No. 18-513

In The
Supreme Court of the United States

LEE MULCAHY,

Petitioner,

v.

ASPEN/PITKIN COUNTY HOUSING AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION, FIFTH AMENDMENT

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

U.S. CONSTITUTION, FOURTEENTH AMENDMENT

Section 1. " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

In his Petition, Lee Mulcahy seeks to relitigate matters finally resolved in the Colorado state courts based solely upon the application of state law. In this brief, the judgment of the Pitkin County District Court, Order on Pending Motions, Appendix B to Mulcahy's Petition, is referred to as the "Order." The decision of the Colorado Court of Appeals affirming the judgment of the District Court, Appendix A to Mulcahy's Petition, is referred to as the "Opinion."

Petitioner Mulcahy owns property he acquired from the City of Aspen, Colorado, located at 53 Forge Road in Aspen, Colorado, "the Property" (Appendix B, App. 16). The Property is located within an affordable housing development undertaken by the City of Aspen to provide housing for local workers (Appendix A, App. 2). By intergovernmental agreement between the City of Aspen and Pitkin County, Respondent Aspen/

Pitkin County Housing Authority ("APCHA") administers the City's affordable housing program, and the Property is in APCHA's inventory.

The Property, which was sold to Mulcahy at a price below free market value, is encumbered by a Master Deed Restriction and Agreement ("Deed Restriction"), accepted by Mulcahy, which imposes requirements to ensure that the Property and other properties in the same development are owned by persons who qualify for the affordable housing program (Appendix B, App. 16-17). The Deed Restriction requires, *inter alia*, that in order to maintain ownership of the Property, Mulcahy or any other owner must be employed within Pitkin County a minimum of 1500 hours per year (Appendix B, App. 17). Following months of investigation, APCHA determined that Mulcahy had failed to provide evidence of compliance with this requirement among others (Appendix B, App. 18-19). On August 15, 2015, APCHA issued to Mulcahy a Notice of Violation ("NOV") with respect to Mulcahy's noncompliance with the various requirements of the Deed Restriction including the employment requirement (Appendix B, App. 19). The NOV required Mulcahy to provide proof of compliance, list the Property for sale, or request a hearing before the APCHA Board within fifteen (15) days in order to contest the NOV (Appendix B, App. 19). Mulcahy did none of these things. Accordingly, on December 2, 2015, APCHA commenced an enforcement action in Pitkin County District Court for specific performance of the Deed Restriction to require Mulcahy to list the Property for sale as provided therein.

In its Order, the District Court found that by the terms of the Deed Restriction, Mulcahy was required to be employed in Pitkin County by a Pitkin County employer for a minimum of 1500 hours per year (Appendix B, App. 17), that Mulcahy admitted that he did not comply with the employment requirement (Appendix B, App. 17), but that in any event the Deed Restriction and the NOV required him to request an administrative hearing before the APCHA Board within fifteen (15) days of the NOV in order to contest the alleged violations (Appendix B, App. 19 and 26). Mulcahy failed to request a hearing (Appendix B, App. 25). As a result, the District Court concluded that Mulcahy failed to exhaust his administrative remedies, which barred all his defenses to APCHA's claims (Appendix B, App. 26). The Court awarded APCHA specific performance of the requirement of the Deed Restriction which states that in the event of a violation, the Property must be listed for sale (Appendix B, App. 26), and ordered him to provide APCHA with the information required by the Deed Restriction to determine the allowable sale price of the Property (Appendix B, App. 37). (Mulcahy's assertion that he is required to list his property for sale at a price substantially below market value is patently false. The sales price has not yet been determined.)

Mulcahy appealed the District Court's judgment against him to the Colorado Court of Appeals. On September 14, 2017, the Court of Appeals issued its opinion, Appendix A, affirming the judgment of the District Court. The Court of Appeals stated, "We strictly adhere to the exhaustion doctrine" (Appendix A, App. 5), and

it held that Mulcahy's failure to request a hearing or to cure the violations listed in the NOV "constitute a breach of the Master Agreement, (*i.e.*, the Deed Restriction) and trigger the County's (*sic*) right to force a sale of property" (Appendix A, App. 8). "Because Mulcahy did not seek a hearing, absent an exception the exhaustion doctrine bars him from raising any claim or defense to the County's (*sic*) decision" (Appendix A, App. 8-9). The Court of Appeals found that none of the exceptions to the exhaustion doctrine applied (Appendix A, App. 10-12).

The Court of Appeals specifically considered Mulcahy's argument, previously rejected by the District Court and raised again here, that his alleged absence from the country at a certain time implicated due process considerations. The Court rejected this argument based on a finding that Mulcahy was not out of the country when the NOV was issued (Appendix A, App. 12-14).

