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IN THE

# Supreme Court of the United States

DR. GAVIN CLARKSON, AN INDIVIDUAL PETITIONER,

*v.*

BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY; ENRICO PONTELLI IN HIS INDIVIDUAL CAPACITY AND OFFICIAL CAPACITY AS HEARING OFFICER

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION(S) PRESENTED

This petition presents one or more questions of exceptional importance. In particular, the Tenth Circuit conflicts with authoritative decisions of the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and particularly the Eleventh Circuits. This petition also raises significant questions regarding the due process protections that are apparently denied to conservative academics. Thus, Supreme Court review is necessary to settle important questions of Federal Law and secure and maintain uniformity of the Circuit Courts' decisions.

1. Should an appeals court supplement the record when the government materially misleads the lower Court, either intentionally or unintentionally, regarding a pivotal exhibit?

2. Should an appeals court floccinaucinihilipilificate arguments presented at an administrative hearing and incorporated as audio exhibits in a motion for summary judgment by treating them as "new arguments" on appeal merely because they were in an audio recording of the actual administrative hearing?

3. Are the Administrative Rules and Procedures promulgated by an instrumentality of a State documents that must be added to the record in order to be considered by a Court of Appeals?

4. Does an explicit waiver of sovereign immunity in a state statute apply when a §1983 claim is based on denial of due process regarding contractual claims related to employment?

5. Should summary judgment be granted when the Court concedes that material facts are in dispute?

6. Should ambiguities in contracts and administrative laws be construed against the government entity that drafted them?

## PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

## STATEMENT OF RELATED CASES

None

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Dr. Gavin Clarkson respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of the Appeals for the Tenth Circuit.

## OPINIONS BELOW

The decision of the District Court is unreported. App. 9a. The Tenth Circuit's opinion is unreported. App. 1a The Tenth Circuit's order denying my motion to reconsider is unreported. App. 57a

## JURISDICTION

This Honorable Supreme Court has jurisdiction over this petition because Petitioner timely filed his May 29, 2021, Notice of Appeal to the Tenth Circuit from the United States District Court for the District of New Mexico, challenging the Honorable U.S. District Judge Kevin R. Sweazea's Memorandum Opinion and Order, and Final Judgment entered on May 3, 2021. 28 USC §1254(1) establishes this Court's jurisdiction.

## RELEVANT PROVISIONS INVOLVED

(see 58a-60a)

## STATEMENT

I am an endangered species. I am an enrolled tribal member who is also a Christian, conservative, pro-life, pro-gun, pro-Israel, pro-secure borders, capitalist, Republican ... college professor.

Respondents have targeted me for years because of my political beliefs and once I formally outed myself as a Republican, they sought to "cancel" me while I was on professional leave without pay.

This episode was merely the latest attempt to destroy my academic career, as the radical leftists at New Mexico State University ("NMSU") started targeting me almost as soon as I joined the faculty in 2012.

Conservatives are often targeted for "cancellation" in academia, but there is particularly toxic vitriol reserved for conservatives from underrepresented groups, even more so if they are pro-life, since I served as the chairman of the board for a Christian abortion alternative center that empowered women to make the choice for life regardless of personal, family, or financial circumstances.

Just as the authoritarian left often calls Justice Clarence Thomas an "Uncle Tom," as a rare conservative tribal member in academia, "woke" academics at NMSU labeled me "Clarence Thomahawk" (Doc 75-2, Hearing_Recording_2 2:44–3:10).

I am a proudly enrolled member of the Choctaw Nation of Oklahoma, and as I testified at the predetermination hearing:

> My father was an orphan Indian kid in Chickasha, Oklahoma, during the depression, in what we would call the Dust Bowl. He was so broke, and he would tell you he was broke and

> not poor, because poor is a state of mind, whereas broke is merely a temporary insufficiency of cash flow. But he was so broke that he was digging through other Indian's garbage cans for food.
>
> In 1943, he decided two things. One, he was sick and tired of poverty. Two, he was mad at the Japanese for bombing Pearl Harbor. So he joined the Navy and never looked back. [In] 1948, he became the first American Indian to fly a jet. In 1962, he became the senior nuclear targeting strategist at NATO headquarters. So I am proof positive that Indian poverty is not a life sentence.

(Doc 75-2, Hearing_Recording1 10:47–11:30)

Like my father and my mother (also an enrolled tribal member), I view government control in Indian Country as a cause of tribal poverty and economic decay rather than the solution (*see e.g.* Clarkson, G., Spilde, K., *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce* 19 Vanderbilt Journal of Entertainment & Technology Law 1 (2016); Clarkson, G., Murphy, A., *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12.2 Journal of Law, Economics and Policy 31 (2016)), and certain faculty members think such beliefs violate leftist norms and thus justify the attempts to destroy my academic career.

If my defense of capitalism weren't bad enough, I am also happily married to a lawful immigrant who

followed the rules to become a US citizen. We both advocate for strong borders and oppose amnesty for illegal immigrants, which prompted a radical "open-borders" asylum law advocate and senior faculty member in my department to take a particular interest in sabotaging my career.

Despite the hostility, I persevered with my research agenda for the benefit of Indian Country. My examination of the impact of double taxation of job creators in Indian County (*see* "American Indians versus the Billion-Dollar Tax Weevil: The Pernicious Dual-Taxation of Tribal Economies after *Cotton Petroleum*;" ssrn.com/abstract=3017298, hereinafter "*Tax Weevil*") influenced an Advanced Notice of Proposed Rule Making (81 Fed. Reg. 89015-89017, December 9, 2016) regarding the Indian Trader Regulations (25 CFR 140).

