No. _____

In the Supreme Court of the United States

DR. RALPH CLAIBORNE WALSH, JR.
Petitioner

v.

LISA HODGE; JOHN SCHETZ; LISA KILLAM-WORRALL; JESSICA HARTOS; EMILY SPENCE-ALMAGUER; SUMIHIRO SUZUKI; VICTOR KOSMOPOULOS; MICHAEL R. WILLIAMS; PATRICIA GWIRTZ; DAMON SCHRANZ
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Justice Thomas and Justice Sotomayor have criticized the "clearly established" prong of the qualified-immunity test and would revisit the Court's precedent as to what is required for the law to be "clearly established." *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting).

The District Court in this case concluded that the relevant precedent was "clearly established," so it rejected qualified immunity for university officials who denied the Petitioner Dr. Walsh the procedural-due-process right to confront and cross-examine his accuser in a Title IX disciplinary proceeding. The Fifth Circuit reversed.

It concluded that the law was "not clearly established" unless the relevant precedent is at a "high degree of specificity" that is "beyond debate" and that the existence of a "split among the Federal Circuits" makes the law "not clearly established." App.18a, App.22a, *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (cleaned up); *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

The courts of appeals are split 4-7 on how to apply *Wilson*/*Wesby*. And they are split 3-1 on the level of specificity required for deliberative as opposed to split-second decisions. Petitioner thus presents two questions:

1. Does the mere presence of a circuit split necessarily foreclose a finding that the law is "clearly established" for qualified immunity purposes?

2. If not, does *Wilson*/*Wesby*'s "clearly established" standard apply, or does a lower standard apply, when officials have sufficient time to obtain and act on legal advice before their rights-violating conduct occurs?

DETAILS REQUIRED BY RULE 14.1(b)

Parties

All parties are listed on the cover page.

Petitioner Dr. Ralph Claiborne Walsh, Jr. was the Plaintiff in the U.S. District Court for the Northern District of Texas, and the Appellee in the U.S. Court of Appeals for the Fifth Circuit.

Respondents were Defendants in the district court and Appellants in the Fifth Circuit.

Rule 29.6 Statement

None of the parties is a corporation.

Related Proceedings

Proceedings directly related to the case are as follows:

- *Walsh v. Hodge*, No. 4:17-CV-323, U.S. District Court for the Northern District of Texas. Order partially granting and partially denying Defendants' Motion for Summary Judgment entered on June 20, 2019.

- *Walsh v. Hodge*, No. 4:17-CV-323, U.S. District Court for the Northern District of Texas. Order staying and closing case pending interlocutory appeal entered on August 9, 2019.

- *Walsh v. Hodge*, No. 19-10785, U.S. Court of Appeals for the Fifth Circuit. Panel's Opinion and Judgment issued on September 15, 2020.

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The Fifth Circuit opinion is reported at 975 F.3d 475. App.1a–23a. The district court opinion is not reported but reproduced at App.24a–44a.

JURISDICTION

The Fifth Circuit's opinion issued on September 15, 2020. App.1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is filed within 150 days of the Fifth Circuit's decision.

RELEVANT PROVISIONS

"No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V (Due Process Clause).

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1 (Due Process Clause).

"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 … ." 42 U.S.C. § 1983.

INTRODUCTION

The decision below has taken the doctrine of qualified immunity far past its stated goals. It blessed systematic and deliberate violations of the law even when pertinent authority plainly alerted government actors to the illegality of their conduct. When, as here, government actors design a policy that systematically violates constitutional rights, qualified immunity becomes unmoored from its foundation where it bars relief unless it is beyond debate that the law of *the specific circuit* forbids the course of conduct.

The Courts of Appeals are split on how to interpret this Court's holding in *Wilson v. Layne*, 526 U.S. 603 (1999). Here, the Fifth Circuit decided it means that a split in circuit authority necessarily precludes a finding that the law is clearly established. In so concluding, the Fifth Circuit cast aside multiple decisions demonstrating the illegality of the University's conduct, reasoning that a split in authority negates any notion that the law was clear. Particularly when the government actors may reflect on such authority before *creating* an unlawful program, a circuit split should make it clear that the illegal acts cannot be undertaken in *good faith*. *Wilson* only held that a *subsequent* split in circuit authority shows that the law was not clearly established when the conduct occurred. There is no such *post-conduct* split in this case. Rather, every court of appeals to consider the question since this case's 2015 Title IX hearing has held that defendants have a right to confront and cross-examine their accuser.

The Court should take this case to resolve the circuit split over the widespread misapprehension of *Wilson* and reaffirm that a *pre-conduct* circuit split in legal authority does not preclude finding that a civil right was "clearly established" so that qualified immunity does not obtain.

The Court should also grant certiorari to decide that qualified immunity does not attach to government officers who have the opportunity to deliberate, discuss, debate, and obtain and act on legal advice before a constitutional right could be violated. Or, at least, the level of specificity required for a law to be clearly established in making deliberative decisions should be far lower than the level required in making split-second decisions.

Previously, Justices Thomas and Sotomayor have invited this Court to revisit and clarify the "clearly established" prong of the qualified-immunity test. The two historical justifications—"fair warning" to government officials and the common-law good-faith defense—do not justify qualified immunity given to officials' conduct that is the product of deliberative decisionmaking.

Whatever may be the justifications for qualified immunity given to government officials making split-second decisions, those justifications do not support giving qualified immunity to official actions taken with sufficient time and opportunity to deliberate.

Additionally, there are serious due process concerns in the way lower courts have expanded the already-high bar to recovery of damages in Section 1983 cases. The Court should take the case to resolve the entrenched circuit split and lower the level of specificity necessary for law to be considered "clearly established" when officials take deliberative decisions.

This case provides an attractive vehicle by which to return to a more textually grounded qualified-immunity doctrine, at least for officials' conduct that is the product of deliberation, discussion, debate, or legal advice.

STATEMENT OF THE CASE

A. Title IX Proceedings at the University

Ralph Claiborne Walsh, Jr., a doctor of osteopathic medicine, was employed as a professor at the University of North Texas Health Science Center ("University") between 2011 and 2015. App.24a, App.2a. His employment contract with the University stated he could be terminated only for good cause. *Id.*

In October 2014, Dr. Walsh, two other faculty members, and two medical students attended a medical conference in Seattle, Washington. App25a. A week after the conference, one of the student attendees filed a Title IX "sexual harassment" complaint against Dr. Walsh with the University. *Id.*

The University hired an outside investigator to investigate the student's complaint, and after conducting interviews but without a formal hearing, the investigator suggested that the complaint was founded. In December 2014, Dr. Walsh received a letter from the University department head stating that based on the outside investigator's findings, the department was proposing a sanction of termination. *Id.*

Dr. Walsh appealed that decision to the dean, who upheld it. *Id.*

In January 2015, Dr. Walsh requested a hearing before the Faculty and Grievance Committee ("Committee") challenging the findings of the investigation and the proposed termination. *Id.*

In February 2015, the University permitted Dr. Walsh to review the outside investigator's report. App.27a. Dr. Walsh noted that the report omitted many of the statements he had made during the investigative interview. *Id.*

The University held a hearing in March 2015. *Id.* The student was not required to testify. App.28a. Instead, the outside investigator testified regarding the allegations made by the student. *Id.* Dr. Walsh attempted to introduce contemporaneous photos taken at the conference showing the student with her arms around Dr. Walsh and otherwise smiling and exhibiting no discomfort or distress. *Id.* The Committee refused to admit those photos into evidence. *Id.* Thus, the University officials designed a process to assess credibility of witnesses in Title IX hearings without any means of actually assessing it.

After the hearing, the Committee concluded that Dr. Walsh violated the University's sexual-harassment policy. *Id.* Dr. Walsh was ultimately terminated, five months before the end of his year-long contract. App.7a, 28a-29a.

B. District Court Proceedings

Dr. Walsh filed suit under 42 U.S.C. § 1983 against the relevant University officials, each sued in their individual capacities. *Id.* The University officials moved for summary judgment on grounds that they did not violate Dr. Walsh's procedural due process rights and were entitled to qualified immunity. *Id.*

The Northern District of Texas, as relevant, denied the motion, concluding that the defendants were not entitled to qualified immunity. *Id.* The court held that the Due Process Clause required Dr. Walsh be given the right to cross-examine his accuser to allow the Committee to evaluate her credibility; cross-examining the outside investigator was not a reasonable substitute. App.12a, 37a–39a.

The district court then held that Dr. Walsh's right to cross-examine the student who accused him was clearly established at the time of the violation (*i.e.*, at the time of the 2015 Committee hearing). App.13a. The court noted that Fifth Circuit case law from 1986 required that "when an administrative termination hearing is required for a public-school employee, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity." App.43a (cleaned up) (quoting *Wells v. Dallas Independent School District*, 793 F.2d 679, 683 (5th Cir. 1986)).

C. Fifth Circuit Proceedings

University officials appealed the district court's ruling on qualified immunity to the Fifth Circuit. The Fifth Circuit performed *Saucier*'s two-step inquiry[1] in order, as it has the option to do under *Pearson v. Callahan* and Fifth Circuit precedent. App.8a–9a; *see Saucier v. Katz*, 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223 (2009); *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011).

At *Saucier* Step One, the court concluded that Dr. Walsh "suffered a violation of his procedural due process rights[.]" App.17a.

To arrive at that conclusion, the Fifth Circuit performed a *de novo* analysis of the *Mathews v. Eldridge*

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[1] The two-part inquiry into government officials' qualified-immunity claims is: (1) "whether the facts that a plaintiff has alleged … or shown … make out a violation of a constitutional right"; and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson*, 555 U.S. at 232 (quoting *Saucier*).

three factors as to Dr. Walsh's procedural-due-process right to confront one's accuser in a university proceeding. 424 U.S. 319 (1976). App.13a–17a.

The procedural-due-process violation, the court said, turned on the second *Mathews* factor because both Dr. Walsh's and the University's interests are significant, App.13a–14a: "the risk of erroneously depriving [Dr.] Walsh of an important interest and whether additional or substitute safeguards could be implemented to mitigate the concern about having a student being confronted by her professor in front of a committee of his peers." App.15a. In the Fifth Circuit's view, the "entire hearing boiled down to an issue of credibility": "It was [Dr.] Walsh's word (mutual flirtation) versus Student #1's (unwanted harassment)." App.15a. "[W]here credibility was critical and the sanction imposed would result in loss of employment and likely future opportunities in academia, it was important for the Committee to hear from Student #1 and [Dr.] Walsh should have had an opportunity to test Student #1's credibility," the court concluded. App.16a. The court was persuaded that "the substitute to cross-examination the University provided [Dr.] Walsh—snippets of quotes from Student #1, relayed by the University's investigator—was too filtered to allow [Dr.] Walsh to test the testimony of his accuser and to allow the Committee to evaluate her credibility, particularly here where the Committee did not observe Student #1's testimony." *Id.*

The Fifth Circuit agreed with the First Circuit's established law "that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if through a hearing panel.'" App.17a (quoting *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019)).

Despite finding a constitutional violation in the Title IX hearing's *design*, the court determined that the constitutional right was not clearly established. It held the officials were entitled to qualified immunity. App.23a.

