No. _____

In The
Supreme Court of the United States

DAVID R. MORABITO and COLETTE M.G. MORABITO

Petitioners

versus

THE STATE OF NEW YORK, THE STATE OF NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and BASIL SEGGOS, (ACTING) COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Respondents

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

PETITION FOR WRIT OF CERTIORARI

David R. Morabito and
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PRO-SE

QUESTIONS PRESENTED

1. Whether the New York State Law, adopted on or about April 3, 2020, permanently banning high volume hydraulic fracturing in the State of New York is an unconstitutional Taking of the United States Constitution under the Fifth and Fourteenth Amendments.

2. Alternatively, whether the New York State Law, adopted on or about April 3, 2020, permanently banning high volume hydraulic fracturing in the State of New York is a violation of Due Process of the United States Constitution under the Fourth and Fourteenth Amendment.

3. Alternatively, whether the United States Court of Appeals-Second Circuit improperly applied or ignored the dictates and reasoning of the Court in Rosemary Knick, Petitioner v. Township of Scott, Pennsylvania, et al., 588 U.S. ____ (2019), Docket No. 17-647, held on June 21, 2019.

4. Alternatively, whether the New York State Law, adopted on or about April 3, 2020, permanently banning high volume hydraulic fracturing in the State of New York is a violation of interstate commerce.

5. Alternatively, whether the decision by the United States Court of Appeals-Second Circuit was a denial of the fundamental rights of justice in that Petitioners were not allowed to: amend their Complaint pursuant to Fed.R.Civ.P. Rule 15; the Fed.R.Civ.P. 12(b)(6) Motion should have been denied; that pursuant to the proposed simple amendments, the suit should not have been barred under the Eleventh Amendment of the United States Constitution; and that Petitioners had standing to sue Respondents.

LIST OF ALL PARTIES

The parties to the judgment from which review is sought is Petitioners David R. Morabito and Colette M. G. Morabito. They were a party in all proceedings below.

Respondents are the State of New York, the State of New York Department of Environmental Conservation, and Basil Seggos, Acting Commissioner, New York State Department of Environmental Conservation.

PARTIES TO PRIOR PROCEEDINGS

DAVID R. MORABITO and COLETTE M.G. MORABITO, Plaintiffs vs THE STATE OF NEW YORK, THE STATE OF NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and BASIL SEGGOS, (ACTING) COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Defendants
No. 17-CV-6853
United States District Court-Western District of New York
Decision and Orders Entered on June 18, 2018 and August 7,2018

DAVID R. MORABITO and COLETTE M.G. MORABITO, Plaintiffs vs THE STATE OF NEW YORK, THE STATE OF NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and BASIL SEGGOS, (ACTING) COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Defendants
No. 18-2499
United States Court of Appeals-Second Circuit
Amended Summary Order Entered on February 27, 2020

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PETITION FOR WRIT OF CERTIORARI

David R. Morabito and Colette M.G. Morabito respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is unpublished and is attached here as Appendix C. The opinions of the District Court are unpublished and are attached here as Appendix A and B.

JURISDICTION

This lower court had jurisdiction over this case under 28 U.S.C. §1331, 42 U.S.C.§1983, and the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. The Court of Appeals for the Second Circuit entered final judgment on February 27, 2020. Appendix C. This Court has jurisdiction under 28U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fourth Amendment to the United States Constitution provides that a person may not be deprived of property by the Government without "due process of law…" U.S. Constitution Amendment IV.

The Fifth Amendment to the United States Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Constitution Amendment V.

The Fourteenth Amendment provides that no state "shall deprive any person of life, liberty or property, without due process of law."

42 U.S.C. §1983 states "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State… subjects, or causes to be subjected, any citizen of the United States… to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

INTRODUCTION

This case raises important questions relating to the overreach by the State of New York, originally as executive orders of Governor Patterson and Governor Cuomo in a moratorium/temporary ban on high volume hydraulic fracturing. The moratorium eventually became a permanent regulatory ban on said practice to extract natural gas in the State of New York. The legal proceedings stated herein commenced in 2015 addressing the constitutionality of the regulatory ban. Recently, on April 3, 2020, a legislative law was passed and signed by the Governor of New York to permanently restrict the New York State Department of Environmental Conservation from approving any permits to drill, deepen, plug back or convert wells that use high volume hydraulic fracturing (2020 Laws of New York, Chapter 59, A-9508).

Most respectfully, as will be set forth below, Petitioners have been denied justice in both state and federal courts. The Petitioners have never been able to present any evidence to support their case in any fact-finding hearings, pre-trial hearings, discovery, depositions, trial or any other legal proceedings to address the viable legal issues raised herein.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. Preliminary Statement

In 1997, Petitioners purchased approximately 400 acres in Western New York that can support high volume hydrofracking (HVHF). The majority of the property is located in the County of Allegany which is found in the Southern Tier of the State of New York. This area is in the southwestern region along the Pennsylvania border in the foothills of the Allegany Appalachia mountain range. The properties are located in the Towns of Belfast, Cuba and Wellsville. Petitioners' properties are basically forested land consisting generally of "Allegany hardwoods" with some grasslands and agricultural land that is used for crop development or grazing.

The property had a total of six (6) oil and gas leases from Shell Oil Company, CNG Producing Company and a private wildcatter who resided in Bradford, Pennsylvania. The Petitioners were able to vacate and cancel all releases of oil, gas and mineral leases from the hereinstated companies in 1997. Between 1997 through 2003, Petitioners purchased additional acreage.

On the additional acreage, there were oil and gas leases from approximately ten (10) gas companies. After years of legal negotiations, all leases were eventually cancelled and vacated so that Petitioners would own all mineral resources including natural gas. Between

February 25, 2013 through October 15, 2013, Petitioners personally had communications with approximately fifty (50) oil and gas exploration companies recommended by the Respondents that were interested in conducting HVHF in the State of New York once the temporary ban was lifted. In all communications with the exploration companies, Petitioners were advised that when the temporary ban was lifted for gas exploration and the acreage became "open" to Marcellus and Utica drilling activity, Petitioners would be contacted.

Petitioners had further extensive discussions with Respondents, other state and federal agencies and departments, attorneys, land lease agents, foresters, representatives from oil and gas companies and even a NYS Judge who had started his own exploration company. Specifically, since 2010, Petitioners were advised by the Respondents and the above-stated entities that is was not possible to conduct HVHF during the ban period. Petitioners were specifically advised by the Respondents that NO ONE was allowed to apply for a permit and that a permit would not be

entertained by any individual or commercial entity during the ban. However, Respondents and the above-stated entities all advised that the "temporary ban" would be lifted during 2015 and commercial HVHF would be a viable option to extract mineral resources in, at least, the Southern Tier of New York.

The Respondents conducted very extensive and detailed studies for HVHF to be allowed in the State of New York. During the past twenty-five (25) years, the Respondents have thoroughly analyzed, critiqued and deciphered extensive studies and conducted research involving HVHF. The Respondents have established and/or promulgated extensive proposed rules and regulations to preserve the needed conservation practices of soil, water, and air quality in protecting the best interests of all residents and citizens of the State of New York. The Respondents have generated many thousands of pages in their Generic Environmental Impact Statement (GEIS), Supplemental Generic Environmental Impact Statement (SGEIS), draft Supplemental Generic Environmental Impact Statement (dSGEIS) and the Revised draft Supplemental Generic Environmental Impact Statement (Revised dSGEIS). These studies have clearly set forth that HVHF is a viable and acceptable practice of retrieving and extracting the enormous gas reserves in the State of New

York and, in particular, the County of Allegany. The scientific reports have concluded that HVHF is a safe and useful means in the extraction of New York State gas reserves.

During the "temporary ban" and being advised by Respondents that the "temporary ban" was going to be lifted in 2015 pursuant to their own studies, Petitioners purchased 339 acres on or about April 29, 2014 for the specific purpose of HVHF. Prior to the closing date, Petitioners were able to obtain a surrender/cancellation/release of numerous oil and gas leases on the hereinstated property. In fact, one of the conditions of the purchase of this property was the revocation of any outstanding oil and gas leases.

Thereafter, on or about December 17, 2014 Petitioners were advised that the ban on HVHF was going to be "permanent". On December 23, 2014 and January 28, 2015, Petitioners communicated with Respondents asking if they, noncommercial private landowners, could obtain a permit or commence the process to obtain a permit for HVHF. On January 29, 2015, Petitioners received communication from the Respondents that they could not obtain a permit or attempt to obtain a permit. After the permanent ban was announced in December of 2014, no individual or entity came forward to commence legal proceedings to contest the ban. Through encouragement from employees of the New York State

Department of Environmental Conservation (Respondents), landowners, attorneys, land leasing agents, New York State politicians (Assembly/Senate), commercial entities in the oil and gas industry, Petitioners commenced the legal proceedings. To date, this lawsuit is the only legal proceeding pending in any State or Federal courts.

The permanent ban on HVHF, "unconventional fracking," has been a very serious economic hardship as Petitioners have not been able to extract vast mineral resources of natural gas on their property(s) that all have petroleum plays in the Utica and Marcellus shales. There is not only a serious economic hardship, but, there will be a devastating environmental impact and harm that will be caused if HVHF is permanently banned on Petitioners' properties and only "conventional" fracking is the means to extract the resources.

The denial for Petitioners to commence the process or receive a permit to conduct HVHF, it was argued at the State level, was based on arbitrary or capricious actions taken by the Respondents, as well as, a violation of constitutional rights under the New York State and United States Constitutions. After exhausting all State remedies, pursuant to the United States Supreme Court case *Williamson County Regional Planning Commission vs Hamilton Bank of Johnson City,* 473 US 172 (1985),

Petitioners commenced a civil action in the United States District Court (WDNY). Petitioners argued that the decision of the Respondents in barring the Petitioners the right to obtain a permit or the right to commence the process to obtain a permit to conduct HVHF on their own private land was arbitrary, irrational, capricious, meritless, not based on science, technology, best management practices and constituted a Taking and violation of Due Process under the United States Constitution.

The Complaint filed in the WDNY was based directly upon the studies prepared by Respondents. The facts, allegations and statements in the Civil Complaint were literally derived almost word for word directly from the Executive Summary of the Revised draft Supplemental Generic Environmental Impact Statement (Revised dSGEIS). This study is approximately 1500 pages in length with a bibliography of approximately 1200 scientific and research studies. The Respondents' studies, which commenced as early as 1992, established that the temporary and permanent bans by Respondents were in violation of the United States Constitution. Respondents were absolutely aware, pursuant to their own studies, that "unconventional" drilling (HVHF) was the only technology that would be commercially used in the State of New York as "conventional" drilling had become obsolete from a commercial and economic perspective, as well as environmental.

