No.

In the
Supreme Court of the United States

JOHN PATERNO,

Petitioner,

– against –

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION and POLLY TROTTENBERG,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ARTHUR Z. SCHWARTZ
Counsel of Record
RICHARD SOTO
ADVOCATES FOR JUSTICE,
CHARTERED ATTORNEYS
Attorneys for Petitioner
225 Broadway, Suite 1902
New York, New York 10007
(212) 285-1400
aschwartz@afjlaw.com

QUESTIONS PRESENTED

1. Whether the Second Circuit, in a "stigma-plus" case, erred in affirming the District Court's dismissal of Petitioner's procedural Due Process claim by applying a temporal proximity test to find, as a matter of law, no causative nexus between defamatory statements concerning petitioner and the denial of the Plaintiff's legal entitlements?

2. Whether the Second Circuit erred in not according the pleaded deprivations the deference they were entitled to under this Court's precedent?

PARTIES TO THE PROCEEDING BELOW

The only parties to the action are those named in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

John Paterno respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals" and "Second Circuit").

OPINIONS BELOW

The opinion of the Court of Appeals is included in Petitioner's Appendix ("Pet. App.") as Pet. App. A, and is reported as *Paterno v. City of New York*, --Fed. Appx.--, 2019 WL 2847166 (2d Cir. July 2, 2019). The opinion of the District Court for the Southern District of New York ("District Court" and "SDNY") is included as Pet. App. B, and is reported as *Paterno v. City of New York*, 2019 WL 3632526 (S.D.N.Y. July 31, 2018).

JURISDICTION

On July 31, 2018 the District Court granted Defendants' Motion to Dismiss. Plaintiff John Paterno filed a timely appeal to the Second Circuit, which affirmed dismissal on July 2, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, Section 2, Amendment XIV, provides, in relevant part:

> … nor shall any state deprive any person of life, liberty, or property, without due process of law …

INTRODUCTION AND STATEMENT OF THE CASE

This Court has long recognized that, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Paul v. Davis*, 424 U.S. 693, 708 (1976), *quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). This Court recognizes that the government may deprive a person of liberty, without process, in contravention of the Fourteenth Amendment, when it makes false statements about an individual, combined with a deprivation of a legal entitlement, while leaving the affected individual with no recourse to contest the allegation or clear his or her name.

This is precisely what happened to Petitioner John Paterno, when unfounded accusations of racially motivated personnel decisions were used to demote him on the job, and when the same accusations were smuggled into a closed door settlement document concocted by the U.S. Attorney for the Southern District of New York and the City of New York (Petitioner's employer) to make Petitioner the fall guy for systemic problems of racial discrimination that plagued the City's Department of Transportation. The initial deprivation occurred when Petitioner, a public employee, was demoted without the resort to any process under of New York State law; his injury was further compounded when the City's Transportation Commissioner, Polly Trottenberg, went to the press, called him a racist, and imperiled all of Petitioner's employment prospects going forward.

Petitioner sought to redress this destruction of his career in Federal Court, but, as will become evident below, that avenue was improperly curtailed by the Court of Appeals when it adopted a temporal proximity test for adjudging stigma-plus due process claims, that is outside the guidelines of this and other Courts' precedents, and when the Second Circuit refused to accord the Petitioner's pleadings the required deference on consideration of a Motion to Dismiss.

A. Facts of the Case

All of the facts as set forth below, are as stated in the Amended Complaint.

On January 18, 2017, the United States sued New York City and the New York City Department of Transportation ("DOT") in a Title VII Civil Rights Act lawsuit (hereinafter "U.S. Complaint") alleging a pattern and practice of discrimination and retaliation based on the failure to promote minority employees working at DOT.

The U.S. Complaint alleged that the race-based discrimination took place at Fleet Services, a subdivision of the Roadway Repair and Maintenance Division ("RRM") of DOT. The U.S. Complaint identified two individuals as the main perpetrators of the discrimination at RRM: Executive Director I ("ED I") and Executive Director II ("ED II").

From factual allegations regarding the job responsibilities of ED I and ED II and the tenure of service of ED I and ED II identified in the U.S. Complaint, these individuals were easily identifiable as an employee named Darren Kaplan ("ED I") and Plaintiff John Paterno ("ED II").

