No. _____

In The
Supreme Court of the United States

COLUMBIAN FINANCIAL CORPORATION,

Petitioner,

v.

TIM KEMP, in his official capacity
as Bank Commissioner of Kansas;
Deputy Bank Commissioner of Kansas,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kansas state banking authorities closed Petitioner's bank and seized and quickly disposed of the bank's assets based on an interpretation of Kansas banking law never before applied in the over 100 year history of the statutes at issue. The state administrative officer gave Petitioner no notice that he intended to apply this novel interpretation. In the post-deprivation hearing (provided only after ordered by a court), this initial due process infirmity was compounded by the courts' refusal to allow Petitioner to conduct basic discovery – including the deposition of the sole state decisionmaker. In Petitioner's subsequent § 1983 lawsuit, the lower federal courts ratified these constitutional deprivations by giving the infected proceedings below preclusive effect through the doctrine of res judicata, a ruling at conflict with at least three other circuit courts of appeals decisions and decisions of this Court.

Against this backdrop, the Questions Presented are:

1) Whether Petitioner's due process rights were violated when the lower federal courts barred Petitioner's claim – alleging due process violations on account of the failure to afford Petitioner the basics of notice and an opportunity to be heard – by applying preclusive effect to the very proceedings in which the underlying due process infirmities occurred.

2) Whether the failure to provide notice of the governing legal standards and permit basic discovery in a post-deprivation hearing violates the Due Process Clause of the Fourteenth Amendment.

PARTIES AND CORPORATE DISCLOSURE STATEMENTS

Tim Kemp is the current Interim Bank Commissioner of Kansas and Deputy Bank Commissioner of Kansas and is named here in his official capacity. He is substituted for Michelle W. Bowman, whose commission has ended.

Pursuant to Supreme Court Rule 29.6, Petitioner Columbian Financial Corporation does not have a parent corporation, and no publicly held company or corporation owns ten percent or more of Columbian Financial Corporation's stock.

LIST OF RELATED PROCEEDINGS

Columbian Financial Corp. v. Bowman, No. 18-3121, Tenth Circuit Court of Appeals (April 12, 2019).

Columbian Financial Corp. v. Bowman, No. 14-2168-SAC, United States District Court for the District of Kansas (May 17, 2018).

Columbian Bank and Trust Co. and Columbian Financial Corp. v. Spilchal, No. 13-110256-A, Supreme Court of Kansas (June 29, 2015).

Columbian Bank and Trust Co. and Columbian Financial Corp. v. Spilchal, Nos. 110,256 & 110,257, Court of Appeals of the State of Kansas (July 25, 2014).

Columbian Bank and Trust Co. and Columbian Financial Corp. v. Spilchal, Nos. 08C1419 & 12C567, District Court of Shawnee County, Kansas (January 30, 2013).

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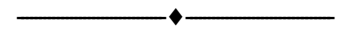
OPINIONS BELOW

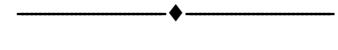
The Tenth Circuit's opinion, issued on April 12, 2019 is reported at *Columbian Financial Corporation v. Bowman*, 768 Fed.Appx. 847 (10th Cir. 2019), and is reprinted in the appendix at App. 1-App. 15.

The District of Kansas's opinion, issued on May 17, 2018, is reported at *Columbian Financial Corporation v. Bowman*, 314 F.Supp.3d 1113 (D. Kan. 2018), and is reprinted in the appendix at App. 16-App. 75.



JURISDICTION

The Tenth Circuit issued its opinion April 12, 2019. Petitioner sought and received an extension of time to file from August 5, 2019 to September 6, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, provides:

> . . . No state shall . . . deprive any person of life, liberty or property without due process of law. . . .

The Kansas Administrative Procedure Act, K.S.A. 77-536, provides:

> (a) A state agency may use emergency proceedings: (1) In a situation involving an immediate danger to the public health, safety or welfare requiring immediate state agency action or (2) as otherwise provided by law.
>
> (b) The state agency may take only such action as is necessary: (1) To prevent or avoid the immediate danger to the public health, safety or welfare that justifies use of emergency adjudication or (2) to remedy a situation for which use of emergency adjudication is otherwise provided by law.
>
> (c) The state agency shall render an order, including a brief statement of findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, to justify the state agency's decision to take the specific action and the determination of: (1) An immediate danger or (2) the existence of a situation for which use of emergency adjudication is otherwise provided by law.
>
> (d) The state agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when rendered. Notice under this subsection shall constitute service for the purposes of the Kansas judicial review act.
>
> (e) After issuing an order pursuant to this section, the state agency shall proceed as quickly

> as feasible to complete any proceedings that would be required if the matter did not justify the use of emergency proceedings under subsection (a).
>
> (f) The state agency record consists of any documents regarding the matter that were considered or prepared by the state agency. The state agency shall maintain these documents as its official record.
>
> (g) Unless otherwise required by a provision of law, the state agency record need not constitute the exclusive basis for state agency action in emergency proceedings or for judicial review thereof.

The Kansas Banking Code, K.S.A. 9-1902, provides:

> A bank or trust company shall be deemed to be insolvent when: (a) The actual cash market value of a bank's or trust company's assets is insufficient to pay such bank's or trust company's creditor liabilities, except that for this purpose unconditional evidence of indebtedness of the United States of America may be valued, at the discretion of the commissioner, at par or cost whichever is the lesser; or (b) the bank or trust company is unable to meet the demands of its creditors in the usual and customary manner.

The Kansas Banking Code, K.S.A. 9-1903, provides:

> If it shall appear upon the examination of any bank or trust company or from any report made to the commissioner that any bank or trust company is:
>
> (a) Critically undercapitalized, the commissioner may:
>
> (1) Enter an informal memorandum pursuant to K.S.A. 9-1810, and amendments thereto, to notify the bank or trust company of the unsafe and unsound condition and require the bank or trust company to correct the condition within the time prescribed by the commissioner; or
>
> (2) take charge of such bank or trust company and all of its property and assets. In taking charge of a critically undercapitalized bank or trust company, the commissioner may:
>
> (A) Appoint a special deputy commissioner to take charge temporarily of the affairs of the bank or trust company; or
>
> (B) appoint a receiver if it shall appear at any time that the bank or trust company cannot sufficiently recapitalize, resume business or liquidate the bank's or trust company's indebtedness to the satisfaction of the depositors and creditors of such bank or trust company.
>
> (b) Insolvent, the commissioner shall take charge of the bank or trust company and all property and assets of such bank or trust

> company. In taking charge of an insolvent bank or trust company, the commissioner shall:
>
> (1) Appoint a special deputy commissioner to take charge temporarily of the affairs of the bank or trust company; or
>
> (2) appoint a receiver if it shall appear at any time that the bank or trust company cannot sufficiently recapitalize, resume business or liquidate its indebtedness to the satisfaction of the depositors and creditors of such bank or trust company.

