Ninth Circuit unfortunately seems oblivious to what trial lawyers well understand: that a due process Committee hearing has what a third-party report does not, with procedures such as cross-examination that our legal system recognizes as essential for accurate decision-making. This Court in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), recognized that the practical reason why due process matters is so that cases are

not decided "on the basis of an erroneous or distorted conception of the law or the facts." The Mesnard edited report cries out for cross-examination of witnesses. This Court has held that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). This is so because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *see Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) ("Due process requires cross-examination in circumstances like these because it is 'the greatest legal engine ever invented' for uncovering the truth. Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted.")

Sixth, the Ninth Circuit did not take account of the fact that the voters of a legislative district have chosen an individual to be their representative, and that choice of the People should not be subject to being negated or overruled by political cabals whose accusations do not pass muster if subjected to a due process Committee hearing.

C. Conflict With *Hope v. Pelzer*, 536 U.S. 730 (2002).

The Ninth Circuit's decision in this case, ruling that a constitutional right is not "clearly established" for an action under 42 U.S.C. § 1983 where there is an absence of a specific case on the facts of this case (16a-17a), conflicts with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730, 740-741 (2002), ruling that the key to determining whether there was "reasonable warning that the conduct then at issue violated constitutional rights," that "general statements of the law are not inherently incapable of giving fair and clear warning" and that "a general constitutional rule already identified in the decision law may apply with obvious clarity to the specific conduct in question."

Shooter's Complaint discusses at paragraphs 90 through 152 and 157 through 172 Shooter's constitutional due process and equal protection rights asserted in this case in connection with the expulsion: Shooter had due process rights to a due process Committee hearing and not to be judged under a retroactively applied and unadopted standard and an equal protection right to be treated the same as a female in the investigation related to the expulsion. (66a-86a.) Those Fourteenth Amendment rights are fundamental, go to the heart of its constitutional guarantees and are clearly established by precedent. There are three constitutional interests at stake: *first*, the due process hearing and being advised of the evidence against him,

quoting at length a classic due process statement in *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959); *second*, the anti-retroactivity principle, *see Landgraf v. USI Film Prod.*, 511 U.S. 244, 265-271 (1994); and *third*, the fundamental right to be free from gender discrimination, *see Davis v. Passman,* 442 U.S. 228, 234–235 (1979). (66a-88a.)

The Ninth Circuit, however, invoked cases decided by this Court which are said to stand for the proposition that satisfaction of the "clearly established" element of disallowing qualified immunity requires cases that were on point to the particular to the facts of the case, citing the concern that plaintiffs would be able to convert the rule of qualified immunity into virtually unqualified immunity by alleging an abstract right: *White v. Pauly*, 137 S.Ct. 548, 552 (2017); *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018); *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

These cases are not remotely on point here. *White v. Pauly*, *Kisela v. Hughes*, *City of Escondido v. Emmons*, and *City & County of San Francisco v. Sheehan* are all cases alleging excessive force by police; and *Ashcroft v. al-Kidd* involves the highly similar issue of a justified arrest. The weighty concerns about not subjecting police officers to liability for law enforcement actions are simply not pertinent to the question of whether a legislator has clearly established due process rights to a due process Committee hearing and to not be judged under

a retroactively applied standard. The Ninth Circuit took language meant for an entirely different context of police liability in law enforcement and misapplied it to avoid recognition of what are clearly established rights in this case.

It is not to be expected there will be many cases regarding the procedure in the specific and highly unusual context of a state legislator's expulsion for alleged creation of a hostile work environment. But that does not mean the rights are not clearly established. The applicable case here is *Hope v. Pelzer*, and the Ninth Circuit's opinion is in conflict with it.

D. Due Process and Conflict Among The Circuits.

The Ninth Circuit's decision in this case upholding a law firm report as acceptable process creates a conflict with other Circuits recognizing a due process interest of a legislator to the due process of a committee hearing: *McCarley v. Sanders*, 309 F.Supp. 8 (M.D. Ala. 1970), and *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 158 (2d Cir. 2010).

The Ninth Circuit rightly seems to recognize that the three-judge district court decision in *McCarley v. Sanders*, 309 F.Supp. 8 (M.D. Ala. 1970), is entitled to weight in a clearly established law inquiry, but wrongly tries to rationalize away the decision. *McCarley v. Sanders* held that the Alabama Senate violated the due process rights of Senator McCarley when expelling him and ordered his reinstatement.

The Ninth Circuit says that *McCarley v. Sanders* had "extreme facts," but this case is even more extreme. In *McCarley v. Sanders*, the Alabama Senate appointed an investigating committee that held hearings with witnesses, but without Senator McCarley and his attorney present, and rendered a report. That process was judged not to be sufficient due process, which would indicate that having a law firm that conducts private interviews without Shooter and counsel present and renders a report would be equally deficient as a matter of due process. The Ninth Circuit says that this case is different from *McCarley v. Sanders* because of the law firm investigation and report, but in fact, this case is worse when the allegations of the Complaint ignored by the Ninth Circuit are considered—for example, how the law firm report was edited by Mesnard to remove exculpatory information about Shooter.

