Case No. B296102

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHMUEL LESHEM,

Petitioner and Appellant,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA,

Respondent.

Appeal from the Superior Court for Los Angeles County
Case No. BS167350
Mitchell Beckloff, Judge

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

"[I]t was a cooked-up case."
Professor Andrei Marmor, USC Grievance Hearing, March 27, 2015. (AR 610.[1])

At the center of this case lies a nefarious, "cooked-up" tenure review held in 2011 to 2013 at the Gould School of Law, which resulted in the wrongful denial of tenure to Appellant, USC Law School Professor Shmuel Leshem, and the loss of his livelihood. Respondent's own policies and procedures require tenure reviewers to "scrupulously follow tenure procedures" explicitly because deviations can be used as "evidence that the institution breached its obligation to conduct a fair review." (AR 126, 796.) Respondent USC intentionally violated numerous tenure-review rules, standards and guidelines, offering no reasonable explanation for its repeated and egregious misconduct, giving rise to a biased tenure review process and an unfair subsequent grievance hearing.

Appellant's procedurally-deficient tenure review process was wholly and entirely inconsistent with its own policies. The process included extensive reliance on peer-review reports not used for any other candidates in violation of a contrary documented promise; dismissal of standard tenure review letters used in each and every other tenure evaluation case; improper

[1] "AR" refers to the Administrative Record, lodged separately.

use of undisclosed citation counts; reliance on non-existent publications quota; dismissal of draft papers; and lack of warning that Appellant was not on track for tenure due to misleading mentoring.

Respondent further failed to document key components of the tenure review process, as required by its own policies and best practices. Finally, Respondent's tenure-denial letters, authored by then-Dean Robert K. Rasmussen, set forth inconsistent reasons for the denial of tenure and identified alleged scholarly inadequacies that were not previously raised during either the probationary period or the initial tenure decision and were not supported by contemporaneous evidence of performance reviews.

As detailed in Professor Andrei Marmor's January 30, 2011 Letter of Complaint submitted to university administrators in the midst of the tenure review, the most egregious violation of the tenure review process involved the extensive use of fraudulently-solicited confidential journal referee reports and editor letters related to both accepted and rejected scholarly work. (AR 707-709). These documents were received by Appellant as part of the peer-review publication process which is different from the law review publication process with which the majority of law professors are most familiar.

Peer-review reports are deliberately-unbalanced

anonymous critique of individual scholarly pieces and are not intended or used for tenure review purposes. Indeed, Respondent's own policies explicitly prohibit the use of peer-review reports in the tenure review process because they are inherently unreliable measures of a body of scholarly work. Respondent, furthermore, disregarded as evidence of scholarly quality the fact that Appellant has published in highly respected peer-reviewed journals.

Upon denial of tenure, Appellant filed a grievance with Respondent, detailing the myriad of deficiencies and policy violations that occurred during his tenure review. Appellant sought a copy of the tenure dossier – the file compiled by Respondent and relied upon by tenure reviewers in evaluating Appellant's tenure. The grievance hearing was marred with its own serious policy violations rendering it grossly unfair and fundamentally unlawful.

More specifically, during the grievance process, the University ignored the evidentiary rulings of the Grievance Panel Chair to produce the tenure file to Appellant, dictating instead what evidence would be produced at the hearing. The Panel Chair ceded control over the hearing, followed the dictates of the University, and denied Appellant access to the tenure dossier – key evidence needed to fully uncover the serious misconduct that plagued the tenure review process. The Panel

Chair's conduct blatantly violated Respondent's own hearing procedures and due process.

The Grievance Panel subsequently issued a whitewashed report of the Law School's misconduct signed off by then-President C. L. Max Nikias. (AR 683-721; AR 1-7.) The Panel members nevertheless embedded in their report a series of inculpatory findings, determining among other things that Tenure Review Subcommittee Chair Gillian Hadfield's (hereinafter "Hadfield") "request" for peer-review documents was "irregular" and her "defense puzzling;" referring to Subcommittee Member Daniel Klerman's (hereinafter "Klerman") comments on the "the inscrutability of [standard] external tenure letters" and the fact that peer-review documents are "more objective, more useful standard;" and finding "procedural irregularities in the compilation of [the tenure] dossier," whose nature and quantity were left unspecified. (AR 686-687.)

The Panel concluded its report by urging the Law School to "take its review process more seriously," recommending that "in future cases it would behoove the law faculty to conduct a more thorough and serious review of tenure-track professors' progress" and "develop fair and consistent policies for weighing [interdisciplinary] publications." (AR 687.) Staggeringly, despite its sweeping recommendations to overhaul the Law School's

tenure review process based on findings that policies were not followed in Appellant's case, the Panel went on to self-contradictorily recommend rejecting the request for a new, rule-compliant tenure review. (AR 688.)

Having exhausted his administrative remedies at USC, Appellant filed on January 10, 2017 a Petition for Writ of Mandate at the Los Angeles Superior Court. (Appellant's Appendix, hereinafter "AA," Vol. 1, page 13.) On September 26, 2017, the Superior Court issued an Order sustaining Respondent's demurrer as to the underlying tenure review, erroneously finding that the tenure review process itself did not qualify for writ review under Civ. Code Pro. §1094.5. (AA V4, p 1028.) This is an error of law and fact.

Subsequently, in a December 10, 2018 order, the Superior Court denied writ relief as to the grievance hearing. (AA V5, p 1231.) Like the Grievance Panel, the Superior Court ignored a wealth of evidence supporting the clear policy violations and procedural errors that existed throughout the tenure review and grievance processes. Instead, the Court based its decision largely on the discredited and self-serving testimony of Hadfield, the Tenure Review Committee Chair who fraudulently secured and wrongfully shared Appellant's peer-review materials in the first instance, while ignoring Subcommittee Member Klerman's own testimony describing his elaborate and uninterrupted subversive

statement advising the Law School voting faculty members to disregard "for four [lengthily explained] reasons" standard tenure review letters and to rely instead on peer-review reports and journal denials. (AR 538-543.)

In patent violation of both state law and fair-process principles and precedents, the Superior Court went on to sanction the Panel's exclusion of the tenure dossier file at the grievance hearing and to deny Appellant's motion to augment the administrative record with the tenure file. (AA V5, p 1231-1246.) In making its decision, the Court incorrectly relied on the conclusion that the subcommittee's report did not reference or quote peer-review documents, when the record clearly indicated that the subcommittee had considered this data. (*Id.*)

Appellant, via this appeal, seeks an opportunity to review the key evidence previously denied to him: his tenure dossier file. Appellant also seeks a rule-compliant tenure review and/or grievance processes.

II. STATEMENT OF CONTENTIONS

A. Grievance Hearing: Appellant did not receive a fair grievance hearing because Appellant was unfairly and improperly denied access to his tenure dossier.

B. Failure of the trial court to provide Appellant with his tenure dossier is reversible error.

C. There was no substantial evidence to support the panel's findings and conclusions whereby (1) the significant procedural deficiencies did not impact the outcome of the tenure decision; (2) Appellant received adequate and unbiased mentoring prior to his tenure review process.

D. Demurrer: The court erred as a matter of law when it determined respondent's tenure review process does not constitute a hearing under C.C.P. § 1094.5.

III. PROCEDURAL HISTORY, APPEALABILITY AND STANDARD OF REVIEW

A. Nature of Case

This is an administrative mandamus case, brought under Cal. Civ. Code Section 1094.5. It lays out claims for review of Respondent's administrative decisions to deny Appellant tenure and thereafter deny his grievance challenging the tenure denial.

B. Relief Sought in Trial Court

The relief sought in the trial court against Respondent was the issuance of a writ of administrative mandamus ordering Respondent to: (1) set aside its June 24, 2015 decision denying Appellant relief; (2) re-convene Appellant's tenure review with instructions to (i) exclude from the review the original tenure review subcommittee members, (ii) prohibit use of impermissible referee reports and citation counts, and (iii) disallow use of or reliance on prior recommendations, reports and conclusions.

Alternately, Appellant sought an order requiring Respondent to: (3) re-convene Appellant's tenure-related grievance; (4) produce to Appellant his full tenure dossier for use as part of the grievance; further seeking to (5) prohibit use of or reliance on prior Grievance Panel recommendations, reports and conclusions; and (6) grant him costs.

C. Identification of Judgments and Orders Appealed From

Respondent filed a demurrer seeking to dismiss the first two claims in Appellant's First Amended Petition for Writ of Administrative Mandamus. After briefing and a hearing, the Superior Court sustained Respondent's demurrer as to the first two claims. (AA V5, p 1168.) Subsequently, the Superior Court conducted a hearing on the remaining claims and judgment was entered for Respondent on January 9, 2019. (AA V5, p 1247.) Appellant filed a notice of appeal of the trial court's Judgment denying the Petition for Writ of Administrative Mandamus as well as the underlying September 26, 2017 order sustaining Respondent's demurrer, which order was included in the Judgment. (AA V5, p 1287.)

D. Appealability

The judgment is appealable. *See* Code Civ. Proc. § 904.1(a)(1). The sustaining of a demurrer is reviewable on appeal from the underlying judgement. *See* Code Civ. Proc. § 906; *Walker v. Countryside Home Loans, Inc.* (2002) 98 Cal.App.4th

1158, 1169.

E. Standard of Review

"An appellate court in a case not involving a fundamental vested right reviews the agency's decision, rather than the trial court's decision, applying the same standard of review applicable in the trial court." *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261. *See Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 334-335 (scope of review from a judgment on a petition for writ of mandate is the same as that of the trial court; *Department of Corrections & Rehabilitation v. Sate Personnel Bd.* (2015) Cal.App.4th 710, 716 (same).

The Court must determine "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." Code Civ. Proc. § 1094.5(b). "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Ibid*; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.

The fairness of the administrative proceeding is reviewed de novo. "A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." *Nasha v. City of Los Angeles* (2004) 125

Cal.App.4th 470, 482. A "fair trial" means a 'fair administrative hearing.' *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 96; *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1730. Generally, a fair procedure requires "notice reasonably calculated to apprise interested parties of the pendency of the action … and an opportunity to present their objections." *Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 24; *see also Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1445 ("Notice of the charges sufficient to provide a reasonable opportunity to respond is basic to the constitutional right to due process and the common law right to a fair procedure.")

