No. 05-214

IN THE

Supreme Court of the United States

Russell J. Hadfield,

Petitioner,

v.

Joseph McDonough, in his individual and official capacity as Sheriff of Plymouth County, Massachusetts, et al.

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

REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Ross D. Ginsberg
DONOVAN HATEM, LLP
World Trade Center East
Two Seaport Lane
Boston, MA 02210

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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REPLY BRIEF FOR THE PETITIONER

In *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985), this Court held that the Due Process Clause requires a pre-termination hearing before a tenured public employee may be deprived of his property interest in his job. Relying on the so-called "*Parratt-Hudson*" doctrine, the First Circuit holds that a pre-termination hearing is *not* actually required, and that a post-deprivation remedy will suffice, so long as the denial of the pre-termination hearing also violates state law. Pet. App. 13a-14a. Respondents agree that this incongruous rule is, in fact, the law of the First and Seventh Circuits. See BIO 15 & n.15. Moreover, respondents do not dispute that decisions from the Second, Fourth, Fifth, and Ninth Circuits have squarely refused to apply that rule when presented with cases in which tenured employees were denied pre-termination hearings in violation of state law. Respondents also do not contest that the question presented is recurring and important. Nor have they identified any vehicle problems that would prevent the Court from resolving the circuit split in this case.

Instead, respondents' principal argument against certiorari is that the decisions petitioner cited as conflicting with the First Circuit rule no longer represent the law of their respective circuits. As discussed below, that assertion is unfounded. Respondents point to no intervening decisions of this Court or the courts of appeals sitting en banc overruling, or even undermining, the on-point decisions cited by petitioner. Rather, respondents rely on cases (some not even precedential) addressing due process challenges in other, inapposite contexts. The difference in outcome in these cases does not, as respondents allege, demonstrate that the circuits have abandoned their prior employment cases. Indeed, the decisions respondents cite do not purport to, and could not, overrule the prior on-point circuit precedent. At the same time, as shown below, there are numerous recent cases outside the employment context in which courts have refused

to hold that conduct which violated state law was therefore "random and unauthorized" under *Parratt-Hudson*. Thus, at most, respondents' cases illustrate petitioner's point (Pet. 14-15) that there is a broad confusion in the circuits about the proper scope and application of *Parratt-Hudson*. That is a reason to grant the petition, not a reason to deny it.

1. Respondents have done nothing to undermine petitioner's demonstration (Pet. 9-15) of the deep and entrenched circuit split over whether the failure to provide a pre-termination hearing violates the Due Process Clause when the hearing was also required by state law and state law provides a post-termination remedy

a. Fourth Circuit. Respondents do not dispute that the decision below is in direct conflict with *Fields* v. *Durham*, 909 F.2d 94 (CA4 1990). Relying on settled circuit precedent, the First Circuit held below that "a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law." Pet. App. 13a (citations omitted). The Fourth Circuit reached the same conclusion in the initial appeal in *Fields*. See 909 F.2d at 96. However, when ordered by this Court to reconsider its decision in light of *Zinermon* v. *Burch*, 494 U.S. 113 (1990), the Fourth Circuit reversed course and concluded that the denial of a pre-termination hearing violates the Due Process Clause even if the denial also violates state law. 909 F.2d at 96-98. *Zinermon*, the Fourth Circuit concluded, reaffirmed that *Loudermill*, not *Parratt-Hudson*, established "the proper standard by which to judge the adequacy of the process afforded." *Id*. at 97 (citation omitted).

Respondents do not dispute that petitioner's due process claim would succeed under *Fields*, but rather argue that the Fourth Circuit abrogated *Fields* in *Bogart* v. *Chapell*, 396 F.3d 548 (2005). See BIO 25-27. This argument fails. In *Bogart*, the police seized more than two hundred of the plaintiff's cats and dogs. Although they were required to care

for the animals under state law, the police instead had the animals euthanized. The court held the subsequent due process claim barred by *Parratt-Hudson*. Respondents argue that in so doing, the court necessarily overruled *Fields*, pointing to the *Bogart* dissent. BIO 27. Respondents conspicuously omit, however, that the *Bogart majority* specifically distinguished *Fields*, explaining that while the officers in the case before it were entirely without authority to destroy the animals, in "*Fields*, the state actors (like those in *Zinermon*) were empowered by the State with the authority to effect the deprivations at issue [*i.e.*, the job termination] and the duty to provide the plaintiffs with predeprivation procedural safeguards." *Bogart*, 396 F.3d at 560 n.11. Petitioner's case, of course, would be controlled by the rule of *Fields*, not *Bogart*, as the *Fields* decision directly addresses the question presented here. But even under *Bogart*, the *Parratt-Hudson* doctrine would not apply because respondent McDonough had the power to fire petitioner and the duty to provide him with a pre-termination hearing. See *ibid*.

