NO. 15-1146

In the Supreme Court of the United States

CYNTHIA LEE,

Petitioner,

–v–

FAIRFAX COUNTY SCHOOL BOARD;
DR. JACK DALE, Former Superintendent;
DR. PHYLLIS PAJARDO, Assistant Superintendent;
JAMEY CHIANETTA, Principal,

Respondents.

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

REPLY BRIEF FOR PETITIONER

ADERSON BELLEGARDE FRANÇOIS
COUNSEL FOR PETITIONER
HOWARD UNIVERSITY SCHOOL OF LAW
CIVIL RIGHTS CLINIC
2900 VAN NESS STREET NW
WASHINGTON, DC 20008
(202) 806-8065
AFRANCOIS@LAW.HOWARD.EDU

APRIL 20, 2016

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

REPLY BRIEF APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

ARGUMENT

I. PETITIONER PROPERLY PRESENTED THAT HER DUE PROCESS RIGHTS WERE VIOLATED BY THE SCHOOL BOARD'S GRIEVANCE PROCESS

Petitioner's central argument here and in the courts below is that Respondent's grievance procedure was in form and substance an arbitration process, which denied her due process and deprived her of a fair and meaningful opportunity to vindicate her rights. Specifically, in the United States Court of Appeals for the Fourth Circuit petitioner maintained:

> Ms. Lee argues that the School Board et al. acted against public policy when they violated her right to due process by refusing to allow her to use steps 1-4 of the grievance process and mandated her to use their Procedure Regulation 4461.1 Step 5 which within itself is unconscionable because it required her to pay half the cost of the Fact-Finding Panel.

Petition ("Pet.") App.19a-25a.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (finding that Petitioners' arguments that an ordinance constitutes a taking in two different ways are not separate *claims* but rather, separate *arguments* in support of a single claim raised in the state courts—that the ordinance effects an unconstitutional taking) (emphasis added); *see also Citizens United v. Fed.*

Election Comm'n, 558 U.S. 310, 331 (2010) (holding that an argument by Citizens United's to overrule precedent was "not a new claim [but]—at most—a new argument to support what has been a consistent claim: that the FEC did not accord Citizens United the rights it was obliged to provide by the First Amendment.").

Ms. Lee has consistently argued that her due process rights were violated by an unlawful arbitration process. *See* Resp't's Br. in Opp'n, App.19a. As in *Yee*, Petitioner's argument that her due process rights were violated by the School Board's arbitration process is not a separate claim from her arguments that she experienced economic duress in violation of due process. Instead, Petitioner offers *separate arguments* in support of the same claim—that her due process rights were violated by an arbitration process that forced her to enter into the settlement agreement under economic duress, barring her from fully vindicating her rights.

Respondent argues that because Mrs. Lee failed to raise the applicability of the Federal Arbitration Act to the grievance process in the courts below, a writ should be denied. In support of that contention, Respondent cites *Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir. 1992). However, *Boardman* makes numerous references to the court's discretion in such circumstances. *See, e.g.*, *Id.* at 1534 (courts have discretion to address defenses raised for the first time in a later rehearing) (citing *Coe v. Thurman*, 922 F.2d 528, 533 n.1 (9th Cir. 1990)); *id.* at 1536 ("we might adopt an intermediate approach and direct the courts of appeals to exercise discretion")

(citing *Granberry v. Greer*, 481 U.S. 129, 131 (1987)); *id.* ("courts of appeals have discretion"); *id.* at 1537 ("we have discretion to reject the Teague defense"); *id.* ("that discretion should be exercised"). As such, there is not a complete bar on arguments raised for the first time in a petition for rehearing. Instead, the appellate court may exercise discretion to decide if justice would be better served by addressing a new argument. Furthermore, the general doctrine of waiver is not without exceptions. *Chambers v. Miss.*, 410 U.S. 284, 305 (1973) (quoting *Carter v. State*, 21 So.2d 404, 404 (Miss. 1945)). Among the exceptions are "errors affecting fundamental rights of the parties . . . or affecting public policy." *Id.* at 305–06. Here, Ms. Lee's denial of due process rights falls squarely within the exception.