The court found the district court's reliance on the Fifth Circuit's *Wells* decision misplaced. App.20a. The language from *Wells* that the district court had relied on, App.43a, was "dicta," the Fifth Circuit said. App.20a.[2]

Discussing other relevant Fifth Circuit precedent, App.18a–21a, the court said that precedent "makes clear" that "before today we have not explicitly held that, in university disciplinary hearings where the outcome depends on credibility, the Due Process Clause demands the opportunity to confront witnesses or some reasonable alternative." App.21a.

The court noted an open and acknowledged split among the circuits on the right-to-confrontation question, including authority that predated the hearing Dr. Walsh faced, App.21a n.54:

- It is clearly established in the First, Sixth, Tenth, and now the Fifth, Circuits that due process demands an opportunity to confront witnesses or some reasonable alternative in university disciplinary hearings. *Haidak*, 933 F.3d at 59 (1st Cir.); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 517–18 (10th Cir. 1998).[3]

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[2] The *Wells* rule is not dicta. It was necessary to resolve the issue. The court applied the rule to the facts and reached a conclusion in a typical issue-rule-application-conclusion format. *See Wells*, 793 F.2d at 683.

[3] In its opinion, the court left out the Seventh Circuit. *Doe v. Purdue Univ.*, 928 F.3d 652, 663–64 (7th Cir. 2019) (concluding that in university disciplinary hearings where the

- It is not clearly established in the Second, Eighth, and Eleventh Circuits that due process generally includes the opportunity to cross-examine in university proceedings. *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Riggins v. Bd. of Regents of Univ. of Nebraska*, 790 F.2d 707, 712 (8th Cir. 1986); *Winnik v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972).

Noting this circuit split, the court decided against Dr. Walsh under the "clearly established" prong for two interrelated reasons:

First, relying on the Fifth Circuit's *Morgan v. Swanson*, which in turn relies on this Court's *Wilson v. Layne* decision, the court held, "when the federal circuit courts are split on the issue, the law cannot be said to be clearly established." App.21a n.54 (quoting *Morgan v. Swanson*, 659 F.3d at 372); *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (noting that post-conduct split in the circuits is the basis for giving qualified immunity to officials).

Second, noting that the "clearly established" prong "requires a high 'degree of specificity,'" and that "existing precedent must have placed the … constitutional question beyond debate," the Fifth Circuit disagreed with the district court's degree-of-specificity analysis. App.18a, App.22a. The Fifth Circuit instead held that it was not clearly established before its decision in Dr. Walsh's case that "the University's use of an investigator to interview the … student and face cross-examination at the hearing violated [Dr.] Walsh's due process rights."

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outcome depends on credibility, due process requires at least the deciding committee to evaluate the accuser's credibility) (Barrett, J., writing for the three-judge panel). That non-inclusion only sharpens the circuit split.

App.22a (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)); App.18a (cleaned up).

REASONS FOR GRANTING THE PETITION

Justice Thomas and Justice Sotomayor have both called on the Court to revisit its precedent as to what is required for the law to be "clearly established" for the purpose of giving qualified immunity to an official's rights-violating conduct. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from denial of certiorari); *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting). This case presents an attractive opportunity for the Court to accept Justices Thomas and Sotomayor's invitation to cure one of the defects of the "clearly established" prong of the qualified-immunity test. As relevant here, *Wilson* and *Wesby* should not foreclose relief when government actors have ample notice that their conduct is unlawful, yet still design a program that violates constitutional rights. The Court should take this case to clarify what level of specificity is required for the law to be clearly established when officials civilly sued for damages under 42 U.S.C. § 1983 have sufficient time to obtain and act on legal advice before their rights-violating conduct occurs.

Separately, this Court should answer a question that is dividing the circuits in *Wilson*'s wake. When a circuit split exists *before* the challenged conduct, particularly when the government actor has time and opportunity for reflection, must that split necessarily foreclose relief to an injured person? The Fifth Circuit's extension of *Wilson* into such territory serves no valid purpose. Instead, it undermines respect for the law, and should be rejected.

I. CIRCUITS ARE SPLIT 4-7 ON WHETHER MERE JUDICIAL DISAGREEMENT ROBS OFFICIALS OF FAIR WARNING

Federal courts are split[4] 4-7 on whether existence of judicial disagreement at the time of the offending official conduct robs officials of fair warning such that they are entitled to qualified immunity because the law cannot be said to be clearly established:

- Four circuits (First, Third, Eighth, Ninth) do not extend *Wilson* to the existence of any circuit split, no matter the timing, that would prevent the law from being clearly established such that the official should get qualified immunity.[5]
- Seven circuits (Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, D.C.) have erroneously extended

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[4] The Federal Circuit has no on-point cases and is not expected to rule on very many qualified-immunity cases, given the nature of its subject-matter jurisdiction. Cases in the Second Circuit are inconclusive. *See Sloley v. VanBramer*, 945 F.3d 30, 40 (2d Cir. 2019) (stating the *Wilson* rule, but the rule likely was not outcome determinative); *see also id.* at 52 (Jacobs, J., dissenting) (criticizing the *Wilson* circuit split fair-warning rationale).

[5] *Irish v. Fowler*, 979 F.3d 65, 78 (1st Cir. 2020) ("[A]s a proposition of law this is wrong. A circuit split does not foreclose a holding that the law was clearly established[.]"); *Pro v. Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) ("[T]he split between the Courts of Appeals … at the time of [official's] actions does not preclude our deciding that [plaintiff's] right … was clearly established."); *Irving v. Dormire*, 519 F.3d 441, 451 (8th Cir. 2008) (no qualified immunity when "split of authority exists" and there is a "lack of a decision squarely on point within our circuit" "given the clear weight of authority in the circuits that have ruled on the question"); *Morgan v. Morgensen*, 465 F.3d 1041, 1046 n.2 (9th Cir. 2006), *opinion amended on reh'g*, No. 04-35608, 2006 WL 3437344 (9th Cir. Nov. 30, 2006) ("potential circuit split … does not preclude our holding that the law was clearly established for the purposes of the § 1983 inquiry").

> *Wilson* to mean that *any* circuit disagreement automatically grants qualified immunity.[6]

In light of the well-developed split resulting from this Court's atextual excursion into the fair-warning rationale, the Court should take this opportune case to clarify that circuit splits do not automatically amount to the law not being "clearly established." At least, this is true when the government actors may consider the adverse authority well in advance of their conduct.

Also, very little further percolation can occur. Each circuit has weighed in on the question. Nothing would change even if the Federal and Second Circuits were to stake a position in this debate. The numbers would

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[6] *Rogers v. Pendleton*, 249 F.3d 279, 288 (4th Cir. 2001) ("[I]f other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be clearly established for qualified immunity purposes."); *Morgan v. Swanson*, 659 F.3d at 372 (5th Cir.); *Citizens In Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016) ("the existence of a circuit split" is sufficient for qualified immunity to attach); *Nader v. Blackwell*, 545 F.3d 459, 477 (6th Cir. 2008) (same); *Denius v. Dunlap*, 209 F.3d 944, 951 (7th Cir. 2000) ("A split among courts regarding the constitutionality of conduct analogous to the conduct in question is an indication that the right was not clearly established at the time of the alleged violation."); *Mocek v. City of Albuquerque*, 813 F.3d 912, 930 n.9 (10th Cir. 2015) ("A circuit split will not satisfy the clearly established prong of qualified immunity."); *Lincoln v. Maketa*, 880 F.3d 533, 539 (10th Cir. 2018) (same); *Marsh v. Butler County*, 268 F.3d 1014, 1033 (11th Cir. 2001) ("We do not understand *Wilson* … to have held that a 'consensus of cases of persuasive authority' from other courts would be able to establish the law clearly."); *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) (same); *Dukore v. Dist. of Columbia*, 799 F.3d 1137, 1144–45 (D.C. Cir. 2015) (concluding that law was not "clearly established" "at the time of the [alleged violation]" because "precedent in this and other circuits was either inconclusive or actively in conflict").

change slightly (the split would be 4-9, 5-8, or 6-7 in place of 4-7), but the nature of the split would not change. The split here is as deep, entrenched and as well-developed as circuit splits can get.

When officials like those sued here have ample time and opportunity to understand the nature of the circuit split (how much confrontation and cross-examination is required in Title IX university proceedings), it cannot be said they lack fair warning. There was no circuit split on the point of law that *some* confrontation and cross-examination is necessary in Title IX proceedings. And precedential authority from outside the Fifth Circuit had held that a complete denial of confrontation was unlawful. But due to the Fifth Circuit's extension of *Wilson* and adherence to *Wesby*—saying the lack of a "high degree of specificity" that is "beyond debate" makes the law "not clearly established"—the court below felt compelled to conclude that the law was not clearly established. Clarification from this Court is sorely needed to prevent such repeated miscarriages of justice in the courts of appeals.

Even though the Fifth Circuit recognized Dr. Walsh suffered a constitutional violation, and even though no fewer than five precedential decisions in that circuit[7] had established the right to due process in faculty disciplinary proceedings, and numerous other circuits had specifically required cross-examination in such hearings, it determined the University lacked a "fair warning" of its constitutional obligations. App.18a. The

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[7] *Levitt v. Univ. of Texas at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985); *Plummer v. Univ. of Houston*, 860 F.3d 767, 775 (5th Cir. 2017), *as revised* (Jun 26, 2017); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Woodbury v. McKinnon*, 447 F.2d 839, 844 (5th Cir. 1971); *Wells*, 793 F.3d at 683.

Fifth Circuit took the concept of "good faith" beyond all meaning and extended this Court's precedents far beyond any conceivable justification, leaving Dr. Walsh without a remedy for the clear violation of his civil rights.

The two historical reasons for qualified immunity (fair warning and good-faith defense) do not justify the Fifth Circuit's application of *Wesby*'s "beyond debate" language. Nor do they require the extension of *Wilson's* post-conduct circuit split degree-of-specificity criterion for the "clearly established" prong of the qualified-immunity test. Certainly not when government actors have designed a disciplinary scheme that several courts of appeals have explicitly said violates the constitutional rights of accused defendants. To be sure, there is a circuit split as the court below recognized. But every circuit to rule on the question after the 2015 conduct of Respondent officials here has ruled in favor of people in Dr. Walsh's situation. *See Wilson*, 526 U.S. at 618 (*post-conduct* circuit split matters). Rather than immunizing good-faith mistakes, qualified immunity in these fraught circumstances rewards deliberate and systematic violations of constitutional rights.

A. The Fair-Warning Rationale Does Not Justify *Wesby* or the Extension of *Wilson* in this Context

1. The Fair-Warning Rationale Departs from Section 1983's Text

Because the Constitution does not "partake of the prolixity of a legal code," simply reading the Constitution does not always tell an official much about what conduct the law forbids. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). The "fair warning" rationale for qualified immunity can be traced to *United States v. Screws*, 325

U.S. 91, 104 (1945), which interpreted the criminal sibling to Section 1983 that is now codified at 18 U.S.C. § 242: "Whoever, under color of any law … willfully subjects any person … to the deprivation of any rights … shall be fined under this title or imprisoned[.]"