b. Fifth Circuit. Respondents make the same mistake in attempting to show that there is no division between the First and Fifth Circuits. Again, respondents do not contest that the decision below cannot be reconciled with *Findeisen* v. *North East Independent School District*, 749 F.2d 234 (CA5 1984). Instead, they argue that *Findeisen* was overruled *sub silentio* by a subsequent case having nothing to do with *Loudermill* or employment termination. See BIO 18-19. This time, respondents rely primarily on a case involving the revocation of a crop-dusting license. *See id.* 19 (citing *Johnson* v. *La. Dep't of Agric.*, 18 F.3d 318 (CA5 1994)). But *Johnson* is inapposite to termination questions, and the panel in that case had no authority to overrule *Findeisen*. In fact, *Johnson* did not even cite *Findeisen*, much less purport to overrule it.[1]

[1] In any event, the panel in *Johnson* acknowledged that the proper construction of the *Parratt-Hudson* doctrine was not disputed in the case before it, as the plaintiff's only argument in

The same is true of the other cases cited in respondents' brief at footnote 16, none of which concern employment termination or discussed *Findeisen*. The decision in *Caine* v. *Hardy*, 943 F.2d 1406 (CA5 1991) (en banc), for example, did not disturb the court's prior employment termination law. *Caine* arose from the suspension of a doctor's clinical privileges at a hospital. The court's primary holding was that a formal pre-suspension hearing was unnecessary under ordinary due process balancing principles, in light of exigent circumstances (the death of a patient). *Id*. at 1412. The court also rejected the doctor's claim that a pre-suspension hearing was nonetheless required by *Zinermon*. *Id*. at 1413. In so doing, however, the court did not cast doubt on *Findeisen*, noting that *Zinermon* "requires a case-by-case analysis of the deprivation at issue." *Ibid*.

The Court returned to the due process rights of terminated public employees in *Coggin* v. *Longview Independent School District*, 337 F.3d 459 (CA5 2003) (en banc). In that case, a tenured teacher was fired without a pre-termination hearing even though state law clearly required one. *Id*. at 465-66. Rather than adopting respondents' view that the violation of state law made the denial "random and unauthorized," the en banc court held that the school board violated the teacher's due process rights. *Ibid*. The Fifth Circuit cited *Zinermon* for the proposition that under "well-established federal law, the constitutional minimums for due process require that the final decision maker must hear and consider the employee's story *before* deciding whether to discharge the employee." *Id*. at 465 (footnote omitted, emphasis added). While the extent to which the parties addressed the application of *Parratt-Hudson* is unclear, the decision in *Coggin*, and especially the citation to *Zinermon*,

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support of his due process claim was that "an earlier opinion in this case established a violation of due process" and therefore established "law of the case." 18 F.3d at 321.

would be difficult to explain had the Fifth Circuit overruled *Findeisen* in *Johnson* or *Caine*.

c. Ninth Circuit. Following the same pattern, respondents do not dispute that in *Honey* v. *Distelrath*, 195 F.3d 531, 533-34 (CA9 1999), the Ninth Circuit rejected the claim that the denial of an adequate pre-termination hearing was "random and unauthorized" simply because the denial also violated state law. Instead, respondents argue that *Honey* no longer represents the law of the Ninth Circuit and that even if it did, it would not apply to petitioner's claim in this case. Both assertions are incorrect.

First, in arguing that the law of the circuit has changed since *Honey*, respondents are again unable to point to any case in the relevant context of employment, much less any case purporting to overrule *Honey* or modify its holding. Instead, respondents again rely on inapposite decisions in other contexts by panels that lacked the authority to overrule *Honey*; in fact, many of the decision lack any precedential authority at all. See BIO 23 & n.21 (four out of six cases cited unpublished); 9th Cir. R. 36-3. Respondents cannot plausibly claim that a court deciding petitioner's case in the Ninth Circuit would have disregarded the on-point binding decision in *Honey* in favor of a non-precedential decision arising in a different context.

Respondents also argue that the petition mischaracterizes the holding of *Honey*. The Ninth Circuit, respondents claim, applies the same rule as the First, with a narrow exception created in *Honey* for denials of due process that are part of a "*de facto*" policy or practice. BIO 24. This is incorrect. The court in *Honey* provided two alternative grounds for its decision. First, the Court rejected the defendants' claim that *Parratt-Hudson* applied because "the deprivation resulted from actions that were in violation of established law," 195 F.3d at 534: "We hold that the acts at issue in this case were not random and unauthorized because the defendants in this case had the authority to effect the very deprivation

complained of, and the duty to afford Honey procedural due process." *Ibid*. Thus, the Court held, contrary to the view of the First Circuit, "even acts in violation of established law may be considered 'authorized.'" *Ibid*.