The Grievance Panel's (hereinafter "Panel") decision is reviewed for substantial evidence. *See* Code Civ. Proc. §1094.5(c) ("abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record.") Evidence is substantial if it is of "ponderable legal significance . . . reasonable in nature, credible, and of solid value." *Estate of Teed* (1952) 112 Cal.App.2d 638, 644; *see also Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9. However, "the courts are not and should not be bound by an administrative finding…when the evidence on the face of it is clearly unbelievable." *County of San Diego* v. *Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 558

citing *Board of Supervisors* v. *Archer* (1971) 18 Cal. App.3d 717 at pp. 723-724. Moreover, conclusions of the superior court, and its disposition of the issues in this case, are not conclusive on appeal. *See Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal. App.3d 368, 387.

A trial court's decision sustaining demurrer is reviewed de novo. A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. Thus, the standard of review on appeal is de novo. *See Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034. In reviewing the sufficiency of a complaint against a general demurrer, courts are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. . . ." *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126. Further, courts must give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. When a demurrer is sustained, a court must determine whether the complaint states facts sufficient to constitute a cause of action. *Berg & Berg Enterprises, LLC, supra* 178 Cal.App.4th at 1034.

IV. FACTUAL BACKGROUND

In 2006 USC appointed Appellant as Assistant Professor of Law on tenure track. (AR 622:15-623:7.) In early 2009, Appellant was promoted to Associate Professor. [AR 710-711 (Ex. 8).] In an email dated December 7, 2009 summarizing "Year End Conference with Shmuel Leshem," Klerman and Dean Rasmussen wrote, "Faculty is impressed with technical quality of pieces and peer-reviewed placements," stating in response to Appellant's questions, "quantity is on track, especially if pace continues." (AR 716.) In a memo dated March 12, 2010, Klerman states, "quality and quantity of scholarship are good and on track to tenure…teaching has improved," recommending publishing in a law review, but noting "pieces in peer-reviewed journals are good and 'count'." (AR 717.) In his concluding fifth-year January 2011 performance review, Appellant was advised he was on track to obtaining tenure. (625:11-20.)

In the spring of 2011 Law School Dean Robert K. Rasmussen appointed Professors Gillian Hadfield, Daniel Klerman and Thomas Griffith to serve on Appellant's tenure review subcommittee with Hadfield as chair. (AR 34, 685.)

Appellant submitted for his initial tenure review three published papers and five completed draft papers, two of which were accepted for publication shortly after the tenure review process began (in September and October 2011). Four other draft

papers (two of them submitted for the reconsideration request) were accepted for publication before the conclusion of the tenure review in March 2013. Per Professor Klerman's testimony in the grievance hearing, "[Appellant] has accumulated a somewhat impressive publication record" and overall "has published in very distinguished places." (AR 554:22-23 ,555:5-6.)

A. Appellant's Tenure Review Did Not Follow UCAPT Manual, Law School's Internal Promotion Standards And Best-Practice Guidelines

The rules governing tenure review applicable to Appellant are set forth in University Committee on Appointments, Promotions and Tenure Manual (January 2011) ("UCAPT Manual") (AR 751-804; 2013 Version 805-856); the Law School's Standards and Procedures for Promotion of Faculty and The Award of Academic Tenure (May 1999) ("Internal Promotion Standards" or "ISPT") (AA V2, p 360); and UCAPT Manual-endorsed *Good Practice in Tenure Evaluation* guidelines ["*Good Practice Guidelines*"; § 1.a-5 (AR 757).] Respondent violated numerous tenure-review rules, standards and guidelines. Specifically, Appellant's procedurally-deficient tenure review process included the following violations (UCAPT Manual's sections are unreferenced):

- Misleading mentoring manifested in positive pre-tenure evaluations, lack of warning of promotion risk, and a last-minute evaluation reversal [§§ 2.4, 3.4 (AR 775, 778); *Good Practice Guidelines*, pp. 3, 10, 17, 20 (AR 124, 125, 127, 128)];

- Repeated violations of tenure-review rules governing the evaluation of a tenure candidate's scholarly work involving:

- Extensive reliance on peer-review reports not used for other candidates in violation of a contrary documented promise and policy [§§ 4.1, 4.2, 4.5, 12.1 (AR 782-783, 785, 796); *Good Practice Guidelines*, p. 13 (AR 126)];

- Dismissal of standard tenure review letters used in each and every other tenure evaluation case [§ 9 (AR 790-793); *Good Practice Guidelines* (*id.*)];

- Improper use of raw, undisclosed citation counts [(§§ 1.b-22, 1.c-6 (AR 766, 768)]; and

- Reliance on non-existent publications quota and dismissing of draft papers [ISPT § II(A)(2) (AR 120)];

- Failure to document key components of the tenure review process including the September 12, 2012 meeting and the use of the peer-review reports; [(§§ 4.2, 12.1 (AR 783, 796)]

- Inconsistent tenure-decision letters that identify alleged scholarly inadequacies never raised during either the probationary period or the initial tenure decision. (§§ 1.a-9, 4.5 (AR 575, 785).]

B. Serious Procedural Irregularities in Appellant's Tenure Review Process

In the summer of 2011 at the outset of the tenure review, Hadfield solicited from Appellant dozens of his confidential and anonymous peer-review reports purportedly for the "only purpose" of "help[ing her] to understand and anticipate views of people in [Appellants'] field with respect to [his] work and contributions." (AR 690-695 (Ex. 1-2), 700-702 (Ex. 5).) Hadfield concurrently requested Appellant to present comments on a paper she drafted at an upcoming faculty workshop explaining that Appellant "[underst[ood] more about this paper than anyone else [she] could ask." (AR 718-720 (Ex. 11).)

On September 12, 2011, three days after Appellant delivered comments on Hadfield's draft paper, Dean Rasmussen and Hadfield pressed him to withdraw his bid for tenure at a hurriedly-convened meeting, asserting *for the first time* and contrary to all prior performance evaluations that his scholarly work is untenurable based on the contents of his peer-review reports, undisclosed citations counts, and lack of sufficient number of publications. (AR 696-699 (Ex. 3-4), 634:16-635:7; 445:17-22.) Notwithstanding Dean Rasmussen and Hafield's prodding, Appellant insisted the tenure review process continue. (AR 464:24-465:2.)

Per UCAPT Manual § 1.c-6, the proper weight of citations counts in a tenure decision is subject to each school's own

standards (AR 768); the Law School's Internal Promotion Standards do not mention citation counts in any context. Moreover, per UCAPT Manual "citation counts…are crude matrices" that "should be supplemented by analysis of how and why the work is cited." [§ 1.b-22 (AR 765).] Dean Rasmussen and Hadfield did not identify a specific cite threshold considered sufficient to grant tenure (because none exists) nor did they analyze Appellant's citation counts, in line with Klerman's testimony that "[citations counts] was not something the subcommittee had previously emphasized." (AR 549:15-16.)

During the September 12, 2011 meeting, Dean Rasmussen and Hadfield did not inquire about Appellant's work in progress or his future research plan, failed to consider several draft papers submitted to top journals as required by section II(A)(2) of the Law School's Internal Promotion Standards, and disregarded the lack of required publication quota. (AR 120, 450: 19-23, 456:18-21, 498:3-4, 499:21-21.) The assessment of Appellant's work separately violated § 2.4's instruction to evaluate interdisciplinary work "properly" rather than by the department's "usual expectations." (AR 775.)

The lack of warning that Appellant's promotion was at risk at the hands of his senior colleagues violated UCAPT Manual § 3.4's instruction to "take stock [at the fifth-year review] to consider whether the candidate should go forward for tenure

evaluation," as well as *Good Practice Guidelines* behooving institutions to provide tenure-track candidates "clear advice about [their] progress in meeting tenure requirements." [p. 17. (AR 778, 127).] *See also* UCAPT Manual § 1.c-4. ["There should be a…serious stock-taking in year five…." (AR 768).]

Contrary to Respondent's own tenure-related rules and procedures, the approximately 90-minutes long September 12, 2011 meeting was not documented but for a stray email of Hadfield sent later that same day to Appellant apologizing for the "difficult discussion." [(AR 445:17-22, 696-699 (Ex. 3-4).] This lack of documentation violated UCAPT Manual's requirement to "describe the process used." [§ 4.2; (AR 783).]

Hadfield distributed Appellant's peer-review reports to members of the subcommittee without informing him or obtaining his permission: "At some point in time [Hadfield] told me [Klerman] that we had referee reports and that they were in our dropbox." (AR 533:23-24.) The distribution of Appellant's confidential documents disproves Hadfield's contention that she asked for Petitioner's peer-review reports to help her "understand and anticipate the views of people in [Appellant's] field." (AR 700-702.)

On the eve of the faculty tenure meeting in early January 2012, Hadfield solicited from Appellant additional peer-review reports once Appellant asked her to specify in the subcommittee

report he had received a revise-and-resubmit request from a journal editor: "Congratulations Shmuel. Can you send me the reports?" [AR 383:3; 703-705 (Ex. 6).] Appellant felt compelled to send Hadfield the peer-review report consisting of an editor letter and a referee report. (*id.*; AR 199-201.) Breaking standard tenure review rules and her own promise yet again, Hadfield surreptitiously and selectively referenced the newly-soliticted peer-review report in the subcommittee report, as she admitted on two separate occasions at the grievance hearing:

> There is a reference to an editor's letter with respect to a revise and resubmit article [...] Prof. Leshem had asked me to include that information about the revise and resubmit in the report, and I felt it was approporiate to include a sentence or two referencing the nature of the revise and resumbit letter, the editor's letter. Q.... So you did make a reference to a revise and resubmit referee report -- referee letter -- A. No, to an editor's letter. (AR 432:15-16, 433:2-11.)
>
> Q. And you reference that much in your subcommittee report? A. Yes. I reference the -- fairly briefly the -- what the editor has said they would be looking for generally in a revision. (AR 438:20-24.)

