No. 19-1319

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID R. MORABITO and COLETTE M.G. MORABITO

Petitioners,

vs

NEW YORK, et al.,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Prior to addressing the three (3) Points in the Brief In Opposition, it is necessary to make a few comments in regard to the inaccurate assessment set forth in the Respondents' Statement of the Case. Respondents allege that "unconventional" High Volume Hydro-Fracturing (HVHF) was extensively reviewed by the Respondents New York State Department of Environmental Conservation (DEC) and the New York State Department of Health (DOH) before being prohibited due to its potentially significant adverse effects on public health and the environment. Respondents state "the final SGEIS and Findings Statement concluded that a prohibition of HVHF was the best available alternative to balance environmental protection, public health concerns, and economic and social considerations."

This statement is inaccurate and distorts the true facts and circumstances of HVHF in the State of New York (NYS). The Respondents conducted their own exhaustive studies and analyzed, critiqued, and deciphered other studies. Pursuant to Respondents' own studies, they proposed extensive rules and regulations to preserve the needed conversation practices of soil, water, and air quality. Respondents' own study of the Revised Draft Supplemental Generic Environmental Impact Statement (Revised dSGEIS) consisted of approximately 1,537 pages with a bibliography of approximately 1,200 studies and reports determining that HVHF is a viable and safe means to extract natural gas in NYS.

To show how extensive the study was, the Revised dSGEIS, which this case

is based upon, was prepared by the following Respondents' Divisions and Departments: Division of Water; Division of Air Resources; Division of Lands and Forests; Division of Fish, Wildlife and Marine Resources; Division of Mineral Resources; New York State Energy and Research Development Authority; Department of Health (DOH); DOH Bureau of Water Supply Protection; DOH Bureau of Toxic Substance Assessment; DOH Bureau of Environmental Radiation Protection; Office of Climate Change; Division of Materials Management; Division of Environmental Permits; and Division of Environmental Remediation.

The hereinstated study specifically stated that HVHF can safely extract natural gas and result in substantial economic benefits. The study determined that if this important energy source (natural gas) was not harvested, it would be contrary to NYS and national interests. It would also contravene Article 23-0301 of the Environmental Conservation Law (ECL), which stated:

"That it is hereby declared to be in the public interest to regulate development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be protected…" Revised dSGEIS 9-2/9-3

The Revised dSGEIS specifically stated that in NYS, the Marcellus Shale is located in much of the Southern Tier. This shale deposit is now considered the

largest known shale deposit in the world. Additionally, the NYS Energy Plan recognized the potential benefit from development of the Marcellus Shale natural gas resource:

"Production and use of in-state energy resources-renewable resources and natural gas-can increase the reliability and security of our energy systems, reduce energy cost, and contribute to meeting climate change, public health and environmental objectives. Additionally, by focusing energy investments on in-state opportunities, New York can reduce the amount of dollars "exported" out of the state to pay for energy resources." Revised dSGEIS 9-2

The NYS Commission on Asset Maximization reported in the Revised draft SGEIS at 9-3, that an increase in natural gas supplies would place downward pressure on natural gas prices, improve system reliability and result in lower energy cost for New Yorkers. In addition, natural gas exploration would create jobs and increase wealth to Upstate landowners and increase state revenue from taxes and land-owner leases and royalties. HVHF would provide "much needed revenue relief to the State and spur economic development and job creation in economically depressed regions of the State." The Revised dSGEIS stated that HVHF would also be a clean green energy source. This report encouraged HVHF and denial of "unconventional" extraction of natural gas would have adverse impacts to the NYS. Further, the Revised draft SGEIS specifically determined that any adverse impacts could be readily mitigated.

Continuing, it was the specious "study" of the DOH that the Respondents,

in its Final SGEIS, determined that HVHF should be banned and eventually outlawed. As was previously argued by the Petitioners, the DOH study was not based on any findings that HVHF was dangerous to the public health and environment. In fact, the DOH did not have any studies that established that HVHF was "dangerous". As repeatedly stated, the permanent ban and law on HVHF was not based on science, technology, research, or geology.

It is interesting to note that the Empire State has contradicted the studies and research of thirty-eight (38) other states (including California) and the Obama/Trump Administrations. Every state that has natural gas exploration is using the modern "unconventional" HVHF technology to extract its resources and has brought the United States out of its dependency as a nation on oil and gas production.

