No. 19-986

In The
Supreme Court of the United States

MARY LOU VOSBURGH
and JAKE MCHERRON,

Petitioners,

v.

BURNT HILLS – BALLSTON LAKE
CENTRAL SCHOOL DISTRICT,
PATRICK MCGRATH, TIMOTHY
BRUNSON, and JOE SCALISE,

Respondents.

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

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Fourteenth Amendment procedural due process claim actionable when the state has not denied due process to the claimant? The United States Court of Appeals for the Second Circuit held that it was not.

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INTRODUCTION

The Fourteenth Amendment prohibits states from depriving individuals of "life, liberty, or property, without due process of law." The states offer various legal mechanisms to safeguard this constitutional right to due process. One of these mechanisms is New York State Civil Practice Law and Rules Article 78, which codifies the procedure for obtaining a writ of mandamus from a New York State court to compel a government actor to perform a legal duty.

Petitioners Jake McHerron ("McHerron") and Mary Lou Vosburgh ("Vosburgh") ("Petitioners") allege that they were terminated from their employment with Respondent Burnt Hills–Ballston Lake Central School District ("District") and that they were stigmatized by the District, its Superintendent Patrick McGrath, Principal Timothy Brunson, and Director of Physical Education and Athletics Joe Scalise ("Respondents") in connection with that alleged termination. These allegations, if true, could establish that Petitioners suffered a "stigma-plus" injury, which the courts recognize as an impairment of a liberty interest protected under the Fourteenth Amendment. The process due to an individual who has suffered a stigma-plus injury is a "name-clearing hearing" at which the individual can challenge the stigmatizing statements made about him. If the opportunity for a name-clearing hearing is provided to the individual, due process has been afforded and the individual's constitutional rights have not been violated.

Petitioners could have pursued an Article 78 proceeding to obtain an order compelling Respondents to hold a name-clearing hearing. They did not.

Instead, they prematurely commenced this action alleging that they had been denied due process. In reality, they had not been denied due process; they had not even sought it. For this reason, the Second Circuit affirmed the dismissal of this action, holding that Petitioners were not denied due process because they could have utilized Article 78 procedures to obtain the name-clearing hearing to which they claim they are entitled.

Petitioners now assert that the Second Circuit's decision should be overturned. Their muddled arguments are based on a basic misunderstanding of the nature of the constitutional right to procedural due process. They contend that they should have been allowed to seek due process in federal court. Quite the contrary: a due process claim of constitutional magnitude arises only if due process has been denied. Here, due process was never denied, so a constitutional violation never occurred. The Second Circuit's holding was sound and there is no need for review by this Court.

STATEMENT OF THE CASE

I. Factual Background[1]

Petitioners were employed by the District as high school varsity girls' lacrosse coaches for the spring 2018 lacrosse season. In May 2018, shortly before the end of the lacrosse season, they were placed on paid administrative leave from their coaching positions while the District investigated complaints about them that it had received from parents of girls on the team. Petitioners remained on paid leave through the end of the lacrosse season.

Despite their insistence otherwise, Petitioners were never "terminated" from their coaching positions (App. 38, 42–43). They were untenured, temporary employees with a fixed term of employment. Their terms simply expired when the spring 2018 lacrosse season ended. They continued to receive full compensation through the end of their terms (and have never alleged otherwise). Although Respondents do not deny that Petitioners were not selected as

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[1] As required by Rule 15(2) of the Rules of the Supreme Court of the United States ("Supreme Court Rules"), Respondents highlight Petitioners' misstatements of fact to the extent that such statements might bear on issues that would be before this Court if certiorari were granted. Respondents also note that because this action was dismissed on a pre-answer motion to dismiss in the courts below, the parties and the court were required to accept Petitioners' allegations as true. Thus, this summary of facts largely reflects the allegations of Petitioners' proposed amended complaint, which were properly considered by the district court and the Second Circuit and accepted as true, unless otherwise noted. *See NRP Holdings LLC v. City of Buffalo*, 916 F.3d 177, 189 (2d Cir. 2019). Respondents do not concede that those allegations are accurate.

coaches for the 2019 lacrosse season, this fact is beside the point since Petitioners had no entitlement to be rehired for subsequent seasons. In fact, Petitioner Vosburgh did not even apply for a 2019 coaching position.

Petitioner McHerron, who had previously worked as a substitute teacher for the District, also alleges that at some point after his suspension from coaching, the District stopped giving him substitute teaching assignments. The District does not deny that it stopped giving substitute teaching assignments to McHerron. However (as Respondents pointed out to the courts below), as a substitute teacher, McHerron had no continuous employment relationship with the District. He had received some discrete, per diem assignments from the District in the past, but he had no legally cognizable interest in receiving additional assignments in the future.

Petitioners allege that Respondents, in connection with Petitioners' so-called "termination" (i.e., their suspension), made defamatory statements about Petitioners. For example, Respondents allegedly notified the press about the parent complaints and Petitioners' suspensions, told members of the community that Petitioners had created a "negative and hostile environment" on the lacrosse team and that the members of the team were victims of "battered girlfriend syndrome," and made negative statements about McHerron's performance as a substitute teacher. Petitioners claim that these statements were stigmatizing. (Respondents dispute these allegations, but because this suit was dismissed at the pleadings stage, they were required to be accepted as true for the purposes of the motion before the district court and the Second Circuit.)