Screws's rationale is described as "three related manifestations of the fair warning requirement": (1) the rule of lenity favoring narrow construction of criminal statutes, (2) broad constructions of the criminal law cannot be applied retroactively, (3) vague criminal statutes are unconstitutional, which the statute should be construed not to be. *United States v. Lanier*, 520 U.S. 259, 266 (1997). Without grounding the *Screws* fair-warning rationale in the text of 42 U.S.C. § 1983, *Lanier* and then *Hope v. Pelzer* simply stated that "[o]fficers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242." 536 U.S. 730, 739 (2002); *Lanier*, 520 U.S. at 270–71.

Under the fair-warning rationale, qualified immunity thus seems to rest on the notion that officials are not to blame for reasonable, even negligent, or reckless mistakes. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Whatever may be the efficacy of that rationale in other contexts (*e.g.*, *Bivens* actions against federal officials, or when applied to officials making split-second decisions), it is inapposite to a vast majority of official decisions (like the Title IX university proceedings at issue here) that are the product of deliberation, discussion, debate, and legal advice.

The fair-warning rationale for qualified immunity ignores its *Screws* and Section 242 origins that made

officials *criminally* liable for "willfully subject[ing]" "any person" "under color of any law … to the deprivation of any rights." This Court has not articulated any text-based reason to assimilate that rationale in the context of *civil* or *tortious* liability for government officials. While *Lanier* and *Hope* restate that the fair-warning rationale is co-opted for Section 1983, those cases never explained why that is so.

The fair-warning rationale also ignores the important textual difference between 18 U.S.C. § 242 and 42 U.S.C. § 1983: "willfully subjects" versus "subjects." That is a relevant distinction under "ordinary rules of statutory construction." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992). In *Monroe v. Pape*, 365 U.S. 167, 187 (1961),[8] the Court explained:

> The word 'willfully' does not appear in [Section 1983]. Moreover, [Section 1983] provides a civil remedy, while the *Screws* case dealt with a criminal law challenged on the ground of vagueness. Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

The fair-warning rationale came to a head in *Wilson v. Layne* when the Court said "it is *unfair* to subject police to money damages" in light of a "split among the Federal Circuits" that "developed on the question" "[b]etween the time of the events of this case and today's decision." 526 U.S. 603, 618 (1999) (emphasis added).

In *Wilson* a split developed *after* the allegedly violative official conduct occurred. *Wilson*, therefore,

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[8] *Monell* does not disturb this portion of *Monroe*. *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978).

untethered the fair-warning rationale from the assumption that *at the time* the rights-violating official conduct occurred, the right was not clearly established. *Pearson* extended the circuit-split fair-warning reasoning to a split "created by the decision of the Court of Appeals in this case." 555 U.S. at 245. To date, the Court has not provided a text- or context-based justification for qualified immunity based on the fair-warning rationale.[9]

Wilson's circuit-split explanation was not imperative for its central holding. After all, *Wilson*'s holding also rests on the alternative explanation that the law was "undeveloped" at the time of the complained-of official conduct. 526 U.S. at 617. But lower courts, have elevated that dicta to binding law. The court below certainly used *Wilson*'s circuit-split explanation as black letter law, but it did not take into account *when* the circuit split developed—and that affected the outcome of the case.

The fair-warning rationale is a two-fer: while *Wilson* uses the existence of a circuit split to say the law could not have been viewed as "clearly established," *Wesby* translates the fair-warning rationale into "high degree of specificity" that is "beyond debate." 138 S. Ct. at 590. The "high degree of specificity" formulation appears for the first time in *Wesby*. The cases it relies on do not mention it; they only mention "clearly established." *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mullenix v. Luna*, 577 U.S. 7 (2015). "Beyond debate," *Wesby* says comes from *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

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[9] Assuming *Wilson* is correct, the fact that every circuit to look at the specific procedural-due-process right Dr. Walsh asserts has ruled in favor of people like Dr. Walsh suggests that the law *was* "clearly established" at the time of the 2015 conduct of the Respondents here—there is no post-conduct circuit split here and *Wilson* speaks only to later-developing circuit splits. That only goes to show the extent of the lower court's misapplication of *Wilson*.

But *al-Kidd* says "beyond debate" supposedly comes from *Anderson* and *Malley*, 475 U.S. 335, when neither case requires a "beyond debate" degree of specificity.

If Section 1983 is to "be read against the background of tort liability," *Monroe*, 365 U.S. at 187, the degree of specificity should conform to the ordinary level of specificity required to prove torts—preponderance of the evidence. *Clearly* established or *beyond debate* formulations that come dangerously close to a criminal-style beyond-reasonable-doubt level of specificity would be constitutionally defective under the Due Process Clause if applied in a civil suit for damages predicated on a tort. *See Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (this Court "engaged in a straight-forward consideration of the factors identified in [*Mathews v.*] *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process").

Neither *Wilson*'s nor *Wesby*'s version of the fair-warning rationale is moored to Section 1983's text. And neither holding makes sense in the context of a University's designing a disciplinary process that has been found unlawful in multiple courts. The Court should grant certiorari to clarify the level of specificity required under the "clearly established" prong of the qualified-immunity analysis in circumstances like those presented here. *Santosky* suggests one way to tackle the question, if the Court is reluctant to return to Section 1983's text and scrap the "clearly established" prong altogether: the Court should perform a *Mathews* analysis to define the degree of specificity required for the qualified-immunity test. Thus, when government actors act with forethought and planning, a lower level of specificity may be appropriate than when they are forced to react in a split second. The *Mathews* analysis would likely point to a level of specificity akin to a more-likely-than-not standard: would a reasonable official at the

time of the conduct conclude that the conduct would, more likely than not, be viewed as violating the rights of a person?

2. The Fair-Warning Rationale Raises Serious Due Process Concerns

If one assumes (as this Court has over the decades) that the *Screws* fair-warning rationale, which developed in the criminal context, supports the qualified-immunity doctrine under Section 1983, then it raises serious constitutional concerns under the Due Process Clause.

At the outset, the contours of a *civil* rule of lenity are unclear. *Thompson/Center Arms* applied the rule of lenity "in a civil setting" because the statute also had "criminal applications." 504 U.S. at 517–18 (plurality opinion). And *Leocal v. Ashcroft* applied the rule of lenity because the statute "has both criminal and noncriminal applications." 543 U.S. 1, 11 n.8 (2004). But Section 1983 does not have criminal applications. Yet the fair-warning rationale rests on the "rule of lenity" drawn from the criminal context. *Lanier*, 520 U.S. at 266.

In Section 1983 cases, per *Wilson*/*Wesby*, a circuit split is considered a strong point in favor of the official. This Court has granted qualified immunity based on judicial disagreement as the basis for lack of fair warning in *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 378–79 (2009); *Reichle v. Howards*, 566 U.S. 658, 669–70 (2012); *Lane v. Franks*, 573 U.S. 228, 246 (2014) (relying on the *al-Kidd* "beyond debate" formulation); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017).

But when nongovernmental litigants, especially criminal defendants, point to such circuit splits, the Court gives them the opposite treatment; circuit splits do

not resolve the lenity inquiry. *Moskal v. United States*, 498 U.S. 103, 108 (1990) ("Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity."); *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("[T]he existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and decision against the position of the respondent reasonably foreseeable."). In other words, nongovernmental litigants in criminal cases cannot point to a circuit split to excuse their wrongful conduct, but governmental defendants in qualified-immunity civil-liability cases can—and are thereby excused according to the circuits that misread or misapply *Wilson*/*Wesby*'s circuit-split-based/beyond-debate fair-warning rationale. *See also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583, 585 (1998).

On the other hand, if Section 1983 is truly read against a backdrop of tort liability, *Monroe*, 365 U.S. at 187, the "clearly established" analysis still treats governmental litigants and nongovernmental litigants differently. Intentional torts require the complainant to prove the defendant knew or *should have known* the natural consequences of action or inaction. Negligent torts occur when the defendant's actions are unreasonably unsafe. Foreseeable plaintiff, foreseeable harm, standard of care, and preponderance of the evidence are all tort-law staples passed down through the centuries of common law. A nongovernmental defendant must overcome these standards to mitigate or overcome any damages sought by the plaintiff.

However, a governmental defendant in a Section 1983 suit is not answerable to these recognized and established standards of tort law. Instead, the official defending the Section 1983 suit only must assert that the plaintiff failed to show that the right at issue was "clearly

established" at the time of the defendant's alleged misconduct, or did not demonstrate that the precise right was established at a "high degree of specificity" that is "beyond debate" and not a subject of a "circuit split." This biased and lopsided treatment of nongovernmental and governmental litigants in civil suits for recovery of tort damages undermines due process. The Court should take this case to correct course in the seven circuits that misread *Wilson*, for not doing so would levy constitutionally impermissible due-process costs on nongovernmental litigants like Dr. Walsh.

B. The Good-Faith Defense Cannot Justify *Wilson* or *Wesby* as Applied Here

Sitting alongside *Screws*'s criminal-law based "fair warning" justification for qualified immunity from a civil suit for money damages is the notion that Section 1983 "'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions'"; that "[p]art of the background of tort liability … is the defense of good faith and probable cause." *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (quoting *Monroe v. Pape*, 365 U.S. at 187). More recently, the Court invoked the common-law background as an important grounding for the legitimacy of the qualified-immunity doctrine. *Filarsky v. Delia*, 566 U.S. 377, 389 (2012)

"The text of § 1983 makes no mention of defenses or immunities. Instead, it applies categorically to the deprivation of constitutional rights under color of state law." *Baxter*, 140 S. Ct. at 1862–63 (2020) (Thomas, J., dissenting from denial of certiorari) (cleaned up). While nineteenth-century officials "sometimes avoided liability because they exercised their discretion in good faith," "officials were not *always* immune from liability for their

good-faith conduct." *Id.* at 1864 (emphasis in original; collecting relevant authoritative references). In other words, in tort law, a successful defense can mitigate or eliminate an award of damages; the fact that tortious conduct can be defensible does not grant immunity from suit. *See also Kisela*, 138 S. Ct. at 1159–60 (Sotomayor, J., dissenting) (criticizing, and offering an alternative to, the "beyond debate" level of specificity).

Tracing the historical maldevelopment of the qualified-immunity doctrine, Justice Thomas stated, "[i]n several different respects, it appears that our analysis is no longer grounded in the common-law backdrop against which Congress enacted [Section 1983]." *Baxter*, at 1864 (cleaned up). At most, the good-faith defense "appears to have been limited to authorized actions within the officer's jurisdiction." *Id.* "An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense." *Id.*

The good-faith rationale cannot justify the extension of the "circuit split" test (*Wilson*) or the "high degree of specificity" that is "beyond debate" test (*Wesby*) under the "clearly established" prong where, as here, officials had time to deliberate, discuss, debate, and seek and act on legal advice. The Court should take the case to delimit the "clearly established" prong or else to clarify that a lower degree of specificity is required for the law to be clearly established when officials civilly sued for damages under 42 U.S.C. § 1983 have sufficient time to obtain and act on legal advice before their rights-violating conduct occurs.

II. THE COURT SHOULD RESOLVE A 3-1 SPLIT OVER THE LEVEL OF SPECIFICITY REQUIRED FOR DELIBERATIVE DECISIONMAKERS TO OBTAIN QUALIFIED IMMUNITY

This Court also should resolve a distinct circuit split concerning qualified immunity in deliberative-decisionmaking contexts and adopt a more flexible standard for the deliberate choices that officials make. Indeed, because of the need for flexible concepts of qualified immunity, the circuits are divided over whether courts should treat deliberative decisionmakers differently than other governmental defendants for purposes of qualified immunity.