Further, HVHF is principally the only means to commercially extract natural gas and as previously admitted by Respondents, the only method banned by the NYS. As stated in detail by Petitioners, "unconventional" HVHF is the only generally accepted means to extract natural gas in the United States and the world. "Conventional" fracking, which is allowed in NYS, is not economically or environmentally viable as a means of gas production. Gas exploration companies have not commenced any serious production in the NYS. The most readily and apparent observation, even though the Respondents have previously stated there are other techniques available, is the fact that "conventional fracking" in NYS is obsolete, unproductive, economically not

viable and will have a negative environmental impact.

The Revised draft SGEIS estimated that there could be anywhere from 1,700 to 2,500 wells for HVHF in the Marcellus shale play per year over the next 30 years. This report further stated that the natural gas market is critical to the State of New York as over 95% of natural gas used in New York State is from other states and Canada. This clearly establishes issues of interstate commerce that should be addressed in the interest of justice and fairness.

POINT 1

2020 LAWS OF NEW YORK CHAPTER 58

Petitioners, in state court, commenced the lawsuits approximately five (5) years ago originally addressing the HVHF regulatory ban was arbitrary, capricious and violated their rights under the Constitutions of the United States and New York State. Thereafter, Petitioners commenced the lawsuit(s) in district court addressing that the HVHF ban was a regulatory Taking in violation of the Fifth and Fourteenth Amendments and a violation of Due Process under the 4th and 14th Amendments-all in violation of 42 USC § 1983.

While the Writ of Certiorari was being prepared, on or about April 3, 2020, the Governor of NYS signed into law a permanent ban on HVHF (2020 Laws of New York, Chapter 58) by incorporating said provisions in the NYS Budget. Whether addressing a regulatory ban or a law, the Petitioners have had their constitutional rights stripped away by the Respondents who argue that they have "had no opportunity to make a record in defense of the statute."

Respectfully, this is a meritless argument.

The NYS law has invalidated any rational claim related to Respondent's position on standing. NYS has absolutely and unconditionally taken Petitioners' mineral resources (natural gas) by a permanent law. Now, NYS has engaged in an outright Taking of Petitioners' property rights in violation of the United States Constitution. All the previous lower courts findings related to standing should be set aside as a result of the NYS law. It is now illegal for Petitioners to attempt to obtain a permit or to commence the permit process to extract natural gas by HVHF.

POINT 2

STANDING

Respondents have repeatedly argued that Petitioners did not have standing. The lower courts have accepted this unjust position. Petitioners did not apply for a permit because Respondents told them they could not apply for a permit. The "standing" argument, raised by the Respondents, respectfully, is a complete distortion of the facts. To allege that Petitioners are at fault because they did not build an "administrative record" is fundamentally unjust and resulted in a miscarriage of justice. Petitioners have attended conferences, classes, seminars, symposiums, spoke to Respondents and other state/federal agencies and departments, attorneys, land leasing agents, foresters, representatives from oil and gas companies, and communicated with approximately 50 oil and gas companies that were poised to start gas

production once the temporary ban to conduct HVHF was lifted. The Respondents have repeatedly raised false allegations to all courts, including this Court, that it is the fault of Petitioners that they do not have standing.

The simple fact is there was a temporary and permanent ban for at least the past ten years on all HVHF in the NYS. The Respondents have previously admitted that it was not possible to conduct HVHF because it was banned. Further, they admitted that no entity or individual could commence the permit process because of the ban. The Respondents specifically advised Petitioners that they, or any entity, could not apply for a permit or be allowed to commence the permit process related to HVHF. To continue the argument that Petitioners failed to establish standing is meritless and a complete miscarriage of justice.

POINT 3

THE DECISIONS BELOW CONFLICT WITH A PRIOR DECISION OF THIS COURT AND SHOULD NOT HAVE BEEN DISMISSED BY COLLATERAL ESTOPPEL, RES JUDICATA, OR BEEN BARRED BY THE FULL FAITH AND CREDIT ACT

The lower court(s) established a conflict with a prior decision of this Court in Knick v. Township of Scott, 139 S.Ct. 2162 (2019) as Petitioners were required to follow the dictates of the ripeness doctrine set out in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 US 172 (1985).*