> Additionally, the Department recognizes that dual taxation on Tribal lands can undermine the Federal policies supporting Tribal economic development, self-determination, and strong Tribal governments. Dual taxation of traders and activities conducted by traders and purchasers can impede a Tribe's ability to attract investment to Indian lands where such investment and participation are critical to the vitality of Tribal economies. (81 Fed. Reg. 89016)

Some tribal leader comments even referenced my *Online Sovereignty* and *Tax Weevil* articles in their responsive comments to the ANPRM.

The "woke" hostility towards me reached its zenith, however, after the 2016 election created mass hysteria throughout academia. The authoritarian left was determined to destroy anyone and everyone even remotely associated with Donald Trump, so my subsequently joining the Trump Administration would later turn out to be an act of academic suicide.

In retaliation for attending transition meetings with the incoming administration at the invitation of the National Congress of American Indians instead of attending a subsequently scheduled faculty meeting, the authoritarian leftists concocted a defamatory dossier alleging I had engaged in plagiarism (Doc 75-4) pp.60-61. I was scheduled to go up for tenure the following year, so the dossier's timing appears intended to cause maximum career damage.

Such false accusations are often made in attempts to destroy the reputation of conservative academics. Since I'm widely recognized as the nation's leading scholar in tribal finance, however, my adversaries were unable to document any cases of actual plagiarism and instead their fake dossier alleged "self-plagiarism."

This fake dossier contained passages that I periodically re-use, with proper attribution, from earlier articles, however the dossier deceptively omitted these attributions in a blatant attempt to persuade the Promotion & Tenure ("P&T") committee not to renew my contract.

I was able to force one of the dossier's protagonists to admit under oath that her allies had

started preparing this false dossier "years ago," (Hearing_Recording3 4:04-4:10), yet she and her allies decided to punish me for attending the Trump Inauguration by circulating this fake dossier two weeks after I was excused from attending the faculty meeting before later bringing it up again before the P&T committee.

The false plagiarism allegations were not the only time that radical leftists attempted to sabotage my academic career. I had been offered a joint position at the University of Arizona's business school and American Indian Studies, but that offer was rescinded after one or more NMSU faculty relayed vague and unsubstantiated and allegations that I had "gender issues."

After successfully debunking the defamatory dossier, I was invited by the incoming to interview for the Deputy Assistant Secretary for Policy and Economic Development – Indian Affairs ("DASPED") position in the United States Department of the Interior on April 26, 2017.

On June 7, 2017, I received the DASPED offer, which would allow me to develop policies to eliminate double taxation on job creators in Indian Country (the "Project"). While other positions offered to me also provided opportunities to work on the Project, the DASPED appointment offered greater potential Project impact. I accepted the DASPED offer effective June 11, 2017, and was sworn in the next day.

Since I was on summer break without NMSU obligations on or off campus, accepting the DASPED

position didn't immediately require leave.[1] Still, I quickly requested leave so replacement faculty could cover my Fall 2017 courses.

I have attached a complete copy of my Leave Request (Appendix 45a), as Respondents repeatedly omit pages 3-5. Whether their initial omission was intentional or not, Respondents have vigorously opposed including my complete Leave Request in the record at every opportunity.

Pursuant to NMSU's Administrative Rules and Procedures ("ARP ") §8.53.1, my Leave Request clearly identified the proposed Project multiple times. My opening paragraph noted that I had already accepted the DASPED appointment and then immediately detailed the Project:

> I will be responsible for developing and implementing economic initiatives throughout Indian Country, and I anticipate having a significant positive impact on tribes in New Mexico as well as the New Mexico economy as a whole. In fact, based on preliminary analysis [published in the Proceedings of the Sovereignty Symposium,] one of the first initiatives that I will work on will generate more than $1 billion of economic stimulus for New Mexico alone and perhaps $20 billion nationwide. *Leave Request.*, p.1.

> I repeated the university's benefit, as I was certain that a $1 billion economic stimulus for New Mexico, improving tribal economic infrastructure, and human capital development

> among the tribal nations of New Mexico clearly benefits the university. *Id.*, p.2.

In the portions omitted by Respondents, my Leave Request detailed the Project's focus on:

> the Indian Trader Regulations, with particular emphasis on reducing or eliminating state overreach in tribal economies, particularly in the areas of regulation and taxation (in part based on a case involving the Jicarilla Apache Tribe in northern New Mexico). My [relevant scholarship], was cited by several tribal leaders and federal officials during the comment period and is now part of the federal record. *Id.*, pp.3-4.

In addition to establishing the Project and its benefits to NMSU and New Mexico, my Leave Request specifically requested a timeframe to work on the Project:

> beginning Monday, August 14 and concluding when faculty report back to campus [January 2020]. I am also requesting the option, at my election, to extend that leave until the faculty report [January 2021]. *Id.*, p.1.

Provost Howard issued the Leave Granting Contract on June 28, 2017, almost three weeks after I started serving as DASPED, and more than six weeks after I received my first offer of political appointment.

ARP §8.53.7 states that:

> Periods of professional leave without pay normally will not apply toward the probationary period for tenure. **All conditions** of professional leave without pay, including the status of the individual upon return to the university and (if appropriate) the effect of this period on tenure and promotion eligibility, **must be in writing prior to the leave period.** (emphasis added)

The Leave Granting Contract's only written conditions, pursuant to ARP §8.53.7, were written in the second and third paragraphs:

> You have requested extended leave of absence without pay beginning Monday, August 14, 2017 and concluding when faculty report back to campus in January of 2020. ... I approve your first request, a leave of absence without pay until January of 2020. (Doc 75-4) p.5.
>
> ...
>
> I am going to immediately stop your tenure clock. It will be re-started when you re-join the faculty of NMSU. Thus, you will be expected to submit an application for tenure no later than the first fall semester following your return to the faculty. *Id.*

Nowhere in the Leave Granting Contract was leave conditioned on a particular position, which was consistent with the ARP §8.53.1 requirement that professional leaves were for projects, not positions. Such was also consistent with the conversations I had with my dean and department head.

