No. 22-103

In The
Supreme Court of the United States

GAVIN CLARKSON,

Petitioner,

v.

BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY and ENRICO PONTELLI IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY,

Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Did the Tenth Circuit err in denying petitioner's motion to supplement the record on appeal with thirty documents based on petitioner's false allegation, made for the first time on appeal, that respondents "materially misrepresented" a document at the summary judgment stage?**

2. **Does the Tenth Circuit's statement that it examined the appellate record suffice to prevent its decision from being overturned based on petitioner's unsupported allegations that the court failed to listen to the audio portions of the appellate record?**

3. **Did the District Court mistakenly apply the wrong administrative rule, despite the fact that it explicitly cited and applied the correct rule?**

4. **Does New Mexico Statutes Annotated (NMSA 1978) Section 37-1-23(A), which waives sovereign immunity based on written contracts, have any bearing on whether respondent NMSU is a "person" under 42 U.S.C. § 1983?**

5. **Is a fact material to a claim simply because it is mentioned in an appellate opinion?**

6. **Did the Tenth Circuit commit reversible error when it declined to consider petitioner's new argument on appeal that his contract with respondent NMSU was ambiguous?**

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

STATUTES, REGULATIONS, AND RULES

STATEMENT OF CASE

A. Facts Relevant to the Issues Submitted for Review

New Mexico State University is a land-grant institution and public research university governed by a Board of Regents that has granted authority to the university administration to adopt rules and procedures as necessary to implement the Board's policies. R. 172, ¶¶ 1, 2, 5. Those rules and procedures, published as Administrative Rules and Procedures ("ARP"), have the force and effect of policy and are not to be construed as a contract. R. 200, ¶ 4.

Defendant Dr. Enrico Pontelli is Dean of the NMSU College of Arts & Sciences, and he served as Hearing Officer for a pre-determination hearing regarding petitioner's termination from NMSU. R. 196.

Petitioner was a tenure-track Associate Professor of Business Law in the Department of Finance in the College of Business at NMSU. R. 202-203. In June 2017, petitioner accepted a full-time position as Deputy Assistant Secretary for Policy and Economic Development ("DASPED") in the Office of Indian Affairs at the U.S. Department of the Interior. R. 17, ¶ 5.

On June 19, 2017, petitioner requested an unpaid professional leave of absence under ARP § 8.53. R. 174. Under ARP § 8.53, after three years of service, any faculty member may apply for professional leave, normally not to exceed one year, "for the purpose of undertaking some project that will directly benefit the

university and the person's professional development." Any conditions of the leave "must be in writing prior to the leave period." R. 209-211.

Petitioner requested leave until January 2020, or optionally at his discretion until January 2021, citing his appointment to the DASPED position. R. 212-213. Petitioner's two-page memorandum regarding his leave request stated that his service as DASPED "provides a direct reputational benefit to NMSU and the College of Business," and that such service would benefit his professional development. *Id*.

Petitioner, in his Opening Brief to the Tenth Circuit, alleged a new theory, not presented to the District Court, that he did not request leave to serve as DASPED, but rather "to work on eliminating double-taxation on job creators in Indian Country," which he refers to as "the Project." Pet. C.A. Br. 2. Petitioner's leave request memorandum makes no mention of this project. Petitioner asked the Tenth Circuit to consider an additional document entitled "Tenure Review for Gavin Clarkson," which he claims proves that he sought leave to work on this "project." This additional document does not refer to a project to eliminate double taxation on job creators, and was never referred to in the trial court proceedings or provided to the District Court.

At all relevant times, Dr. Daniel J. Howard served NMSU as Executive Vice President and Provost. The Deans of each NMSU academic college, including Dr. Pontelli, report to the Provost. R. 196-199, ¶ 5. On June

28, 2017, in response to petitioner's leave request, Provost Howard congratulated petitioner on his appointment as DASPED and granted his request for unpaid leave until January 2020. R. 214.

