No. 07-

IN THE

Supreme Court of the United States

CITY OF NEWPORT NEWS, VIRGINIA; DENNIS A. MOOK,
Petitioners,

v.

CHRISTOPHER A. SCIOLINO,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." Under this Court's precedents, the "liberty" component of the Due Process Clause includes the right to a name-clearing hearing for a government employee who is terminated on the basis of stigmatizing charges if those charges are "made public." *Bishop v. Wood*, 426 U.S. 341 (1976). A sharp conflict has developed among the federal circuits concerning the meaning of this "publication" requirement when a local government terminates an employee and does nothing more than place the reasons for that termination in the former employee's personnel file. As Judge Wilkinson observed: "To say there is a circuit split is at once true and not indicative of the full extent of the problem. Whether a liberty interest is infringed by a letter in a file drawer has generated answers with shades and permutations that mock the clarity law must provide for human conduct." App. 20a.

The question presented is:

When a government employer takes no steps to publicize the reasons for an employee's termination, but places the allegedly false stigmatizing reasons for the termination in the employee's personnel file, does the Due Process Clause require the employer to provide the terminated employee with a name-clearing hearing?

PARTIES TO THE PROCEEDING

Petitioners are the City of Newport News, Virginia, and Dennis A. Mook, defendants-appellees below.

Respondent is Christopher A. Sciolino, plaintiff-appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Newport News, Virginia, and Dennis A. Mook (collectively, "the City") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 480 F.3d 642, and is reprinted in the Appendix to the Petition ("App.") at 1a-35a. The district court's order granting the City's motion to dismiss the Amended Complaint is unreported and is reprinted in the Appendix at App. 36a-48a.

JURISDICTION

The court of appeals issued its decision on March 12, 2007. App. 1a. An order denying petitioners' petition for rehearing en banc was entered on April 10, 2007. App. 54a. A corrected order denying the petition for rehearing en banc was entered on April 11, 2007. App. 55a. Judge Wilkinson voted to grant panel rehearing. *Id.* On June 25, 2007, Chief Justice Roberts granted an extension of time to file a petition for a writ of certiorari to August 8, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The City terminated respondent Christopher A. Sciolino from his job as a police officer for destroying public property by tampering with the odometer on his police cruiser. The reason for the termination was placed in his personnel file. Pursuant to 42 U.S.C. § 1983, Sciolino filed suit, asserting

that the City's actions deprived him of due process. App. 57a. Sciolino alleged that the Due Process Clause required the City to provide him with a hearing to defend his professional reputation even though petitioners had not made public the allegedly false and stigmatizing grounds for termination. The court below held that a name-clearing hearing is constitutionally required if Sciolino can show that respondents are "likely" to make the odometer-tampering charges public.

As Judge Wilkinson emphasized in his "vigorous" dissent (App. 17a), the court's decision conflicts with *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, this Court held that the Due Process Clause guarantees a name-clearing hearing only when there is "*public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added). There can be no deprivation of a liberty interest where there is only a hypothetical prospect of serious harm to a terminated employee's professional reputation, a limitation embodied in the publication requirement. App. 32a. Because the City took no steps to publicize the charges against Sciolino, the Due Process Clause was not implicated by the routine act of placing the reasons for his termination in a personnel folder.

Not only does the decision below conflict with a controlling decision of this Court, but it also deepens a decades-old conflict among the circuits. As Judge Wilkinson observed: "To say there is a circuit split is at once true and not indicative of the full extent of the problem. Whether a liberty interest is infringed by a letter in a file drawer has generated answers with shades and permutations that mock the clarity law must provide for human conduct." App. 20a.

Judge Wilkinson also explained that the question presented is of great practical importance to government employers because it implicates the day-to-day administration of personnel matters in state and municipal governmental offices throughout the country. Left undisturbed, the legacy

of the decision below and those like it will be an unwarranted level of federal interference in matters of local concern, inhibition of open and honest communication between government employers and employees, and a significant increase in the litigation burden on state and local governments.

In short, the decision below is in square conflict with a controlling decision of this Court, deepens a widely recognized conflict in the circuits, and incorrectly resolves an issue of great practical importance to state and local governments. Certiorari is warranted.

A. Legal Background

The Due Process Clause of the Fourteenth Amendment guarantees that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In a series of seminal cases, this Court has established three basic principles governing the contours of a due process "liberty" interest.

First, termination from government employment alone is insufficient to implicate a liberty interest in reputation. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court rejected the notion that a former employee's liberty interest was infringed merely by the fact that a government employer did not renew his contract, even though that non-renewal might make it more difficult for the employee to find future employment. In deciding not to rehire the plaintiff, the state had not made any allegations "that might seriously damage his standing and associations in his community" – *i.e.*, the state did not accuse him of "dishonesty[] or immorality" or otherwise damage his "good name, reputation, honor, or integrity." *Id.* at 573. Nor did it "impose[] on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* And although an individual's liberty interest includes the right "to engage in any of the common occupations of life," *id.* at 572, "it

stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another," *id.* at 575.

Second, in *Paul v. Davis*, 424 U.S. 693 (1976), the Court held that government-inflicted defamation standing alone does not establish a deprivation of a liberty interest. As the Court explained, "reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701. Thus, "the mere defamation of an individual," no matter how damaging to the individual's reputation, is not "sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment." *Id.* at 706.