The opinion in *Honey* then proceeded to provide a second reason for denying the *Parratt-Hudson* defense in the case before it: "*Additionally*, this circuit does not apply *Parratt* where a deprivation occurs because officials are acting according to established procedures – even if those established procedures violate other state or federal laws." 195 F.3d at 534 (emphasis added). That additional reason for rejecting the defendants' *Parratt-Hudson* defense was, by its plain terms, an alternative holding. And in the Ninth Circuit, the law is clear that *both* alternative holdings are law of the circuit. See, *e.g.*, *Operating Engineers Pension Trust* v. *Charles Minor Equip. Rental, Inc.*, 778 F.2d 538 (CA9 1985). Accordingly, as the First Circuit itself recognized (see Pet. App. 14a n.6), the decision below conflicts with the Ninth Circuit's decision in *Honey*.

d. Second Circuit. Respondents argue that there is no split of authority between the First and Second Circuits because the Second Circuit's decision in *Dwyer* v. *Regan*, 777 F.2d 825 (1985), does no more than recognize "a special exception to the *Parratt-Hudson* doctrine and holds that conduct that otherwise could be considered random and unauthorized, including conduct in violation of established state law, is not random and unauthorized if the actor is a 'high-ranking official having final authority over the decision-making process.'" BIO 20 (quoting *Dwyer*, 777 F.2d at 832).

As an initial matter, respondents cannot and do not claim that this rule is consistent with the law of the First Circuit, which makes no exception for deprivations effected by "high-ranking officials." See Pet. App. 13a-15a; see also *Easter House* v. *Felder*, 910 F.2d 1387, 1402-03 (CA7 1990) (en banc) (rejecting *Dwyer*'s "high-ranking official" rule).

Respondents claim only that this circuit conflict is not implicated in this case because, they assert, the Sheriff would not be considered a "high-ranking official" under *Dwyer*. That assertion is unfounded.

Respondents argue that Sheriff McDonough does not qualify as a "high-ranking official" because his "hiring and firing decisions are constrained by state law such as" the statute that required him to provide petitioner a pre-termination hearing. BIO 21. But the same was true of the "high-ranking official" in *Dwyer*. See 777 F.2d at 831 (defendant's ability to terminate plaintiff constrained by N.Y. Civ. Serv. Law 75(1), which requires a pre-termination hearing); see also *Burtnieks* v. *City of New York*, 716 F.2d 982, 988 (CA2 1983) (*Parratt-Hudson* inapplicable to claim against high-ranking officials who were required by city ordinances to provide a pre-deprivation hearing).

Respondents further claim that the Sheriff was not a "high-ranking official" under *Dwyer* because his termination decisions were subject to review by the County Commission. BIO 21. But even if the possibility of such review made the Commission rather than the Sheriff the final decisionmaker, that would simply mean that the respondent Commissioners in this case are "high-ranking officials" under *Dwyer* even if the Sheriff is not. See *RR Village Assoc., Inc.* v. *Denver Sewer Corp.*, 826 F.2d 1197 (CA2 1987) (*Dwyer* applied to actions of a town council).[2]

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[2] Respondents point out that the Commissioners refused to exercise any control over the Sheriff's termination decision in this case, thinking that petitioner was not tenured. BIO 21 n.19. For the purposes of its decision, the First Circuit assumed that this conclusion was wrong. Pet. App. 12a-13a. Accordingly, as the case is presented to this Court, the Commissioners had the authority and responsibility to ensure that petitioner was provided a pre-termination hearing and, as a result, would be considered a "high-ranking officials" under *Dwyer*.

In any case, the Second Circuit has not limited *Dwyer* to officials with unreviewable authority. For example, in *Velez* v. *Levy*, 401 F.3d 75 (CA2 2005), the Second Circuit recently held *Parratt-Hudson* inapplicable in a case in which the Chancellor of the New York City school system removed a local school board member. Although that removal decision was subject to review by the City School Board, *id*. at 81, the Second Circuit nonetheless found that the Chancellor was a "high-ranking official" within the meaning of *Dwyer*. *Id*. at 92. It was enough, the court held, that the official "had the authority to remove [the plaintiff], and the duty as Chancellor to follow the governing New York statutes and regulations" that required a pre-termination hearing. *Ibid*.; see also *DiBlasio* v. *Novello*, 344 F.3d 292, 303 (CA2 2003). The same is true in this case – the Sheriff had both the authority to terminate petitioner and the responsibility to provide a pre-termination hearing. See *Clow* v. *Deily*, 953 F. Supp. 446, 453 (N.D.N.Y. 1997) (Commissioner of Police had "final authority over the decision to terminate Plaintiff from her position as a police officer" and therefore his acts were did not fall within the rule of *Parratt*).

