No. __-____

IN THE

Supreme Court of the United States

ANDREW J. CAPUL, DAVID COLON,
ERIC R. RODRIGUEZ, and PETER A. DEBLASIO,

Petitioners,

v.

THE CITY OF NEW YORK,
WILLIAM JOSEPH BRATTON and LAWRENCE BYRNE,
in their individual capacity and official capacity,

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

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QUESTION PRESENTED

Respondent, the City of New York (the "City"), issued an ultimatum to these four highly distinguished Petitioners-Plaintiffs, who were Deputy Chiefs or Inspectors for the NYPD, demanding that they immediately resign or that they would be immediately demoted, face unspecified charges, and then ultimately be terminated. Though the Petitioners-Plaintiffs had an undisputed property interest in their jobs, the ultimatum to resign was issued without the City providing any pre-deprivation process, including notification of charges, identification of witnesses and evidence, and a minimal opportunity to be heard. Under the threat of the loss of significant retirement benefits if they were demoted and terminated, each Petitioner-Plaintiff succumbed to the forces exerted by the City and resigned. Shortly thereafter, an impartial hearing officer ruled that the resignations were coerced and were not voluntary, thereby constituting a constructive discharge.

Eight Circuit Courts have held or suggested that coerced resignations/constructive discharges of employees with property rights in continued employment must be afforded at least minimal due process. Below, the Second Circuit diverged from these other Circuits and held that coerced resignations do not require pre-deprivation due process because New York's Article 78 procedures provide adequate post-deprivation process.

The question presented is:

1. Whether a municipal employer's coerced resignation of an employee with a protected property interest in continued employment requires pre-deprivation due process under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

PARTIES TO THE PROCEEDINGS

Petitioners are Andrew J. Capul, David Colon, Eric R. Rodriguez, and Peter A. DeBlasio.

Respondents are City of New York, William Joseph Bratton, and Lawrence Byrne.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

OPINIONS BELOW

The Second Circuit's opinion (App. 1a-4a) is available at 832 Fed. App'x 766 (2d Cir. 2021). The District Court's opinion (App. 5a-42a) is available at 19 Civ. 4313, 2020 U.S. Dist. LEXIS 92727 (S.D.N.Y. May 27, 2020).

JURISDICTION

The Court of Appeals entered judgment on February 2, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV, Section 1.

STATEMENT OF THE CASE

A. The NYPD Hires then Promotes Four Exemplary Police Officers

By 1992, the City, through the New York City Police Department (the "NYPD"), hired Petitioners, Andrew J. Capul, Peter A. DeBlasio, David Colon, and Eric R. Rodriguez as police officers. (App. 46a-48a ¶¶ 11, 16, 21, 26). Each Petitioner, after his hire, performed his job in an exemplary manner,

and, in recognition of their work, the NYPD promoted each of the Petitioners multiple times. Ultimately, each of the Petitioners were promoted by the NYPD through discretionary promotions to some of the highest-ranking positions in the NYPD. (App. 46a-48a ¶¶ 12-15, 17-20, 22-25, 27-31). Specifically, in 2013, 2014, and 2015, the NYPD promoted Colon, Rodriguez, and Capul, respectively, to Deputy Chiefs. (App. 47a-48a ¶¶ 13, 18, 23). In May 2011, the NYPD promoted DeBlasio to Inspector. (App. 49a ¶ 29).

B. Job Protections for NYPD Captains and Designated Higher Ranks

NYPD Captains and officers holding the higher ranks that Petitioners held, such as Deputy Inspector, Inspectors and Deputy Chiefs (the "Higher Ranks"), are represented by the Captains Endowment Association ("CEA"), a collective bargaining unit. (App. 16 ¶¶ 32, 34). The NYPD cannot terminate Captains or the Higher Ranks without providing them with notification of charges and an opportunity to be heard on those charges, including by being heard at a departmental hearing. (App. 49a ¶¶ 37, 39-40, 43).

The Commissioner may appoint, detail, or promote Captains to the Higher Ranks, but such officers remain represented by the CEA. (App. 49a-50a ¶¶ 34-35). The Commissioner may demote a Higher Rank officer "at will," but promoted officers continue to enjoy job protection at the rank of Captain, including the prohibition against the NYPD firing

such officers without due process. (App. 16-17 ¶¶ 39-40, 43).

C. To Give the Public Appearance of Action Against Alleged Corruption in the NYPD, The City Made Scapegoats of Petitioners

In 2013, concerned about corruption in the NYPD reaching ranks as high as the Chief of the Department of the NYPD, then Philip Banks, the FBI opened an extensive investigation. (App. 51a ¶¶ 44-45). Among other things, the investigation probed suspicions that in exchange for favors, NYPD police officers were accepting gifts and vacations from businessmen Jona Rechnitz and Jeremy Reichberg, who allegedly had ties to the Mayor and Chief Banks. (App. 51a-52a ¶¶ 47-48). In December 2015, the investigation extended to include the Deputy Inspector of the Internal Affairs Bureau, Michael Deddo. (App. 52a ¶ 49).

During the fact gathering stage of the investigation, the FBI interviewed up to fifty NYPD high ranking officials, including the Petitioners, and fifty other NYPD employees, both uniformed and civilian. (App. 52a ¶¶ 51-52). The FBI agents interviewed Rodriguez and Colon and assured these Deputy Chiefs that they were not targets of the investigation. (App. 53a ¶¶ 55-56).

Nevertheless, on April 7, 2016, the president of the CEA, Roy Richter, told Rodriguez and Colon that Respondent Police Commissioner William J. Bratton, intending to show the public that the

NYPD was taking serious steps to confront the alleged corruption, planned to transfer the Petitioners-Plaintiffs. (App. 53a ¶ 58). Richter told the Petitioners that the transfers were for appearances only and were not based on any misconduct. (App. 53a ¶ 60). At the time of the transfers, Bratton openly expressed to reporters that "action must be taken" to guarantee that the NYPD meets the expectations of the public. (App. 54a ¶ 65).

The next day, on April 8, 2016, the FBI and IAB agents interviewed Capul and assured him that he was not a target of the investigation either. (App. 54a ¶¶ 62-63). Yet, a few days later, Bratton transferred Capul to a less prestigious position, even though the NYPD did not accuse or charge him with any allegations of corruption or misconduct. (App. 55a-56a ¶¶ 74, 76).

In May 2016, Bratton and Respondent Deputy Commissioner Lawrence Byrne created two lists for officers who were involved in the investigation; a "fired" list and an "arrested" list. (App. 58a ¶¶ 94-95). Without proof or suspicion of wrongdoing, they put DeBlasio on the "fired" list. (App. 58a ¶¶ 94-95). By the end of the same month, Bratton, via Richter, told Capul, Colon, and Rodriguez that he wanted them to submit their resignations and make their retirements effective by May 31, 2016. (App. 58a ¶ 96). Bratton, trying to ensure he would receive Petitioners' retirements without a hearing, threatened Petitioners by communicating to them that if they did not retire, the NYPD would charge them and, regardless of the outcome of the hearing,

he would fire them. (App. 58a-59a ¶¶ 97-98, 104). Such threat represented the City's objective to remove allegedly "tainted" employees from the NYPD so that the NYPD and City could put the corruption scandal behind them. (App. 59a ¶ 106).

Ultimately, Bratton presented each Petitioner with an ultimatum—either submit the retirement as demanded or be subjected to an immediate demotion and then termination. (App. 61a-62a ¶¶ 116-120). No Respondent or any other agent of the NYPD informed any Petitioner of the basis of any potential charge Petitioners would have faced had they not submitted their resignations. (App. 62a-63a, 66a ¶¶ 122, 126, 146). Nevertheless, fearing they would lose substantial employment benefits from termination but not with retirement, each Petitioner submitted his retirement papers as Bratton demanded. (App. 64a-66a ¶¶ 138-145, 147).

D. An Independent Hearing Officer Determined Petitioners' Resignations Were Coerced and the City Deprived Them of Due Process

In August 2016, Petitioners commenced a grievance process, challenging the City's failure to pay them accrued leave time. (App. 66a ¶ 148). The issue required resolving the question of whether Petitioners' retirements were voluntary or forced. (App. 66a ¶ 148). In resolving the question of voluntariness, the independent hearing officer determined, *inter alia*, that (1) "the facts establish that Byrne engaged in a course of action designed to

force [Petitioners] out," (2) Byrne's threats constituted a breach of Petitioners' "statutory and due process rights," (3) Bratton ordered Petitioners to submit their retirement papers "without sharing any facts or allowing any of the [Petitioners] to present a defense informally," and (4) the City failed to "adduce any evidence that it had reason to believe at or about the time of the [forced resignation] that the Department had information that any of the [Petitioners] had engaged in actionable misconduct." (App. 66a-67a ¶ 149-151).

Since Petitioners' submission of their retirements, each Petitioner has requested reinstatement, but the City has ignored every such demand. (App. 69a ¶¶167-170).

E. Proceedings to Date

On May 14, 2019, Petitioners filed a Complaint in the Southern District of New York, based on federal question jurisdiction 28 U.S.C. §§ 1331, 1343. Respondents moved for dismissal under FED. R. CIV. P. 12(b)(6). Respondents argued that the Second Circuit's decision, *Giglio v. Dunn*, 732 F.3d 1133 (2d Cir. 1984), controlled and compelled dismissal.

The District Court agreed and dismissed the case. *Capul v. City of New York*, 19 Civ. 4313, 2020 U.S. Dist. LEXIS 92727 (S.D.N.Y. May 27, 2020). The District Court held, among other things, that *Giglio* stands for the proposition that a coerced resignation or constructive discharge cannot give rise to a due process claim. *Id.* at 29-39. The court

acknowledged that other Circuits may allow such claims to proceed, but that *Giglio* controlled in the Second Circuit, so the District Court was constrained by that decision. *Id*. at *31 n.4.

After the dismissal, Petitioners appealed to the Second Circuit Court of Appeals. Petitioners argued that (a) *Giglio* is no longer good law because of subsequent Supreme Court and Second Circuit cases; and (b) even if *Giglio* remains viable, the outcome here should be different because of divergent fact patterns. The Second Circuit affirmed, noting in a brief summary order that it was doing so, "[f]or substantially the same reasons set forth by the district court." *Capul v. City of New York*, 20-1905-cv, 832 Fed App'x 766 (2d Cir. Jan. 12, 2021). The Second Circuit further stated that "post-termination process provided by New York State satisfies due process." *Id*. Judgment was entered on February 2, 2021.

This Petition followed.

REASONS FOR GRANTING THE PETITION

In the Second Circuit, District Courts have interpreted *Giglio* as a bright-line rule standing for the proposition that coerced resignations/constructive discharges of public employees with property interests in their jobs do not require pre-deprivation due process under the Fourteenth Amendment. *Capul*, 2020 U.S. Dist. LEXIS 92727 at *31-34. But for dicta in a footnote in a published decision, the Sec-

ond Circuit has endorsed this view in summary orders. *Compare Moffitt v. Town of Brookfield*, 950 F.2d 880, 883 n.2 (2d Cir. 1991) *with Stenson v. Kerlikowske*, No. 99-7833, 2000 U.S. App. LEXIS 3478 (2d Cir. Mar. 3, 2000).

But the law of the Second Circuit is at odds with each and every other Circuit which has considered the same question. Indeed, eight other Circuits—the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits[1]—have either allowed due process claims to proceed based on a coerced resignation allegation or have opined that under the right circumstances, such a claim could be viable. *E.g. Lauck v. Cambell County*, 627 F.3d 805, 812-13 (10th Cir. 2010) ("An employer cannot circumvent the due-process requirements that would attend a true firing by trying to compel a resignation in a manner that violates the employee's property . . . rights"); *Knappenberger v. City of Phoenix*, 566 F.3d 936, 941 (9th Cir. 2009) (noting "The Third, Fourth, Eighth, Tenth and Eleventh Cir-

[1] Though not a coerced resignation case, the Seventh Circuit has suggested that pre-deprivation process is required when *Monell* liability exists because in such circumstances, the municipality itself is deemed to have acted and was thus in a position to provide pre-deprivation process. *Bradley v. Village of Univ. Park*, 929 F.3d 875, 880 (7th Cir. 2019). Here, the Complaint alleged that the City was liable under *Monell* because (1) final policy makers acted and (2) the City enacted a policy of making scapegoats to take the fall for the corruption which led to the deprivation of the rights. (App. 70a). Thus, the Seventh Circuit would likely agree that this case required pre-deprivation due process.

cuits" allow Section 1983 claims to proceed on an allegation of constructive discharge); *Eggers v. Moore*, 257 Fed. App'x 993, 995 (6th Cir. 2007) ("due process may be triggered by constructive discharge"); *Hargray v. Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995); *Fowler v. Carrollton Public Lib.*, 799 F.2d 976, 981 (5th Cir. 1986) (when state actor's intent is to circumvent *Loudermill* protections and the actor presents the employee with an "either/or termination proposition," facts may establish a procedural due process claim). Moreover, the panel below diverged from the Second Circuit's own suggestion that if a plaintiff is "coerced into surrendering a job in which he had a constitutionally protected property interest, a violation of Section 1983 occurred." *Moffitt*, 950 F.2d at 883 n.2.

The Fifth Circuit, which has held that coerced resignations may require due process, has explained why such a rule is a proper, and why the Second Circuit's view on the matter is wrong as a matter of law and policy. The Fifth Circuit foresees occasions where the public employer is motivated to avoid providing constitutionally required predeprivation process and strangleholds the employee into a position where it demands that the employee resign or face certain termination. *Fowler*, at 981 (5th Cir. 1986) (when state actor's intent is to circumvent *Loudermill* protections and the actor presents the employee with an "either/or termination proposition," facts may establish a procedural due process claim). The Second Circuit's

Giglio rule opens this loophole for public employers in its jurisdiction.

