1988 WL 1025695 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

UNIVERSITY OF PENNSYLVANIA, Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Respondent.

No. 88-493.
October Term, 1988.

Brief of Princeton University, Brown University, Stanford University, Harvard University, and Yale University, as Amici Curiae, in Support of the Petition

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***1 INTEREST OF THE AMICUS CURIAE**

The Trustees of Princeton University, Brown University in Providence in the State of Rhode Island, and Providence Plantations, Leland Stanford, Jr. University, President and Fellows of Harvard College and Yale University ("the Universities"), are private

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institutions of higher education. The Universities make extensive use of confidential academic peer review materials in reaching their tenure decisions.

The Universities derive confidential peer review materials from two sources. The first source is from within the Universities, usually confidential evaluations from the tenured faculty members in the candidate's own department. The second source is from outside the Universities. As an important part of their procedure for making tenure decisions, the Universities request evaluations from distinguished scholars in the field of the tenure candidate who are not on their own faculties. The Universities consider the receipt of completely candid assessments to be a crucial element of the tenure process. Consequently, these outside scholars, who are under no obligation to participate in the Universities' tenure review processes, are given promises of confidentiality.

The Universities are convinced that the compromise of the confidentiality of these peer review materials would result in a significant diminution of their ability adequately to evaluate candidates for tenure. For the Universities, as for other colleges and universities, the decision to grant tenure is a critically important academic decision, setting the courses of the institution and the individual involved for thirty or more years. The decision is one in which the academic freedom of both the candidate and the institution is directly implicated.

***2** The Universities seek leave to appear as *amicus curiae* because of the importance of the confidentiality issue to their tenure process.

*3 ARGUMENT

THE CONFLICT IN THE CIRCUITS CONCERNING THE DISCOVERABILITY OF CONFIDENTIAL PEER REVIEW MATERIALS SHOULD BE RESOLVED BY THIS COURT AS SOON AS POSSIBLE

The tenure process determines who will teach, what will be taught, what research will be conducted and, to a very large extent, the nature of academic discussion and debate. Thus, the tenure process lies at the heart of academic freedom and implicates core First Amendment values. *See, e.g., Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (Powell, J.). The ability to maintain a substantial degree of confidentiality for evaluations of tenure candidates by their peers, known as "peer reviews", is vital to the tenure process. If academic institutions could not assure confidentiality for peer reviews, it would be very difficult for them to secure frank appraisals of candidates for tenure.

Currently, there is an irreconcilable and apparently permanent conflict in the Courts of Appeals with respect to the degree of protection, if any, to be afforded to peer reviews. The Third Circuit, following the precedent established in *EEOC v. Franklin & Marshall College,* 775 F.2d 110 (3rd Cir. 1985), *cert. denied,* 476 U.S. 1163 (1986), and the Fifth Circuit, *see In re Dinnan,* 661 F.2d 426 (5th Cir. 1981), *cert. denied,* 457 U.S. 1106 (1982), refuse to afford any protection at all to peer reviews. Three other Circuits -- the Second, Fourth, and Seventh -- have all adopted a rule of affording some protection to peer reviews by requiring a balancing of competing interests before any intrusion in the ***4** process will be allowed.[1] *See Gray v. Board of Higher Education,* 692 F.2d 901 (2d Cir. 1982; *Keyes v. Lenoir Rhyne College,* 552 F.2d 579 (4th Cir. 1977), *cert. denied,* 434 U.S. 904 (1977); *EEOC v. University of Notre Dame du Lac,* 715 F.2d 331 (7th Cir. 1983).

The conflicting rules adopted by these Circuits have injected substantial uncertainty about confidentiality into the peer review procedure and thus have had, and continue to have, a debilitating effect on the entire tenure selection process at schools across the country. This uncertainty, which has existed for more than six years, has confused, concerned, and inhibited academicians who are asked to provide tenure evaluations. This conflict imposes an unnecessary burden on the ability of institutions of higher education to select the best qualified tenure candidates, and thereby impermissibly infringes First Amendment interests.

The issues raised by the University of Pennsylvania's petition are of great importance to institutions of higher education. Having endured six years of conflict in the Circuits, those institutions need this Court to rule definitively on this issue and provide guidance to the lower courts. Therefore, we respectfully request that the petition for a writ of certiorari in this case be granted.

*5 CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Footnotes

1 The Ninth Circuit in *Lynn v. Regents of the University of California,* 656 F.2d 1337, 1347 (9th Cir. 1981), and the Sixth Circuit, in an unpublished opinion in *Bergman v. Bowling Green State University,* 820 F.2d 1224 (6th Cir. 1987), also appear to have accepted some form of balancing test.

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