Among other allegations, the U.S. Complaint falsely alleges that Plaintiff John Paterno:

(a) Actively aided and carried out discriminatory staffing practices directed by Darren Kaplan (something he denies).

(b) Failed to confirm Darren Kaplan's use of racial epithets on the job when confronted by EEO at an initial interview during a DOT EEO investigation of Mr. Kaplan. (While Mr. Paterno was never confronted with any such question at his initial interview, his subsequent testimony was one of the pillars underlying DOT EEO's successful case against Mr. Kaplan.)

(c) Continued race-based hiring practices once Mr. Kaplan left. Almost every "example" proffered in the Complaint to support this point was carried out for non-race-related reasons and was carried out at the direction of DOT management and/or with the imprimatur of upper management at DOT.

These allegations were directed at Mr. Paterno by the U.S. Attorney for the Southern District of New York, without one interview of Plaintiff or other relevant DOT employees by the U.S. Attorney, DOT staff, or New York Corporation Counsel before the U.S. Complaint was filed. Had the City actually investigated the U.S. Attorney's Complaint, the case against the City arising from Mr. Paterno's purported conduct would likely have been disproven.

Indeed, the Complaint is replete with specific allegations against Mr. Paterno that would have crumbled if Mr. Paterno had been allowed the opportunity to defend himself. For example:

(a) In paragraphs 28 and 29 of the U.S. Complaint, the United States alleges that Mr. Paterno discussed with and urged Supervisor I (upon information and belief, a Mr. Brian Connolly) to remove Mechanic I (upon information and belief, a Mr. Oliver Redman III) from his position. Instead, it was actually Mr. Paterno who prevented Mr. Kaplan from removing Mr. Redman.

(b) The U.S. Complaint goes on to state in paragraph 33 that Mr. Connolly refused to comply with an order from Mr. Kaplan to remove Mr. Redman's computer from his workspace. The person who refused to comply with the order, and who counseled against it, was Mr. Paterno. Moreover, the U.S. Complaint (at paragraph 35) alleges that Mr. Paterno ordered the removal of Mr. Redman's phone, when, in actuality, it was Mr. Kaplan who gave this directive.

(c) The U.S. Complaint's recitation of the details of Mr. Paterno's interviews with DOT EEO regarding Mr. Kaplan are replete with errors which cast aspersions on Mr. Paterno's character. In paragraph 47, the United States alleges that Mr. Paterno denied ever hearing Mr. Kaplan using racial epithets when confronted about it in his first interview. Mr. Paterno was never asked such a question in his first interview with DOT EEO.

(d) The U.S. Complaint states, in paragraph 48, that Mr. Paterno later recanted his testimony. He did no such thing; he did supplement his testimony after being approached by EEO on a second occasion and learning that Mr. Kaplan had projected his own discriminatory conduct onto the shoulders of Mr. Paterno.

(e) The U.S. Complaint alleges in paragraph 53 that Mr. Paterno promoted a culture of fear and intimidation and, in paragraph 54, that he systematically excluded minorities from preferred assignments and special projects. In fact, Mr. Paterno helped numerous minority employees (such as Eugen McNeil, John Matthews Jr., and Colvert Dwyer) keep pay grades they would otherwise have lost and helped transition minority employees into preferred assignments (such as Seupersand Bharat, Luis Ramirez, and others).

(f) The U.S. Complaint alleges in paragraph 55 that Mr. Paterno hand-picked white candidates to fill preferred assignments that lead to supervisory positions that opened up during his tenure as Executive Director, rather than have an open process that involved consultation. This is false; every single alleged preferred assignment and/or supervisory position that was filled under Mr. Paterno's tenure was filled after consultation with a committee and/or direction and/or approval from Mr. Paterno's superiors. If minorities were underrepresented in the ranks of those who were selected to fill supervisory openings, it was the consequence of policies and procedures promulgated by higher-ups at DOT and not Mr. Paterno.