Further, none of the factors exist in a coerced resignation case that would make it impracticable for the public employer to provide the most minimal constitutionally required pre-deprivation due process before coercing a resignation. *Findeisen v. North East Ind. Sch. Dist.*, 749 F.2d 234, 239 (5th Cir. 1984). As held in *Findeisen*, "one threatened with the deprivation, under color of state law, of a federally protected property interest must be given "an opportunity . . . at a meaningful time and in a meaningful . . . manner for [a] hearing appropriate to the nature of the case." *Id*. (quoting *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 437 (1982)).

Below, Petitioners elaborate on these points establishing the reasons the Petition should be granted.

I. The Second Circuit's Decision Cements Its Split from Eight Other Circuits That Require Pre-Deprivation Due Process Before a Coerced Resignation

The law is well-settled that civil service employees who are entitled to retain their jobs while performing good service and behaving well, and who cannot be terminated except for cause, enjoy a property interest in their employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985). In such circumstances, before terminating the employee, the public employer must provide

constitutionally adequate pre-deprivation process. *Id*. at 546. This Court has defined that process to mean the employee is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id*. (citation omitted). Even when states provide for full "elaborate" post-deprivation process, *Loudermill* requires these minimal pre-deprivation procedural safeguards when the state can "feasibly" provide it. *Id*. at 545-47; *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) ("regardless of the adequacy of a postdeprivation tort remedy" states must provide pre-deprivation process unless it is unduly burdensome or the state cannot anticipate the deprivation).

The issue before the Court is whether, in circumstances where a public employee has a protected property interest in continued employment and the employer coerces the employee's resignation constituting a constructive discharge, must the public employer first provide the minimal *Loudermill* pre-deprivation procedures, or is a state's post-deprivation procedures sufficient. As discussed below, eight Circuits require pre-deprivation process (or suggest it might be required in some circumstances), while the Second Circuit is the sole Circuit which holds, as a bright-line rule, that pre-deprivation process is not required.

A. Coerced Resignations are Foreseeable by the Employer So the Majority of Circuits Correctly Require Pre-Deprivation Process

Even before *Loudermill*, the Fifth Circuit held that when a public employer coerces an employee to resign, the employer must first provide pre-deprivation process. *Findeisen*, 749 F.2d at 238-39. In *Findeisen*, a tenured public-school teacher alleged he submitted a resignation letter under threat of discharge. *Id*. at 236. The teacher alleged the resignation constituted a constructive discharge, so he was entitled to pre-deprivation process before being discharged. *Id*.

The Fifth Circuit easily concluded that the teacher held a property interest in his employment. *Id*. at 237. The Fifth Circuit also readily determined that individuals with a protected property interest are entitled to due process "at a meaningful time and in a meaningful manner" and that, generally, the requisite due process must be provided before the deprivation. *Id*. (citing *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972)). The problem confronted by the *Findeisen* court was whether this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), changed the analysis.

In *Parratt*, the question presented was whether pre-deprivation process is required when a state official's negligent act caused a deprivation of a property right. *Parratt*, 451 U.S. at 543. In cases of negligence, a state cannot possibly predict the dep-

rivation of property, thus pre-deprivation process cannot practicably be provided. *Id*.

The Fifth Circuit in *Findeisen* extrapolated from *Parratt* four factors by which courts can consider whether pre-deprivation process is required: (1) pre-deprivation process is vital when the state has established procedures to authorize the deprivation at issue; (2) the necessity of pre-deprivation process is greatest when the protected interest is the party's livelihood; (3) the necessity of pre-deprivation process is lessened with a need for the state to act quickly; and (4) the requirement of pre-deprivation process may be mitigated when circumstances make providing pre-deprivation process impractical and post-deprivation remedies are available. *Findeisen*, 749 F.2d. at 238 (citing *Parratt*, 451 U.S. at 540; *Bell v. Burson*, 402 U.S. 535, 538-39 (1971)).

Applying the factors to the coerced resignation in *Findeisen*, the Fifth Circuit determined that (1) state law established procedures for dismissal of tenured teachers; (2) the action affected the teacher's livelihood (in contrast to the "hobby goods" at issue in *Parratt*); (3) no emergency existed requiring "hasty" action; and (4) school boards can easily hold pre-deprivation hearings to consider terminating an employee. *Findeisen*, 749 F.2d at 239. The Fifth Circuit summed up with the key holding: permanent public employees threatened with a deprivation must be provided "timely notice and an opportunity to answer charges . . . ." *Id*. at 239. This analysis was reaffirmed by the Fifth Cir-

cuit in 2015 in *LeBeouf v. Manning*, 575 Fed. App'x 374, 377 (5th Cir. 2014) (noting due process was required for coerced resignation when the employer's intent was to avoid a hearing).

Other Circuits have taken a narrower view but would nonetheless allow coerced resignation pre-deprivation due process claims to proceed given the right circumstances. The Tenth Circuit acknowledges that constructive discharges are "peculiar" for due process cases. *Lauck*, 627 F.3d at 812. Like the Second Circuit, the Tenth Circuit reasonably sees that an employer "may not even know that its actions have compelled the employee to quit" and cannot, therefore, "hardly be required to provide notice or a hearing before the resignation." *Id*.

In contrast to the Second Circuit, however, and much like the Fifth Circuit, the Tenth Circuit foresees circumstances where an employer "intentionally or knowingly" creates an environment in which it could reasonably expect the employee to quit. *Id*. Thus, in the Tenth Circuit, "[a]n employer cannot circumvent the due-process requirements that would attend a true firing by trying to compel a resignation in a manner that violates the employee's property (that is, contract) rights." *Id*.

Ultimately, in *Lauck*, the court determined that the plaintiff's due process rights were not violated. *Id*. at 813. Critically, the court found that (a) the plaintiff's work conditions were not intolerable; (b) his employer did not know the working conditions

would cause the plaintiff's resignation; and (c) he had minimal pretermination hearings. *Id*.

In contrast, here, (a) a neutral arbitrator has already determined that Respondents caused a coerced resignation; (b) Respondents knew their actions would cause the termination because it demanded that specific action; and (c) Respondents withheld any and all information from Petitioners regarding the reason for issuing the resignation ultimatum. (App. 66a-67a ¶¶ 149-151). Accordingly, were this case in the Tenth Circuit, the case likely would not have been dismissed on Rule 12(b)(6) motion, but because it was brought in the Second Circuit where *Giglio* controls, the case was immediately dismissed. By hearing this appeal, this Court can correct this disparity.

The Eleventh Circuit similarly envisions circumstances when a resignation requires due process. *Hargray*, 57 F.3d at 1569. In *Hargray*, the plaintiff alleged that his employer, a city, deprived him of due process by forcing him to resign. *Id*. at 1567. The District Court allowed the case to proceed through a bench trial—which the plaintiff won—but the city then appealed. *Id*.

On appeal, the Eleventh Circuit noted two circumstances when the law might require pre-deprivation due process for a constructive discharge: (1) when the resignation is coerced, particularly when the employer lacks good cause to believe grounds exist for termination; or (2) when the resignation is obtained by the employer's misrepresentation of a

material fact. *Id*. at 1569-70.[2] On the fully developed factual record before it, the Eleventh Circuit found that the plaintiff could not satisfy either basis for a due process claim because it determined the resignations were voluntary, so no due process was owed. *Id*.[3]

Here, again, a neutral arbitrator has determined that the Petitioners' resignations were coerced. (App. 67a ¶ 151). The question of whether the resignations were voluntary or not was not addressed by the District Court or the Second Circuit, because they determined that, even if coerced and involuntary, due process is not violated in such circumstances. *E.g. Capul*, 2020 U.S. Dist. LEXIS 92727 at *39-40. The Second Circuit's split from other Circuits can be corrected by this appeal.

In the Ninth Circuit, the "duress or coercion" theory is also available to employees in the jurisdiction. *Knappenberger*, 566 F.3d at 941 (noting the "Third, Fourth, Eighth, Tenth and Eleventh Cir-

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[2] The Third Circuit has endorsed this formulation. *See e.g. Judge v. Shikellamy Sch. Dist.*, 905 F.3d 122, 125 (3d Cir. 2018).

[3] Using a similar analysis, the Fourth Circuit also determined that some circumstances may exist where a resignation is involuntarily, thus requiring due process, but in the case before it (decided on summary judgment), the record showed that the plaintiff was "fully informed of the nature of the charges against him" and "what his rights were." *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 177-78 (4th Cir. 1988). Further, facts developed in the record contradicted the plaintiff's arguments about why the resignation was involuntary. *Id*. at 178.

cuits" all recognize such a theory). The Court of Appeals cautioned the District Court for imposing too limiting a rule, which, though it would have allowed a constructive discharge due process claim, required a showing of "intolerable and discriminatory working conditions." *Id*. The Ninth Circuit noted that "a retirement or resignation may be involuntary and constitute a deprivation of property for purposes of a due process claim in the absence of intolerable working conditions." *Id*.

Like the *Hargray* and *Lauck* courts, the *Knappenberger* court determined that the plaintiff was not entitled to due process because he could not show the retirement was involuntary since the "complaint allege[d] merely that he anticipated he would be terminated." *Id*. The Ninth Circuit found determinative factors to be that the employer did not request the resignation or tell the employee that he would be terminated, the employer did not require the employee to make "an on-the-spot decision," noting further the plaintiff could choose the date of his retirement, and the employee did "not even allege that a termination would have been inevitable." *Id*. at 942.

Here, Petitioners' employers threatened them that if they did not retire by a date certain, they would face certain termination. (*E.g.* App. at 59a ¶ 100). Notwithstanding, unlike the Third, Ninth, Tenth, and Eleventh Circuits, the Second Circuit never even considered whether the terminations were involuntarily, because, in the Circuit's view, and in contradiction to the view of these other Cir-

cuits, the determination of voluntariness did not matter for purposes of due process. *Capul*, 2020 U.S. Dist. LEXIS 92727 at *39-40.

In sum, the Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all held that in some circumstances, the Constitution requires that a public employee be given pre-deprivation due process before being constructively discharged. The Second Circuit, however, has completely foreclosed the possibility that pre-deprivation due process must be provided in any circumstance involving a constructive discharge.[4] Here, a neutral factfinder already determined that Petitioners were coerced into resigning and that the resignations were not voluntary, so this threshold issue was not a question in the lower courts. The only issue was whether these circumstances require pre-deprivation process. Eight Circuits would answer that question affirmatively, but the Second Circuit has rejected this overwhelmingly supported approach and dismissed Petitioners' claims. Granting this Petition would clearly establish the law across these United States.

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[4] Critically, one Second Circuit panel has opined, in a non-precedential manner that, "[i]f [plaintiff] was coerced into surrendering a job in which he had a constitutionally protected property interest, a violation of Section 1983 occurred." *Moffit*, 950 F.2d at 883 n.2. None of the other coerced resignation cases considered by the Second Circuit have discussed the significance of this footnote and District Courts continue to dismiss it as dicta, relying on *Giglio* as the controlling law. *Stenson*, 205 F.3d 1324; *Jaeger v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 125 F.3d 844 (2d Cir. 1997).

B. The Second Circuit's Rule is Wrong Because Coerced Resignations are Foreseeable by the Employer

In the Second Circuit, courts rely on the precedent set by *Giglio* when analyzing coerced resignation due process cases. *E.g. Capul*, 2020 U.S. Dist. LEXIS 92727 at *26-28 (discussing how the Second Circuit "continues to cite *Giglio* with approval" and "District courts also continue to rely on *Giglio* in cases involving coerced resignations"). *Giglio* relied on this Court's holding in *Parratt*. But, *Giglio* is undermined by subsequent cases, including *Hudson v. Palmer*, 486 U.S. 517 (1984) and *Zinermon v. Burch*, 494 U.S. 113 (1990).

In *Parratt*, the question presented was whether pre-deprivation process is required when a state official's negligent act caused a deprivation of a property right. *Parratt*, 451 U.S. at 543. In cases of negligence, a state cannot possibly predict the deprivation of property, thus pre-deprivation process cannot practicably be provided. *Parratt*, 451 U.S. at 543. Thus, *Parratt* lays the groundwork for the importance of foreseeability in analyzing the requisite process owed in a particular situation. *See Matthews v. Elridge*, 424 U.S. 319, 334 (1976) (noting that the process due varies according to particular situations and identifying factors to be used in determining the process due).

After *Parratt*, the Second Circuit decided *Giglio*. The plaintiff in *Giglio*, a tenured high school principal, resigned from his position because of school

officials' alleged coercion. *Giglio*, 732 F.2d at 1134. He alleged that officials threatened him that the school district would abolish his position at a meeting to be held later that day unless he agreed before the meeting, to either return to work by a date certain or resign. *Id*. The plaintiff resigned, then argued his resignation was involuntary and coerced so he was denied due process because a hearing did not precede the coercion. *Id*. The crucial inquiry was whether the deprivation of the plaintiff's fundamental property right in his tenured position occurred without due process of law or, more specifically, whether he was entitled to a pre-deprivation hearing. *Id*. at 1136.