On December 29, 2017, petitioner resigned from the DASPED position. R. 104-120, ¶ 24. In his Opening Brief to the Tenth Circuit, petitioner asserted for the first time that he resigned because he had "reassessed how best to achieve the goals of [his] project." Pet. C.A. Br. 2. Petitioner identified no place in the record where he states this reason for his resignation. In contrast, in petitioner's own affidavit, attached to his Motion for Partial Summary Judgment, he stated that after Congressman Steve Pearce announced his intent to run for Governor of New Mexico rather than seeking reelection to Congress, petitioner "began seriously considering leaving Interior and running for the open seat, given that one of my mentors, Garrey Carruthers, had taken a similar path." R. 275, ¶ 19.

On January 12, 2018, Provost Howard revoked petitioner's unpaid leave of absence, citing the end of petitioner's appointment as DASPED, and ordered petitioner to return to work for spring 2018 and to report to campus with all other NMSU faculty members on January 16, 2018. R. 215. Petitioner did not return to work. On January 24, 2018, Provost Howard issued a Notice of Proposed Termination, stating that petitioner's refusal to return to work constituted job abandonment and insubordination. R. 216-217. Respondent asserted these undisputed facts in its Motion for Summary Judgment (R. 174-175, ¶¶ 17-18), and petitioner

did not dispute them in his Response and Opposition to Defendants' Motion for Summary Judgment.

Petitioner falsely stated for the first time in his Opening Brief to the Tenth Circuit that it is "undisputed" that he complied with the "specified requirements for returning to work," and stated that proposed termination was based solely on his "protest" of the alleged "*ultra vires* cancellation" of his leave of absence. Pet. C.A. Br. 7. There are no cites to the record to support petitioner's proposition.

Petitioner also referred to ARP § 6.03 and ARP § 10.10.7 for the first time on appeal. Neither of those documents are in the record. He refers to these now in his argument that the "just cause" of "job abandonment and insubordination" stated in the Notice of Proposed Termination did not apply to him as a faculty member. Pet. C.A. Br. 7. Petitioner's argument that "job abandonment and insubordination" do not represent "just cause" to terminate a faculty member is not only illogical, but was also presented for the first time on appeal.

On January 31, 2018, petitioner exercised his right to a pre-determination hearing on the proposed termination, as provided in ARP § 10.50. Pet. App. 16a. The pre-determination hearing took place on April 13, 2018. R. 196-199, ¶ 14. Dr. Pontelli served as Hearing Officer. *Id.* As Dean of the College of Arts & Sciences, Dr. Pontelli reported to Provost Howard, but did not supervise petitioner and had no role in the evaluation

of petitioner's performance or qualifications for tenure. *Id*., ¶ 10.

Petitioner brought an attorney to the pre-action hearing, and he was permitted to consult with the attorney during the hearing. *Id.*, ¶ 18. Petitioner requested four witnesses be available for the hearing, and all were presented and examined by petitioner. R. 226. Dr. Pontelli allowed petitioner only limited questioning of witnesses regarding an allegation of self-plagiarism made in the spring 2017 semester; Dr. Pontelli ruled that the self-plagiarism allegation was not relevant to the Notice of Proposed Termination. *Id*., ¶ 19.

Dr. Pontelli issued a Final Determination on April 20, 2018, upholding the proposed termination. He also ordered NMSU to provide petitioner "a final chance to request the opportunity to immediately resume his regular duties as a faculty member at NMSU in lieu of termination." R. 230-232.

Provost Howard issued a Notice of Termination, dated April 24, 2018. That Notice included an offer of immediate reinstatement in lieu of termination, as ordered by Dr. Pontelli. Petitioner did not return to work and NMSU proceeded his with termination effective April 27, 2018. R. 233.

Petitioner then requested a post-determination appeal hearing pursuant to NMSU rules, but later abandoned efforts to get it scheduled. R. 219-224, Section K.

