No.

IN THE
Supreme Court of the United States

JOHN CANNICI,
Petitioner,
v.

VILLAGE OF MELROSE PARK, ILLINOIS, et al.,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

John Cannici is a firefighter. After his employment was terminated by a government board, he sought to have it overturned on two grounds. First, his due process rights were violated because the board's legal counsel was biased, providing legal counsel to the Board and at the same time providing legal guidance to the prosecutor *ex parte* to help with the prosecution of the case. Second, Cannici's equal protection rights were violated because other similarly situated firefighters, who hired the Mayor of the Village of Melrose Park as their attorney, were not terminated under the same municipal ordinance though he was.

Cannici's federal claims were dismissed on the grounds he was not entitled to due process predeprivation because he was challenging improper conduct by an official occurring in a state procedure, which constituted "random and unauthorized" not protected by the Due Process Clause. His equal protection claim was denied on the grounds an individual cannot bring an Equal Protection Claim in the employment context.

The questions presented here are:

1. Whether the Due Process Clause requires a government agency to provide due process before depriving a citizen of his property where the

deprivation occurs through an established state procedure.

2. Whether the Equal Protection Clause applies, without limitation, to the enforcement of a municipal ordinance even where the municipal ordinance is enforced in the employment context.

PARTIES TO THE PROCEEDINGS

Petitioner John Cannici was a firefighter for his childhood hometown for 16 years and is a citizen of Illinois.

Respondent Village of Melrose Park is a suburb of Chicago located in Cook County, Illinois.

Respondent Board of the Fire and Police Commissioners of Melrose Park, Illinois is the administrative agency under Illinois law. It is responsible for conducting administrative hearings in accordance with its Rules and Regulations, the Municipal Code of the Village of Melrose Park and due process. At the time Cannici's employment was terminated, it was comprised of three members.

Respondent Michael Caputo was a member of the Board at the time Cannici's employment was terminated.

Respondent Mark Rauzi was a member of the Board at the time Cannici's employment was terminated.

Respondent Pasquale Esposito was a member of the Board at the time Cannici's employment was terminated.

Respondent Richard Beltrame is the Fire Chief for Melrose Park, the highest-ranking officer of the Melrose Park Fire Department at the time Cannici's employment was terminated.

Respondent Ronald Serpico was the Mayor of Melrose Park, the highest-ranking officer of the Village of Melrose Park at the time Cannici's employment was terminated.

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The opinion of the Seventh Circuit Court of Appeals is reported at 885 F.3d 476, and is reprinted in the Appendix ("App.") at 1a. The district court's memorandum opinion and order granting Respondents' Motions to Dismiss is reported at 262 F. Supp. 3d 591, and is reprinted at App. 12a. An order entered in a related state case before the Circuit Court of Cook County, Illinois is unpublished. It is reprinted at App. 23a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 15, 2018. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

The Due Process Clause and the Equal Protection Clause both stem from our "American ideal of fairness." *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). The Due Process Clause requires the government to provide a fair hearing, including notice and a fair tribunal, before taking the property of its citizens. The Equal Protection Clause requires the government to enforce laws against its citizens on an impartial basis.

In this case, the respondents, all government actors, deprived John Cannici of his 16-year career as a firefighter with the Village of Melrose Park, Illinois by denying him a hearing before a fair tribunal prior to terminating his employment, and enforcing a municipal ordinance against him though not enforcing the same ordinance against his fellow firefighters who were in similar situations but who, unlike Cannici, had hired the Mayor of the Village of Melrose Park to handle their personal affairs.

After filing charges against John Cannici alleging he violated the village's residency ordinance, the attorney providing legal counsel to the tribunal simultaneously provided legal guidance to the attorney prosecuting the charges to educate him on the substantive law and to warn him to avoid agreeing to an extension because it could result in a victory for Cannici, even sending the prosecuting attorney lengthy excerpts from a case in which an employee

like Cannici avoided termination due to an extension of the hearing date. All these communications were sent on an *ex parte* basis.

The federal district court held Cannici was not entitled to due process before termination because Cannici's allegations that the Board and its counsel were biased in conducting the hearing, in its analysis, represented a "random and unauthorized" action, thereby requiring only "sufficient remedies" after the termination. The court focused exclusively on the randomness of the conduct, and put no weight on the undisputed fact the conduct occurred in a government established procedure. The Seventh Circuit confirmed the district court's dismissal for the same reasons.