The Second Circuit affirmed the District Court's dismissal of the plaintiff's complaint for failure to state a claim. *Giglio*, 732 F.2d at 1134. Both the trial and appellate courts, relying heavily on *Parratt*, held, *inter alia*, that a pre-coercion hearing would have been virtually impossible and thus not constitutionally required. *Id*. The Second Circuit noted that due process requires only that a hearing be held "at a meaningful time and in a meaningful manner" and that when a pre-deprivation hearing is impractical and a post-deprivation meaningful, a post-deprivation hearing is all that is required. *Id*. at 1135. The Second Circuit determined post-deprivation process was satisfied because a New York C.P.L.R. Article 78 proceeding was sufficient post-deprivation process in the case of the coerced resignation presented in *Giglio*. *Id*. at 1135.

After *Parratt* and *Giglio*, the Supreme Court decided *Hudson*, 486 U.S. at 517, a case concerning the intentional deprivation of a property right. *Hudson* furthered the concept of a "random, unauthorized act." *Id*. at 533. When a deprivation occurs because of a "random, unauthorized act," the state cannot predict the deprivation, so pre-deprivation process is impracticable. *Id*. This is the case even with intentional deprivations, provided the act is random and unauthorized. *Id*. This Court emphasized that, "[t]he controlling inquiry is solely whether the state is in a position to provide for pre-deprivation process." *Id*.

The importance of foreseeability in determining whether the state is in a position to provide pre-deprivation process was highlighted in *Zinermon*. 494 U.S. at 113. In *Zinermon*, the plaintiff was found wandering along a highway disoriented and apparently injured. *Id*. at 118. Though his symptoms included hallucinations and confusion, upon arrival at a mental health facility, the plaintiff signed papers giving consent for admission and treatment. *Id*. Later, he also signed more papers consenting to admission and treatment at a long-term care facility. *Id*. The plaintiff was held in treatment facilities for five months without a hearing. *Id*.

Upon his release, the plaintiff alleged that he was involuntarily committed and that the defendants should have known he was not capable of giving consent. *Id*. at 121. Thus, he claimed he was denied due process. *Id*.

To resolve the question of whether the state owed the plaintiff due process, the Court turned to the question of whether the "kind" of deprivation was predictable. *Id*. at 128-29. The answer derives from the lessons of *Parratt* and *Hudson*, the "proper inquiry" being "whether the state is in a position to provide for predeprivation process." *Id*. at 130 (quoting *Hudson*, 468 U.S. at 534).

Ultimately the *Parratt*/*Hudson* rule did not apply to the plaintiff in *Zinermon* because (1) it was not unpredictable that a seemingly competent person was actually incompetent, and the state knew that the "erroneous deprivation" would occur "at a predictable point in the admission process"; (2) the state could have enacted procedures to guard against the deprivation at issue; and (3) the state granted the defendants the power to effect the precise deprivation at issue. *Id*. at 136-37. The *Zinermon* Court summarized by noting:

> Such a deprivation is foreseeable, due to the nature of mental illness, and will occur, if at all, at a predictable point in the admission process. Unlike *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged.

Id. at 139.

In sum, *Parratt*, *Hudson*, and their progeny, including *Zinermon*, emphasize the importance of the employer's ability to predict or foresee the deprivation. In cases of negligence or where low-level employees cause the deprivation, the state cannot possibly provide pre-deprivation process because it cannot know a deprivation is about to occur. But, where high level decision makers issue ultimatums to employees causing a constructive discharge, the state knows (and desires) that the employee will resign. If the employee would be entitled to due process were the employer to affirmatively discharge the employee, it stands to reason that the same employee should be entitled to due process before the employer knowingly forces the employee into an involuntary resignation.[5]

Applied here, the *Hudson*/*Parratt* analysis compels a determination that coerced resignations can require pre-deprivation due process and it was required here. Respondents were high ranking decision makers who demanded that each Petitioner resign by a date certain or be immediately demoted then terminated based on unspecified charges. Thus, Respondents were wholly in a position to foresee that by issuing such an ultimatum,

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[5] Whether a resignation was voluntary or involuntary may be another issue to be resolved in such cases. But, here, Respondents did not dispute the voluntariness of the resignations and an arbitrator already determined that the resignations were not voluntary. Moreover, Circuits like the Fifth, Ninth, Tenth and Eleventh, have developed workable tests to determine whether a resignation is voluntary or not. *E.g. Judge*, 905 F.3d at 125.

Petitioners would, in fact, resign. Moreover, at the time of the ultimatum, Respondents could have readily provided the Petitioners with information concerning the nature of the charges they would face, if termination were truly warranted.

Here, resignation is the precise outcome Respondents wanted because, as alleged, they did not want to face uncomfortable facts coming out during a departmental trial. (App. 69a ¶165). Further, Respondents could have implemented procedural safeguards, such as requiring, before issuing such resignation ultimatums, that they disclose the nature of any alleged wrongdoing to Petitioners and allow them an opportunity to, at least, informally respond, i.e., that they provide the most minimal *Loudermill* protections.

In sum, here, Respondents wanted Petitioners' resignations and, in fact, obtained those resignations. Further, they did so without evidence of Petitioners' wrongdoing (App. 67a ¶151), and they did so to avoid providing the pre-deprivation process, which the Constitution requires that they provide. All the factors that almost every Circuit considers favors a finding that pre-deprivation process is required in a coerced resignation case, which are present here. Yet, the Second Circuit did not consider one of these factors, instead relying on a dated and abrogated decision from 1984.

This case presents this Court with the opportunity to close the loophole opened by the Second Circuit which allows public employers to skirt their

Constitutional duties to provide due process by extracting seemingly voluntary resignations without due process.

CONCLUSION

For all these reasons, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted.

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Counsel for Petitioners

April __, 2021

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of January, two thousand twenty-one.

PRESENT: GUIDO CALABRESI,
REENA RAGGI,
DENNY CHIN,
Circuit Judges.

20-1905-cv

ANDREW J. CAPUL, DAVID COLON,
ERIC R. RODRIGUEZ, PETER A. DEBLASIO,

Plaintiffs-Appellants,

—v—

CITY OF NEW YORK, WILLIAM JOSEPH BRATTON,
LAWRENCE BYRNE, in their individual capacity
and official capacity,

Defendants-Appellees.

FOR PLAINTIFFS-APPELLANTS:

MATTHEW WEINICK, Famighetti & Weinick, PLLC, Melville, New York; and Yale Pollack, Law Offices of Yale Pollack, P.C., Syosset, New York.

FOR DEFENDANTS-APPELLEES:

DANIEL MATZA-BROWN (Richard Dearing, and Claude S. Platton, *on the brief)* for James E. Johnson, Corporation Counsel of the City of New York, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Failla, *J.).*

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiffs-appellants ("plaintiffs"), four former officers with the New York City Police Department (the "NYPD"), appeal the district court's judgment, entered May 28, 2020, dismissing their claims against defendants-appellees the City of New York and two former NYPD officials ("defendants"). Plaintiffs alleged that defendants violated their right to due process by coercing them into retiring from the NYPD. By opinion and order entered May 27, 2020, the district court granted defendants' motion to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), citing to this Court's holding in *Giglio v. Dunn,* 732 F.2d 1133 (2d Cir. 1984), and its progeny. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

For substantially the reasons set forth by the district court in its thorough opinion, we agree that plaintiffs have failed to state a claim for relief. As we have squarely held, the post-termination process provided by New York State satisfies the due process requirements of the Fourteenth Amendment in cases such as this, where state and local governmental employees who were purportedly coerced into resigning contend that their due process rights were violated. *See Hellenic Am. Neighborhood Action Comm. v. City of New York,* 101 F.3d 877, 881 (2d Cir. 1996) (collecting cases and noting that "[w]e have held on numerous occasions that an Article 78 proceeding is a perfectly adequate post-deprivation remedy in the present situation").

We have considered plaintiffs' remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 Civ. 4313 (KPF)

ANDREW J. CAPUL, DAVID COLON, ERIC R. RODRIGUEZ, and PETER A. DEBLASIO,

Plaintiffs,

—v.—

CITY OF NEW YORK, WILLIAM J. BRATTON, *in his individual and official capacities,* and LAWRENCE BYRNE, *in his individual and official capacities,*

Defendants.

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

Plaintiffs, four former New York City Police Department ("NYPD" or the "Department") officers holding the ranks of Deputy Chief or Inspector, bring this action pursuant to 42 U.S.C. § 1983 against the City of New York, former New York City Police Commissioner William J. Bratton, and former NYPD Deputy Commissioner for Legal Matters Lawrence Byrne. Plaintiffs assert a single claim—that Defendants deprived them of a property interest in their employment, in violation of their Fourteenth Amendment right to due process, by coercing their resignations from the Department

and vitiating the pre-deprivation process that would otherwise be available. Defendants now move to dismiss the Complaint, arguing that: (i) Plaintiffs have not adequately pleaded that the alleged constitutional deprivations were part of a municipal policy or custom; (ii) Plaintiffs' due process claim is not cognizable because of the post-deprivation process available to them; and (iii) Defendants Bratton and Byrne are entitled to qualified immunity. For the reasons explained below, the Court dismisses Plaintiffs' Complaint.

BACKGROUND[1]

A. Factual Background

1. The Plaintiffs

The Court accepts, as it must, the well-pleaded allegations of the Complaint. Plaintiff Andrew J. Capul was hired by the NYPD in 1984. (Compl. ¶ 11). For decades, Capul performed his duties in an exemplary manner as evidenced by, among other things, multiple promotions to the positions

[1] The facts in this Opinion are drawn primarily from Plaintiffs' Complaint ("Complaint" or "Compl." (Dkt. #8)), which is the operative pleading in this case, as well as the Declaration of Yale Pollock ("Pollock Decl." (Dkt. #41)) and its attached exhibit ("Arbitration Award" (Dkt. #41-1)). For ease of reference, the Court refers to Defendants' opening brief as "Def. Br." (Dkt. #39); Plaintiffs' opposition brief as "Pl. Opp." (Dkt. #40); and Defendants' reply brief as "Def. Reply" (Dkt. #44). Additionally, the Court refers to the Individual Defendants by using the rank that each held during the relevant time period.

of Sergeant, Lieutenant, Captain, Deputy Inspector, and Inspector; receipt of performance evaluations consistently rating him above or well above standards; and several awards, honors, and recognitions. (*Id.* at ¶ 12). In June 2015, the NYPD again promoted Capul via a discretionary promotion to the rank of Deputy Chief. (*Id.* at ¶ 13). During the relevant time period, Capul held the position of Deputy Chief, assigned to Patrol Borough Manhattan North, which Plaintiffs claim is one of the most highly coveted and respected assignments in the NYPD. (*Id.* at ¶ 14).

Plaintiff Eric R. Rodriguez was hired by the NYPD in June 1992. (Compl. ¶ 16). During his tenure with the NYPD, Rodriguez performed his duties in an exemplary manner as evidenced by, among other things, multiple promotions to the positions of Sergeant, Lieutenant, Captain, Deputy Inspector, and Inspector; receipt of performance evaluations consistently rating him above or well above standards; and several awards, honors, and recognitions. (*Id.* at ¶ 17). In November 2014, the NYPD again promoted Rodriguez via a discretionary promotion, to the rank of Deputy Chief. (*Id.* at ¶ 18). During the relevant time period, Rodriguez held the position of Deputy Chief, assigned to Patrol Borough Brooklyn South, which Plaintiffs allege is another of the most coveted assignments in the NYPD. (*Id.* at ¶ 19).

Plaintiff David Colon was hired by the NYPD in July 1986. (Compl. ¶ 21). For decades, Colon performed his duties in an exemplary manner as evidenced by, among other things, multiple promo-

tions to the positions of Sergeant, Lieutenant, Captain, Deputy Inspector, and Inspector; receipt of performance evaluations consistently rating him above or well above standards; and several awards, honors, and recognitions. (*Id.* at ¶22). In July 2013, the NYPD again promoted Colon via a discretionary promotion, to the rank of Deputy Chief. (*Id.* at ¶23). During the relevant time period, Colon held the position of Deputy Chief, assigned to the NYPD's Housing Bureau. (*Id.* at ¶24).

Plaintiff Peter A. DeBlasio was hired by the NYPD as a police officer on January 4, 1984. (Compl. ¶26). For decades, DeBlasio performed his duties in an exemplary manner as evidenced by, among other things, multiple promotions to the positions of Sergeant, Lieutenant, and Captain; receipt of performance evaluations consistently rating him above or well above standards; and several awards, honors, and recognitions. (*Id.* at ¶27). In May 2007, the NYPD promoted DeBlasio to the rank of Deputy Inspector. (*Id.* at ¶28). DeBlasio continued to excel in this appointed position, and in May 2011, the Commissioner promoted and designated DeBlasio to the rank of Inspector. (*Id.* at ¶29). During the relevant time period, DeBlasio held the position of Inspector, assigned to Patrol Borough Brooklyn South as operations commander. (*Id.* at ¶30).

2. Job Protections for Captains and Designated Higher Ranks

NYPD Officers holding the rank of Captain or higher are represented by a collective bargaining unit, the Captains Endowment Association (the "CEA"). (Compl. ¶¶ 32, 34). Captains cannot be terminated absent notification of charges and an opportunity to be heard on those charges, including being heard at a Department hearing. (*Id.* at ¶ 37). The Commissioner may detail, appoint, or promote Captains to higher ranks, such as Deputy Inspector, Inspector, and Deputy Chief (collectively, the "Higher Ranks"), where these officers would continue to be represented by the CEA. (*Id.* at ¶¶ 34-35). Captains designated or promoted to the Higher Ranks serve in such positions at the pleasure of the Commissioner. (*Id.* at ¶ 38). But while the Commissioner may demote an officer promoted to the Higher Ranks "at will," he cannot terminate outright the officer's employment with the NYPD. (*Id.* at ¶ 39).