The divergence between the rules of the First and Second Circuits is thus squarely presented in this case.

3. As shown above, the division cited in the petition is real and continuing. Indeed, even in respondents' view, the courts of appeals currently apply at least three different rules in evaluating claims under *Loudermill*: (a) some courts, including the First and Seventh Circuits, hold that *all* violations of state law are "random and unauthorized" (BIO 15 & n.15); (b) the Second Circuit has created an exception for the acts of "high-ranking officials" (BIO 20); and (c) the Ninth Circuit permits suits alleging deprivations that violate state law but are pursuant to a *de facto* policy (BIO 24). Even if that were a complete and accurate description of the state of the law (which it is not), certiorari would still be warranted to resolve this three-way conflict.

Moreover, in attempting to diminish the circuit split by relying on cases outside the employment termination context, respondents fail to acknowledge numerous recent cases declining to hold that an official's conduct was "random and unauthorized" simply because it was in violation of state law.[3] Thus, recharacterizing the question presented in broader terms simply illustrates the breadth of the conflict and confusion regarding the scope of the *Parratt-Hudson* doctrine. Petitioner acknowledges that this conflict and confusion may even extend to decisions in different settings within the same circuit. But that inter- and intra-circuit conflict is a reason to grant certiorari in this case, not a reason to assume that there is no real conflict at all.

Indeed, the judges of the courts of appeals have not shared respondents' view that the state of the law is clear and consistent. See, *e.g.*, *Locurto* v. *Safir*, 264 F.3d 154, 173 (CA2 2001) (stating that *Zinermon* "has generated considerable confusion among the courts of appeals," creating a "legal thicket"); *Charbonnet* v. *Lee*, 951 F.2d 638, 642 n.17 (CA5 1992) (remarking on the "legal and institutional instability" of *Zinermon*); *Caine* v. *Hardy*, 943 F.2d 1406, 1415 (CA5 1991) ("[T]he courts of appeals have not found *Zinermon* easy to interpret."); see also *O'Neill* v. *Baker*, 210 F.3d 41, 51 (CA1 2000) (Selya, J., concurring in judgment) (calling the *Parratt-Hudson* a "doctrinal swamp"); *Easter House*, 910 F.2d at 1409 (Easterbrook, J., concurring)

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[3] See, *e.g.*, *Woodard* v. *Andrus*, 419 F.3d 348 (CA5 2005) (County Clerk's policy of charging filing fees above state law limits not "random and unauthorized"); *Castellano* v. *Fragozo*, 352 F.3d 939, 956 (CA5 2003) (en banc) (*Parratt-Hudson* inapplicable to claim of denial of due process arising from unlawful use of manufactured evidence and perjured testimony); *Thomas* v. *Cohen*, 304 F.3d 563, 578-80 (CA6 2002) (doctrine inapplicable to unlawful eviction without prior hearing); *Brooks* v. *George County*, 84 F.3d 157, 165 (CA5 1996) (Sheriff's custom of failing to pay inmate wages due under state law not "random and unauthorized").

(describing the doctrine's development as "resembling the path of a drunken sailor").

4. Finally, as described in the petition (at 15-28), the First Circuit's decision effects a breathtaking, and erroneous, expansion of the *Parratt-Hudson* doctrine. The First Circuit rule prevents victims of even the most serious violations of the most basic due process rights from seeking a federal remedy whenever state law also prohibits the conduct and provides a post-deprivation remedy.

This result is contrary to the basic purposes of the Due Process Clause and 42 U.S.C. 1983, both of which were enacted in large part as a response to the "random and unauthorized" actions of state officials who arbitrarily deprived newly freed slaves of their lives and property in the face of state laws that promised equal treatment and fair procedures. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 801 (1966); *Monroe* v. *Pape*, 365 U.S. 167, 174-76 (1961). The First Circuit's reading of *Parratt-Hudson* completely undermines those purposes, withdrawing a federal forum from victims of even the most egregious violations of the Constitution's most fundamental due process rights whenever the State happens to have incorporated those rights into state law as well. By the same token, the First Circuit permits a federal suit for less significant due process claims whenever a State has failed to incorporate federal due process standards into state law. Neither this Court, nor the framers of the Due Process Clause and Section 1983, could have intended to allocate access to federal remedies in such an arbitrary and haphazard manner.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Ross D. Ginsberg
DONOVAN HATEM, L.L.P.
World Trade Center East
Two Seaport Lane
Boston, Massachusetts 02210

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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