(g) The U.S. Complaint, in paragraphs 56 through 63, alleges that Mr. Paterno conspired to have Seupersaud Bharat replaced as the assistant supervisor to Supervisor II, a Mr. Robert Conca, in 2009. These paragraphs are completely false. Mr. Bharat never served as an "Assistant Supervisor" to Mr. Conca. Mr. Paterno transferred Mechanic II (upon information and belief a Mr. Michael Moliero) to provide more supervisory help to Mr. Conca

following Mr. Conca's direct request. Moreover, after Mr. Moliero was transferred, Mr. Paterno was instrumental in helping to keep Mr. Bharat employed, performing the administrative tasks he was performing for Mr. Conca. In mid-2010 (after training under Mr. Moliero), Mr. Bharat was given greater supervisory tasks under Mr. Conca.

(h) An even greater falsehood is the U.S. Complaint's recitation in paragraphs 64 through 77 that involved what it calls the Biodiesel Retrofit Program, or BRP. No such program ever existed during Mr. Paterno's tenure as Executive Director.

(i) Paragraphs 78 through 123 of the U.S. Complaint laid at the feet of Mr. Paterno the purported exclusion of minorities from consideration for or promotion into Supervisor of Mechanics (Mechanical Equipment) ("SOMME") title vacancies. As stated before, every single supervisory position, including provisional and permanent SOMME title promotions, that were filled under Mr. Paterno's tenure, were filled after consultation with a committee and/or recommendation from Mr. Paterno, and the approval from his superiors. If minorities were underrepresented in the ranks of those who were selected to fill supervisory openings, it was the consequence of policies and procedures promulgated and enforced by DOT, not Mr. Paterno.

(j) Likewise, paragraphs 129 through 136 of the U.S. Complaint, which discuss a series of threats that were allegedly made by Mr. Paterno against Donald Prophete (identified in the Complaint as "Blacksmith I"), are completely false.

Instead of contesting any of these allegations, the City and DOT, with the approval of Defendant [NYC Transportation Commissioner] Trottenberg, entered into a Consent Decree, dated June 13, 2017, and admitted to the entirety of the allegations in the Complaint, including demonstrably false allegations that were directed at Mr. Paterno and incorporated into the Consent Decree.

The Consent Decree reiterated and even embellished many of the allegations in the U.S. Complaint directed at Mr. Paterno. As with the U.S. Complaint, all allegations concerning discriminatory/ retaliatory conduct on the part of Mr. Paterno were false. By entering into the Consent Decree, the City and DOT joined the United States in making false, damaging accusations directed at Mr. Paterno.

Mr. Paterno was never questioned by the Defendants about the critical allegations in the U.S. Complaint before the Consent Decree was signed and published. (*Id*.). When the Consent Decree was filed it was widely reported by the press, which was able to easily identify Mr. Paterno as Executive Director II.

The publication of the Consent Decree had the effect of casting Mr. Paterno as a racist villain at DOT who needed to be purged. Editorials calling for punitive action against Mr. Paterno were published in the press, and at least one New York City Council member publicly called for his immediate removal from any employment with the City.

In fact, the City had already punished Plaintiff. On June 16, 2016, Plaintiff was transferred to a new, lesser position (the "June 2016 Demotion"), without

(at the time) any explanation, with a loss in pay of around $60,000 per year.

The basis for this demotion was the false allegations of discriminatory conduct that formed the basis for the Consent Decree, that had been adopted around DOT without affording Plaintiff the opportunity to rebut them, and that now carried the imprimatur of a Consent Decree.

When confronted by editorial writers in the press with fallout from the Consent Decree, Defendant Trottenberg wrote in a letter that was quoted in an article in *The Chief*, a widely circulated public employee newspaper, that appeared on June 30, 2017:

> [ ] that DOT had been proactive and that "before the agency even entered into its consent decree with the Department of Justice, it had undertaken "aggressive" action, including in 2015 and 2016, "dramatically" restructuring senior leadership within both the Fleet and Equal Employment Opportunity units "to address the concerns raised by the complainants." A previous Executive Director of Fleet Services who engaged in racist practices was simultaneously working with the EEO unit before he was forced to retire eight years ago.
>
> ---
>
> DOT added four additional EEO staff members in September 2016, and promoted three minority candidates to the Supervisor of Mechanics Mechanical Equipment title. In July 2016, Ms. Trottenberg wrote, "DOT removed John Paterno, the main subject of the investigation, from his

> position, reassigning him to a position without supervisory responsibility and no role in hiring or promotions." His compensation dropped from $197,000 in 2015 to $163,000 last year.