Third, in *Bishop v. Wood*, 426 U.S. 341 (1976), the Court synthesized *Roth* and *Paul*, holding that no liberty interest in reputation is infringed where a government employee is terminated but "there is no *public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added). In *Bishop*, plaintiff was discharged as a policeman, and the reasons for the discharge – including "failure to follow certain orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer" – were communicated to him orally and in private, but were not publicly disclosed. As the Court explained, because the "communication was not *made public*, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (emphasis added). Any other result would "penalize forthright and truthful communication between employer and employee." *Id.* at 349. *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 n.13 (1985) ("the failure to allege that the reasons for the dismissal were published dooms this claim"). Thus, *Bishop* attempted to balance and advance two core goals: (1) "to protect employees from seri-

ous harm to their future employment opportunities," which requires "sufficient dissemination to actually create such a risk," and (2) "to avoid defining public dissemination so broadly as to impair the normal functioning of personnel operations in public agencies." *Burton v. Town of Littleton*, 426 F.3d 9, 16 (1st Cir. 2005).

B. Factual Background

Respondent Christopher A. Sciolino was hired by Petitioner Newport News as a police officer. App. 57a. For the initial eighteen months of his employment, Sciolino was a probationary employee and thus was not entitled to any departmental grievance rights. *Id.* Before this probationary period elapsed, Sciolino was placed on administrative duty by the Acting Chief of Police Carl D. Burt, pending an investigation into allegations that Sciolino had advanced the odometer on police cruiser 816 by approximately 10,000 miles in order to obtain a new vehicle more quickly. *Id.* Sciolino denied the charges. *Id.* Thereafter, Chief of Police Dennis A. Mook terminated Sciolino by letter, finding that he engaged in "[d]eliberate destruction or reckless use of City Property" in violation of the City's Personnel Administrative Manual. App. 60a. This letter was circulated internally and made part of Sciolino's personnel file. App. 57a, 60a.

C. Proceedings Below

Sciolino filed suit against the City, asserting a single cause of action for "denial of due process" pursuant to 42 U.S.C. § 1983. App. 57a. In his Amended Complaint, Sciolino claims that his termination letter was placed in his personnel file, which he alleges "may be available to public employers and the public at large." *Id.* He does not allege that the letter or its contents have actually been so disclosed. *Id.* He nonetheless asserts that placement of the letter in his file without a hearing "denied . . . his constitutional right to due process under the Fourteenth Amendment to the United

States Constitution," and he seeks expungement of his personnel file, a due process hearing, compensatory damages (including for lost wages, benefits, mental anguish and distress and injury to reputation), punitive damages, and attorneys' fees. App. 58a.

The City moved to dismiss the complaint, arguing that Sciolino failed to state a claim because he did not allege that the City actually publicized the charges against him. App. 36a. The district court granted the City's motion. App. 48a. The court noted that *Bishop* required the respondent to allege "that the charges were made public by his employer," although "there is some dispute over what activity constitutes information being 'made public.'" App. 40a. The court also observed that the circuit courts "appear to be split upon whether actual dissemination of material in a personnel file must occur before it is considered 'made public,' or whether the mere filing of material in such a way that it is likely that the material could be disseminated is sufficient to consider something 'made public.'" App. 41a. Finding no direct answer in the Fourth Circuit's own precedents, the court concluded that "public disclosure of defamatory information occurs when that information is placed in a personnel file that is likely to be available to prospective employers." App. 45a. Because Sciolino had only alleged that the charges "may" be disclosed, the court found that Sciolino had not alleged a likelihood of dissemination and dismissed his complaint. App. 48a. The court denied Sciolino leave to amend his complaint to allege a likelihood of dissemination. App. 53a. Sciolino appealed.

In a divided opinion, the Court of Appeals affirmed. The majority first concluded that *Bishop* did not answer the question of what constitutes "publication." In the majority's view, *Bishop* held only "that a *purely private* communication of the reasons for an employee's termination cannot form the basis for a due process claim, because there is no possibility

of the allegation affecting the individual's Fourteenth Amendment liberty interests." App. 7a. Finding no answer in *Bishop*, the court looked to other jurisdictions and agreed with the district court that "the cases from our sister circuits articulate varying standards as to the meaning of public disclosure." App. 8a.

Turning to the parties' contentions, the court rejected the City's argument that actual dissemination is required because that standard would deny a cause of action "even if a plaintiff alleged a likelihood that prospective employers would see the false and stigmatizing charges in his file." App. 9a. The majority worried that if an employee fears prospective employers might learn of the stigmatizing charges, he "must choose between finding future employment and protecting his reputation by not applying for jobs (and thus not risking the release of the stigmatizing allegations)." App. 10a. The court likewise purported to reject the "may be available" standard advocated by respondent because that would permit claims to proceed whenever there is "just a small chance" or a "slight possibility" that a "prospective employer could inspect the file, or an uncertainty as to whether the former employer would ever make the file available." App. 9a.