Petitioners allege that they twice requested a name-clearing hearing from Respondents and that the Respondent denied these requests. As discussed *infra*, New York State provides a procedure for claimants to obtain mandamus relief compelling a recalcitrant government actor to perform a legal duty. Petitioners could have utilized this procedure to obtain a court order requiring the District to hold a name-clearing hearing. They did not. Instead, they filed this federal suit just three months after they were placed on leave.

II. Procedural Background

Petitioners commenced this suit in the United States District Court for the Northern District of New York on August 21, 2018, alleging that Respondents had violated their Fourteenth Amendment procedural and substantive due process rights and seeking to impose liability on Respondents pursuant to 42 U.S.C. § 1983.

On October 15, 2018, Respondents filed a motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all of Petitioners' claims on the grounds that Petitioners had failed to state claims upon which relief could be granted. Petitioners opposed the motion and cross-moved to amend their complaint to expand their factual allegations relating to their Fourteenth Amendment claims and to add a new claim that Respondents retaliated against Petitioners for commencing this lawsuit by posting a job opening for a spring 2019 lacrosse coach (the position which McHerron had held in 2018) in violation of the First Amendment. In a decision and order and judgment dated January 24, 2019, the district court dismissed all of Petitioners' claims and denied their cross-motion to amend as futile (App. 12–63). With respect to the

procedural due process claim, the district court held that Petitioners had failed to state a stigma-plus due process claim because they failed to allege that Respondents had deprived them of any cognizable liberty or property interest (App. 29–49).

Contrary to Petitioners' suggestion (Pet. at 11), Respondents' briefing before the district court did raise the issue of the availability of Article 78 relief and argued that that Petitioners' claim was barred by the availability of that relief. The district court did not reach this issue because it found that Petitioners had not established a stigma-plus injury and thus were not entitled to a name-clearing hearing (*see* App. 49).

Respondents appealed the portions of the district court's decision which dismissed their procedural due process claim and denied their request to add a retaliation claim. On October 2, 2019, in a unanimous, unpublished summary order with no precedential effect,[2] the Second Circuit affirmed the district court's decision (App. 1–11). Its reasoning was, however, different than the district court's. The Second Circuit held that even if Petitioners had successfully alleged a stigma-plus injury, their due process claim was defeated by the availability of an Article 78 proceeding (App. 4–6). On November 7, 2019, the Second Circuit denied Petitioners' request

[2] The Second Circuit's rules state that "When a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order." Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit, Rule 32.1.1

for a panel rehearing or rehearing *en banc* (App. 64–65).

This appeal followed.[3] Petitioners challenge only the portion of the Second Circuit's holding which affirmed the district court's dismissal of Petitioners' stigma-plus claim. They do not seek review of the dismissal of their substantive due process or First Amendment claims.

REASONS TO DENY PETITIONERS' WRIT

This Court should not grant Petitioners' request for a writ of certiorari. Petitioners' contention that their stigma-plus claim is viable relies upon their fundamental misunderstanding of the nature of due process claims.

A procedural due process claim does not accrue unless due process has been denied by the state. If a claim has not accrued, it cannot be asserted in federal court. Here, the Second Circuit did not impose an impermissible "exhaustion" requirement on Petitioners. It simply, and correctly, reasoned that Petitioners had no viable due process claim because they had never pursued – and had thus never been denied – the process available to them.

Article 78 proceedings in New York State have long been recognized by both the state and federal courts as a satisfactory means for claimants to obtain due process. Petitioners' feeble attempt to challenge

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[3] Respondents note that they were never served with notice "of the date of filing, the date the case was placed on the docket, and the docket number of the case," as required by Rule 12(3) of the Supreme Court Rules.

the constitutional sufficiency of Article 78 proceedings falls flat in the face of voluminous case law attesting to the efficacy of such proceedings. Additionally, because Petitioners here never even pursued an Article 78 proceeding, there is no reason for this Court to entertain their purely hypothetical complaints about what might have transpired in a nonexistent proceeding.

Finally, there is no circuit split or conflict in the case law which would merit this Court's attention here. In particular, Petitioners' attempt to characterize the Second Circuit's holding as inconsistent with *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), fails because *Knick* is completely inapplicable to due process claims.

I. Petitioners' Position is Incompatible with the Basic Principle that Procedural Due Process Claims Do Not Accrue Unless Process Has Been Denied by the State.

The Fourteenth Amendment provides that states may not "deprive any person of life, liberty, or property, without due process of law" (emphasis added). As this Court has explained:

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. 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.

Zinermon v. Burch, 494 U.S. 113, 125–26, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990). In other words, due process is not the legal remedy for an independently actionable deprivation of a protected interest in life, liberty, or property. Due process is an element of the constitutional right itself. If a deprivation occurred but due process was provided, then no constitutional right was violated. If no right was violated, no actionable claim accrued.