If the Commissioner desires to terminate the employment of a person holding a Higher Rank, the NYPD must bring charges against that person in the same manner as it is required to do for Captains. (Compl. ¶¶ 39-40). That is, the NYPD must follow the directives of New York Civil Service Law § 75, NYPD Patrol Procedures 206-06, 206-07, and 206-13, and the Rules of the City of New York, Title 38, § 15-01. (*Id.* at ¶¶ 40-41). Those provisions entitle officers to, among other things: (i) service of charges and specifications identifying the "date,

time and place" of the alleged misconduct, as well as the "contract provision, law, policy, regulation or rule that was allegedly violated" by the officer in question (*see* N.Y.C. Admin. Code Title 38, § 15-03(a)); (ii) an opportunity for the accused officer to reply to the charges within eight days of service (if served personally), or thirteen days of service (if served by mail) (*see id.* at § 15-03(c)); (iii) discovery concerning the disciplinary charges, including "[r]equests for production of relevant documents, identification of trial witnesses and inspection of real evidence to be introduced at the Hearing" (*see id.* at § 15-03(f)); (iv) a disciplinary hearing where, with the assistance of union or private counsel, an accused officer can introduce evidence, examine and cross-examine witnesses, and make opening statements (*see id.* at § 15-04); and (v) the production to the accused officer of a draft of the report and recommendation of the Deputy Commissioner of Trials, along with an opportunity to submit written comments thereto (*see id.* at § 15-06).

3. The NYPD Corruption Probe

In 2013, the Federal Bureau of Investigation (the "FBI") opened an investigation into corruption in the NYPD that ultimately extended to the Chief of the Department, Philip Banks, and the President of the Correction Officers Benevolent Association, Norman Seabrook. (Compl. ¶¶ 44-46). The FBI was investigating allegations that police officers accepted gifts and vacations from two wealthy New York City

businessmen, Jeremy Reichberg and Jona Rechnitz, in exchange for favors. (*Id.* at ¶47). In December 2015, when the investigation hit an impasse with regard to Banks and Seabrook, the FBI began to investigate others within the NYPD, the most notable being Deputy Inspector Michael Deddo, then working in the NYPD Internal Affairs Bureau ("IAB"). (*Id.* at ¶49). As part of the investigation, the FBI interviewed, or attempted to interview, at least 50 high-ranking NYPD officials, including Plaintiffs, and 50 other NYPD employees, uniformed and civilian. (*Id.* at ¶¶51-53). When Rodriguez and Colon were interviewed on February 25, 2016, the FBI agents interviewing them assured them that they were not targets of the investigation. (*Id.* at ¶¶55-56).

On April 7, 2016, Rodriguez and Colon received calls from the President of the CEA, Roy Richter, telling them that Commissioner Bratton was going to transfer them because the Commissioner had to take some action in response to articles that were being published about the corruption. (Compl. ¶58). Richter told Rodriguez that Commissioner Bratton selected him because Reichberg lived in the Brooklyn South area where Rodriguez worked. (*Id.* at ¶59). Richter also told Rodriguez and Colon that the transfers were only temporary, suggesting that this was being done for appearances only, and not because of any wrongdoing. (*Id.* at ¶60).

After consultation with his union and private attorneys, Capul arranged to meet with the FBI and IAB on April 8, 2016. (Compl. ¶61). At the meeting, investigators assured Capul that he was

not a subject or target of any investigation, but rather, that the investigators were interested in learning information Capul was believed to possess. (*Id.* at ¶62). After the April 8, 2016 meeting, Capul was again assured that he was not the subject or target of any investigation by the United States Attorney's Office. (*Id.* at ¶63).

Because the allegations of wrongdoing inculpated high-ranking NYPD officials, if not the Mayor himself—whom, it is alleged, the NYPD was trying to protect—the NYPD believed it needed to take immediate action, at least for public relations purposes. (Compl. ¶64). When the investigation came to light in April 2016, Commissioner Bratton told the press on April 7, 2016, that "[t]he public has expectations of its public officials, of its police department and certainly the leadership of the department. If those expectations are not met, actions must be taken." (*Id.* at ¶65). Meanwhile, Deputy Commissioner Byrne suggested to the press that the corruption was not systemic, but rather was confined to a small group of "senior" people who had "bad judgment." (*Id.* at ¶66). In so doing, Commissioner Bratton and Deputy Commissioner Byrne could suggest to the public that (i) the City, the NYPD, and NYPD leaders were taking action against the bad actors, and (ii) they could have faith in the NYPD because the alleged corruption was confined to a few high-level officials. (*Id.* at ¶67).

Plaintiffs allege that rather than going after the corrupt NYPD officials, Commissioner Bratton instead implicated "expendable" deputy chiefs and

inspectors—career police officials with impeccable records—while protecting politically tied officers. (Compl. ¶ 70). In essence, Plaintiffs claim that they were the scapegoats for others' corruption. For example, on the day that Commissioner Bratton spoke out publicly regarding the corruption investigation, he transferred Colon and Rodriguez to desk duty, despite the fact that they had not been accused of any misconduct, no charges had been filed against them, and they were not subjects of the FBI investigation. (*Id.* at ¶¶ 71-72). Commissioner Bratton also transferred Deputy Chief Harrington and Deputy Inspector James Grant and further stripped these officers of their guns and badges. (*Id.* at ¶ 73).

On April 13, 2016, just a week after Capul's meeting with the FBI and IAB, Commissioner Bratton transferred Capul from the highly coveted position of Executive Officer of Manhattan North to an administrative position as executive officer of the School Safety Division. (Compl. ¶ 74). At the time of his transfer, Capul was considered a highly respected chief with an unblemished record. (*Id.* at ¶ 75). Further, Capul was not a target of the FBI's investigation, and the NYPD did not accuse Capul of corruption or misconduct. (*Id.* at ¶ 76).

Put simply, Capul's transfer was yet another in a series of actions that the NYPD took to give the appearance that it was addressing the FBI's corruption concerns. (Compl. ¶ 77). Unfortunately for him, Capul's transfer immediately attracted press coverage, with the NYPD telling the media that Capul had been "reassigned to an administrative

position pending further review." (*Id.* at ¶ 78). At least one headline from the New York Daily News implicated Capul in the corruption scandal, reading, "Deputy Chief Andrew Capul is latest officer disciplined in ongoing FBI corruption probe into the NYPD." (*Id.* at ¶ 79). So while Capul was found guilty in the court of public opinion, the NYPD successfully deflected attention from other, higher-ranking officials who had been previously been the subject of press attention. (*Id.* at ¶ 80).

On April 29, 2016, DeBlasio met with FBI agents, at which time he was assured that he was not the target or subject of the investigation. (Compl. ¶¶ 81-82). Indeed, after Plaintiffs' meetings with the FBI, Richter told each Plaintiff that he had done nothing wrong. (*Id.* at ¶ 83). Richter stated that Plaintiffs were simply witnesses and that everything would be handled administratively by the NYPD. (*Id.* at ¶ 84). This was confirmed by CEA attorney Lou LaPietra, who advised that Plaintiffs had done nothing wrong. (*Id.* at ¶ 85). On May 5, 2016, Richter called Rodriguez to advise that he had just left a meeting with Commissioner Bratton, who informed Richter that Rodriguez's name had not come up anywhere and that he would soon be back on track with his career. (*Id.* at ¶ 86). Richter repeated these promises to Rodriguez on a number of other occasions in May 2016. (*Id.* at ¶ 87).

Although Plaintiffs told the NYPD and the CEA about their contacts with the FBI, and even advised the NYPD that they would be willing to speak to NYPD investigators about these contacts, the NYPD showed no interest in further question-

ing Plaintiffs, except for initially notifying DeBlasio that IAB would interview him. (Compl. ¶ 88). IAB later cancelled DeBlasio's scheduled interview. (*Id.* at ¶ 89). Richter told DeBlasio that Deputy Commissioner Byrne cancelled the interview indefinitely. (*Id.* at ¶ 90).

4. Plaintiffs' Forced Resignations

In May 2016, Commissioner Bratton and Deputy Commissioner Byrne created two lists for officers implicated by the FBI's investigation, regardless of proof (or even suspicion) of wrongdoing: a "fired" list and an "arrested" list. (Compl. ¶ 94). DeBlasio was put on the fired list. (*Id.* at ¶ 95). Then, on May 20, 2016, Richter told Capul, Rodriguez, and Colon, in separate conversations, that Commissioner Bratton was seeking their retirements, and that the Commissioner wanted those retirements effective as of May 31, 2016. (*Id.* at ¶ 96). Richter conveyed to Plaintiffs the seriousness of the Commissioner's intent with a threat: if Plaintiffs did not retire, the NYPD would charge them and terminate them notwithstanding the outcomes of their respective hearings. (*Id.* at ¶¶ 97-104).

Richter told Colon, in sum and substance, that Colon had no choice but to retire, because if he did not, the NYPD would file unspecified charges against him. (Compl. ¶ 97). Richter further reminded Colon that even if he challenged the as-yet-unknown charges at a hearing, it would not matter because the findings would be non-binding; the Commissioner was already intent on terminating Colon; and the Commissioner would in fact termi-

nate Colon notwithstanding the outcome of the hearing. (*Id.* at ¶ 98).

According to Plaintiffs, Commissioner Bratton's demand that Plaintiffs retire represented the City's policy of removing "tainted" employees from the Department so that the Department could put the scandal behind it. (Compl. ¶ 106). Significantly, however, Commissioner Bratton's motive was not benign, nor were his actions genuine efforts to remove wrongdoers from the Department, as evidenced by the fact that Banks's retirement (and the retirement of other implicated high-ranking officials, such as Deputy Chief Jimmy McCarthy, Inspectors Stephenson and Brian McGinn, and Deputy Inspectors Michael Endall and Deddo) was not similarly sought. (*Id.* at ¶ 107).

Ultimately, Commissioner Bratton, through Richter, presented each Plaintiff with an ultimatum: retire immediately and retain certain benefits or face disciplinary charges that would result in certain termination. (Compl. ¶¶ 108-25). No one, including neither of the Individual Defendants, informed any Plaintiff of any charge against him, or of any basis that could give rise to any charge against him. (*Id.* at ¶¶ 122, 126, 146). For this reason, Plaintiffs were unable to gauge the chance of success in defending against any such charges. (*Id.* at ¶ 122).

Faced with the threat of losing substantial employment benefits that would be forfeited in the event of a termination, but not a retirement, each Plaintiff submitted retirement papers per the Commissioner's direction. (Compl. ¶ 146). Colon capitu-

lated to the Commissioner's demand and filed his retirement paperwork on May 24, 2016. (*Id.* at ¶116). Rodriguez filed amended retirement paperwork on or about June 27, 2016. (*Id.* at ¶141). Capul filed amended retirement paperwork on June 29, 2016. (*Id.* at ¶138). DeBlasio filed retirement paperwork on July 16, 2016. (*Id.* at ¶145). After their retirements, Plaintiffs all received "good guy" letters from Commissioner Bratton. (*Id.* at ¶147).[2]

In August 2016, Plaintiffs commenced the grievance process against the City and the NYPD, pursuant to their collective bargaining agreement, arguing that they had retired under duress, such that the forfeiture of their accrued time had been void. (Compl. ¶148). Of potential significance to the instant motion, while Plaintiffs grieved their benefit calculations, they elected not to grieve the circumstances of their departures from the NYPD through an Article 78 proceeding in New York State Supreme Court. (Dkt. #36 at 7-10). On July 16, 2018, hearing officer David N. Stein agreed with Plaintiffs and determined that their retirements were given under duress. (Compl. ¶149; *see generally* Arbitration Award). In Arbitrator Stein's Opinion and Award, he found it "clear that the Department interfered with the grievants' exercise of their rights to run their accrued compensatory

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[2] A "good guy letter" is a letter that states, in relevant part, that the subject of the letter retired from the NYPD in good standing, and it is a requisite for the subject to obtain a license to carry a pistol as a retiree.

time and unusual annual leave prior to retirement. The Department's actions amounted to a breach of [their collective bargaining agreement]." (Arbitration Award 39).

In June 2017, all four Plaintiffs submitted letters of reinstatement to the NYPD. (Compl. ¶¶ 167-70). None of the Plaintiffs received a response. (*Id.).*

B. Procedural History

Plaintiffs filed the Complaint in this action on May 13, 2019, asserting one cause of action for the violation of their due process rights under the Fourteenth Amendment. (Dkt. #1). On July 12, 2019, Defendants filed a letter seeking to have this case consolidated with another case, *Grant* v. *City of New York, William J. Bratton and Lawrence Byrne,* No. 19 Civ. 4334 (ALC), brought by another former NYPD employee, which was proceeding before Judge Carter. (Dkt. #21). On July 24, 2019, Plaintiffs filed a letter in opposition to the motion to consolidate. (Dkt. #28). The plaintiff in *Grant* also filed a letter opposing Defendants' requested consolidation. (Dkt. #29). On July 29, 2019, the Court denied the motion to consolidate the cases. (Dkt. #30).

On August 9, 2019, Defendants filed a letter seeking a pre-motion conference concerning their anticipated motion to dismiss. (Dkt. #31). Plaintiffs filed a letter in opposition on August 13, 2019. (Dkt. #32). The Court held a pre-motion conference on September 16, 2019. (Dkt. #36 (transcript)). At that conference the Court set a briefing schedule

and ordered discovery stayed pending resolution of Defendants' motion to dismiss. (*See id.*).