Thus, the majority held that "an employee must allege (and ultimately prove) a likelihood that prospective employers (i.e., employers to whom he will apply) or the public at large will inspect the file." App. 11a. According to the majority, this standard is met by an allegation that either (1) the government employer has a "practice of releasing personnel files to all inquiring employers"; or (2) it releases files only to certain employers, but the employee intends to apply for a position with one or more of those employers. *Id.* Because Sciolino had not alleged that the City was likely to publicize the reasons for his termination, the majority affirmed the dismissal of his complaint on that basis. But the court went on to reverse the district court's denial of Sciolino's motion

for leave to amend. Under the court's announced standard, amendment would not be futile and thus the court remanded for further proceedings. App. 13a.[1]

In a dissenting opinion characterized by the majority as "vehement[] and length[y]," Judge Wilkinson agreed with the majority on only one thing – the existence of a troubling conflict among the courts of appeal that "mock[s] the clarity law must provide for human conduct." App. 20a. On the substantive question, Judge Wilkinson rejected the notion "that a document in a government file drawer can violate a constitutional liberty interest in reputation and future employment" – *i.e.*, that the City may have deprived Sciolino of his due process liberty interest "by explaining in a letter to Sciolino himself that Sciolino's employment was being terminated due to alleged misconduct and then placing the letter in its files." App. 17a. Judge Wilkinson found this conclusion untenable, reasoning that the City had "done nothing but keep its own record, which it must do if it is not to act arbitrarily and if it is to protect itself from future litigation." *Id.*

In Judge Wilkinson's view, this Court has already held that actual disclosure is required. In *Bishop*, the Court found no deprivation of liberty where the charge was not "made public" or "public[ly] disclos[ed]." 426 U.S. at 347, 348. This standard, Judge Wilkinson found, admits of no ambiguity and plainly requires actual public dissemination of the reasons for termination. App. 21a. Thus, under *Bishop*, the City should not be exposed to liability merely because it engaged in ordinary record-keeping practices.

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[1] The court did not address the City's argument that it had already provided Sciolino with all the process he was due when Mook met with Sciolino to give him an opportunity to respond to the charges. *See* App. 60a ("I met with you in accordance with City Policy to provide you the opportunity to respond to the allegations against you"). The court stated only: "The referenced meeting may have afforded Sciolino all the process to which he would be due; we simply do not know that at this early stage." App. 4a.

Apart from its conflict with *Bishop*, Judge Wilkinson faulted the majority for permitting constitutional claims to proceed on the basis of speculative harm, noting "[t]he Constitution does not give courts the power to predict future harms and declare the Constitution violated before the possible harms transpire." App. 23a. Moreover, Judge Wilkinson rejected the majority's premise that a sufficient injury exists because a terminated employee might limit his job search to avoid inquiries into his prior employment. Those same concerns for professional and reputational harm were present – and explicitly acknowledged – in *Roth*, *Paul*, and *Bishop*, and yet those courts "refused to find a constitutional interest because the text and structure of the Fourteenth Amendment set too high a bar." App. 25a. The majority, Judge Wilkinson lamented, "reason[ed] from the remedy [it] wish[ed] to provide back to the creation of a constitutional wrong," and in so doing "has done violence to our constitutional text and reordered our constitutional structure. The upshot is to federalize myriad aspects of the local employment relationship without any pretense of democratic sanction." App. 23a.

Last, Judge Wilkinson found substantial reason to doubt the wisdom of the majority's likelihood standard as a matter of policy. Although former a government employee might "fear[] the release of stigmatizing allegations" and thus "feel obligated 'to choose between finding future employment and protecting his reputation by not applying for jobs,'" Judge Wilkinson stressed that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." App. 25a (quoting *Bishop*, 426 U.S. at 349). Moreover, the "likelihood" standard creates disincentives for documentation of personnel matters despite the obvious benefits of such practices for government employers and employees alike. And the majority's standard imposes an enormous burden on state and local governments by ensuring that "there is little that

state and local governments will be able to do to avoid litigation over even merit-less claims." App. 30a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH *BISHOP v. WOOD*

This case should have been decided by a straightforward application of this Court's decision in *Bishop v. Wood*, 426 U.S. 341 (1976). As Judge Wilkinson explained below, *Bishop* "directly took up the question of when allegations of employee misconduct in connection with a termination implicate a Fourteenth Amendment interest." App. 23a. In that case, a terminated police officer argued that the city had deprived him of "liberty" within the meaning of the Due Process Clause because "the reasons given for his discharge," which were communicated to him orally and in private and were not otherwise disseminated, were "so serious as to constitute a stigma that may severely damage his reputation in the community." *Id.* at 347. The Court rejected that argument, holding that a public employee who is dischargeable at will is not deprived of "liberty" when "there is no *public disclosure* of the reasons for the discharge." *Id.* at 348 (emphasis added). As the Court explained, if a "communication was not *made public*, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." *Id.* (emphasis added).

Bishop made it unambiguously clear that *actual* disclosure is required. App. 23a ("If there was room for doubt about this matter, the Supreme Court eliminated it in *Bishop*."). As Judge Wilkinson explained, "[t]o 'make public' means 'to cause to become known generally' just as 'disclosure' entails 'exposure' or 'revelation,' and the majority cites no alternative definition or use that calls into doubt the meanings familiar to school children." App. 24a (quoting *The Random House Dictionary of the English Language* 562, 1562-63 (2d ed. 1987)). Yet the majority remained "in-

explicably puzzled by the Supreme Court's plain language," and its assertion that *Bishop* "did not 'resolve the question'" "wishes for ambiguity where there is none." App. 24a.[2] *Accord Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) ("Defining 'public disclosure' in a way which encompasses 'no public disclosure' is an exercise we choose not to embrace.").