The statements made by Trottenberg were outrageous. In fact, the three promotions of minority individuals that are cited as "corrective action" were carried out at the behest and direction of Mr. Paterno. The Trottenberg letter is an admission that the June 2016 Demotion was carried out to remedy the purported conduct outlined in the Complaint and Consent Decree. It is also clear from this admission that the June 2016 Demotion was punitive in nature and an effective demotion that deprived Plaintiff of compensation.

Moreover, by directly linking the June 2016 Demotion to the Complaint and Consent Decree, the Defendants reiterated their support for the outrageously false allegations contained in the Complaint and Consent Decree.

The June 2016 Demotion was carried out without giving Mr. Paterno recourse to any process through which he could have cleared his name or appealed what was being done to him.

On or around June 26, 2017, shortly after the first articles about the Consent Decree appeared in the local press, Mr. Paterno was served with a Notice of Complaint which alleged that Mr. Paterno had been accused of "retaliation." The disciplinary Complaint stated, in part:

> [I]t is alleged that you appeared at Flatlands Yard on June 16, 2017 and spoke to DOT employees regarding the consent decree

> executed in *USA v. City of New York*, including speaking with individuals who are identified as claimants in that action.

There was no allegation of any threatening or retaliatory action taken against any individuals in the Notice.

All discussions Mr. Paterno had with co-workers about the Consent Decree, by its very nature, including denial of the City's "admissions" in the Complaint that touched his conduct, or asking other employees for their views, involved a matter of public importance, *i.e.*, discriminatory conduct at DOT, and his involvement in it.

On or around September 15, 2017, Mr. Paterno received correspondence from DOT that stated "EEO has concluded its investigation of the above referenced complaint [EEO Complaint 841-2017-00021] filed alleging discrimination on the basis of retaliation … DOT finds the allegations were substantiated against you."

The September Letter goes on to name "corrective measures" to be taken, including but not limited to "appropriate and applicable" disciplinary proceedings. The September Letter was issued shortly after Mr. Paterno's attorney provided a statement to the press contesting the allegations of discrimination directed against Mr. Paterno in the Consent Decree.

Appellees announced an intention to punish Mr. Paterno, not for taking any adverse action against his subordinates, or threatening them, but for voicing his opinions about a matter of public concern, the Consent Decree, in and outside the workplace.

Mr. Paterno was set to (and did) retire sometime around May 15, 2018. Despite his retirement, Appellees, in a subsequent notice outlining the specific charges against Appellant, stated that Mr. Paterno was not being disciplined for threatening his subordinates but for purportedly questioning co-workers about the Consent Decree and disclosing the details of Specific Consent decree award(s). The allegations in the charges are not violations of New York City's Equal Employment Opportunity policy.

B. Proceedings in the District Court and the Court of Appeals

Petitioner filed suit on October 26, 2017, and after some initial motion practice amended the Complaint on April 30, 2019, seeking relief on the grounds that Respondents:

(a) Violated Petitioner's rights to due process under the Fourteenth Amendment to the U.S. Constitution, by transferring and demoting Petitioner without process and upon false allegations of racism, *i.e.*, a stigma-plus claim, and

(b) Violated Petitioner's First Amendment rights under the U.S. Constitution by taking disciplinary/retaliatory action against Petitioner for making statements involving matters of public concern, *i.e.*, a First Amendment retaliation claim.

The Respondents moved to dismiss the Amended Complaint on May 8, 2019. Petitioners responded on May 29, 2019. On July 31, 2018, the District Court entered an Opinion and Order, dismissing all of the claims against the Respondents, and specifically

ruled that the procedural due process claim[1] must be dismissed on the grounds that:

(a) The Amended Complaint did not identify a stigmatizing statement upon which such a claim could rest, as the statements identified were either contained in legal pleading and hence protected by New York State's absolute privilege against defamation for statements uttered in the course of a legal proceeding, or referenced statements that were opinions, inferential, or otherwise true.

(b) That all stigma-plus due process claims may, and must, be adjudicated under New York State's Article 78 proceeding.

As stated above, a timely appeal was interposed with the Court of Appeals. That Court, on July 2, 2019, after conducting a *de novo* review, affirmed the dismissal of the Amended Complaint in its entirety on the grounds that:

(a) The stigmatizing statements complained of in the due process claim were not made "concurrently in time" with the alleged deprivation.