The Kansas Banking Code, K.S.A. 9-1905, provides:

> (a) In the event the commissioner appoints a receiver for any bank or trust company, the commissioner shall appoint:
>
> (1) The federal deposit insurance corporation; or
>
> (2) any individual, partnership, association, limited liability company, corporation or any other business entity which shall have accounting, regulatory, legal or other relevant experience in the field of banking or trust as shall be determined by the commissioner.
>
> (b) Any receiver other than the federal deposit insurance corporation shall give such bond as the commissioner deems proper and immediately file in the district court of the county where the bank or trust company is located for liquidation, disposition and dissolution pursuant to the state banking code, the

Kansas general corporation code, and as may be ordered by the court.

(1) The receiver shall be entitled to reasonable compensation subject to the approval of the district court.

(2) Upon written application made within 30 days after the filing in district court, the court may appoint as receiver any person that the holders of more than 60% in amount of the claims against such bank or trust company shall agree upon in writing. The creditors so agreeing may also agree upon the compensation and charges to be paid such receiver. Each receiver so appointed shall make a complete report to the commissioner covering the receiver's acts and proceedings as such.

(c) The bank or trust company shall have the right to petition for review of the commissioner's order taking charge, appointment of a special deputy or appointment of a receiver. Such review shall not be subject to the provisions of K.S.A. 77-501 et seq., and amendments thereto. A petition for review shall be filed within 10 days of the commissioner's action. Notwithstanding any provision of law to the contrary, or by order of the court, review shall proceed as expeditiously as possible pursuant to the provisions of K.S.A. 77-601 et seq., and amendments thereto. Notwithstanding any provision of law to the contrary, the decision of the district court may be appealed only to the supreme court of Kansas. The time within which an appeal may be taken shall be

10 days from final disposition of the district court.

STATEMENT OF THE CASE

On August 22, 2008, Kansas State Bank Commissioner J. Thomas Thull (the "Commissioner")[1] declared the Columbian Bank & Trust Company (the "Bank") to be insolvent and appointed a receiver. The receiver sold most of the Bank's assets on the same day. That seizure violated the due process rights of the Bank's owner, Columbian Financial Corporation ("Columbian").

Per Kansas statute, a bank is insolvent "when it ***is*** unable to meet the demands of its creditors in the usual and customary manner." K.S.A. 9-1902 (emphasis added). The Commissioner did not prove, or even contend, that the Bank had failed to meet a creditor's demand before declaring it insolvent. Indeed, the Commissioner did not give the Bank or Columbian notice of its purported insolvency at any time before declaring the Bank insolvent.

Columbian contested the seizure by filing a petition for judicial review. The Kansas district court held the seizure lacked an evidentiary foundation

[1] The Bank Commissioner and Deputy Bank Commissioner in their official capacities are the Respondents in this action. Several individuals have held those positions in the relevant time period. The Respondents are referred to collectively as the "Commissioner" except where context requires reference to a specific individual.

for judicial review because the Commissioner had "omitted" a "constitutionally adequate post-seizure procedure." The district court remanded the matter to the Commissioner to "follow[] through" with a post-deprivation hearing.

The newly-appointed Commissioner Edwin Splichal —Commissioner Thull's direct successor—sitting as hearing officer, held an administrative proceeding. The Commissioner limited Columbian's discovery of the facts underlying the seizure. Most significantly, the Commissioner prohibited Columbian from deposing Thull, even though the Deputy Commissioner testified during her deposition that Thull alone decided to close the Bank.

Unsurprisingly, the Commissioner upheld his predecessor's seizure. The Commissioner's order held that the Bank was properly declared insolvent on August 22 based on projections that, under certain assumptions, the Bank *might* be unable to meet a creditor's demand on August 29. Before the Bank's seizure, no Kansas court had ever interpreted the statute defining insolvency in such a manner.

Columbian filed a second petition seeking judicial review of the Commissioner's order. The Kansas district court dismissed the petition as moot, finding Columbian had no available remedy because the Commissioner had already disposed of the Bank's assets. Columbian appealed the dismissal to the Kansas Court of Appeals. Columbian argued on appeal that the Commissioner's never-before-applied interpretation of K.S.A. 9-1902

was contrary to Kansas law, and, if not contrary to Kansas law, then contrary to due process, because Columbian did not have notice of the interpretation prior to the Bank's seizure.

The Kansas Court of Appeals found the district court erred in declaring the case moot, but otherwise affirmed the dismissal. The court summarily rejected the previous decisions interpreting K.S.A. 9-1902 as not "particularly helpful" and held the Commissioner acted in accordance with the statute. Regarding Columbian's argument that it did not have notice of the Commissioner's novel interpretation, the court wrote:

> Finally, Columbian argues that anything less than a requirement of insolvency-in-fact violates due process. But the Commissioner did find the Bank to be insolvent. So this argument fails to provide Columbian relief from the Commissioner's decision.

The Kansas Supreme Court declined Columbian's petition for review.

In March 2014, Columbian filed a separate § 1983 action in the United States District Court for the District of Kansas. In the operative First Amended Complaint, Columbian contended the Commissioner violated its due process rights by (i) failing to give Columbian a constitutionally adequate opportunity to contest the Bank's seizure; and (ii) failing to give Columbian fair notice of the "projected future insolvency" interpretation of K.S.A. 9-1902 before seizing the Bank. The district court entered judgment for the Commissioner,

holding Columbian's claims to be precluded by the prior state-level litigation. The Tenth Circuit affirmed the district court.

REASONS FOR GRANTING THE PETITION

This case is about whether the state failed to provide constitutionally adequate post-deprivation procedures when it seized and disposed of the assets of Columbian Bank & Trust Company (the "Bank"). On August 22, 2008, the Kansas State Bank Commissioner (the "Commissioner") found the Bank to be insolvent and appointed a receiver. The receiver sold most of the Bank's assets on the same day. The Bank's owner, Petitioner Columbian Financial Corporation ("Columbian"), contends that the seizure violated its due process rights.