The majority's lone effort to distinguish *Bishop* from this case does not withstand scrutiny. In the majority's view, *Bishop* held only "that a *purely private* communication of the reasons for an employee's termination cannot form the basis for a due process claim, because there is no possibility of the allegation affecting the individual's Fourteenth Amendment liberty interests." App. 6a-7a. But the City's letter to Sciolino, placed in his personnel file with no allegation that it has been shared outside the department, was also a "purely private" communication. In addition, the majority mistook a difference in medium – the oral communication in *Bishop*, the written communication here – for a difference in consequence. The Court's point in *Bishop* was that since the "communication was not made public, it cannot properly form the basis" of a liberty interest. 426 U.S. at 348. That reasoning is applicable to *all* communications, regardless of the format of the message.

Because the majority's decision is contrary to binding precedent of this Court, certiorari should be granted.

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[2] The "actual disclosure" requirement of *Bishop* is even more clear in view of the dissenting opinion of Justice Brennan, who would have permitted the claim to proceed in part because he found "no reason to believe that respondents will not convey these actual reasons to petitioner's prospective employers." *Id.* at 352. In other words, he found that the government employer was *likely* to disseminate the stigmatizing allegations – the standard endorsed by the majority below.

II. THE FEDERAL CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED HERE

In the 30 years since this Court decided *Bishop* and held that an allegation must be "public[ly] disclos[ed]" in order to implicate any "liberty" interest guaranteed by the Due Process Clause of the Fourteenth Amendment, the lower courts have adopted conflicting interpretations of this requirement. Numerous federal courts have recognized the division in the law. *See, e.g., Cox v. Roskelley*, 359 F.3d 1105, 1115 (9th Cir. 2004) (Hall, J., dissenting) ("As we [have] cautioned . . . other circuits considering substantially similar issues had reached diametrically different conclusions."); *Olivieri v. Rodriguez*, 122 F.3d 406, 408-09 (7th Cir. 1997) (recognizing the persistent "intercircuit conflict"). State courts and legal commentators have also repeatedly noted the direct conflict in circuit precedent.[3]

As shown below, the federal circuits are divided 3 to 5, with an additional two circuits adopting inconsistent positions on the question presented. The First, Third and Seventh Circuits (along with several state appellate courts) have properly interpreted the publication requirement to demand *actual* publication, not merely the potential for future publication. In direct conflict, the Second, Fourth and Tenth Circuits (and several state appellate courts) have permitted

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[3] *See, e.g., Cartwright v. Wilbanks*, 541 S.E.2d 393, 396 (Ga. Ct. App. 2000) ("We recognize that the federal circuit courts are sharply and evenly divided on this issue."); *Swinton v. Safir*, 720 N.E.2d 89, 92 (N.Y. 1999) ("The Federal Circuit courts that have addressed the issue are almost equally divided."); Nat Stern, *Defamed But Retained Public Employees: Addressing A Gap In Due Process Jurisprudence*, 31 Hofstra L. Rev. 795, 800 (2003) ("[F]ederal courts of appeals have split on whether stigmatizing material in an employee's personnel file must actually be disseminated to meet *Bishop*'s requirement of publication."); Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 Kan. L. Rev. 171, 183 (1998) ("*Publication Debate*") (discussing "sharp split of authority" among federal courts of appeals).

claims to proceed so long as there is a *likelihood* of future dissemination to prospective employers or the public at large. The Ninth and Eleventh Circuits have similarly held that charges are deemed "published" when they are placed in personnel files that are public records as a matter of state law. The Fifth and Eighth Circuits are internally divided.

The Court should take this opportunity to restore clarity to an important question of constitutional law.

A. Three Circuits Have Followed *Bishop* And Held That A Government Employer Need Not Provide A Name-Clearing Hearing To A Terminated Employee In The Absence Of Actual Public Dissemination Of The Reasons For Termination

The First, Third, and Seventh Circuits have enforced the plain language of *Bishop* and held that its "public disclosure" requirement demands *actual* public disclosure of allegedly false stigmatizing charges, rejecting the notion that mere placement of such charges in a personnel file is sufficient to give rise to a constitutional tort.

The Seventh Circuit has repeatedly affirmed its conclusion that no deprivation of a liberty interest may occur unless and until an allegedly stigmatizing charge is actually disseminated to prospective employers or the public at large. In *Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991), the court held that "the mere existence of damaging information in [plaintiff]'s personnel file cannot give rise to a due process challenge." Plaintiff had argued, in reliance on the Second Circuit's decision in *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987), that he need only demonstrate a likelihood that the charges in his file would be publicly disseminated. The court specifically rejected this position as inconsistent with *Bishop*, and refused to hold "that 'public disclosure' actually means '*likelihood* of public disclosure.'" 943 F.2d at 16. To the contrary, the court explained that "[d]efining 'public disclosure' in a way which

encompasses 'no public disclosure' is an exercise we choose not to embrace." *Id.* at 17. Thus, the court had "no problem determining that potentially stigmatizing information which remains in a discharged employees personnel file and has not been disseminated beyond the proper chain of command within the police department has not been made public." *Id.* *See also RJB Props. v. Bd. of Educ.*, 468 F.3d 1005 (7th Cir. 2006) (rejecting argument that "the Board disseminated stigmatizing information by placing it in documents available to the public under the Illinois Freedom of Information Act"); *Olivieri*, 122 F.3d at 408-09 (acknowledging "intercircuit conflict," but stating that "[o]ur court, however, insists on dissemination").