The Panel blatantly disregarded the clear evidence that the subcommittee report referenced a peer-review report: "The subcommittee's report, Hadfield testified, merely included a note that one article has received a "revise and resubmit" response from a journal editor." (AR 687.) Upholding the Panel's contrived

finding, University President Nikias faulted Appellant for requesting that "the revise and resubmit action be included in the…report." (AR 2.) The Writ Denial Order, also omits Hadfield's admission that she referenced the peer-review report in the subcommittee report. (AA V5, p1239-1241; *see also* RT 11/28/18 hearing, 8:21-24.)

Hadfield also told the voting faculty during the tenure meetings in January 2012 that Appellant's peer-review reports confirmed her reservations about Appellant's work. (AR 575:24-576:9.)

C. UCAPT Manual And Best Practice Rules Prohibit The Use Of Peer-Review Documents In Tenure Reviews.

The extensive use of Appellant's peer-review reports in the tenure review violated UCAPT Manual: "Unsolicited letters are not part of the dossier, are not welcome, and are not considered significant; they have no appreciable weight because they are subject to selection bias." (§ 1.b-25; AR 766.)

Peer-review reports are plagued with "selection bias" because they are intended primarily for screening and improving subject-specific scholarly work by highlighting flaws, limitations, and imperfections, as acknowledged by Hadfield. (AR 411:6-23.)

UCAPT Manual further requires that "Committee members, when reviewing candidates in disciplines with which they are familiar, will take care to observe the standard tenure

processes rather than, for example, independently seeking external advice." (§ 12.1; AR 796.) Hadfield holds a Ph.D. in Economics; both she and Klerman are familiar with Appellant's scholarly field. (AR 430:1-4; 552:23-24, 563:12-15). The seeking out and reliance on 'external advice' in the form of referee reports was therefore entirely improper and contrary to UCAPT policies and procedures. *Good Practice Guidelines* similarly caution against relying on items "not used for other candidates," holding that procedural deviations can be used as evidence of unfair review. (p. 13, AR 126.)

Relying on peer-review reports and journal rejections further fails the requirements to provide "analyses of issues rather than advocacy of conclusions;" perform "independent assessment;" and refrain from "skewing the selection of referees to achieve a desirable outcome." [§§ 4.1, 4.2, 4.5 (AR 782-783, 783, 785).] An undocumented use of peer-review reports separately violates the instructions to "describe the process used" and to document "all information that is relied on." (§§ 4.2, 12.1; AR 783, 796.)

Good Practice Guidelines include a general standard proscribing the use of peer-review reports: "The tenure application dossier should…exclude items that the institution has not used for other candidates." (p. 13; AR 126.) "All reviewers should scrupulously follow tenure procedures. Deviations can be

used as evidence that the institution breached its obligation to conduct a fair review." (*Id.*)

Furthermore, Law School Promotion and Tenure Committee Chair Gregory Keating verified the Law School has not been using referee reports for any other tenure candidate in the ten (10) years preceding Appellant's tenure review. (AR 653:11-14.) Chair Keating's testimony and authorities cited above demonstrate that consulting of peer-review reports in the tenure review process is prohibited by Respondent's own policies, procedures and practices.

D. Disinterested Third Party Confirmed Use and Abuse of Referee Reports in Tenure Review Process

Professor Marmor, then-Professor of Philosophy and Maurice Jones Jr. Professor of Law at USC (now Professor at Cornell University), (hereinafter "Marmor") confirmed that the subcommittee report contained references and quotes from a referee report:

> [W]hen I got…the [subcommittee's] report, I was totally astonished to see that...Gillian [Hadfield] did that again after...Shmuel reported that one of his papers was a revise and resubmit…[Hadfield] asked for the referee report on that. ***She quoted part of it in the [subcommittee] report to the faculty*** and there was additional data in that report about referee reviews -- not quotations, but some data, how many articles were rejected, or something like that. […]

(AR 598; emphasis added.)

Marmor notified Vice-Provosts Beth Meyerowitz and Martin Levine and the University Committee on Appointments, Promotions and Tenure of the procedural irregularities in Appellant's tenure review via letter of complaint dated January 30, 2012. (AR 706-709, (Ex. 7); AR 599-600.)

> ***I was totally dismayed to read that the [subcommittee] report contained explicit references to facts about, and conclusions from, these journal reports.*** (See pp. A13-14, and notice the quotation from the JLS editors' report concerning the recent revise and resubmit decision; a very partial quotation…not mentioning the fact that the external reviews were very positive….)
>
> [C]ontrary to the Dean's assurance [to Marmor] that "the sub-committee does not plan to rely on" external reviews from peer-reviewed journals, we now know for a fact that [subcommittee members] did [rely on external reviews], and that they shared some of the information with the tenured faculty.

(AR 708; emphasis added.)

Marmor's letter established that the subcommittee report included misleading references to "facts" and "conclusions" extracted from Appellant's peer-review documents. (*Id.*)

Marmor further testified that before the proceedings even started, Hadfield contacted him and told him that she had reservations about Appellant's tenure, citing an editor's review included in the improperly-considered referee reports.

"[Hadfield] just went on and on why she thinks it's not a good report and she is worried about it, which kind of baffled me…[I]t was very difficult to figure out what she told me about it, because I haven't seen the [editor's] letter." (AR 594-596.)

Professor Michael Shapiro, Dorothy W. Nelson Professor of Law at USC (now Emeritus), who was a voting faculty member, similarly established that Hadfield had discussed the referee reports at the tenure meeting:

> ***[T]he memory that sticks out is listening to Prof. Hadfield talk about [the referee reports] at the faculty meeting.*** […] [Hadfield's] view was that [the referee reports] confirmed her reservations about Shmuel's models and the extent to which his work was understandable by a broad audience.

(AR 575:24-576:9; emphasis added.)

Moreover, according to Marmor's testimony, the subcommittee report contained data on publication rejections extracted from the referee reports: "[T]here was additional data in that report about referee reviews -- not quotations, but some data, how many articles were rejected, or something like that." (AR 598:21-23.) Klerman confirmed the subcommittee report included information on journal rejections: "So we referenced the decisions of the journals." (AR 533:14-18.)

E. Subcommittee Member Klerman Confirmed Extensive Use of Referee Reports During the Tenure Review Process

Klerman confirmed that he advised voting faculty to rely on

journal denials and peer-review reports and disregard "for four reasons" the standard tenure review letters:

> I told the committee…that I thought that there was some contradiction between…the tenure letters, which could be read in a positive fashion; and the fact that Shmuel had four draft papers that had been rejected, several of them repeatedly, from peer reviewed journals. […]
> And I said given the contradiction, I put more weight on the journal denials which were based on referee letters, for four reasons.
>
> I said, first of all, there are some people who just don't like writing negative tenure letters.[…] Second of all…some people at higher ranked schools have a view that USC's tenure standards are not very high. So they might think: "Well, it's not good enough for the journals I respect, and it's not good enough for the journals that I edit, but, hey, it's USC, it's good enough for them." […] Third of all, many people have the impression that once a [sub]committee sends out for review letters….[the subcommittee members] have already made a decision to give tenure[…].. [F]inally, many people who write tenure letters… see themselves as sort of champions of their field[…]
>
> [F]or those reasons I told the full faculty I don't trust those tenure review letters and I put more weight on the rejections from the journals. And I think I inartfully expressed that to say I put more weight on the referee letters. I realized I think very soon after that that I had spoken in a way that was inappropriate. […]
>
> [It was] the decision by the journals to reject [Appellant's] papers based on the referee letters that I thought was of interest to the faculty and should be taken into account as they read the tenure letters which…could be given a more positive interpretation.

(AR 538-543.)

Klerman further testified, "I generally find tenure letters unhelpful. That's my view. And that's basically what I told the faculty. And I know that's a controversial view, but it is my view." (AR 547:16-19.) Hadfield testified that Klerman spoke about rejections of specific articles to undermine some of the external tenure letters: "[Klerman told the faculty he] was actually drawing an inference from the rejection of the articles by…editors and referees…[putting] greater weight on [them] than [on] some of the letters that he had read from the external reviewers." (AA V5, 1243:12-23; AR 441:12-16.)[2]

F. There Were Additional Irregularities in the Tenure Review Process

In addition to the improper use of Appellant's peer-review reports, Appellant's tenure review process was plagued with other procedural irregularities: (1) irregularities in the commissioning of external tenure letters, for which the Panel failed to make any findings; and (2) duplicative and duplicitous

[2] Hadfield wrongly defended Klerman that "it's perfectly appropriate to evaluate the fact of the rejection [of a paper included in a tenure review]" (AR 443:24-25), contrary to UCAPT Manual's requirements to provide "analyses of issues rather than advocacy of conclusions" and perform "independent assessment." [§§ 4.1, 4.2 (AR 782-783, 783).]

fifth-year review memos by Klerman. These are discussed below.

1. **Irregularities in the commissioning of external tenure letters confirm this was a "cooked-up case" with a predetermined outcome.**

Per UCAPT Manual, Solicitation Letters must include a "curriculum vita" and "a sample of publications" requesting an analysis of "scholarly contributions" and an evaluation of "impact on thinking in the field." (§ 13.1, AR 797.) The dossier itself as well must include "sample of recent publications…[including] the candidate's best work." (§ 10, AR 793.) Here, by contrast, Marmor testified that the external tenure letters and responses he reviewed demonstrated that contrary to policy and practice, 'a sample of publications' was not provided to Appellant's external reviewers. He testified at the Grievance hearing as follows:

> ***I do know that once [Hadfield] started the…process, just by witnessing what I've witnessed, including the way in which the file was written and the way in which [reviewers] were approached to write letters, that it was a cooked-up case.***
>
> [W]hat I saw…is that [A] was asked to write about paper Y, B was asked to write about paper X, some [reviewers] even said in their letter, "I don't know what other stuff there is. I am just telling my opinion about this particular paper you sent me." […]
>
> I remember at least two letters in which the reviewer said: You asked me to give you…overall judgment, but I haven't seen the other stuff; I don't know what's the other stuff.