The Commissioner used a constitutionally infirm process to destroy Petitioner's business, based on a new and novel interpretation of an existing state statute. The statute defines insolvency as when a bank "is unable to meet the demands of its creditors in the usual and customary manner." K.S.A. 9-1902. The Commissioner did not prove, or even contend, that the Bank had failed to meet a creditor's demand before declaring it insolvent. Indeed, the Commissioner did not give the Bank or Columbian notice of its purported insolvency before declaring the Bank insolvent. Instead, the Commissioner for the first time ever interpreted the

statute's definition of insolvency as the Bank's *possible* condition on *some future date*.

When Petitioner initially contested the seizure, the Kansas state courts agreed that Respondents had "omitted" a "constitutionally adequate post-seizure procedure" and ordered Respondents to hold a post-deprivation hearing. But during that hearing, Respondents refused to allow Petitioner to conduct discovery necessary to show Respondents' reliance on an unprecedented interpretation of the state statute. Following the hearing, the Commissioner held that the Bank was properly declared insolvent on August 22 based on projections that, under certain assumptions, the Bank *might* be unable to meet a creditor's demand on August 29. Before the seizure, no Kansas court had ever interpreted the statute defining insolvency in such a manner.

The district court held (and the Tenth Circuit affirmed) that Petitioner's suit—which alleges the state failed to provide constitutionally adequate post-deprivation procedures—is precluded by the very same state proceeding that is alleged to be inadequate. But the precedent cited to support that holding, *B. Willis, C.P.A., Inc. v. BNSF Railway Corp.*, reached the opposite result, holding that the plaintiff's § 1983 suit alleging procedural violations was a "viable" claim that could be asserted as soon as it was fully ripened by the conclusion of the state proceeding. 531 F.3d 1282, 1304–06 (10th Cir. 2008). The Tenth Circuit's holding in *B. Willis* is consistent with other circuits. *See Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 515–16 (2d Cir.

2014) ("if the only process guaranteed to one whose property is taken is a post-deprivation remedy, a federal court cannot determine whether the state's process is constitutionally deficient until the owner has pursued the available state remedy."); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004). Therefore, in deviating from its own precedent, the Tenth Circuit created a split among the circuits that calls for resolution by this Court.

Moreover, the facts giving rise to Petitioner's claims arose during the course of the state proceeding at issue. The Tenth Circuit's holding that Petitioner was required to assert its due process claims in the very same state proceeding in which the constitutional deficiencies occurred directly contradicts precedent. *See Hatch v. Boulder Town Council*, 471 F.3d 1142, 1150 (10th Cir. 2006); *McCoy v. Michigan*, 369 Fed.Appx. 646, 650 (6th Cir. 2010); *Rumbough v. Comenity Capital Bank*, 748 Fed.Appx. 253, 255 (11th Cir. 2018). A judgment "cannot be given the effect of extinguishing claims which did not even then exist. . . ." *Lawlor v. Nat'l Screen Serv., Corp.*, 349 U.S. 322, 328 (1955). Rather, "[t]he constitutional violation actionable under § 1983 is not complete . . . unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). Here, Columbian's due process claims did not arise until the notice and hearing provided by the Commissioner was inadequate, and the state courts failed to require the Commissioner to provide Columbian adequate due process. Therefore, Columbian's claims regarding the inadequacy of the state

proceedings could not have been asserted in the state courts and cannot then be precluded by the state court's judgment.

I. THE TENTH CIRCUIT'S HOLDING THAT PETITIONER'S CLAIMS WERE PRECLUDED DIRECTLY CREATES A SPLIT AMONG THE CIRCUITS

A. Columbian's claims cannot be precluded by the very same constitutionally infirm process its claims address

The district court found that the doctrine of res judicata barred Columbian's due process claims. "The doctrine of res judicata, or claim preclusion, will prevent a party from litigating a legal claim that was or could have been the subject of a previously issued final judgment." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (quoting *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005)). "To apply claim preclusion, 'three elements must exist: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits.'" *Id*. (quoting *King v. Union Oil Co. of Cal.*, 117 F.3d 443, 445 (10th Cir. 1997)). An exception to res judicata exists if the plaintiff did not have a full and fair opportunity to litigate their claims in state court. *Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997).

Res judicata can bar Columbian's § 1983 suit only insofar as it contains a claim that "could have been raised" in the state proceedings. *Cain v. Jacox*, 302 Kan. 431, 435–36, 354 P.3d 1196, 1199 (2015). It follows that any claim contained in Columbian's § 1983 suit that was not ripe to be asserted in the state proceedings cannot be barred by those very same state proceedings. *See Sierra Club v. Mosier*, 305 Kan. 1090, 391 P.3d 667, 678 (2017) (plaintiff had "no obligation" to raise unripe claim in prior suit); *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1086–87 (10th Cir. 2017) (similar), *cert. denied*, 139 S. Ct. 784 (2019). To hold otherwise gives rise in itself to a due process violation.

Columbian's claims that it did not receive meaningful post-deprivation process did not become ripe "unless and until the state . . . refuses to make available a means to remedy the deprivation." *McKinney v. Pate*, 20 F.3d 1550, 1563 (11th Cir. 1994); *accord Zinermon*, 494 U.S. at 125 ("[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.") (quoted by App. 10-11). Accordingly, Columbian's procedural due process claims did not become ripe until the state proceedings concluded without remedying the deprivation of Columbian's rights. The Tenth Circuit agreed that Columbian needed to exhaust available state remedies before it could file its § 1983 action, but held that the state proceeding also precluded the § 1983 action, citing *B. Willis, C.P.A., Inc. v. BNSF Railway Corp.*, 531 F.3d 1282, 1300 n.21 (10th Cir. 2008). But in *B. Willis*, which arose

from similar factual circumstances, the Court held that the related state proceedings did *not* preclude the plaintiff's § 1983 due process claim. *See* 531 F.3d at 1304–05. The Tenth Circuit held that the § 1983 suit alleging procedural violations was a "viable" claim that could be asserted as soon as it was fully ripened by the conclusion of the state proceeding. *Id.* at 1304–06 (10th Cir. 2008).

B. Willis cannot be squared with the Tenth Circuit's decision here. Columbian's claim that the Commissioner violated its due process rights by denying a fair hearing mirrors the *B. Willis* plaintiff's claim against the administrative agency. The Tenth Circuit held that Columbian should have raised this claim in its state court appeal to the Kansas Court of Appeals. *See* App. 11-12. This result is contrary to the analysis and result in *B. Willis*. *See* 531 F.3d at 1290.