The Second Circuit in *Monserrate v. N.Y. State Senate*, 599 F.3d 148, 158 (2d Cir. 2010), recognized the stigma-plus interest of a State Senator who was subject to legislative expulsion and the need for a due process requirement before expulsion. *See Doe v. Purdue*, 928 F.3d 652 (7th Cir. 2019) (Barrett, J) ("stigma-plus" in university disciplinary context). In that case, a select committee was formed to deal with the issue; a private law firm was not hired to conduct the investigation and render a report. The Second Circuit held that what the select committee offered Senator Monserrate was sufficient process in terms of an appearance.

The point is that a Committee of peers needs to be the due process mechanism for considering grounds for expulsion, not a private law firm report subject to manipulation.

E. Due Process and A Deliberate Effort To Prevent Anti-Corruption Inquiries.

The Ninth Circuit's qualified immunity decision effectively immunizing a deliberate effort to prevent anti-corruption inquiries raises an important federal constitutional due process question that the U.S. Supreme Court should consider and calls for the exercise of the Court's supervisory power. Qualified immunity as a legal doctrine was developed so that good faith law enforcement decisions by Government officers not be subject to liability. Qualified immunity was never designed for the purpose of keeping corrupt activities free of scrutiny.

F. Equal Protection and Supervisory Authority.

The Ninth Circuit's transparently deficient ground for rejecting Shooter's equal protection claim constitutes an important federal constitutional due process question that the U.S. Supreme Court should consider and calls for the exercise of the Court's supervisory power.

The Ninth Circuit recognizes that the Complaint adequately pleads that Ugenti-Rita was treated differently than Shooter (and she was), but rules that the Complaint did not sufficiently allege intent in

treating Shooter differently because of sex, asserting that the Complaint alleges that the differential treatment of Ugenti-Rita was due to the efforts to end Shooter's efforts to uncover corruption. (77a-81a.) But the plain error of the Ninth Circuit is that acting with the intent to end Shooter's efforts to uncover corruption does not exclude also acting with the discriminatory intent of treating Shooter differently and protecting Ugenti-Rita because of sex.

Here, the Ninth Circuit opinion is deficient in reaching the conclusion that the Complaint failed to plead facts supportive of discriminatory intent based upon sex (77a-81a):

(i) The Mesnard edited report stated in a conclusory manner that there was no credible evidence that Ugenti-Rita had violated the sexual misconduct policy, even though a known victim of Ugenti-Rita came forward, was interviewed by Sherman & Howard, and provided her account, documentary evidence (lewd and nude texting) and corroborating contemporaneous witnesses to sexual harassment.

(ii) The Complaint alleged that the 75-page report had 65 pages dedicated to the allegations against Shooter, while 1½ pages concerned the allegations against Ugenti-Rita.

(iii) The report excluded the evidence of sexual misconduct by Ugenti-Rita that was far more egregious than any allegation against Shooter, and Ugenti-Rita was never disciplined.

G. Departure From Established Principles.

In two significant ways, the Ninth Circuit departed from established principles, stated by this Court and other courts of appeal, for deciding motions to dismiss, departures that constitute an important federal question that the U.S. Supreme Court should consider and that call for the exercise of the Court's supervisory power.

First, the Ninth Circuit, by omitting recognition of a plethora of material allegations of the Complaint, departs from what is a well-recognized principle of law and stated by this Court in *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007): "[F]aced with a Rule 12(b)(6) motion to dismiss. . . , courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true." U.S. Courts of Appeal have made similar pronouncements—e.g. *Doe v. Columbia*, 831 F.3d 46, 48 (2d Cir. 2016), "On a motion under Rule 12(b)(6) to dismiss a complaint for failure to state a claim, the only facts to be considered are those alleged in the complaint, and the court must accept them, drawing all reasonable inferences in the plaintiff's favor, in deciding whether the complaint alleges sufficient facts to survive."

Further, the Ninth Circuit treats as true a document not attached to the Complaint but rather that is attacked in the Complaint as erroneous. That treatment is not justified by the requirement that the courts "consider" "documents incorporated into

the complaint by reference." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). The Mesnard edited Sherman & Howard report was not incorporated by reference into the Complaint such that the statements in that report were part of the allegations of the Complaint. It is important for courts, when considering a document not attached to the Complaint and instead asserted to be erroneous, not to treat as true what is stated in the document without reference made to the allegations of the Complaint calling into question the document. A proper treatment of the Mesnard edited report would not permit the Ninth Circuit's dismissal of Shooter's anti-retroactivity due process claim.

Second, the Ninth Circuit upheld the District Court's denial of leave to amend the original Complaint that was dismissed on a Rule 12(b)(6) motion. Rule 15(a)(2) of the Federal Rules of Civil Procedure states that "The court should freely give leave when justice so requires." The wise rule in the Second Circuit is for the court to allow one amendment at the outset before considering denying leave to amend. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 189-191 (2d Cir. 2015). Here, an amended pleading could, for example, add a request for prospective injunctive relief to secure due process rights and avoid a qualified immunity inquiry and add allegations to fortify the equal protection and anti-retroactivity claims.

CONCLUSION

Based on the foregoing, this Court should grant the petition for a writ of certiorari and such other and further relief as deemed just and proper.

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