Holloman v. Harland rejected qualified immunity for a high school teacher and principal, concluding that both violated the student's clearly established First Amendment rights. 370 F.3d 1252, 1269–70, 1278–79 (11th Cir. 2004). The Court did "not find it unreasonable to expect the defendants—who hol[d] themselves out as educators—to be able to apply" the relevant legal standard "notwithstanding the lack of a case with material factual similarities." *Id.*

In contrast, three circuits (Fourth, Fifth, Seventh) have concluded otherwise in qualified-immunity cases arising in the deliberative-decisionmaking context.[10] The extra measure of deference afforded to officials with sufficient time to formulate a course of conduct, especially in contexts where they are not making split-second decisions (unlike, say, police officers deciding whether to draw a weapon) is troubling. In deliberative decisionmaking, there is sufficient time to obtain and act

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[10] *Abbott v. Pastides*, 900 F.3d 160, 174 (4th Cir. 2018); *Morgan v. Swanson*, 755 F.3d at 760 (5th Cir.); *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005).

on legal advice—time and opportunity that may not be available to officers making split-second decisions. Given the broader "range of the professional competence" and time available to make an informed decision, university officials, like Respondents here, should be held accountable when applying even some mental effort to the relevant caselaw would have given them "fair warning" that their decision withholding from Dr. Walsh *some* opportunity to confront or cross-examine Student #1 would be unconstitutional. *Malley*, 475 U.S. at 346 n.7.

III. THIS CASE PRESENTS AN ATTRACTIVE VEHICLE TO CLARIFY THE LEVEL OF SPECIFICITY REQUIRED FOR THE LAW TO BE CLEARLY ESTABLISHED

This case is attractive because it can be decided by clarifying but not revisiting *Wilson* and/or *Wesby*. That is so because the Fifth Circuit dramatically extended both of those cases. On one hand, the Fifth Circuit rejected at least five of its own precedential decisions that had already found a right to due process in faculty disciplinary proceedings. App.18a–22a. But because due process itself can "vary depending upon the circumstances of the particular case," App.13a, in essence, the Fifth Circuit concluded that no due process rights can ever really be clearly established under its view of *Wesby*. The Court can take this opportunity to rectify that overly restrictive view of its precedents.

On the other hand, the Fifth Circuit extended *Wilson* to find the presence of *any* circuit split, even a pre-existing one, to defeat the fair notice requirement of qualified immunity. App.21a. Chief Justice Rehnquist's majority opinion in *Wilson* highlights the internal inconsistency of this Court's circuit-split formulation

that the court below exacerbated. At one point, *Wilson* states that the degree of specificity for the law to be clearly established is "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." 526 U.S. at 617. Turn the page, and the opinion concludes that "[g]iven … an undeveloped state of the law," and given that a circuit split developed *after* the complained-of official conduct occurred, it was "unfair to subject police to money damages." *Id.* at 618. An *undeveloped* state of the law is one thing, a preexisting circuit split which still shows a "consensus of cases of persuasive authority" is quite another. Therefore, one way to resolve this case would be to clarify that the mere existence of a circuit split does not defeat a "consensus of cases." Indeed, that would resolve the 4-7 split that has developed in the wake of *Wilson*.

Dr. Walsh's case, therefore, provides a clean vehicle for this Court to clarify the level-of-specificity analysis, and that clarification need not involve overturning *Wilson* or *Wesby*.

CONCLUSION

The writ should issue.

Respectfully submitted, on February 12, 2021.

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APPENDIX

[ENTERED: September 15, 2020]

United States Court of Appeals
Fifth Circuit
FILED
September 15, 2020
Lyle W. Cayce
Clerk

United States Court of Appeals
for the Fifth Circuit

No. 19-10785

Ralph Clay Walsh, Jr.,

Plaintiff—Appellee,

versus

Lisa Hodge; John Schetz; Lisa Killam-Worrall; Jessica Hartos; Emily Spence-Almaguer; Sumihiro Suzuki; Victor Kosmopoulos; Michael R. Williams; Patricia Gwirtz; Damon Schranz,

Defendants—Appellants.

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-323

Before Davis, Jones, and Engelhardt, *Circuit Judges*.

W. Eugene Davis, *Circuit Judge*:

Ralph Walsh, Jr., a former medical school professor at the University of North Texas Health Science Center ("University"), sued various professors and school administrators (collectively, "Defendants") under § 1983, alleging they violated his Fourteenth Amendment procedural due process rights. The Defendants voted to recommend firing Walsh after conducting a hearing to address a student's sexual harassment claim against him. Walsh asserted that Defendants denied him both a fair tribunal and a meaningful opportunity to be heard. Defendants moved for summary judgment on the basis of qualified immunity, and the district court partially denied the motion. Because Walsh's deprivations of due process were not clearly established constitutional rights, we REVERSE the district court's denial of qualified immunity and RENDER judgment in favor of Defendants.

I. BACKGROUND

Walsh is a doctor in osteopathic manipulative medicine (OMM) and family medicine. He served as an Assistant and Associate Professor for the University, where he both taught and engaged in clinical work from 2011 to 2015. The University could terminate Walsh before the expiration of his employment contract only for good cause.

In October 2014, Walsh attended a medical conference in Seattle with two fellow University faculty members and two medical students. The conference included a formal banquet consisting of a reception, dinner, and dancing. All parties consumed alcohol, and the evening soon became "festive and somewhat boisterous."

When the conference ended and the parties returned to Texas, one of the two students, Student #1, promptly filed a Title VII complaint with the University. She alleged Walsh sexually harassed her at the banquet. The University hired attorney Lisa Kaiser to investigate Student #1's complaint. Kaiser interviewed all parties and prepared a report documenting the allegations, along with details of her investigation and an ultimate recommendation.

Kaiser's report detailed the evening from Student #1's perspective. Student #1 "complained that Dr. Walsh put his arm around her, rubbed her back and touched her buttocks after the dinner service." Student #1 also observed Walsh "standing behind her while she was sitting, and he was looking down her dress," becoming more aggressive as the evening wore on. She reported feeling uncomfortable, especially when Walsh repeatedly asked "whether he should come to her room." Student #1 explained that while she felt "embarrassed" and "ashamed," she did not want to leave or be "that student" who did not participate; she "did not know what to do at the time."

Student #1 also expressed unease over an email Walsh sent her the morning after the banquet. Part of the email read, "Hi. Are you and [Student #2] still here? You are welcome to do some hands-on training with me at OES." Student #1 understood the phrase "hands-on training" to be sexually suggestive and left the conference two days early as a result. She explained that, upon returning to school, she still felt "embarrassed" and "distracted," and she no longer wanted to come to campus. She stressed that Walsh, as her professor, should have been someone whom she could trust.

Kaiser next interviewed the other parties present that evening: Student #2, Faculty Member #1, and Faculty Member #2. Student #2 confirmed that Student #1 looked "uncomfortable." Faculty Member #1 and #2 saw the controversy differently. Faculty Member #2 said she did not see anything inappropriate. She explained Walsh's behavior by reasoning that the medical profession is "very handsy" with "quite a bit of hugging," but that students are in a "different mindset," and she could see "how students can misinterpret." She argued that Student #1 "could have left without making a scene" had she wished. Faculty Member #1 echoed Faculty Member #2's statements, remarking that "nobody left the event crying." But he also recalled walking Student #1 back to her room at her request, because she feared Walsh would be waiting for her when she got there.

Kaiser next interviewed Walsh, who contested Student #1's depiction of the evening. He stressed the flirtation was mutual—Student #1 at no point communicated her unease to him. Indeed, he claimed she reciprocated his advances: she sat on his hand, danced with him, and held hands throughout the evening. He argued photos from the evening corroborated that Student #1 was at no point uneasy. He only asked to walk her to her room because he worried she had too much to drink; moreover, she replied, "Maybe. I don't know. I'll let you know," portraying no discomfort. As to the email he sent the next morning, Walsh explained he sought to tell Student #1 in person that he regretted their flirtation, since he is a married man. "Hands-on training" carried no double entendre, he clarified, because this terminology is frequently used by the OMM group.

After hearing from Walsh, Kaiser re-interviewed Student #1.

Kaiser's report concluded that the interviews substantiated Student #1's allegation. Kaiser sent her report to the Dean of the University, who then recommended Walsh's termination. Walsh learned of Kaiser's report and the decision to take disciplinary action, and he appealed the decision to the University's Faculty Grievance and Appeal Committee ("Committee").

Soon thereafter, Patricia Gwirtz, Chair of the Committee, sent Walsh a letter outlining the charges against him, a list of the Committee's witnesses, and the evidence it planned to consider. The letter also informed Walsh he could set up an appointment to review Kaiser's report and take notes. The Committee gave Walsh 90 minutes to present his case.

During the next five weeks, Walsh reviewed Kaiser's redacted report twice, and he prepared a five-page letter to the Committee outlining his defenses. Walsh sought to circulate photos from the banquet that he believed was evidence that Student #1 welcomed his flirtations, but Gwirtz determined they were not relevant.

The Committee consisted of eight voting members and Gwirtz, who served as chair with a tiebreak vote. Kaiser testified first at the hearing. She answered the Committee's questions, echoing her findings and explaining how she went about interviewing the parties.

Walsh was not represented by counsel at the hearing but was accompanied by a fellow professor,

Dr. Gamber. On cross-examination, Walsh challenged Kaiser's account of the evidence, which he argued ignored his side of the story.

Walsh then offered his account of the evening. Much of his testimony was spent explaining that he viewed their interactions as mutual flirtation, and repeatedly urged that Kaiser's report was "inaccurate" and biased. At numerous points, Walsh sought to bring up the photos from the evening but was refused each time.

The University offered two other witnesses: Dean Don Peska, who outlined the charges against Walsh and produced evidence on behalf of the University, and Director of Human Resources Dana Perdue, who explained the University's investigative process. Walsh, meanwhile, called Julie Innmon, a labor and employment attorney with experience conducting sexual harassment investigations; she testified to the procedural deficiencies of the hearing. Walsh had two other witnesses who spoke to his character, as well as six other character witnesses who provided written testimony to the Committee.

When the hearing concluded, the Committee found that Walsh's conduct violated the provisions of the University's Faculty Policy by a 6-0-2 vote and the University's Faculty Bylaws by a unanimous vote. The Committee recommended that Walsh be terminated for violating the University's Policy No. 05.205, Sexual Harassment, and Article XIII of the University's Faculty Bylaws. The University Provost, after reviewing the record, agreed with the Committee and recommended to the University's President that Walsh should be terminated. Walsh

was given the opportunity to appeal this decision. Walsh submitted another letter to appeal the Committee's finding, but the President agreed with the Committee and terminated Walsh five months before the end of his year-long contract.

Walsh filed a § 1983 suit against the University and its faculty members/administrators involved in his termination, each in his or her individual capacity. The University officials moved for summary judgment on grounds that they did not violate Walsh's procedural due process rights and were entitled to qualified immunity. The district court partially granted Defendants' motion, holding that Walsh was adequately apprised of the charges against him. The court otherwise denied the motion. Defendants timely appealed the court's ruling that they were not entitled to qualified immunity.