Other federal appellate courts have echoed the Tenth Circuit's holding in *B. Willis*: *See, e.g.*, *Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 515–16 (2d Cir. 2014) ("if the only process guaranteed to one whose property is taken is a post-deprivation remedy, a federal court cannot determine whether the state's process is constitutionally deficient until the owner has pursued the available state remedy."); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 530 (6th Cir. 2006) ("res judicata does not apply to claims that were not ripe at the time of the first suit."); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004).

And in fact, this Court has reaffirmed the decisions of the circuits, including prior decisions of the Tenth Circuit:

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, **and whether it was constitutionally adequate**.

Zinermon v. Burch, 494 U.S. 113, 126 (1992) (emphasis added).

> The State must, however, satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.

Kremer v. Chem. Const. Corp., 456 U.S. 461, 482 (1982). The Tenth Circuit's holding in this case contradicts *B. Willis* and represents a departure from precedent in this Court and the other circuits.

B. The Tenth Circuit's decision is contrary to precedent holding that facts developing after suit is filed may be brought in a separate action

The facts giving rise to some of Columbian's § 1983 claims arose during the course of the state proceeding at issue. Specifically, Columbian alleged that the hearing provided by the Commissioner (after an order by the Kansas state court) was inadequate because it denied Columbian the right to conduct discovery necessary to prove its claims. In *Hatch v. Boulder Town Council*, the Tenth Circuit previously held that facts which develop during the pendency of an action will give rise to a new "claim" for preclusion purposes so long as the new facts "*are enough on their own* to sustain the second action." 471 F.3d 1142, 1150 (10th Cir. 2006) (quoting *Storey v. Cello Holdings, LLC*, 347 F.3d 370, 384 (2d Cir. 2003)) (emphasis added in *Hatch*). Consequently, "'new' claims, arising after the complaint has been filed . . . [may] be litigated in a subsequent action." *Id.* This holding has been adopted by other circuits as well. *See, e.g.*, *McCoy v. Michigan*, 369 Fed.Appx. 646, 650 (6th Cir. 2010); *Rumbough v. Comenity Capital Bank*, 748 Fed.Appx. 253, 255 (11th Cir. 2018). "The *res judicata* doctrine does not apply to new rights acquired during the action which might have been, but which were not, litigated." *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997). Columbian's § 1983 allegations meet that test. The Tenth Circuit's holding that Columbian was required to assert its due process claims in the state

proceeding is contrary to *Hatch* and precedent from other circuits, creating a divergence on this important constitutional question among the circuit courts of appeals.

Just as in *Hatch*, Columbian had no obligation to raise its due process claim during the state proceeding because the facts it is premised upon developed during the course of that very same proceeding and are sufficient to sustain an independent claim. The Tenth Circuit held that Columbian should have raised its due process claim "when it filed its second petition for judicial review in state court." But the Tenth Circuit overlooked that Columbian's second petition for judicial review was part of the same action—case number 08C1419—as the first petition for judicial review that initiated the state proceedings.[2] Indeed, the Commissioner conceded in the state proceedings that the second judicial review petition was "a later stage of the same suit" initiated by the first judicial review petition.

Columbian's second petition for judicial review was thus part of the same action that Columbian initiated after the Commissioner seized the Bank in 2008. Per *Hatch*, Columbian was not required to include in the second petition the due process claims that arose during the state proceeding and formed the basis of its

[2] The Kansas Judicial Review Act does not specify how to request a review of a previously remanded administrative proceeding. To ensure that it would not waive its right to judicial review, Columbian filed a "materially identical" copy of the second petition as a new action.

§ 1983 suit. Because the Tenth Circuit's decision contradicts *Hatch*, Columbian should be granted certiorari.

C. The Tenth Circuit's decision directly contradicts well established principles of res judicata and validates a serious due process infirmity

This Court has made clear that res judicata is inapplicable when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate the claim. *Kremer*, 456 U.S. at 481–82; *Scroggins v. Dep't of Human Res.*, 802 F.2d 1289, 1291 (10th Cir. 1986) (holding that a plaintiff's § 1983 suit should not be precluded by a state proceeding that failed to give the plaintiff a "full and fair opportunity" to argue his constitutional claims). The full and fair opportunity exception means "that claim preclusion cannot arise from proceedings that denied due process." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1243 (10th Cir. 2017) (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4415, at 366 (2d ed. 2002)).

The Kansas Supreme Court has stated "that the propriety of applying res judicata to administrative agency decisions depends on how closely what the agency does resembles what a trial court does." *Scroggins*, 802 F.2d at 1293 (quoting *Neunzig v. Seaman Unified Sch. Dist. No. 345*, 239 Kan. 654, 722 P.2d 569,

573 (1986)). And here, the administrative agency proceeding strayed far from the procedures of a trial court when it limited Columbian's discovery of the facts underlying the seizure. Most significantly, the Commissioner prohibited Columbian from deposing former Commissioner J. Thomas Thull, even though the Deputy Commissioner testified during her deposition that Thull alone decided to close the Bank. During the state court proceedings, the court again refused to allow Columbian to depose Thull. Therefore, the hearing was inadequate and Columbian never had meaningful due process.

Although it raised due process claims in its second Petition for Judicial Review, Columbian did not have a full and fair opportunity to litigate its claims that the hearing was inadequate and that it did not have notice of the Commissioner's interpretation of insolvency. The Shawnee County District Court dismissed Columbian's petition as moot without addressing the merits of the procedural due process claims. And the Kansas Court of Appeals upheld the dismissal, albeit on different grounds. Although it found the petition was not moot, the Kansas Court of Appeals only cursorily concluded that Columbian was provided due process when it received review from the Commissioner and the Kansas courts under the Kansas Judicial Review Act. However, the Kansas Court of Appeals did not consider whether the review was adequate and meaningful, as required to be sufficient under the Due Process Clause.

In *Scroggins*, though the plaintiff had a chance to make his constitutional argument in a judicial review

proceeding before the Kansas Court of Appeals, the Tenth Circuit deemed the state court's review "narrow and conclusory," and was unwilling to afford it preclusive effect. *Id.* at 1293. Columbian received similarly insufficient review; however, the Tenth Circuit reached the opposite result, finding that because the district court applied a de novo standard of review, res judicata barred Columbian's § 1983 claims. The effect is that the courts gave deference to an administrative agency's decision that initially refused to hold any post-deprivation process at all, applied a novel interpretation of a statute, and denied discovery regarding the insolvency determination. This result cannot be squared with *Scroggins*.