In doing so, the lower courts turned this Court's due process precedent on its head. A government employee with a property interest in his employment is entitled to due process before his employment is terminated. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'." *Id.* at 542. This Court referred to the principle of providing due process *before* deprivation as the "root requirement" of the Due Process Clause. *Id.* The "random and unauthorized" exception, which both lower courts here relied on in dismissing Cannici's claim, was narrowly limited by this Court in *Zinermon v. Burch,* 494 U.S. 113 (1990) to situations where the conduct leading to the deprivation is unpredictable and does

not occur in an established state procedure. The lower courts here, however, disregarded the requirement that the misconduct must not occur in a state established procedure, focusing solely on the unpredictability of the misconduct. In other words, a citizen, in any context, has no right to protection under the Due Process Clause where a government official, through improper conduct, takes his property through a state established procedure. They are left with only a right to due process postdeprivation. This expansion of the *Zinermon* "random and unauthorized" exception all but consumes the protective scope of the Due Process Clause. In one case, property improperly seized through a state proceeding was destroyed. *Pacesetter Apparel, Inc. v. Cobb County, Ga.,* 374 Fed. App'x 910 (11th Cir. 2010). The Eleventh Circuit Court of Appeals held there was no constitutional violation based on the denial of due process predeprivation because a tort action could be brought postdeprivation (and postdestruction). *Id.* at 911-12. The consequences of reserving due process until after the deprivation were highlighted in *Loudermill,* where the court acknowledged that it is likely the "only meaningful opportunity to invoke the discretion of the decisionmaker" is "before termination takes effect," and highlighted in the *Pacesetter* case, *supra,* where the property, once seized, was destroyed. Significantly, it is not just the Seventh and Eleventh Circuits which have strayed from this Court's holding in *Zinermon* and diminished the scope of the Due Process Clause, but also First, Second, and Third Circuits. A resolution of this case would put this issue

back on the right track and bring uniformity to this very important issue which likely affects thousands of citizens involved in government established procedures each year.

The basis for the appeal of the equal protection claim is also the Seventh Circuit's overbroad application of another exception to a constitutional right. In *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008) this Court considered whether the Equal Protection Clause applies to the termination of an at-will employee terminated based on subjective criteria. The Court specifically noted that public employees are protected by the Equal Protection Clause if the employer is treating distinct groups of individuals categorically different, giving as an example a case involving employees who used methadone. *Id.* at 605. Here, Cannici alleged that action was not being taken against his colleagues hired the Mayor of the Village to handle their legal affairs.

Unlike in *Engquist,* Cannici was not an at-will employee. Pursuant to a state statute, he could only be terminated for cause. Moreover, unlike in *Engquist,* the termination was based on a clear standard—the residency law established municipal ordinance subject to decisions by the Supreme Court of Illinois—and not on subjective, individualized determinations. Cannici was no different than any citizen who is denied equal protection under a municipal code or state law, whether in the employment context or otherwise. In fact, the very same types of ordinances are used in determining

whether candidates are eligible to run for public office throughout the country. When an ordinance is at the center of an equal protection claim, there is no rationale under *Engquist* for denying a citizen his constitutional rights merely because the impartial enforcement of the law resulted in the deprivation of a property interest in employment as opposed to some other property interest.

STATEMENT OF THE CASE

A. Factual Background

"The material facts are not in dispute" and were set forth in Cannici's complaint, which was dismissed with prejudice. (App. at 12a-22a). John Cannici grew up in Melrose Park, a suburb on the outskirts of Chicago, Illinois. (App. at 28a, ¶¶ 3-4). (*Id.* at 28a, ¶ 3). After graduating from college, he chose a career working as a firefighter for his hometown. (*Id.* at 30a, ¶ 10). Cannici had an unblemished career for 16 years, from June of 2000 until August 24, 2016 when his employment was terminated. (*Id.* at 28a, ¶ 3).

In 2000, while working as a firefighter, Cannici bought his own home in Melrose Park on Broadway Avenue. (*Id.* at 30a, ¶ 11). In 2002, he married and continued to live in the Broadway home in Melrose Park with his wife. (*Id.*). In 2003, Cannici listed the Broadway home in Melrose Park for sale and then looked for and found another home in Melrose Park on Norwood Street. (*Id.* at 30a, ¶ 12). This would be Cannici's third home in Melrose Park. (*Id.*).

When Cannici and his wife had their first child, Marco, in 2004, they continued to live in Melrose Park. (*Id.* at 30a, ¶ 13). They remained in Melrose Park through the birth of their second child, Annabella, in 2006 and for two years following. (*Id.*). During this time, when the Cannicis were unavailable due to work, their children were cared for by Cannici's in-laws who resided in Orland Park, Illinois, another Chicago suburb which is about a 45-minute drive from Melrose Park. (*Id.* at 30a, ¶13; *id.* at 31a-32a, ¶ 16). This arrangement worked since the full-time occupation of Cannici's wife was operating the hair salon she owned in Orland Park. (*Id.* at 30a-31a, ¶ 14).

In 2008, as Cannici's first child was approaching school age, the Cannicis were confronted with a dilemma shared by many households across the country. (*Id.* at 31a, ¶ 15). Specifically, working out the logistics of a child going to school in one town while being partially cared for grandparents in another a distance away (*Id.*). The Cannicis' solution was for Cannici's wife and the children to live in a home in the Orland Park, the same town the grandparents lived in and the mother worked, while Cannici lived in the Melrose Park home. (*Id.* at 32a, ¶ 17). Cannici and the children could visit the Melrose Park home on the weekends and Cannici could visit the Orland Park home as well when off work. (*Id.*).