Mulcahy filed a Petition for Writ of Certiorari to the Colorado Supreme Court. By order dated April 30, 2018, Appendix E, the Supreme Court denied the petition. On July 17, 2018, Mulcahy filed in this Court an Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, wherein he asserts that this case "is small town political retaliation" (para.3) based on allegations of conspiracy between the District Court judge and the Aspen Skiing Company (para.2). The extension request was approved by the Court on July 23, 2018, and Mulcahy filed a Petition for Writ of Certiorari on September 27, 2018 ("the Petition").

Previously, on July 29, 2018, Mulcahy filed a complaint in U.S. District Court for the District of Colorado, *Mulcahy v. Aspen/Pitkin County Housing Authority*, Case No. 18-cv-01918-PAB-GPG, in which he makes the same factual assertions and legal claims as stated in the Petition in this case. APCHA has moved to dismiss that case based, *inter alia*, on the *Rooker-Feldman* doctrine.

In his Petition, Mulcahy makes a great number of factual allegations which find no support in the record of proceedings in the state court action and which are otherwise demonstrably false. Most of these allegations are irrelevant for purposes of the Petition, whether true or not, for the reasons set forth below. However, there is one false factual assertion which is relevant to this Petition, namely, that he was never afforded a hearing on the alleged violations. It is clear from the record in the state court proceedings, and is the law of the case there, that the Deed Restriction and the NOV both gave Mulcahy the right to request an administrative hearing (Appendix B, App. 7 and 23; Appendix A, App. 3), and that he failed to request such a hearing (Appendix B, App. 25; Appendix A, App. 6). The only reason that there was no administrative hearing is that Mulcahy failed to request it.

SUMMARY OF ARGUMENT

The claims asserted in the Petition do not satisfy any of the considerations identified in U.S. Supreme

Court Rule 10 because no federal question was decided by the Colorado Court of Appeals. The Colorado District Court granted summary judgment in favor of Respondent APCHA based upon Petitioner Mulcahy's failure to exhaust administrative remedies, and that was the only basis for the decision of the Colorado Court of Appeals affirming the judgment. The Colorado Supreme Court denied a petition for writ of certiorari. No federal constitutional claim was made in the state courts. There is no claim made in the Petition that could not have been asserted there. Finally, the allegations of due process and equal protection violations are insufficient as a matter of law, because they fail to meet this Court's pleading requirements.

ARGUMENT

A. THE PETITION DOES NOT SATISFY THE CONSIDERATIONS OF U.S. SUPREME COURT RULE 10.

Most of the considerations listed in U.S. Supreme Court Rule 10 have no applicability here, but two of them should be addressed. U.S. Supreme Court Rule 10(b) identifies as a consideration whether a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. No such assertion is made by Mulcahy in the Petition, and it is apparent that the Colorado Court of Appeals did not decide an important federal question.

Supreme Court Rule 10(c) identifies as a consideration whether a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Again, no federal question was decided by the Colorado Court of Appeals, and the Petition does not identify any issue of first impression that should be settled by this Court. The Order on Pending Motions of the Colorado District Court, Appendix B, and the opinion of the Colorado Court of Appeals affirming that Order, Appendix A, rest on state law grounds, *i.e.*, the exhaustion doctrine, and they did not decide any federal question, much less an important one in a way that conflicts with U.S. Supreme Court precedent.

Rule 10 states that where, as here, a petition for a writ of certiorari asserts errors based on erroneous factual findings or the misapplication of a properly stated rule of law, the writ is rarely granted. As set forth below, Mulcahy has failed to meet the threshold requirement of preserving any federal question for judicial review. Furthermore, Mulcahy's assertions of erroneous factual findings and the misapplication of rules of law find no support in the record below as stated in the District Court Order and the Court of Appeals Opinion.

B. THE JUDGMENT OF THE COLORADO COURT OF APPEALS RESTS ON AN ADEQUATE DETERMINATION OF STATE LAW, NAMELY, THE PETITIONER'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The judgment in favor of APCHA rests upon the application of the doctrine of exhaustion of administrative remedies and not upon the resolution of a federal question. The exhaustion doctrine is not created by the U.S. Constitution or any federal statute, and the state courts are free to apply this prudential doctrine of judicial administration in the absence of a statute limiting application of the doctrine, which is not the case here. *Darby v. Cisneros*, 509 U.S. 137, 144-46 (1993); *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992).

It is apparent from the District Court Order and the Court of Appeals Opinion that the application of the exhaustion doctrine in this case is based upon the precedents established by the decisions of the Colorado appellate courts, which constitute state law.

It is firmly established that this Court will not review judgments of state courts that rest on an adequate and independent state ground. *Murdock v. City of Memphis*, 87 U.S. 590, 635 (1874). The only power of this Court over state court judgments is to correct their adjudication of federal rights. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). In this case, the Colorado courts did not adjudicate the federal constitutional rights asserted by Mulcahy for the first time in this Petition. No constitutional due process claim or equal protection

claim was asserted in the Colorado District Court or the Colorado Court of Appeals or decided in either court.