Moreover, the Kansas Court of Appeals ignored Columbian's core argument regarding its lack of notice of the Commissioner's insolvency interpretation. Columbian argued to the Kansas Court of Appeals that the statute defining bank insolvency (and a century of case law) required "insolvency-in-fact," meaning "an actual demand for payment . . . made in the usual and customary matter . . . [that] the Bank was unable to pay." (*See* Section II.A.1 below for further discussion). Any other interpretation, Columbian argued, violated its due process rights because it did not have fair notice that any standard other than insolvency-in-fact would be applied. But the Kansas Court of Appeals' "analysis" of that argument was so woefully deficient as to be meaningless. The court wrote:

> Finally, Columbian argued that anything less than a requirement of insolvency-in-fact

> violates due process. But the Commissioner did find the Bank to be insolvent. So this argument fails to provide Columbian relief from the Commissioner's decision.

Columbian Bank & Trust Co. v. Spilchal, 329 P.3d 557, 2014 WL 3732013, at *12 (Kan. Ct. App. July 25, 2014). The court's circular conclusion that Columbian's due process rights were not violated because "the Commissioner did find the Bank to be insolvent" completely ignores the substance of Columbian's argument. It is not only conclusory (in that it is unsupported by reference to any record evidence or legal principles); it commits the very constitutional violation Columbian intended to challenge—it affirms the Commissioner's discretion to define insolvency however it pleases regardless of whether banks or their owners have fair notice of that definition.

Furthermore, although the Tenth Circuit concluded that the state court of appeals gave Columbian an opportunity to litigate the "fair notice" component of its due process claim, the record does not support that conclusion. The portion of the state court opinion the Tenth Circuit quotes to demonstrate Columbian's claim was fairly considered is in fact irrelevant to Columbian's claim regarding notice.[3] The Tenth Circuit

[3] The Tenth Circuit cursorily explained that the Kansas Court of Appeals "had unlimited review over Plaintiff's alleged due process violations." App. 14. However, this portion of the Tenth Circuit's opinion—and the opinion as a whole—failed to recognize the fact that the state court did not address Columbian's claim regarding notice.

thus fails to distinguish this case from *Scroggins*, where this Court held that a plaintiff's § 1983 suit should not be precluded by a state proceeding that "disregarded without addressing" the plaintiff's constitutional claims. 802 F.2d 1289, 1292 (10th Cir. 1986).

The Tenth Circuit's recognition in *Scroggins* that claim preclusion should not be applied to produce a plainly inequitable result is consistent with Kansas law and leading authorities. *See Cain v. Jacox*, 302 Kan. 431, 354 P.3d 1196, 1200 (2015) (whether to apply claim preclusion is "an equitable determination grounded in principles of fundamental fairness and sound public policy"); Restatement (Second) of Judgments § 24 cmt. b (1982) (in applying claim preclusion, courts must consider "the interest of the plaintiff in the vindication of a just claim"); *see also Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995). The Tenth Circuit's failure to follow its own precedent undermines the public's confidence that the judiciary will take seriously their constitutional grievances. A "full and fair opportunity" to litigate a claim requires, at a minimum, that the court deciding the claim follow a "path of decision [that] is reasonably discernible." *Scroggins*, 802 F.2d at 1292. The Kansas Court of Appeals did not do so when disposing of Columbian's fair notice argument, so its decision should not be afforded preclusive effect. The doctrine of res judicata should "not [be] applied so rigidly as to defeat the ends of justice." *Wells, Adm'r v. Ross*, 204 Kan. 676, 678, 465 P.2d 966 (1970).

II. THIS CASE INVOLVES ISSUES OF SIGNIFICANT PUBLIC INTEREST AND IMPORTANCE THAT ARE LIKELY TO RECUR

A. The claims in this case implicate the important constitutional guarantees to due process when the state takes private property

When the government takes someone's private property, the Due Process Clause of the Fourteenth Amendment requires the government to provide certain basic protections. Here, the state deprived Columbian of its property (its business), without constitutionally guaranteed process, based on a novel interpretation of a statute, compounded by the court and the Commissioner's unwillingness to allow Columbian to probe—via a deposition of the sole decisionmaker—the basis for this interpretation and ultimate conclusion that the Bank was insolvent. The availability of a post-deprivation administrative hearing—which Columbian only received after seeking relief from the courts—did not satisfy Columbian's constitutional right to procedural due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

"So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Id*. at 81. "This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews*, 424 U.S. at 333.

> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'

Fuentes, 407 U.S. at 81 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–72, Frankfurter, J., concurring)).

Post-deprivation remedies satisfy procedural due process **only** when two conditions are met: (1) no

viable pre-deprivation process can exist that could have prevented the harm; and (2) the government's failure to provide process must be random and not the result of de facto state policy. *Hudson v. Palmer*, 468 U.S. 517, 531–34 (1984). Notice and a hearing are the two most important safeguards of procedural due process. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). And while a post-deprivation hearing may be appropriate instead of pre-deprivation, the post-deprivation hearing must be meaningful. "[I]t is axiomatic that the hearing must provide a real test." *Fuentes*, 407 U.S. at 97; *see also Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). In this case, Columbian had no notice of the Commissioner's interpretation of insolvency and no opportunity to be heard prior to the Bank's closure and asset seizure, and the post-deprivation hearing was inadequate to protect Columbian's rights under the Due Process Clause.

1. Petitioner was not notified of the Commissioner's novel interpretation of Kansas statute prior to the seizure

The Commissioner applied a novel interpretation of K.S.A. 9-1902's definition of insolvency when it found the Bank *may* be insolvent at *some future date*. Due process requires—at the least—that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This principle

applies to civil as well as criminal penalties. It also applies when an agency advances a novel interpretation of its own regulation in the course of a civil enforcement action. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083–84 (10th Cir. 1998) ("In order to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit." (quoting *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997)); *cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) ("[I]nterpretive changes [to regulations must] create no unfair surprise."); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) (vacating as arbitrary and capricious an FCC order dismissing applications to operate radio stations as untimely filed and in the wrong location because the FCC's rules were ambiguous. "[I]f [the agency] wishes to use [its] interpretation to cut off a party's right, it must give full notice of its interpretation."); *id.* at 3–4 ("The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise, the practice of administrative law would come to resemble 'Russian Roulette.' ").