In 2013, five years into this arrangement, Cannici was contacted by a neighbor, also a Melrose Park resident, about the neighbor's relatives, the Cichons, who had recently lost a newborn child and were going

through financial difficulties. (*Id.* at 33a, ¶ 20). The family was expecting the birth of another child. (*Id.*). Cannici was asked whether he would be willing to allow the family to live in the Melrose Park home with him for a temporary period of time. (*Id.*). After careful consideration, Cannici agreed to help, but determined it would be easier for the family to live in the house alone. (*Id.*). Because of their situation, Cannici charged them rent at a rate significantly lower than what he could have received otherwise. (*Id.*).

At the time Cannici made the decision to lease his home, he was subject to a Melrose Park Residency Ordinance, which required that an employee of the Village must be a "resident" of Melrose Park (*Id.* at 36a, ¶ 31). Resident is defined as a "natural person who occupies a residence, as hereinbefore defined, as his or her principal place of residence and abode." (*Id.*). The Residency Ordinance requires that the employee maintain "residency status" (*id.* at 36a, ¶ 32), but does not define the term "residency status" (*id.* at 37a, ¶ 33) and likewise does not define the term "residency" (*id.* at 37a, ¶ 34). Under the Residency Ordinance, the penalty for violation is established in Section 2.52.110 under the heading "Violation-Penalty". (*Id.* at 37a, ¶ 35). The designated penalty for violation of the Residency Ordinance is "suspension without pay" (*id.* at 37a, ¶ 36), which may only be in place until the employee is in compliance with the Residency Ordinance or is discharged (*id.* at 37a, ¶ 37). The Village never suspended Cannici without pay. (*Id.* at 37a, ¶ 38). Discharge under the Residency Ordinance is only permitted when an employee "fails

to meet or comply" with the residency requirements. (*Id.* at 37a, ¶ 39 (*quoting* Section 2.52.060(E) of the Residency Ordinance)).

Prior to renting out the home, a high-profile case involving a candidate for Mayor of the City of Chicago (current Mayor Rahm Emmanuel) made the local newspapers as the Illinois Supreme Court considered whether he was a "resident" of the City of Chicago under the relevant municipal ordinance in light of the fact he had not been physically living in Chicago for years (working for then President Barack Obama). The case, *Maksym v. Board of Election Com'rs of City of Chicago*, 242 Ill. 2d 303 (2011), held that physical presence is required to establish residency, but once residency is established, the presumption is that residency continues, and the party contesting residency to defeat residency must show both (1) physical absence from the jurisdiction and (2) an intent to abandon residency. In *Maksym,* Mayor Rahm Emmanuel was determined to be a resident because he testified he did not intend to abandon his residency and because there was corroborating evidence including that he maintained ownership of his Chicago home, kept his personal belongings in the Chicago home, and continued to vote in Chicago elections.

While renting his home to the Cichons, Cannici, aware of the *Maksym* decision, continued to treat the Melrose Park home as his residence to ensure that his intent not to abandon his residency was clear. (*Id.* at 33a-34a, ¶ 21). In the lease he used the word

"temporary," and he did not extend the lease after the first year. (*Id.*). He also leased out only a portion of the home, reserving the remainder of the home available for his use. (*Id.*). He kept personal belongings in the home, ensured that he could access the home by putting a specific provision in the lease confirming his right to do so, paid the utilities for the Melrose Park home, paid the taxes for the Melrose Park home, received all of his mail at the Melrose Park home, and confirmed the Melrose Park address as his home in all of his professional and personal matters, including in his children's school documents, his drivers' license, his teaching license, his insurance papers, his automobile city sticker, and his voters' registration. (*Id.*). Indeed, he continued to vote in all elections after 2013 in Melrose Park. (*Id.*). When the initial lease expired and the family did not leave, Cannici did not renew the lease. (*Id.* at 34a, ¶ 22). The plan was that the family would leave when they identified suitable housing. (*Id.*).

The Fire Department and the Mayor of Melrose Park, both defendants in this action, were aware of other employees of the Village, including employees of the Fire Department, whose families lived in towns other than Melrose Park but who have not had charges brought against them for violations of the Village's residency ordinance. (*Id.* at 43a, ¶ 68). In at least the five years preceding the discharge of Cannici, he was the only Firefighter to be terminated based on the Residency Ordinance. (*Id.* at 46a, ¶ 89).

Firefighter Pasquale Fioccola, who was Board member Pasquale Esposito's own nephew, did not reside in Melrose Park. (*Id.* at 43a, ¶ 69). In addition to the family of Firefighter Fioccola, Firefighter August Taddeo did not even live in the State of Illinois, but rather lived in Wisconsin. (*Id.* at 44a, ¶ 73). Firefighter Taddeo's children attended middle school and high school in Wisconsin. (*Id.* at 44a, ¶ 74). Further, Firefighter Taddeo did not own a home in Melrose Park (*id.* at 44a, ¶ 75), but rather owned a home in the City of Lake Geneva, in Walworth County, Wisconsin (*id.* at 44a, ¶ 76). Firefighter Taddeo also owned a business in Wisconsin, which was registered in Wisconsin. (*Id.* at 44a, ¶ 77). The vehicles owned by Firefighter Taddeo were registered to the home he owned in Wisconsin. (*Id.* at 44a, ¶ 78). Yet, Firefighter Taddeo claimed that he lived with his parents in Melrose Park. (*Id.* at 44a, ¶ 79). At the time of Cannici's hearing and discharge, Firefighter Taddeo had not been targeted for termination. (*Id.* at 44a, ¶ 80).