(AR 610-612; emphasis added.)

Despite the fact that doing so would be highly unusual and contrary to well-established policy, Hadfield did "not recall" if she sent any external reviewer only one paper to review. (AR 423:4-6.)

2. Deficient and Inconsistent Mentoring Demonstrating Bias

Klerman served as Associate Dean of Academic Affairs between 2009-2011 and was assigned to mentor Appellant during the time period leading to Appellant's tenure review. (AR 503:21-25.) Appellant regularly received positive evaluations of his work and was informed that he was on track to secure tenure. The subsequent evaluation record, however, reflects duplicitous and duplicative fifth-year review memos from Klerman demonstrating his bias and lack of credibility, recognized by the Grievance Panel that found that "Prof. Leshem was not terribly well mentored by his senior colleagues." (AR 688, 774.) The Panel's finding is indeed a gross understatement given Klerman's incredible testimony designed to cover his tracks and explain away his complete abdication of any mentoring responsibilities.

Specifically, Klerman prepared two separate memos that appear to summarize the same critical fifth-year review meeting. The first is dated March 12, 2010 and states that "quality and quantity of scholarship are good and on track to tenure," whereas a longer and highly detailed memo dated January 26, 2011

includes opposite comments on quality, quantity, and placement of the same scholarship. (AR 717, 715). These memos were never communicated to Appellant. (AR 505:19-506:7, 505:25-506:7.) The Panel determined that these memos "appear hastily written [by Klerman] to the detriment of [Appellant]." (AR 687.) During the grievance hearing, Klerman attempted to explain why there were two memos and why the longer (more negative) memo is "more reliable" stating,

> I wrote the first [longer] memo relatively soon after the meeting…[For some reason I forgot to cross it off my to-do list…and at some point later I noticed that writing that memo was still on my to-do list…[W]ithout realizing that I have already done it, I wrote another [shorter] one…So the first [longer] one, is my guess, is the more reliable of the two [memos].

(AR 507:23-508:10.)

Either the March 10, 2010 memo pertains to the 2009 performance review and is an implausible re-write of the original memo; or, alternatively, this memo pertains to the 2010 (fifth-year) performance-review and was self-servingly backdated. Klerman testified that he destroys evidence stating "…occasionally…delete[s] [these memos] accidentally or they get deleted accidently." (AR 558:11-22.) Moreover, the detrimental January 26, 2011 performance-review memo includes details on specific journal submissions of which Klerman could only have known through Appellant's peer-review reports that were

subsequently provided, further undermining his credibility.

G. Respondent University Provides Shifting Reasons for Tenure Denial

In September 2011, prior to the tenure review process, Respondent told Appellant that his application for tenure was destined to be rejected. On May 1, 2012, Appellant was formally denied tenure. (AR 63.) In his letter denying tenure, Dean Rasmussen, in a total of three sentences, cited productivity concerns, but provided no substantive scholarly assessment. (*Id.*)

Appellant sought reconsideration of the denial of tenure, pursuant to University procedures, reviewed by the same tenure review subcommittee. (AR 214:15-18.) Dean Rasmussen communicated the (second) denial in a letter dated April 1, 2013. Abandoning the productivity concerns, Rasmussen included in this letter one sentence of scholarly critique, invoking unsubstantiated inadequacies on model assumptions, outcomes and applicability that were missing from the original decision. (AR 64-65.) "A negative tenure decision should not be the first criticism the individual receives." *Good Practice Guidelines*, p. 3. (AR 124.)

H. Unfair Grievance Process

Respondent's Faculty Handbook describes Respondent's grievance process. (AR 730-749.) "Grievance related to

reappointment, promotion or tenure are limited to (i) a claim that the person was not fairly evaluated because of procedural defects…that materially inhibited the tenure process, or (ii) a claim that the person was not fairly evaluated on the merits because the decision was based significantly on considerations violative of academic freedom…..” [Faculty Handbook § 7-A (AR 732).] On September 12, 2013 Appellant filed a Statement of Grievance with USC Academic Senate. (AR 8-25.) On March 10, 2014 Appellant filed an Amended Grievance. (AR 29-131.) Appellant’s grievance alleged serious substantive and procedural deficiencies of the tenure review process, namely, solicitation and misuse of confidential referee reports; lack of notice that promotion or tenure was at risk; bias and prejudgment in evaluating Appellant’s tenure; violation of basic University tenure review policies and practices. (*Id.*)

Given the grave allegations set forth in his grievance, Appellant sought to review the very document upon which Respondent allegedly based its tenure denial decision. At the beginning of the initial grievance hearing on December 8, 2014, Appellant’s Counsel moved the Panel to order the University to produce a copy of the tenure dossier file to Appellant in accordance with Section 7-C(4). (AR 211:17-213:1; 684.) University Representative Niels Frenzen (hereinafter “Frenzen”) objected on grounds that “tenure dossiers university wide are

confidential documents" per UCAPT Manual, underscoring the dossier includes "two memoranda from the [tenure review] subcommittee" and "outside tenure letters." (AR 213:8- 214:23.) Rejecting the University's confidentiality claim after the panelists conferred on the motion, the Panel Chair stated: "[The panelists] agreed unanimously that we would like to see the tenure dossier before the hearing commences…to make the most effective use of the witnesses' times…." (AR 218:15-20.) Responding to Frenzen's indirect question ("if this is your instruction…") the Panel Chair clarified:

> [T]hat is our instruction. We feel that to adequately hear this case, to understand all of its contours…to render our judgment in the most responsible way, we believe we need to see [the tenure dossier file].

(AR 219:8-12.)

Dismissing Frenzen's proposal to rely on Appellant's witnesses "[s]o that it's not only one side of this process [that] would be talking about [the tenure] file" (AR 221:12-16), the Panel Chair explained:

> With all due respect, the law school faculty who have seen the dossier, first of all, when did they last view the dossier? And secondly, when they viewed it…I assume were not looking at it in the same way that we will be looking at it, so they may not be able to address the issue that we want to address.

(AR 221:21-222:2.)

The Panel Chair went on to clarify that the file should be produced to the Panel and to Appellant. (AR 222:8-9). Adjourning the hearing, the chair concluded: "I don't see any other way." (AR 223:16-17.) The Panel Chair's repeated rejection of the University's confidentiality claim stressing the Panel's unanimous contemplated position that the tenure dossier file is necessary for "mak[ing] the most efficient use of witnesses' time" and "render[ing]…judgment in the most responsible way" indicates the chair instructed the University to produce the file to the panel *and* to Appellant, as requested by Appellant.[3]

1. **Contrary to Faculty Handbook Rules, Respondent University, Not the Panel Chair, Set the Terms of Disclosure**

On December 19, 2014, less than two weeks after the initial grievance hearing, Interim Provost Michael Quick announced "[he] would be willing" to produce the tenure file to the Panel alone "on a confidential basis," reiterating the same confidentiality argument made previously by Frenzen. (AR 227-229; 213:8- 214:23.) In response, the Panel Chair instantly retracted his previous instruction: "[t]he members of the faculty

[3] The Court's mischaracterization of the Panel Chair's instruction as "a request" ("there was no order; it was a request") is contrary to Faculty Handbook § 7-C(4) vesting the panel chair with power to "rule on all evidentiary questions" and charging him with responsibility to "preside over the hearing." (AR 737.)

panel are satisfied with [Quick's] solution" -- ["the panel accepted the university ruling"] -- without giving Appellant an opportunity to respond. (AR 230, 246; 684.)

Over the next two months Appellant repeatedly requested that the tenure file be produced to Appellant in accordance with the Panel Chair's instruction and Faculty Handbook's rules; to no avail. (AR 231-352.) The Panel Chair declined to exert independent judgment: "[the Provost's response] was not the response we had hoped for but we felt compelled to accept it." (AR 258).

The Panel subsequently conducted an in-camera review of "documents made available by the university" whose nature and scope was never ascertained, concluding there were no "documents that…would be necessary…[for] a fair and reasonable hearing." (AR 366:1-7; 358.) At the beginning of the continued hearing, Appellant again objected to the Panel's private review, pointing out it violated Faculty Handbook's rules. (AR 366:13-367:5.) Noting the objection, the Panel Chair stated:

> The Panel originally asked for the university to turn over the dossier to us. The terms that the university gave us were that we panelists would gain access to it and we could then, as we understood it, make a ruling about whether this material would be necessary in order to have a reasonable hearing.

(AR 367:11-16.) Appellant was not provided with a copy of his tenure dossier and the hearing resumed.

I. The Panel Found Serious Procedural Defects in Appellant's Tenure Review Process

In its April 16, 2015 report, the Panel found *inter alia*:

- the subcommittee's solicitation of Appellant's peer-review reports constituted an "irregular conduct" (AR 688);
- Hadfield "should not have had to rely on [Appellant's peer-review] reports in formulating… judgment…or…anticipating critique" and therefore her "defense" of her "irregular" conduct is "puzzling"; (AR 686-687);
- there were additional unspecified "procedural irregularities in the compilation of [Appellant's] dossier" (AR 687);
- duplicative fifth-year performance review memos written by Klerman "appear hastily written to the detriment of [Appellant]" [AR 507:23-508:10, 687, 714-717 (Ex. 10)]; and
- Appellant "was not terribly well mentored" by his senior colleagues. (AR 688.)

Based on these findings, the Panel urged the Law School to "take its review process more seriously," "conduct a more thorough and serious review of tenure-track professors' progress" and "develop fair and consistent [tenure review] policies" (AR 687). Despite the plethora of findings of procedural defects, the Panel concluded without substantial evidence that the unidentified procedural irregularities "did not have any impact

on the law school tenure committee's deliberations or conclusions" (AR 687); the irregular solicitation of Appellant's peer-review reports "had no effect on the outcome of the law school's deliberations" (AR 688; 4); and the poor mentoring of Appellant did not involve "persuasive evidence of bias." (AR 688.) On June 24, 2015 University President Nikias issued a final decision adopting the Panel's findings and conclusions and denying Appellant's grievance. (AR 1-7.)