Likewise, the First Circuit has "emphasized in [its] caselaw that public dissemination is the sine qua non of a due process claim based on reputational harm." *Burton v. Town of Littleton*, 426 F.3d 9, 17 (1st Cir. 2005). In that case, a teacher was fired, and her termination letter was sent to the Commissioner of Education. *Id.* at 15. The court rejected the notion that sending the letter to the Commissioner was sufficient to constitute publication, because the court traditionally had only recognized truly public dissemination, such as "'at public meetings or to the press.'" *Id.* at 16 (quoting *Beitzell v. Jeffrey*, 643 F.2d 870, 879 (1st Cir. 1981)).[4] Because there can be no harm absent disclosure, "the placement of damaging information in a personnel file, without further dissemination, is not sufficient to trigger the constitutional tort." *Id.* at 18. *See also id.* at 15-16 ("*Bishop* is concerned not with hypothetical or merely possible reputational harms to public employees, but with significant infringements on their liberty interests."). With respect to the plaintiff in that

[4] Plaintiff also insinuated that her continued unemployment was linked to materials in her personnel file, but she had no evidence of actual disclosure. *Id.* at 16. The court rejected this argument as well, requiring actual evidence of dissemination rather than "innuendo." *Id.*

case, the court found that "[t]he risk of harm to [his] ability to get a job is too ephemeral for this disclosure to constitute public dissemination under *Bishop*." *Id.*[5]

The Third Circuit, too, has rejected due process claims asserting a deprivation of liberty where the public employer did not actually disseminate the allegedly stigmatizing charges. In *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), the plaintiff alleged only that the "presence of information relating to his termination in his personnel file raises an inference that the city intends to communicate this information to prospective employers," and that this inference was strengthened by the fact that he had been unable to find subsequent employment. *Id.* at 1148. The court rejected this argument, holding that the inclusion of the charges in his personnel file was insufficient, and that plaintiff "must produce evidence that the reason for his termination was made public by the city." *Id.*

Similarly, courts in at least four states – Minnesota, Iowa, Georgia, and New York – have followed the First, Third and Seventh Circuits in requiring actual dissemination of stigmatizing charges in order to give rise to a state or federal constitutional due process liberty interest. *See Phillips v. State*, 725 N.W.2d 778, 784 (Minn. Ct. App. 2007) (no deprivation of liberty interest where defendant "did not make public either the letter informing [plaintiff] of [its] decision not to rehire him or the investigator's report substantiating the sexual-harassment allegation"); *Simonson v. Iowa St. Univ.*, 603 N.W.2d 557, 564-65 (Iowa 1999) (rejecting due process claim where there was no evidence the defendant

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[5] *See also Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 75 (1st Cir. 1990) ("Even when a false and defamatory reason is cited for discharging a public employee, the employee is not deprived of 'liberty' unless that reason is communicated to others, because otherwise, 'it cannot properly form the basis for a claim that [the employee's] interest in his 'good name, reputation, honor, or integrity' was thereby impaired." (quoting *Bishop*, 426 U.S. at 348)).

publicly disclosed the reason for the disciplinary action; "Liberty interests are not violated by the private disclosure of reasons for discharge from public employment when there is no public disclosure of the reasons for the discharge." (quotations omitted)); *cf. Cartwright v. Wilbanks*, 541 S.E.2d 393, 396 (Ga. Ct. App. 2000) ("We recognize that the federal circuit courts are sharply and evenly divided on this issue. But, under Georgia law, precedent is clear that where a supervisor has a duty to report a matter, his report is not considered published for purposes of the tort of libel merely because it has been placed in the subject employee's personnel file."). The highest court of New York has also required actual dissemination when the plaintiff, like the respondent here, seeks damages. *See Swinton v. Safir*, 720 N.E.2d 89, 93 (N.Y. 1999) (where damages are sought, "[r]equiring proof of actual dissemination makes sense").

B. Seven Circuits Require A Government Employer To Provide A Hearing To A Terminated Employee Even Where The Reasons For The Termination Have Not Been Actually Disseminated

Courts in seven circuits have rejected the plain meaning of *Bishop* and allowed due process claims to proceed in the absence of any allegation that the reasons for termination have actually been disseminated to any prospective employer or the public at large. Although the precise allegations necessary to trigger such a claim vary somewhat among the jurisdictions, the common thread is that all of these courts recognize constitutional torts on the basis of the mere potential for *future* dissemination.

1. In direct conflict with the jurisdictions just discussed, three Circuits – the Second, Fourth, and Tenth – recognize due process claims where the basis for the discharge has not yet been publicly disseminated, but the allegedly false and stigmatizing charges in a personnel file are "likely" to be disseminated to prospective employers.