---

[1] Petitioner does not seek review of the dismissal of his First Amendment retaliation claim and omits discussion of those portions of the District Court and Court of Appeals rulings addressing the retaliation portion of the Amended Complaint.

REASONS FOR GRANTING THE PETITION

In *Paul*, this Court laid out the broad contours under which an individual could challenge the deprivation, without due process, of a liberty interest secured by the Fourteenth Amendment brought about by stigmatizing actions of the government. This Court held that a plaintiff must show the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, *plus* the denial of "some more tangible interest[ ] such as employment," or the alteration of a right or status recognized by state law. *Paul*, 424 U.S. at 701, 711. Damage to one's reputation is not "by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701. This species of due process claim has come to be known as a "stigma-plus" due process claim.

The Second Circuit has interpreted *Paul* and its progeny to require a Plaintiff, seeking redress for deprivation of liberty without due process on the part of the government, under § 1983 to show "(1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights." *Paterno*, 2019 WL 2847166 at *1, *quoting Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004).[2]

Under the pleading requirements established under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555

[2] In this case they added a "temporal proximity" test and applied it during a Motion to Dismiss.

(2007), Petitioner satisfied these requirements. He pleaded the utterance of statements that were derogatory in nature and that were capable of being proved false (specifically charges or racism that were repeated by Respondents in the press and that had been circulating around DOT at the time of Petitioner's transfer and demotion). *See* Pet. App. C-9 – C-11. Respondent also pleaded that the state had imposed a burden on and altered rights secured by collective bargaining and state law (specifically that a government employer had demoted him/changed his job responsibilities, and reduced his compensation, in violation of his collective bargaining agreement and New York State law,[3] and that the state's conduct placed an undue burden on all future job prospects within and without DOT). *See* Pet. App. C-11, C-14.

[3] New York Civil Service Law Section 75 states that a covered employee "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." N.Y. Civ. Serv. L. § 75(1) (McKinney 1999).

I. The Temporal Proximity Test Applied by the Second Circuit Conflicts with Precedents from This Court and Other Circuits, and Undermines the Structure of the Due Process Clause of the Fourteenth Amendment

These pleadings were not sufficient to satisfy the District Court and the Second Circuit; in its decision the Second Circuit specifically held that Petitioner's pleadings ran afoul of the Second Circuit's additional requirement that for a stigma-plus claim to succeed "*[a] plaintiff must also 'show the stigmatizing statements were made concurrently in time' with the burden on his or her rights.*" *Paterno*, 2019 WL 2847166 at *1, *quoting Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004. The Court of Appeals further observed, "*Paterno's appeal must fail because he did not—and cannot—plead that the alleged stigmatizing statements were made 'concurrently in time' with the alleged deprivation. The consent decree in the Title VII case was not made public until a year after Paterno's transfer, and any allegedly defamatory statements by Commissioner Trottenberg were even further removed in time.*" *Id.*

What was implicit in *Paul*, 424 U.S. 693, this Court's key decision on stigma-plus cases, was made explicit in this Court's ruling in *Siegert v. Gilley*, 500 U.S. 226, 234 (1991), to wit, that there must be some nexus between the stigmatizing statements and action on the part the government, *i.e.*, the stigma element, and the denial of the legal right or entitlement secured by state law, *i.e.*, the "plus" element, of a stigma-plus claim. *See Siegert*, 500 U.S. at 234 ("[t]he alleged defamation was not uttered incident to the termination of Siegert's employment

by the hospital, since he voluntarily resigned from his position at the hospital, and the [allegedly defamatory] letter was written several weeks later.") The Second Circuit has interpreted this nexus requirement to require a concurrent temporal link between defamatory statements and the deprivation of a legal entitlement. *See supra*, *Paterno*, 2019 WL 2847166 at *1; *see also Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26, 32 (2d Cir. 1994) ("[s]everal of our cases interpreting *Paul* clearly indicate that a concurrent temporal link between the defamation and the dismissal is necessary if the employee is to succeed upon a claim of liberty deprivation").