This Court's jurisprudence recognizes an important distinction between "pre-deprivation" and "post-deprivation" process. Under some circumstances, a person's due process rights have inherently been violated if process was not afforded before the person's protected interest was impaired. This is "pre-deprivation" due process. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S. Ct. 1011, 1018, 25 L. Ed. 2d 287 (1970) (requiring pre-termination process before termination of welfare benefits). However, in other circumstances, it is sufficient for the state to provide process after a person's interests have already been impaired. This is "post-deprivation" due process. *See, e.g.*, *Parratt v. Taylor*, 451 U.S. 527, 543–44, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (holding that post-deprivation state tort remedies provided adequate due process to an inmate alleging deprivation of his personal property). When post-deprivation process is sufficient, a constitutional claim does not instantly accrue when the person's interests are impaired. *Zinermon*, 494 U.S. at 125–26. A claim accrues only if

the person is denied due process following an impairment of his or her protected interest. *See id.*

Before name-clearing hearings even came to be known as "name-clearing hearings," this Court held that post-deprivation process suffices in stigma-plus cases. *Arnett v. Kennedy*, 416 U.S. 134, 157, 94 S. Ct. 1633, 1646, 40 L. Ed. 2d 15 (1974) (holding that because a stigma-plus plaintiff's liberty interest "is not offended by dismissal from employment itself, … the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,'" so a hearing "after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause"). The settled rule in the Second Circuit is that post-deprivation due process – which, in New York, is available via an Article 78 proceeding – is sufficient to cure a stigma-plus injury. *Hughes v. City of New York*, 680 F. App'x 8, 10 (2d Cir. 2017); *Guerra v. Jones*, 421 F. App'x 15, 19 (2d Cir. 2011); *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 121 (2d Cir. 2011).

Thus, courts' analysis of due process claims "proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219, 131 S. Ct. 859, 861, 178 L. Ed. 2d 732 (2011) (emphasis added). "If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

Flouting these basic tenets, Petitioners repeatedly insist that there is no difference between

an Article 78 proceeding and a § 1983 action. They are mistaken; the difference is obvious. An Article 78 proceeding offers due process which prevents a federal claim from arising in the first place. A § 1983 claim only arises if and when due process is denied.

The district courts in New York are well aware of this difference. "An Article 78 proceeding is a novel and special creation of state law, and differs markedly from" federal litigation; Article 78 claims and procedural due process claims are not interchangeable. *Lucchese v. Carboni*, 22 F. Supp. 2d 256, 258 (S.D.N.Y. 1998). In fact, even where a claimant has viable federal claims (which Petitioners here do not) intertwined with viable Article 78 claims, "the interests of judicial economy are not served by embroiling [a federal] court in a dispute over local laws and state procedural requirements," and Article 78 relief must be pursued in state court, separately from the federal claims. *Birmingham v. Ogden*, 70 F. Supp. 2d 353, 372–73 (S.D.N.Y. 1999).

New York State courts also recognize that Article 78 and federal claims are not functionally equivalent. In one recent example, a New York appellate court, correctly discerning the difference between Article 78 process and federal due process claims, determined that a plaintiff's due process claim was premature and *sua sponte* converted it into an Article 78 request for a name-clearing hearing. *Wilcox v. Newark Valley Cent. Sch. Dist.*, 107 A.D.3d 1127, 1133, 967 N.Y.S.2d 432, 439–40 (2013).

Petitioners assert that the Second Circuit's 2004 decision in *Patterson v. City of Utica*, 370 F.3d 322 (2d Cir. 2004), demonstrates that a claimant can receive an "order for a name-clearing hearing" (Pet. at

3) as his federal remedy for a successful due process claim. Petitioners misread *Patterson*. The employee in *Patterson* did not bring his federal action to obtain a name-clearing hearing in the first instance; his employer had already held a name-clearing hearing, and he challenged the hearing's sufficiency. *Id.* at 328. The Second Circuit carefully reviewed the conduct of that hearing and determined that it had been insufficient to afford due process to the employee. *Id.* at 335–37. At any rate, contrary to Petitioners' assertion, the *Patterson* court did not order a name-clearing hearing; it remanded the action for a damages trial. *Id.* at 338–39.

The Second Circuit in *Patterson* did acknowledge that in a prior case, *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623 (2d Cir. 1996), it had ordered the district court to arrange a name-clearing hearing for the plaintiff. *Patterson*, 370 F.3d at 337 (citing *Donato*). Although the *Donato* decision did not identify what the plaintiff there had done to pursue a name-clearing hearing, it specifically concluded that she was entitled to a name-clearing hearing because she had been "deprived of liberty without due process of law." *Donato*, 96 F.3d at 633 (emphasis added). Therefore, neither *Patterson* nor *Donato* supports Petitioners' position that claimants have historically been able to demand name-clearing hearings in federal court before there has been any state-level denial of due process. Both cases confirm that federal due process claims are actionable only after due process has been denied by the state.

Petitioners also complain, without citing any authority, that bringing an Article 78 proceeding would have precluded them from subsequently vindicating their constitutional rights in federal court.

This concern is unfounded. It is well-established in the Second Circuit that § 1983 claims are not precluded by the claimant's prior pursuit of an Article 78 proceeding. *DiBlasio v. Novello*, 344 F.3d 292, 296 (2d Cir. 2003). Logically, a state proceeding based on a claim that an individual is entitled to due process would not bar a federal action based on a claim that due process was denied in the hearing secured via the state proceeding.

Here, the Second Circuit correctly held that Petitioners had not stated an actionable stigma-plus claim because the availability of Article 78 relief meant that Petitioners were not denied due process. Petitioners' insistence that they were entitled to rush straight to federal court to demand a name-clearing hearing (Pet. at 3–4, 16) is based on a fatal misapprehension of the nature of their own claim. There is no reason for this Court to entertain Petitioners' meritless challenge to the Second Circuit's holding.