Several months after assuming my appointment as DASPED, I reassessed how best to pursue the Project. In order to best to continue working on the Project, I resigned as DASPED on December 29, 2017. The record clearly shows, however, and Respondents' do not deny, that I continued to work on the Project through the end of the proposed leave period, and beyond.

Three days after a January 9, 2018, local newspaper story reported that I was a Republican, and despite publicly continuing work on the Project, Respondents canceled my leave and demanded my return to campus in a January 12, 2018, Notice to Return to Work. The record shows that I complied with every single requirement contained in that notice, and Respondents have provided precisely zero evidence that I didn't comply.

I thought about filing a faculty grievance but decided that compliance under protest and a well-reasoned refutation of the Respondents' *ultra vires* action was preferable. Because I didn't willingly submit to the authoritarian leftist administration at NMSU, however, Provost Howard initiated termination proceedings on January 24, 2018, while I was still properly on leave and still working on the Project.

I filed a timely appeal under ARP §10.50 and after Respondents' numerous delays and failure to provide all relevant information and access to witnesses, an administrative hearing took place on Friday, April 13, 2018.

While Respondents' denial of my due process rights began in January 2018, they were particularly egregious, as evidenced in the audio recordings (Doc 75-2) from a sham administrative hearing. No official written transcript of that hearing was ever made, but the entire audio of the appallingly short hearing was provided at summary judgement to the District Court (Doc 75-2) and despite being initially omitted as part of the Record on Appeal ("ROA"), was later added to the ROA (although subsequently ignored by the Tenth Circuit). The heart of my claim is the blatant denial of due process by the Respondents, which has been plainly evident from the beginning, but perhaps because only audio evidence was available, was apparently never considered by either the district court or the Tenth Circuit.

On April 20, 2018, Hearing Officer Enrico Pontelli unsurprisingly ruled for his direct superior, Provost Howard.

On April 21, 2018, pursuant to ARP §10.50.14, I timely appealed to NMSU's Faculty Appeals Board ("FAB").

Nevertheless, before the appeal was resolved, Provost Howard terminated my employment on April 24, 2018.

Respondents failed to schedule the FAB hearing within ARP §10-50.14.D's 25-day requirement.

On May 18, 2018 I filed suit *pro se* alleging breach of contract, denial of due process, retaliatory

discharge, and discrimination based on age, race, and religion.

On September 14, 2018, Respondents removed the case to federal Court and moved to dismiss. The district court denied the Respondents' motion as to my civil rights claims.

On January 11, 2021, I filed for partial summary judgment on my due process claims. Respondents simultaneously filed for summary judgment on my due process and contract claims.

Of critical importance to my appeal, Respondents materially misled the district court by claiming that my Leave Request was only the first two pages and omitted the substantive discussion of my efforts to eliminate double taxation on job creators in Indian Country in the remaining three pages.

This Court has made clear that "a 'fair trial in a fair tribunal is a basic requirement of due process.' [for] administrative agencies which adjudicate" *Withrow v. Larkin*, 421 US 35, 46, (1975). Demanding "the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication." *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1909 (2016).

I am asking this Court to either grant my petition and allow me to present oral argument regarding Respondents' egregious denial of due process as well as their other civil rights violations or, in the alternative, grant, vacate and remand back to the

district court so that those issues can properly be presented to a jury at trial.

**Administrative Hearing Decision**

The entirety of the administrative hearing was made part of the record before both the district court and the Tenth Circuit and was explicitly incorporated into my motion for summary judgment (Doc 75-2), yet neither court appears to have taken the time to listen to the hearing audio despite it being less than three hours in length.

**District Court Decision**

The Court partially ruled in my favor on May 3, 2021, but found for the Respondents overall and dismissed the case. Importantly, however, the Court didn't rule on ambiguity in either the Leave Granting Contract or my employment contract, did not find any failure to perform under my employment contract, nor did it find just cause for my termination.

Having correctly ruled the ARP incorporated into both contracts and finding a "bargained-for exchange" (Doc 105, p.25), the Court correctly noted that ambiguity "'is a matter of law to be decided by the trial court,'" *Id* p.26.

The Court erred, however, in characterizing the bargained-for exchange as one regarding a position rather than the Project, and then proceeded to infer ambiguities based on language that simply didn't exist in the Leave Granting Contract.

The Court thus failed to properly apply ARP §8.53.1, which clearly states that leaves are granted for projects, not positions. I presented substantial evidence that I was seeking leave for the Project. As I testified at the administrative hearing, I "went to DC for an issue, [the "Project,"] not a job. I went there to fundamentally improve" New Mexico's economy (Doc 75-2, Hearing_Recording2 12:33-12:41). Under oath, Provost Howard acknowledged that the primary benefit of the Project was the potential for a "$1 billion economic stimulus" (Hearing Recording1 18:28:18:24)

The Court ignored the description of the Project and instead fixated on the surrounding dicta in my Leave Request and dicta in the Leave Granting Contract and thus erroneously ruled that the leave was for a position, not a project as required under ARP §8.53.1.