J. Writ Proceedings

On January 10, 2017 Appellant filed Petition for Writ of Mandate challenging USC's decisions to deny him tenure and to deny his grievance. On June 7, 2017 the Superior Court sustained with leave to amend USC's demurrer to the tenure review-related causes of action. On September 26, 2017 the Court sustained without leave to amend USC's demurrer to the said causes of actions of Appellant's First Amended Petition, erroneously and without legal or factual basis finding that the tenure review process as compared with the grievance hearing did not constitute a "hearing" for purposes of qualifying for review under Cal. Civ. Code § 1094.5. (AA V4, p 1028.)

On October 18, 2017, the Court denied without prejudice Appellant's motion to augment the Administrative Record with the tenure dossier file. (AA V5, p 1168.) On December 10, 2018, the Court denied the Writ Petition along with Appellant's

renewed motion to augment the Administrative Record with the tenure file. Judgment was entered on January 9, 2019. (AA V5, p 1247.)

V. LEGAL ARGUMENT

A. APPELLANT DID NOT RECEIVE A FAIR ADMINISTRATIVE HEARING

1. The Exclusion of the Tenure Dossier by the Hearing Panel Violated the Faculty Handbook and Resulted in a Fundamentally Unfair Grievance Hearing.

"The inquiry in [1094.5 mandamus review] shall extend to...whether there was a fair trial…." Code Civ. Pro. 1094.5(b). California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations which control important economic interests. *See Applebaum* v. *Board of Directors* (1980) 104 Cal.App.3d 648, 656. "A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482. A "fair trial" entails a 'fair administrative hearing'. *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 96; *Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1730.

2. The Faculty Handbook Entitles Appellant to a Copy of the Tenure Dossier.

Faculty Handbook § 7-C(4) sets forth the evidentiary requirements of the grievance hearing. Namely,

> Each party shall have the opportunity to present its evidence, including witnesses, and to make an argument to the grievance panel. Each party shall have the right to confront and question witnesses of the other. Each party shall have the right to inspect and respond to all written and documentary evidence offered.
>
> The grievant shall be given an opportunity to obtain necessary witnesses and documentary or other evidence.

(AR 737.)

Faculty Handbook § 7-C(4) further provides, "Panels will be instructed that their decisions must be in accord with all relevant federal, state, and local law, and established University policies, including those contained in the Faculty Handbook and faculty member's contract." (*Id.*)

In denying Appellant access to his tenure dossier file, the University not only deprived Appellant of his Faculty Handbook § 7-C(4)'s right to "obtain necessary…documentary or other evidence," but also violated Appellant's right under that same section to "inspect and respond to…documentary evidence offered" as well as Appellant's right to a fair hearing:

> [S]uch a construction would nullify the right to a hearing, for manifestly there is no hearing when the party does not

> know what evidence is offered or considered and is not given an opportunity to test, explain, or refute.
> […]
> All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding.

Interstate Commerce Commission v. *Louisville & N.R. Co.* (1913) 227 U.S. 88, 93.

3. Appellant was Deprived of his Right to Know the Evidence on which the Panel Relied.

"There can…be no fair dispute over the right to know the nature of the evidence on which the administrator relies." Henry J. Friendly, "'Some Kind of Hearing'," 123 *University of Pennsylvania Law Review* 1267, 1283 (1975). The Panel's ruling to exclude the tenure dossier effectively establishes that the tenure file does not contain evidence of wrongdoing and thereby forms the basis of the Panel's key determinations adopted by the President. By determining that the file was not necessary for "a fair and reasonable hearing" (AR 366:4-7) without introducing it into evidence, the Panel denied Appellant an opportunity to "test the sufficiency of the facts [that] support the finding." *Interstate Commerce Commission* v. *Louisville & N.R. Co. supra*, 227 U.S. 88, 96. *See also Olive Proration Program Committee v.*

Agricultural Prorate Com. (1941) 22 Cal. 2d 204, 210. ["Only evidence which the opposite party has an opportunity to refute at the hearing may be relied upon as the basis of finding." (Citing *United States v. Abilene & So. Ry. Co.* (1924) 265 U.S. 274.)] *English v. City of Long Beach* (1950)35 Cal. 2d 155, 159 ["…the right of hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties...." (Citing *La Prade v. Department of Water &Power* (1945) 27 Cal.2d 47, 52; *Universal Cons. Oil Co. v. Byram* (1944) 25 Cal.2d 353.)]

Moreover, the Panel's unspecified finding that "there were procedural irregularities in the compilation of Professor Leshem's dossier," determined not to have "any impact on the law school tenure committee's deliberations and discussion" (AR 687) violates Appellant's right to a fair hearing by suppressing the nature of the evidence on which the Panel based its conclusion. The Panel's reliance on unspecified findings independently violates Faculty Handbook § 7-D requiring the grievance panel to "state the basis for [its] decision." (AR 738.)

4. The Evidence Produced at the Grievance Hearing Independently Shows the Panel's Exclusion Decision was Improper

The necessity of the tenure dossier file for a fair hearing is

further demonstrated in the testimonies of Hadfield and Klerman. When asked about the way she commissioned Solicitation Letters to external reviewers, Hadfield replied: "There could have been other attachments [to the Solicitation Letters], but I don't recall. I would have to review…those letters." (AR 420:20-22.) Hadfield also testified, "I'd have to review [if any of the external tenure reviewers received only one paper to review in violation of UCAPT Manual]. I don't recall." (AR 423:4-6.)

In response to questions on the contents of the subcommittee report, Klerman testified:

> I have not read this [sub]committee report in four years. I cannot say what is definitely in it or not….I don't think we [directly quoted from referee reports]. I definitely didn't intend to. Whether [a quote from referee reports] got in there by a slip, I don't remember. […] I [also] don't remember whether we referenced anything that was in the editorial letter. (AR 532-533, 533:18-20.)
>
> I don't remember [if the subcommittee emphasized citation counts as a key problem with Prof. Leshem's tenure prospects]. Q. That is something if you looked at the [subcommittee] report you could tell? A. Yes. (AR 550:8-14.)

Hadfield's and Klerman's poor responses show that critical contents of the tenure dossier file could *not* have been ferreted out because of the improper exclusion of the file at the grievance hearing.

5. The Panel Chair Improperly Relinquished His Responsibility to Preside over the Hearing and Rule on Evidentiary Questions.

Faculty Handbook § 7-C(4) sets forth the grievance panel chair's authority and responsibility to make evidentiary rulings and preside over the hearing:

> The chair of the grievance panel shall be responsible for presiding over the hearing and shall rule on all evidentiary questions. The chair shall set the order of argument and of presentation of evidence and may exclude irrelevant or unduly repetition evidence or argument.

(AR 737.)

The Panel Chair fundamentally abdicated his responsibilities. At the initial hearing, the Panel Chair clearly ordered Respondent to produce to Appellant the complete tenure dossier. (AR 218:15-20, 219:8-12, 221:12-16; 223:16-17.) Respondent failed to abide by that order, however, instead dictating to the Panel the terms by which the dossier would be disclosed. Remarkably, the Panel Chair ceded his authority to Respondent, in clear violation of Faculty Handbook § 7C-(4), conceding at several different times that he had 'no choice' but to accept the terms set by Respondent relating to this key evidentiary matter. Thus, the Panel Chair acknowledged that "the panel accepted the university ruling" that the dossier should be reviewed in camera. (AR 230, 246; 684); that "[the Provost's

response] was not the response we had hoped for but we felt compelled to accept it." (AR 258); and further that "[t]he terms that the university gave us were that we panelists would gain access to [the tenure dossier file] and we could then, as we understood it, make a ruling about whether this material would be necessary in order to have a reasonable hearing." (AR 367:11-16.)

The Panel Chair accordingly abandoned his responsibility to "preside over the hearing," renouncing any notion of independence required to ensure a fair administrative hearing. His ceding to Respondent the authority to make orders and set terms of discovery and disclosure fundamentally violated Appellant's right to a fair hearing as well as Appellant's right, "to obtain necessary…documentary…or other evidence." § 7-C(4). (AR 737.)

Because Appellant did not receive a fair hearing, the court should reverse the denial of the writ and order Respondent to produce to Appellant immediately a complete copy of Appellant's tenure dossier for use in new proceedings.

B. THE COURT'S DECISION TO DENY THE MOTION TO AUGMENT THE RECORD VIOLATED C.C.P. § 1094.6(C) AND DUE PROCESS

The Court was statutorily required to review Appellant's tenure dossier file under Civ. Code Pro. § 1094.6(c) whether or

not the file was improperly excluded at the hearing:

> The complete record of the proceedings [on a C.C.P. § 1094.5 writ]…shall include…all admitted exhibits, all rejected exhibits in the possession of the local agency or its commission, board, officer, or agent, all written evidence, and any other papers in the case. (*Ibid.*)

The fact that the Panel "conducted…an in camera review of the documents that were made available…by the provost's office" and determined there were no documents necessary for a "fair and reasonable hearing" (AR 366:1-7) rendered the tenure dossier file a "rejected exhibit" which should have been included in the administrative record under Section 1094.6(c). *See also Aluisi v. Fresno County* (1958) 159 Cal.App.2d 823, 826-827 ("[D]ue process requires the preservation [and production] of a [whole] record of adjudicative administrative proceedings" allowing "showing arbitrary action.")

C. THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE CONCLUSION THAT THE SIGNIFICANT PROCEDURAL DEFICIENCIES DID NOT IMPACT THE OUTCOME OF THE TENURE DECISION.

"[S]ubstantial evidence has been defined as…"`relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *County of San Diego* v. *Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 555 (citing *Hosford* v. *State Personnel Bd.* (1977) 74 Cal. App.3d 302, 307). Conclusory statements are insufficient. *See American Indian*

Model Schools v. Oakland Unified School District (2014) 227 Cal.App.4th 258; *W. Chandler Blvd. Neighborhood Ass'n. v. City of Los Angeles* (2011) 198 Cal.App.4th 1506 (reversal of denial of writ where conclusory findings did not show how city council traveled from evidence to action). "By focusing on the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action." *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. In reviewing the evidence, the courts, "are not and should not be bound by an administrative finding…when the evidence on the face of it is clearly unbelievable." *County of San Diego* v. *Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 558 citing *Board of Supervisors* v. *Archer* (1971) 18 Cal. App.3d 717 at pp. 723-724.