II. Article 78 Proceedings Are a Long-Established and Effective Means of Requesting Name-Clearing Hearings in New York State.

According to Petitioners, they cannot be faulted for failing to seek "an 'Article 78 name-clearing hearing'"[4] because such a hearing is "a non-existent

[4] Notwithstanding Petitioners' use of quotation marks, the Second Circuit's summary order never used the phrase "Article 78 name-clearing hearing." *See* App. 1–8. *Anemone*, cited by the court below, does use the phrase in the context of distinguishing a plaintiff who did not pursue an Article 78 proceeding from a colleague of his who did (and who received a court-ordered name-clearing conducted by a special master). *Anemone*, 629 F.3d at 111; *Casale v. Metro. Transp. Auth.*, 23 Misc. 3d 1121(A), at *6–

proceeding" (Pet. at 12). This sham excuse is highly disingenuous. Article 78 proceedings involving name-clearing hearings are hardly a figment of the Second Circuit's imagination. There is an overwhelming wealth of precedent supporting the Second Circuit's holding that Petitioners could have sought a name-clearing hearing by filing an Article 78 petition.

Article 78 proceedings involving name-clearing hearings have been litigated in New York courts for decades. The New York State Court of Appeals (the state's highest court) has repeatedly considered such proceedings. *See, e.g.*, *Swinton v. Safir*, 93 N.Y.2d 758, 767, 720 N.E.2d 89, 94 (1999) (remitting proceeding to trial court for further fact-finding to determine the petitioner's entitlement to a name-clearing hearing); *Lentlie v. Egan*, 61 N.Y.2d 874, 875, 462 N.E.2d 1185, 1186 (1984) (denying name-clearing hearing on the basis that the petitioners had not established stigma); *Petix v. Connelie*, 47 N.Y.2d 457, 459–60, 391 N.E.2d 1360, 1362 (1979) (same).

Likewise, the state's intermediate appellate courts are well-acquainted with such proceedings. *See, e.g.*, *Wilcox v. Newark Valley Cent. Sch. Dist.*, 129 A.D.3d 1230, 1231–32, 11 N.Y.S.3d 703, 706 (2015) (reversing trial court's order directing a name-clearing hearing, on the basis that the petitioner had not established stigma); *Knox v. New York City Dep't of Educ.*, 85 A.D.3d 439, 440, 924 N.Y.S.2d 389, 389 (2011) (affirming trial court order directing a name-clearing hearing); *Vandine v. Greece Cent. Sch. Dist.*, 75 A.D.3d 1166, 1168, 905 N.Y.S.2d 428, 431 (2010)

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*10, 886 N.Y.S.2d 70 (Sup. Ct. 2009), *aff'd*, 75 A.D.3d 486, 906 N.Y.S.2d 531 (2010) (discussing the colleague's name-clearing hearing).

(directing trial court to order a name-clearing hearing to be held by the respondent); *Budd v. Kelly*, 14 A.D.3d 437, 438, 788 N.Y.S.2d 114, 114 (2005) (affirming trial court order directing a name-clearing hearing); *Khawaja v. Kaladjian*, 207 A.D.2d 398, 399, 615 N.Y.S.2d 720, 721 (1994) (denying name-clearing hearing on the basis that the petitioners had not established stigma); *Blum v. Quinones*, 139 A.D.2d 509, 510, 526 N.Y.S.2d 611, 612 (1988) (same); *Carrion v. Webb*, 131 A.D.2d 806, 806, 517 N.Y.S.2d 171, 172 (1987) (reversing trial court's order directing a name-clearing hearing, on the basis that the petitioner had not pled stigma); *Ranus v. Blum*, 96 A.D.2d 1144, 1145, 467 N.Y.S.2d 740, 741 (1983) (permitting discovery because the petitioner successfully stated "a cause of action for a destigmatization hearing"); *Merhige v. Copiague Sch. Dist.*, 76 A.D.2d 926, 928, 429 N.Y.S.2d 456, 459 (1980) (remanding to trial court for fact-finding on stigma to determine whether a name-clearing hearing was warranted); *Minor v. Nassau Cty.*, 49 A.D.2d 882, 882, 373 N.Y.S.2d 209, 210 (1975) (remanding to trial court for a hearing, relying on *Civil Serv. Emp. Ass'n, Inc. v. Wallach*, 48 A.D.2d 923, 369 N.Y.S.2d 510 (1975)); *Wallach*, 48 A.D.2d at 924, 369 N.Y.S.2d at 512 (same, relying on *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)); *Reeves v. Golar*, 45 A.D.2d 163, 166, 357 N.Y.S.2d 86, 89 (1974) (remanding to employer for a "hearing consonant with due process requirements").