Nothing is more in dispute in this case than whether consideration for the Leave Granting Contract was the Project or the DASPED position. Given the evidence presented favoring Project effort rather than the DASPED position as consideration, the entirety of the administrative hearing audio submitted to the Court (Doc 75-2), my declaration (Doc 75-3), and the clear language of ARP §8.53.1, Respondents failed to meet their burden, and the Court erred in not dismissing the contract claims portions of Respondents' Motion for Summary Judgment on this basis alone.

I clearly and unambiguously referenced multiple provisions of ARP §8.53, but Provost Howard testified he didn't review ARP §8.53 until ten months after

issuing the Leave Granting Contract. (Doc 75-2, Hearing_Recording1 37:30-37:36)

Well, if Provost Howard hadn't reviewed ARP §8.53, who did?

Regardless of who drafted the Leave Granting Contract or the incorporated ARP, I had no part in drafting either, thus any ambiguities regarding discussions of the Project in the Leave Granting Contract, or ambiguities in the ARP itself, should be construed against Respondents. *See e.g. Salazar v. Citadel Communs. Corp.*, 135 NM 447 (citing *Heye v. Am. Golf Corp.*, 2003 NMCA 138, P14, 80 P.3d 495,499-500, "We construe ambiguities in a contract against the drafter to protect the rights of the party who did not draft it."). This argument was raised at the administrative hearing, yet Pontelli erroneously construed perceived ambiguities against me (Doc 74-1 p.36). That argument was before the Court (Doc 27) ¶78, yet the Court adopted Pontelli's flawed analysis (Doc 105 p.9).

Chronologically, the bargained-for exchange cannot have been the DASPED position, as I had served as DASPED for nine days when I asked for leave. The proposed start date for my leave would have been more than nine weeks after I was sworn in.

When I first alerted Respondents of a potential Leave Request thirteen weeks earlier, I didn't have the DASPED offer, but I did have an offer from the Department of Energy and was still considering other positions. While future positions were unclear, the Project was crystal clear.

As has been argued during the administrative process and before the Court, (Doc 27) ¶¶8, 50, leaves are granted for projects, not positions, and the Court erred in finding that the consideration in the bargained-for exchange was the DASPED position rather than Project effort.

The Court also ignored ARP §8.53.7's explicit, unambiguous requirement that all conditions of the leave must be put in writing. As has been argued since January 2018, ARP §8.53.7's language is unambiguous. It doesn't say "most" or "some," it says "**All conditions** ... must be **in writing** prior to the leave period" (emphasis added). Despite ARP §8.53.7's unambiguous requirements and repeated references throughout the record, Pontelli failed to even mention ARP §8.53.7. The Court's similar omission compounded that error.

For the Court to ignore both ARP §8.53.7 and the plain text of the Leave Granting Contract and instead find ambiguities where none exist was clearly erroneous. The existence of written conditions or lack thereof in the Leave Granting Contract is certainly a material fact in dispute, and the Court erred in finding that Respondents met their MSJ burden. *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir.1993).

The Court erred in its rulings on both my employment contract and the Leave Granting Contract, particularly when it ignored ARP provisions incorporated into both contracts, failed to construe ambiguities against the drafter of the Leave Granting Contract, and ruled on just cause under ARP §10.10 (Staff) rather than ARP §10.50 (Faculty), the latter

does not include insubordination as just cause. Although I would argue that protesting an *ultra vires* cancellation of leave cannot constitute insubordination, assuming *arguendo* that it did, insubordination is not just cause for firing Faculty, probably because, as all of the Justices who are former faculty are aware, most faculty members are notoriously insubordinate when heavy-handed administrators go too far.

The Court erred in finding that there was just cause, as any alleged insubordination did not apply to Faculty. Neither did "job abandonment" apply to Faculty, and even if it did, the record is clear that I did not abandon my job

Pontelli erred in implicitly ruling that Respondents met their burden required for "just cause" termination under ARP §10.50.9, given that Pontelli didn't even mention just cause or burden of proof. The Court compounded that error by upholding Pontelli's ruling.

The Court erroneously ruled that the Leave Granting Contract's consideration was accepting the DASPED position rather than Project efforts

No evidence was presented at the administrative hearing or at summary judgment of "serious misconduct constituting just cause under" §10.5.9, and thus the Court erred in finding that Respondents met their MSJ burden. *Shapolia*, at 1036.

The New Mexico Supreme Court held the right "to petition the government for a redress of grievances is guaranteed by the First Amendment to the United

States Constitution. Both the United States and New Mexico Constitutions prohibit a State from depriving a person of life, liberty, or property without due process of law. U.S.Const. amend. XIV, § 1; N.M.Const., Art. II, § 18." *Jiron v. Mahlab*, 99 NM 425, 426 (1983)

Surely, merely protesting over ARP §8.53's interpretation cannot be just cause, and the Court erred by failing to protect my right to seek redress of grievances.

As for sovereign immunity, the Court cited *Garcia v. Middle Rio Grande Conservancy Dist.*, 121 NM 728 (1996) for contract principals yet inexplicably ignored *Garcia*'s holding that NMSA §37-1-23(A)

> which waives governmental immunity in cases involving valid written contracts, incorporates an implied employment contract that includes written terms as set forth in a personnel policy. We hold that it does." *Garcia* p.732.

The Court's analysis of immunity for the Board of Regents is erroneous because all of the parties are governmental actors without sovereign immunity. All of the cases cited by the Court can be distinguished due to New Mexico's statutory waiver of immunity. The *Garcia* court held that summary judgment was granted in error, as should this Court.

The Court's dismissal of Pontelli under qualified immunity is also flawed as it was based on a purported waiver that simply didn't happen. As argued previously, in addition to constitutional protections, my

due process rights are also contractually guaranteed (Doc 27) ¶88.