Indeed, "'in light of the whole record' language means that the court reviewing the agency's decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record." *See Lucas Valley Homeowners Assn.* v. *County of Marin* (1991) 233 Cal.App.3d 130, 141-142, *citing Bixby* v. *Pierno* (1971) 4 Cal.3d 130, 149); *see also County of San Diego* v. *Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 555.

1. **The Panel Admitted Procedural Errors.**

As discussed above, the Panel acknowledged the significant procedural errors underlying Appellant's tenure review process, determining, *inter alia*, that Hadfield's request for Appellant to share his referee reports was "irregular" and finding her defense of her own actions "puzzling." (AR 686.) The Panel, moreover, doubted Hadfield's stated need for the materials given her own scholarship in a related field, thus calling into question her credibility. (AR 686-687.) Furthermore, the Panel admonished the law school faculty to "take its review process more seriously" and "develop fair and consistent evaluation policies for weighing publications in law reviews and refereed journals." (AR 687.)

Nevertheless, the Panel concluded without substantial evidence that the unidentified procedural irregularities "did not have any impact on the law school tenure committee's deliberations or conclusions" (AR 687); the irregular solicitation of Appellant's peer-review reports "had no effect on the outcome of the law school's deliberations" (AR 688; 4); and the poor mentoring of Appellant did not involve "persuasive evidence of bias." (AR 688.)

a.) Peer-Review reports were incorporated into the subcommittee's report.

Marmor's testimony and January 2012 Letter of Complaint and Hadfield's testimony both establish that content of Appellant's peer-review reports was incorporated into the subcommittee's report to the faculty and therefore shared with the tenure committee. (AR 708, 598, 599-600; 432:15-16, 433:2-11, 438:20-24.) Marmor's Letter establishes the "crucial role" of Appellant's peer-review reports in tenure deliberations. (AR 709.) Professors Shapiro and Marmor respectively testified that Hadfield discussed the peer-review reports at the tenure meeting and privately shared their contents. (AR 575:24-576:9, 594-596.) Thus, there is no factual basis for the conclusion that the peer review reports were not shared with the tenure committee. (AR 687.)

b.) The Panel relied on testimony that it admits lacked credibility and mischaracterized evidence to reach the finding that the referee reports did not play a role in the tenure committee discussion.

The Panel found that "[t]he assertion made by Marmor in his testimony and in a letter to the provost that the referee reports played a role in the tenure committee discussion of the case is controverted by Hadfield's and Klerman's testimonies." (AR 687.) This finding is unreasonable on its face: No reasonable trier of fact would have accorded Hadfield's self-serving

testimony [whose "defense" of her "irregular" conduct is "puzzling"] more credibility than the testimony of a faculty member who volunteered adverse information against his colleagues.

The Panel's characterization and summary of Klerman and Hadfield's testimonies justifying the Panel's conclusions both distort the record. (AR 687). Thus, the Panel stated,

> Klerman explained in his testimony that he had simply been commenting on the inscrutability of external tenure letters and the fact that referee reports are written by experts in a candidate's specific research area, noting therefore that referee reports can be seen as a more useful, more objective standard.

(*Id.*) This ignores the fact that referee reports and external tenure letters are written by the very same experts.[4] More important, Klerman testified that he had thoroughly and uninterruptedly discussed Appellant's referee reports advising the faculty to rely on referee reports and journal denials and disregard standard external tenure letters. (AR 538-543.)

Moreover, Klerman's testimony is consistent with Marmor's Letter and testimony, as Klerman admitted he relied on the referee reports. (AR 538-543; 708; 604:14-20.) The finding that Klerman was making a "general point" is accordingly refuted both by Klerman's own testimony and that of Professor Marmor.

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[4] University President Nikias also wrote the Klerman "was [merely] making a general point." (AR 2, footnote 2.)

[*See* AR 687 ("Hadfield confirms that Klerman was making a general point and did not reveal the contents of the reports.")].

"[T]he courts are not and should not be bound by an administrative finding…when the evidence on the face of it is clearly unbelievable." *County of San Diego* v. *Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 558 citing *Board of Supervisors* v. *Archer* (1971) 18 Cal. App.3d 717 at pp. 723-724.

Indeed, given that the Panel already determined that Hadfield's explanation for soliciting Appellant's peer-review reports is not credible (AR 686), the Panel's reliance on her testimony to belittle the role of Appellant's peer-review reports in the tenure review is arbitrary and not supported by substantial evidence.

c.) Procedural irregularities impacted tenure deliberations or conclusions.

There was no substantial evidence to support the determination that "irregularities did not have any impact on the law school tenure committee's deliberations or conclusions." (AR 687.)

As an initial matter, the Panel failed to specify the nature and quantity of the "procedural irregularities" in the compilation of Appellant's dossier, making it impossible for a reviewing court to follow the "analytical route the administrative agency traveled from evidence to action." *Topanga Assn. for a Scenic Community,*

supra, 11, Cal.3d. at 515. The determination that the unspecified irregularities did not have any impact on the outcome of the tenure review is therefore conclusory and fails to satisfy the requirements of Code Civ. Pro. § 1094.5 and related case law. *See Honey Springs Homeowners Ass'n, Inc.* v. *Board of Supervisors of San Diego County* (1984) 157 Cal.App.3d 1122, 1151 ("Although the Board facially made the necessary finding, it did so perfunctorily without defining its analytical base, making it impossible for us to review the record to determine whether substantial evidence supports it.") The Panel's reliance on unspecified findings independently violates Faculty Handbook § 7-D requiring the grievance panel to "state the basis for [its] decision." (AR 738.)

Moreover, the conclusion that the [irregular conduct of the tenure review subcommittee] "had no effect on the outcome of the law faculty's deliberations" relies on findings discussed *infra* which have no evidentiary support. *See* Code Civ. Pro. §1094.5(b) ("Abuse of discretion is established if the…decision is not supported by the findings.").] The Panel ignored or otherwise failed to consider the undisputed concurring testimonies that establish that the subcommittee report selectively and misleadingly referenced Appellant's peer-review report in blatant violation of Hadfield's documented commitment. [AR 708, 598, 599-600; 432:15-16, 433:2-11, 438:20-24; 700-702 (Ex. 5).]

d.) Witnesses Establish That Hadfield Unlawfully Shared Appellant's Peer-Review Reports And Discussed Them With Voting Faculty At The Tenure Meeting.

Multiple witnesses involved in the tenure review testified to the use of and reference to Appellant's referee reports. Professor Michael Shapiro testified that Hadfield had discussed the referee reports at the tenure meeting:

> [T]he memory that sticks out is listening to Prof. Hadfield talk about [the referee reports] at the faculty meeting. […] [Hadfield's] view was that [the referee reports] confirmed her reservations about Shmuel's models and the extent to which his work was understandable by a broad audience." (AR 575:24-576:9.)

Professor Shapiro's testimony belies Hadfield's account that "[she] did not discuss the referee reports." (AR 439:21-23.)

Klerman testified that Hadfield electronically shared Appellant's peer-review reports with the subcommittee members. (AR 533:23-24; 537:3-4.) Moreover, Klerman testified at length that he made an elaborate and uninterrupted statement advising the faculty to rely on referee reports and journal denials and disregard "for four reasons" standard external tenure letters, consistent with Marmor's 2012 Letter and testimony. (AR 538-543, 604:14-20, AR 708.)

Marmor testified that Hadfield privately relayed to him at length the specific contents of an "editor's review" at the

beginning of the tenure review process. (AR 594-596.) Moreover, as detailed in his January 2012 Letter, Marmor described how Appellant's peer-review documents played a crucial rule in the tenure review process.

> [I]nformation obtained from blind-reviews of top-peer-reviewed journals clearly affected the [sub]committee's deliberation, and indeed played a central role in forming the [sub]committee's opinion.

(AR 709.)

Although both UCAPT Manual and *Good Practice Guidelines* prohibit the use of peer-review reports in tenure reviews (AR 766, 796; 126), the subcommittee's report imported prejudicial information on rejection counts extracted from Appellant's peer-review documents. (AR 533:14-18, 598:21-23.)

Discussing information obtained from or related to Appellant's peer-review reports prior to and during the tenure meetings was particularly biasing given that most of the voting faculty members – who routinely publish in law review journals not involving peer assessment – had had little or no formal experience with the peer-reviewed publication process. (AR 601:10-21.)

Moreover, voting faculty members who were not privy to the referee reports could neither verify the veracity of Hadfield and Klerman's statements nor independently check the inferences drawn from them, as. noted in Marmor's January 2012

Letter:

> Most problematically, the referee reports played a crucial role in the [sub]committee's argument to the faculty that the tenure letters written by experts in the field ought to be discounted in favor of the referee reports…that nobody outside the [sub]committee has seen…and could only take the [sub]committee's word on their negative implication. A curious argument…given the fact that Shmuel ended up publishing a number of articles in the top journals in his field.

(AR 709.)

The biasing effect of peer-review reports and publication rejections is indeed self-evident from their very exclusion from tenure reviews precisely because they are poor quality indicators.

Finally, the Panel's conclusion is inconsistent with the Panel's own advice to the law school's faculty to "take its review process more seriously" and "develop fair and consistent evaluation policies for weighing publications in law reviews and refereed journals." (AR 687.) Ignoring the wealth of evidence regarding Respondent's improper use of Appellant's peer-review reports and its failure to adhere to its own policies and standards, the Panel issued findings and decisions wholly unsupported by the record.

2. The contradictory and unreliable evidence cited by the Panel is insufficient to support its finding that Klerman had expressed concerns to Appellant about his scholarship.