Petitioners further argued that the Respondents' "permanent" ban was not based on the previous studies, research and analysis but rather a "new study" derived from speculation, conjecture, and meritless conclusions not supported by science, technology, or geology. The New York State Department of Health (DOH) study, which was completed in the Fall of 2014, the basis for the permanent ban, was in direct conflict with the extensive studies of the Respondents that have concluded that HVHF is a safe and useful means in the extraction of natural gas reserves.

That for at least the past ten (10) years, Petitioners have very actively tried to conduct HVHF gas exploration on their properties but have been unsuccessful as a result of the "temporary ban" that eventually led to the "permanent ban". During this time, Petitioners have been advised by Respondents that it would not be possible to obtain a permit or to even commence the permit process as there was a "ban". However, Respondents have argued in all court proceedings that Petitioners did not have standing simply because they did not apply for a permit. Inconsistent with reason, logic or common sense, the courts have held that Petitioners did not have standing to commence legal proceedings as a result of their failure to apply for a permit even though Respondents have admitted otherwise. That in 2010 Governor Patterson

issued an Executive Order prohibiting the issuance of any permits for HVHF and in January 2011, Governor Cuomo extended the Order. The Executive Orders barred all landowners or entities from attempting to apply for a HVHF permit.

However, on or about April 3, 2020, the Governor of New York State has signed into law a permanent ban on HVHF. (2020 Laws of New York, Chapter 59, A-9508). Now, the ban on HVHF is not a regulatory decision by Respondent Department of Environmental Conservation, but rather an absolute permanent ban in the State of New York which has only exacerbated the constitutional violations of "takings" and "due process."

2. Respondents' Extensive Studies Determine That High Volume Hydrofracking is a Viable Means to Extract Natural Gas in New York State

The Respondents have conducted very extensive and detailed studies for "fracking" and HVHF to be conducted in the State of New York. During the past twenty-five (25) years, the Respondents have thoroughly analyzed, critiqued and deciphered extensive studies and conducted research involving HVHF. The Respondents have also established and promulgated extensive proposed rules and regulations to preserve the needed conservation practices of soil, water, and air

quality in protecting the best interests of all residents and citizens of the State of New York. The hereinstated rules and regulations are greatly in excess of the standards established by the United States Environmental Protection Agency (under the Obama/Trump administrations) or any other 38 states (including California) that conduct HVHF. These studies have clearly set forth that HVHF in the State of New York is a viable and acceptable practice of retrieving and extracting the enormous gas reserves in Western New York and in particular, the Southern Tier of New York incorporating Petitioners' properties.

The Respondents proposed very strict regulations to ensure potential environmental impacts resulting from HVHF were mitigated to the maximum extent practical that is consistent with the legislative objectives in the Environmental Conservation Law (ECL).

The actions taken by the Respondents are not based on science, technology or even conservation. Unequivocally, the decision of the Respondents in barring the Petitioners the right to obtain a permit or the right to commence the process to obtain a permit to conduct HVHF on their own private lands is arbitrary, irrational, capricious, meritless, not based on science, technology, best management practices and constituted a Taking and violation of Due Process under the United States Constitution. The decision to permanently ban HVHF is politically

motivated and is a clear constitutional violation.

3. High Volume Hydraulic Fracturing (HVHF)

High volume hydraulic fracturing (HVHF) is a type of drilling that has been used commercially for approximately 65 years. Today, the combination of advanced hydraulic fracturing and horizontal drilling, employing cutting-edge technologies, is mostly responsible for surging United States oil and natural gas production. HVHF involves safely tapping shale and other tight- rock formations by drilling a mile or more below the surface before gradually turning horizontal and continuing up to twenty-five thousand feet or more. Thus, a single surface site can accommodate a number of wells. Once the well is drilled, cased and cemented, small perforations are made in the horizontal portion of the well pipe, through which a typical mixture of water (approximately 90%), sand (9.5%) and additives (0.5%) is pumped at high pressure to create micro-fractures in the rock that are held open by the grains of sand. Additives play a number of roles, including helping to reduce friction (thereby reducing the amount of pumping pressure from diesel-powered sources, which reduces air emissions), and prevent pipe corrosion, which in turn helps protect the environment and boosts well efficiency.

Increased production of domestic natural gas resources from deep underground shale deposits in other parts of the United States has dramatically altered future energy supply projections and has the promise of lowering costs for users and purchasers of this energy commodity. HVHF is distinct from other types of well completion that have been allowed in the State of New York. Horizontal (unconventional) drilling results in fewer well pads than traditional vertical (conventional) well drilling.

In New York State, the primary target for shale-gas development would be the Marcellus Shale, with the deeper Utica Shale also identified as a potential resource. Recent studies have indicated that the Marcellus Shale may be the largest natural gas shale formation in the world.

B. STATE COURT PROCEDURE

1. Exhaustion of State Administrative Remedies

That Petitioners had contacted representatives of the Respondents over a number of years seeking permission to commence the permit process and eventually receive a permit to conduct high volume hydraulic fracturing (HVHF). That on or about January 16, 2015, the Respondents informed Petitioners that the ban and prohibition for

HVHF in the State of New York applied to all owners of property in New York.

2. Exhaustion of State Remedies

That Petitioners, in order to comply with *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), commenced a special proceeding in the New York State Supreme Court. Petitioners argued that said ban was arbitrary, capricious and violated their rights under the Constitutions of the United States and New York State.

On February 10, 2016, the New York State Supreme Court granted Respondents' Motion to Dismiss the Petition in its entirety for lack of standing. A Notice of Appeal was timely filed by Petitioners on or about March 3, 2016. Under no conditions did the New York State Courts provide a full and fair opportunity for the constitutional issues to be heard. There was no decision relative to the constitutional issues on the merits.

Thereafter, the Petitioners filed a timely appeal to the New York State Supreme Court Appellate Division-Third Department. The appellate court, on April 13, 2017, held that the Petitioners lacked standing for failure to file for a permit and the other issues were rendered "academic"

Petitioners then filed motions dated April 20, 2017 at the New York State Court of Appeals seeking leave to appeal. The motion was denied in an Order dated September 7, 2017.

The only issue decided, in the New York State Courts, was standing. The state courts did not address the identical constitutional claims set forth in the Complaint/Amended Complaint filed in the United States District Court (WDNY). The Respondents did not file an Answer, no discovery proceedings were conducted, and a Motion for Summary Judgment was never filed.

C. DISTRICT COURT PROCEDURE

On December 12, 2017, Petitioners filed a 95 page Complaint in the United States District Court-Western District of New York under Docket No. 17-CV-6853 alleging two (2) causes of action:

a) Regulatory Taking in violation of the Fifth and Fourteenth Amendments through 42 U.S.C. §1983; and

b) Violation of Due Process Clause of the Fourteenth Amendment. The Complaint contained 191 paragraphs setting forth the allegations that Respondents violated Petitioners' constitutional rights. Thereafter, on March 16, 2018 Petitioners filed a 104 page Amended Civil Complaint pursuant to a Rule 15 application. The new Complaint maintained the

counts and allegations against the same Respondents from the original Complaint but accounted for additional factual information.

The United States District Court denied the application and dismissed the Complaint pursuant to a Notice of Motion to Dismiss filed by Respondents on June 18, 2018 and August 7, 2018 (A-1, B-1).

D. SECOND CIRCUIT DECISION

In the Amended Summary Order (C-1), the Second Circuit upheld the lower court's dismissal. At the Second Circuit the Petitioners argued that the district court abused its discretion in dismissing the Petitioners' Complaint/causes of action: as it did not follow the ripeness doctrine set out in *Williamson County Regional Planning Commission;* improperly dismissed the Complaint pursuant to Rule12(b)(6); that the motion to amend was not futile; Petitioners pled a plausible claim for prospective relief; that Petitioners met the standard for obtaining leave to file an amended complaint under Rule 15; the case was incorrectly barred under the Eleventh Amendment; said causes of action should not have been dismissed for collateral estoppel and res judicata; Petitioners had standing to sue; that constitutional issues were not addressed in state court; and the three (3) additional points stated herein involving "takings," "due process" and interstate commerce.

REASONS FOR GRANTING THE PETITION

1. THE NEW YORK STATE LAW, ADOPTED ON OR ABOUT APRIL 3, 2020, PERMANENTLY BANNING HIGH VOLUME HYDRAULIC FRACTURING IN THE STATE OF NEW YORK IS AN UNCONSTITUTIONAL TAKING AS THE LAW IS IN VIOLATION OF THE UNITED STATES CONSTITUTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

In the original Complaint, Petitioners clearly established a "Taking" by the illegal actions of the Respondents. Additional information pursuant to Respondents' request/objections were incorporated relative to the "Takings" issue in the proposed Amended Complaint. The information incorporated in the Amended Complaint consisted of the size of the acreage, tax map numbers, location and dates of purchase.

The acreage purchased in 2014 in the Town of Cuba, County of Allegany was specifically purchased ONLY for natural gas exploration using "unconventional" HVHF technology. Said property was not purchased for any other business or recreational reasons and/or purposes.

The properties owned by Petitioners pursuant to the Respondents' own studies and research, all have Marcellus and Utica Shale formations underlying said properties and are capable of commercial production. The properties satisfy all of Respondents' requirements necessary to obtain drilling permits, and pursuant to technology, will only be

commercially developed by the use of HVHF.

Respondents' prohibition against HVHF is the only reason that a drilling permit(s) will not be granted on Petitioners' properties. That if Respondents did not prohibit HVHF, Petitioners would have been able to enter into oil and gas leases with exploration companies that were capable of, and prepared to develop the oil and gas underlying said properties, as well as other properties located in the Southern Tier of the State of New York.

It is well established and admitted by Respondents that a permit application for the approval of HVHF would have been denied since 2008 to the present.

Moreover, as clearly established, Petitioners own the mineral rights on their properties. The Petitioners have an absolute legal right, as owners, to exploit, mine and/or produce any or all the minerals lying below the surface of said properties. Petitioners not only have the right to extract said resources but also can convey their interests in said economic assets. The Petitioners have the absolute legal right to the following:

A. The right to use as much of the surface as is reasonably necessary to access the minerals on their property;

B. The right to further convey these mineral rights;

C. The right to receive economic consideration from conveying said rights;

D. The right to receive delay rentals; and

E. The right to receive royalties.

Additionally, Petitioners may separately convey any or all of the above listed interest as they have viable economic interest in the minerals under the surface of their properties. The Respondents' ban has taken Petitioners' ability in the development and exploration of, in particular, the natural gas in the Marcellus and Utica Shale plays.