The Court got my initial lawsuit filing date wrong, ignored the ARP's mandatory timeframe for scheduling a FAB hearing, and thus erroneously found that I had waived my right to subsequent appeal. The Court erroneously states that the lawsuit was filed in July 2018 in both its ruling on the motion to dismiss as well as its summary judgment ruling despite Respondents' concession "Plaintiff filed his initial Complaint on May 18, 2018" (Doc 74) p.2, three days after the 25-day deadline for scheduling the FAB hearing had expired. Thus, the Court erroneously found I waived my appellate rights to seek redress prior to filing suit.

Separate from the Court's erroneous constitutional due process ruling, the Court also erred in failing to address my contractually guaranteed due process rights under the ARP, which were properly before the Court (Doc 27) ¶88.

Whether the contractual due process requirements under ARP §10.50.11 or due process protections under the US Constitution are more stringent appears a question of first impression. Either way, what transpired failed to meet minimum due process protections either constitutionally or contractually, and the Court was in error to rule otherwise.

The Court cited *Loudermill* stating "[t]he central tenets of procedural due process are: (i) notice, (ii) the right to be heard," 470 US 532, 542 (1985) and

the "opportunity to present [my] side of the story," *Id.* at 546.

In the case repeatedly cited by the Court as an example of sufficient due process in an academic setting, *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504 (10th Cir. 1998), Tonkovich was provided proper notice.

In my case, however, the purported charges of "'job abandonment and insubordination'" as just cause (Doc 105) p.7. in the proposed termination are clearly pretextual rather than actual notice, since those offenses only apply to Staff and not to Faculty. Only ARP §10.50.9 applies to Faculty, and no notice was given that references any just cause provision of §10.50.9. Instead, what "the reasons offered for [my proposed termination were] false and mere subterfuge." *Goudeau v. Indep. Sch. Dist. No. 37 of Okla. Cty., Okla.*, 823 F.2d 1429, 1431 (10th Cir. 1987)

The Court erred in finding proper notice was given.

This Court has found without proper procedures, and presumably adequate time, employees "can never discover whether the reasons offered for [their] discharge are true—or are false and mere subterfuge." *Goudeau*, 823 F.3d at 1431.

Particularly since Respondents refused to turn over requested documents or allow me to properly investigate before the hearing, as was allowed in *Tonkovich*, I was forced to use my limited time to essentially conduct discovery on-the-fly. The arbitrarily

short time to present my case-in-chief denied me due process.

Tonkovich's proposed termination was filed April 17, 1992, (*Tonkovich.* p.513). His administrative hearing opened August 27, 1992 (*Id.*) and "lasted until May 12, 1993, with sessions held once a week during the school year." (*Id.*)

In contrast to the months afforded both *Tonkovich* and *Loudermill*, I was only given minutes. Surely due process requires that I be given adequate opportunity to demonstrate that Respondents' pretextual charges were "false and mere subterfuge." *Goudeau*, p.1431.

Perhaps because he reported directly to Provost Howard, and unlike the hearing in *Tonkavich*, Pontelli refused to allow me ample time or opportunity to cross-examine Provost Howard, nor did he acknowledge Provost Howard's impeached credibility.

While eliciting testimony directly related to my case-in-chief, Pontelli shut down my entire line of questioning. I objected on the record (Doc 75-2, Hearing_Recording1 48:13-48:45)

Pontelli also repeatedly shut down Respondents' questioning of witnesses or any questioning regarding the P&T process (*see e.g.* Doc 75-2, Hearing_Recording3 5:24-6:30).

Additionally, I was repeatedly denied the opportunity to argue that Respondents' pretextual charges were "false and mere subterfuge." *Goudeau*, p.1431.

Pontelli improperly ruled that the Respondents pattern of prior behavior targeting me was not relevant (Doc 74-1 p.36), yet he also denied my opportunity to elicit testimony that would have demonstrated that relevance.

Both in the administrative proceeding and before the Court (Doc 27) ¶51, my "side of the story" has been the pretextual nature of Respondents' proposed termination. Both the Court and Pontelli erroneously ruled that my "right to be heard" was protected, *Loudermill* at 542, and that I had adequate "opportunity to present [my] side of the story," *Id.* at 546.

**The Tenth Circuit Decision**

Before it even began its discussion, the Tenth Circuit admitted that the "parties dispute whether Clarkson returned as required," (p.3). That acknowledgement alone should be sufficient to grant, vacate, and remand back to the district court, as material facts are thus clearly in dispute.

In its discussion section, the Tenth Circuit affirmed the district court's ruling without any actual discussion (p.5). Instead of listening to the properly lodged hearing recordings, the Tenth Circuit chose to improperly characterize several arguments as "new" arguments even though they were part of the hearing audio (Doc 75-2) and were incorporated into my summary judgement motion (p. 6).

In contrast, in *United States v. Tate*, 2022 U.S. App. LEXIS 11440 (6th Cir. 2022), the district court

was given a seven-hour video and "viewed it in full" (*Id* n.3). The Sixth Circuit indicates that while a "copy of the video might also aid our review," their record didn't contain the video because Mr. Tate never filed a motion under Rule 10(e)(2). In contrast, I went to great lengths to ensure that the audio recording (Doc 75-2) was included in the ROA, but apparently, neither the district court nor the Tenth Circuit bothered to listen to the audio, which was less than three hours and evidenced the entirety of Respondents' due process violations.