The state's trial courts have been capably handling Article 78 proceedings involving name-clearing hearings ever since 1972, when this Court in *Roth* first articulated the right to such hearings in the employment context. *See, e.g.*, *Starker v. Carrion*, 56 Misc. 3d 1221(A), 65 N.Y.S.3d 493 (N.Y. Sup. Ct. 2017)

(denying name-clearing hearing on the basis that the petitioners had not established stigma); *In re Mccurry v The New York State Office for People with Developmental Disabilities*, No. 663-12, 2013 WL 1562578, at *9 (N.Y. Sup. Ct. Jan. 17, 2013) (directing the respondent to conduct a name-clearing hearing and, if warranted, to expunge the statements disputed by the petitioner); *Parise v New York City Dept. of Educ.*, No. 103208/08, 2008 WL 4690756 (N.Y. Sup. Ct. Oct. 14, 2008) (granting a name-clearing hearing but denying petitioner's request that the hearing be conducted by the court); *Wright v. Guarinello*, 165 Misc. 2d 720, 724–25, 635 N.Y.S.2d 995, 998 (Sup. Ct. 1995) (ordering the state agency with which the petitioner's private employer had shared the statements at issue to conduct a name-clearing hearing); *Aster v. Bd. of Ed. of City of New York*, 72 Misc. 2d 953, 959, 339 N.Y.S.2d 903, 909 (Sup. Ct. 1972) (remanding to employer for a hearing and describing the procedural standards for the hearing).[5]

Typically, where a name-clearing hearing is warranted, the court will order the respondent to conduct the hearing. *Knox*, 85 A.D.3d at 440; *Vandine*, 75 A.D.3d at 1168; *Budd*, 14 A.D.3d at 438; *Reeves*, 45 A.D.2d 163; *In re Mccurry*, 2013 WL 1562578, at *9; *Parise*, 2008 WL 4690756; *Wright*, 165 Misc. 2d at 724–25; *Aster*, 72 Misc. 2d 953; *see also Swinton*, 93 N.Y.2d at 765 (noting that a name-clearing hearing would be "departmental" – i.e., held by the employer); *Vetter v. Bd. of Educ.*, 53 A.D.3d

[5] Although this early case held that the petitioner, a probationary teacher, should have been afforded a pre-termination hearing (*id.* at 958), subsequent case law has clarified that post-termination process suffices for at-will employees. *Segal v. City of New York*, 459 F.3d 207, 214 (2d Cir. 2006).

847, 847–48, 863 N.Y.S.2d 503, 504 (2008), *aff'd as modified*, 14 N.Y.3d 729, 926 N.E.2d 589 (2010) (noting that the respondent agreed to hold a name-clearing hearing after the petitioner had commenced an Article 78 proceeding).

On occasion, the hearing will be held before the court as part of the Article 78 proceeding. For example, in *Brandt v. Bd. of Co-op. Educ. Servs., Third Supervisory Dist., Suffolk Cty., N.Y.*, 820 F.2d 41 (2d Cir. 1987), the court noted that the plaintiff had obtained a state court order directing a name-clearing hearing before the court. *Id.* at 43. The Second Circuit remanded the case to the district court, directing that "since the state courts have already directed the [defendant] to provide [employee] with a name-clearing hearing, which we were told during oral argument was imminent, the district court should explore with the parties the effect of that order on this case." *Id.* at 46.

Yet another alternative is to hold the hearing before a special master. *Casale v. Metro. Transp. Auth.*, 23 Misc. 3d 1121(A), at *6–*10, 886 N.Y.S.2d 70 (Sup. Ct. 2009), *aff'd*, 75 A.D.3d 486, 906 N.Y.S.2d 531 (2010) (discussing a name-clearing hearing held, with the parties' consent, before a special master rather than before the respondent).

Based on the above, it is patently obvious that Article 78 proceedings involving name-clearing hearings are anything but "non-existent" in New York State. Therefore, Petitioners' attempt to cast doubt on the Second Circuit's holding on this basis is misguided.

III. Article 78 Proceedings Offer Due Process by Enabling Claimants to Either Secure Mandamus Relief Ordering a Name-Clearing Hearing or to Obtain a Name-Clearing Hearing in Court.

Petitioners further claim that the Second Circuit held that an Article 78 proceeding was "in and of itself a name-clearing hearing" and assert that the court was incorrect because an Article 78 proceeding "is not a hearing" (Pet. at 3–5). They are wrong on two counts.

First of all, the Second Circuit never stated that an Article 78 proceeding was itself a name-clearing hearing. It merely held that an Article 78 proceeding affords adequate process (App. 4–6). More specifically – as Petitioners acknowledge – an Article 78 proceeding provides a means for an employee to secure mandamus relief in the form of a court order directing the employer to hold a name-clearing hearing. Although Petitioners have not clearly explained the basis for their displeasure with this process, they appear to take the position that a two-step procedure for obtaining a name-clearing hearing (first obtaining a court order directing a hearing, and then holding the hearing itself) is somehow inherently a denial of due process. That is, they seem to believe that a name-clearing hearing must be conducted in the same forum in which the claimant requests it, and therefore a name-clearing hearing is inadequate if it is ordered by a court but is not held before that court.

However, Petitioners cite no legal authority whatsoever in support of their dubious theory that to afford adequate due process, a name-clearing hearing must be either be convened by the employer without

court intervention, or must be held before the court itself. Case law directly contradicts this theory and confirms that due process is satisfied even if a claimant must bring an action in state court to vindicate his or her entitlement to a name-clearing hearing, which is then conducted by the employer.[6] For example, relying on *Parratt*, a district court considering whether Article 78 proceedings afford due process explained that:

> Article 78 proceedings provide for speedy review of administrative action and thus serve as an integral part of the regulatory process, rather than as a source of separate judicial review. Plaintiffs cannot complain that due process has been denied them when they have rejected the state procedure that is available to them for correcting the alleged procedural deficiency. Plaintiffs cannot manufacture a § 1983 claim by pointing to the allegedly defective [administrative process] while ignoring that part of the regulatory process that serves to redress administrative error. Rather, in considering whether defendants have failed to afford plaintiffs due process…, the Court evaluates the entire procedure, including the adequacy and availability of remedies under state law.