Further, the ban on HVHF on Petitioners' properties has systematically denied the right for gas and oil exploration. It is not economically feasible and a severe economic hardship will be placed on Petitioners to conduct "conventional" drill sites when "unconventional" HVHF technology would extract the natural gas in a more efficient and economic way. The ban by Respondents has taken Petitioners' right in violation of the 5th and 14th Amendments of the United States Constitution to conduct exploration on said properties. In a practical sense, single well conventional drilling is not a viable means of extraction of natural gas as the industry does not and will not invest in "conventional fracking". The industry does not use "conventional fracking" technology as it is outdated technology and is not an

acceptable practice in the 21st Century. Only "unconventional" HVHF technology is generally being used at this time.

In 1922, the first real case of any significance in interpreting the "Takings Clause" of the 5th Amendment, the Court decided *Pennsylvania Coal vs. Mahon*, 260 US 393 (1922). This case involved a regulation enacted by the Pennsylvania legislation to prohibit mining of coal under streets, houses and places of public assembly. The Coal Company held mineral rights in Northeast Pennsylvania and had sold the surface rights to others. The Coal Company argued that a "taking" had occurred under these regulations because it was unable to mine the coal. The United States Supreme Court agreed and said that, while property may be regulated, if the regulation goes "too far", it constitutes a compensational taking. Though no compensation was ordered in that case, the Pennsylvania law was deemed invalid and the Coal Company was able to extract and use their mineral rights.

Also, governmental land use regulation, that denies the property owner of economically viable use of their land, is deemed a "taking" of the affected property. See *Lucas vs. South Carolina Coastal Council*, 505 US 1003 (1992); *First English Evangelical Lutheran Church vs. County of Los Angeles* (1987). In *Agins vs. City of Tiburon*, 447 US 25 (1980) the Court held that the application of land use regulations to a particular piece of

property is a "taking" "if the ordinance does not substantially advance legitimate State interest . . . or denies an owner economically viable use of his/her land". However, in *Lingle vs. Chevron*, 544 US 528 (2005), the Court overruled the "substantially advanced" criterion of a "taking". When a government regulation affects a "taking" of private property by such excessive regulation, the owner may initiate inverse condemnation proceedings to recover the just compensation for the taking of his or her property.

The inverse condemnation is a term which describes a claim brought against the government in which a property owner seeks compensation for a "taking" of property under the 5th Amendment. In the inverse condemnation context, it is the property owner who sues the Government, alleging the "taking"of property without just compensation. See *San Diego Gas and Electric Company vs. City of San Diego*, 450 US 621 (1981); *United States vs. Clark*, 445 US 253 (1980); and *Agins supra*.

The Petitioners submit that the Respondents' ban on HVHF is a classic violation of their constitutional rights under the United States Constitution. To argue that there is a legitimate state interest in the ban is a sham that can easily be overcome in any fact finding hearing or trial

as rank and file employees of Respondents will testify contrary to the political position taken by the State of New York.

Very simply, the Fifth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, provides "nor shall private property be taken for public use, without just compensation." United States Constitution Amendment V. The actions taken by Respondents are "under color of State law" within the meaning of 42 U.S.C. §1983. Therefore, this Court should overturn the dismissal of the civil action against Respondents for damages. The Court has held that a taking categorically occurs when a regulation "denies economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992). The actions taken by the Respondents have deprived the Petitioners of the use of their property through their governmental regulation and now permanent law. Respondents' prohibition against HVHF constitutes a denial of economically viable use of the Petitioners' properties. Therefore, Petitioners are entitled to just compensation for a taking of their property under the Fifth Amendment. The dismissal was an absolute abuse of discretion by the District Court. Dismissing this cause of action was a fundamental miscarriage of justice. The Second Circuit decision has continued the abuse.

2. THE NEW YORK STATE LAW, ADOPTED ON OR ABOUT APRIL 3, 2020, PERMANENTLY BANNING HIGH VOLUME HYDRAULIC FRACTURING IN THE STATE OF NEW YORK IS A VIOLATION OF DUE PROCESS OF THE UNITED STATES CONSTITUTION UNDER THE FOURTH AND FOURTEENTH AMENDMENT

The Petitioners have clearly stated a cause of action in both the Complaint and Amended Complaint involving a violation of Due Process clause of the Fourth and Fourteenth Amendments. As previously stated, the Complaint/Amended Complaint directly addresses the arbitrary and irrational restrictions on Petitioners' property rights which violate Due Process. The Compliant/Amended Complaint clearly established that the regulations for banning HVHF were arbitrary and "shocks the conscious."

The Fourteenth Amendment provides that no State "shall deprive any person of life, liberty or property, without due process of law." That as a result of Respondents' actions, "under color of State law" within the meaning of 42 U.S.C.§1983, the Court of Appeals should have remanded this civil action back to the District Court to allow the parties to litigate and give Petitioners the chance to establish damages for a violation of the United States Constitution.

The Court has recognized that "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause". *Lingle vs Chevron, U.S.A. Inc.,* 544 U.S. 528 (2005). The Respondents' decision to preclude Petitioners, or

anyone else, from extracting natural gas and other petroleum based products by HVHF on their properties is arbitrary, irrational and runs afoul of the Due Process clause. The Respondents' actions:

a. In banning HVHF violates due process as it is an abuse of executive power and "shocks the conscience". See *Collins vs City of Harber Heights,* TEX 503 US 115 (1992);

b. In banning HVHF has completely ignored the conclusions in their own studies, set forth herein for the past twenty-five (25) years;

c. In banning HVHF has ignored the conclusions of the overwhelming scientific evidence, geology, technology, and research of not only its own studies, but independent studies and research from an excess of 1,200 sources set forth in its own Revised dSGEIS study;

d. In banning HVHF has completely ignored the conclusions of the studies and research conducted by Federal Agencies consisting of the Environmental Protection Agency, Department of Interior, United States Geological Survey, to name a few, under the Obama administration and current administration;

e. In banning HVHF has completely ignored the conclusions of studies of at least 38 other states, including California, that HVHF is a viable and safe means to extract natural gas from "black" shale formations;

f. Ignored overwhelming scientific evidence, technology, geology and research in banning HVHF is "arbitrary in the constitutional sense" as an abuse that "shocks the conscience that it did not comport with traditional ideas of fair play and decency." See *Breithaupt vs Abram,* 352 US 432 (1957);

g. In banning HVHF is conduct that violates substantive due process as it does not comport with traditional ideas of fair play and decency. id;

h. In banning HVHF is conduct that is egregious and an exercise of power without any reasonable justification. See *Lombardi vs Whitman,* 485 US F2d 73 (2nd Circ. 2007); and

i. In banning HVHF on unfounded allegations by environmental groups for political reasons and not based on scientific evidence, technology, geology or research has violated Petitioners' constitutional rights to due process.

Simply, prohibiting extraction of natural gas and petroleum based products by HVHF technology is an arbitrary and irrational restriction on Petitioners' property rights and violates the Due Process Clause. Therefore, Petitioners are entitled to damages pursuant to 42 U.S.C. §1983. The District Court's dismissal was fundamentally wrong, misplaced and abused its discretion in dismissing the cause of actions. The Court of Appeals did not overrule the lower court's decision.

Finally, the Respondents have completely "missed the point" relative to: value of property; technology in regard to drilling; and surface use of properties. As has been stated, the value of the surface property and use thereof is minimal and negligible compared to the value of the property allowing HVHF. In regard to technology, between "conventional" and "unconventional" drilling, exploration companies will

not conduct "conventional" drilling. Approximately 95% of all gas and oil exploration is now done through HVHF in the United States. It is not economical for "conventional" drilling when "unconventional" drilling is more viable, economically efficient and more environmentally safe using best management practices. Finally, in regard to surface use of the properties: agricultural value is minimal and negligible; timber value is minimal and negligible; and there is no potential for "housing" value. The acreage is located in the Southern Tier in "desolate" and/or minimal habitable areas of Allegany County in the State of New York. The properties in question are in areas that are economically destitute.

3. THE UNITED STATES COURT OF APPEALS-SECOND CIRCUIT IMPROPERLY APPLIED OR IGNORED THE DICTATES AND REASONING OF THE COURT IN *ROSEMARY KNICK, PETITIONER VS TOWNSHIP OF SCOTT, PENNSLYVANIA, ET AL.*, 588 U.S. ____ (2019), Docket No. 17-647, held on June 21, 2019.

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Constitution Amendment V. This very simple and straightforward right is easy to understand but very complex to apply in litigation. Respectfully, the District Court abused its discretion in holding that Petitioners' causes of actions must be dismissed because of collateral estoppel, issue preclusion and res judicata as the matters were "litigated" in state court.

The central issue in this entire case is whether or not Petitioners are entitled to a realistic and fair opportunity to seek compensation for a constitutional "taking" and violation of "due process" involving their property rights within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Pursuant to the District Court's determination, Petitioners had no such opportunity. However, prior to the commencement of the case at bar, Petitioners were very much aware that they had to comply with the Court's decision of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985).

Under that decision, Petitioners could not hold the state government liable for a taking of their property rights in federal court until they exhausted state court remedies. In application, this rule barred Petitioners from vindicating their constitutional property rights in federal courts and stripped them of reasonable access to the federal courts to address federal constitutional issues. Petitioners, pursuant to the hereinstated rule, exhausted their state remedies in order to litigate the takings controversy in the United States District Court (WDNY).

The Petitioners filed a Complaint and Amended Complaint under the Fourth and Fourteenth Amendments and the takings clause of the Fifth Amendment. The District Court granted the Respondents' Motion to

Dismiss and held that the Petitioners' claim that the HVHF ban failed to conform with the constitutional requirements was fully litigated in state courts. Therefore, the District Court held that Petitioners were precluded to address said constitutional issues in the federal courts. Respectfully, this determination was wrong.

The Court in *Rose Mary Knick, Petitioner v. Township of Scott, Pennsylvania, et al.,* 588 U.S.___(2019), Docket No. 17-647, held on June 21, 2019 that the Takings Clause of the Fifth Amendment states that "private property (shall not) be taken for public use, without just compensation." In *Williamson County,* "the (United States Supreme Court) held that a property owner whose property has been taken by a local government has not suffered a violation of his Fifth Amendment rights-and thus cannot bring a federal takings claim in federal court-until a state court has denied his claim for just compensation under state law." *Knick at 1.*

The Court in *Knick* further held that "the Williamson County Court anticipated that if the property owner failed to secure just compensation under state law in state court, he would be able to bring a "ripe" federal takings claim in federal court. See *id.,* at 194. But as (the Supreme Court) later held in *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit. The takings plaintiff thus finds himself in a Catch-22: he cannot go to

federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning." *Knick at 2.*

Continuing, the Court in *Knick* held that the *San Remo* preclusion trap should have tipped off the (Supreme Court) that the state-litigation requirement rested on a mistaken view of the Fifth Amendment. "The Civil Rights Act of 1871, after all, guaranteed "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies" is not a prerequisite to an action under 42 U.S.C. §1983." *Heck v. Humphrey,* 512 U.S. 477 (1994)(quoting *Patsy v. Board of Regents of Florida,* 457 U.S. 496 (1982). *Knick at 2.*

The Court further held in *Knick* that "we now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. *Knick at 2.*

In the case at bar, the Petitioners were required to commence their constitutional causes of action in the state courts of New York. The constitutional issues were never resolved in the state courts of New York. Rather, the state courts erroneously ruled that the Petitioners did not have standing. This issue has been addressed in multiple points of Petitioners' (Appellants') Second Amended Brief. Nevertheless, pursuant to the

recently overturned case of *Williamson County*, Petitioners were required to commence actions in the state courts rather than proceed directly to federal court under a §1983 action. As a result of the *Williamson County* requirement, the District Court ruled that Petitioners were precluded to file federal claims. The *Knick* opinion stated herein completely vindicates the position of Petitioners which absolutely and unconditionally establishes that the decision by the District Court was improper.