On October 28, 2019, Defendants filed their motion to dismiss. (Dkt. #38, 39). Defendants' motion asserts three grounds for dismissal: (i) Plaintiffs fail to state a claim for municipal liability against the City of New York; (ii) Plaintiffs' due process claim fails as a matter of law; and (iii) Commissioner Bratton and Deputy Commissioner Byrne are entitled to qualified immunity. (*See generally* Dkt. #39). On December 2, 2019, Plaintiffs filed a brief and declaration in opposition to Defendants' motion. (Dkt. #40, 41). Defendants filed a reply brief on December 20, 2020. (Dkt. #44). On March 18, 2020, Plaintiffs filed a letter alerting the Court to a supplemental authority from the Second Circuit Court of Appeals. (Dkt. #45). Accordingly, the motion is fully briefed and ripe for decision.

DISCUSSION

A. Applicable Law

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 544, 570 (2007)). A complaint is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *N.J. Carpenters*

Health Fund v. *Royal Bank of Scotland Grp., PLC,* 709 F.3d 109, 120 (2d Cir. 2013). But while a plaintiff must demonstrate the plausibility of his claims, he need not show that a judgment in his favor is probable. *Iqbal,* 556 U.S. at 678.

B. Analysis

Defendants assert three arguments in support of their motion to dismiss the Complaint. *First,* they argue that the claims against the City of New York and the Individual Defendants in their official capacities cannot proceed because Plaintiffs have not adequately pleaded that the alleged constitutional deprivations were part of a municipal custom or policy. (*See* Def. Br. 6-10). *Second,* they argue that Plaintiffs' claim that their resignations were coerced is not actionable as a due process violation because Plaintiffs could have sought to challenge the voluntariness of their resignations via an Article 78 special proceeding in New York State Supreme Court. (*See id.* at 10-14). *Third,* Defendants argue that Commissioner Bratton and Deputy Commissioner Byrne are shielded from suit by the doctrine of qualified immunity. (*See id.* at 14-15). The Court addresses Defendants' second argument first, as that issue is dispositive.

1. Plaintiffs Have Failed to State a Procedural Due Process Claim

The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due

process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause thus bars arbitrary government action, and guarantees procedural fairness when a state action deprives a citizen of a protected interest in life, liberty, or property. *See Daniels* v. *Williams,* 474 U.S. 327, 331 (1986). "The fundamental requirement of the Due Process Clause is that an individual be given the opportunity to be heard at 'a meaningful time and in a meaningful manner.'" *Patterson* v. *City of Utica,* 370 F.3d 322, 336 (2d Cir. 2004) (quoting *Goldberg* v. *Kelly,* 397 U.S. 254, 267 (1970)).

A procedural due process claim comprises two elements: (i) the existence of a property or liberty interest that was deprived; and (ii) deprivation of that interest without due process. *Bryant* v. *New York State Educ. Dep't,* 692 F.3d 202, 218 (2d Cir. 2012); *Ciambriello* v. *Cty. of Nassau,* 292 F.3d 307, 313 (2d Cir. 2002). Defendants do not contest that Plaintiffs had a property interest in their employment with the NYPD. (*See* Def. Br. 10). Rather, they contend that Plaintiffs' claim fails under the second prong of the analysis because, notwithstanding Defendants' purported violation of various procedural safeguards, the State provided other procedures to protect Plaintiffs' property interests in the face of those violations. (*See id.).* Thus, the question is whether the process afforded to Plaintiffs was sufficient to satisfy the requisites of the Due Process Clause.

Plaintiffs argue that when the property interest at stake is continued employment, the Constitution requires pre-deprivation process, including some

kind of hearing, notice of the charges, an explanation of the employer's evidence, and an opportunity to present the employee's side of the story. (*See* Pl. Opp. 10 (citing *Cleveland Bd. of Educ.* v. *Loudermill,* 470 U.S. 532, 538-46 (1985))). Thus, the crux of the dispute is whether, when a state employee is coerced to resign from employment, the employee must be afforded pre-deprivation process or whether post-deprivation process, in the form of an Article 78 proceeding, suffices. Resolution of this issue requires a careful study of Supreme Court and Second Circuit precedent.

a. Pre-Deprivation Process Is Not Required Where Plaintiffs Resign Their Employment, Even If Coerced to Do So

In *Parratt* v. *Taylor,* 451 U.S. 527 (1981), the Supreme Court acknowledged the many cases in which it had held that due process requires a pre-deprivation hearing before the state interferes with any liberty or property interest. *Id.* at 537-38. However, the Court also "recognized that post-deprivation remedies made available by the State can satisfy the Due Process Clause." *Id.* at 538. In particular, the Court

> recognize[d] that either the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some

> time after the initial taking, can satisfy the requirements of procedural due process.

Id. at 539. The Court then summarized its teachings in the area:

> Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). However, . . . we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any pre-seizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.

Id. at 540-41 (emphasis in original).

The Court further explained that "[t]he justifications which we have found sufficient to uphold takings of property without any pre-deprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee." 451 U.S. at 541. The

Court reasoned that in such cases, the loss is not the result of some established state procedure and the state cannot predict precisely when the loss will occur. *Id.* Because the deprivation in *Parratt,* which was caused by the negligent misplacement of a prisoner's property, was beyond the control of the state, it would have been impracticable and impossible for the state to provide a meaningful hearing before the deprivation. *Id.* At the same time, excusing the pre-deprivation hearing because the deprivation was random and unauthorized did not excuse the state from providing a meaningful post-deprivation remedy. *Id.* The Court held that the State of Nebraska's tort remedy provided sufficient post-deprivation process. *Id.* at 543.

Three years later, in *Hudson* v. *Palmer,* 468 U.S. 517 (1984), the Supreme Court extended the reasoning of *Parratt* to intentional deprivations of property. *Id.* at 533. As just discussed, the *Parratt* Court had reasoned that when deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply impracticable, since the state cannot know when such deprivations will occur. *Id.* The *Hudson* Court could discern no logical distinction between negligent and intentional deprivations of property, insofar as the "practicability" of affording pre-deprivation process was concerned, because the state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees that it can anticipate negligent conduct. *Id.* Accordingly, the Court concluded that even intentional depriva-

tions of property, if random and unauthorized, do not violate the Due Process Clause if adequate post-deprivation remedies are available. *Id.*

The Second Circuit had occasion to apply the principles of *Parratt* and *Hudson* in *Giglio* v. *Dunn,* 732 F.2d 1133 (2d Cir. 1984). In that case, Giglio was a tenured high school principal who resigned after the school district's superintendent began harassing him with the intent of inducing him to have a nervous breakdown. *Id.* at 1134. Giglio claimed that he had been forced to take full-time disability leave due to mental health issues occasioned by the harassment. *Id.* Six months later, the district and board superintendents, who were "acting at the direction" of the school board's trustees, told Plaintiff "that the Board of Education would abolish his position at a meeting that evening unless he agreed to return to work" by a date certain. *Id.* Giglio informed the superintendents that he could not return to work because of his condition, but he was again informed that his position would be abolished unless he agreed to resign. *Id.* Instead of facing a vote at the meeting, Giglio resigned several hours after receiving these threats. *Id.* Giglio then filed suit alleging that his resignation had been coerced and that he had been denied due process because a hearing did not precede the coercion. *Id.* The district court dismissed Giglio's complaint for failure to state a claim, holding that a pre-coercion hearing would have been "not only impractical but virtually impossible," and, further, that Giglio's post-deprivation remedy under Article 78 of the New York Civil Practice

Law, "which is an amalgam of the common law writs of certiorari to review, mandamus, and prohibition," provided adequate due process. *Id.*

The Second Circuit agreed that Giglio's post-deprivation remedies afforded him sufficient process, explaining that "[h]ad an Article 78 hearing been held, the court, with all the facts before it, could have determined whether [Giglio's] resignation was coerced, and avoiding the constitutional thicket, could have ordered such reinstatement and monetary relief as was appropriate." 732 F.2d at 1134. The Court observed that resignations (even if not truly voluntary) are distinguishable from ordinary firings for two reasons: (i) a resignation is not a unilateral act on the part of the employer; and (ii) it does not purport to be for cause. *Id.* And because a coerced resignation is "simply the submission by an employee to pressure exerted by a superior . . . it is hard to visualize what sort of prior hearing the Constitution would require the employer to conduct." *Id.* at 1135. Thus, where an Article 78 proceeding would give the employee a meaningful opportunity to challenge the voluntariness of his resignation, the employee is not deprived of due process simply because he failed to avail himself of that opportunity. *Id.*

The Second Circuit continues to cite *Giglio* with approval. In *Jaeger* v. *Bd. of Educ. of Hyde Park Central School Dist.,* 1997 WL 625006 (TABLE), 125 F.3d 844 (2d Cir. 1997) (summary order), the plaintiff alleged that he had been coerced into resigning by the Board of Education. *Id.* at *1. The Court found that the plaintiff failed to state a due

process violation because he had not established a protected interest in his job. *Id.* at *2. The Court went on to find that, even if the plaintiff had a protected interest in continued employment, his due process claim would still fail because of the availability of an Article 78 proceeding that "provides the victim of an allegedly coerced resignation with adequate procedural protection." *Id.* Citing *Giglio,* the Court held that the Board of Education was not required to show that a pre-deprivation hearing was impossible. *Id.*

The plaintiff in *Stenson* v. *Kerlikowske,* 2000 WL 254048 (TABLE), 205 F.3d 1324 (2d Cir. 2000) (summary order), similarly alleged that he had been coerced into resigning by the City of Buffalo Police Department after a positive drug test. *Id.* at *1. On appeal, Stenson argued that the district court had erred in concluding that the pre-deprivation process that he received satisfied the notice requirements for public-sector employees that had been set forth by the Supreme Court in *Loudermill,* 470 U.S. 532. *Id.* The *Stenson* Court began by summarizing the law as clarified by the Supreme Court:

> The Court explained in *Loudermill* that a pre-deprivation hearing ensures that there is "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." [470 U.S.] at 545-56. Thus, a tenured public employee "is entitled to oral or written notice of the charges against him, an

> explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

Id. However, the Court went on to explain that Stenson's case was distinguishable because he alleged that he had been coerced into resigning. *Id.* Citing *Giglio,* the Court held that a pre-deprivation hearing was neither feasible nor constitutionally required in such circumstances. *Id.* In so doing, the Court reaffirmed that when an employee claims that he was coerced to resign, an Article 78 proceeding provides him with sufficient process. *Id.*

District courts also continue to rely on *Giglio* in cases involving coerced resignations. As but one example, in *Cole-Hatchard* v. *Hoehmann for Town of Clarkstown, N.Y.,* No. 16 Civ. 5900 (VB), 2017 WL 4155409 (S.D.N.Y. Sept. 18, 2017), a former employee of the Clarkstown Police Department brought suit alleging that he had been deprived of due process when he was forced to resign. *Id.* at *7. Citing *Giglio* and *Stenson,* the district court held that because the plaintiff elected not to bring an Article 78 proceeding to challenge the voluntariness of his resignation, the allegation that he was denied due process was implausible. *Id.*

This line of cases would seem to apply squarely to the facts of the instant case. Here, too, Plaintiffs allege that Defendants violated their procedural due process rights in short-circuiting established state procedures for terminating them. Here, too—like the plaintiffs in *Giglio, Jaeger, Stenson,* and *Cole-Hatchard*—Plaintiffs short-circuited the pre-

deprivation notice and heading procedures to which they were entitled by resigning. If Plaintiffs had wanted to be served with notice of the charges against them, followed by an opportunity to be heard, as they now claim, they could have rejected the demand that they retire, and invoked their rights to be disciplined pursuant to established procedures. Instead, Plaintiffs strategically avoided the filing of charges against them—and the procedural protections attendant to the filing of such charges—by resigning.

b. *Giglio* Applies to Plaintiffs' Claim

In response to these cases, Plaintiffs advance two arguments: (i) the *Giglio* line of cases does not apply here; and (ii) *Giglio* is no longer good law. Plaintiffs' first argument is premised on the contention that *Giglio* applies only where the deprivation was random and unauthorized, and that when the deprivation was based on established procedures, pre-deprivation process is required. (Pl. Opp. 13-14). Plaintiffs assert that their resignations, coerced by high-ranking decision makers, were not "random and unauthorized," as in *Giglio,* but rather were entirely foreseeable and predictable to Defendants, thereby entitling Plaintiffs to pre-deprivation process. (*See id.* at 15-17).

Plaintiffs miss the point of *Giglio* and its progeny. While it is true that the Second Circuit has held that deprivations caused by high-ranking decision-makers are not random and unauthorized—and may therefore require pre-deprivation process—

those cases do not address deprivations caused by resignations. *See, e.g., Hellenic American Neighborhood Action Committee* (*"HANAC")* v. *City of New York*, 101 F.3d 877 (2d Cir. 1996) (addressing claim by city contractor that it was debarred from obtaining city procurement without due process of law); *Rivera-Powell* v. *N.Y. Bd. of Elections*, 470 F. 3d 458 (2d Cir. 2006) (addressing whether judicial candidate was removed from ballot without procedural due process); *see also Henry* v. *City of New York,* 638 F. App'x 113 (2d Cir. 2016) (summary order) (addressing due process claim brought by plaintiffs who were terminated from employment); *DeSimone* v. *Bd. of Educ. S. Huntington Union Free Sch. Dist.*, 604 F. Supp. 1180 (E.D.N.Y. 1985) (addressing claim brought by tenured teacher who was terminated by Board of Education).[3] The point of *Giglio* is that resignations, even if involuntary, differ from firings and other typical deprivations in that they are not unilateral acts on the part of the employer and they do not purport to be for cause. *See Giglio,* 732 F.2d at 1134-35 ("When an employee resigns, the only possible dispute is whether the

[3] Plaintiffs cite *Moffitt* v. *Town of Brookfield,* 950 F.2d 880 (2d Cir. 1991). But the only support for their argument in *Moffit* is in a footnote in the background section of the opinion consisting of dicta, which states that "[i]f Moffit was coerced into surrendering a job in which he had a constitutionally protected property interest, a violation of section 1983 occurred." *Id.* at 883 n.2. The dispositive issue in that case was whether the appellate court had jurisdiction over the district court's denial of qualified immunity. *See generally id.* at 881-87.

resignation was voluntary or involuntary, and this cannot be determined in advance.").