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[6] The New York State cases cited above (*supra* Point II) illustrate that the employer/respondent is typically tasked with conducting the hearing itself. *Swinton*, 93 N.Y.2d at 765; *Knox*, 85 A.D.3d at 440; *Vandine*, 75 A.D.3d at 1168; *Vetter.*, 53 A.D.3d at 847–48; *Budd*, 14 A.D.3d at 438; *Reeves*, 45 A.D.2d 163; *In re Mccurry*, 2013 WL 1562578, at *9; *Parise*, 2008 WL 4690756; *Wright*, 165 Misc. 2d at 724–25; Aster, 72 Misc. 2d 953.

Liotta v. Rent Guidelines Bd. for City of New York, 547 F. Supp. 800, 802 (S.D.N.Y. 1982).[7] Similarly, and also relying on *Parratt*, the Second Circuit held that an Article 78 proceeding affords adequate post-deprivation due process because "the Article 78 court has the authority and seemingly the duty to order the agency to conduct a proper hearing." *Campo v. New York City Employees' Ret. Sys.*, 843 F.2d 96, 101 (2d Cir. 1988) (affirming dismissal of action arising from a city agency's refusal to hold an administrative hearing in connection with a denial of retirement benefits); *see also Cotton v. Jackson*, 216 F.3d 1328, 1332–33 (11th Cir. 2000) (Eleventh Circuit holding that Georgia mandamus procedures satisfy due process). There is simply no basis in law for Petitioners' position that mandamus does not provide due process simply because the relief available in a mandamus proceeding is a court order directing the respondent to provide the claimant with the process due to him.

Second, it not true that a New York court could not conduct a constitutionally adequate name-clearing hearing as part of an Article 78 proceeding. Petitioners' superficial analysis of the statute governing Article 78 proceedings does not persuasively rule out this possibility and provides no substantive basis for their contention that such a hearing would be inadequate.

In fact, Article 78 "provides both a hearing and a means of redress" for claimants. *Hellenic Am.*

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[7] Thus, Petitioners' assertion (Pet. at 10, 20) that Respondents denied their request for a name-clearing hearing is irrelevant. Petitioners admit that they never pursued an Article 78 proceeding to challenge this alleged denial.

Neighborhood Action Comm. v. City of New York, 101 F.3d 877, 881 (2d Cir. 1996). Fact-finding can be conducted – even in the form of a formal trial, if warranted – in an Article 78 proceeding. *Id.*; *accord Locurto v. Safir*, 264 F.3d 154, 174 (2d Cir. 2001). There is "no persuasive authority that states an administrative hearing with a neutral adjudicator rather than judicial review under Article 78 is needed to satisfy due process. No reason exists to depart from the general presumption that a judicial trial represents the epitome of full process." *Locurto*, 264 F.3d at 175.

Accordingly, courts have long recognized that "Article 78 proceedings have been held to be adequate post-deprivation procedures [which] frequently function as name clearing hearings." *Ryan v. Carroll*, 67 F. Supp. 2d 356, 361 (S.D.N.Y. 1999); *accord Walsh v. Suffolk Cty. Police Dep't*, No. 06-CV-2237 JFB ETB, 2008 WL 1991118, at *14 (E.D.N.Y. May 5, 2008), *aff'd*, 341 F. App'x 674 (2d Cir. 2009); *see also Kuczinski v. City of New York*, 352 F. Supp. 3d 314, 324 (S.D.N.Y. 2019) ("The plaintiff does not dispute the fact that an Article 78 name-clearing hearing was available to him."); *Paterno v. City of New York*, No. 17 CIV. 8278 (LGS), 2018 WL 3632526, at *6 (S.D.N.Y. July 31, 2018), *aff'd*, 781 F. App'x 15 (2d Cir. 2019), *cert. denied*, No. 19-437, 2019 WL 5875168 (U.S. Nov. 12, 2019) ("Any damage to Plaintiff's reputation was addressable in an Article 78 proceeding; damaged reputations are precisely the harm that a 'name-clearing' hearing under Article 78 is designed to address."); *Cohen v. Walcott*, No. 13-CV-9181 (JGK), 2017 WL 2729091, at *4 (S.D.N.Y. June 23, 2017) ("[T]here was an adequate post-termination name-clearing hearing available to the plaintiff, namely, an Article 78 proceeding under the CPLR.");

Brandt, 820 F.2d at 43 (noting that a name-clearing hearing had been ordered in the underlying Article 78 proceeding). For example, an Article 78 proceeding wherein an employee directly "challeng[es] his termination as arbitrary and capricious and contrary to law" can be a constitutionally sufficient name-clearing hearing. *Fiore v. Town of Whitestown*, No. 6:07-CV-797, 2010 WL 4513422, at *3 (N.D.N.Y. Nov. 2, 2010); *accord Nawrocki v. New York State Office of Children & Family Servs.*, 66 F. Supp. 3d 337, 339–40 (W.D.N.Y. 2014) (confirming that such a proceeding is available to at-will employees); *Walsh*, 2008 WL 1991118, at *14 (same).