Fire Department Captain Kenneth Greifelt and his wife, Carlene Buvak Greifelt, registered one of their vehicles to a home on Ashland Avenue in River Forest, Illinois. (*Id.* at 45a, ¶ 82). Captain Greifelt and his wife listed their residence as the Ashland home in River Forest. (*Id.* at 45a, ¶ 83). Cannici had reason to believe that since the time that the Mayor of the Melrose Park, Ronald Serpico, served as Captain Greifelt's attorney in selling his Melrose Park home in 2009, Captain Greifelt had not owned a home in Melrose Park. (*Id.* at 45a, ¶ 84). Counsel for Fire

Department was advised that Captain Kenneth Greifelt does not own property in Melrose Park but rather owns property and lives in River Forest, Illinois. (*Id.* at 46a, ¶ 88). Yet, Captain Greifelt was not terminated for failure to maintain residency in Melrose Park (*id.* at 45a, ¶ 85), but instead remained a Captain with the Melrose Park Fire Department (*id.* at 45a, ¶ 86).

Counsel for the Fire Department was advised that the families of Captain Greifelt, Firefighter Taddeo, and Firefighter Fioccola did not live in Melrose Park, yet none were terminated. (*Id.* at 44a, ¶ 80; *id.* at 45a, ¶¶ 85, 87). Mayor Serpico was even aware of other examples of Village employees who resided outside of Melrose Park. (*See id.* at 45a, ¶ 81). He assisted in representing a Fire Department employee who sold his home in Melrose Park and bought a home in another town, even while remaining an employee of the Melrose Fire Department. (*Id.*). He was aware that the Village was taking action against Cannici, while he was simultaneously turning a blind eye to other Village employees in similar situations. (*Id.*).

B. Procedural Background

In May of 2016, Cannici was summoned to appear at an interrogation concerning his residency. (*Id.* at 34a-35a, ¶ 23). At that time, Cannici notified the Cichon family that he was being investigated due to their presence in his home. (*Id.*). The family was taken aback and sorry for his situation since he had been helping them. (*Id.*). They said they would move out of

the home and then did so shortly thereafter. (*Id.*). Beginning in June of 2016 and at least through his termination, Cannici lived at the Melrose Park home and his family visited him there as well. (*Id.* at 35a, ¶ 24).

At all times relevant to his employment with the Melrose Park Fire Department and the related administrative proceedings, Cannici was covered by the Fire Protection District Act, 70 ILCS 705/1 *et seq.* (the "Act"). (*Id.* at 35a, ¶ 25). Section 16.13b of the Act provides, inter alia, that "no officer or member of the fire department of any protection district who has held that position for one year shall be removed or discharged except for just cause, upon written charges specifying the complainant and the basis for the charges, and after a hearing on those charges before the board of fire commissioners, affording the office or member an opportunity to be heard in his own defense." (*Id.* at 35a, ¶ 26 (*quoting* 70 ILCS 705/16.13b)). Section 16.13b of the Act also provides, inter alia, that "if written charges are brought against an office or member, the board of fire commissioners shall conduct a fair and impartial hearing of the charges." (*Id.* at 35a-36a, ¶ 27 (*quoting* 70 ILCS 705/16.13b)).

After learning that Cannici was living at the Melrose Park home, the Village nevertheless filed charges against him, not seeking to discipline him or suspend him, but seeking to terminate his long-term employment with the Village's Fire Department. (*Id.* at 36a, ¶ 28). Though it was undisputed that Cannici

had been living in Melrose Park for the first 13 years he was a firefighter, and was living in the Melrose Park home at the time the Statement of Charges were filed, the Village contended that he was not a resident of Melrose Park in the Statement of Charges filed against him. (*Id.* at 36a, ¶ 29). In the Statement of Charges, filed after Cannici notified Respondent Beltrame that he was living in his Melrose Park home, Beltrame nevertheless stated that Cannici has "not slept in the Norwood House for many years." (*Id.* at 36a, ¶ 30). Beltrame knew at the time the Statement of Charges was filed that Cannici was living in his Melrose Park home. (*Id.*).

After filing the Statement of Charges, the attorney prosecuting the charges against Cannici on behalf of the Fire Department communicated repeatedly *ex parte* with legal counsel for the Board concerning this matter. (*Id.* at 38a, ¶ 41). Counsel for Fire Chief Beltrame was invited by counsel for the Board to appear before the Board on the first date this matter was scheduled, although Cannici's counsel was not provided with the same personal notice of the meeting and accordingly was not present. (*Id.* at 38a, ¶ 42). Following the *ex parte* meeting and filing of the Statement of Charge against Cannici, counsel for the Board and counsel for the Fire Chief continued to discuss this matter *ex parte*. (*Id.* at 38a, ¶ 43). Counsel for the Board even sent, *ex parte*, an appellate decision explaining the standard for overturning administrative decisions to counsel for Chief Beltrame. (*Id.* at 38a, ¶ 44).