The Court in *Knick* has held that "the unanticipated consequences of this ruling were not clear until 20 years later, when this Court decided *San Remo*. In that case, the takings plaintiffs complied with *Williamson County* and brought a claim for compensation in state court. 545 U.S., at 331. The Complaint made clear that the Plaintiffs sought relief only under the Takings Clause of the state constitution, intending to reserve their Fifth Amendment claim for a later federal suit if the state suit proved unsuccessful. *Id. at 331-332.* When that happened, however, and the Plaintiffs proceeded to federal court, they found that their federal claim was barred." *Knick at 5.*

In *San Remo*, the Court held that the "full faith and credit statute, 28 U.S.C. §1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment. See 545 U.S. at 347. The adverse state court decision that,

according to *Williamson County,* gave rise to a ripe federal takings claim simultaneously barred that claim, thus preventing the federal court from ever considering it." *Knick at 6.*

The Court further held in *Knick* that the "*Williamson County* effectively established an exhaustion requirement for §1983 takings claims when it held that a property owner must pursue state procedures for obtaining compensation before bringing a federal lawsuit...Instead, *Williamson County* broke with the Court's longstanding position that a property owner has a constitutional claim to compensation at the time the government deprives him of his property, and held that there can be no uncompensated taking, and thus no Fifth Amendment claim actionable under §1983, until the property owner has tried and failed to obtain compensation through the available state procedure. "(U)ntil it has used the procedure and been denied just compensation," the property owner "has no claim against the government for a taking." 473 U.S., at 194-195 (quoting *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018, n.21 (1984)." *Knick at 12.* The Court then determined that takings claims against local governments should be handled the same as other claims under the Bill of Rights. *Williamson County* erred in holding otherwise. *Knick at 20.*

The Court then stated "because of its shaky foundations, the state-litigation requirement has been a rule in search of a justification for over 30 years." *Knick at 21-22.* The Court then determined that "the state-litigation requirement has also proved to be unworkable in practice. *Williamson County* envisioned that the takings plaintiffs would ripen their federal claims in state court and then, if necessary, bring a federal suit under §1983. But, as we held in *San Remo*, the state court's resolution of the plaintiff's inverse condemnation claim has preclusive effect in any subsequent federal suit. The upshot is that many takings plaintiffs never have the opportunity to litigate in a federal forum that §1983 by its terms seems to provide. That significant consequence was not considered by the Court in *Williamson County*." *Knick at 22.*

In conclusion, the Court in *Knick* held that "takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County,* a property owner had no federal claim until a state court denied him compensation." The Court then concluded that "state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under §1983 upon the taking of his property without just compensation by a local government." *Knick at 22-23.*

Petitioners were required to file and litigate state claims before bringing an action in the District Court. This Court should not bar the Petitioners their lawful right to address federal constitutional claims in a federal court. The *Williamson County* requirement imposed upon Petitioners is fundamentally wrong and a miscarriage of justice. Respectfully, Petitioners asked the Court of Appeals to correct the rights of Petitioners in bringing constitutional claims involving property rights in a federal court without having their causes of action dismissed as a result of attempting to comply with the Court's decision in *Williamson County.*

4. THE NEW YORK STATE LAW, ADOPTED ON OR ABOUT APRIL 3, 2020, PERMANENTLY BANNING HIGH VOLUME HYDRAULIC FRACTURING IN THE STATE OF NEW YORK IS A VIOLATION OF INTERSTATE COMMERCE

The Commerce Clause-Article 1, Section 8, Clause 3 of the United States Constitution-grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. Art.1, §8 CL.3. The Commerce Clause has an expansive history, and the Court has interpreted it to expressly grant authority to Congress and limit the power of the states, to regulate commerce. See *NLRB vs Jones and Laughlin Steel Corp.,* 301 US 1 (1937; *United States vs Lopez,* 514 US 549 (1995). The Court has held that the Commerce Clause limits states' ability to "unjustifiably- discriminate against or burden the

interstate flow of articles of commerce." See *Or. Waste Sys.,Inc. vs Dep't of Envtl. Quality,* 511 US 93 (1994).

The Commerce Clause gives Congress the power to make all laws which shall be necessary and proper for the execution of enumerated powers, including the power to regulate the commerce. Further, the Commerce Clause is not only a positive grant of power to Congress, but it is also a negative constraint upon the states. In *Swift & Company vs United States,* 196 US 375 (1905), the Court stated that even business done at the local level can become part of a continuous current of interstate movement of goods and services and be considered commerce if it had a "substantial economic effect" on interstate commerce, or if the "cumulative effect" could have a substantial economic impact on interstate commerce.

The ban on HVHF in the State of New York has had an enormous impact on exploration, storage, disposal and transportation activities of natural gas which are a part of a continuous "current" of interstate movement of goods and services in the national and global energy market. The permanent ban on HVHF activities in the State of New York are demonstratibly having a "substantial economic effect" individually and cumulatively on interstate commerce. Petitioners, in particular, are deprived of either the right to market their mineral, oil and natural gas natural resources to interstate markets as well as out of state purchasers

are deprived of the ability to purchase the oil and gas products from Petitioners and other New York property owners and companies. Where a regulation clearly discriminates against interstate commerce on its face, as Petitioners submit, that regulation violates the Constitution.

The natural gas industry supports millions of jobs, either directly through companies engaged in exploration and drilling or indirectly through manufactures that use the fuel as a raw material. The real potential for economic impact, however, lies in the vast reservoirs of shale gas accessible through unconventional drilling in the State of New York. In prohibiting the drilling and production of a significant segment of the United States' shale gas, the Petitioners are subject to a serious economic loss and said ban violates interstate commerce.

5. THE DECISION BY THE UNITED STATES COURT OF APPEALS-SECOND CIRCUIT WAS A DENIAL OF FUNDAMENTAL RIGHTS OF JUSTICE AS PETITIONERS WERE NOT ALLOWED: TO AMEND THEIR COMPLAINT; THE FED.R.CIV.P 12(b)(6) MOTION SHOULD HAVE BEEN DENIED; THE SUIT SHOULD NOT HAVE BEEN BARRED UNDER THE ELEVENTH AMENDMENT; AND PETITIONERS HAD STANDING TO SUE RESPONDENTS

A. MOTION TO AMEND COMPLAINT

Petitioners moved the District Court, pursuant to Rule 15, for leave to file an Amended Complaint. The Amended Complaint maintained the same counts and allegations against the same (Defendants) from the original complaint but accounted for additional factual information.

The amendments to the Amended Complaint included:

A. Correcting the classification of Respondent Basil Seggos under the color of law in his personal and individual capacity;
B. Supplying more detailed information in regard to the original New York State proceedings for clarification;
C. Supplying more detailed information in regard to location, acreage, tax map numbers and ownership of the property(s) subject to the lawsuit;
D. More detailed allegations under the Second Cause of Action in regard to due process; and
E. A request for judgment to be awarded to the Petitioners for treble damages and injunctive relief.

The Amended Complaint added additional information and clarification for the Respondents to adequately respond in filing an Answer. Moreover, the Amended Complaint did not alter the general allegations in the two causes of action set forth in the original Complaint

Pursuant to Fed. R. Civ. P. 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." It is acknowledged that the decision whether to grant leave to amend a pleading is within the sound discretion of the district court, but as all Circuits aptly recognize, this discretion is strictly circumscribed by the proviso that "leave (should) be freely given when justice so requires".

Gramegna v. Johnson, 846 F. 2d 675 (11th Circuit 1988). Therefore, a justifying reason must be apparent for denial of a Motion to Amend. "Unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." See Shipner v. Eastern Air Lines, Inc., 868 F. 2nd 401 (11th Cir. 1989).

In the interest of justice, the District Court should have granted Petitioners' Motion to Amend given the clear absence of any substantial reason to deny leave to amend.

B. MOTION TO DISMISS

In reviewing a complaint for dismissal under Rule 12(b)(6), the complaint may be dismissed only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Connelly vs Gibson*, 355 US 41 (1957). To survive dismissal for failure to state a claim, a complaint must simply "give the defendants their notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. vs Twombly,* 550 US 544 (2007).

In considering a Rule 12(b)(6) motion, "(t)he issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Scheuer v Rhodes,* 416 US 232 (1974).

The Court has laid down in two cases, the guidelines to determine whether the factual allegations of a complaint are sufficient in content and form to survive a motion to dismiss. Those cases are *Bell Atlantic Corp vs Twombly,* 550 US 544 (2007) and *Ashcroft vs Iqbal,* 556 US 662 (2009).

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *Iqbal,* 556 US at 678 (quoting *Twombly,* 550 US at 570). This pleading standard creates a "two-pronged approach," *Iqbal,*556 US at 679, based on "(t)wo working principles," *id at 678.*

First, although a complaint need not include detailed factual allegations, it must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal,* 556 US at 678. Second, "(w)hen there are well-pleaded factual allegations, a court should assume the veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal* 556 at 679. This "facial plausibility" prong requires the plaintiff to plead facts 'allow(ing) the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *id* at 678

Petitioners have raised two causes of action in the Complaint /Amended Complaint. The first cause of action deals with a Taking in violation of the Fifth and Fourteenth Amendments, through 42 USC § 1983. Further, it was alleged that the Court has held that a "taking" categorically occurs when a regulation "denies economically beneficial

or productive use of land." *Lucas v S.C. Coastal Council,* 505 US 1003 (1992). It is a fact Respondents have banned HVHF in the State of New York. The actions taken by the Respondents have deprived the Petitioners of the use of their property (mineral rights) through governmental action.

The second cause of action alleges a violation of Due Process Clause of the Fourth and Fourteenth Amendment in that the Court has recognized that "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the due process clause." *Lingel vs Chevron, USA Inc,* 544 US 528 (2005).

The granting of Respondents' Motion to Dismiss was an abuse of discretion by the lower courts.