In *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2d Cir. 1987), the district court granted summary judgment to the school board on plaintiff's claim that his liberty rights had been violated by placement of allegedly stigmatizing charges in his personnel file. The Second Circuit reversed, holding that "the presence of the charges in his personnel file satisfies the 'public disclosure' requirement because there is a likelihood that these charges may be disclosed in the future." *Id.* at 44. The *Brandt* court read *Bishop* to leave unanswered the question of what constitutes "public disclosure," and concluded that the standard "is not a self-defining concept." *Id.* In its view, "[t]he purpose of the requirement is to limit a constitutional claim to those instances where the stigmatizing charges made in the course of discharge have been or are *likely to be disseminated* widely enough to damage the discharged employee's standing in the community or foreclose future job opportunities." *Id.* (emphasis added). Applying this standard, the *Brandt* court found summary judgment to be inappropriate because the employer "did not stipulate that it would never disclose the charges to [plaintiff's] prospective employers." *Id.* On remand, plaintiff would be given the opportunity to show "that prospective employers are likely to gain access to his personnel file and decide not to hire him." *Id.* at 45. The result would be no different even if the employee authorized the release of his file. *Id.*[6]

The Tenth Circuit has reached a similar conclusion. In *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985), the court permitted a due process claim to proceed in the absence of any allegation of actual dissemination of the reasons for termination. Like the Second Circuit, the court found it

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[6] *See also Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 632 (2d Cir. 1996) ("This [publication] requirement is 'satisfied where the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to prospective employers.'" (quoting *Brandt*, 820 F.2d at 45)).

sufficient that there was a possibility that such disclosure might take place in the future, stating that "the presence of false and defamatory information in an employee's personnel file may constitute 'publication' if not restricted for internal use." *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985). *See also Brandt*, 820 F.2d at 45 (citing *Bailey* for "likelihood" standard).

In the opinion below, the Fourth Circuit aligned itself with the Second and Tenth Circuits, reasoning that if terminated employees had to wait until adverse reasons for termination were actually shared with potential employers to receive a name-clearing hearing, they might be forced to choose between seeking employment and protecting their reputation. App. 10a. Thus, the majority held that "an employee must allege (and ultimately prove) a likelihood that prospective employers (i.e., employers to whom he will apply) or the public at large will inspect the file." App. 11a.

2. Other circuits have adopted an array of varying but similarly permissive requirements. Despite their "shades and permutations," App. 20a, the standards in all of these courts would permit a constitutional tort claim to proceed where allegedly false and stigmatizing charges have been placed in a personnel file, even though there has been no actual dissemination of those charges.

The Ninth and Eleventh Circuits have so held in the context of applicable state public records statutes. In *Buxton v. Plant City*, 871 F.2d 1037 (11th Cir. 1989), a former police officer complained that he was deprived of his liberty interest by placement of certain materials in his personnel file and by an internal affairs report, both of which were public records under Florida law. Because the materials were public records and therefore "the information in the file may be reviewed years after it is filed," the court concluded that "its publication, for due process purposes, must be held to occur at the time of filing." *Id.* at 1045. In the court's view,

"[p]rotection of the due process name clearing right cannot be effectively afforded any other way." *Id.* Following *Buxton*, the Ninth Circuit held in *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004), that "placement of the stigmatizing information in [plaintiff's] personnel file, in the face of a state statute mandating release upon request, constituted publication sufficient to trigger [plaintiff's] liberty interest under the Fourteenth Amendment." *Id.* at 1112. Neither of these circuits has addressed the question in the absence of a public records statute.

As a practical matter, both the Fifth and Eighth Circuits also require a government employer to provide a name-clearing hearing every time an employee is terminated. Panels in each circuit have held that the mere likelihood of dissemination of the reasons for termination warrants a hearing. *See In re Selcraig*, 705 F.2d 789, 796 n.6 (5th Cir. 1983) (former employee must show "that his employer has made or is likely to make the allegedly stigmatizing charges public in any official or intentional manner") (internal quotations omitted); *Hogue v. Clinton*, 791 F.2d 1318, 1323 n.7 (8th Cir. 1986) ("That 'Hogue's personnel file is replete with wrongdoing,' however, may be a sufficient publication if the defendants made that file available to prospective employers." (quoting *Bailey v. Kirk*, 777 F.2d 567, 580 n.18 (10th Cir. 1985))); *Clark v. Mann*, 562 F.2d 1104, 1116 (8th Cir. 1977) (sufficient that a charge "would be available to prospective employers"). Thus, the prudent government employer in both circuits will provide such a hearing.

Nevertheless, as Judge Wilkinson noted, the law in the Fifth and Eighth circuits is inconsistent. Judge Wilkinson observed that the Fifth Circuit's cases "seem to be in some internal tension." App. 19a (citing *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000) (rejecting likelihood-of-disclosure argument because the "mere presence of the [] page in Hughes' personnel file is insufficient to create a tri-

able issue on the public disclosure element of her claim")). Similarly, the Eighth Circuit, as Judge Wilkinson recognized, "do[es] not fit neatly" into the "camps" established by the other circuits. App. 19a. *See, e.g., Raposa v. Meade School Dist.*, 790 F.2d 1349, 1354 (8th Cir. 1986) (requiring actual disclosure; "[Plaintiff] asserts that her reputation has been damaged and her employment prospects impaired by the written complaints put in her personnel file. However, she does not allege, nor did she prove, that her files were provided to any other school."). *See also* Brannan, *Publication Debate*, 47 Kan. L. Rev. at 186 ("the Eighth Circuit's position on the publication issue is unclear").