Upon learning of the ongoing *ex parte* communications, which Cannici considered improper and which violated the Illinois Administrative Procedure Act, 5 ILCS 100/10-60, Cannici filed a Motion to Dismiss or in the Alternative for Reappointment of Counsel to the Board and Disqualification of Prosecutor. (*Id.* at 38a-39a, ¶ 45). That Motion was denied by the Board, with the assistance of the attorney who was the subject of the Motion, without a hearing and without explanation. (*Id.* at 39a, ¶ 46).

At the hearing on the charges, Cannici was the only witness to testify. (*Id.* at 43a, ¶ 67). At the conclusion of the hearing, Cannici submitted a brief to the Board. (*Id.* at 39a, ¶ 47). In his Brief, Cannici explained Illinois law on residency issues turning primarily to the decision in *Maksym v. Board of Election Com'rs of City of Chicago*, 242 Ill. 2d 303 (2011). In its decision, the Board acknowledged that Firefighter Cannici had established residency, but then based its termination decision in large part on the fact that he did not sleep in his Melrose Park home for three years. (*Id.* at 40a, ¶ 49).

The Order on the Charges also contained misstatements of the record. (*Id.* at 40a, ¶ 50). The Order on the Charges stated, *inter alia*, "Cannici claims that the termination of the lease was coincidental to the residency investigation." (*Id.* at 40a, ¶ 51). Cannici never testified that the termination of the lease was coincidental to the

residency investigation. (*Id.* at 40a, ¶ 52). He testified as follows:

> Q: And the reason why you terminated that lease is because you were aware that your residency was being investigated, isn't it?
>
> A: I mentioned it to them, and they said that they don't want to cause me any problems, that I've helped them enough. And they said, we're going to leave the house. And, you know, so they left the house.

(*Id.* at 40a-41a, ¶ 53). As to any coincidences concerning the departure of the Cichons, Cannici testified that the fact they actually moved out of his home the day of his interrogation, which was shortly after they were notified, was coincidental, but the decision to move was directly tied to the charges against Cannici and he never denied as much. (*Id.* at 41a, ¶ 54).

The Order on the Charges also states that Firefighter Cannici made an "admission that he was not residing in the Melrose Park while he rented the home to the Cichons." (*Id.* at 41a, ¶ 55). Cannici did not testify that he was not "residing" in Melrose Park while he rented the home to the Cichons. (*Id.* at 41a, ¶ 56). The word "residing" was never once used in any question during the hearing. Cannici testified that he never had any intention of not maintaining his residency in Melrose Park while the Cichons were living in the Norwood home. (*Id.* at 41a, ¶ 57). Cannici

also volunteered during his testimony in the hearing that he was reluctant to rent the home to the Cichons initially because he did not want to risk losing his residency. (*Id.* at 41a-42a, ¶ 58). He also testified that the neighbor approached him concerning the Cichons at about the time of the Rahm Emmanuel case concerning residency issues. (*Id.* at 42a, ¶ 59). Cannici testified that he read up on the case to determine what he could do to help this family and maintain his residency. (*Id.* at 42a, ¶ 60). Cannici testified that he wanted to comply with Illinois law. (*Id.* at 42a, ¶ 61).

The Board, with no evidence other than that offered by Cannici, found that Cannici's efforts to understand the law were not so he could comply with it, but rather so he could "avoid the Village's residency ordinance." (*Id.* at 42a, ¶ 62). There was no testimony before the Board that these were his motives, or that he had been a bad actor in the past or a disruptive or rule-breaking employee. Just the opposite, he had never been reprimanded or disciplined for being untruthful in his 16 years as a Firefighter for the Melrose Park Fire Department. (*Id.* at 42a, ¶ 64). There was no evidence presented at the hearing before the Board contradicting any of Cannici's testimony or the voluminous documentary evidence he presented. (*Id.* at 42a, ¶ 65; *id.* at 43a, ¶ 66).

Cannici brought a three-count Verified Complaint in the Circuit Court of Cook County against Defendants on September 26, 2016, seeking administrative review of the decision to terminate his employment as a firefighter with Defendant, Village

of Melrose Park, in Count I, as well as relief for damages sustained through violations of his constitutional due process and equal protection rights in Counts II and III, respectively, pursuant to 42 U.S.C. § 1983. (App. at 25a-53a).

Defendants jointly removed the matter to the United States District Court for the Northern District of Illinois, Eastern Division, on October 20, 2016. (App. at 13a). Following removal, Defendants filed Motions to Dismiss and those Motions were fully briefed by the parties. (*Id.)*. The Honorable Judge Elaine E. Bucklo issued her Memorandum Opinion and Order on January 27, 2017, in which she determined that Cannici did not plead sufficient grounds for either his due process claim in Count II of the Complaint or his equal protection claim in Count III of the Complaint. (App. at 16a-22a). She held that Cannici's allegations were 'based on the 'random and unauthorized' actions of the state officials … in failing to follow the requirements of existing law" and therefore he was not entitled to predeprivation due process and must "avail" himself of the state postdeprivation remedies. (App. at 17a-18a). She held his equal protection claim was "foreclosed by the Supreme Court's decision in *Engquist,"* which she explained, "expressly held that the 'class-of-one' theory of equal protection has no place in the public employment context." (App. at 20a). The state claim for administrative review was returned to the state court. (*Id.* at 22a).