In his Petition, Mulcahy devotes five pages to the argument that the exhaustion doctrine should not have been applied to bar his equitable defenses (Petition, pp. 21-25). This issue was specifically addressed by the Court of Appeals (Appendix A, App. 9-14). The Court of Appeals properly held that the exhaustion doctrine barred these defenses because the underlying factual bases for such claims could have been asserted in an administrative hearing, and because the policy goals of the exhaustion doctrine are served by requiring a party to bring equitable defenses in an administrative proceeding. In particular, the Court of Appeals considered and rejected the argument that the exhaustion doctrine should not apply because it is only an affirmative defense and that therefore APCHA as plaintiff in the state court action could not raise this issue. In rejecting this argument, the Court followed its own decision in *Colorado Department of Public Health and Environment v. Bethell*, 60 P.3d 779 (Colo. App. 2002). It did not apply federal case law to this determination.

C. MULCAHY DID NOT RAISE ANY CONSTITUTIONAL CLAIMS IN THE STATE COURTS AND NONE WERE DECIDED THERE.

Mulcahy asserts in his Petition that he alleged a due process violation in the state courts (Petition,

p. 13). A party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988); *Webb v. Webb*, 451 U.S. 493, 495 (1981). It is also required that it appears from the record that resolution of the federal question was necessary to the determination of the case and that the judgment could not have been rendered without deciding it. *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206, 212-13 (1938). None of these requirements are satisfied here. The District Court denied a takings claim asserted by Mulcahy (Appendix B, App. 30-31). This issue was not raised on appeal. The Court of Appeals, though it addressed the question of fundamental fairness (Appendix A, App. 12-14), did not address any constitutional claim of due process or equal protection because none was asserted on appeal. This Court "will not undertake to review what the court below did not decide." *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954).

D. THE PETITION FAILS TO ASSERT A VIOLATION OF PROCEDURAL DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Mulcahy's allegations of procedural due process violations are based upon the District Court's alleged failure to follow the Colorado Rules of Civil Procedure (Petition, p. 13), APCHA's alleged failure to follow its own rules (Petition, p. 14) and the District Court's

improper denial of Mulcahy's motion to amend his answer to the complaint. These arguments were not made in the state court proceedings and were not decided on appeal.

In any event, it is well-settled that the constitutional right to procedural due process requires notice and an opportunity to be heard appropriate to the nature of the case, and not more. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). Mulcahy received notice in the Notice of Violation, which also gave him the opportunity to be heard. He did not avail himself of this opportunity. As stated in *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), due process does not require that in every case a hearing must be held. "A State can, for example, enter a default judgment against a defendant, who, after adequate notice, fails to make a timely appearance." *Id.* at 378. The opportunity to be heard is what procedural due process requires, and that opportunity is subject to waiver. *Id.* at 378-79. "The period within which the appearance must be made and the right to be heard exercised is, of course, a matter of regulation . . . and if the appearance be not made, and the right to be heard not exercised within the period thus prescribed, the default of the party prosecuted . . . may, of course, be entered." *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876). The state courts have found conclusively that Mulcahy was afforded notice and the opportunity to be heard and that he failed to request a hearing. Since that is all that due process requires, the Petition should be denied.

Finally, the claim that the District Court and APCHA failed to follow their own rules does not state a violation of procedural due process as guaranteed by the U.S. Constitution. An alleged violation of state or local law does not give rise to a procedural due process claim. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Since Mulcahy failed to request a hearing, he cannot argue that such a hearing would not have afforded him due process.

E. THE PETITION FAILS TO ASSERT A VIOLATION OF EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

We agree with Mulcahy's citation to *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), as standing for the proposition that a "class of one" may assert an equal protection claim. However, Mulcahy made no such claim in the Colorado state courts, which he could have done. Furthermore, Mulcahy's allegations of an equal protection violation are insufficient to establish that others were similarly situated, that they were treated differently, or that there was intentional discrimination. The reference to one person, Peter Gilman (Petition, p. 19), as being treated differently does not include sufficient factual allegations to establish that his situation was the same as Mulcahy's, that there was intentional discrimination, or that any differential treatment lacked a rational basis. There are no factual assertions but only conclusory allegations regarding his six neighbors who allegedly were treated differently (Petition, p. 19). This Court is not the place for

Mulcahy to make an evidentiary record. He should have done that in the state courts.

The essence of Mulcahy's equal protection claim is selective enforcement. In cases of alleged selective enforcement, the claimant must make a "substantial threshold showing" of potential liability. *Wade v. U.S.*, 504 U.S. 181, 186 (1992). In *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 603-04 (2008), the Court recognized that where individualized assessments are made, "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* at 603.

Accordingly, Mulcahy's equal protection claim fails as a matter of law.

CONCLUSION

For the reasons set forth above, Respondent Aspen/Pitkin County Housing Authority moves the Court to deny Lee Mulcahy's Petition for Writ of Certiorari to the Colorado Court of Appeals.

Respectfully submitted,

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