II. DISCUSSION

A. Standard of Review

We first address our jurisdiction to hear this appeal. While a denial of summary judgment is not a final judgment, the Supreme Court has held that it may be considered a collateral order capable of immediate review when (1) the defendant is a public official asserting qualified immunity, and (2) "the issue appealed concerned, not which facts the parties might be able to prove, but, rather, whether or not certain given facts show a violation of 'clearly established' law."[1]

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[1] *Johnson v. Jones*, 515 U.S. 304, 311 (1995) (citation omitted).

"A denial of summary judgment based on qualified immunity is reviewed *de novo*."[2] Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[3] When assessing an interlocutory appeal for qualified immunity, however, we cannot review a district court's conclusions that a genuine issue of fact exists concerning whether a defendant engaged in certain conduct.[4] We must instead "review the complaint and record to determine whether, assuming that all of [plaintiff's] factual assertions are true, those facts are materially sufficient to establish that defendants acted in an objectively unreasonable manner."[5] In other words, "we can review the *materiality* of any factual disputes, but not their *genuineness*."[6]

This analysis requires two steps. First, we must determine whether Walsh suffered a violation of his procedural due process rights as a matter of law.[7] Second, we must decide whether the Defendants' conduct was objectively unreasonable in light of clearly established law at the time of the incident.[8] "Courts have discretion to decide which prong of the

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[2] *Wallace v. Cty. of Comal*, 400 F.3d 284, 288 (5th Cir. 2005).

[3] Fed. R. Civ. P. 56(a).

[4] *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (en banc).

[5] *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000).

[6] *Id.*

[7] *Hare v. City of Corinth*, 135 F.3d 320, 325 (5th Cir. 1998).

[8] *Id.*

qualified-immunity analysis to address first."[9] While courts should "think hard" before addressing the constitutional question, "it remains true that following the two-step sequence—defining constitutional rights and only then conferring immunity—is sometimes beneficial to clarify the legal standards governing public officials."[10]

B. Walsh's Procedural Due Process Rights

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[11] The Supreme Court has held that procedural due process is implicated when a university terminates a public employee dismissible only for cause.[12] In determining what process is due,

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[9] *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc).

[10] *Camreta v. Greene*, 563 U.S. 692, 707 (2011).

[11] *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

[12] *Gilbert v. Homar*, 520 U.S. 924, 928–29 (1997); *Mathews*, 424 U.S. at 333. Defendants try to draw a distinction between Walsh, a contract employee who could only be fired for cause, and a tenured employee. While the Court in *Gilbert* addressed "tenured" professors, it also stressed that "public employees who can be discharged *only for cause* have a constitutionally protected property interest in their tenure." 520 U.S. at 928–29 (emphasis added). *See also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment, had a property interest safeguarded by due process). The Supreme Court has also held that due process may be implicated when termination "might seriously damage [a professor's] standing and associations in his community." *Id.* at 573.

"[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."[13]

In *Levitt v. University of Texas at El Paso*, we held that due process protections for a terminated professor include the following:

> (1) be advised of the cause for his termination in sufficient detail so as to enable him to show any error that may exist; (2) be advised of the names and the nature of the testimony of the witnesses against him; (3) a meaningful opportunity to be heard in his own defense within a reasonable time; and (4) a hearing before a tribunal that possesses some academic expertise and an apparent impartiality toward the charges.[14]

We evaluate due process using a sliding scale the Supreme Court first introduced in *Mathews v. Eldridge*.[15] Courts must balance (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[16]

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[13] *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

[14] 759 F.2d 1224, 1228 (5th Cir. 1985).

[15] *Mathews*, 424 U.S. at 335.

[16] *Id.*

At issue here is whether Walsh had a meaningful opportunity to be heard and whether the University's tribunal was impartial. Walsh argues Defendants denied him his due process rights because: (1) Defendants permitted an allegedly biased committee member to hear his claim, and (2) Defendants did not allow him to confront his accuser and introduce photos from the evening, and instead relied on hearsay testimony from the University's investigator.

1. The Right to a Fair Tribunal

Walsh alleged that one of the Committee members, defendant Damon Schranz, was not impartial because he served as Student #1's preceptor, and spent time with her weekly in various clinics. The court denied summary judgment on that ground pending further discovery regarding the alleged bias (thereby granting Walsh's Rule 56(d) motion).

The Supreme Court has emphasized that a "fair trial in a fair tribunal is a basic requirement of due process."[17] Yet "bias by an adjudicator is not lightly established."[18] "The movant must overcome two strong presumptions: (1) the presumption of honesty and integrity of the adjudicators; and (2) the presumption that those making decisions affecting the public are doing so in the public interest."[19]

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[17] *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (quoting *In re Murchison*, 340 U.S. 133, 136 (1955)).

[18] *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1052–53 (5th Cir. 1997).

[19] *Id.*

We have held that procedural due process requires proof of actual bias.[20] "Alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences."[21] Walsh alleged that only one member of the eight-person Committee knew Student #1 from serving as one of her preceptors in medical school. That one Committee member knew the accuser in a university proceeding is not enough to establish a due process claim of bias in this instance. We find no merit to this argument.

2. The Right to Confront One's Accuser in a University Proceeding

Walsh argues next that Defendants denied him due process by not affording him the right to confront and cross-examine his accuser before the Committee. Defendants argue that the district court erred in agreeing with Walsh's argument. The court concluded that the Due Process Clause required Walsh be given the right to cross-examine his accuser to allow the Committee to evaluate her credibility; cross-examining Kaiser was not a reasonable substitute.[22]

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[20] *Levitt v. Univ. of Tex. at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985).

[21] *Duke v. N. Tex. State Univ.*, 469 F.2d 829, 834 (5th Cir. 1972).

[22] Walsh was found in violation of § 05.205(c) of the University's Policies. The policy states: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature (regardless of gender), even if carried out under the guise of humor, constitute a violation of this policy when such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile or offensive employment, or educational environment."

The district court then held Walsh's right to cross-examine Student #1 was clearly established at the time of the violation.

The first prong of qualified immunity requires us to address whether Walsh suffered a deprivation of procedural due process by not being permitted to cross-examine his accuser. At the outset, we recognize that the "interpretation and application of the Due Process Clause are intensely practical matters and . . . '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'"[23] Indeed, "[t]he nature of the hearing should vary depending upon the circumstances of the particular case."[24]

To assess Walsh's claim, we turn to the *Mathews v. Eldridge* sliding scale. The first *Mathews* factor, Walsh's private interest, is significant: the loss of his employment. "[T]he denial of public employment is a serious blow to any citizen."[25] Moreover, the termination for sexual assault necessarily impacts future employment opportunities as an academic in a medical school, as a charge of

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[23] *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

[24] *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961).

[25] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 589 (1972) (Marshal, J., dissenting). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) ("the significance of the private interest in retaining employment cannot be gainsaid"); *Jones v. La. Bd. of Sup'rs of Univ. of La. Sys.*, 809 F.3d 231, 237 (5th Cir. 2015) (terminated professor's interest in retaining job was "significant").

sexual harassment inevitably tarnishes Walsh's reputation.[26]

The third *Mathews* factor, the University's interest, is also significant. Defendants argue the University has three public interests: (1) preserving the University's resources to serve its primary function of education, (2) protecting vulnerable witnesses, and (3) providing a safe environment for other members of the faculty and student body. We have recognized the importance of all three.

"To impose . . . even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness."[27] We have also held that universities have a "strong interest in the 'educational process,' including maintaining a safe learning environment

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[26] *See, e.g.*, *Bd. of Regents of State Colleges*, 408 U.S. at 574 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring)) ("[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury"); *cf. id.* (reasoning "there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities"). *See also Ludwig v. Bd. of Trustees of Ferris State Univ.*, 123 F.3d 404, 410 (6th Cir. 1997) ("An injury to a person's reputation, good name, honor, or integrity constitutes the deprivation of a liberty interest when the injury occurs in connection with an employee's termination.").

[27] *Goss*, 419 U.S. at 583. *See also Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (1st Cir. 1988) ("[I]t is no exaggeration to state that the undue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-productive.").

for all its students, while preserving its limited administrative resources."[28] If Student #1 had to testify in front of the Committee, Defendants contend, this would discourage future students from coming forward. We have acknowledged the importance of supporting victims of sexual harassment: "Only when sexual harassment is exposed to scrutiny can it be eliminated; thus it makes sense to encourage victims of sexual harassment to come forward because . . . they are often the only ones, besides the perpetrators, who are aware of sexual harassment."[29]

This, then, leads us to the second *Mathews* factor: the risk of erroneously depriving Walsh of an important interest and whether additional or substitute safeguards could be implemented to mitigate the concern about having a student being confronted by her professor in front of a committee of his peers. Walsh underscores that the risk of erroneous deprivation of his rights, absent the Committee hearing Student #1's account more directly, is great. We agree that this is a particularly important interest in this case when the entire hearing boiled down to an issue of credibility. It was Walsh's word (mutual flirtation) versus Student #1's (unwanted harassment).[30]

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[28] *Plummer v. Univ. of Houston*, 860 F.3d 767, 773 (5th Cir. 2017), *as revised* (June 26, 2017).

[29] *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 463 n.19 (5th Cir. 2013) (en banc) (brackets omitted) (quoting *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 933 (8th Cir. 2008)).

[30] This case poses a stark contrast to *Plummer*, 860 F.3d at 770–71, where two students were expelled after sexually assaulting a third student. Video and photos corroborated the allegations, but the third student (too inebriated to recall the events) was neither deposed nor asked to testify at the hearings.

In this case, where credibility was critical and the sanction imposed would result in loss of employment and likely future opportunities in academia, it was important for the Committee to hear from Student #1 and Walsh should have had an opportunity to test Student #1's credibility. The University's interests in protecting victims of sexual harassment and assault are important too. But we are persuaded that the substitute to cross-examination the University provided Walsh—snippets of quotes from Student #1, relayed by the University's investigator—was too filtered to allow Walsh to test the testimony of his accuser and to allow the Committee to evaluate her credibility, particularly here where the Committee did not observe Student #1's testimony. We conclude in this circumstance that the Committee should have heard Student #1's testimony.[31] As Student #1 was a graduate student

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Id. at 772. We held that cross-examining the amnesiac third student "could [not] have otherwise altered the impact of the videos and photos." *Id.* at 775–76. Neither the third student's testimony nor cross-examination "would have suggested that she consented to the degrading and humiliating depictions of her in the videos and photos," and the testimony "could [not] have otherwise altered the impact of the videos and photos." *Id.* at 776.

[31] Defendants argue that this court should not recognize Walsh's claim because he did not ask to confront Student #1 during the hearing. Walsh's explanation for this is compelling—any attempt to secure testimony would have obviously been futile, as the University had already denied his request to introduce photos of Student #1 in efforts to protect her anonymity. Furthermore, the University denied Walsh during the hearing of the opportunity to have counsel, who could have advised him to preserve any such claim. And in any event, Walsh made his objections to the University's procedures and its violation of his due process clear throughout the hearing.

presumably in her mid-twenties, we believe that being subjected to additional questions from the Committee would not have been so unreasonable a burden as to deter her and other similar victims of sexual harassment from coming forward.