Subsequently, the Seventh Circuit Court of Appeals upheld the dismissal of both the procedural due process and equal protection claims. On Cannici's due process claim, the Seventh Circuit cited to its own decision in *Michalowicz v. Vill. of Bedford Park*, with no reference to this Court's decision in *Zinermon,* where the Seventh Circuit "found the due process claim based on a biased committee 'a challenge to the random and unauthorized actions of the state officials in question, i.e., to their unforeseeable misconduct in failing to follow the requirements of existing law,'" and found "that, '[b]ecause such misconduct is inherently unpredictable,' the state is obliged 'to provide sufficient remedies after its occurrence, rather than to prevent it from happening.'" (App. at 7a (*citing* 528 F.3d 530, 535 (7th Cir. 2008)). The Seventh Circuit then applied those principles to Cannici's case when it held that "Cannici's argument surrounding any potential bias of the Board is precisely the same unpredictable misconduct contemplated in *Michalowicz*. (*Id.)*. Thus, the district court's application of random and unauthorized acts by the Board was not erroneous." (*Id.)*. The appellate court also determined "that the Illinois Administrative Review Act provides sufficient post-deprivation relief" (*id.* (*citing* 735 ILCS 5/3-101 *et seq.*) (additional citations omitted), and determined that on the basis of a ruling "that the state court judge has found" a due process violation "in his favor," the Seventh Circuit had "no reason to believe Cannici has been deprived of his due process rights." (App. at 7a). The state court judge that the Seventh Circuit was referring to was the Honorable Judge Neil H. Cohen from the

Chancery Division of the Circuit Court of Cook County, Illinois, who made a finding that Cannici's due process rights had been violated because the Board's attorney acted in an improper manner by serving as an advocate for the prosecutor and legal counsel to the Board, but who also denied Cannici's motion for leave to take discovery on the impact the improper conduct had on the proceedings, and then found "Mr. Cannici has not established he was prejudiced by the due process violation," and dismissed Cannici's case. (App. at 23a). Judge Cohen initially said he was not concerned with the federal courts' position on using the state court process to serve as Cannici's postdeprivation remedy. (App. at 55a-56a).

The Seventh Circuit assessed Cannici's equal protection claim on a class-of-one theory. (App. at 8a). The court there used this Court's decision in *Engquist* as support for its determination that "'the class-of-one theory of equal protection does not apply in the public employment context.'" (*Id.* (*citing Engquist*, 553 U.S. at 598)). The panel rejected Cannici's argument "that equal protection claims are not inappropriate in all government employment contexts, pointing to the Court's rationalization that "the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct *groups of individuals* categorically differently" (App. at 9a (*citing Engquist*, 553 U.S. at 598) (emphasis in original)), and rejected the argument that there were groups of individuals in Cannici's case, even though Cannici argued he was

treated differently than others similarly situated with respect to the residency ordinance (*id.* at 9a). While the Court acknowledged that the Fire Protection District Act, 70 ILCS 705/16.13b, the statute which prevented Cannici's employment as a firefighter from being characterized as at-will employment, "requires 'just cause' for termination," the Court chose disregarding the statute's provisions because "nowhere in this statute does it provide full protection from termination," and the Respondents "afforded Cannici precisely what this statute requires: written charges, a hearing, and the opportunity to present evidence." (App. at 10a-11a).

REASONS FOR GRANTING THE PETITION

I. The Decisions of the First, Second, Third, Seventh and Eleventh Circuits Conflict with the Narrow Exception to Due Process Recognized by this Court's Precedent and Result in a Denial of Due Process to Citizens Deprived of Property through Government Procedures.

A. The Due Process Clause requires due process before a government takes property from its citizen.

The Due Process Clause provides a constitutional guarantee that property, among other substantive rights, "cannot be deprived except pursuant to constitutionally adequate procedures." *Loudermill*, 470 U.S. at 541. The property interest under review in *Loudermill* was a government employee's interest in

employment, the same interest as in this case. In *Loudermill,* this Court held that such due process must occur before termination takes effect as this is likely to be the "only meaningful opportunity to invoke the discretion of the decisionmaker." *Id.* at 543.

B. This Court recognized a narrow exception to the predeprivation due process requirement in cases where the deprivation is unpredictable, the action is unauthorized, and the deprivation does not occur through a state established procedure.

In *Zinermon v. Burch,* this Court considered when the failure to provide due process prior to deprivation might not give rise to a due process claim. 494 U.S. 113 (1990). In *Zinermon,* the trial court dismissed a complaint where the deprivation occurred through the State's "statutory procedure" and the plaintiff did not allege that the procedure was inadequate, but rather that the petitioner had failed to follow the procedure. *Id.* at 113. The trial court found that since the State could not have anticipated or prevented the unauthorized deprivation (i.e., predicted the unauthorized conduct), there was no feasible predeprivation remedy and all that was due respondent was post-deprivation tort remedies. The Court of Appeals and this Court rejected the district court's finding, with this Court explaining that in determining whether predeprivation due process is required, the focus is on the predictability of "when the loss will occur," not on the predictability of when the unauthorized conduct will occur. This Court found

that the "random and unauthorized" exception only applies if the conduct is unpredictable and does not occur through a state established procedure. *Id.* at 136-37.