3. Several state courts, including the courts of last resort in Alaska, Massachusetts and the District of Columbia, have also permitted state or federal due process claims to proceed in the absence of an allegation that the basis for a termination has actually been disseminated to prospective employers or the general public. *See Dep't of Military & Veterans Affairs v. Bowen*, 953 P.2d 888, 901 (Alaska 1998) ("cited reason for Bowen's discharge, 'misconduct,' is sufficiently stigmatizing to implicate a liberty interest triggering due process protection"; no allegation of public disclosure); *Stetson v. Bd. of Selectmen of Carlisle*, 343 N.E.2d 382, 387 (Mass. 1976) ("We think dismissal because of immoral, illegal conduct . . . entitles the employee to notice of the reasons for his discharge and a hearing on them, if those charges have been or *are likely to be disseminated* either to members of the public or to prospective employers.") (emphasis added); *Leonard v. District of Columbia*, 794 A.2d 618, 629 (D.C. 2002) ("However, the requirement of public disclosure of the defamatory statement can be satisfied 'where the stigmatizing charges are placed in the discharged employee's personnel file and *are likely to be disclosed* to prospective employ-

ers.'" (quoting *Donato*, 96 F.3d at 631-32) (emphasis added).[7]

* * *

The Court has not addressed the question of what constitutes public disclosure since *Bishop* was decided more than 30 years ago. The split that has developed in the wake of that decision is deep and intolerable. As one commentator observed, until this Court "decides whether the presence of stigmatizing material in a discharged employee's personnel file constitutes publication, the federal courts of appeals will continue to provide inconsistent protection to public employees asserting deprivation of occupational liberty claims." Brannan, *Publication Debate*, 47 Kan. L. Rev. at 207-08.

III. THE QUESTION PRESENTED IS OF GREAT PRACTICAL IMPORTANCE TO STATE AND LOCAL GOVERNMENTS

As explained by Judge Wilkinson below and by those courts that have faithfully interpreted *Bishop*, permitting a due process claim to proceed in the absence of any allegation of present injury to professional reputation is not only wrong as a matter of constitutional interpretation, but it also is bad policy. The permissive rules adopted in the court below and elsewhere serve to federalize the relationship between state and local governments and their employees, stifle open and

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[7] *See also Lubey v. City & County of San Francisco*, 159 Cal. Rptr. 440, 444 (Cal. Ct. App. 1979) (permitting claim to proceed where court found the personnel files were not confidential, and noting "we must also realistically assume that in the officers' future applications for employment, inquiry will be made of their prior job experience, and then into the reasons for their termination as policemen"); *Montoya v. Law Enforcement Merit Sys. Council*, 713 P.2d 309, 311 (Ariz. Ct. App. 1985) ("And although the state did not 'publicly' announce these allegations, the stigmatizing consequence exists because the charges were made part of Montoya's personnel record.").

honest communication between governmental employers and employees, and generate meritless litigation.

A. The Decision Below Imposes An Unwarranted Level Of Federal Interference In Matters Of State And Local Government

In *Bishop*, the Court emphasized that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." 426 U.S. at 349. Rejecting the suggestion "that almost every discharge implicates a constitutionally protected liberty interest," the Court explained that "the ultimate control of state personnel relationships is, and will remain, with the States." *Id.* at 350. The Court's effort to constrain the scope of federal oversight of such relationships, however, would be undone by the decision of the court of appeals and others like it, which would permit constitutional tort claims to be maintained on the strength of a terminated employee's mere speculation that the reasons for his discharge are likely to be shared with potential employers at some point in the future.

Judge Wilkinson explicitly recognized the impermissible federal interference in government personnel decisions that would result from the low bar set by the majority. "Holdings that would 'mandat[e] judicial oversight of communications between and among government employees and their superiors in the course of official business,'" he warned, "can lead to 'permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and separation of powers.'" App. 21a (quoting *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006)). The First Circuit as well has recognized that the rule adopted by the majority here "threaten[s] public agencies with exactly the sort of micromanagement against which the *Bishop* Court cautioned." *Burton*, 426 F.3d at 18.

This "micromanagement" undermines the role of state and local governments in setting their own policies and addressing internal personnel matters, "invad[ing] an area in which state and local officials are often better equipped than judges to make decisions." App. 26a. The Constitution does not impose a one-size-fits-all set of procedural protections that must be employed with respect to all personnel decisions. As Judge Wilkinson explained, "[w]hether benefits of accuracy and fairness justify the costs of particular procedural safeguards is not a question that can be answered in the abstract and for all time." *Id.* Thus, state and local officials must be afforded some leeway in determining the appropriate procedures, consistent with constitutional requirements.

The alternative, under the rule endorsed by the majority below, would tie the hands of public agencies in ways not contemplated by the constitutional text. For instance, as several circuits have observed, requiring a name-clearing hearing whenever there is a potential for future actual dissemination "comes close to arguing that there is no such thing as probationary public employment – that no public employee can be fired without a hearing because if he is, and the ground of the discharge impugns his fitness for employment in a similar job, as it very often will, his employer will have violated his constitutional rights, no matter how secretive the employer is about the ground." *Olivieri*, 122 F.3d at 409. Similarly, the First Circuit has explained that creating a constitutional tort where there has been no actual dissemination would "undermine the state legislature's decision to create a probationary period in which new teachers can be terminated without process." *Burton*, 426 F.3d at 18. *See also Brennan v. Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989) (requiring a name-clearing hearing the absence of actual dissemination "would simply erase in many instances the constitutional distinction between the 'at will' and the 'tenured' employee").