The Tenth Circuit erroneously denied my Rule 10(e)(2) motion to correct the materially misleading omission of the complete version of the pivotal exhibit, my Leave Request. (p. 7). The Tenth Circuit also refused to consider documents discovered during the preparation of my appeal that were improperly withheld by Respondents during the administrative hearing, which thus provided additional evidence of denial of due process. Respondents falsely claimed that I was arguing about discovery during the trial when I was arguing about due process during the administrative proceedings. The Tenth Circuit failed to grasp that distinction and denied my motion to supplement the record. *Id.*

**PRIOR PROCEEDINGS**

On May 18, 2018, I filed suit *pro se* alleging breach of contract, denial of due process, retaliatory discharge, and discrimination based on age, race, and religion.

On September 14, 2018, Respondents removed to federal Court

Despite partially ruling in my favor by finding that I did have a protected property interest in my employment, the Court found for the Respondents overall and dismissed the case on May 3, 2021.

On May 29, 2021, I filed Notice of Notice of Appeal.

On March 31, 2022, the Tenth Circuit denied my appeal.

On April 14, 2022, I filed a Motion to Reconsider

On April 29, 2022, the Tenth Circuit denied my Motion to Reconsider.

I am filing this Petition for Certiorari within the 90-day period.

**REASONS FOR GRANTING THE PETITION**

This case is an appropriate vehicle to resolve the questions presented. The case presents the clean legal issue of determining under what conditions the ROA can be expanded, either under FRAP 10(e)(2) or under equitable authority. The case also offers the Court the chance to decide whether conservative academics are entitled to due process protections, whether under the United States Constitution, state regulations that guarantee due process, or both.

1. **Should an appeals court supplement the record when the government materially misleads the lower Court, either intentionally or unintentionally, regarding a pivotal exhibit?**

At Summary Judgement, Respondents submitted only the first two pages of my Leave Request but falsely claimed that it was my entire Leave Request. The omission of my Leave Request's discussion of the Project's core component, namely the effort to eliminate double taxation on job creators in Indian Country, should have been pivotal to the district court's resolution of this case.

The circuits appear split on the applicability of Rule 10(e)(2), with the Tenth Circuit consistently refusing to add "anything material to either party [that has been] omitted from or misstated in the record by error or accident." In contrast, the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth and particularly the Eleventh Circuits either interpret the scope of Rule 10(e)(2) substantially more broadly than the Tenth Circuit, or those circuits are willing expand the record using equitable authority whereas the Tenth Circuit is not.

If, as suspected, the material misstatement of the content of my Leave Request was intentional, the interests of justice require either supplementing the record and considering my entire Leave Request or granting this petition and then vacating and remanding to the district court.

In case similar to mine, the Eleventh Circuit used its equitable power to expand the record because the existence or non-existence of [a document] was pivotal to the district court's resolution of this case. Under these circumstances, we are persuaded that supplementation of the record on this issue is in the interests of justice. See *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1555 (11th Cir.1989) (a consideration of all the relevant information is necessary to make an informed and final decision)." *C.S.X. Transp. Inc. v. City of Garden City*, 235 F.3d 1325, 1330 (11th Cir. 2000).

The leading case cited by other circuits regarding equitable authority to supplement the record is *Ross v. Kemp*, 785 F.2d 1467, (11th Cir. 1986). In that case the Eleventh Circuit chose to expand the ROA because it was "disturbed by the state official's failure to produce" records, and because the "proffered evidence, if included in the record, would certainly appear to have a definite impact on his ability to prove" his claim. *Id* at 1477. In my case, state officials repeatedly failed to produce records, and the attorneys for the State materially mischaracterized my Leave Request. If my complete Leave Request is considered, it would certainly impact my ability to prove the scope of my proposed Project. The Eleventh Circuit ruled that "because of the significance of the alleged constitutional violations, the interests of justice will best be served by remanding for further hearings." *Id.* My case also alleges significant constitutional violations, and if the Court does not grant my petition grant in order to hear oral argument, I alternatively ask this Court to grant, vacate, and remand back to the district court.

In *United States v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000), the Tenth Circuit tried to distinguish *Ross* by noting that there was "there is no indication the government was lying to Mr. Kennedy's attorney concerning the location of records or was refusing to produce information." *Kennedy* at 1192. When the Tenth Circuit applied *Kennedy* in denying my Rule 10(e)(2) motion, however, it ignored plain evidence of a material misrepresentation to the district court and repeated failures to produce required documentation prior to the administrative hearing.

I have not located a single post-*Kennedy* case where then Tenth Circuit has granted a motion to supplement the record under its inherent equitable authority.

In contrast, while the Eight Circuit notes that "[g]enerally an appellate court cannot consider evidence that was not contained in the record below. However, this rule is not etched in stone. When the interests of justice demand it, an appellate court may order the record of a case enlarged." *Dakota Indus. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993). Just as in my case, the Eight Circuit was

> faced with a situation in which misrepresentation, willful or otherwise, left the district court with an incomplete picture of the infringement alleged by Industries. Perhaps we would apply a different analysis if this information had come to light after a full trial on the merits of the complaint. In such a scenario, the diligence of Industries' discovery process might be called into question, and the failure to

> produce all three marks employed by Sportswear might be attributed to poor litigation skills on the part of Industries' attorneys. However, this case is far different from the one hypothesized above. Discovery has not yet been completed, and there has been no trial on the merits. Further, we are left with the impression that Sportswear has been less than forthcoming with the Court." *Id.*

The Fifth Circuit also used its "inherent equitable authority to supplement the record on appeal." *United States ex rel. Minna Ree Winer Children's Class Trust v. Regions Bank of La.*, 1997 U.S. App. LEXIS 43421 (5th Cir. 1997).