Petitioners' claim that an Article 78 proceeding could not afford due process – whether in the form of mandamus relief, or in the form of a name-clearing hearing conducted by the court itself – is baseless and does not warrant this Court's consideration.

IV. Because Petitioners Never Even Sought Article 78 Relief, This Proceeding Would Be a Poor Test Case for Evaluating the Constitutional Sufficiency of Article 78 Procedures.

Even supposing for the sake of argument that Petitioners could, hypothetically, be correct that an Article 78 proceeding does not afford due process to stigma-plus plaintiffs seeking name-clearing hearings, this particular action is not a suitable test case for this Court to meaningfully evaluate the sufficiency of Article 78 proceedings. This Court has noted that "[b]ecause the requirements of due process are flexible…, we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures."

Wilkinson v. Austin, 545 U.S. 209, 224, 125 S. Ct. 2384, 2395, 162 L. Ed. 2d 174 (2005) (citation and quotation marks omitted).

Typically, courts do not evaluate the sufficiency of name-clearing hearings based on nothing more than an abstract, cursory review of the statutory procedures governing such hearings, as Petitioners apparently believe they should (Pet. at 20–21), nor do they peremptorily condemn perfectly adequate procedural protections merely because the applicable rules does not include explicit instructions for conducting a name-clearing hearing (*see id.*). Rather, they engage in a fact-intensive analysis of the proceedings actually held to determine whether they were sufficient to provide due process. *See, e.g.*, *Patterson*, 370 F.3d at 335–37 (applying the sufficiency test articulated by *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine that a meeting held by the employer was not an adequate name-clearing hearing); *Abelli v. Ansonia Bd. of Educ.*, 987 F. Supp. 2d 170, 179–80 (D. Conn. 2013) (analyzing the proceedings in a name-clearing hearing in Connecticut and rejecting plaintiff's argument that the hearing – which, the court observed, was akin to a New York Article 78 proceeding – was insufficient because it applied an "arbitrary and capricious" standard of review)[8]; *see also Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230,

[8] One Second Circuit case, *Segal*, did consider the adequacy of an administrative hearing procedure that the plaintiff had not actually pursued, and concluded that the procedure was sufficient. However, the *Segal* court was specifically addressing the question of whether a post-termination, as opposed to pre-termination, procedure was adequate – an issue not relevant here. *Id.* At 214–18.

242, 108 S. Ct. 1780, 1788, 100 L. Ed. 2d 265 (1988) (cautioning that the timing of post-deprivation proceedings "cannot be evaluated in a vacuum").

Here, however, Petitioners never pursued an Article 78 proceeding, so they can do no more than lodge purely hypothetical complaints about what might have transpired if such a proceeding had taken place. Since there was never any Article 78 proceeding in this case, no "particular procedures" are even at issue, and this Court could only speculate regarding the sufficiency of the procedures that might have been afforded in an imaginary proceeding. Judicial resources should not be squandered on such an academic endeavor. *See Hudson v. Palmer*, 468 U.S. 517, 534–35, 104 S. Ct. 3194, 3204, 82 L. Ed. 2d 393 (1984) (cautioning against second-guessing lower courts' due process holdings when the plaintiff's due process arguments are "speculative"). Instead, the lower courts – particularly the Second Circuit and the district courts within New York, which have a wealth of direct experience with procedural issues unique to New York State – should be left to consider the sufficiency of Article 78 proceedings in future cases where such proceedings have actually occurred.

V. *Knick* Does Not Affect Procedural Due Process Jurisprudence.

While this action was pending before the Second Circuit, this court decided *Knick*.[9] *Knick*

[9] Prior to oral argument, the parties submitted supplemental briefing, pursuant to Federal Rules of Appellate Procedure Rule 28(j), regarding *Knick*. Petitioners argued that *Knick* supported their position that the availability of Article 78 relief did not preclude their claim, and Respondents argued that *Knick* did not

marked a substantial shift in takings jurisprudence, holding that a Fifth Amendment claim accrues immediately when a taking of property occurs. *Id.* At 2170. Previously, this Court had held that no Fifth Amendment claim accrued until the owner had unsuccessfully sought adequate compensation for the property taken – a process that would typically play out in state court. *Id.* at 2167–69 (discussing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)). *Knick* overturned that rule, explaining that "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." *Id.* at 2174.

Petitioners contend that the Second Circuit should have applied *Knick* to their stigma-plus claim. Petitioners are mistaken. *Knick* did not disturb the well-established (and self-evident) principle that a constitutional claim can only be pursued in federal court once it is ripe. It merely changed the criteria for when a Fifth Amendment takings claim becomes ripe, based on reasoning that applied narrowly and exclusively to takings claims – not to all constitutional claims.

Furthermore, *Knick* emphatically did not change the law on exhaustion of remedies. The rule has long been, and remains, that exhaustion of state remedies is not a prerequisite to a § 1983 action – but a ripe federal claim is. *See id.* at 2167; *Veterans Legal Def. Fund v. Schwartz*, 330 F.3d 937, 941 (7th Cir.

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apply to this case. Thus, the Second Circuit was aware of the case.