B. Procedural History

Petitioner, then represented by counsel, filed a Complaint in the Third District Court, State of New Mexico, County of Dona Ana, on July 27, 2018 (D-307-CV-2018-0161).[1] Respondents filed a Notice of Removal on September 14, 2018. R. 13-47. In November 2018, respondents filed a Motion to Dismiss for Failure to State a Claim. R. 58-67. In March 2019, the District Court granted the Motion to Dismiss in part and granted petitioner leave to file an amended complaint. R. 91-104.

Petitioner filed his First Amended Complaint on March 29, 2019, with two causes of action: Breach of Contract and due process violations under 42 U.S.C. § 1983. R. 104-120. Petitioner in his Amended Complaint named four individual respondents for the first time: Enrico Pontelli, James Hoffman, Dan Howard, and Nancy Oretskin. On September 24, 2019, respondents filed a Motion to Dismiss the Amended Complaint on behalf of defendant James Hoffman. R. 135-142. Petitioner responded with a Notice of Dismissal as to Hoffman. R. 143-144. Petitioner failed to serve Dan Howard and Nancy Oretskin and the District Court dismissed them from the lawsuit. R. 7, Docket #51.

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[1] Petitioner asserted for the first time on appeal to the Tenth Circuit, and in his petition for a writ of certiorari, that he filed his lawsuit on May 18, 2018. Pet. C.A. Br. 8. Petitioner's pro se filing is not in the record, and there is no evidence that Petitioner served that lawsuit on any defendant.

After the District Court's orders, NMSU and Dr. Pontelli were the only remaining respondents. Petitioner alleged breach of contract against NMSU and due process violations under 42 U.S.C. § 1983 against "Respondents," presumably both NMSU and Dr. Pontelli. R. 104-120. After the close of discovery, respondents moved for Summary Judgment and petitioner moved for Partial Summary Judgment regarding violation of due process on January 11, 2021.

On May 3, 2021, the District Court issued its Memorandum Opinion and Order (R. 496-525) and the Final Judgment (R. 526) granting respondents' Motion for Summary Judgment, denying petitioner's Partial Motion for Summary Judgment, and thereby dismissing petitioner's claims. The District Court dismissed petitioner's due process claim against the Board of Regents with prejudice because the Board of Regents and Dr. Pontelli, in his official capacity, are not proper defendants in a Section 1983 claim, noting that "the Tenth Circuit has consistently held that universities and their boards of regents are arms of the state and, thus, not 'persons' under Section 1983." Pet. App. 22a-25a (citing *Sturdevant* v. *Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000); *Barrett* v. *Univ. of N.M.*, 562 Fed. Appx. 692, 694 (10th Cir. 2014) ("The Board is an arm of the State of New Mexico. . . ."); *Porro* v. *Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010) (claim against a state employee in his official capacity is essentially "another way of pleading an action against the [governmental entity] they represent")).

The District Court also held that petitioner's due process claim for injunctive relief against Defendant Pontelli in his official capacity failed as a matter of law because petitioner did not dispute that Defendant Pontelli did not have the authority to grant the prospective relief petitioner requested. *Id.* (citing, *inter alia*, *Barrett*, 562 Fed. Appx. at 695 (explaining that in order to obtain prospective equitable relief the plaintiff must "adequately allege the individual official's duty to enforce the statute in question and a demonstrated willingness to do so")).

The District Court also found that Defendant Pontelli was entitled to qualified immunity from petitioner's due process claim in his individual capacity because "[p]etitioner was notified of the reasons for his proposed termination, given an opportunity to be heard and present his side at a hearing, was provided the documents (respondents) relied on at the hearing, and presented with an opportunity to appeal his termination decision, which he abandoned." Pet. App. 36a. The District Court noted that the pretermination hearing "need not definitively resolve the propriety of the discharge," but "should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Pet. App. 31a (citing *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-546 (1985)). The District Court concluded that "the totality of the procedures and opportunities which the University afforded plaintiff were sufficient to satisfy

constitutional requirements." Pet. App. 36a (citations omitted). The Court also found that "Plaintiff does not make a substantial showing of personal bias on the part of the hearing officer, nor does he present any facts indicating the hearing process was fundamentally unfair." Pet. App. 37a.