C. SUIT SHOULD NOT HAVE BEEN BARRED UNDER THE ELEVENTH AMENDMENT

Petitioners strongly assert that the Respondents have violated their civil rights guaranteed by 42 U.S.C. §1983. Further, Petitioners acknowledge that they incorrectly brought the suit against the Acting Commissioner Seggos in his "official" capacity though Petitioner was aware that he had to commence the action in an "individual capacity" or "private capacity." That was one of the reasons Petitioners filed an application to amend the civil complaint. It was a simple mistake that should not bar or destroy Petitioners' rights to commence this lawsuit.

To do so would be a horrendous miscarriage of justice. Respondent Seggos, in the Amended Complaint was being sued, under color of law, as a private citizen of the State of New York both personally and in his individual and private capacity.

Petitioner is very much aware of the concept of sovereign immunity arising under the Eleventh Amendment and its possible prohibition in bringing suits against a State in Federal Court. Simply, in the case at bar, Petitioner incorrectly stated in 'official' capacity and filed motions to amend the Complaint to correct the hereinstated oversight.

The Respondents in no way suffered undue prejudice by the proposed amendment. The Amended Complaint did not involve addition of new defendants, set forth any new claims, or raise new legal theories. The Respondents did not file an Answer, there had been no discovery consisting of the exchange and production of documents, interrogatories, examinations before trial, fact finding hearings or even a motion for Summary Judgment.

However, even if the Respondents, or more particularly the Acting Commissioner was under the classification of "official capacity", the Court has held that the Eleventh Amendment does not bar actions against a state "official" when there is a violation of federal law and the Petitioners are seeking an injunction that governs the official's future

conduct. See *Edelman v Jordan,* 415 US 651 (1974). Under this "well-known exception" to Eleventh Amendment immunity, set forth in *Ex Parte Young,* 209 US 123 (1908), "A plaintiff may sue a state official acting in his official capacity- notwithstanding the Eleventh Amendment, for prospective, injunctive relief from violations of federal law." *In re Deposit Ins Agency,* 482 F 3d 612 (2d Cir 2007), *State Employees Bargaining Agent Cole vs Rowlan*, 494 F 3d 71 (2d Cir 2007).

Petitioners also sought leave for injunctive relief-to enjoin the Respondents from enforcing an illegal ban on HVHF.

D. THE COURTS ABUSED THEIR DISCRETION IN DISMISSING CAUSES OF ACTION AS THERE WAS STANDING

The courts abused their discretion in determining that Petitioners had no standing and did not establish an injury in fact. The Respondents submitted that Petitioners failed to establish that they suffered a non-speculative injury-in-fact as a direct result of the ban on HVHF. It was readily submitted that the injuries received by Petitioners were concrete, particularized, actual, imminent and not conjectural or hypothetical. See *Int'l Action Ctr vs City of New York,* 587 F 3d 521 (2d Cir 2009).

Moreover, Petitioners had clearly established in the Complaint/Amended Complaint identifiable, concrete, non-speculative harm different from the public at large (see *Lujan vs Defenders of Wildlife,* 504 US 555 (1992). Petitioners submitted that they

could establish that their injury is real and different from injury most members of the public faces. See *Bell Atl Corp vs Twombly,* 550 US 544 (2007) and *Congregation Rabbinical College of Tarticov, Inc. vs Village of Pomona,* 915 supp 2d 574 (SDNY 2013).

Next, Respondents argued in their Motion to Dismiss that Petitioners' claims are speculative about intentions of third parties and outcome of negotiations with said third parties. Thereafter, Respondents argued that Petitioners needed concrete plans but failed to set forth any in the Complaint. Again, Respondents' arguments are without merit as no individual or entity in the State of New York could conduct HVHF for the past ten (10) years.

Petitioners argued, that they clearly have standing and should be distinguished from the public at large for the following reasons:

(a) Petitioners purchased 339 acres of land in Cuba, New York in the latter part of April, 2014 for the specific purpose to conduct HVHF;

(b) Petitioners are the owners of the properties;

(c) Petitioners pay the taxes on the properties;

(d) Petitioners own the mineral rights of natural gas and oil on said properties;

(e) Petitioners' properties are in a feasible area to conduct HVHF while the majority of the State of New York, and in excess of 99% of the residents of the State of New York, could not do HVHF on their own properties; and

(f) That the public at large is not economically disadvantaged by the ban on Petitioners' properties.

The majority of the State of New York and the "public at large" are not directly, or even indirectly, impacted by the ban on HVHF by Respondents. Pursuant to Respondents' rules and regulations involving set backs, water sheds, distances, spacing, etc., there are very few landowners in the State of New York that could even attempt to do HVHF. The majority of the State of New York does not have access to the Marcellus Shale and Utica Shale plays.

There are only approximately seven (7) counties along the Pennsylvania border, in the Southern Tier of New York, that are located in the hereinstated areas. There are very few landowners in this region that have the sizable acreage to have HVHF conducted on their own properties. Petitioners' properties are in a unique situation and the ban on HVHF has caused very serious economic and environmental hardship and injury.

Finally, it is absolutely disingenuous for the Respondents to argue that Petitioners did not have standing as they did not comply with the permit applications or otherwise meet any of the statutory or regulatory requirements for developing an oil and gas well in New York. Petitioners were specifically told by Respondents that they could not apply for a permit application, or apply for any other regulatory requirements for

developing an HVHF gas well in New York State until the "ban" was lifted by Governor Cuomo and the Respondents. Simply, the Respondents would not entertain any permit applications for HVHF.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Dated: May 6, 2020

Respectfully submitted,

/s/David R. Morabito, Esq.

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UNITED STATES SUPREME COURT

DAVID R. MORABITO and COLETTE M.G MORABITO,

Petitioners,

v.

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and BASIL SEGGOS, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Respondents

CERTIFICATE OF COMPLIANCE WITH RULE 33.1(h)

Pursuant to Rule 33.1(h), I certify that the Petition for the Writ of Certiorari contains 8,891 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 17, 2020.

/s/ David R. Morabito
David R. Morabito, Esq.

APPENDIX

Page

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID R. MORABITO and COLETTE M.G. MORABITO,

Plaintiffs,

-vs-

No. 6:17-cv-06853-MAT
DECISION AND ORDER

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and BASIL SEGGOS, Commisioner of the New York State Department of Environmental Conservation,

Defendants.

I. INTRODUCTION

Plaintiffs David R. Morabito ("Mr. Morabito") and Collette M.G. Morabito ("Mrs. Morabito") (collectively "Plaintiffs" or the "Morabitos") bring this suit against Defendants the State of New York (the "State"), the New York State Department of Environmental Conservation ("NYSDEC"), and NYSDEC Commissioner Basil Seggos ("Commissioner Seggos") (collectively "Defendants"), alleging violations of the Fifth Amendment's "Takings" Clause and the Fourteenth Amendment's Due Process Clause. In particular, Plaintiffs allege that the State's decision to ban high-volume hydraulic fracturing ("HVHF") on property owned by Plaintiffs constituted a regulatory taking and/or an arbitrary and irrational restriction on Plaintiffs' property rights.

Three motions are currently pending before the Court: a motion to dismiss filed by Defendants (Docket No. 7) and two motions for leave to file an amended complaint (Docket Nos. 11 and 14) filed by

Plaintiffs. For the reasons discussed below, Defendants' motion is granted and Plaintiffs' motions are denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from Plaintiffs' complaint, filed in this Court on December 12, 2017. Docket No. 1. As required at this stage of the proceedings, the Court has treated Plaintiffs' factual allegations as true. The Court has further taken judicial notice of the public proceedings held by NSYDEC which culminated in the prohibition on HVHF in New York. See Schubert v. City of Rye, 775 F. Supp. 2d 689, 695 n.3 (S.D.N.Y. 2011) (courts may take judicial notice of state administrative proceedings on a motion to dismiss, because they are public records). The Court has limited its consideration of the public record to the timing of the proceedings, and has not treated the conclusions reached by NYSDEC as true. See id. (considering public records "for the limiting purposes of determining the fact of the meetings and the actions taken by the relevant parties, not for the truth of any statements made during these proceedings").

Plaintiffs are residents of Monroe County and have at all relevant times been the owners in fee simple of properties located in Monroe and Allegany Counties. "[O]ver a number of years," Plaintiffs have contacted NYSDEC "seeking permission to receive a permit or to commence the permit process to conduct high volume hydraulic fracturing (HVHF) on their property(s) located in Western New York." Docket No. 1 at ¶ 11.

HVFF is a well-stimulation technique used to extract natural gas from rock. New York State has been studying the environmental impact of HVHF for a number of years. In September 2009, pursuant to New York's State Environmental Quality Review Act ("SEQR"), NYSDEC issued a draft supplemental generic impact statement ("SGEIS") related to the potential future enactment of regulations associated with HVHF.

In 2010, then-Governor David Paterson issued an executive order prohibiting NYSDEC from issuing permits for HVHF pending the completion of the SGEIS under SEQR. This executive order was extended by Governor Andrew Cuomo in 2011.

A period of public comment related to the draft SGEIS was held, during which more than 13,000 public comments were submitted. NYSDEC issued a revised draft SGEIS on September 7, 2011. NYSDEC held additional public hearings following the issuance of the revised draft SGEIS and received another 67,000 public comments.

In 2012, former NYSDEC Commissioner Joseph Martens ("Former Commissioner Martens") asked Dr. Joseph Zucker, Commissioner of the New York Department of Health (the "NYSDOH"), to review and assess the potential health impacts set forth in the SGEIS. The NYSDOH conducted a public health review in which it reviewed the scientific literature, engaged outside expert consultants, engaged in field visits, and communicated with various stakeholders. In December 2014, the NYSDOH released a Public Health Report of High-

Volume Hydraulic Fracturing for Shale Gas Development, in which it recommended that HVHF not proceed in New York State.

According to Plaintiffs, on January 16, 2015, Former Commissioner Martens instructed Bradley J. Field, the former NYDEC Director of the Division of Mineral Resources, to inform Plaintiffs that New York's HVHF prohibition would apply to all New York property owners.

In June 2015, NYSDEC issued its final SGEIS related to HVHF, as well as a legally binding Findings Statement. The final SGEIS and Findings Statement concluded that a prohibition on HVHF was the best available alternative to balance environmental protection, public health concerns, and economic and social considerations.

Mr. Morabito commenced an action[1] in New York State Supreme Court pursuant to Article 78 of New York's Civil Procedure Law and Rules, in which he alleged that the statewide ban on HVHF was arbitrary and capricious and had deprived him of his right to due process. Defendants sought dismissal and on February 10, 2016, the New York State Supreme Court, Albany County (the "trial court") dismissed Mr. Morabito's Article 78 petition in its entirety. In particular, the trial court concluded that Mr. Morabito lacked standing to bring his action.

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[1] The complaint alleges that this action was commenced by "Plaintiff(s)." See Docket No. 1 at ¶ 14). A review of the judicial decisions issued in connection with this action indicates that Mr. Morabito was the sole plaintiff. See Morabito v. Martens, 149 A.D.3d 1316 (3d Dep't 2017), leave to appeal denied, 29 N.Y.3d 916 (2017).

Mr. Morabito timely appealed the dismissal of his Article 78 petition to the Appellate Division, Third Department (the "Appellate Division"). On appeal, Mr. Morabito contended that the trial court had erred in finding that he lacked standing. He further argued that the matter should have been heard by a judge who had participated in a program, put on by the National Judicial College, that offered training on the mechanical aspects of HVHF, and that the trial judge had labored under "preconceived and prejudicial presumptions." Docket No. 1 at ¶ 16. On April 13, 2017, the Appellate Division entered an order affirming the trial court's dismissal if the Article 78 petition. See Morabito v. Martens, 149 A.D.3d 1316 (3d Dep't 2017).

Mr. Morabito sought leave to appeal the Appellate Division's decision to the New York State Court of Appeals (the "Court of Appeals"). The Court of Appeals denied Mr. Morabito's request on September 7, 2017. See Morabito v. Martens, 29 N.Y.3d 916 (2017). Plaintiffs then commenced the instant action on December 12, 2017. Docket No. 1.

III. DISCUSSION

A. Defendants' Motion to Dismiss

1. Legal Standard

"To survive a motion to dismiss [made pursuant to Federal Rule of Civil Procedure 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678

(2009) (internal quotation marks and citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Although a complaint need not provide "detailed factual allegations," it nevertheless must assert "more than labels and conclusions," and "a formulaic recitation of the elements of a cause of action" will not suffice. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007). The plaintiff must plead facts that "raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." Id. (citations omitted). In deciding the a Rule 12(b)(6) motion, the Court must accept as tru, all factual allegations in the complaint, and must draw all reasonable inferences in favor of the nonmovant. See Atwood v. Cohen & Slamowitz LLP, 716 F. App'x 50, 52 (2d Cir. 2017).

2. Defendants are Immune to Plaintiffs' Claims

As a threshold matter, Defendants contend that this matter must be dismissed because they are immune to Plaintiffs' claims. The Court agrees. Moreover, because the Court finds this issue dispositive, the Court does not reach Defendants' other arguments in favor of dismissal.

"[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984); see also New Holland

Vill. Condo. v. DeStaso Enterprises Ltd., 139 F. Supp. 2d 499, 501 (S.D.N.Y. 2001) ("Absent a State's consent or valid Congressional abrogation of its sovereign immunity, a suit in federal court by private parties against the State, its agencies, or its officials acting in their official capacity, seeking money damages, is barred by the Eleventh Amendment to the United States Constitution.").

In this case, Plaintiffs seek to bring their due process claim and their regulatory takings claim pursuant to 42 U.S.C. § 1983 ("Section 1983"). Section 1983 "establishes a cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States." Burroughs v. Petrone, 138 F. Supp. 3d 182, 197 (N.D.N.Y. 2015) (internal quotation). However, "it is settled law" that Section 1983 does not "operate to abrogate the State's Eleventh Amendment immunity." Gebman v. New York, No. 07-CV-1226 GLS-DRH, 2008 WL 2433693, at *4 (N.D.N.Y. June 12, 2008) (finding regulatory takings claim brought pursuant to Section 1983 barred by the Eleventh Amendment); see also Knight v. State of N. Y., 443 F.2d 415, 418 (2d Cir. 1971) (finding New York State immune from suit alleging unlawful taking); McCluskey v. New York State Unified Court Sys., 442 F. App'x 586, 588 (2d Cir. 2011) (due process claim against New York's Unified Court System was "barred by the Eleventh Amendment since [the court system] is an arm of the State of New York").

In this case, Plaintiffs' complaint asserts Section 1983 claims against the State, NYDEC, and Commissioner Seggos "in his

official capacity." Docket No. 1 at ¶¶ 8-10. All of these Defendants are immune from suit under the Eleventh Amendment. See Pennhurst, 465 U.S. at 101-102 (Eleventh Amendment immunity applies in suit against state officials where the state is the real party in interest); see also Will v. Michigan Dep't of State Police, 491 U.S. 58, 89 (1989) ("an official-capacity action is in reality always against the State"). Moreover, Plaintiffs have not plead, nor could they plausibly do so, that the State has waived its Eleventh Amendment immunity in connection with their claims. Accordingly, Plaintiffs' complaint cannot be maintained against Defendants and must be dismissed.

B. Plaintiffs' Motions to Amend

1. Legal Standard

Pursuant to Federal Rule of Civil Procedure 15(a), leave to amend shall be given freely "when justice so requires." Nevertheless, it remains "within the sound discretion of the district court to grant or deny leave to amend." Kim v. Kimm, 884 F.3d 98, 105 (2d Cir. 2018) (internal quotation omitted). In particular, the Court may deny leave to amend "for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007). A proposed amendment is futile where it "fails to state a claim on which relief can be granted." Krys v. Pigott, 749 F.3d 117, 134 (2d Cir. 2014). "The adequacy of a proposed amended complaint to state a claim is to be judged by the

same standards as those governing the adequacy of a filed pleading." Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012).

2. Plaintiffs' Proposed Amendments are Futile

In this case, Plaintiffs have filed two separate motions for leave to amend. Docket Nos. 11, 14. Having reviewed the proposed amended complaints submitted in connection with these motions, the Court finds that both would be subject to dismissal under Rule 12(b)(6). Accordingly, the proposed amendments are futile, and leave to amend is denied.

As discussed at length above, Plaintiffs' claims are barred by the Eleventh Amendment. The proposed amended complaints attempt to circumvent the issue of Eleventh Amendment immunity in two ways. First, Plaintiffs seek to assert claims against Commissioner Seggos in his individual capacity. Second, Plaintiffs have included a request for injunctive relief in the later-filed of their proposed amended complaints. Neither of these additions to Plaintiffs' allegations would permit Plaintiffs to proceed with their claims.

i. Plaintiffs do not State a Claim Against Commissioner Seggos in his Individual Capacity

Turning first to Plaintiffs' attempt to sue Commissioner Seggos in his individual capacity, "a plaintiff must establish a given defendant's personal involvement in the claimed violation in order to hold that defendant liable in his individual capacity under § 1983." Patterson v. Cty. of Oneida, N.Y., 375 F.3d 206,

229 (2d Cir. 2004). In this case, the proposed amended complaints contain no allegations of personal involvement by Commissioner Seggos whatsoever. To the contrary, Plaintiffs affirmatively allege that it was the "former Commissioner" of NYSDEC who denied them the ability "to commence the process or receive a permit to conduct HVHF." Docket No. 14 at ¶ 13; see also Docket No. 11 at ¶ 12 (alleging that it was "former Commissioner Martens" who instructed his staff to inform Plaintiffs that New York's HVHF prohibition applied to all New York property owners). Commissioner Seggos is not mentioned in the proposed amended complaints beyond being identified as a party, nor are any actions he allegedly took with respect to Plaintiffs or the HVHF ban identified. Plaintiffs' proposed amended complaints therefore fail to state a claim against Commissioner Seggos in his individual capacity.

ii. Plaintiffs have not Pled a Plausible Claim for Prospective Relief

Plaintiffs' inclusion of a request for injunctive relief in one of their proposed amended complaints also does not render their claims viable. While it is true that "the Eleventh Amendment does not bar suits alleging an ongoing violation of federal law and seeking prospective (i.e., injunctive) relief, brought against state officials in their official capacities," Stevens v. New York, 691 F. Supp. 2d 392, 398 (S.D.N.Y. 2009), Plaintiffs have failed to state a plausible basis on which this Court could grant the prospective relief they seek.

The sole prospective relief sought by Plaintiffs is "[a]n injunction imposed against Defendants banning Plaintiffs the ability to commence High Volume Hydro Fracturing on their property(s) [sic]." Docket No. 14 at 102. In order to grant the broad, far-reaching prospective relief sought by Plaintiffs, the Court would have to find that New York's ban on HVHF was facially unconstitutional, as opposed to constituting a taking for which Plaintiffs are entitled only to monetary compensation. See Caruso v. Zugibe, 646 F. App'x 101, 105 (2d Cir. 2016) (to validly seek prospective relief, plaintiff must allege an ongoing violation of federal law, as opposed to a past violation for which money damages are owed). However, Plaintiffs' claim that the HVHF ban failed to comport with the requirements of the Due Process Clause was already fully litigated and dismissed in New York State court. Accordingly, pursuant to 28 U.S.C. § 1738 ("Section 1738") and the doctrine of collateral estoppel, Plaintiffs may not now pursue such a claim in this Court.

Section 1738 provides that the judicial proceedings of the court of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." The Supreme Court has explained that "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from

which the judgments emerged." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Accordingly, to the extent that Plaintiffs would be prohibited from pursuing their due process claim in New York's courts, they are also prohibited from pursuing it in this Court.

In this case, Mr. Morabito commenced a proceeding in New York state court wherein he expressly alleged that New York's HVHF ban was unconstitutional, having been obtained without due process of law. The trial court determined that Mr. Morabito lacked standing to pursue this claim, a decision that was subsequently upheld by the Appellate Division. The Court must determine as a threshold matter what preclusive effect a New York court would give this judgment.

Under New York law, "the doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984). Collateral estoppel, also sometimes referred to as issue preclusion, applies to rulings on the issue of standing. See Glass v. Del Duca, 151 A.D.3d 941, 942 (2d Dep't 2017) ("The doctrine of collateral estoppel bars relitigation of the issue of the individual plaintiffs' standing to bring the first two causes of action" where the issue of standing was "was raised and decided

against [one plaintiff] on the merits in a separate action" and the other plaintiffs were in privity); Martin v. Bixby, 40 A.D.3d 1277, 1278 (3d Dep't 2007) (plaintiff's claims precluded by prior resolution of standing issue against him); Fallek v. Becker, Achiron & Isserlis, 246 A.D.2d 394, 395 (1st Dep't 1998) (lower court correctly found that plaintiff was collaterally estopped by prior order holding that he lacked standing). Moreover, "[c]ourts in this Circuit routinely apply collateral estoppel to the issue of standing." CIT Bank N.A. v. Conroy, No. 14-CV-5862, 2017 WL 1745486, at *5 (E.D.N.Y. May 3, 2017) (internal quotation omitted) (finding claims barred where state court had determined plaintiffs lacked standing in prior proceeding).

Mr. Morabito had a full and fair opportunity to litigate his standing to challenge the constitutionality of New York's HVHF ban in state court. That issue was decided against him on the merits by the trial court, which concluded that he had not demonstrated an injury in fact distinct from that of the public at large, and that he was in the same position as every other landowner in the state of New York. That determination was upheld on appeal by the Appellate Division. See Morabito, 149 A.D.3d at 1316-17. Accordingly, the doctrine of collateral estoppel applies, and Mr. Morabito cannot relitigate that issue in this Court. His attempt to do so in the proposed amended complaints is therefore futile.

Moreover, although Mrs. Morabito was not a party to the state court action, she is in privity with Mr. Morabito. In the context of collateral estoppel, privity extends to "those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action." Buechel v. Bain, 97 N.Y.2d 295, 304 (2001) (finding parties in privity with former law partner because he was co-signatory to disputed agreement). Here, Mrs. Morabito and Mr. Morabito share the same property interests, which were represented by Mr. Morabito in the prior action. See, e.g., Parolisi v. Slavin, 98 A.D.3d 488, 490 (2d Dep't 2012) (finding plaintiff in privity with prior owners of his property). As such, Mrs. Morabito is equally estopped from relitigating the issue of standing before this Court.

Because Plaintiffs are barred by Section 1783 and the doctrine of collateral estoppel from pursuing a claim that New York's ban on HVHF is unconstitutional based on the Due Process Clause, there is no basis on which they can seek prospective relief. Accordingly, their inclusion of such a request in their proposed amended complaint does not render their claims viable. Accordingly, the Court denies Plaintiffs' motions for leave to amend on the basis of futility.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss this action (Docket No. 7) is granted. Plaintiffs' motions for leave to amend (Docket Nos. 11 and 14) are denied. The Clerk of the Court is instructed to enter judgement in favor of the Defendants and to close the case.

ALL OF THE ABOVE IS SO ORDERED.

S/Michael A. Telesca

HON. MICHAEL A. TELESCA
United States District Judge

Dated: June 18, 2018
Rochester, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID R. MORABITO and COLETTE M.G. MORABITO,

Plaintiffs,

-vs-

No. 6:17-cv-06853-MAT
DECISION AND ORDER

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and BASIL SEGGOS, Commissioner of the New York State Department of Environmental Conservation,

Defendants.

I. INTRODUCTION

Plaintiffs David R. Morabito ("Mr. Morabito") and Collette M.G. Morabito ("Mrs. Morabito") (collectively "Plaintiffs" or the "Morabitos") commenced this suit against Defendants the State of New York (the "State"), the New York State Department of Environmental Conservation ("NYSDEC"), and NYSDEC Commissioner Basil Seggos ("Commissioner Seggos") (collectively "Defendants") on December 12, 2017, alleging violations of the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process Clause related to the State's decision to ban high-volume hydraulic fracturing on property owned by Plaintiffs. Docket No. 1. Defendants subsequently moved to dismiss the complaint (Docket No. 7), and Plaintiffs responded with two motions for leave to amend (Docket Nos. 11 and 14).

On June 18, 2018, the Court entered a Decision and Order (the "June 18th Decision and Order") (Docket No. 26) granting Defendants' motion to dismiss and denying Plaintiffs' motions for leave to amend. In particular, the Court found that Defendants were immune to Plaintiffs' claims pursuant to the Eleventh Amendment. The Court also found that Plaintiffs' proposed amended complaint failed to allege a plausible claim against Commissioner Seggos in his individual capacity, because they had not alleged that he was personally involved in the alleged deprivation of rights. The Court further found that Plaintiffs' request to amend their complaint to include a claim for prospective relief was futile, because Plaintiffs had already litigated their due process claim in state court, and were therefore barred from relitigating it in this Court pursuant to 28 U.S.C. § 1738 and the doctrine of collateral estoppel. Pursuant to the June 18th Decision and Order, judgment was entered in favor of Defendants on June 19, 2018. Docket No. 27 (the "Judgment").

Currently pending before the Court are two motions by Plaintiffs seeking vacatur of the June 18th Decision and Order and the Judgment. Docket Nos. 28, 29. For the reasons set forth below, the motions are denied.

II. Discussion

A. Legal Standard

As set forth above, Plaintiffs have filed two motions for vacatur in this matter. The first (Docket No. 28) is brought pursuant to Federal Rule of Civil Procedure 60(b)(6) ("Rule 60(b)"), which provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." The second (Docket No. 29) is brought pursuant to both Rule 60(b) and Federal Rule of Civil Procedure 59(e) ("Rule 59(e)"), which permits a party to file a motion to alter or amend a judgment within 28 days of entry.

A party seeking relief pursuant to Rule 60(b)(6) is required "to show extraordinary circumstances justifying the reopening of a final judgment." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005) (internal quotation omitted); see also Intellectual Prop. Watch v. United States Trade Representative, 205 F. Supp. 3d 334, 352 (S.D.N.Y. 2016) ("[Rule 60(b)(6) motions] are disfavored and should only be granted upon a showing of extraordinary circumstances, or extreme hardship.") (internal quotation omitted).

Turning to Rule 59(e), "[t]here are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based.... Second, the

motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice.... Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law." 11 Fed. Prac. & Proc. Civ., Grounds for Amendment or Alteration of Judgment, § 2810.1 (3d ed.) (footnotes omitted). "The standard for granting ... a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., 70 F.3d 255, 256 (2d Cir. 1995).

B. Plaintiffs have not Shown that Vacatur is Warranted

Here, whether considered under the Rule 59(e) standard or the Rule 60(b) standard, Plaintiffs have failed to demonstrate that vacatur is warranted. Plaintiffs argue that the June 18th Decision and Order contained "numerous factual inaccuracies" that warrant reconsideration. Docket No. 29 at ¶ 3. However, these so-called "factual inaccuracies" are nothing more than a rehashing of arguments that the Court has already rejected.

First, Plaintiffs contend that the Court erred in concluding that their due process claim had been "'fully litigated and dismissed in New York State Court'" (Id. (quoting Docket No. 26 at 11) because their state court claim was dismissed on standing

grounds. Plaintiffs argument misapprehends the meaning of "fully litigated" in this context. The Court is aware that the state courts did not reach the merits of Plaintiffs' due process claim, and discussed at length in the June 18th Decision and Order the fact that the state court's dismissed the matter due to lack of standing. See Docket No. 26 at 12. However, as the Court further explained, "[c]ollateral estoppel, also sometimes referred to as issue preclusion, applies to rulings on the issue of standing." Id. Accordingly, the Court had to consider whether Plaintiffs had "a 'full and fair opportunity' to litigate the standing issue" in state court." Lefkowitz v. McGraw-Hill Glob. Educ. Holdings, LLC, 23 F. Supp. 3d 344, 362 (S.D.N.Y. 2014). The Court concluded that Plaintiffs did have such an opportunity, and that, as such, the issue could not be relitigated in front of this Court. Plaintiffs have provided no new evidence, overlooked case law, or any other "extraordinary circumstance" that would change this conclusion.

Second, Plaintiffs contend that the Court erred in its determination that Defendants were immune under the Eleventh Amendment, because Plaintiffs sought leave to assert claims against Commissioner Seggos in his individual capacity. The Court fully considered this argument by Plaintiffs in the June 18th Decision and Order. As the Court explained therein, although Plaintiffs sought leave to include an individual capacity claim against Commissioner Seggos, they had made no factual allegations whatsoever related to

actions taken by Commissioner Seggos. "To the contrary, Plaintiffs affirmatively allege that it was the 'former Commissioner' of NYSDEC who denied them the ability 'to commence the process or receive a permit to conduct HVHF.'" Docket No. 26 at 10 (quoting Docket No. 14 at ¶ 13)). As the Court explained, the lack of any allegations of personal involvement by Commissioner Seggos was fatal to an individual capacity claim against him. Again, Plaintiff has failed to provide any new basis for the Court to reconsider its prior conclusion and simply reiterates an argument that this Court has already fully considered.

Finally, Plaintiffs attempt to relitigate their request to add a claim for prospective injunctive relief. The Court will not repeat its analysis of this claim here, having thoroughly discussed the matter in the June 18th Decision and Order. The Court notes again that the June 18th Decision and Order fully acknowledged and considered the fact that the state court proceedings were dismissed on standing grounds, and nevertheless concluded that collateral estoppel applied. Plaintiffs' disagreement with that conclusion is simply not a basis to reopen this matter or to disturb the Judgment. See United Airlines, Inc. v. Brien, 588 F.3d 158, 177 (2d Cir. 2009) ("The agency's grounds for the Rule 60(b)(6) motion - which essentially boil down to a claim that the decision was wrong - are not sufficiently extraordinary to justify reopening a closed case....").

III. Conclusion

For the reasons set forth above, Plaintiffs' motions to vacate the June 18th Decision and Order and the Judgment (Docket Nos. 2829) are denied.

ALL OF THE ABOVE IS SO ORDERED.

s/Michael A. Telesca

MICHAEL A. TELESCA United States District Judge

Dated: August 6, 2018
Rochester, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMENDED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of February, two thousand twenty.

PRESENT:

RALPH K. WINTER,
JOHN M. WALKER, JR.,
SUSAN L. CARNEY,
Circuit Judges.

David R. Morabito and Colette M.G. Morabito,

Plaintiffs-Appellants,

v. **No. 18-2499**

The State of New York, The State of New York Department of Environmental Conservation, and Basil Seggos, Acting Commissioner, New York State Department of Environmental Conservation,

Defendants-Appellees.

FOR PLAINTIFFS-APPELLANTS: David R. Morabito, Colette M.G. Morabito, pro se, East Rochester, NY.

FOR DEFENDANTS-APPELLEES: Claiborne E. Walthall, Assistant Attorney General, Susan L. Taylor, Assistant Attorney General, Frederick A. Brodie, Assistant Solicitor General, Jeffrey W. Lang, Deputy Solicitor General, Barbara D. Underwood, Solicitor General, *for* Letitia James, Attorney General of the State of NY, Albany, NY.

Appeal from a judgment of the United States District Court for the Western District of New York (Telesca, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND

DECREED that the judgment of the district court dated June 19, 2018, and order dated August 7, 2018, are **AFFIRMED**.