Next, Respondent claims *Adams v. Robertson*, 520 U.S. 83, 88 (1997) supports the contention that Mrs. Lee's reference to mandatory arbitration agreements in her Fourth Circuit Petition for Rehearing does not form the proper presentation of the issues. However, *Adams*, which involved the question whether this Court will review a state court judgment on an issue of federal law that was never raised in the state courts, does not control the present case, where Petitioner seeks review of a federal court judgment on an issue that was indeed raised below. *See Adams*, 520 U.S. at 87 ("we adhere[ ] to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.")

II. THE FACT-FINDING PANEL CONSTITUTED A CONSTRUCTIVE ARBITRATION PROCESS, WHICH DID NOT ALLOW MS. LEE TO VINDICATE HER RIGHTS

The July 10, 2003 "Continuing Contract with Professional Personnel" was an employment contract between Ms. Lee and the Fairfax County School Board, which stated in pertinent part that: "The Employee further agrees to . . . comply with provisions of the . . . the Code of Virginia, the Virginia State Board of Education regulations, and with the rules, regulations, and policies of the school system." Pet. App.37a. The relevant school board regulations included the right of Ms. Lee or the School Board to use a Fact-Finding Panel. Pet. App.22a-24a. The regulations also stipulated that:

> Following a hearing by a fact-finding panel, the employee shall not have the right to a further hearing by the school board as provided in subsection F3 of this section. The school board shall have the right to require a further hearing in any grievance proceeding as provided in subsection F3 of this section.

Pet. App.24a.

The Fact-Finding Panel was indeed a form of arbitration. *See AMF Inc. v. Brunswick Corp.*, 621 F.Supp. 456, 460 (E.D.N.Y. 1985) ("If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration. The arbitrator's decision need not be binding in the same sense that a judicial decision needs to be to satisfy the constitutional requirement of a justiciable case or controversy."). Indeed, the panel's decision would have been binding

on Ms. Lee had the panel decided against her, but had the panel decided in her favor, the decision would have been appealable by the School Board. In essence, while the fact-finding process was not binding upon Respondent, it was certainly binding upon Ms. Lee and, as such, had all the marks and attributes of arbitration. *See Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 142 (2d Cir. 2013) (holding that the Third-physician provision in a disability insurance certificate was an arbitration clause, since parties had agreed to submit medically-related policy dispute to "a third Physician who [would] make a final and binding decision."); *see also Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208-09 (9th Cir. 1998) (holding that dispute resolution procedures established the agreement at issue qualified as "arbitration" for purposes of the FAA.).

III. PETITIONER'S AGREEMENT FALLS WITHIN THE SCOPE OF THE FEDERAL ARBITRAITON ACT BECAUSE VIRGINIA LAW HAS RECOGNIZED THAT NONBINDING AGREEMENTS ARE GOVERNED WITHIN THE SCOPE OF THE ACT AND HER JOB AFFECTS COMMERCE

Ms. Lee's agreement falls within settled Fourth Circuit doctrine for determining when the Federal Arbitration Act is appropriate because she can demonstrate (1) the existence of dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, and (3) a relationship of transaction, which is evidenced by agreement, to interstate or foreign

commerce. *Brown v. Green Tree Services, LLC*, 585 F.Supp.2d 770 (D.S.C. 2008).

Respondent attempts to dismiss the applicability of the Federal Arbitration Act ("FAA") by making two arguments: first, that Virginia Law does not allow a school district to enter in a binding arbitration agreement; and second, that Ms. Lee's agreement is not an arbitration agreement "evidencing a transaction involving commerce" as required under the FAA. Opp'n Br. at 18-19.

Simply put, respondent is wrong.

A. Neither Virginia Law Nor Fourth Circuit Precedent Forbids the Sort of Arbitration Agreement at Issue Here

Virginia Code holds that "Public bodies may enter into agreements to submit disputes arising from contracts entered into pursuant this chapter to arbitration . . . however, such procedures entered into by the Commonwealth, or any department . . . shall be nonbinding . . . alternative dispute resolutions procedures entered into by school boards shall be nonbinding." Va. Code Ann. § 2.2-4366. This Code allows public bodies to enter into agreements that allow them to submit disputes to arbitration, mediation, or other alternative disputes procedures. Though the Statute mandates nonbinding arbitration for school boards, there is case law involving a Virginia school board, which states that nonbinding arbitration provisions are fully enforceable under the FAA. In *Russell Cty. Sch. Bd. v. Conseco Life Ins., Co.*, the District Court for the Western District of Virginia held that the enforceability of an arbitration