As to petitioner's breach of contract claim, the District Court found that "the parties entered into a contract for petitioner to take a leave of absence to January 2020 for the purpose of serving as DASPED and to extend petitioner's tenure review to the fall semester immediately following his return to NMSU." Pet. App. 40a. The Court found that ARP § 8.53 allowed for a leave of absence only for a purpose that directly benefits the university, which "must be detailed in the application." Pet. App. 42a.

> Once that purpose ended, the parties were no longer bound by the leave of absence agreement and petitioner was required to perform under the 2017-2018 contract. Instead, petitioner refused to acknowledge his leave of absence had ended and did not return to his duties as a faculty member or request a second leave of absence. Therefore, Plaintiff cannot demonstrate due performance under the leave of absence agreement, so Defendant's revocation of the leave was not a breach. Accordingly, the Court finds as a matter of law there was no breach of contract and grants summary judgment for Defendants on this claim.

Id. The Court thus granted summary judgment in favor of respondents and dismissed all of petitioner's claims with prejudice. Pet. App. 43a. Petitioner was represented by counsel throughout the proceedings at the trial court level. R. 11.

Petitioner, then acting *pro se*, filed a Notice of Appeal on June 1, 2021, stating he was appealing the Final Judgment entered on May 3, 2021. R. 11-12.

On October 18, 2021, petitioner filed his Opening Brief to the Tenth Circuit, which respondents answered on November 18, 2021. Petitioner's Opening Brief contained an extensive section entitled "Other Relevant Facts," beginning on page 8 and continuing through page 25. Petitioner alleged that "numerous facts were not presented to the court at summary judgment but were part of the record." Pet. C.A. Br. 8. Petitioner then went on to describe those "facts" that were by his own admission "not presented" to the District Court.

Petitioner filed an unopposed Motion to Correct the Record on Appeal to supplement the record with the audio recordings of the pre-determination hearing. The audio recordings were lodged with the District Court as an attachment to petitioner's Motion for Partial Summary Judgment but not initially included in the record on appeal. On November 23, 2021, that appellate court granted petitioner's Agreed Motion to Correct the Record on Appeal, adding the audio recordings to the record.

On December 23, 2021, petitioner moved to supplement the record with thirty documents, asking the appellate court to simply "exercise its discretion" to accept and consider the thirty documents he identified. Respondents opposed this motion arguing, *inter alia*, that acceptance of material not previously before the District Court would not aid in the court's review of the lower court decision.

The Tenth Circuit issued its Order and Judgment on March 31, 2022, denying petitioner's motion to supplement the record and affirming the District Court's entry of final judgment "for substantially the reasons cited by the district court." Pet. App. 1a, 6a. The Tenth Circuit declined to "consider the arguments Clarkson raises for the first time on appeal because he does not argue that they support reversal under plain-error review." *Id.* at 6a (citing *Richison* v. *Ernest Group, Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.")). Moreover, the Tenth Circuit found that the records petitioner sought to add to the record were either not submitted to the District Court or were already in the record. As the Federal Rule of Appellate Procedure 10(e) permits modification of the record on appeal "only to the extent it is necessary to 'truly disclose what occurred in the district court,' " the Tenth Circuit reiterated that it "will not consider material outside the record before the district court." *Id.* at 7a (citing *United States* v. *Kennedy*, 225 F.3d 1187, 1191 (10th

Cir. 2000) (brackets omitted) (quoting Fed. R. App. P. 10(e)(1))). Petitioner's Petition for Panel Rehearing was denied by the Tenth Circuit on April 29, 2022.

REASONS FOR DENYING THE PETITION

A. The Court should not grant the petition because petitioner's questions presented are based on false premises, were not raised below, and/or are irrelevant to the lower courts' decisions.