We are not persuaded, however, that cross examination of Student #1 by Walsh personally would have significantly increased the probative value of the hearing. Such an effort might well have led to an unhelpful contentious exchange or even a shouting match. Nonetheless, the Committee or its representative should have directly questioned Student #1, after which Walsh should have been permitted to submit questions to the Committee to propound to Student #1.

In this respect, we agree with the position taken by the First Circuit "that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'"[32] We stop short of requiring that the questioning of a complaining witness be done by the accused party, as "we have no reason to believe that questioning . . . by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation."[33]

Because we have concluded Walsh suffered a violation of his procedural due process rights, we proceed to the second prong of the qualified immunity analysis: was Walsh's constitutional right clearly

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[32] *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (citation omitted).

[33] *Id.*

established? Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[34] "This is a demanding standard."[35] "[W]e do not deny immunity unless 'existing precedent must have placed the . . . constitutional question *beyond debate*.'"[36] Although we do not require a case "*directly* on point . . . there must be adequate authority at a sufficiently high level of specificity to put a reasonable official on notice that his conduct is definitively unlawful."[37] In other words, the "*sine qua non* of the clearly-established inquiry is 'fair warning.'"[38]

Walsh is correct that we have clearly established that due process for a terminated professor includes "a meaningful opportunity to be heard in his own defense."[39] However, none of our case law speaks directly to the procedures necessary to protect a professor's interest in avoiding career-destruction after being accused of sexual harassment. *Levitt v. University of Texas at El Paso*, our only due process case concerning a professor terminated for sexual harassment, provides us little clarity.[40] In

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[34] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

[35] *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015).

[36] *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

[37] *Vincent*, 805 F.3d at 547.

[38] *Swanson*, 659 F.3d at 372 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

[39] *Levitt v. Univ. of Tex. at El Paso*, 759 F.2d 1224, 1228 (5th Cir. 1985).

[40] *Id.* at 1224.

Levitt, the University's rules permitted the professor to confront witnesses (though it is unclear if these witnesses included his accusers).[41] The professor alleged the University violated his due process rights in failing to follow its rules; this included the University denying him the right to confront witnesses for two days when he was absent from the hearing due to illness.[42] We held that the University gave the professor all due process to which he was entitled despite its failure to follow its rules.[43] But we did not otherwise address the right to confront witnesses or directly hear from the accuser.

The only other analogous case is *Plummer v. University of Houston*, which centered on a university hearing for two students expelled for sexual assault.[44] In that 2017 opinion, we explicitly acknowledged that we have not yet determined "whether confrontation and cross-examination would ever be constitutionally required in student disciplinary proceedings."[45]

Other, less analogous cases from our circuit address the necessity of confrontation in administrative hearings more generally—all prove similarly inconclusive. Our first case addressing the issue of confrontation in university hearings came in 1961, in a suit concerning student expulsion for

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[41] *Id.* at 1226 n.1.

[42] *Id.* at 1229 n.6.

[43] *Id.* at 1229.

[44] 860 F.3d at 767.

[45] *Plummer v. Univ. of Houston*, 860 F.3d 767, 775 (5th Cir. 2017), *as revised* (June 26, 2017).

unidentified misconduct.[46] We held that the right to be heard does *not* require "a full-dress judicial hearing, with the right to cross-examine witnesses."[47] Ten years later, we observed that cross-examination in administrative hearings "depends upon the circumstances."[48]

In 1986, we stated that "[w]hen an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity."[49] The district court relied on this language to conclude that Defendants violated Walsh's constitutional rights, and that those rights were clearly established. Yet this language is dicta—the court was addressing whether the plaintiff had been advised of the names and nature of the testimony against him, *not* if he had a meaningful opportunity to be heard—and the court did not elaborate on what qualified as a "reasonable substitute."[50]

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[46] *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

[47] *Id.* at 159.

[48] *Woodbury v. McKinnon*, 447 F.2d 839, 844 (5th Cir. 1971). In that case, the court held that because of the nature of the charges (professional competence of a terminated doctor) and the nature of the hearing (informal discussion of medical records with no witnesses), cross-examination was not necessary. *Id.*

[49] *Wells v. Dall. Indep. Sch. Dist.*, 793 F.2d 679, 683 (5th Cir. 1986).

[50] *Id.*

Five years later, we again emphasized that we had not fully explored the scope of procedural due process guaranteed to terminated faculty members.[51] In that case, plaintiffs requested the right to have presence of counsel, cross-examine adverse witnesses, present evidence, and obtain a written record.[52] We held that in our past faculty termination cases, "the aggrieved instructor was afforded a relatively formal procedure as a matter of state law or institutional policy. We believe that the due process clause, of its force, requires little formality."[53]

Thus, as the above discussion makes clear, before today we have not explicitly held that, in university disciplinary hearings where the outcome depends on credibility, the Due Process Clause demands the opportunity to confront witnesses or some reasonable alternative. Our sister circuits, meanwhile, are split on this issue.[54] And the

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[51] Tex. Faculty Ass'n v. Univ. of Tex. at Dall., 946 F.2d 379 (5th Cir. 1991).

[52] *Id.* at 389.

[53] *Id.* Because the decision to terminate faculty was incident to the termination of an entire academic program, the court found that the right to confront adverse witnesses would do little to aid the truth-seeking process. *Id.*

[54] *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc) ("Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established."). The Second, Eighth, and Eleventh Circuits have held that due process does not generally include the opportunity to cross-examine in university proceedings. *See Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Riggins v. Bd. of Regents of Univ. of Neb.*, 790 F.2d 707, 712 (8th Cir. 1986); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (though noting cross-examination may be essential to a fair hearing

Department of Education recently revised Title IX regulations to require universities to permit crossexamination of all witnesses, further demonstrating how in flux this right is.[55]

Nor can we hold, as Walsh contends, that "a meaningful opportunity to be heard" should have put Defendants on notice that their actions were unlawful. The clearly established standard "requires a high 'degree of specificity.'"[56] Our case law does not make clear that the University's use of an investigator to interview the accused student and face cross-examination at the hearing violated Walsh's due process rights. Walsh presents us with no binding or persuasive authority for the proposition that the Committee was required to give Walsh the opportunity to test Student #1's version of the events more than it did.

Because of our conflicting, inconclusive language in past cases, we cannot find that Defendants "knowingly violate[d] the law."[57] And, because of all the opportunities Defendants afforded

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when credibility is at issue). The First, Sixth, and Tenth Circuit have held the opposite. *See Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (with the caveat that the accused may not be allowed to do the confronting); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 517–18 (10th Cir. 1998).

[55] *See Summary of Major Provisions of the Department of Education's Title IX Final Rule*, DEPARTMENT OF EDUCATION (May 13, 2020), page 7, https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf.

[56] *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)).

[57] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Walsh to be heard, we cannot conclude Defendants were "plainly incompetent" in denying Walsh the right to cross-examine Student #1 or some substitute method to test her testimony.[58] The district court, therefore, erred in denying Defendants' motion for summary judgment on the basis of qualified immunity for these claims.[59]

III. CONCLUSION

Defendants are entitled to qualified immunity. Therefore, the district court's order denying Defendants' motion for summary judgment on the basis of qualified immunity is REVERSED, and judgment is RENDERED in favor of the Defendants.

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[58] *Id.*

[59] Walsh also argues that the Committee's refusal to admit four photos taken of Walsh, Student #1, and the other attendees during the evening in question violated his due process rights. The four posed photos depict generally that the attendees were having fun, and one of the photos appears to show Student #1 leaning into Walsh in the group photo. But no record was established about when in the evening the photos were taken in relation to when Walsh's alleged improper behavior occurred. As we noted above, the Committee should have examined Student #1 and given her an opportunity to explain how the photos supported her testimony that she was uncomfortable with Walsh's actions. However, we do not agree with the district court that the Committee's decision to exclude the photos was a violation of Walsh's clearly established due process rights. *See Shawgo v. Spradlin*, 701 F.2d 470, 480 (5th Cir. 1983) (concluding that although the Commission's evidentiary rulings "may indeed have hindered [the plaintiff's] presentation of the defense of selective discipline with respect to conduct that was a common practice in the [Police] Department," the court was "unable to say that the Commission's rulings were arbitrary").

[ENTERED: June 20, 2019]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RALPH CLAY WALSH, JR.	§	
	§	
VS.	§	ACTION NO.
	§	4:17-CV-323-Y
LISA HODGE, ET AL.	§	

ORDER PARTIALLY GRANTING MOTION FOR SUMMARY JUDGMENT

Pending before the Court is Defendants' Motion for Summary Judgment on Qualified Immunity (doc. 32). After review of the motion, related briefs, and applicable law, the Court concludes that the motion should be and hereby is PARTIALLY GRANTED.

I. Facts[1]

Plaintiff Ralph Claiborne Walsh Jr. is a doctor in osteopathic manipulative medicine. From April 1, 2011, to April 14, 2015, he was employed as a non-tenured assistant/associate professor in the department of Osteopathic Manipulative Medicine at the University of North Texas Health Science Center ("UNTHSC"). Walsh's employment was governed by a contract with UNTHSC providing that he could be terminated only for good cause.

[1] Except where otherwise indicated, the facts set out in this section are taken from Walsh's declaration. (Walsh's App. (doc. 39) 1-4.)

On October 24, 2014, Walsh, two other faculty members, and two medical students attended a formal banquet as part of a medical conference in Seattle, Washington. The banquet included a reception, dinner, and dancing. The mood was festive and boisterous, and all of the UNTHSC attendees consumed alcohol while at the banquet.

During the evening, Walsh interacted frequently and danced with one of the medical students. Walsh alleges that at one point when he touched the student on the small of her back, she reached behind her back and grabbed, squeezed, and held his hand. Flattered, Walsh continued to hold the student's hand. They continued interacting for much of the evening, with the student allegedly initiating further hand-holding.

After the dance, the group adjourned to the hotel bar. As the group was walking to the bar, Walsh asked the student where she was staying and, because she had been drinking, asked her if she wanted him to walk her to her room. She responded "Maybe, I don't know; I'll let you know." (Walsh's App. (doc. 39) 2.) Immediately thereafter, they got on an escalator and the student grabbed Walsh's hand and pulled him toward her. The evening ultimately ended fifteen to thirty minutes later when one of the physicians became ill, and the student walked the ill physician back to her room.

The following week, the student filed a sexual-harassment complaint under Title IX against Walsh with UNTHSC. UNTHSC hired attorney Lisa Kaiser as an outside investigator to investigate the student's complaint. As part of her investigation, Kaiser

interviewed Walsh. Walsh declares that, during the interview, Kaiser put him on the defensive, and her demeanor suggested to Walsh that she had already reached a conclusion before hearing his side of the story. During the interview, Walsh admitted to the flirtation and that he had exercised bad judgment, but denied having received any indication from the student that she was uncomfortable. Indeed, he told Kaiser that the student had been smiling and laughing throughout the evening.

Walsh learned during the interview that the student claimed he had touched her buttocks and invited her to his hotel room. He denied both accusations and told Kaiser what he contends actually happened. Regarding the alleged buttocks-touching accusation, Walsh told Kaiser that his hand was on the chair next to him and the student came over and sat on the chair while his hand was resting there. He also told her that the student had initiated all physical contact with Walsh. Regarding the alleged proposition, Walsh indicated that he had merely asked the student if she wanted him to walk her to her room since she had been drinking.