2003) ("[P]laintiffs continually insist that § 1983 does not require that plaintiffs exhaust state remedies. This is true; unfortunately it is completely irrelevant. While a plaintiff is not required to exhaust state remedies to bring a § 1983 claim, this does not change the fact that no due process violation has occurred when adequate state remedies exist." (citation omitted)); *Cotton*, 216 F.3d at 1331 n.2 ("This directive [that a section 1983 claim is not stated unless inadequate state procedures exist to remedy an alleged procedural deprivation] is not an exhaustion requirement. [It] is a recognition that procedural due process violations do not even exist unless no adequate state remedies are available." (citations omitted)); *Hellenic Am. Neighborhood Action Comm.*, 101 F.3d at 882 ("[The plaintiff] can find little comfort in the general rule that § 1983 allows plaintiffs with federal or constitutional claims to sue in federal court without first exhausting state judicial or administrative remedies. Our decisions holding that an Article 78 proceeding constitutes an adequate postdeprivation procedure under the Due Process Clause are consistent with this general rule. If there *is* a constitutional violation, federal courts are available to hear § 1983 suits despite the availability of adequate state procedures. *Parratt*, *Hudson* and their progeny, however, emphasize that there *is no* constitutional violation (and no available § 1983 action) when there is an adequate state postdeprivation procedure to remedy [the deprivation of a liberty or property interest]." (citations omitted, emphasis in original)); *Bonilla v. City of Allentown*, No. 5:14-CV-05212, 2019 WL 4386398, at *3 (E.D. Pa. Sept. 12, 2019) (rejecting a plaintiff's argument that *Knick* should be read to change the exhaustion rule).

Contrary to Petitioners' assertion (Pet. at 12), *Knick* simply does not affect due process law or the "scheme of the 14th Amendment." In fact, *Knick* specifically criticized the *Williamson County* rule which it overturned because that rule had been based on due process law. The *Knick* majority held that the *Williamson County* court should not have applied due process reasoning in the takings context:

> Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: "[N]or shall private property be taken for public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation."
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> …
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> Other than *Monsanto*, the principal case to which *Williamson County* looked was *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) . Like *Monsanto*, *Parratt* did not involve a takings claim for just compensation. Indeed, it was not a takings case at all. *Parratt* held that a prisoner deprived of $ 23.50 worth of hobby materials by the rogue act of a state employee could not state a due process claim if the State provided adequate post-deprivation process. 451 U.S. at 543–544, 101 S.Ct. 1908. But the analogy from the due process context to the takings context is strained, as *Williamson County* itself recognized.

Id. at 2170, 2174. Stated bluntly, *Knick* held that takings claims ripen immediately once a property right is infringed precisely because they are not analogous to Fourteenth Amendment claims, which contain a due process element and only ripen once due process has been denied. Thus, *Knick* is impervious to Petitioners' attempt to extend its holding to procedural due process claims.[10]

Notably, the four dissenting justices in *Knick* felt that the majority went too far even within the context of takings. The dissent worried that the new rule will open the floodgates to "a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts." *Id.* at 2187. In comparison to the unparalleled extension of the law which Petitioners propose – which would allow all individuals who allege deprivations of their Fourteenth Amendment liberty or property interests to swarm into federal court demanding injunctive relief before they have even been denied due process – this dreaded *Knick* flood would look like a gentle trickle.

As demonstrated above, *Knick* has no bearing whatsoever on the well-settled principles governing procedural due process claims. Petitioners' insistence to the contrary once again relies fatally upon their misunderstanding of the fundamental difference between due process itself and a constitutional claim arising from the denial of due process. Post-*Knick*, a

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[10] Some district courts have already faced, and have correctly and decisively rejected, contentions that *Knick* should be applied to due process claims. *See, e.g.*, *Myers v. Mahoning Twp.*, No. 4:19-CV-01349, 2019 WL 7020410, at *5 n.42 (M.D. Pa. Dec. 20, 2019); *Bonilla*, 2019 WL 4386398, at *3.

due process claim still does not exist unless due process has been denied. The truism that a nonexistent claim cannot be brought is still not an "exhaustion" requirement. Accordingly, there is no need for this Court to review or disturb Second Circuit's well-reasoned holding in this case.

VI. There Is No Circuit Split on the Question of Whether State Mandamus Proceedings Afford Due Process.

As Petitioners correctly point out, the Eleventh Circuit agrees with the Second Circuit that due process is satisfied in a stigma-plus case by the availability of mandamus relief in state court. *Cotton*, 216 F.3d at 1332–33 (holding that the availability of mandamus relief under Georgia law defeated a stigma-plus claim). In addition, the Sixth and Seventh Circuits have also affirmatively held that state mandamus proceedings afford adequate post-deprivation due process. *Kahles v. City of Cincinnati*, 704 F. App'x 501, 507 (6th Cir. 2017) (holding that the availability of mandamus under Ohio law defeated a due process claim involving termination of retirement benefits); *Veterans Legal Def. Fund*, 330 F.3d at 941 (holding that the availability of mandamus under Illinois law defeated a due process claim involving deprivation of civil service hiring preferences).

In other words, all the circuit courts which have had occasion to consider whether mandamus relief provides adequate post-deprivation due process appear to agree that it does. There is no circuit split that would warrant this Court's attention. *See* Rule 10(a) of the Supreme Court Rules (identifying a conflict between the circuits as one basis for a grant of certiorari).

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court deny Petitioners' request for a writ of certiorari.

Respectfully submitted,

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