Each of the petitioner's questions presented prove problematic as vehicles for the Court's review of legal issues. Some are premised on unsupported, false assertions. Others are merely generalized objections to the lower courts' application of settled law that fail to include any substantive legal basis for dispute. Finally, most of the questions presented rely on arguments and evidence not presented to the trial court, despite the fact that petitioner was represented by counsel at that stage.

1. Petitioner's first question presented is based on a false accusation against respondent, facts and argument not presented to the District Court, thus deemed waived by the Tenth Circuit, and is unsupported by the document petitioner claims respondents misrepresented.

Petitioner's first question presented is premised on his allegation "the government materially misleads

the lower court" with respect to an exhibit. Petitioner argues that respondents omitted a document that he says supports his argument that he requested leave to work on a "project," and not simply to serve as DASPED.

The omitted pages only undermine his claim. They begin with the capitalized heading "TENURE REVIEW OF GAVIN CLARKSON DRAFT EXECUTIVE SUMMARY," include topics unrelated to his leave request, such as his teaching philosophy, and do not mention double taxation or that petitioner is pursuing a "project" to eliminate double taxation. Pet. App. 48a-56a. The leave request memorandum in the record does not refer to these omitted pages, nor do those pages refer to his request for leave. Thus, the document does not support petitioner's argument that his request for leave was to pursue a project beyond his appointment as DASPED, and therefore was not submitted to the District Court because it was not pertinent to his request for leave. It would be a waste of the Court's time to review this case to determine whether the Tenth Circuit should have supplemented the record on appeal to add a document that does not support petitioner's argument.

Most telling is the fact that petitioner never alerted the District Court to the "pivotal" document, or to the argument that his leave request was for a project beyond his appointment at DASPED. The burden is on a plaintiff to present and prove his case at the trial court level and where, as here, the defense moves for summary judgment, a plaintiff is also responsible to

ensure that any objections to that motion and its exhibits are raised in response brief. These responsibilities and the attendant consequences of failing to meet them (i.e., waiver of the arguments not raised) were undoubtedly known to petitioner, a legal scholar who was represented by counsel in the administrative and trial court proceedings. Even assuming *arguendo* respondents unintentionally attached an incomplete document as an exhibit to their summary judgment motion, it was petitioner's obligation to direct the District Court's attention to that mistake for correction. Petitioner's protest on appeal regarding an allegedly incomplete document is merely a mendacious part of a larger ploy to sidestep the legal standard of review in order to reframe his case on appeal with new arguments. If any party has materially misled the courts, it is surely petitioner.

Finally, there is no conflict between the U.S. Circuit Courts regarding when they will supplement a record on appeal that could be resolved by granting the petition. The Tenth Circuit's decision not to supplement the record or consider new arguments is consistent with the general rule of this Court that "a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). "[W]hen to deviate from this rule [is] a matter 'left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.'" *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 (2008) (citing *Singleton* at 121). The Court has "previously stopped short of stating a general principle to contain

appellate courts' discretion," and declined to do so in *Exxon*. *Exxon* at 487. Petitioner has presented no reason for the Court to do so now.

2. The lower courts did not commit reversible error if they did not listen to the entire audio recording of petitioner's administrative hearing that petitioner failed to show would result in reversal.

Petitioner seems to argue that the District Court and Tenth Circuit committed reversible error by not listening to the entire audio recording of his administrative hearing. Yet petitioner failed to alert this Court as to *any* evidence or legal theory that could be gleaned from the audio recording that would support reversal. Petitioner also cited no case law supporting his argument that either court was required to scour the record for evidence supporting his claims, nor has he identified why this issue is so important as to warrant review by the U.S. Supreme Court. Therefore, this Court has no reason to review this question.

Also, petitioner falsely alleged that the Tenth Circuit "failed to listen to even one minute of that hearing audio. . . ." There is no basis for this assertion. The Tenth Circuit's Order and Judgment stated that it examined the briefs *and appellate record.* Pet. App. 8a.