Plaintiffs cite no binding authority for the proposition that pre-deprivation process is required where a plaintiff resigns, even if the resignation was allegedly coerced by a high-ranking decision-maker.[4] And the distinction between firings and resignations makes practical sense: When an employee resigns, as opposed to being terminated, the defendant "ha[s] no opportunity or reason to bring him up on charges, or to hold a hearing," inasmuch as the employee quit before giving the defendant an opportunity to do so. *Fortunato* v. *Liebowitz,* No. 10 Civ. 2681 (AJN), 2012 WL 6628028, at *6 (S.D.N.Y. Dec. 20, 2012).

Perhaps more importantly, the Second Circuit in *Stenson* explicitly rejected the argument Plaintiffs make here, albeit in a summary order. Stenson, who resigned from his position, argued that "an Article 78 proceeding only suffices when the under-

[4] Plaintiffs cite several cases from courts outside of the Second Circuit that, they claim, support their argument that pre-deprivation process must be afforded to those who are constructively discharged. (*See* Pl. Opp. 11-12 (citing *Findesian* v. *North East Ind. Sch. Dist.,* 749 F.2d 234 (5th Cir. 1984)); *id.* at 14 (citing *Lauck* v. *Campbell Cty.,* 627 F.3d 805, 812-13 (10th Cir. 2010); *Knappenberger* v. *City of Phoenix,* 566 F.3d 936, 941 (9th Cir. 2009); *Eggers* v. *Moore,* 257 F. App'x 993, 995 (6th Cir. 2007); *Hargray* v. *Hallandale,* 57 F.3d 1560, 1568 (11th Cir. 1995); *Fowler* v. *Carrollton Public Lib.,* 799 F.2d 976, 981 (5th Cir. 1986); *Rao v. Gondi,* 14 C 66, 2015 U.S. Dist. LEXIS 173049, at *7-11, 2015 WL 9489908 (N.D. Ill. Dec. 30, 2015)). However, *Giglio* is the case that is binding on this Court.

lying deprivation was random, unauthorized, or unforeseeable, and that the Buffalo Police Department was required to provide [him with] an administrative hearing [] since the deprivation was predictable and authorized pursuant to the official Drug Testing Policy." 2000 WL 254048, at * 1. The Court disagreed, reasoning that "since Stenson alleges that he was coerced into resigning, the underlying deprivation was sufficiently unforeseeable that the availability of an Article 78 proceeding provided Stenson with a 'meaningful opportunity to challenge the voluntariness of his resignation' sufficient to ensure due process." *Id.* (quoting *Giglio,* 732 F.2d at 1135).

Unsurprisingly, district courts in this Circuit have also rejected this argument. For example, in *Silverman* v. *City of New York,* No. 98 Civ. 6277 (ILG), 2001 WL 1776157 (E.D.N.Y. Nov. 19, 2001), the plaintiff alleged that he was entitled to pre-deprivation process despite his resignation because his deprivation had been occasioned "not by the random and unauthorized acts of low-level employees, but rather by individuals who had final authority over the decision-making process." *Id.* at *2 (internal quotation marks omitted). The district court explained why this argument was unavailing:

> The problem with Silverman's new allegations, however, is that they fail to address a problem the Court previously noted with respect to these claims: the fact that Silverman was not terminated from his position, but rather resigned. In such a situation, it is hard to visu-

> alize what sort of prior hearing the Constitution would require the employer to conduct, because the only possible dispute is whether the resignation was voluntary or involuntary, and this cannot be determined in advance. Accordingly, such a hearing would make little sense. Instead, Silverman should have availed himself of the post-deprivation remedy available to him: the commencement of an Article 78 proceeding.
>
> Silverman argues that, because the persons who allegedly coerced him to resign are "municipal policymakers," an Article 78 proceeding is not an adequate post-deprivation remedy. Nothing in *Giglio,* however, suggests that the holding in that case should apply with any less force where an employee resigns due to a municipal policy, as opposed to a "random, unauthorized act" of a low-level employee. In fact, in *Stenson,* the Second Circuit squarely rejected the distinction Silverman asks the Court to draw.

Id. at *3 (internal citations and quotations omitted).

Similarly, in *Dodson* v. *Bd. of Educ. of the Valley Stream Union Free Sch. Dist.,* 44 F. Supp. 3d 240 (E.D.N.Y. 2014), the district court applied *Giglio* to dismiss a tenured high school teacher's due process claim that he had been coerced into resigning, even as the court found that the deprivation had been caused by a school board and district that, the court explicitly held, maintained municipal policy-

making authority. *Id.* at 247-49. And in *Weslowski* v. *Zugibe,* 14 F. Supp. 3d 295 (S.D.N.Y. 2014), the district court held that

> whether a deprivation was "random and unauthorized" or whether it was pursuant to "established government procedures" is "moot" in the context of a public employee's wrongful-termination claim, because . . . an Article 78 proceeding . . . allows a petitioner specifically to raise claims that the employer was biased and prejudged the outcome of the termination process.

Id. at 316 (internal quotation marks and alterations omitted).

The distinction between resignations and terminations is perhaps made most clear in *Fortunato,* which involved both. In that case, the defendants, having mistaken the plaintiff for a probationary rather than permanent employee, terminated him without a hearing. 2012 WL 6628028, at *2-3. Roughly a month after his termination, he was reinstated to his position. *Id.* at *4. However, on the day that the plaintiff returned to work, he found the conditions of his reinstatement unacceptable and resigned from his position, describing his resignation as a constructive discharge. *Id.* The plaintiff brought claims alleging that his procedural due process rights had been violated by both his original termination and his constructive discharge. *Id.* at *4-7.

The district court dismissed the plaintiff's due process claim premised on his constructive discharge, observing that that

> [a] substantial line of Second Circuit precedent has held that, in the case of an alleged constructive discharge in New York, the lack of a hearing *before* a plaintiff's resignation—*i.e.,* before the plaintiff's alleged constructive discharge—does not deprive the plaintiff of procedural due process because New York has provided an opportunity for a post-deprivation hearing.

2012 WL 6628028, at *4. In this regard, the plaintiff had argued that a pre-deprivation hearing would have been practical in his situation, because it was obvious to defendants that they were forcing him to resign. *Id.* at *5. The court rejected this argument, citing *Stenson,* explaining that the issue in a case of a coerced resignation is *not* whether the deprivation is random, unauthorized, or foreseeable. *Id.* Rather, the Second Circuit has established a categorical rule that a pre-deprivation hearing is impractical in cases of coerced resignation. *Id.*[5]

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[5] Following this logic, the Court found a plausible due process claim with respect to the plaintiff's claim for his termination. *Fortunato* v. *Liebowitz,* No. 10 Civ. 2681 (AJN), 2012 WL 6628028, at *6 (S.D.N.Y. Dec. 20, 2012). There, the question of whether the deprivation occurred pursuant to established state procedures or random, unauthorized acts of state employees *was* relevant. *Id.* That is, in answering this question, it did matter whether the defendants were the ultimate decision-makers because, if so, the deprivation would not be considered random and unauthorized conduct. *See id.*

Plaintiffs urge the Court to adopt a proposition made in dicta in *DeSimone,* 604 F. Supp. at 1184, that *Giglio* would have been decided differently if Giglio had been coerced to resign pursuant to formal official action by the Board of Education, rather than as a consequence of informal, unofficial, and unauthorized threats by individual superiors. (Pl. Opp. 17). This Court demurs. Even if this distinction were relevant in the context of a coerced resignation, Plaintiffs' coerced resignations were not caused by formal action of the City or official municipal policy. The relevant question is, instead, whether the deprivation was effectuated pursuant to established state procedures or in violation of them, even when the decision is made by a high-ranking person.

This distinction was addressed in *HANAC,* where the Second Circuit began by summarizing the law with respect to due process violations:

> When reviewing alleged procedural due process violations, the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees. *See Hudson* v. *Palmer,* 468 U.S. 517, 532, 104 S. Ct. 3194, 3203, 82 L.Ed.2d 393 (1984); *Parratt* v. *Taylor,* 451 U.S. 527, 541, 101 S. Ct. 1908, 1916, 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). In the latter case, the Due Process Clause of the Fourteenth Amendment is not violated when a state

> employee intentionally deprives an individual of property or liberty, so long as the State provides a meaningful post-deprivation remedy. *Hudson* v. *Palmer,* 468 U.S. at 531, 533, 104 S. Ct. at 3202-03, 3203-04. When the deprivation occurs in the more structured environment of established state procedures, rather than random acts, the availability of post-deprivation procedures will not, *ipso facto,* satisfy due process. *Id.* at 532, 104 S. Ct. at 3203; *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 435-36, 102 S. Ct. 1148, 1157-58, 71 L.Ed.2d 265 (1982).

101 F.3d at 880. The plaintiff in *HANAC* complained that the City's chief procurement officer had instructed all city agency heads to reject all of the plaintiff's proposals and to cancel all existing contracts with the plaintiff as they came up for renewal, resulting in a *de facto* debarment. *Id.* at 881. The Second Circuit observed that the plaintiff made no claim that the due process violation was caused by an established state procedure, such as the City Charter or Procurement Policy Board ("PPB") Rules. *Id.* "To the contrary, [the plaintiff] argue[d] that state officials acted in flagrant *violation* of the City Charter and PPB Rules." *Id.* (emphasis added).

Despite the *HANAC* plaintiff's allegation that the officials who denied it due process were high-ranking policymakers, the Court held that the deprivation was still random and arbitrary because it had not been done according to established state

procedures. 101 F.3d at 881-82. Accordingly, the Second Circuit stated that, following *"Parratt, Hudson* and their progeny, . . . there *is no* constitutional violation (and no available § 1983 action) when there is an adequate state post-deprivation procedure to remedy a random, arbitrary deprivation of property or liberty." *Id.* at 882 (emphasis in original).

A sister court in this District noted as much in *Carnell* v. *Myers,* No. 17 Civ. 7693 (KMK), 2019 WL 1171489 (S.D.N.Y. Mar. 13, 2019). There, the court dismissed the plaintiff's procedural due process claim, in which he alleged that he had been coerced to surrender his paramedic license without a formal hearing. *Id.* at *5-6. In so doing, the court cited *Giglio*'s holding that the availability of an Article 78 proceeding satisfies procedural due process in a case where a New York State employee claims a coerced resignation. *Id.* at *6. Further, citing *HANAC,* the court explained that in coercing the plaintiff to surrender his license, defendants had *violated* state procedures, rather than acted pursuant to such procedures, such that the alleged deprivation was thus a "random, unauthorized act" for which an Article 78 procedure sufficed. *Id.* at *5.

As in *HANAC* and *Carnell,* Plaintiffs here allege that Commissioner Bratton and Deputy Commissioner Byrne violated New York State and City Law that entitled them to certain pre-deprivation process by prejudging the outcome of their hearings. Plaintiffs make no claim that their alleged due process violation was caused by an established

state procedure, such as the City Charter. Under *Giglio* and *HANAC,* they have failed to establish a due process violation.

c. New York's Article 78 Procedure Provided Plaintiffs with Adequate Post-Deprivation Process

No one disputes that Plaintiffs, following their retirements, had the opportunity to challenge the voluntariness of their respective decisions by commencing an Article 78 proceeding. Plaintiffs do not explain how the Article 78 proceeding, in which they could have challenged their allegedly coerced resignations, would have provided insufficient due process. Their failure to avail themselves of such post-deprivation procedure does not render their due process claims viable. *See HANAC,* 101 F. 3d at 881. Plaintiffs are not entitled to circumvent established due process protections and then claim they were never afforded such protections. *See Finley* v. *Giacobbe,* 79 F.3d 1285, 1296 (2d Cir. 1996) (concluding that plaintiff who resigns before employer takes all the steps necessary to fire her cannot complain of procedural due process violation, because "the resignation effectively deprives the employer of the opportunity to comply with the procedural obligations").

Plaintiffs' argument that *Giglio* is no longer good law also fails. The Second Circuit relied on *Giglio* in *Stenson*, a 2000 decision, and thereafter has continued to cite *Giglio* as good law. *See, e.g., Hoover v. Cty. of Broome*, 340 F. App'x 708, 711 (2d Cir.