The Panel found that "[t]here is a preponderance of evidence that Klerman expressed concerns to [Appellant] about the quantity of his published scholarship and its relevant to legal scholars." (AR 687.) There is no substantial evidence to support this conclusion. To the contrary, Klerman presented contradictory performance-review memos from Klerman and Rasmussen included in Exhibit 10 (AR 714-717, 557:18-558:4) that were never communicated to anyone including Appellant. (AR 505:19-506:7, 505:25-506:7.) The Panel itself determined that these memos "appear hastily written [by Klerman] to the detriment of [Appellant]." (AR 687.)

Klerman testified that "there are two memos that seem to summarize the same [critical fifth-year-review] meeting." (AR 507:22-23.) The longer, highly-detailed memo dated January 26, 2011 includes critical comments on quality, quantity, and placement at variance with the Law School's decision to "go forward with the tenure evaluation" following Appellant's fifth-year annual performance review. [AR 715; UCAPT Manuel § 3.4 (AR 778.)]

Explaining why the longer memo is the "more reliable," Klerman incredibly stated that he "forgot to cross [the assignment of writing a memo on the critical fifth year performance review] off [his] to-do list…and at some point later [he] noticed that writing that memo was still on [his] to-do list."

(AR AR 507:23-508:10.) When asked if he had electronic record of the email messages including these critical memos, Klerman reported that "occasionally I delete [digital record of these memos] accidentally or they get deleted accidently, and I don't know how. So I can't guarantee I have these." (AR 558:11-22.) Klerman did not provide any credible explanation as to why the contents of the memos are contradictory or why they were never communicated to anyone.

Furthermore, Klerman's testimony stands in stark contrast to the law school's decision to proceed with tenure review at the fifth-year performance review, as evidenced by the very formation of a tenure-review subcommittee. (AR 685, 625:11-20.) No reasonable decision-maker could have failed to consider Klerman's contradictory statements or find such thin excuses without evidentiary support credible.

3. The Panel's finding that there were concerns about the rate at which Appellant was publishing ignores the actual administrative record and the fact that failure to consider draft papers was in violation of school policy.

The Panel further found without evidentiary support, "testimonies show that over the next years, concerns grew about the rate in which Leshem was publishing, where he was trying to publish, and the establishment of expertise over a particular field of law. Indeed, between 2009 and 2011 Leshem did not have any additional article accepted for publication." (AR 687.) Therein,

the Panel failed to identify the "testimonies" on which its finding is based and therefore failed the requirements of Section 1094.5. *See Topanga Assn. for a Scenic Community, supra*, 11, Cal.3d. at 515; *Honey Springs Homeowners Ass'n, Inc.*, *supra*, 157 Cal.App.3d at 1151.

Moreover, "[B]oth the trial and appellate courts have broader responsibility to consider all relevant evidence in the administrative record, both contradicted and uncontradicted…This consideration involves some weighing of the evidence to fairly estimate its worth." *County of San Diego* v. *Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 555 (citations omitted.)

Here, there is *no* credible evidence supporting the Panel's finding. Rather, between 2009 and 2011 Appellant had written several draft papers presented at different forums (including the Law School's Faculty Workshop in April 2011), as acknowledged by Klerman. (AR 638:8-12, 498:3-4.)

During 2011 Appellant submitted his draft papers to publication at top journals (AR 153, 160, 162, 192-193). It made little sense for Appellant to do so if there were concerns over his publication rate.

Moreover, the Law School's Internal Promotion Standards explicitly considers "the number and scope" of completed draft papers, as Klerman acknowledged. (AR 120, 499:21-21.) Failing

to consider Appellant's draft papers therefore violated the Law School's Internal Promotion Standard. (ISPT § II(A)(2), *Ibid.*) . Additionally, the article published in the Rand Journal of Economics in May 2010 (referenced by the Panel at AR 687) was accepted for publication in September 2009 (AR 184-185), after Appellant was promoted to Associate Professor.

Professor Shapiro's testimony refutes the existence of viable concerns regarding Appellant's "expertise over a particular field of law," stating this concern "really never went anywhere" (AR 572:23) and that "[he] didn't get the impression that anyone seriously thought that was going to be a criterion for denial of tenure." (AR 573:9-11.) Professor Shapiro's testimony similarly refutes the presence of real concern that Appellant did not publish in law reviews (in contrast to peer-reviewed journals), stating that "if you are going to take seriously the idea that we are growing and trying to growing interdisciplinary people, you cannot expect them to publish everything or even most of their stuff in law reviews." (AR 574:7-11.) There is accordingly insufficient evidence of solid value to support the Panel's contention regarding the lack of publications by Appellant. "[S]ubstantial evidence has been defined…as evidence... reasonable in nature, credible, and of solid value." *County of San Diego* v. *Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 555 citing *Ofsevit* v. *Trustees of Cal. State University &*

Colleges (1978) 21 Cal.3d 763, 773, fn. 9.)

The last-minute, hurriedly-convened meeting at the outset of Appellant's tenure review in which Dean Rasmussen and hitherto "strongest supporter" Hadfield (per Klerman) prodded Appellant to relinquish his bid for tenure is further evidence of the failure to communicate Respondent's supposed concerns to Appellant. (AR 534:19-20, 454:22.) Said lack of warning violated UCAPT Manual § 3.4's instruction to "take stock [at the fifth-year review] to consider whether the candidate should go forward for tenure evaluation." (AR 778.) *See also* UCAPT Manual § 1.c-4. (AR 768); *Good Practice Guidelines* (institutions should provide tenure-track candidates "clear advice about [their] progress in meeting tenure requirements.") (p. 17, AR 127.) It is also evident that the tenure-review decision was pre-determined: nothing Appellant could have presented would have afforded him a fair tenure process, given the eleventh-hour admonishment of scholarly deficiency.

Finally, the Panel's conclusions stand at variance with the Panel's own advice to the law school's faculty "to conduct a more thorough and serious review of tenure-track professors' progress" (AR 687.) The Panel's finding that "Prof. Leshem was not terribly well mentored by his senior colleagues" thus materially understates the detrimental effect of the law school senior members' total abdication of their "special [mentoring]

responsibilities" on Appellant's tenure review. UCAPT Manual § 2.2(a). (AR 688, 774.)

4. **The administrative record includes evidence of bias of the subcommittee members, contrary to the Panel's conclusion.**

Marmor testified that "over the years [he and Hadfield] had conversations about [Appellant]…not in [his] presence, and [Hadfield] was always extremely positive," further testifying that Hadfield "was very familiar with [Appellant's] work…why she changed her mind, I don't know." (AR 609:10-12, AR 610:14-15.)

Professor Shapiro testified that "**I think that [the subcommittee members] were biased**…the reason I make that inference is because I cannot comprehend their attitude. I do not understand their criticism. I do not understand what they thought they were doing," stating that in his view Hadfield consulted Appellant's referee reports "to confirm…her newly developed reservations or her newly articulated reservations." (AR 586:18-22, AR 591:9-11; emphasis added.) Professor Shapiro further testified that "the turnaround at the end of the five years…was sharp… it was a 180" and that "[the] 180 degree turn, that's the lack of [notice]. It's the plain unfairness." (AR 588:15-17, 590:21-22.)

5. Contrary To Section 1094.5, the Panel Failed to Make Several Key Findings, Undermining Meaningful Review and Necessitating Reversal of the Denial of the Writ

An administrative agency is required to make findings to ensure that the administrative body makes "legally relevant sub conclusions supportive of its ultimate decision" and thereby "facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." *Topanga Assn. for a Scenic Community* v. *County of Los Angeles* (1974) 11 Cal. 3d 506, 516; *Respers* v. *University of California Retirement System* 171 (1985) Cal.App.3d 864, 871 (findings requirement implicit in 1094.5; gives meaning to judicial review).

Here, however, the Panel failed to make *any findings* regarding several key issues raised by Appellant during the grievance process. First, it failed to issue any findings regarding Dean Rasmussen's own violations of tenure review rules and procedures and his responsibility for the integrity of the process.[5] Second, it failed to consider the effects of the irregular use of Appellant's citations counts invoked by Dean Rasmussen's letter denying Appellant's request for reconsideration on the outcome of the tenure review. (AR 64-65.) Third, the Panel failed to make

[5] According to then-Vice-Provost for Faculty Affairs Martin Levine, Dean Rasmussen wrote in his memo to the provost that "[referee] reports were never…mentioned to the faculty as a whole," which flagrantly misrepresented the actual facts. (AA V2, 401-406) (Petition for Writ of Mandate, Ex. 24.)

any findings as to the nature and extent of the procedural irregularities committed by the tenure review subcommittee in commissioning Appellant's external tenure letters. Nowhere in the decisions nor in the June 24, 2015 letter denying Appellant's grievance are these matters addressed. (AR 683-689.) This failure substantially undermines this court – or any reviewing body – the substantive and analytic bread crumbs necessary for proper review.

D. THERE IS NO LEGAL OR FACTUAL BASIS FOR THE COURT'S SEPTEMBER 26, 2017 ORDER SUSTAINING DEMURRER

Judicial review of a private entity's internal decision-making process is available under Section § 1094.5 to any "final administrative order or decision [resulting from] a proceeding that required a hearing, the taking of evidence, and discretionary administrative determination of facts." *Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Boards* (2004) 121 Cal.App.4th 29, 37 [citing *Pomona College v. Sup. Ct.* (1996) 45 Cal.App.4th 1716, at 1727, 1729 ("*Pomona College*"); *Kirkpatrick v. City of Oceanside* (1991) 232 Cal.App.3d 267, 279; Code Civ. Pro. § 1094.5(a)]. The *Pomona College* court held in particular that Section 1094.5 applies to private universities. *See Pomona College*, 45 Cal.App.4th at 1722-1724. The *Pomona College* court further ruled that a requirement of hearing and the taking of evidence renders Section 1094.5 mandamus review available for *either* a tenure review *or* grievance process:

> Section 1094.5 expressly provides that it is the *requirement* of a hearing and taking of evidence — not whether a hearing is actually held and evidence actually taken — that triggers the availability of mandamus review. This being so, [Appellant's] exclusive remedy for any procedural defects which he believes existed *in the tenure review or grievance processes* is administrative mandamus.