3. The District Court applied and cited the correct section of the ARP.

Petitioner's third question presented is based on a misstatement of the Memorandum Opinion and Order of the District Court. Contrary to petitioner's representation to this Court, the District Court did not refer to or rely on ARP § 10.10.7 (concerning staff discipline) in its decision, nor was that document part of the record. The District Court did, however, explicitly cite to and apply ARP § 10.50, entitled "Faculty Alleged Misconduct Investigation, Discipline, and Appeals Process," the portion of the ARP petitioner concedes is applicable. Pet. App. 28a. Moreover, petitioner has again failed to show how additional sections of the ARP would support reversal on any of his claims.

4. NMSA 1978 Section 37-1-23(A) does not apply to petitioner's 42 U.S.C. § 1983 claims.

The District Court dismissed the due process claim against respondent NMSU because it is not a "person" under 1983. Pet. App. 22a-24a. NMSA 1978, § 37-1-23(A), which waives immunity from suits based on valid, written contracts, has no bearing on whether NMSU is a person under § 1983. Therefore, the Tenth Circuit appropriately did not consider this statute.

5. The fifth question presented by petitioner is based on a misstatement of the appellate court's opinion and is therefore irrelevant to his appeal.

Petitioner bases the fifth question on a misstatement of the appellate court's Order and Judgment. Specifically, he claims that the appellate court "concedes that material facts are in dispute." In fact, the appellate court only stated that the parties dispute a specific fact, "whether Clarkson returned [to duty] as required." The Tenth Circuit never opined that this fact is material. Pet. App. 3a.

In fact, petitioner did not allege that he returned to duty in the spring of 2018 until his brief-in-chief to the Tenth Circuit. The Tenth Circuit affirmed the District Court "for substantially the same reasons cited by the district court" with respect to arguments presented to the District Court. Pet. App. 6a. Given that petitioner's fifth question presented is clearly based on a false premise, the purported issue does not require resolution by the Court.

6. The sixth question presented was not ruled on by the appellate court because the ambiguities petitioner alleges were never raised to the District Court.

Petitioner did not claim there were any ambiguities with his contract with respondent NMSU until his appeal. As the Tenth Circuit explained, these claims of ambiguity were not considered by that court because

the petitioner did not argue that they support reversal on plain-error review.

Petitioner also has failed to identify any ambiguity in the contract that would support reversal. If his petition is read to argue that the ambiguity was the scope of the purpose of the leave, i.e., for the DASPED position or for a broader "project," the evidence, whether in the record or in petitioner's "pivotal exhibit," also does not support reversal for the reasons stated in Section A.1., *supra*.

B. There are no important legal issues presented by the petition, the appellate court did not err, and the appellate court's ruling will have no precedential value.

1. The petition does not present issues that have widespread applicability, are of profound importance to our national jurisprudence, or address ambiguous statutes or legal precedents.

While likely of personal importance to the petitioner, the Court's rulings on his questions presented would not result in reversal of the lower court's decision. Nor will they be of use to other litigants, practitioners of law, or jurists because they involve merely the petitioner's general objections, without sufficient legal or factual support, to the appellate court's affirmation of the lower court's rulings concerning his termination after an administrative hearing that included witness testimony, cross examination,

documentary evidence, and a written decision. These are not legally complex matters and do not involve novel questions of law, but rather the routine application of settled standards of legal review to a straightforward motion for summary judgment that was correctly resolved by the District Court and that court's subsequent dismissal of the remaining claims. Petitioner was represented by counsel at the administrative hearing and throughout the District Court proceedings.

Moreover, the factual scenario involves no topics of national concern or debate. This is a simple employment law case involving the firing of a single person, for legitimate reasons and in accordance with constitutional due process, where the petitioner merely refuses to accept the outcome despite the fact it has received layers of consistently appropriate judicial review.

2. The appellate court's ruling will have no precedential value with respect to non-parties.

Though it may be cited for persuasive value, the footnotes of the appellate court's Order and Judgment state it "is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel." Pet. App. 8a, n.1. There is, therefore, no need for the Court to examine further the appellate court's

opinion with an eye toward its potential impact as a widespread binding authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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