In this case, there was no way Columbian could have had notice of the Commissioner's interpretation of insolvency because it was birthed the day the Commissioner closed the Bank. For more than one hundred years, until the day the Commissioner closed the Bank, the Kansas statutes have been interpreted to require insolvency-in-fact to appoint a receiver for a bank. *See*

Martin v. Citizens' Bank, 134 Kan. 650, 8 P.2d 81, 81–82 (1932); *Dodson v. Wightman*, 6 Kan. App. 835, 49 P. 790, 792 (1897). On the day the Commissioner closed the Bank, he made a significant and abrupt change in the financial standards relied upon in Kansas when he found the Bank was insolvent based on its alleged inability to meet customer demand at some undefined point in the future.[4]

Allowing the Commissioner to change this relied-upon interpretation in favor of his ad hoc liquidity calculations and post hoc reasoning—and tell the Bank only *after its seizure* what standard he is going to apply—granted the Commissioner unchecked discretion to interpret Kansas law and violated due process. Irrefutably, on August 22, 2008—the day the Commissioner seized Columbian Bank—the Bank was showing a profit. The Bank was adequately capitalized. And the Bank could and did meet all of its depositors' and creditors' demands for payment that day. In fact, the Federal Reserve offered to extend credit to the Bank the day of the closure, indicating the Bank's relative

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[4] Significantly, the Commissioner changed his position several times on the legal standard he applied to close the Bank. First, in accordance with the statute, it was insolvency prior to closure. Then it was inability to meet customer demand the day of closure, and ultimately the Commissioner identified the Bank's alleged inability to meet customer demand at some undefined point in the future as justification to close the Bank. *Compare* OSBC Response to Motion to Take Depositions, *Columbian Bank and Trust Co. v. Thull*, Case No. 08C1419 (Shawnee Cty. Cir. Ct. Jan. 28, 2009); *with* Brief of Appellee/Cross Appellant, *Columbian Bank and Trust Co. v. Spilchal*, Case No. 12-110256-A (Kansas Ct. App. Nov. 27, 2013).

financial health, not infirmity. *See* First Amended Complaint ¶ 21, *Columbian Financial Corporation v. Stork*, Case No. 2:14-cv-02168-SAC-KGS (D. Kan. July 20, 2016). Nevertheless, the Commissioner declared the Bank insolvent under K.S.A. 9-1902(2) because he did not know if the Bank could pay off certificates of deposit maturing the following week. Columbian had no notice that the Commissioner intended to construe the statute to allow seizure for under such circumstances and thus violated Columbian's due process rights.

Under K.S.A. 9-1902(2), a bank is insolvent only when "it is unable to meet the demands of its creditors in the usual and customary manner." The Kansas banking code requires the Commissioner to take charge of a bank and all of its property and assets "[i]f it shall appear upon the examination . . . that . . . any bank or trust company is insolvent." K.S.A. 9-1903. The Commissioner may take such control only on a temporary basis. In no more than nine months, the Commissioner must return control of the bank to its board of directors or appoint a receiver. *Id.* K.S.A. 9-1903 does not authorize the Commissioner to appoint a receiver.

K.S.A. 9-1905 governs the Commissioner's authority to appoint a receiver. The statute allows appointment of a receiver only if the Commissioner has "ascertain[ed] [the bank's] **actual** condition as soon as possible by making a thorough investigation into its affairs and condition." K.S.A. 9-1905 (emphasis added). Only if the Commissioner is "satisfied that such bank or trust company cannot . . . resume business or liquidate

its indebtedness to the satisfaction of its depositors and creditors" may the Commissioner appoint a receiver. *Id.* Stated differently, under the plain terms of K.S.A. 9-1903, although the Commissioner may take temporary charge of a bank that "appears" insolvent, under K.S.A. 9-1905, the appointment of a receiver requires the existence of both insolvency-in-fact *and* a finding that the bank cannot sufficiently liquidate its indebtedness or resume business. *See Martin*, 8 P.2d at 81-82 (interpreting the predecessor to K.S.A. 9-1905, and stating that the Commissioner's duty to "ascertain" the bank's "actual condition" required the Commissioner to "definitely ascertain[] that the bank is insolvent" before a receiver is appointed);[5] *see also Dodson*, 49 P. at 792 (noting the statute required the commissioner to take charge of a bank that "appear[ed] to be insolvent" but receivership proceedings could commence only upon a report to the attorney general of "the fact of [the bank's] insolvency" after a "thorough examination into its affairs").

A bank is insolvent, as the Kansas Supreme Court has long held, only when three critical elements are present: (1) there has been an actual demand for payment by a depositor or creditor, (2) the demand for payment was made in the usual and customary manner,

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[5] The predecessor statute provided, "Upon taking charge of any bank, the bank commissioner shall as soon as possible ascertain, by a thorough examination into its affairs, its actual condition; and whenever he shall become satisfied that such bank cannot resume business or liquidate its indebtedness to the satisfaction of all its creditors, he shall forthwith appoint a receiver." *Martin*, 8 P.2d at 81.

and (3) the Bank was unable to pay the demand. *See State v. Ohlfest*, 139 Kan. 40, 30 P.2d 301, 302 (1934); *Sec. Nat'l Bank v. Payne*, 136 Kan. 372, 15 P.2d 410, 411 (1932); *State v. Myers*, 54 Kan. 206, 38 P. 296, 297 (1894) ("in order to be solvent, its resources must be equal in value to its liabilities, and be of such a character as to be available at the command of the bank, to be used in *paying its liabilities past due, whenever the same may be demanded in the ordinary course of business*" (emphasis added)).[6]

When referring to creditors' "demands," the legislature clearly intended to limit a determination of insolvency under section 1902(2) to a bank's ability to meet actual demands for payment. Otherwise, banks would have to keep on hand every dollar contained in every demand deposit account in order to avoid seizure because those deposits theoretically could be demanded at any time. Kansas law does not require that. To the contrary, a bank is not "expected to be able to pay every depositor at once." *Myers*, 38 P. at 297. Rather, a bank need only be able to "pay or provide for its deposits and other debts *as they are demanded* in the usual course of business." *Id.* (emphasis added); *see also Ohlfest*, 30 P.2d at 302 (stating that the Bank is insolvent under this definition when "depositor Paul

[6] Although these cases involve interpretation of a statute that criminalizes a cashier's acceptance of a deposit with knowledge of the bank's insolvency, *see* R.S. 9-119 (repealed), the statute uses an identical definition for insolvency as in K.S.A. 9-1902(2), *see* R.S. 9-133 (repealed). Thus, there is no reason to deviate from the Kansas Supreme Court's interpretation of this language in construing K.S.A. 9-1902.

wants some of his money [and] the Bank cannot pay him"); *Sec. Nat'l Bank*, 15 P.2d at 411 (stating that the trial court's determination that the Bank was insolvent was not supported by "substantial evidence" because there was "*no evidence* that [the bank] was unable to meet the demands of its creditors in the usual customary manner" (emphasis added)). Thus, the Supreme Court found one bank insolvent when a depositor "could get only $20 in cash of her checking account of $270[] because defendant told her he did not have the money," *see Ohlfest*, 30 P.2d at 303, but another bank solvent when "the bank received deposits, paid checks, and carried on a banking business." *Sec. Nat'l Bank*, 15 P.2d at 411.