While *Paul* implicitly, and *Siegert* explicitly, require some nexus between the stigma and the "plus" elements of a stigma-plus claim, this Court has never reduced that requirement to a bright-line temporal rule, especially in the context of a Motion to Dismiss. At least one other Circuit agrees with Petitioner's reading of this Court's precedent and disagrees with the rule adopted by the Second Circuit. *See Ulrich v. City and County of San Francisco*, 308 F.3d 968, 983 (9th Cir. 2002) ("[t]his element does not require a strict temporal link between the defamation and the nonrenewal or discharge").

The Court of Appeals for the Ninth Circuit went on to expound that where the stigmatizing statements are made several days after a discharge/failure to rehire, "the defamatory statement [were] 'so closely related to discharge from employment that the discharge itself may become stigmatizing in the public eye.'" *Ulrich*, 308 F.3d at 983 *quoting*

Campanelli v. Bockrath, 100 F.3d 1476, 1482 (9th Cir. 1996).

Petitioner makes a similar claim his pleadings, *i.e.*, that the demotion that took place approximately a year before Commissioner Trottenberg's statements to the press was *in and of itself* stigmatizing in the public eye. Indeed, Petitioner has explicitly pleaded that the allegations that he was a racist were circulating within DOT at the time of his demotion, well before Respondent Trottenberg's comments to the press, Pet. App. C-9 – C-10 ("[t]he basis for this Demotion was the false allegations of discriminatory conduct [ ] that had been adopted around DOT without affording Plaintiff the opportunity to rebut them …") and that Trottenberg's publicly confirmed that these stigmatizing allegations had indeed formed the basis for the deprivation of his legal entitlement to continued employment without demotion or diminution of his job responsibilities. Pet. App. C-10. There is no need for temporal proximity to demonstrate a causal relationship between the pleaded stigma and pleaded plus elements of a stigma-plus claim when one of the Respondents has so barely laid forth the causal nexus between the "plus" action and the defamatory statements in her statements to the press.

II. The Refusal of the Second Circuit and the Lower Court to Consider the Factual Pleadings with Respect to Injury in a Light Most Favorable to Petitioner Conflicts with the Decisions of This Court

The Second Circuit (and the District Court) also fell afoul of this Court's precedent on what is necessary to sufficiently plead a claim upon which relief may be granted when Petitioner's claims were dismissed.

To survive a Motion to Dismiss, a Complaint must allege facts sufficient "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "[M]ere conclusory statements" will not suffice, *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937: the "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "On a motion to dismiss, all factual allegations in the complaint are accepted as true and all inferences are drawn in the plaintiff's favor." *Littlejohn v. City of New York*, 795 F.3d 297, 306 (2d Cir. 2015).

On each element of a stigma-plus claim, Petitioner did plead facts that were subject to examination during the course of discovery and revisited either at summary judgment or in front of the factfinder at trial. *See supra*. Even assuming, *arguendo*, that the Second Circuit's temporal proximity test is in accord with this Court's precedent on stigma-plus claims, in order for the Second Circuit to affirm the District Court's dismissal it must explicitly ignore two other portions of the pleadings that establish a clear nexus

between a stigma and the deprivation of a legal entitlement:

- Paragraph 23 of the Amended Complaint clearly sets forth that stigmatizing allegations had been circulating around DOT, and formed the bases for Petitioner's demotion *at the time he was demoted*. *See supra*, Pet. App. C-9 – C-10.
- Paragraph 47 of the Amended Complaint clearly alleged that the public adoption by Respondents of false allegations, from a Consent Decree entered into between the City of New York and the United States, in a press release would impermissibly burden Petitioner's job prospects within the DOT and outside the DOT moving forward.[4]

[4] The Second Circuit clearly recognizes a stigma-plus claim where stigmatizing statements place a tangible burden on future employment prospects. *See Valmonte v. Bane*, 18 F.3d 992, 1001 ("Valmonte alleges much more than a loss of employment flowing from the effects of simple defamation. The Central Register does not simply defame Valmonte, its places a tangible burden on her employment prospects.")

CONCLUSION

The petition for writ of certiorari should be *granted*.

Dated: September 30, 2019

Respectfully submitted,

ARTHUR Z. SCHWARTZ
Counsel of Record
RICHARD SOTO
ADVOCATES FOR JUSTICE,
CHARTERED ATTORNEYS
Attorneys for Petitioner
225 Broadway, Suite 1902
New York, New York 10007
(212) 285-1400
aschwartz@afjlaw.com