agreement is not affected by the fact that Virginia law requires the arbitration to be nonbinding. No. 1:01CV00131 at *2 (W.D. Va. Dec. 12, 2001). The court in *Russell* reached this conclusion by relying on the Fourth Circuit and other circuits that established a framework for what constituted "arbitration" under the FAA. *See id.* The court concluded that nonbinding arbitration clauses are enforceable under the FAA when the arbitration agreement requires the parties to submit a dispute to a third party and neither party could seek recourse from the court until the arbitration was complete. *Id.*; *see also Wolsey, Ltd.*, 144 F.3d at 1209 (the court held that nonbinding arbitration clauses were enforceable under the FAA). Because of this, though the school board argues that according to *W.M. Schlosser Co. v. Sch. Bd. of Fairfax County* a school board cannot validly enter into an arbitration agreement because it would be an *ultra vires* act, the court held the argument invalid since the enactment of the Virginia code allows the school board to enter a nonbinding agreement that is governed by the Federal Arbitration Act. 980 F.2d 253, 259 (4th Cir. 1992).

Moreover, courts have held that an arbitration agreement is valid, and therefore governed by the FAA, when an agreement to arbitrate exists between the parties and covers the matter in dispute. In *Hooters of Am., Inc. v. Phillips*, the Fourth Circuit held that as long as the agreement to arbitrate exists and it covers the matter in dispute, the FAA commands. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir.1999). Courts have also held that a clause requiring the parties to submit disputes arising under their agreement to nonbinding arbitration as a

condition precedent to litigation is within the scope of the FAA and must be given the same effect as any other contract provision. *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640 (Neb. 1996) *disapproved of on other grounds by Webb v. Am. Employers Corp.*, 684 N.W.2d 33 (Neb. 2004). Lastly, case law following the passage of the Federal Arbitration Act reflects unequivocal support of agreements to have third parties decide disputes-the essence of arbitration and that no magic words such as "arbitrate" or "binding arbitration" or "final dispute resolution" are needed to obtain the benefits of the Act. *See City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910) (dictum) (Explaining that "a plain case of the submission of a dispute or difference which had to be adjusted . . . was in fact an arbitration, though the arbitrators were called appraisers."). Therefore, if the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration and are within the scope of the FAA. *Wolsey, Ltd.*, 144 F.3d at 1208.

The agreement Ms. Lee entered into asked her to select from a school board hearing or a three-panel hearing as a means to resolve her dispute. Since the school board established that Ms. Lee would need to adhere to the independent three-panel hearing, her agreement falls within the scope of the FAA.

B. The Arbitration Agreement Between Petitioner and Respondent Evidences a Transaction Involving Interstate Commerce

Congress and the courts have read the phrase "evidencing interstate commerce" broadly to cover the transaction Ms. Lee had with the school board.

For example, in *Citizens Bank v. Alafabco, Inc*. the court held that debt-restructuring agreements that were executed in Alabama by Alabama residents were nonetheless contracts evidencing transactions "involving commerce," whose arbitration clauses were enforceable pursuant to a provision of the FAA. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). The court concluded that the term "involving commerce" as used by the FAA is the functional equivalent of the more familiar term "affecting commerce," which are words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause Power. *Id.*

Federal circuit courts have followed suit and interpreted the "involving commerce" requirement not as a limitation on the power of the federal courts, but a necessary qualification on a statute intended to apply in state and federal courts. *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 452 (4th Cir. 1997). In *Glass*, the Fourth Circuit reasoned that to confine the scope of this section and to limit the enforcement to the federal courts would frustrate what Congress intended the Act to be, which is a broad statement of federal substantive law of arbitrability that is applicable to all arbitration agreements within the reach of the Commerce Clause. *Id.* The Fourth Circuit also recognized the broad scope of the Act in *Saturn Distribution Corp. v. Williams*, in which it held that the Act preempts conflicting state laws which restrict the validity or enforceability of arbitration agreements. 905 F.2d 719, 722 (1990). Ms. Lee's agreement falls within the FAA because it affects "commerce." 9 U.S.C. § 2. The agreement sought to resolve a dispute over an employment contract, which is a quintessential commercial act. If the fact that the

Alafabco debt-restructuring agreements were executed in Alabama by Alabama residents did not place them outside the scope of the FAA, the fact that the arbitration agreement between Ms. Lee and Fairfax County was entered into and executed in Virginia should similarly not place it outside the reach of the statute.