On December 22, 2014, Walsh received a letter from David Mason, the chair of UNTHSC's Department of Osteopathic Manipulative Medicine, informing him that, based upon the findings of Kaiser's investigation, he was proposing a sanction of termination. Walsh appealed that decision to the dean, who upheld the decision. As a result, on January 5, 2015, Walsh requested a hearing before the Faculty and Grievance Committee ("the Committee") to challenge the findings of the investigation and the proposed termination. While

the hearing was pending, Walsh continued to be employed by the UNTHSC and received his salary and benefits.

On February 10, Walsh received a letter from defendant Patricia Gwirtz, the chair of the Committee, informing him that "the charges of faculty misconduct derive from allegations of sexual harassment that are fully described in a Complaint Investigation Report dated November 25, 2014 prepared for the UNT Health Sciences Center." (Defs.' Third Am. App. (doc. 45) 20.) Gwirtz further informed him that he could make an appointment to review the report and make notes from it but would not be provided with a copy of the report. Gwirtz also confirmed that the names of the complainant and witnesses were redacted from the copy of the report she had received and that he could review.

Walsh made an appointment to review the report, and upon so doing realized that Kaiser had omitted many of the statements he made during his interview with her. The report did not reflect his contention that the student had initiated the hand-holding; that his touch of her buttocks resulted from her sitting on this hand; that she had initiated other physical contact during the evening; and that she had been smiling and laughing the entire evening. Instead, Kaiser's report reflected that Walsh had essentially confirmed the student's account of the evening.

The hearing was held on March 23, 2015. Gwirtz presided over the hearing, and the Committee was comprised of most of the defendants, including Damon Schranz. Unbeknownst to Walsh at the time

of the hearing, Schranz "acted as a 'preceptor' for [the] [s]tudent, which meant that he was her key advisor and spent approximately 40 hours per week with her in various clinics." (Walsh's Resp. (doc. 38) 9.)

The student was not required to testify at the hearing. Rather, Kaiser testified regarding the allegations made by the student. Walsh attempted to introduce contemporaneous photos taken at the banquet showing the student with her arms around Walsh and otherwise smiling and exhibiting no discomfort or distress, but Gwirtz refused to admit the photographs.

After the hearing, the Committee concluded that Walsh violated Faculty Policy 5.205, which provides that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature (regardless of gender) . . . constitute[] a violation of this policy when: a) submission to or tolerance of such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education; or b) submission to or rejection of such conduct by an individual is used as a basis for academic or employment decisions . . . affecting the individual; or c) such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile, or offensive employment, or educational environment." (Defs.' Third Am. App. (doc. 45) 345.) Thereafter, Walsh appealed the Committee's decision to the UNTHSC's president, Michael Williams, but Williams upheld the decision. Williams notified Walsh by letter dated April 16,

2014, that he was being terminated, effective immediately.

As a result, Walsh filed this action under 42 U.S.C. § 1983, asserting individual claims against Gwirtz, Williams, and the members of the Committee.[2] Walsh's amended complaint alleges that Defendants violated his constitutional rights to procedural due process and equal protection under the Fourteenth Amendment. The Court previously dismissed Walsh's equal-protection claim. Defendants now seek summary judgment on Walsh's due-process claim, contending that they are entitled to qualified immunity.[3]

II. Standard of Review

A. Summary Judgment

When the record establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is appropriate. Fed. R. Civ. P. 56(a). "[A dispute] is 'genuine' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citation omitted). A fact is "material" if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

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[2] Walsh's claims against two of the original defendants, Patrick Clay and Yasser Salem, were dismissed on October 31, 2018, by agreement of the parties.

[3] Defendants' motion urges that all defendants are entitled to immunity for the same reasons, so the Court has not distinguished among them in its analysis.

To demonstrate that a particular fact cannot be genuinely in dispute, a defendant movant must (a) cite to particular parts of materials in the record (e.g., affidavits, depositions, etc.), or (b) show either that (1) the plaintiff cannot produce admissible evidence to support that particular fact, or (2) if the plaintiff has cited any materials in response, show that those materials do not establish the presence of a genuine dispute as to that fact. Fed. R. Civ. P. 56(c)(1). Although the Court is **required** to consider only the cited materials, it **may** consider other materials in the record. *See* Fed. R. Civ. P. 56(c)(3). Nevertheless, Rule 56 "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Instead, parties should "identify specific evidence in the record, and . . . articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

In evaluating whether summary judgment is appropriate, the Court "views the evidence in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor." *Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010) (citation omitted) (internal quotation marks omitted). "After the non-movant has been given the opportunity to raise a genuine factual [dispute], if no reasonable juror could find for the non-movant, summary judgment will be granted." *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

B. Qualified Immunity

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The qualified immunity inquiry thus involves two prongs that must be answered affirmatively for an official to face liability: (1) whether the defendant's conduct violated a constitutional right, and (2) whether the defendant's conduct was objectively unreasonable in light of clearly established law at the time of the violation." *Terry v. Hubert*, 609 F.3d 757, 761 (5th Cir. 2010) (citing *Pearson*, 129 U.S. at 816). The Court may begin its inquiry with either prong. *Pearson,* 555 U.S. at 236. "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc). The assertion of such a "defense alters the usual summary judgment burden of proof. . . . Once an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010), *cert. denied*, 563 U.S. 1021 (2011). But, being the non-moving party, all inferences from

the admissible evidence are drawn in the plaintiff's favor. *See McClendon,* 305 F.3d at 323*; Brown*, 623 F.3d at 253.

III. Analysis

A. Constitutional Violation

In order to satisfy his burden, Walsh must point to admissible evidence tending to demonstrate that the defendants violated his Fourteenth Amendment due-process rights in conjunction with his termination. In the context of public employment, the Supreme Court has held that the due-process clause "requires 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."[4] *Id.* at 546. Although a

[4] In *Loudermill*, the Court noted that the school-district employees were entitled to "a full post-termination hearing" under state law. 470 U.S. at 546. There is no indication from either party that Walsh was entitled to any additional hearing regarding his termination other than his pre-termination hearing before the Committee. Indeed, it appears that the decision of UNTHSC's president, Michael Williams, to uphold the Committee's decision and terminate Walsh was final. (Defs.' Third Am. App. (doc. 45) 351.) An elaborate pre-termination hearing is not required if it creates an "excessive burden . . . 'on the government's interest in quickly removing an unsatisfactory employee.' But in the event of minimal pre[-]termination safeguards, the substantial private interest one has in not being deprived of his livelihood requires a full hearing after termination." *Schaper v. City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987) (quoting *Loudermill*, 470 U.S. at 546).

full evidentiary hearing prior to termination generally is not required, the notice and opportunity to be heard must be meaningful. *See Matthews v. Eldridge,* 424 U.S. 319, 343 (1976); *Stone v. F.D.I.C.*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). The parties agree that Walsh was entitled to due process prior to being terminated. Instead, they dispute whether Walsh was given the process that he was due.

The pre-termination hearing "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." *Loudermill*, 470 U.S. at 545-56. Due process generally is satisfied where the public employee is provided with "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.*; *see also Levitt v. Monroe*, 590 F. Supp. 902, 906-07 (W.D. Tex. 1984) ("The right of a state university faculty member to procedural due process in connection with his termination includes (1) the right to be advised of the cause for his termination in sufficient detail to fairly enable him to show any error that may exist; (2) the right to be advised of the names and the nature of the testimony of the witnesses against him; (3) a meaningful opportunity to be heard in his own defense within a reasonable time; and (4) a hearing before a tribunal that possesses some academic expertise and also possesses an apparent impartiality toward the charges.") (citing *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970)). This is all that is guaranteed under the Constitution; a university's violation of its own rules "may constitute a breach of contract or violation of state

law, but unless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation."[5] *Levitt v. Univ. of Tex.*, 759 F.2d 1224, 1230 (5th Cir. 1985); *see also Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 682 (5th Cir. 1986) ("If a state or local government demands that its officials afford a more elaborate process than the Constitution requires, its demands alone cannot expand the boundaries of what concerns us here: federal constitutional due process.").

1. Notice of Cause for Termination

Initially, Walsh contends that he was not adequately apprised of the cause for his proposed termination or provided with a reasonable opportunity to prepare for the hearing before the Committee. Specifically, Walsh complains about defendant Gwirtz's refusal to provide him with a complete copy of Kaiser's report and notes that she permitted him to review only a redacted version of the report and take notes from his review. Walsh contends that the redacted report "contains significant gaps (sometimes multiple lines)" and that "[w]here smaller areas are redacted, what remains is sometimes unclear." (Walsh's Resp. Br. (doc. 38) 15.)

Walsh received notice of the basis for his proposed termination and the date and location of the alleged improper incident upon which the charges

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[5] Walsh's First Amended Complaint does not assert a breach-of-contract claim or any other claim under state law. Thus, to the extent Walsh complains that Defendants did not comply with UNTHSC's policies, his claims fail except to the extent those requirements coincide with constitutional due-process guarantees.

were based in a letter from his department chair, David Mason, dated December 22, 2014. That letter provides that Mason recommended Walsh's termination in light of the findings of an internal investigation that he had "sexually harassed a female student" in violation of UNTHSC's "Sexual Harassment Policy No 05.205."[6] (Defs.' Third Am. App. (doc. 45) 15.) The letter further indicates that the investigation inquired about "events that occurred on the evening of October 24, 2014[,] at a formal banquet during a conference you attended in Seattle, Washington." (*Id.*) Additionally, Walsh was subsequently permitted to review Kaiser's investigation report, which summarizes the evidence against him and contains redactions only of the names of the persons, other than Walsh, who were involved in the incident. Those redactions are replaced with designations, such as "student 1" or "faculty member 1." (*Id.* at 4-8.)

The Court concludes that Walsh had adequate notice of the charges against him to satisfy the requirements of due process. Indeed, the Court suspects Mason's letter alone was sufficient notice to

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[6] This letter does not mention UNTHSC's consensual-relationship policy or identify it as a basis for Walsh's termination. Although the contents of that policy are not before the Court, it appears that UNTHSC precludes "consensual relationships between faculty or staff members in positions of authority and their subordinates or students." (Defs.' Third Am. App. (doc. 45) 346, ¶2.) The sexual-harassment policy mentions that UNTHSC forbids consensual relationships between faculty and students, but further indicates that "[f]or details regarding Consensual Relationships see policy 2.08." (*Id.*) None of the letters between Walsh and the defendants specifically mention the consensual-relationship policy or cite it as a basis for Walsh's termination.

comply with the requirements of due process. *See Wells*, 793 F.2d at 683 (concluding that sufficient notice was provided regarding two charges that "were allegations of misdeeds in specific circumstances, permitting [the plaintiff] to prepare his defense"). But assuming Mason's letter was insufficient alone, Walsh certainly had sufficient notice of the charges against him after reviewing Kaiser's report. That report specifies that "Walsh is in violation of Chapter 5 of the Human Resources Policy section 05-205 prohibiting sexual harassment."[7] (Defs.' Third Am. App. (doc. 45) 4.) It also lists the witnesses Kaiser interviewed (albeit with names redacted) and details the information provided by those witnesses. The redactions in Kaiser's report are not sufficiently numerous or lengthy to render it ineffective to provide Walsh with adequate notice of the cause for his proposed termination in sufficient detail to permit him to respond.[8] And Walsh has failed to cite any

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[7] In the report's "Summary of Findings," Kaiser mentions only that the student's "allegation of sexual harassment is substantiated" and that Walsh violated policy "05-205 prohibiting sexual harassment." (Defs.' Third Am. App. (doc. 45) 4.) Kaiser does not mention the consensual-relationship policy in this summary. She does, however, note at the end of her report the consensual-relationship policy and concludes that "even if the complaint by student 1 was not substantiated, Dr. Walsh would still be in violation of UNTHSC policy." (*Id.* at 8.)