The legislature's use of the word "is" to describe a bank's ability to meet such a demand confirms this interpretation. "Is"—as opposed to "will be" or "may be"—requires the Commissioner to determine, before closing a bank, that the bank is *at that time* unable to meet its creditors' actual demands for payment. Indeed, courts routinely conclude that "is" refers to conditions as they currently exist. *See, e.g.*, *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 775 (9th Cir. 2008) (holding that the word "is" in a statute "unequivocal[ly]" means the "present [] tense"); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001) (stating that "is" in a statute indicates present tense and contemplates conditions currently in existence "at that time"); *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998); *Banos v. O'Guin*, 144 F.3d 883, 885 (5th Cir. 1998) (interpreting "is" as "at the time"); *Bonnichsen v.*

United States, 217 F.Supp.2d 1116, 1136 (D. Or. 2002) (interpreting "is" as "presently existing"); *Friendly Fin. Corp. v. Orbit Chrysler Plymouth Dodge Truck, Inc.*, 835 A.2d 1197, 1204 (Md. 2003); *compare with* 12 U.S.C. § 1821(c)(5)(F) (referring to possible FDIC actions if an institution "is **likely to be** unable to pay its obligations or meet its depositors' demands in the normal course of business") (emphasis added); K.S.A. 9-1902.

K.S.A. 9-1905 does not allow the Commissioner to speculate about possible demands on a bank in the future. The sole reasonable interpretation is that insolvency occurs only when a bank cannot meet an actual demand for payment.[7] The statute further limits the types of creditor demands that may be considered in determining a bank's solvency. Even if a depositor or creditor were to make a demand that a bank cannot pay, the bank would not be insolvent under the statute if the demand were not made in "the usual and customary manner." K.S.A. 9-1902(2); *see also Ohlfest*, 30 P.2d at 302 (stating that, "[u]nusual situations, created by circumstances not according to banking habit, practice, procedure, or experience" are not demands made in the

[7] The Commissioner stated in his April 18, 2012 Order that K.S.A. 9-1902 cannot be interpreted to require an actual unmet demand for payment because then: "there would be no need to examine banks, but rather the OSBC could just wait for a complaint to be filed by a depositor who was refused funds when the bank ran out of liquid assets." Such an argument ignores the Commissioner's power to take temporary charge of a bank when it is balance sheet insolvent or critically undercapitalized. *See* K.S.A. 9-1903, 9-1902(1), 9-1902a. There is no contention here that the Bank's balance sheet showed insolvency. Rather, it is undisputed that the Bank was adequately capitalized.

"usual and customary manner"). Under this standard, insolvency occurs only when a bank is unable "to pay debts in usual course of business *as they fall due*." *Id.* (emphasis added). As a matter of law, a bank that fails to meet a creditor's demand for payment on a debt before the due date is not legally insolvent under K.S.A. 9-1902(2).

This statutory interpretation is further bolstered by the fact that the relevant statutes make specific provision for what occurs if a bank "might be unable" to meet its creditors' demands or, more accurately, "appears" insolvent. In such cases, the Commissioner is to take temporary control of it. K.S.A. 9-1903.

The Commissioner could not have lawfully appointed a receiver on August 22, 2008, if he had applied the plain meaning of the statutes at issue in accordance with Kansas Supreme Court precedent interpreting that language. Rather than apply the plain language of the statute and the Kansas Supreme Court's century-old interpretation of that language, the district court left it to the discretion of the Commissioner to determine whether, based on the exigencies of today's banking practices, "the 'appearance' of insolvency" (i.e., the standard for taking temporary charge of a bank under K.S.A. 9-1903) is "the true measure governing the test for the exercise of the Commissioner's power [to appoint a receiver under K.S.A. 9-1905]." *See* Memorandum Opinion and Entry of Judgment at p. 35, *Columbian Bank and Trust Co. v. Thull*, Case No. 08C1419 (Shawnee Cty. Cir. Ct. March 29, 2010). At the time of the district court's ruling, the law in Kansas

was unclear as to what deference, if any, should be afforded an administrative agency's interpretation of its authorizing statute. Thus, the district court's acquiescence is understandable (although unsupported by the statute's plain language). Following entry of the district court's Memorandum Opinion, however, the Kansas Supreme Court clarified that:

> 1. Kansas administrative agencies have no common-law powers. Any authority an agency or board claims must be conferred in the authorizing statutes either expressly or by clear implication from the express powers granted.
>
> 2. An appellate court exercises unlimited review on questions of statutory interpretation without deference to an administrative agency's or board's interpretation of its authorizing statutes.

Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors, 290 Kan. 446, 228 P.3d 403, Syl. ¶¶ 1, 2 (2010). Thus, it is inappropriate to allow the Commissioner to determine whether the "true measure" of his authority to appoint a receiver is the "appearance of insolvency" rather than insolvency-in-fact. It is also inappropriate to defer to the Commissioner's interpretation of K.S.A. 9-1905.

The result of the Commissioner's actions were extreme: Petitioner's assets were seized and sold off, and a state chartered bank was closed based on this interpretation. The premature and unlawful closing of a bank causes great harm to the bank's uninsured depositors, *see, e.g.*, *Aviva Life & Annuity Co. v. Fed.*

Deposit Ins. Corp., 654 F.3d 1129 (10th Cir. 2011) (discussing the post-closure loss of one of Columbian's depositors of more than $11 million in uninsured funds), and to the public and banking system as a whole, *see* Office of Inspector General Material Loss Review of The Columbian Bank and Trust Company, available at: http://www.fdicoig.gov/reports09/09-005-508.shtml (although, at Columbian's closing, regulators estimated the loss to the Deposit Insurance Fund at $61.5 million, the FDIC's fire sale of assets caused the loss to balloon to $232 million as of December 31, 2008). Surely, requiring notice of the Commissioner's novel interpretation of insolvency is not "absurd" considering the harm that comes to uninsured depositors, creditors, and the banking system when a bank enters into receivership.