IV. THE SETTLEMENT AGREEMENT DOES NOT CONSTITUTE A WAIVER OF PETITIONER'S FUNDAMENTAL RIGHT TO DUE PROCESS

The Fairfax County School Board has created a property interest in continued employment through its contractual and statutory obligations to keep Ms. Lee in its employ unless there is "just cause" for her termination. Va. Code Ann. § 22.1-307; *Virginia Dep't of Corr. v. Compton*, 623 S.E.2d 397, 405 (Va. Ct. App. 2005). In addition to Ms. Lee's right to continued employment, courts also have recognized that "[e]mployees have a constitutionally protected liberty interest in their 'good name, reputation, honor, or integrity,'" *Davis v. Rao*, 982 F.Supp.2d 683, 694 (E.D. Va. 2013), *aff'd*, 583 F.App'x 113 (4th Cir. 2014); *see also Johnson v. Morris*, 903 F.2d 996, 999 (4th Cir. 1990) ("The Supreme Court has acknowledged that [w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to [her], notice and an opportunity to be heard are essential.") (internal quotations omitted). Fairfax County School Board has both deprived Ms. Lee of her property interest in continued employment and her reputation by deeming her incompetent, a label that would threaten

her ability to get a teaching position in and outside of the Fairfax County limits.

Affording due process is a fairly simple requirement for a government employer to meet. Once the party proposed for termination receives notice, "all the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-48 (1985). Fairfax County School Board refused to abide by its own grievance procedure that was meant to act as a statutory protection of Ms. Lee's due process rights. Although the grievance procedure codified in Virginia statute gave Ms. Lee the opportunity to go before the School Board or a fact finding panel, Superintendent Dale created a completely new procedure for Ms. Lee in which she could either 1) have a termination referral presented to the School Board without an opportunity to defend her position or 2) pay an exorbitant fee to defend her position before a fact finding panel. *See* Pet. Reply 5a-6a. Neither option appropriately protected her due process rights. Had the School Board simply followed its own grievance procedure, Ms. Lee could have responded to the claims against her in accordance with her due process rights without having to pay a prohibitive fee to do so.

Having already deprived Ms. Lee of her due process rights once, Respondent seeks to do so again by claiming that the settlement agreement amounts to a waiver of her right to make a due process claim. The Supreme Court has stated that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . [the Court]

'[does] not presume acquiescence in the loss of fundamental rights.'" *United States v. Camacho*, 955 F.2d 950, 955 (4th Cir. 1992) *quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937). This Court has also stated that "A waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *see also Bowens v. N.C. Dep't of Human Res.*, 710 F.2d 1015, 1018 (4th Cir. 1983) ("Although constitutional rights are subject to contractual waiver, the waiver must, at the very least, be clear.") (internal quotations omitted). No part of the settlement agreement, either generally or with the specificity required by law, addresses the waiver of Ms. Lee's fundamental right to due process. *See* Resp't's Br. in Opp'n, App.40a.

CONCLUSION

For the aforementioned reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

ADERSON BELLEGARDE FRANÇOIS
COUNSEL FOR PETITIONER
HOWARD UNIVERSITY SCHOOL
OF LAW CIVIL RIGHTS CLINIC
2900 VAN NESS STREET NW
WASHINGTON, DC 20008
(202) 806-8065
AFRANCOIS@LAW.HOWARD.EDU

APRIL 20, 2016

REPLY BRIEF APPENDIX TABLE OF CONTENTS

LETTER FROM PRINCIPAL JAMEY CHIANETTA (May 14, 2012)

FAIRFAX COUNTY PUBLIC SCHOOLS

William Halley Elementary School
8850 Cross Chase Circle
Fairfax Station, Virginia 22039

To: Phyllis Pajardo

From: Jamey Chianetta
Principal

Subject: Recommendation for Dismissal

I recommend the dismissal of Ms. Cynthia Lee, Special Education teacher, for reasons of incompetence. She has failed to plan instruction in alignment with the Program of Studies and Pacing Guides, and to present lessons to her students in a satisfactory manner by providing the critical components of lesson design. She has failed to demonstrate adequate improvement to utilize materials and resources to promote the development of critical thinking, problem-solving, and performance skills; and to utilize a variety of teaching methods and strategies for active student participation and improvement of student learning. Ms. Lee has not met expectations to work in a collegial and collaborative manner to support and promote student learning and program evaluation. Ms. Lee received a conditional reappointment in 2010-2011 and has not met the expectations of competency listed in Regulation 4293 in 2011-2012. Although assistance has been provided during the 2011-2012 school year, she has not demonstrated satisfactory planning or

instruction; and I see no indication of improvement forthcoming in her teaching skills.