2009) (summary order) ("Even assuming the evidence could support the inference that Hoover suffered a constructive discharge, we agree with the district court that Hoover would not be entitled to a pre-deprivation remedy for the constructive discharge."). A plethora of district courts have as well. *See, e.g., Dodson*, 44 F. Supp. 3d at 248 ("[I]t is well-settled that where a New York state employee resigns and later contends that his resignation was not voluntary, the lack of a hearing prior to the resignation does not deprive the employee of procedural due process because New York has provided an opportunity for a post-deprivation hearing in the form of an Article 78 proceeding." (citing *Giglio*, 732 F.3d at 1135)); *Silverman*, 2001 WL 1776157, at *3 (noting that a pre-deprivation hearing "would make little sense" where plaintiff "was not terminated from his position, but rather resigned"); *Cole-Hatchard*, 2017 WL 4155409, at *7 (dismissing police officer's due process claim where he resigned); *Carnell*, 2019 WL 1171489, at *6 ("[D]istrict courts in this Circuit have subsequently applied *Giglio*'s holding that the availability of an Article 78 proceeding satisfies procedural due process in a case where a New York state employee claims a coerced resignation." (internal quotation marks omitted)); *Guttilla* v. *City of New York*, No. 14 Civ. 156 (JPO), 2015 WL 437405, at *8 (S.D.N.Y. Feb. 3, 2015) (citing *Giglio* in dismissing plaintiff's due process claim that she had been coerced into resigning from her tenured position with the New York City Department of Education because of the availability of an Article 78 proceed-

ing); *Fotopolous* v. *Bd. of Fire Comm'rs of Hicksville Fire Dep't*, 11 F. Supp. 3d 348, 371 (E.D.N.Y. 2014) ("While a public employee with a property right in his job is normally entitled to a pre-termination hearing, it is impractical for employees who are constructively discharged to obtain a pre-termination hearing, and the availability of an Article 78 proceeding subsequent to termination provides adequate procedural due process."); *McGann* v. *City of New York*, No. 12 Civ. 5746 (PAE), 2013 WL 1234928, at *8 (S.D.N.Y. Mar. 27, 2013) ("[E]ven assuming the dubious proposition that McGann was constructively discharged, he was not denied due process . . . [because] had [he] wished to challenge his resignation as coerced, McGann could have instituted an Article 78 proceeding in New York state court."); *Kruggel* v. *Town of Arietta*, No. 6:11 Civ. 1250 (LEK) (ATB), 2013 WL 5304184, at *4 (N.D.N.Y. Sept. 19, 2013) (holding that availability of an Article 78 proceeding is all the process that is due "where, as here, a plaintiff claims that her resignation was coerced, because the voluntariness of a resignation cannot be determined in advance"). Plaintiffs have provided the Court with no compelling reason to depart from established Second Circuit law, and the Court sees no reason to do so.

For all of these reasons, Plaintiffs have failed to state a due process claim. The Court thus need not reach the questions of whether the City can be held municipally liable, or whether either or both of Commissioner Bratton and Deputy Commissioner Byrne are entitled to qualified immunity.

CONCLUSION

For the reasons explained above, Defendants' motion to dismiss is GRANTED. Plaintiffs' Complaint is dismissed.

The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: May 27, 2020
New York, New York

/s/ KATHERINE POLK FAILLA
KATHERINE POLK FAILLA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

19 CIVIL 4313 (KPF)
DATE FILED May 28, 2020

ANDREW J. CAPUL, DAVID COLON, ERIC R. RODRIGUEZ, and PETER A. DEBLASIO,

Plaintiffs,

—against—

CITY OF NEW YORK, WILLIAM J. BRATTON, in his individual and official capacities, and LAWRENCE BYRNE, in his individual and official capacities,

Defendants.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated May 27, 2020, Defendants' motion to dismiss is GRANTED and Plaintiffs' Complaint is dismissed; accordingly, this case is closed.

Dated: New York, New York
May 28, 2020

RUBY J. KRAJICK
Clerk of Court
BY: /s/ K MANGO
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No.:

ANDREW J. CAPUL, DAVID COLON,
ERIC R. RODRIGUEZ, and PETER A. DEBLASIO,

Plaintiffs,

—against—

THE CITY OF NEW YORK, and
WILLIAM J. BRATTON and LAWRENCE BYRNE,
in their individual and official capacities,

Defendants.

COMPLAINT

JURY TRIAL REQUESTED

Plaintiffs, ANDREW J. CAPUL, DAVID COLON, ERIC R. RODRIGUEZ, and PETER A. DEBLASIO (collectively "Plaintiffs"), by and through their attorneys, LAW OFFICES OF YALE POLLACK, P.C. and FAMIGHETTI & WEINICK, PLLC, allege upon knowledge as to themselves and their own actions, and upon information and belief as to all other matters, as follows:

JURISDICTION AND VENUE

1. This is a civil action based on Defendants' violations of Plaintiffs' rights as guaranteed to them

by the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983 ("Section 1983").

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343.

3. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this action alleged herein, occurred in this district.

PARTIES

4. Plaintiff, Andrew J. Capul ("Capul"), is a resident of the State of New York, County of Rockland.

5. Plaintiff, Eric R. Rodriguez ("Rodriguez"), is a resident of the State of New York, County of Staten Island.

6. Plaintiff, David Colon ("Colon"), is a resident of the State of New York, County of Orange.

7. Plaintiff, Peter A. DeBlasio ("DeBlasio"), is a resident of the State of New York, County of Queens.

8. Defendant, the City of New York (the "City"), was and still is a municipality organized under the laws of the State of New York and is a public employer with a principal place of business in the County of New York. The City operates, as one of its many agencies, the New York City Police Department ("NYPD").

9. Defendant, William J. Bratton ("Bratton" or the "Commissioner"), was at all relevant times, Commissioner of the NYPD, working in the County of New York. As commissioner, Bratton was vested by State and City law to have final policymaking decisions with respect to matters concerning the NYPD, and Bratton regularly exercised such final policymaking authority. In fact, as described herein, Bratton directed, approved of, and/or acquiesced in the decisions and acts which caused the Constitutional deprivations at issue here.

10. Defendant, Lawrence Byrne ("Byrne"), was, at all relevant times Deputy Commissioner of Legal Matters of the NYPD and acted under color of state law with respect to the allegations herein. Byrne was a high-ranking official of the NYPD and had final authority over significant NYPD matters, including the employment matters at issue here. Byrne reported directly to the Commissioner.

FACTS

Andrew J. Capul

11. On July 16, 1984, the NYPD hired Capul.

12. For decades, Capul performed his duties in an exemplary manner as evidenced by, among other things, multiple promotions to the positions of Sergeant, Lieutenant, Captain, Deputy Inspector, and Inspector, and receipt of consistent performance evaluations rating him above or well above standards, and awards, honors, and recognitions, too numerous to list here.

13. In June 2015, the NYPD again promoted Capul via a discretionary promotion, to the rank of Deputy Chief.

14. At the time of the relevant events described herein, Capul held the position of Deputy Chief, assigned to Patrol Borough Manhattan North, one of the most highly respected and coveted assignments in the NYPD, showing the NYPD's overwhelming trust in Capul.

15. At all relevant times, Capul was a member in good standing of the NYPD.

Eric R. Rodriguez

16. In June 1992, the NYPD hired Rodriguez.

17. During his tenure with the NYPD, Rodriguez performed his duties in an exemplary manner as evidenced by, among other things, multiple promotions to the positions of Sergeant, Lieutenant, Captain, Deputy Inspector, and Inspector, and receipt of consistent performance evaluations rating him above or well above standards, and awards, honors, and recognitions, too numerous to list here.

18. In November 2014, the NYPD again promoted Rodriguez via a discretionary promotion, to the rank of Deputy Chief.

19. At the time of the relevant events described herein, Rodriguez held the position of Deputy Chief, assigned to Patrol Borough Brooklyn South, one of the most highly respected and coveted

assignments in the NYPD, showing the NYPD's overwhelming trust in Rodriguez.

20. At all relevant times, Rodriguez was a member in good standing of the NYPD.

David Colon

21. In July 1986, the NYPD hired Colon.

22. For decades, Colon performed his duties in an exemplary manner as evidenced by, among other things, multiple promotions to the positions of Sergeant, Lieutenant, Captain, Deputy Inspector, and Inspector, and receipt of consistent performance evaluations rating him above or well above standards, and awards, honors, and recognitions, too numerous to list here.

23. In July 2013, the NYPD again promoted Colon via a discretionary promotion, to the rank of Deputy Chief.

24. At the time of the relevant events described herein, Colon held the position of Deputy Chief, assigned to the NYPD's Housing Bureau.

25. At all relevant times, Colon was a member in good standing of the NYPD.

Peter A. DeBlasio

26. On January 4, 1984, DeBlasio was hired by the NYPD as a police officer.

27. For decades, DeBlasio performed his duties in an exemplary manner as evidenced by, among

other things, multiple promotions to the positions of, Sergeant, Lieutenant, and Captain, and receipt of consistent performance evaluations rating him above or well above standards, and awards, honors, and recognitions, too numerous to list here.

28. In May 2007, the NYPD promoted DeBlasio to the rank of Deputy Inspector.

29. DeBlasio continued to excel in this appointed position, so in May 2011, the Commissioner promoted and designated DeBlasio to the rank of Inspector.

30. At the time of the relevant events described herein, DeBlasio held the position of Inspector, assigned to Patrol Borough Brooklyn South as operations commander.

31. At all relevant times, DeBlasio was a member in good standing of the NYPD.

Job Protections for Captains and Designated Higher Ranks

32. Captains are represented by a collective bargaining unit, the Captains Endowment Association ("CEA").

33. The City and CEA are/were parties to a collective bargaining agreement, entitled the Captains' Endowment Association 2012-2019 Agreement (the "CBA").

34. Captains may be detailed, appointed, or promoted for other assignments, i.e. ranks, such as

Deputy Inspector, Inspector, and Deputy Chief (the "Higher Ranks").

35. The CEA continues to represent Captains who have been designated for such assignments by the Commissioner.

36. The CEA and the City have negotiated the terms and conditions of employees represented by the CEA.

37. A term of employment enjoyed by Captains pursuant to the CBA and New York Civil Service Law is that they cannot be terminated absent notification of charges against the employee and an opportunity to be heard on the charges at a department hearing.

38. Captains designated or promoted for Higher Ranks serve in such Higher Rank at the pleasure of the Commissioner.

39. The Commissioner can demote Captains serving in Higher Ranks, at-will, but the Commissioner cannot outright terminate a Higher Rank from employment with the NYPD.

40. Rather, if the NYPD desires to terminate the employment of Higher Rank, the NYPD must bring charges against the Higher Rank, in the same manner as the NYPD is required to do for Captains, that is, the NYPD must follow the directives of New York Civil Service § 75, as well as NYPD Patrol Procedures 206-06, 206-07, and 206-13.

41. Additionally, the NYPD must comply with the Rules of the City of New York, 38 15-01, which

sets forth the procedures for issuing, serving, and hearing disciplinary charges.

42. Although Higher Ranks do not enjoy a property interest in the Higher Rank, they have a property interest in their continued employment with the NYPD as a Captain.

43. Thus, notwithstanding any of the foregoing procedures, Captains, and Captains serving in Higher Ranks, cannot be terminated from the NYPD without being afforded constitutionally adequate due process, meaning a notice of charges and at least a minimal opportunity to be heard on the charges prior to being deprived of their employment, i.e. terminated from the NYPD.

NYPD Corruption Probe

44. As early as 2013, the FBI was conducting an extensive investigation concerning corruption in the NYPD (the "Corruption").

45. The investigation initially began with Ruel Stephenson, an NYPD inspector who was protecting an establishment owned by Hamlet Peralta.

46. This investigation then led to the Chief of the Department, Philip Banks ("Banks"), and Corrections Union President, Norman Seabrook ("Seabrook"), including investigations into the investments they had made.

47. Later, the FBI investigated suspicions that police officers accepted gifts and vacations, in exchange for favors for wealthy New York City

businessmen, allegedly Jeremy Reichberg ("Reichberg") and Jona Rechnitz ("Rechnitz").

48. These businessmen allegedly had ties to Mayor Bill de Blasio, and the suspected corruption involved the highest-level officials within the NYPD, including the then Chief of Department, Banks.

49. When the investigation led to a roadblock on Banks and Seabrook at that time, in December 2015, the FBI began to investigate others within the NYPD, the most notable being Deputy Inspector Michael Deddo ("Deddo") who, at the time, was working in NYPD Internal Affairs ("IAB").

50. As well, there was an investigation of Shaya Alex Lichtenstein, who was later convicted of bribing police offers in the NYPD Gun License Division.

51. As part of the investigations, the FBI interviewed, or tried to interview, at least fifty (50) high ranking NYPD officials, including the Plaintiffs, and others, such as Deputy Chief Michael Harrington ("Harrington").

52. In addition to high ranking NYPD officials, more than fifty (50) others were interviewed of other ranks and titles, as well as civilians.

53. According to sources quoted by the New York Daily News, these interviews were not intended to target the officials as suspects in the investigation, but rather were intended only to obtain information to further the investigation.

54. Indeed, the FBI interviewed Harrington and asked him about information he had relating to Banks, Seabrook, Reichberg, and Rechnitz.

55. As part of this ongoing interviewing, on February 25, 2016, FBI agents met with Rodriguez, Colon and others.

56. The agents questioned them but assured Rodriguez and Colon that they were not targets or subjects of the investigation.

57. On March 30, 2016, the FBI, as well as IAB, tried to meet with Capul at his home, but he was not home at the time.

58. On April 7, 2016, Rodriguez and Colon received calls from the President of the CEA, Roy Richter ("Richter"), telling them that Bratton was going to transfer them because Bratton had to take some action to respond to the articles that were being published about the Corruption.

59. Richter told Rodriguez that Bratton selected him because Reichberg lived in the Brooklyn south area where Rodriguez worked.

60. Richter stated that the transfers of Rodriguez and Colon were only temporary, suggesting that this was being done for appearances only, and not because of any wrongdoing.

61. After consultation with his union and private attorney, Capul arranged to meet with the FBI and IAB on April 8, 2016.

62. Concerning Capul's April 8, 2016 meeting, investigators assured Capul that he was not a subject or target of any investigation, but rather the investigators were interested in just learning about information of which they believed he had knowledge.