2. The post-deprivation hearing was constitutionally inadequate

Not only did Columbian have no notice of the Commissioner's interpretation of insolvency, the Commissioner did not hold a hearing prior to seizing Columbian's assets and closing the Bank. In fact, Columbian had to seek judicial intervention before the Commissioner held a hearing, and even then the Commissioner only provided a post-deprivation hearing because the Kansas District Court ordered one pursuant to K.S.A. 77-536(e). However, the post-deprivation hearing was inadequate under the Fourteenth Amendment's Due Process Clause because the Commissioner limited discovery of the facts underlying the seizure.

> Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. Due process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . before he can be deprived of his property.

Fuentes, 407 U.S. at 97. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334. "Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated." *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 261 (1987).

Here, the interests at stake were high; Columbian lost its business and livelihood as a result of the state's actions. And the hearing fell short of "a fairly extensive evidentiary hearing." *Id.* Commissioner Edwin Spilchal —Commissioner J. Thomas Thull's direct successor— presided over the administrative hearing as hearing officer. *See* First Amended Complaint ¶ 47, *Columbian Financial Corporation v. Stork*, Case No. 2:14-cv-02168-SAC-KGS (D. Kan. July 20, 2016). On October 25, 2011, Commissioner Spilchal issued a Discovery Order that stated "[t]he parties may engage in discovery to the extent the parties agree." *Id*. Counsel representing the Commissioner in the proceeding refused to allow the deposition of former Commissioner Thull, even though

the Deputy Commissioner testified during her own deposition that it was Thull's decision, and his alone, to close the Bank. *Id*. ¶ 48. Columbian moved to compel the deposition of former Commissioner Thull, but Commissioner Spilchal denied the motion. *Id*. ¶ 48. Commissioner Spilchal's order stated that when former Commissioner Thull decided to close the Bank, he "was acting in a quasi-judicial capacity subject to the executive privilege," and therefore, this decision-making process was not subject to discovery. *Id*. ¶ 48.

Commissioner Spilchal's refusal to allow Columbian to take former Commissioner Thull's deposition prevented Columbian from determining the precise justifications and calculations relied upon in closing the Bank and impeded its ability to prove the Bank should not have been declared insolvent. As a direct result, the Commissioner received summary judgment on whether the Bank was insolvent when seized, whether there was a basis to conclude the Bank would be insolvent as of August 29, 2008 and whether the Bank could have resumed business or liquidated its indebtedness. *Id*. ¶¶ 50–51. The Commissioner's denial of discovery violated Columbian's right to a meaningful process.

B. The Commissioner's statutory authority to declare a Kansas bank insolvent is a matter of significant statewide interest and public importance that is likely to recur

Since this decision, Kansas law has not changed. Nothing prevents the Commissioner from seizing another bank's assets based on his interpretation of insolvency. Although the Kansas legislature updated the statutory definition of insolvency in 2016, it made no substantive changes to the portion interpreted by the Commissioner in determining the Bank's insolvency. *See* K.S.A. 9-1902. Further, the Kansas statutes still allow the Commissioner to take charge of a bank and all its assets if the Commissioner determines the bank is insolvent. K.S.A. 9-1903.

Columbian Bank was the first Kansas bank to fail since 1993. Since then, however, the Commissioner has shuttered nine Kansas banks. *See* FDIC Failed Bank List, available at: http://fdic.gov/bank/individual/failed/banklist.html. The regulation of banks is obviously a matter of substantial public interest. *Bd. of Comm'rs of Greeley County v. Horace State Bank*, 135 Kan. 126, 9 P.2d 986, 986 (1932) ("Banking is affected with a public interest, and is regulated for the protection of that interest."); *First Fed. Savs. Bank & Trust v. Ryan*, 927 F.2d 1345, 1358 (6th Cir. 1991) ("[T]he safety of the banking system is generally considered to be an important governmental or public interest.").

Case law interpreting materially identical predecessor statutes fails to support what the Commissioner has done here. *See supra* Section II.A.1. In earlier briefing, the Commissioner contended he could disregard the Supreme Court's interpretation of the statutory language and substitute his own because the nature of banking has changed over the last 100 years:

> The state of banking in the late 1800s and during the depression in the *Ohlfest* and *Myers* example offered by Petitioners is not applicable today. The usual and customary manner of banking is vastly different in the Columbian Bank example than it was the time of *Ohlfest* and *Myers*. The only mechanism of demand in *Ohlfest* and *Myers'* days was the physical demand by an individual who walked into the bank and demanded his money. There were no electronic transfers of funds. Monies were not moved by the flick of a switch or the press of a button. By the same token, modern day technology provides for speedy closure and reopening of a bank.

See OSBC Brief in Opposition to Petition for Judicial Review, *Columbian Bank and Trust Co. v. Thull*, Case No. 08C1419 (Shawnee Cty. Cir. Ct.). He further justified ignoring the statute "[a]s a policy matter" because closing a bank on a Friday is more "orderly" than a mid-week closure. *Id*. If the modernization of banking in the prior century mandates changing the statutes, that is a matter for the legislature—not the Commissioner—to resolve. *See Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 613, 214 P.3d 676 (2009) ("It is well settled

that where judicial construction of a statute has been in place for a number of years, the legislature is deemed to have approved the construction and that construction is as much a part of the statute as if embodied in it in plain and unmistakable language[.]").

Despite the Commissioner's attempted juxtaposition of early twentieth century banking with today's banking, substantial reasons support applying the Supreme Court's early interpretations of the statutory language. The social costs of declaring a bank insolvent are high—causing fear and changes in the expectations of other banks' customers—both of which are heightened in periods of economic instability. Unlike insolvencies of industrial firms, a bank's insolvency weakens the whole banking industry by affecting the reputation of its competitors and the reputation of banking regulators. More harm is done to the public by the seizure of a solvent, adequately capitalized, and profitable bank (as this bank was at the time it was closed) than done in waiting to see if regulators' improbable worst-case-scenario actually materializes. The decision to close a bank should not be taken lightly and, for the benefit of the public and the industry as a whole, individuals who operate the bank must be provided with clear guidance as to the meaning of the statutes that govern them. The lower court's deference to the Commissioner's unfettered authority to interpret the banking statutes inconsistently with precedent resulting in the seizure of a solvent bank without adequate constitutional protections warrants this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted this 6th day of September, 2019,

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