C. The Seventh Circuit Court of Appeals broadened the scope of the "random and unauthorized" exception by eliminating the requirement that the taking not occur through a state established procedure.

In *Michalowicz v. Vill. of Bedford Park*, the Seventh Circuit Court of Appeals, like the overruled lower court in *Zinermon*, shifted back to focusing exclusively on the unpredictability of the conduct. 528 F.3d 530, 535 (7th Cir. 2008). The Seventh Circuit focused on whether the claim involved "unforeseeable conduct," in which case it determined predeprivation due process would not be required. Under *Michalowicz,* any deprivation that occurs through a state established procedure cannot support a due process claim as long as postdeprivation procedure is itself adequate. The effect of the shift in focus is that the exception all but consumes the rule.

The *Michalowicz* decision, which implicitly rejects this Court's clear holding in *Zinermon,* was followed by the Seventh Circuit in this case, and has been followed elsewhere. *See Hilfiger v. Alger,* 582 F. Supp. 2d 418, 427 (W.D.N.Y. 2008) (adopting the Seventh Circuit's finding that failure to follow prescribed procedures is "random and unauthorized").

D. There is a split among the circuits on the requirements for application of the "random and unauthorized" exception.

Circuit courts, though not citing *Michalowicz,* have similarly focused on whether the actions, rather than the deprivation, were unpredictable and have applied the "random and unauthorized" exception to cases where the deprivation occurred through a statutory procedure, completely inconsistent with this Court's holding in *Zinermon*. *See South Commons Condominium Ass'n v. Charlie Arment Trucking, Inc.*, 775 F.3d 82, 89 (1st Cir. 2014); *Henry v. City of New York,* 638 Fed. App'x. 113, 115 (2d Cir. 2016); *Ragland v. Commissioner New Jersey Department of Corrections,* 717 Fed.Appx. 175, 177 (3d Cir. 2017); *Pacesetter Apparel, Inc. v. Cobb County, Ga.,* 374 Fed.Appx. 910 (11th Cir. 2010).

Other circuit courts have followed this Court's decision in *Zinermon* and have required predeprivation due process where the deprivation occurred through a state procedure. *McGiver v. Garcia,* 729 Fed.Appx. 349 (5th Cir. 2018) (a "deprivation that may have resulted from established state procedure rather than random and unauthorized action" means that a due process claim may be appropriate); *DiLuzio v. Village of Yorkville, Ohio,* 796 F.3d 604, 614 (6th Cir. 2015) (finding an act not "random and unauthorized" if the official is "acting pursuant to any established state procedure"); *Walters v. Wolf*, 660 F.3d 307, 313 (8th Cir. 2011) ("Moreover, the district court recognized that, 'when

an established state procedure or a foreseeable consequence of such a procedure causes the loss, an adequate postdeprivation remedy is of no consequence, and the Court focuses solely on the process afforded by the established procedure'."); *Swanson v. Siskiyou County,* 498 Fed.Appx. 719, 720 (9th Cir. 2012) (deprivation occurred "under established state law procedures, which made it possible for them to both foresee the deprivation and provide pre-deprivation due process").

E. There is even a split on the proper basis for application of the "random and unauthorized" exception within the Seventh Circuit, with some panels following *Zinermon* and some following *Michalowicz.*

Not only is there a split among circuits, but there is an internal conflict within the Seventh Circuit. For example, *Simpson v. Brown County,* issued after *Michalowicz* but before *Cannici,* aligned with this Court's decision in *Zinermon* but parted ways with the analysis in *Michalowicz,* explaining that situations involving such "random and unauthorized" conduct are "relatively rare," and that the exemption is only applied where the government "could not predict the conduct causing the deprivation, could not provide a pre-deprivation hearing as a practical matter, *and* did not enable the deprivation through established state procedures and a broad delegation of power." 860 F.3d 1001, 1007 (7th Cir. 2017) (emphasis added)

F. The result of the split is the denial of due process rights to citizens deprived of property through statutory procedures.

Under the analysis applied by the First, Second, Third, Seventh and Eleventh Circuits, citizens who are deprived of their property through a government procedure run amok are left only with due process on the back end. This is not consistent with this Court's acknowledgement that providing due process *before* deprivation is the "root requirement" of the Due Process Clause. *Loudermill,* at 542. The proper scope of the Due Process Clause should be restored.

II. This Court Created a Narrow Exception to the Equal Protection Clause in the Employment Context Based on Circumstances Involving At-Will Employment and a Termination Premised on Discretionary Criteria.

A. The *Engquist* decision created a narrow exception to the Equal Protection Clause because of the nature of at-will employment and discretionary termination decisions but acknowledged its continued application in public employment under different circumstances.