In short, it simply is not the case that a federal constitutional cause of action must or should exist in order to remedy every routine government employment decision. As Judge Wilkinson explained: "The loss of a government job and a filed record detailing the reasons for that loss are obviously no small matter. But the Constitution cannot possibly remedy every wrong experienced in life or for that matter every wrong experienced at the hand of some public entity." App. 21a. The majority's expansion of federal authority over state and local government personnel management simply cannot be reconciled with the goal of *Bishop* or with longstanding principles of federalism.

B. The Decision Below Inhibits Communication Between Government Employers And Their Employees

In articulating the "public disclosure" requirement in *Bishop*, the Court cautioned that permitting liability in the absence of actual dissemination "would penalize forthright and truthful communication between employer and employee," a result the Court would not sanction. 426 U.S. at 349. *See also Burton*, 426 F.3d at 16 ("The [*Bishop*] doctrine . . . seeks to avoid defining public dissemination so broadly as to impair the normal functioning of personnel operations in public agencies."). Careful and thorough documentation of personnel decisions is a practice that serves both employers and employees well. It benefits employees by guarding against arbitrary disciplinary actions, and aids employers by ensuring the creation of records needed to defend against lawsuits claiming discrimination or other improper reasons for dismissal. App. 26a-27a ("Governments may also record these reasons in order to defend themselves in the event that a former employee claims a dismissal was based upon race, sex, or some other impermissible consideration."). The rule adopted by the court of appeals, how-

ever, would penalize, and thus discourage, such necessary and sensible record-keeping.

Judge Wilkinson outlined the various ways in which the expansion of constitutional tort liability endorsed by the majority would disrupt the day-to-day administration of personnel matters. Attaching potential liability to documents in a personnel file, he commented, "may make government processes less fair and more arbitrary" by doing just what *Bishop* cautioned against – "'penaliz[ing] forthright and truthful communication between employer and employee.'" App. 9a (quoting *Bishop*, 426 U.S. at 349). *See also Burton*, 426 F.3d at 18 ("*Bishop*'s second concern is that the ability of individuals in defendants' position to communicate within a single system of employment – say, between employer and employee – not be impaired by an overly broad understanding of what constitutes a public dissemination." (citing *Bishop*)). In particular, as Judge Wilkinson noted, "when courts open governments to liability because they provide such reasons, government employers may simply stop giving them: "'where there was no constitutional requirement for the state to do anything', Judge Friendly has written, 'the state would merely opt to give no reasons and the employee would lose the benefit of knowing what might profit him in the future.'" App. 27a (quoting *Russell v. Hodges*, 470 F.2d 212, 217 (2d Cir. 1972)). *See also Burton*, 426 F.3d at 18 (liberal interpretation of the public disclosure requirement "would likely discourage local superintendents from privately, if officially, communicating appropriate concerns about teachers to the Commissioner in his capacity as a licensing authority").

Indeed, even where documentation of disciplinary actions may be required, either as a matter of collective bargaining, policy or local law, App. 27a, the threat of liability nonetheless provides a powerful disincentive to record potentially stigmatizing charges. And these competing con-

cerns place government employers in an untenable position. As Judge Wilkinson explained, "the majority's new threat of liability may place governments between a rock and a hard place" – because "governments [have] little choice but to document the reasons for major personnel actions, . . . it is odd, to say the least, to make such records necessary and in the next breath open governments up to liability on the basis of the same documents." App. 27a-28a.

C. The Decision Below Encourages Litigation Whenever A Former Employee Disputes The Basis Of Dismissal

Judge Wilkinson is correct that "[t]here is little that state and local governments will be able to do to avoid litigation over even meritless claims under the unascertainable standards the majority imposes." App. 30a. As he explained, "[t]he majority imposes an amorphous overlay upon an area of the law where balancing tests already leave state and local governments uncertain about the nature of their obligations." App. 28a. Under the "likelihood" standard, "[g]overnment employers will have to predict whether a court would find a 'likelihood' that even confidential documents would be disclosed in the future. This vague standard imposes enormous cost even when government conduct is found to be blameless, because uncertainty over its application will give rise to litigation in the absence of harm." App. 29a.

The likelihood standard would also generate additional confusion and litigation costs because it is so fact-specific and speculative. What may constitute a "likelihood" of future dissemination is bound to vary tremendously from case to case, disabling an employer from predicting its exposure to liability. The Second Circuit's articulation of the standard demonstrates just how fact-bound and unpredictable the inquiry really is. "In determining the degree of dissemination that satisfies the 'public disclosure' requirement, we must look to the potential effect of dissemination on the em-

ployee's standing in the community and the foreclosure of job opportunities. As a result, *what is sufficient to constitute 'public disclosure' will vary with the circumstances of each case.*" *Brandt*, 820 F.2d at 44 (emphasis added). Thus, contrary to the maxim that "[t]he constitutional tort is a narrow one," *Burton*, 426 F.3d at 16, the claims of plaintiffs in jurisdictions employing a relaxed standard will be virtually immune to dismissal, and terminated employees will have a license to impose costly and lengthy litigation on their former employers, "put[ting] governments at the mercy of litigants no matter how careful the governments' conduct." App. 29a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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