[8] In support of his argument, Walsh cites to *Stone v. F.D.I.C.*, 179 F.3d 1368, 1377 (Fed. Cir. 1999), for the proposition that "[p]rocedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information." (Walsh's Resp. Br. (doc. 38) 15.) But Walsh wholly fails to present any evidence suggesting that the defendants had an unredacted copy of Kaiser's report or that they considered any "new and material information" that was not included in the

authority suggesting that his due-process rights required that he be provided with a personal copy of Kaiser's report.

2. Names and Cross Examination of Witnesses

Walsh also complains about Defendants' failure to allow him to cross-examine the primary witness against him. Specifically, Walsh contends that the Committee should have called the complaining student to testify in person at the hearing or at least required her to provide a sworn statement. Instead, the medical student's version of events was relayed to the Committee solely through Kaiser's testimony. Indeed, Defendants never provided Walsh with the name of the student at issue.

"When an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity." *Wells*, 793 F.2d 679, 683 (5th Cir. 1986). Defendants contend that Walsh had an opportunity to confront Kaiser, who testified at the hearing. But Kaiser was not the complaining student. She had no personal knowledge of the events of the evening in question and simply relayed the complaining student's hearsay statements to the Committee. The student's credibility was never tested by being required to submit a declaration under penalty of

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copy of the report Walsh was permitted to examine. Indeed, UNTHSC's Title IX Coordinator, Trisha Van Duser, declared that the "redacted version of the investigation report was the only copy provided to the Chair of the Faculty Grievance and Appeal Committee." (Defs.' Third Am. App. (doc. 45) 2, 6.)

perjury, nor was Walsh provided with the student's name or an opportunity to hear her statements personally or delve into her credibility in front of the Committee. The Court concludes that, as a matter of law, Walsh's being able to hear Kaiser's testimony and question her about it was not a reasonable substitute for "an opportunity . . . to confront the witness[] against him and to hear [her] testimony." *See id.* Kaiser was not the true witness against Walsh--the student was. So confrontation of Kaiser and her hearsay-ridden and allegedly sanitized testimony affords no more than a chimera of the protection an accused person is entitled to via the right of confrontation. And in any event, Walsh has provided reason to question whether Kaiser was biased against him, given his perception at their initial meeting that Kaiser had prejudged him coupled with her omission from her report of the majority of Walsh's account of the evening in question. Consequently, the Court concludes that Walsh has demonstrated a constitutional violation of his due-process right to confront his accuser or a reasonable substitute for that opportunity. *See Kermode v. Univ. of Miss. Med. Ctr.*, No. 3:09CV584-DPJ-FKB, 2011 WL 4351340, *6 (S.D. Miss. Sept. 15, 2001) (concluding that issue of fact precluded summary judgment on professor's due-process claim where he "never had a chance to hear and confront [the student] although she was interviewed as part of the investigation leading to the termination recommendation"); *see also Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 519 (10th Cir. 1998) (reversing district court's denial of qualified immunity where the professor accused of sexual harassment "received sufficient notice of the charges

against him, and, in addition, . . . had the opportunity to cross-examine the Law Student at his hearing"); *Winter v. Pa. State Univ.*, 172 F. Supp. 3d 756, 770 (M.D. Pa. 2016) (concluding due-process violation was not alleged where professor complained about "testimony from faculty without personal knowledge of the harassment" where professor also conceded in his complaint that the student "herself testified at the hearing and that [his counsel] was able to cross-examine her.")

The Court is uncertain whether it would reach the same conclusion had Walsh instead been terminated for violating the school's consensual-relationship policy. Walsh admits that on the night in question, he held the student's hand and flirted with her. (Walsh's Am. Compl. (doc. 6) 7, ¶¶ 23-24.) But Walsh instead was terminated for violating the school's sexual-harassment policy, which prohibits "[u]nwelcome sexual advances . . . and other verbal or physical conduct of a sexual nature [if it] substantially interfer[es] with an individual's academic . . . performance or creat[es] an intimidating, hostile, or offensive . . . educational environment." (Defs.' Third Am. App. (doc. 45) 345.) The Committee very clearly understood at the hearing that Walsh's recommended discipline was due to an alleged violation of the school's sexual-harassment policy, and not the consensual-relationship policy. (*Id.* at 155-57.) As a result, the extent to which the student welcomed Walsh's conduct and whether it substantially interfered with her academic performance or created a hostile educational environment was relevant. Consequently, Walsh should have been provided with her name and permitted to question her and delve into her credibility at the hearing.

3. Meaningful Opportunity to be Heard

Walsh further contends that his due-process rights were violated when Gwirtz refused to permit questions regarding the student's conduct and further refused to permit the Committee to consider pictures Walsh had taken during the evening in question that allegedly show the student smiling, laughing, and remaining in close proximity to Walsh throughout the evening. Because the extent to which the student welcomed Walsh's advances or whether they interfered with her educational environment was at issue, the failure to permit Walsh to introduce these photographs and elicit testimony regarding the student's conduct on the night in question violated Walsh's right to a meaningful opportunity to be heard.

4. Impartiality of Decision Makers

Walsh's final complaint is that one of the Committee members, defendant Damon Schranz, was not impartial because he acted as the student's preceptor and spent many hours per week with her. To demonstrate a genuine issue of fact regarding Schranz's bias sufficient to constitute a due-process violation, Walsh must present evidence demonstrating "actual partiality of . . . [the Committee's] individual members." *Levitt*, 759 F.2d 1224, 1228 (5th Cir. 1985). Indeed, inasmuch as Kaiser's report redacted the student's name, it is entirely unclear whether Schranz even knew he was preceptor for the student at issue.

In Walsh's response to the summary-judgment motion, however, he requests permission to conduct discovery to determine whether Schranz knew of the

student's identity while serving on the Committee and inquire into his impartiality. Defendants' reply characterizes this request as one for a "fishing expedition" and notes that Walsh "offers no evidence in support of [actual bias]." (Defs.' Reply (doc. 43) 8.) But in accordance with this Court's Initial Scheduling Order for Consideration of the Defense of Qualified Immunity (doc. 30), all discovery was stayed pending resolution of Defendants' immunity defenses. Thus, Walsh has not yet had an opportunity to conduct discovery regarding Schranz's alleged bias. And the Court concludes that Walsh has alleged a sufficient basis upon which to question that impartiality to justify discovery regarding that issue. Thus, the Court denies summary judgment on this ground pending further discovery.

B. Clearly Established Law

The question remains whether the defendants' failure to require the student to testify and Gwirtz's refusal to permit Walsh to inquire about the student's conduct and present photographs taken the night in question was objectively unreasonable in light of clearly established law at the time of the hearing. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981). "The 'of which a reasonable person would have known' language in the qualified[-]immunity standard does not add anything to the 'clearly established law' requirement because 'a reasonably competent public official should know the law governing his conduct.'"

Kinney v. Weaver, 367 F.3d 337, 349 (5th Cir. 2004) (quoting *Harlow*, 457 U.S. at 818-19).

For purposes of qualified immunity, "clearly established" means that "'[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Although case law with "materially similar facts" is not required, being clearly established in an abstract sense (e.g., government officials may not deny due process) gives insufficient notice. *Kinney*, 367 F.3d at 350. Rather, the law must be "clear in the more particularized sense that reasonable officials should be 'on notice that their conduct is unlawful.'" *Id.; see also Hope v. Pelzer*, 536 U.S. 730, 739-42 (2002)(recognizing that when the constitutional violation is obvious, a materially similar case is unnecessary to find the law clearly established). Because the primary concern is fair notice to the defendant, the law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 740 (citation omitted). But the "preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every likesituated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Pasco v. Knoblauch*, 566 F.3d 572, 579-80 (5th Cir. 2009)(quotation omitted); *see also Mullenix*, 136 S.Ct. at 308 ("'We do not require a case directly on point, but existing precedent must have placed the statutory

or constitutional question beyond debate.'") (quoting *Ashcroft v. Kidd*, 563 U.S 731, 741 (2011)).

As previously noted, Fifth Circuit case law from 1986 required that "[w]hen an administrative termination hearing is required [for a public school employee], federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity." *Wells*, 793 F.2d 679, 683 (5th Cir. 1986). Thus, long before the time of Walsh's 2014 hearing, it was clearly established that he was entitled to either an opportunity to hear and confront his accuser or a reasonable substitute for that opportunity. Here, the student did not testify against Walsh at the hearing; indeed, Defendants still had not provided her name to Walsh at the time of hearing. And, as previously noted, being permitted to confront Kaiser, who had no personal knowledge about the evening in question, simply was not a reasonable substitute for the opportunity to hear from and confront his accuser.

Furthermore, Walsh's right to a meaningful opportunity to be heard was well established at the time of the hearing. Walsh was accused of having sexually harassed a student by making unwelcome advances and/or engaging in conduct that created an intimidating or offensive educational environment for the student. A reasonable official in Gwirtz's and Williams's positions should have known that Walsh's meaningful opportunity to be heard in response to these sexual-harassment charges included being permitted to ask questions about and present evidence regarding whether the student welcomed his advances.

IV. Conclusion

For the foregoing reasons, the Court PARTIALLY GRANTS Defendants' summary-judgment motion; specifically, summary judgment is GRANTED against Walsh's contention that he did not receive adequate notice of the charges against him. The remainder of the motion is, however, DENIED.

SIGNED June 20, 2019.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[ENTERED: August 9, 2019]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RALPH CLAY WALSH, JR.	§	
	§	
VS.	§	ACTION NO.
	§	4:17-CV-323-Y
LISA HODGE, ET AL.	§	

ORDER STAYING AND CLOSING CASE
PENDING INTERLOCUTORY APPEAL
(With Special Instructions to the Clerk of the Court)

On July 11, 2019, Defendants filed a notice of appeal as to this Court's recent order partially granting and partially denying their summary-judgment motion. In an effort to efficiently manage this Court's docket, the Court concludes that all proceedings in this case should be and hereby are STAYED, and this case is ADMINISTRATIVELY CLOSED, pending the United States Court of Appeals for the Fifth Circuit's final decision and issuance of mandate regarding the interlocutory appeal. Either party may move to reopen this case no later than thirty days after the Fifth Circuit's issuance of mandate. *Cf. Prior Products, Inc. v. Southwest Wheel-NCL Co.*, 805 F.2d 543, 544 (5th Cir. 1986).

The clerk of the Court shall note this closing on the Court's docket.

SIGNED August 9, 2019.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE