No. 19-1319

IN THE
Supreme Court of the United States

DAVID R. MORABITO, et ux.
Petitioners,

v.

NEW YORK, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, who allege that a New York regulatory prohibition violated their rights under the Takings and Due Process Clauses by precluding them from extracting oil and natural gas from their property by high-volume hydraulic fracturing, are barred from pursuing their claims by multiple threshold deficiencies, including the Eleventh Amendment and the collateral estoppel effect of a prior state court judgment.

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STATEMENT OF THE CASE

Petitioners David and Colette Morabito seek to challenge New York's 2015 ban on high-volume hydraulic fracturing (HVHF), a method to stimulate the production of oil and natural gas wells. However, petitioners never applied to the New York State Department of Environmental Conservation (DEC) for a permit to drill oil or gas wells on their property. Consequently, when petitioner David Morabito challenged the HVHF ban in state court, his lawsuit was dismissed for lack of standing because he failed to demonstrate concrete injury from the HVHF ban.

Following the dismissal of the state action, petitioners sued in federal court, still without having applied for a permit. The United States District Court for the Western District of New York (Telesca, J.) granted respondents' motion to dismiss, denied as futile petitioners' request to amend, and later denied motions for vacatur and reconsideration. The United States Court of Appeals for the Second Circuit (Winter, Walker, and Carney, JJ.) affirmed.

The Second Circuit's decision relied upon basic legal principles as to which there is no dispute. The Eleventh Amendment required the Second Circuit to dismiss any claims for money damages against the State. The Full Faith and Credit Act, 28 U.S.C. § 1738, required the federal courts to credit the state-court ruling that petitioners lacked standing, which resulted in dismissal or denial of leave to amend as to all remaining claims. Those fundamental barriers to recovery preclude this Court from reaching the substantive points that petitioners ask it to review.

A. Statutory and Regulatory Background

1. Regulation and permitting of oil and gas drilling in New York State

For decades, drilling for oil and gas has been regulated under article 23 of New York's Environmental Conservation Law (ECL) and required a permit from DEC. ECL § 23-0305(8)(d); 6 N.Y.C.R.R. pts. 551-553. Applicants for a permit to drill an oil or gas well must pay a permit fee, submit to DEC a variety of reports, and post financial security. *See* ECL §§ 23-0501(2), 23-1903; 6 N.Y.C.R.R. §§ 551.1, 551.4-551.6, 552.1, 553.1, 553.3.

In addition to its jurisdiction to grant or deny permits, DEC also reviews the potential environmental impacts of well-drilling proposals pursuant to the State Environmental Quality Review Act. ECL art. 8; 6 N.Y.C.R.R. pt. 617.

2. After extensive review, New York prohibits HVHF

HVHF is a well-stimulation technique used to extract natural gas from rock. New York State studied the environmental impact HVHF for a number of years, In September 2009, pursuant to New York's State Environmental Quality Review Act DEC issued a draft supplemental generic impact statement (SGEIS) related to the potential future enactment of regulations associated with HVHF. (Pet. App. A3.)

In 2010, then-Governor David Paterson issued an executive order prohibiting DEC from issuing permits for HVHF pending the completion of the SGEIS. 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. DEC issued a revised draft SGEIS on September 7, 2011. DEC held additional public hearings following issuance of the revised draft SGEIS and received another 67,000 public comments. (Pet. App. A3.)

In 2012, former DEC Commissioner Joseph Martens asked the Commissioner of the New York Department of Health to review and assess the potential health impacts set forth in the SGEIS. The Health Department 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 Health Department released a report recommending that HVHF not proceed in New York State.[1] (Pet. App. A3-4.)

In June 2015, DEC issued its final SGEIS relating to HVHF, as well as a legally binding Findings Statement.[2] The final SGEIS and Findings Statement concluded that a prohibition on HVHF was the best

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[1] See N.Y. State Dep't of Health (DOH), *A Public Health Review of High-Volume Hydraulic Fracturing for Shale Gas Development* (Dec. 2014), *in* N.Y. State Dep't of Envtl. Conserv., *Final Supplemental Generic Environmental Impact Statement on the Oil, Gas & Solution Mining Regulatory Program*, vol. 2, *Appendices to Response to Comments*, app. A (Apr. 2015) (internet).

[2] *See* N.Y. State Dep't of Envtl. Conserv., *Final Supplemental Generic Environmental Impact Statement on the Oil, Gas & Solution Mining Regulatory Program*, vol. 2, *Response to Comments*, RTC-297–304 (Apr. 2015); DOH, *A Public Health Review*, *supra*, note 1.

available alternative to balance environmental protection, public health concerns, and economic and social considerations. (Pet. App. A4.)

B. State Administrative and Court Proceedings

Petitioners never applied for a permit to drill for oil or gas on any property. Indeed, prior to litigation, petitioners did not even disclose to DEC the specific location of their properties.

Because petitioners did not apply for a permit, DEC neither granted nor denied any permit. DEC made no determination regarding any resource extraction activity on any specific property owned by petitioners. Petitioners acknowledged in their brief to the Second Circuit that they could potentially extract oil and gas on their property using methods other than HVHF. (Appellants' Br. 28, CA2 ECF #131.)

In May 2015, before DEC had issued its regulatory prohibition against HVHF, Mr. Morabito sued DEC's then-Commissioner Martens and a subordinate official in New York state court to challenge the policy. Mr. Morabito asserted that DEC's correspondence in December 2014 and January 2015 had applied the ban to him. He sought to overturn the prohibition as arbitrary and capricious. He further asserted that it effected an unconstitutional taking and violated his substantive due process rights. (Pet. App. A4.)

The state court dismissed the proceeding for lack of standing. (Pet. App. A4.) Among other things, the court held that Mr. Morabito had not suffered any injury: he had not applied for any permit and his plans for contracts with oil and gas companies were speculative. An intermediate state appellate court

affirmed the dismissal, and the New York State Court of Appeals denied leave to appeal. (Pet. App. A5.) *See Morabito v. Martens*, 149 A.D.3d 1316, 53 N.Y.S.3d 213 (3d Dep't 2017), *lv. denied*, 29 N.Y.3d 916, 86 N.E.3d 558 (2017).

C. Proceedings Below

In December 2017, petitioners commenced this action pro se[3] in the United States District Court for the Western District of New York. (Pet. App. A5.) The complaint asserted two causes of action against the State, DEC, and Commissioner Seggos in his official capacity: a regulatory takings claim and a substantive due process claim. (Pet. App. A1.) Petitioners sought compensation for the alleged taking and damages for the alleged due process violation. Respondents moved to dismiss. (Pet. App. A1, B1.)

Petitioners cross-moved to amend their complaint. (Pet. App. A1-2, B1.) Among other things, petitioners asserted in their cross-motion that the proposed amended complaint would have (1) added information about properties owned by petitioners (without including any information about applications for oil or gas drilling permits for those properties); (2) asserted claims against Commissioner Seggos[4] in his individual capacity (without alleging any actions that Seggos took personally with respect to the HVHF prohibition); and (3) added a request for prospective injunctive relief based on asserted continuing violations. Petitioners acknowledge that their proposed amendments "did not alter the general allegations in

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[3] Petitioner David Morabito is an attorney.

[4] The caption incorrectly identified Seggos as Acting Commissioner.

the two causes of action set forth in the original Complaint." (Pet. 33.)

The district court granted the State's motion to dismiss the complaint and denied petitioners' motion to amend. (Pet. App. A1-15.) The court held that the Eleventh Amendment barred petitioners' claims for compensation and damages against the State, its department, and Commissioner Seggos in his official capacity. (Pet. App. A6-8.) The court also examined petitioners' proposed amendments and concluded they would be futile. (Pet. App. A9.) Because petitioners alleged no personal involvement by the Commissioner, the district court held that they had not stated a claim against him individually. (Pet. App. A10.) The court further ruled that petitioners had not stated a plausible claim for injunctive relief. (Pet. App. A10-14.) And the court held that the state court judgment dismissing Mr. Morabito's challenge to the HVHF prohibition for lack of standing collaterally estopped petitioners[5] from relitigating this issue. (Pet. App. A11-14.)

The district court entered judgment on June 19, 2018. (Pet. App. B2.) Petitioners subsequently moved twice to vacate the judgment (*see* Pet. App. B2), and the district court denied both motions (Pet. App. B2, B7).

Petitioners appealed to the United States Court of Appeals for the Second Circuit. In an unpublished summary order dated February 27, 2020, the Second Circuit affirmed the district court's judgment. (Pet.

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[5] Petitioners do not dispute that, for purposes of this lawsuit, Mrs. Morabito is in privity with Mr. Morabito. (*See* Pet. App. C6 n.3.)

App. C1-9.) The Second Circuit agreed that the Eleventh Amendment barred petitioners' claims for damages and observed that petitioners had not challenged that holding on appeal. (Pet. App. C3-4.) The court further held that the district court correctly denied leave to amend the complaint. Because Commissioner Seggos was not involved in creating the HVHF ban or enforcing it against petitioners, asserting a personal claim against him would have been futile. (Pet. App. C4-5). Petitioners' proposed request for prospective injunctive relief was barred by the state court's holding that they lacked standing, which had collateral estoppel effect. (Pet. App. C5-8.)

Petitioners did not seek panel rehearing or en banc review.

REASONS FOR DENYING THE PETITION

I. MULTIPLE THRESHOLD DEFICIENCIES BAR THIS COURT'S CONSIDERATION OF THE QUESTIONS PETITIONERS SEEK TO RAISE.

Although petitioners purport to raise five questions in their petition, multiple threshold deficiencies bar this Court's consideration of those questions.

First, petitioners' questions one, two, and four all challenge a New York law that restricts the authorization of HVHF permits, but that law was not in effect when the events in this case occurred. (Pet. i, 14, 20, 30.) *See* 2020 N.Y. Laws, ch. 58, pt. WW.[6] The law, enacted April 3, 2020, was neither briefed nor considered in the district court's 2018 decisions or the Second Circuit's February 27, 2020 summary order.

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[6] Petitioners incorrectly cite the law as chapter 59.

Petitioners ask this Court to examine the validity of the newly-enacted April 2020 statute as a matter of first impression. (*See* Pet. x, 7.) The Court should decline the invitation. The State has had no opportunity to make a record in defense of the statute. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The lower courts have had no opportunity to construe the law on a properly compiled record. And this case—which concerns events that occurred before the law's enactment—affords no opportunity for considering the new law's constitutionality.

Second, petitioners' question four asserts a claim under the Commerce Clause that is unpreserved. (Pet. i, 30-32.) As petitioners acknowledged to the Second Circuit (CA2 ECF #131 at 93), they did not assert such a claim in the district court. This Court therefore should not consider the claim. *See Wood v. Milyard,* 566 U.S. 463, 473 (2012); *Singleton,* 428 U.S. at 121.

Third, to the extent petitioners purport to challenge New York's regulatory prohibition on HVHF as part of question five, they lack standing to challenge this prohibition and are barred by collateral estoppel from relitigating that issue. Petitioners did not apply for a drilling permit from DEC, nor did they show they had met any of the requirements for such a permit, obtained commitments from oil and gas exploration companies, or planned to move forward with the permitting process. Mr. Morabito's standing thus was "no different than that of any landowner in the state." *Morabito*, 144 A.D.3d at 1317. For that reason, the New York state courts held that Mr. Morabito lacked standing to challenge the regulatory prohibition against HVHF. *Id.*

The Second Circuit properly gave full faith and credit to the state courts' ruling on standing and held that petitioners were collaterally estopped from asserting their standing to bring similar claims in federal court. (Pet. App. C5-8; *see also* Pet. App. A11-14, B4-5.) Because the state-court judgment precludes petitioners from relitigating the issue of standing, a grant of certiorari would not enable this Court to address the substantive issues they seek to assert.

Fourth, petitioners never applied for a permit, depriving this Court of an administrative record. This failure, by itself, would make a grant of certiorari improvident. Because petitioners ignored the permitting process, the State was unable to make a record at the administrative level. Without an administrative record, the Court cannot know whether the HVHF restrictions actually deprived plaintiffs of a property interest as claimed. For example, petitioners' land could be environmentally unsuitable for oil and gas extraction, or petitioners might be unable to post the security required for a well-drilling permit.

II. THE DECISION BELOW DOES NOT CONFLICT WITH A PRIOR DECISION OF THIS COURT OR PRESENT AN ISSUE ON WHICH THE CIRCUITS ARE DIVIDED.

Even if the merits of petitioners' claims concerning New York's regulatory prohibition on HVHF were properly before the Court, petitioners offer no reason for this Court to review those claims.

Although petitioners argued that the decision below conflicts with a prior decision of this Court, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (Pet. 25-30), no such conflict exists. In *Knick,* this Court

held that plaintiffs need not exhaust remedies in state court prior to suing under the Takings Clause in federal court. *Id.* at 2169, 2179. But as the Second Circuit observed, petitioners' takings claims were not dismissed for failure to exhaust state remedies. (*See* Pet. App. C8.) Rather, the lower courts properly applied collateral estoppel to a valid state-court judgment holding that petitioners lacked standing to assert a takings claim based on DEC's prohibition against HVHF, among other reasons because they had not applied for a permit and their plans for contracts with oil and gas companies were speculative. As the Second Circuit recognized (Pet. App. C8), the fact that claimants no longer need to exhaust state remedies does not rob existing state-court judgments of the full faith and credit accorded to them by statute. *See* 28 U.S.C. § 1738.

Nor do petitioners identify a conflict among the federal circuits on any issue decided by the court of appeals or the district court in this case. Indeed, petitioners inform the Court that this is the *only* lawsuit in any state or federal court to challenge the fracking restrictions (Pet. 4) and claim their properties "are in a unique situation" (Pet. 40). Thus, a decision by this Court would not resolve any judicial conflict and might have no effect beyond this case.

III. THE DECISION BELOW CORRECTLY APPLIED THE ELEVENTH AMENDMENT AND RELATED LAW TO BAR PETITIONERS' CLAIMS.

There is no need to review the decision below because the Second Circuit correctly held that petitioners could not proceed against respondents based on the Eleventh Amendment and related legal

doctrines (*see* Pet. App. C3-4; *see also* Pet. App. A6-8, B5-6), the validity of which is not in dispute.

First, petitioner cannot proceed against defendants under the federal civil rights statute, 42 U.S.C. § 1983, because that statute does not apply to States, their agencies, or the officers of those agencies acting in their official capacities, none of which are "persons" subject to liability for damages under the statute. *See Hafer v. Melo*, 502 U.S. 21, 26 (1991); *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 70-71 (1989).

Second, petitioner's recovery is barred by the Eleventh Amendment, which precludes suits for damages against the State of New York by its own citizens. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Hans v. Louisiana,* 134 U.S. 1, 21 (1890). The Eleventh Amendment likewise protects Commissioner Seggos, in his official capacity, from claims for damages. *See Edelman v. Jordan*, 415 U.S. 651, 663, 677 (1974).

Third, petitioners had no basis to amend their allegations against Commissioner Seggos to change the phrase "official capacity" to "individual capacity" or "private capacity." (*See* Pet. 36.) Seggos did not become DEC's Commissioner until October 2015, months *after* June 29, 2015, when the HVHF ban became effective.[7] The correspondence on which petitioners' claims rest predates Seggos's tenure and was directed to former Commissioner Martens. (*See* Pet. App. A9-10, B5-6, C4-5.) Because a government official "is only liable for his or her own misconduct," *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009), Seggos

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[7] *See* N.Y. State Dep't of Envtl. Conserv., *Present and Past DEC Commissioners* (internet).

cannot be sued personally for Martens' official actions. (*See* Pet. App. C4-5.)

Finally, petitioners lacked standing to maintain a claim for prospective injunctive relief (*see* Pet. 37-38) and are collaterally estopped from challenging that conclusion for the reasons set forth by the Second Circuit. (See Pet. App. C5-8.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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