Assuming, *arguendo*, that the material misstatement of the content of my Leave Request was inadvertent, then Rule 10(e)(2) applies because the material information was omitted in the record by error or accident. Again, the Tenth Circuit is split from the majority of the circuits having never granted expansion of the ROA under Rule 10(e)(2). Other circuit courts are more inclined to consider expanding the ROA, particularly in cases such as mine, where there has been a material misrepresentation to the district court by government lawyers.

Much of the existing case law regarding Rule 10(e)(2) involves instances where there was a failure to seek to supplement the ROA. In my case, however, the Tenth Circuit denied my motion to supplement the record under Rule 10(e) without comment as to my full Leave Request. Note that my full Leave Request did not fall into any of the three categories identified by the

Court (p. 7), as it was materially altered by Respondents before its submission to the Court.

The Tenth Circuit has never granted a Rule 10(e)(2) motion to supplement material information omitted in the record, such as the three missing pages of my complete Leave Request. In contrast, the Second, Third, Fifth, Sixth, Seventh, Ninth and Eleventh circuits have each granted such motions, most of them on multiple occasions.

The Second Circuit has held that "Pursuant to Rule 10(e), we may also on our "own initiative" direct supplementation of the record if the materials 'bear heavily on the merits of appellant's claim' [even if] that claim was presented for the first time on appeal. *United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1980)." *Alnutt v. United States*, 588 F. App'x 45, 47 (2d Cir. 2014).

In *United States v. Johnson*, the Second Circuit granted a construed motion to correct the record to reflect the actual language of a document. 945 F.3d 606 n.2 (2d Cir. 2019). I seek to have the actual language of my Leave Request considered.

Even more recently, in *United States v. Perkins*, 810 F. App'x 77 (2d Cir. 2020), the Second Circuit expanded the record with an additional document and then vacated and remanded to the district court.

In *Bonadonna v. Zickefoose*, the Third Circuit granted a motion "to supplement the record pursuant to Fed. R. App. P. 10(e)(2) to include materials related to that computation" of a core matter before the Court. 538 F. App'x 147 n.3 (3d Cir. 2013). The scope of my

Project was a core matter before the district court in my case.

In *United States v. Templet*, the Fifth Circuit granted a motion to supplement the record with a document that discussed the scope of its agreement with Mr. Templet. 431 F. App'x 270 (5th Cir. 2011). My full leave agreement should be added to the record as it clearly outlines the scope of my Project, which was central to the agreement granting my leave.

In *United States v. Moses*, the Sixth Circuit granted a motion to supplement the record with documents referred to by the district court, No. 20-3965, 2021 U.S. App. LEXIS 13049 at *2 (6th Cir. April 30, 2021). In *United States v. Greco*, the Seventh Circuit also supplemented the ROA to include a document that was referenced by the district court. 938 F.3d 891, 896 (7th Cir. 2019). As in both of these cases, my Leave Request was referenced by the district court and thus the complete Leave Request should have been added to the ROA. Thus this case should be vacated and remanded to the district court to consider my full Leave Request.

In *White v. Gaetz*, the Seventh Circuit granted a motion to include a document "after both parties cited [it] in their briefs, and [it] would assist this Court. See Fed. Rule App. P. 10(e)(2)." 588 F.3d 1135, 1137 n.2 (7th Cir. 2009). Both Petitioner and Respondents have cited my Leave Request, and an examination the document that was actually used to request my leave would assist this Court, or the district court upon remand.

In *Stevo v. Frasor*, the Seventh Circuit supplemented the record under Rule 10(e)(2) because "an accidental omission went undiscovered until the last minute on appeal, and correcting the record serves to avoid punishing innocent parties for an unnoticed omission." 662 F.3d 880, 885 (7th Cir. 2011). If the failure to include my full Leave Request was accidental, and I didn't catch it at the time, the Seventh Circuit's logic should be followed, particularly given that a trial on the merits of my case has not taken place.

In *United States v. Stapleton*, the Ninth Circuit granted a motion to remand to the district court for a determination as to whether body camera footage should be made part of the record. No. 19-50266, 2021 U.S. App. LEXIS 1866 *1 (9th Cir. 2021). My complete Leave Request should definitely be part of the record and this case should similarly be remanded.

In *Morgal v. Maricopa Cty. Bd. of Supervisors*, the Ninth Circuit supplemented the record under Rule 10(e)(2) to make sure a document was properly identified. 442 F. App'x 246 n.1 (9th Cir. 2011).

In *All. for the Wild Rockies v. Tidwell*, the Ninth Circuit granted a construed motion to expand the ROA under Rule 10(e)(2) regarding a document necessary for a party to have standing. 385 F. App'x 732,734 (9th Cir. 2010). Expanding the record to include my Complete Leave Agreement is necessary to establish the scope of my Project.

In *Kilian v. Equity Residential Props. Tr.*, the Ninth Circuit specifically expanded the record to include excerpts of documents because they "should

have been part of the record below because they were explicitly incorporated into Equity's amended Daubert motion. To the extent that the materials in question were accidentally omitted from the district court record, we have the authority to correct such omission. See Fed. R. App. P. 10(e)(2)." 191 F. App'x 537, 539 n.1 (9th Cir. 2006). The last three pages of my complete Leave Request should have similarly been added to the record by the Tenth Circuit.

In *United States v. Elmore*, the Eleventh Circuit vacated and remanded, not just once, but twice, because of a "substantial and significant omission" 745 F. App'x 341, 342 (11th Cir. 2018). The failure to consider my complete Leave Request is certainly a substantial and significant omission.

In *Scott v. United States*, the Eleventh Circuit granted a motion to supplement the record with documents containing evidence of civil rights violations. 232 F. App'x 898, 899 n.1 (11th Cir. 2007).