In addition to her failure to improve in areas noted above to the acceptable level, Ms. Lee has failed to maintain the momentum of instruction in her learning environment, and she has not demonstrated an acceptable understanding of her assigned subject areas in order to create meaningful learning experiences.

Attached is a copy of Ms. Lee's complete school file which includes the observations, conference summaries, and other communications which have been addressed to her.

Attachment

Cc: Cynthia Lee
Local Site File
Human Resources Personnel File, ID # 130080

LETTER FROM PHYLLIS PAJARDO
(May 23, 2012)

FAIRFAX COUNTY PUBLIC SCHOOLS
FAIRFAX, VIRGINIA

To: Jack D. Dale

From: Phyllis Pajardo

Subject: Recommendation for Dismissal

I recommend the dismissal of Cynthia Lee, a special education teacher at Halley Elementary School, for reasons of incompetence. Ms. Lee has failed to plan instruction in alignment with the Program of Studies and Pacing Guides, and to present lessons to her students in a satisfactory manner by providing the critical components of lesson design. She has failed to demonstrate adequate improvement to utilize materials and resources to promote the development of critical thinking, problem-solving, and performance skills; and to utilize a variety of teaching methods and strategies for active student participation and improvement of student learning. Ms. Lee has not met expectations to work in a collegial and collaborative manner to support and promote student learning and program evaluation. Ms. Lee received a conditional reappointment in 2010-2011 and has not met the expectations of competency listed in Regulation 4293 in 2011-2012. Although assistance has been provided during 2011-2012 school year, she has not demonstrated satisfactory planning or instruction. There is no indication of improvement forthcoming in her teaching skills.

In addition to her failure to improve in areas noted above to the acceptable level, Ms. Lee has failed to maintain the momentum of instruction in her learning environment. She has not demonstrated an acceptable understanding of her assigned subject areas in order to create meaningful learning experiences.

Based on the above reasons, I am recommending that Ms. Cynthia Lee be dismissed from Fairfax County Public Schools.

PP/ap

cc: Cynthia Lee
Principal, Halley Elementary School
Assistant Superintendent, Cluster V
Personnel File, ID# 130080

LETTER FROM SUPERINTENDENT JACK D. DALE (May 30, 2012)

FAIRFAX COUNTY PUBLIC SCHOOLS

Certified Letter—Return Receipt Requested

Jack D. Dale, Superintendent
8115 Gatehouse Road
Falls Church, VA 22042-1203

Ms. Cynthia Lee
5445 Quaint Drive
Woodbridge, VA 22193-4591

Dear Ms. Lee:

This is to notify you that pursuant to Section 22.1-307, et. seq. of the Code of Virginia, and applicable policies and regulations of the State Board of Education and the Fairfax County School Board, I will recommend to the School Board that you be dismissed from employment with the Fairfax County Public Schools. This recommendation will be based on the reason stated in the enclosed memorandum from Dr. Phyllis Pajardo.

Under state procedure, you are entitled to written notification of the reason for your dismissal, or a personal interview in which the reasons will be presented. This letter constitutes formal written notification.

Within 15 days of receiving this letter, you may request a hearing before the School Board or before a

fact-finding panel. Pursuant to the procedures prescribed by the State Board of Education and Fairfax County Public Schools, the School Board has a right to elect that a fact-finding panel conduct any hearing requested by an employee. In this case, the School Board already has determined that any requested hearing will be held by a fact-finding panel.

Consequently, if you elect to have a hearing, a fact-finding panel will conduct that hearing, and the School Board will review that panel's recommendations in accordance with state and school system procedures. If you do not elect a hearing, the School Board will make its final decision on the basis of my written recommendation. Enclosed is a copy of the form for requesting a hearing.

Sincerely,

/s/ Jack D. Dale
Superintendent of Schools

JDD/ap
Enclosures

cc: Principal, Halley Elementary School
Director, Office of Employment Services
Director, Office of Salary Services
Director, Office of Payroll Management
Director, Office of Benefit Services
Personnel File; ID# 130080