Appellants David Morabito (an attorney) and Colette Morabito, proceeding pro se,[1] appeal the district court's judgment dismissing their 42 U.S.C. § 1983 complaint and post-judgment order denying their motion to vacate the judgment. The Morabitos sued the State of New York, the New York State Department of Environmental Conservation ("DEC"), and Basil Seggos in his official capacity (as Commissioner of the DEC), claiming that New York's regulation banning high-volume hydraulic fracturing ("HVHF") violated the Takings and Due Process clauses of the Constitution. After defendants moved to dismiss the complaint as barred by Eleventh Amendment immunity, the Morabitos moved to amend. Their proposed amended complaint attempted to circumvent Eleventh Amendment immunity by suing Seggos in his individual (rather

[1] Although it is well-settled that "a court is ordinarily obligated to afford special solicitude to *pro se* litigants" based on "[t]he rationale . . . that a *pro se* litigant generally lacks both legal training and experience," "a lawyer representing himself ordinarily receives no such solicitude at all." *Tracy v. Freshwater*, 623 F.3d 90, 101-02 (2d Cir. 2010). Because David Morabito is a licensed attorney, the Morabitos are not entitled to the "special solicitude" afforded to the typical pro se litigant. C-2

than official) capacity and by seeking injunctive relief under § 1983, in addition to damages. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision to affirm.

I. Dismissal

We review de novo a judgment of dismissal entered under either Federal Rules of Civil Procedure 12(b)(1) or 12(b)(6).[2] *See Washington v. Barr*, 925 F.3d 109, 113 (2d Cir. 2019). In considering whether a governmental entity is entitled to Eleventh Amendment immunity, we review a district court's factual findings for clear error and its legal conclusions de novo. *See Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 134 (2d Cir. 2015).

"The Eleventh Amendment generally bars suits in federal court by private individuals against non-consenting states." *Id.* The Eleventh Amendment also bars damages claims brought against state agencies and individual state defendants in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (state officials in their official capacities); *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009) (per curiam) (state agencies). It is well settled that § 1983 does not override Eleventh Amendment immunity. *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990). The district court thus correctly held that the Eleventh Amendment barred the Morabitos' § 1983 suit against New York (a state), the DEC (a state agency), and Seggos (a state official) in his official capacity. Although, as discussed below, the Morabitos also challenge th

[2] Although the district court characterized its dismissal as falling under Rule 12(b)(6), it is more appropriately characterized as a dismissal under Rule 12(b)(1), as it was based on sovereign immunity. *See Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990) (explaining the federal courts "lack jurisdiction" over § 1983 claims that are barred by Eleventh Amendment immunity (internal quotation marks omitted)).

district court's holdings dismissing their claims against Seggos in his individual capacity and their request for injunctive relief, they do not challenge the district court's core holding barring their other claims under the Eleventh Amendment.

II. Proposed Amendments

We generally review a district court's denial of leave to amend a complaint for abuse of discretion. *See Grochowski v. Phx. Constr.*, 318 F.3d 80, 86 (2d Cir. 2003). If a district court denies leave to amend because the proposed amended complaint does not state a claim upon which relief can be granted, however, our review is de novo. *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185–86 (2d Cir. 2012). "While generally leave to amend should be freely granted, it may be denied when there is a good reason to do so, such as futility, bad faith, or undue delay." *Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002) (internal citation omitted). The district court correctly held that the Morabitos' motion to add claims against Seggos in his individual capacity and to seek injunctive relief were attempts to circumvent Eleventh Amendment immunity and therefore that amendment was futile.

First, the district court correctly held that the Morabitos failed to state a claim against Seggos in his individual capacity under § 1983. "It is well settled that, in order to establish a defendant's individual liability in a suit brought under § 1983, a plaintiff must show, *inter alia*, the defendant's personal involvement in the alleged constitutional deprivation." *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013). As the district court observed, the Morabitos failed to allege any personal involvement of Seggos in their alleged constitutional deprivation. They argue, however, that Seggos is personally involved in the deprivation because, as the present Commissioner, he is the only person who could modify or abolish the regulation. Although that

argument may be sufficient to sustain a claim for prospective relief (theirs fails for a different reason, discussed below), it is insufficient to sustain a § 1983 damages claim for *past* alleged constitutional deprivations that occurred on the watch of a different official. The Morabitos did not make *any* allegations that Seggos had any personal involvement in the creation or enforcement of the operative regulation. *Cf. Farrell v. Burke*, 449 F.3d 470, 484 (2d Cir. 2006) (holding that, where a prior official imposed an allegedly unconstitutional special condition of parole, an allegation that another official not only continued that condition but actively enforced it by arresting the plaintiff was sufficient to show personal involvement). Nor—to all appearances— could they, since he assumed the commissioner's position only after the regulation was adopted.

Second, we see no error in the district court's ruling that the Morabitos' motion to add a request for injunctive relief (as opposed to damages under § 1983) was only a futile attempt to avoid the Eleventh Amendment bar. If a complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective," the Eleventh Amendment does not bar the proceeding against a state. *See Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002); *see also In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007) ("[A] plaintiff may sue a state official acting in his official capacity—notwithstanding the Eleventh Amendment—for prospective injunctive relief from violations of federal law." (internal quotation marks omitted)). But as the district court ruled, the Morabitos' claim for injunctive relief was precluded by collateral estoppel. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must abide by New York state court judgments, using New York case law to determine the effect of those judgments. *See Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 93 (2d Cir. 2005). "The doctrine of collateral estoppel precludes a party from relitigating an issue which has previously

been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985) (internal quotation marks and citations omitted). Collateral estoppel applies when "the identical issue necessarily . . . [was] decided in the prior action and [is] decisive of the present action, and . . . the party to be precluded from relitigating the issue . . . had a full and fair opportunity to contest the prior determination." *Id.*; *see also Vargas v. City of New York*, 377 F.3d 200, 205–06 (2d Cir. 2004).

In an Article 78 proceeding that he pursued in May 2015 in state court, David Morabito urged that the state's HVHF ban was unconstitutional. This is the same argument underlying his proposed request for injunctive relief in the present action.[3] The New York courts held that David Morabito lacked standing to challenge the constitutionality of the regulation because he did not demonstrate his own actual or imminent injury-in-fact. *Matter of Morabito v. Martens*, Dkt. No. 01-15-ST6838 (N.Y. Sup. Ct. 2016), *aff'd*, 149 A.D.3d 1316, 1316–17 (N.Y. App. Div. 3d Dep't 2017), *leave to appeal denied*, 29 N.Y.3d 916 (2017). The standing issue was fully and fairly litigated in the state courts and was necessary to the courts' decisions. Indeed, it was the sole holding of those courts. *See Morabito*, 149 A.D.3d at 1317. Further, the Second Circuit has previously applied collateral estoppel to preclude parties from re-litigating issues of standing that were already decided in New York state court. *See Mrazek v. Suffolk Cty. Bd. of Elections*, 630 F.2d 890, 896 n.10 (2d Cir. 1980) (holding that, where the New York courts had decided the issue of standing, that decision was binding on the federal courts). Thus, the district court owed full

[3] As the district court found, Colette Morabito is in privity with her husband David Morabito for the purpose of collateral estoppel, and is therefore bound by our collateral estoppel ruling against him. On appeal, the Morabitos do not challenge that finding.

faith and credit to the state courts' standing holding and correctly applied collateral estoppel to bar the Morabitos' renewed claim for injunctive relief.

The Morabitos argue that collateral estoppel cannot apply in the federal action because the state courts never decided the merits of their constitutional claims. This argument falls short. It appears to confuse the doctrine of collateral estoppel (issue preclusion) with that of res judicata (claim preclusion); collateral estoppel asks only if the *issue* (here, standing) was necessarily decided and does not require the prior court to have determined the merits of the *claims*. *Compare Kaufman*, 65 N.Y.2d at 455 ("[C]ollateral estoppel precludes a party from relitigating an *issue* which has previously been decided against him[.]" (emphasis added) (internal quotation marks omitted)), *with Matter of Josey v. Goord*, 9 N.Y.3d 386, 389 (2007) ("The doctrine of res judicata precludes a party from litigating a *claim* where a judgment *on the merits* exists from a prior action between the same parties involving the same subject matter." (emphasis added) (internal quotation marks and citation omitted)). Thus, the district court was bound to apply the state court ruling that the Morabitos did not have standing to seek injunctive relief.

The Morabitos also argue that the state courts' standing determination was incorrect because it was based on their failure to apply for an HVHF permit for use on their property. This argument, however, misconstrues the state court holdings. Those courts ruled that the Morabitos lacked standing because they had not demonstrated an injury-in-fact for several reasons. These included but were not limited to their failure to seek a permit. *Morabito*, 149 A.D.3d at 1317 ("[P]etitioner had not applied for a permit nor offered any proof that he met any of the requirements to obtain a permit. He offered no proof of any plans to move forward with the process and conceded that any plans would necessarily involve commitments by oil and gas exploration

companies, of which he had none."). In any event, the Full Faith and Credit Clause precludes this Court from reexamining the state courts' standing determination, and the district court did not err in concluding that it must give the decision binding effect. *See Hoblock*, 422 F.3d at 93.

Finally, the Morabitos argue that, because they were required—under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194–96 (1985)— to first exhaust remedies in state court before bringing a Takings Clause claim in federal court, the federal court should not apply collateral estoppel to state court rulings on their claims. We are not persuaded. The Morabitos are correct that the Supreme Court recently overturned the portion of its *Williamson* decision that required exhaustion of remedies in state court. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019) (holding, in contrast to *Williamson*, that a plaintiff asserting a Takings Clause claim need not seek relief in state courts before bringing a claim in federal court). That argument is inapposite, however, because the district court did not dismiss their claims for failure to exhaust state remedies (as in *Knick*); ultimately, whatever the reason they did so, the fact is that the Morabitos brought their claims in state court, where they lost. The district court was required by federal law to apply collateral estoppel to issues decided in those proceedings.

III. Rule 59 and 60 Motions

Finally, the district court did not abuse its discretion in denying the Morabitos' motion under Federal Rules of Civil Procedure 59 and 60 for vacatur of the judgment. *See Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 150 (2d Cir. 2008) (Rule 59(e) motion); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998) (Rule 60(b) motion). "[R]econsideration [of a judgment] will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked. . . ." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Reconsideration is not warranted where the party seeks "solely to relitigate . . . issue[s] already decided," *id.*, and reconsideration motions are "a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional

circumstances," *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (internal quotation marks omitted). The Morabitos adduced no new data and pointed to no intervening decisions that the court overlooked in rendering its first decision. Therefore, we affirm the district court's order for substantially the same reasons as were stated by the district court in its thorough Order of August 7, 2018.

We have considered all of the Morabitos' remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the judgment and post-judgment order of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES SUPREME COURT

DAVID R. MORABITO and COLETTE M.G MORABITO,

Petitioners,

v.

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and BASIL SEGGOS, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Respondents

CERTIFICATE OF SERVICE

I certify that on the 19th Day of May, 2020, I served three (3) copies of the Petition for Writ of Certiorari upon: Barbara D. Underwood, Esq., Solicitor Generals Office at New York State Attorney Generals Office, The Capitol, Albany, NY 12224, (518-776-2380) by depositing a true copy of the same enclosed in a post-paid, properly addressed wrapper, in a Post Office depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ David R. Morabito
David R. Morabito, Esq.