Whether the material misrepresentation of my leave request was intentional or unintentional, the complete leave request should be added to the record. The circuits would benefit from clear guidance on both the scope of Rule 10(e)(2) as well as the scope of their inherent equitable authority to supplement the record, which seems a sufficient reason to grant this petition. If this Court is not prepared to address the circuit split at this time, then I am asking this Court to grant my petition, vacate the district court judgement, and remand to the district court with instructions to consider my complete leave request.

2. **Should an appeals court floccinaucinihilipilificate arguments presented at an administrative hearing and incorporated as audio exhibits in a motion for summary judgement by treating them as "new arguments" on appeal merely because they were in an audio recording of the actual administrative hearing?**

While the district court was provided with the entire administrative hearing audio (Doc 75-2), which was less than three hours, unlike in *Tate*, 2022 U.S. App. LEXIS 11440 (6th Cir. 2022), the district court failed to listen to the audio at all, much less "in full" (*Id* n.3). All of Respondents' civil rights violations were either committed during that administrative hearing or were raised at the hearing and later incorporated into my motion for summary judgement. The Tenth Circuit similarly failed to listen to even one minute of that hearing audio, instead choosing to characterize my references to the hearing audio as new arguments, thus rendering them a nullity.

I have always maintained that the best evidence of Respondents' due process and civil rights violations were contained in the actual hearing audio rather than a written summarization since an official transcript was never created or produced by Respondents. The arguments I raised in that administrative hearing have remained consistent throughout this case, including before the Tenth Circuit.

Since the Tenth Circuit did not cite any cases in its perfunctory dismissal of those arguments, and I

have not located any cases on point, it appears that this question is one of first impression. Thus, I am asking this Court to grant my petition and provide guidance to the lower courts regarding the incorporation of arguments from administrative proceedings where only audio recordings rather than written transcripts exist. If this Court is not prepared to address this question directly, then I ask this Court to grant my petition, vacate the Tenth Circuit decision, and remand to the Tenth Circuit with instructions to consider the arguments raised at the administrative hearing that were incorporated in my summary judgement motion via the lodging of the hearing audio as an exhibit to my motion.

3. **Are the Administrative Rules and Procedures promulgated by an instrumentality of a State documents that must be added to the record in order to be considered by a Court of Appeals?**

Since the district court applied the wrong sections of the ARP, such as applying ARP §10.10.7, which applies to Staff and contains provisions for job abandonment and insubordination as just cause for termination, as opposed to ARP §10.50.9, which applies to Faculty and specifically omits job abandonment and insubordination as just cause for termination, the proper sections of the state regulations were not part of the district court record.

The Tenth Circuit improperly decided that the absence of the regulation or statute in the ROA that demonstrated the district court's error prevented pointing out that error on appeal with a citation to the

correct regulation or statute, stating "we need not supplement the record to include the documents in the third category because the documents falling in this category cited to or by the district court are already in the record." (p. 7).

It seems illogical for the Tenth Circuit to require a party to anticipate when a lower court is going to reference an inapplicable regulation, either directly or implicitly, and then require that party to clairvoyantly cite the correct regulation.

If a court makes errors of law, particularly in instances where neither party has briefed the relevant regulation or statute, parties should be able to point out those errors of law and direct the court's attention to the correct regulations and statutes.

Resolution of this question could be accomplished alongside a thorough examination of the scope of Rule 10(e)(2) and the inherent equitable authority to supplement the record, if this Court were to grant my petition. In the alternative, this Court could grant my petition, vacate the Tenth Circuit's decision, and remand this case back to the Tenth Circuit with an instruction to consider the statutes and regulations that were cited in my briefs.

**4. Does an explicit waiver of sovereign immunity in a state statute apply when a §1983 claim is based on denial of due process regarding contractual claims related to employment?**

The Tenth Circuit failed to examine the failure of the district court to properly apply the sovereign immunity waiver contained in NMSA §37-1-23(A). The State should not be able to claim sovereign immunity in instances where it has explicitly and unambiguously waived that immunity. On this question, I am asking this Court to grant my petition, vacate, and remand back to the Tenth Circuit with instructions to consider New Mexico's waiver of sovereign immunity contained in NMSA §37-1-23(A).

As to qualified immunity, again, the Tenth Circuit's opinion included no analysis. This Court has ruled that government officials "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). Given the violations of my constitutional rights discussed above, I am asking this Court to grant my petition, vacate, and remand back to the district court to reconsider the violations of my constitutional rights in the administrative hearing with an instruction for the district court to actually listen to the hearing audio (Doc 75-2).

**5. Should summary judgment be granted when the Court concedes that material facts are in dispute?**

Given the Tenth Circuit's own precedent pertaining to disputes regarding material facts (p. 5) and its admission that the "parties dispute whether Clarkson returned as required," (p.3), I am asking that this Court grant my petition, vacate, and remand back to the district court so that a jury can decide whether I complied with the Notice to Return to Work to consider whether my complete leave request discussed the Project's scope in terms of my efforts to eliminate double taxation on job creators in Indian Country.

**6. Should ambiguities in contracts and administrative laws be construed against the government entity that drafted them?**

Again, the Tenth Circuit failed to consider my arguments regarding ambiguity or to examine the errors in the district court's opinion regarding ambiguity. I am thus asking this Court to grant my petition, vacate, and remand back to the Tenth Circuit with an instruction that any ambiguities in the Leave Granting Contract or the ARP should be construed against Respondents since Petitioner had no part in drafting either.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the position expressed in this petition or whatever is fair and reasonable under the circumstances.

Respectfully submitted,

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