The Court held that the unanticipated consequences of the *Williamson*

County decision was that a takings plaintiff who complied with *Williamson County* and brought a claim in state court would-on proceeding to federal court after the unsuccessful state claim-have the federal claim barred because of the full faith and credit statute that required a federal court to give preclusion effect to the state court's decision. This issue was exactly on point with the Petitioner's appeal. The lower courts dismissed Petitioners' causes of actions because of collateral estoppel, issue preclusion, res judicata, and application of the Full Faith and Credit Act 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 Amendment, Fifth Amendment and Fourteenth Amendments to the United States Constitution. Pursuant to the lower courts' 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.*

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. Petitioners, pursuant to the hereinstated rule, exhausted their state remedies in order to litigate the takings controversy in the district court.

The Court 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. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it...and therefore may bring his claim in federal court under §1983 at that time." *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 as said courts erroneously ruled that the Petitioners did not have standing. This issue has been addressed in multiple points in the lower courts. As a result of the *Williamson County* requirement, the lower courts ruled that Petitioners were precluded to file federal claims. The *Knick* opinion stated herein completely vindicates the position of Petitioners which establishes that the decision by the lower courts were wrong, faulty, and improper.

Petitioners are most respectfully requesting that this Court impose on the lower courts to follow the mandate of *Knick v. Township of Scott.*

POINT 4

THE LOWER COURTS INCORRECTLY BARRED THIS SUIT UNDER THE ELEVENTH AMENDMENT

Petitioners respectfully assert that the Respondents have violated their civil and constitutional rights guaranteed by 42 U.S.C. §1983. Further, Petitioner acknowledges that he incorrectly brought the suit against the Acting Commissioner Seggos in his "official" capacity though he 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 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 the State in Federal Court. Petitioner has commenced or is aware of prior actions against "state officials" under §1983 actions by using the following terms:

A. Under color of law;

B. Under color of law, personal capacity;

C. Under color of law, private capacity;

D. Under color of law, individual capacity; and

E. Under color of law, private and personal capacity.

Simply, in the case at bar, Petitioner incorrectly stated in 'official' capacity. As stated, Petitioner filed motions to amend the Complaint to correct the hereinstated oversight.

The Respondents have not 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.

Pursuant to the requested amendments of the Amended Complaint, the Respondent (Seggos) is not immune from suit under the Eleventh Amendment. 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." Petitioners also sought leave for injunctive relief to enjoin the Respondent(s) from enforcing an illegal ban on HVHF.

In the case at bar, the district court had the inherent authority and power to enjoin the Respondent(s) from continuing their illegal, unconstitutional, and improper ban on HVHF. Further, this Court has the authority to redress the injury imposed on Petitioners by the Respondents' ban on HVHF. Here, the Petitioners have been deprived of their rights under the United States Constitution and

federal laws. Moreover, Petitioners clarified in their Prayer for Relief that they seek both monetary and injunctive relief against the Respondents for violating federal law and the United States Constitution.

Finally, when Petitioners' commenced the action in the federal court, Respondent Acting Commissioner Seggos of the New York State DEC was substituted as a defendant. He was personally the individual, who at that time, had the authority to revoke, annul, cancel or "lift" the ban on HVHF anytime he chose. Respondents have stated that this lawsuit should have been brought against a retired commissioner. This position is not accurate as Seggos was the current commissioner or acting commissioner at that time and was responsible for the ban on HVHF. In any event, the Petitioners should have the right to amend the complaint in order to bring an action against the appropriate Respondents.

POINT 5

THE LOWER COURTS ABUSED THEIR DISCRETION IN DISMISSING PETITIONERS' CAUSES OF ACTION AS THE BAN ON HVHF IS A VIOLATION OF INTERSTATE COMMERCE

Though this argument was raised for the first time in the circuit court, Petitioners are respectfully asking the Court to address interstate commerce issues in the interest of justice and fairness.

As stated, the ban on HVHF in the State of New York has had an enormous impact on exploration, storage, disposal and transportation activities 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 demonstrably 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 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.

CONCLUSION

The Court should vacate the judgments below and remand for further proceedings.

Dated: August 24, 20202

Respectfully submitted,
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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners,

-against- 19-1319

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(g)(iii)

Pursuant to Rule 33.1(g)(iii), I certify that the Reply to Brief In Opposition contains 2,978 words, excluding the parts of the Reply 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 August 29, 2020.
/s/David R. Morabito
David R. Morabito