Id. at 1729; emphasis added.)[6] *See also Gutkin v. USC* (2002) 101 Cal.App.4th 967, 976 (same.) The *Pomona College* and *Gutkin* decisions reflect that a tenure-denial decision – as distinct from a post-tenure decision to deny a professor's grievance – is a "final" decision reviewable under Section 1094.5 subject to exhaustion of administrative remedies.

The Superior Court's conclusion that USC Law School's tenure review did not include a hearing relies entirely on the Court's mistaken determination that Appellant could *not* have responded or submitted rebuttal evidence to the tenure review subcommittee's recommendation:

> Here, the tenured faculty of the law school voted on Appellant's application based on a **unilateral submission**

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[6] The *Pomona College* court considered whether a professor challenging a tenure-denial decision is limited to a 1094.5 mandamus review or may recover damages through a breach of contract action. Based on the particular procedure required in the college handbook, the court held that both the tenure review and grievance processes required a hearing and the taking of evidence and therefore the professor's exclusive remedy was a mandamus review. The tenure review process in *Pomona* was substantially similar to Respondent's.

> from the subcommittee. While the subcommittee's report included materials from Appellant, such as Appellant's personal statement, **Appellant was not given an opportunity to respond to the subcommittee's recommendation or submit rebuttal evidence.... As noted above, USC's procedures for the granting or denial of tenure do not provide for [Pomona-like] hearings.**

(AA V4, p 1033-1034, emphases added.)

The Court's determination that Appellant was not given an opportunity to respond or submit contrary evidence to the subcommittee's recommendation has no basis in USC Law School's Internal Promotion Standards, which specifically provide a tenure candidate with such an opportunity. As described by the Superior Court itself,

> USC Law School's [Internal Promotion Standards] state that a subcommittee of three or more members will prepare a "written report" on a faculty member being evaluated for tenure. (Pet. Exh. 20, § IV(B).) "Prior to the submission of the subcommittee's report to the full committee, the chair of the subcommittee and the dean discuss the substance of the subcommittee's report with the faculty member." (IV(C)(3).) The committee then meets and casts written ballots based on the subcommittee's recommendation. (IV(C)(4).)
> (AA V4, p 1033.)

Respondent USC's process was remarkably similar to that in *Pomona*, where the Court held that for purposes of evaluating whether Section 1094.5 applied, "Pomona's Handbook requires both a hearing and the taking of evidence in reaching its initial tenure decision." *Pomona, supra,* 45 Cal.App.4th at 24. In *Pomona*, pursuant to the university's Handbook, the tenure candidate "submits a statement describing his or her professional

accomplishments and goals" along with "any other material the candidate judges to be important;" that evidence is considered along with student views, outside recommendations, and the candidate participates in an interview. Thereafter, a confidential written recommendation is presented to a larger committee and a vote is taken and forwarded to the college president for his formal recommendation to the college cabinet that is ultimately forwarded to the board of trustees for approval. *Id.* at 21-23.

According to USC Law School's Internal Promotion Standards, among other things the candidate provides a current CV and written personal statement; suggests potential expert external reviewers and identifies potentially biased ones; and suggests best publications to send to external reviewers. UCAPT Manual §(1)b-12. (AR 762-763.) The dean and the chair of the tenure review subcommittee are required to "discuss the substance of the subcommittee's report with the faculty member" prior to the larger faculty hearing to obtain the candidate's response thereof.[7] ISPT §§ IV(C)(3), (D)(3).(AR 122.) The subcommittee -- as an organ acting on behalf of the larger tenure committee -- must relay the candidate's response to the voting faculty committee. (*Id.*) The tenure committee subsequently considers both the subcommittee's report and recommendation

[7] Appellant's counsel pointed this section out for the court at the September 22, 2017 court hearing. (RT 9/22/17 Hearing, 3:26-4:3.)

along with the tenure candidate's position. (*Id.*) Therefore, exactly as in *Pomona*, the Law School's tenure review involves both a hearing and the taking of evidence and therefore satisfies both prongs of *Pomona College's* availability test, rendering Appellant's tenure-denial decision reviewable under Section 1094.5.

1. Appellant exhausted his administrative remedies.

The Superior Court also sustained demurrer as to the first two claims because it erroneously found that Appellant failed to exhaust his administrative remedies through the grievance process:

> Because Appellant has a right to appeal any tenure-related decision through the grievance process, Appellant is required to exhaust that administrative remedy prior to seeking review of the University's decision.

(AA V4, 1034.)

Not only is the Superior Court's determination that "Appellant failed to pursue [a grievance process]" factually baseless, but the Order itself describes Appellant's filing of a Statement of Grievance with the Academic Senate and the subsequent grievance process held at USC:

> On September 12, 2013, Appellant appealed Respondent's decision to deny tenure by filing a Statement of Grievance with the Academic Senate Office. (FAP ¶ 31; Leshem Decl. ¶ 21.) Upon filing a grievance, Appellant requested Respondent to provide him with a copy of his tenure review file. (FAP ¶ 32.) Respondent refused to do so. (Id. ¶¶ 32-35.)

> On or around April 16, 2015, the grievance panel denied Appellant's request for relief. (Id. ¶ 36.) On June 24, 2015, the University President adopted the panel's finding and conclusions. (Ibid.)

(AA V4, p 1031.)

In fact, counsel for Appellant and Respondent both advised the Superior Court at the time of the hearing that Appellant had in fact pursued the grievance process.

> The Court: The problem, and the reason I say untimely -- that's not really quite the right way to say it, but your client could have gone in the direction of the grievance process, but didn't. So –
> Mr. Muller: He could have gone? I am not following, your honor. He did submit a grievance. It is part of this writ.
> The Court: Okay.
> Mr. Muller: So –
> The Court: I'm sorry. Maybe I'm not remembering the specifics today. But was there not a process he failed to invoke?
> Ms. Pazzani: There was a grievance process, your honor.

(RT 9/22/17 Hearing Transcript 9:3-18.)

Notwithstanding the clear record and both counsels' on-record statements, the Superior Court ignored undisputed facts and issued a legally erroneous ruling. Upon de novo review, the Court must reverse the demurrer, and reverse the denial of Appellant's Writ.

E. CONCLUSION

Breaking its own rules, USC enabled Law School Professors to exercise capricious judgment and seal the fate of an aspiring scholar. Concealing this egregious misconduct behind a

curtain of confidentiality, Respondent broke its rules yet again by holding a fundamentally unfair grievance hearing, bending tenure-review rules for tenure reviewers and whitewashing the Law School's wrongdoings.

For reasons set forth herein, Appellant requests the Court reverse the denial of the Petition for Administrative Mandamus and reverse the Order sustaining Respondent's demur to the First Amended Petition.

Dated: September 9, 2019

Respectfully submitted,

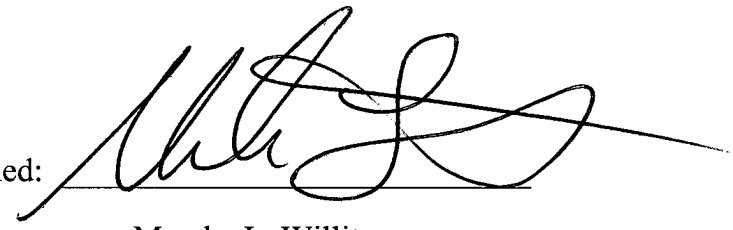
STEWART & MUSELL, LLP

Maraka L. Willits
Attorneys for Appellant
Shmuel Leshem

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Shmuel Leshem is produced using 13-point Roman type including footnotes and contains approximately 13,731 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: 09/09/19

Signed: 

Print Name: Maraka L. Willits

Attorney(s) for: Shmuel Leshem

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Second **APPELLATE DISTRICT, DIVISION** Five	Court of Appeal Case Number: B296102
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Wendy E. Musell SBN 203507 Maraka L. Willits SBN 209612 2200 Powell Street, Ste 440 Emeryville, CA 94608 TELEPHONE NO.: 415-593-0083 FAX NO. *(Optional):* 415-593-0920 E-MAIL ADDRESS *(Optional):* wmusell@stewartandmusell.com ATTORNEY FOR *(Name):* Appellant, Shmuel Leshem	Superior Court Case Number: BS167350 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: SHMUEL LESHEM RESPONDENT/REAL PARTY IN INTEREST: University of Southern California	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): SHMUEL LESHEM

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

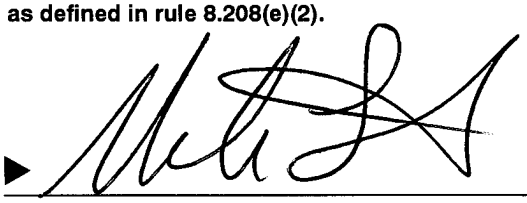
Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 9/9/19

Maraka L. Willits
(TYPE OR PRINT NAME)

▶ 
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PROOF OF SERVICE

I am employed in the City and Emeryville, County of Alameda, State of California in the office of a member of the bar of this Court whose direction the following service was made. I am over the age of 18 and am not a party to this action. My business address is 2200 Powell Street, Suite 440, Emeryville, California, 94608. On the date set forth below, I served the following document(s) described as:

1. **APPELLANT SHMUEL LESHEM'S OPENING BRIEF [INCLUDES CERTIFICATION OF COMPLIANCE AND CERTIFICATE OF INTERESTED PARTIES]; AND**
2. **APPELLANT'S APPENDIX, VOLUMES 1-5**

on the parties in this action as follows:

Julie Arias Young
Karen J. Pazzani
1150 South Olive Street, STE 1800
Los Angeles, CA 90015
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[VIA UNITED STATES MAIL] I placed a true and correct copy of each document in a sealed envelope to the addressee as noted above in the mail at Emeryville, California. I am "readily familiar" with this firm's practice of collection and processing of correspondence and pleadings for mailing. According to that practice, I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business.

[X] **[BY ELECTRONIC SERVICE]** Pursuant to TrueFiling processes, when I filed with the Court of Appeals, I also selected to have the above documents electronically served on the above parties.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on September 9, 2019 at Emeryville, California.

Maraka L Willits