Before the district court, Defendants argued that an equal protection claim in the employment context can only be brought by an employee alleging race, national origin, or gender discrimination. The federal district and appellate courts agreed. That position,

however, does not align with this Court's decision in *Engquist*, 553 U.S. at 605, the very case relied on. In *Engquist*, this Court specifically stated that it was not excepting public employees "from the Fourteenth Amendment's protection against unequal and irrational treatment." *Id.* In support, this Court cited approvingly numerous decisions in which the Supreme Court addressed equal protection cases in the employment context where race, national origin, or gender was not at issue and stated "[o]ur cases make clear that the Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically different." *Id.* One of the cases the Court referenced as an example was *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979), in which the Court considered whether a rule by a public employer prohibiting the employment of methadone users was a violation of the Equal Protection Clause. *Engquist*, 553 U.S. at 605; *Beazer*, 440 U.S. at 593. Methadone use does not constitute "race, gender or national origin," and accordingly the Supreme Court's reference to the decision in *Beazer* affirms that equal protection in the employment context is not limited to only those cases where plaintiff's race, gender, or national origin is at issue. *Engquist*, 553 U.S. at 605.

Further, the Supreme Court's references to *Beazer* and other equal protection cases in the employment context clarifies that it was not, as respondents in the lower courts argued, issuing a blanket denial of equal protection claims in all employment cases. Rather, the

Engquist decision was premised on two factors present in *Engquist* but not present in this case: (1) the at-will employment relationship; and (2) a termination decision that is based on subjective and wholly discretionary criteria.

Indeed, in explaining why the Court was not applying the Equal Protection Clause in *Engquist*, this Court wrote, "[w]e long ago recognized the 'settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Id.* at 606 (*citing Cafeteria and Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 896 (1961)). On the other hand, where employees are not at will, such as here, or where the differential treatment results from enforcement of legislation governing the employment relationship, an equal protection claim is appropriate. This Court in *Engquist* explained that "the Fourteenth Amendment 'requires that all persons subjected to…legislation shall be treated alike, under like conditions and circumstances, both in the privileges conferred and in the liabilities imposed.'" *Id.* at 602 (*citing Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887)). The Court highlighted the "crucial difference" between the government "exercising the power to regulate or license, as lawmaker" from its actions "as proprietor, to manage [its] internal affairs." *Engquist*, 553 U.S. at 598.

B. The lower courts applied a blanket prohibition on equal protection rights in the employment context for individual plaintiffs in violation of the Equal Protection Clause.

In this case, Cannici is not an at will employee like Engquist, simply claiming that he was not treated like other employees based on discretionary criteria. Rather, there are two separate pieces of legislation at the center of his claim: (1) the Melrose Park Residency Ordinance; and (2) the Fire Protection District Act, 70 ILCS 705/1 *et seq.* (the "Act"). The Residency Ordinance is not a Fire Department rule, it is a Village Ordinance. The Act, an Illinois statute, specifically provides in Section 16.13b that Cannici could only be terminated for just cause after service of written charges and a hearing on those charges.

Where legislation is involved, as here with the Residency Ordinance and the Act, an employee is on equal footing with all citizens seeking to protect their constitutional rights under state or local law. The *Engquist* Court specifically recognized the distinction between "an arm's-length regulation" and "treating seemingly similarly situated individuals differently in the employment context." *Engquist*, 553 U.S. at 604. In this case, however, the "highly discretionary and individualized sorts of decisions that public employers must make about their employees" is not at issue, though respondents argued otherwise before the lower courts. *See Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010). This case involves the employer acting in its sovereign role, enforcing a law, its Residency

Ordinance. In fact, the Residency Ordinance is interpreted by application of the same case law applied to ordinances governing those running for public office including the high-profile case of Mayor Rahm Emmanuel. In *Maksym v. Board of Election Com'rs of City of Chicago*, 242 Ill. 2d 303 (2011), the Illinois Supreme Court reviewed the residency ordinance governing Mayor Emmanuel's bid for office of Mayor of the City of Chicago. That same case and analysis was then applied in the employment context in the case of *Thomas v. Chicago Transit Auth.*, 24 N.E.2d 245 (Ill. App. Ct. 1st Dist. 2014), which, like here, addressed a residency ordinance. The same analysis is applied whether the ordinance concerns the general public or an employment relationship.

The lower courts' determination that every employment decision, regardless of whether it is "inherently subjective" or objective based on a statute, and regardless of whether the employee is employed at-will or protected from termination absent cause, is immune from class-of-one claims was not in accord with this Court's decision in *Engquist.*

When the subjective versus objective analysis is applied, the result is a finding that a class-of-one claim is appropriate. Cannici is not an at-will employee and his claim is about a residency statute and the Village could easily compare Cannici to the other firefighters who own homes outside Melrose Park. It is an objective test based on concrete criteria. In this case, the discretion of the Melrose Park Fire Department and the Village is circumscribed by the

Residency Ordinance (which, as discussed *supra*, is like those applied to the general public under election laws), Illinois case law, which has set out the parameters for determining residency under such ordinances, *supra*, and the Act, which requires that any termination be with "just cause" rather than arbitrary. Consistent with the rationale set forth in *Engquist,* an employee who loses his employment based on an ordinance that is enforced in a impartial manner should be entitled to bring a claim under the Equal Protection Clause.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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