63. After the April 8, 2016 meeting with Capul, he was again assured that he was not the subject or target of any investigation by the AUSA's office.

64. Because the allegations led to the highest-ranking NYPD officials, and perhaps directly to the Mayor, who the NYPD was trying to protect, the NYPD believed it needed to take immediate action, at least for public relations purposes.

65. In fact, when the investigation came to light in April 2016, Bratton told the press on April 7, 2016, that, "The public has expectations of its public officials, of its police department and certainly the leadership of the department. If those expectations are not met, actions must be taken."

66. Moreover, Byrne suggested to the press that the corruption was not systemic, but rather confined to a small group of "senior" people, who had "bad judgment."

67. In other words, Bratton and Byrne were laying the foundation for showing the public that the City, the NYPD, and their leaders, were taking action against the bad actors and that they could have faith in the NYPD because the alleged corruption was confined to a few high-level officials.

68. Further, because the corruption allegations reached the Mayor's office, the Mayor, the City, and NYPD top leaders, such as the Commissioner and Chief Banks, they had an interest in insulating themselves from the allegations.

69. Indeed, Bratton noted that this probe did not reach the levels of the 1970s Knapp Commission scandal or the 1990s Mollen Commission scandal.

70. Accordingly, the NYPD implicated "expendable" deputy chiefs and inspectors—career police officials with impeccable records—while protecting politically tied officers from implication in the Corruption.

71. For example, on the same day Bratton made these comments, Bratton transferred Colon and Rodriguez to desk duty.

72. Colon and Rodriguez were not accused of any misconduct, no charges had been filed against them, and they were not subjects of the FBI investigation.

73. Bratton also transferred Deputy Chief Harrington and Deputy Inspector James Grant ("Grant"), and further stripped these officers of their guns and badges.

74. On April 13, 2016, just seven days after Bratton's comments and after assurances at the April 8, 2016 meeting that he was a not a target or subject of investigation, Bratton transferred Capul from the highly coveted position as the Executive Officer of Manhattan North, to an administrative

position as executive officer of the School Safety Division.

75. At the time of his transfer, Capul was considered a highly respected chief with an unblemished record.

76. Further, Capul was not a target of the FBI's investigation and the NYPD did not accuse or charge Capul with any allegations of corruption or misconduct.

77. In other words, Capul's transfer was another in a series of actions which the NYPD took to give the appearance that it was addressing the FBI's corruption concerns.

78. Moreover, Capul's transfer immediately attracted press coverage, with the NYPD telling media that Capul was "reassigned to an administrative position pending further review."

79. At least one headline from the New York Daily News implicated Capul in the Corruption, reading, "Deputy Chief Andrew Capul is latest officer disciplined in ongoing FBI corruption probe into the NYPD."

80. Thus, Capul was immediately guilty in the world of public opinion and the NYPD was successfully employing scapegoats to take the heat off of other higher-ranking officials, previously implicated by the press.

81. On April 29, 2016, FBI agents met DeBlasio.

82. With respect to DeBlasio, like the others, the agents posed some questions to him, but assured him that he was not a target or subject of the investigation.

83. After Plaintiffs' meetings with the FBI, Richter told Plaintiffs that they had done nothing wrong.

84. Richter stated that Plaintiffs were simply witnesses and that everything was going to be handled administratively by the NYPD.

85. This was confirmed by CEA's attorney, Lou LaPietra, who advised that Plaintiffs had done nothing wrong.

86. On May 5, 2016, Richter called Rodriguez to advise that he just left a meeting with Bratton, who informed him that Rodriguez's name had not come up anywhere and that he would soon be back on track with his career.

87. Richter repeated these promises to Rodriguez on a number of other occasions in May 2016.

88. Although Plaintiffs told the NYPD and the CEA about their contact with the FBI and further told the NYPD that they would be willing to speak to NYPD investigators about the contact, the NYPD showed no interest in further questioning the Plaintiffs, except for initially notifying DeBlasio that IAB would interview him.

89. IAB later canceled DeBlasio's scheduled interview.

90. Richter told DeBlasio that Byrne canceled the interview indefinitely.

91. But the FBI continued to pursue questioning DeBlasio and obtained a subpoena compelling his testimony at a grand jury.

92. DeBlasio asserted his Fifth Amendment right to not testify at the grand jury.

93. After asserting his right, the NYPD placed DeBlasio on modified duty, and transferred him to an administrative position within the Medical Division.

94. In association with this modification, DeBlasio met with union officials and a union attorney during which Richter told DeBlasio that Bratton and Byrne created two lists – an "arrested" list and a "fired" list.

95. DeBlasio was placed on the fired list.

96. On May 20, 2016, Richter told Capul, Rodriguez, and Colon, in separate conversations, that the Commissioner was seeking their retirements, and that the Commissioner wanted those retirements effective by May 31, 2016.

97. Speaking to Colon, Richter said, in sum and substance, that Colon had no choice but to retire, because if he did not, the NYPD would file charges against him, charges which were unspecified and unknown.

98. Richter further reminded Colon that even if he challenged the charges at a hearing, it would

not matter because the findings are non-binding, the Commissioner was already intent on terminating Colon, and the Commissioner would in fact terminate Colon notwithstanding the outcome of the hearing.

99. Capul asked Richter what would happen if he did not retire.

100. Richter similarly told Capul that the NYPD would file charges against him (unspecified and unknown at the time) and the Commissioner would terminate him, notwithstanding a hearing's outcome.

101. When speaking to Rodriguez, Richter said that he needed Rodriguez to retire for political reasons and to protect Bratton's legacy because Rodriguez's name had appeared in the newspaper.

102. However, in the same conversation, Richter told Rodriguez that he did nothing wrong.

103. Similarly, Richter told Capul, in sum and substance, that the "politics" of the matter required his retirement, but that there were no allegations of misconduct.

104. Richter further confirmed, in sum and substance, to Colon that there was no legitimate reason for the NYPD to demand his retirement either, but Richter's estimation was that it was a political maneuver, relating to protecting Bratton's legacy.

105. Richter suggested to Rodriguez and Capul that the NYPD was exploring a number of ways for

them to retire and that he would get back to them with those options.

106. Upon information and belief, Bratton leaked to the press that Plaintiffs were "tainted" and he wanted them out of the NYPD to put the scandal behind him.[1]

107. But Bratton's motive was not benign or a genuine attempt to remove wrong-doers from the department as evidenced by the fact that Banks's retirement (and the retirement of other implicated high ranking officials such as Deputy Chief Jimmy McCarthy, Inspectors Ruel Stephenson and Brian McGinn, and Deputy Inspectors Michael Endall and Deddo) was not similarly sought.[2]

108. Richter advised that if Rodriguez and Capul submitted their retirements, they could do so in a normal manner with all of their accrued time.

109. Richter further told Rodriguez, Capul, and Colon, that if they retired, they would receive standard NYPD retirement benefits, including a "Good Guy Letter."

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[1] The basis of this information and belief is press coverage and testimony in the Plaintiffs' grievance hearing.

[2] In fact, in 2018, according to the New York Times, Banks was set to receive a promotion to Deputy Commissioner, but he suddenly chose, not only to decline the promotion, but to retire completely from the NYPD "a day after a judge approved a FBI wiretap that was part of a sprawling investigation in which the feds found more than $300,000 in 'unexplained' cash deposits into Banks' accounts."

110. Moreover, Richter told Capul that the NYPD would seek formal charges, though Richter could not identify what those charges might be.

111. Rodriguez, Capul, and Colon asked Richter if they could "run their time."

112. "Running time" is standard practice for NYPD members at all levels and at every rank.

113. Running time means that members may use accrued leave time so that they do not have to report to work, but they remain technically employed by the City.

114. This has the effect of allowing members to receive their regular salary while at the same time continuing to accrue regular work benefits such as pension contributions.

115. On May 24, 2016, Richter told Capul and Rodriguez that they could run their time, but to wait because the then Chief of Department, James O'Neill was trying to save their jobs.

116. Based on his May 20, 2016 conversation with Richter concerning the Commissioner's intent to terminate him at any costs, Colon capitulated to the Commissioner's demands and filed his retirement paperwork on May 24, 2016.

117. On May 27, 2016, Richter called Rodriguez and Capul to tell them to go to the pension section of the NYPD to submit their papers on May 31, 2016, run their time and then come back when the dust had settled.

118. On May 31, 2016, Rodriguez met with Richter and other union officials to file his retirement papers with an effective retirement date of May 31, 2018, the date his accrued time would be depleted.

119. On May 31, 2016, Capul met with Richter and other union officials to finalize his retirement papers, selecting an effective date of August 31, 2018, the date his accrued time would be depleted.

120. On June 10, 2016, Byrne, via Richter, issued DeBlasio a similar ultimatum—retire or face demotion and the predetermined termination decision from the Commissioner.

121. DeBlasio initially protested the ultimatum to Richter telling him he would not take the offer, to which Richter said, "don't do it . . . they will demote you and terminate you."

122. Moreover, that Defendants refused to provide any basis to Plaintiffs as to why charges might be filed or what those charges might consist of, meant that Plaintiffs lacked any ability whatsoever to determine their chances of success in defending the as yet to be issued charges.

123. As to DeBlasio, unlike other Plaintiffs, Richter said the ultimatum included forfeiture of his accrued leave and vacation time.

124. DeBlasio questioned why he could not run his time when he knew that others had been allowed.

125. Richter said that that was the ultimatum issued by Byrne.

126. In orchestrating these actions against Plaintiffs, Bratton was not concerned about the Plaintiffs' guilt or innocence, or the fact that no allegations existed to support a basis to lawfully remove the Plaintiffs from employment.

127. On June 20, 2016, the FBI arrested Harrington, Grant, and two other lower ranking officers from the licensing division in connection with the Corruption.

128. That same day, Richter, at the direction of Byrne, called Capul and Rodriguez to tell them that the NYPD changed its mind and that they had to waive all their accrued time by June 30, 2016.

129. Richter also said that Bryne threatened Capul and Rodriguez that if they did not retire that the NYPD would immediately demote them and would initiate proceedings to terminate them.

130. As noted, the disciplinary proceedings were form over substance, as the Commissioner had already determined that Capul and Rodriguez would be terminated.

131. By the mere act of demoting Capul and Rodriguez, they would have lost significant benefits, including pay (which would have affected pension contributions and value), and the prestige they had garnered as Deputy Chiefs, which could affect future employment and job opportunities.

132. The demand to retire immediately meant that Capul and Rodriguez would lose the opportunity to "run" their accrued time of over two years.

133. On June 22, 2016, Richter told Capul that Byrne said the CEA members should be "glad to have the opportunity to retire" and that the Harrington and Grant criminal complaints identified a cooperating complainant.

134. Byrne suggested that this cooperating witness would implicate some of the retiring members in the Corruption.

135. Later, Plaintiffs would learn that the witness was Rechnitz, who in no way implicated any Plaintiff, meaning that Byrne's statement was a bluff used to extract the Plaintiffs' retirement.

136. On June 20, 2016, Richter told Colon that running his time was no longer an option and that he must give up his accrued time and be off the books by June 30, 2016.

137. Byrne, via Richter, stated that Colon must retire or face demotion and termination.

138. Under such threats and duress, Capul amended his retirement date to June 29, 2016 from August 31, 2018, but signed the form indicating, "Under Duress/Protest."

139. On or about June 24, 2016, Capul filed his amended retirement making it effective June 30, 2016, and thus forfeited 186 days of vacation and more than 2,800 hours of compensatory time.

140. In his papers, Capul specifically stated:

> This correspondence is to inform you of my intention to change my lump sum retirement date from 2400 hours 8/31/18 to 6/30/16. This decision to waive my accrued time (Vacation, Lost Time and Chart Days) is being done under duress/protest. I was informed on Tuesday, 6/21/16 at approximately 1630 hours, by [Richter] that [Byrne] stated that if I did not change my retirement date to 6/30/16 (in effect waiving all of my accrued time equaling approximately 2 years and 2 months), I would be demoted from Deputy Chief to Captain in the NYPD. Additionally I would be subject to Departmental Charges and Specifications and face a Hearing, where "Termination Proceedings" would commence.

141. On or about June 27, 2016, Rodriguez filed his amended retirement making it effective June 30, 2016, and thus forfeited 40 days of vacation and more than 3,200 hours of compensatory time.

142. When submitting his papers, Rodriguez told Richter the NYPD's actions were not fair since he did nothing wrong and was being forced to sign papers under duress so as to not be demoted and terminated.

143. In Rodriguez's retirement papers, he stated that he was doing it "under duress and threat of demotion and termination" and that he was not "involved in any criminal contact, nor [was he] subject of any department charges."

144. On June 30, 2016, Colon filed his amended retirement under the same threats and thus forfeited more than 1,000 hours of compensatory time.

145. On July 15, 2016, DeBlasio retired, forfeiting 69 vacation days and more than 1,600 hours of compensatory time.

146. In sum, prior to their forceful retirements, Defendants did not provide to any Plaintiff with a notice of charges, an explanation of evidence and/or witnesses against them, or even a minimal opportunity to be heard.

147. After their retirements, Plaintiffs all received "good guy" letters from Bratton.

148. In August 2016, Plaintiffs commenced the grievance process against the City and the NYPD arguing that their retirements were given under duress and so the forfeiture of their accrued time is void.

149. On July 16, 2018, impartial arbitrator David N. Stein, Esq. agreed with the Plaintiffs and determined that their retirements were given under duress, and that the NYPD deprived them of due process.

150. In Arbitrator Stein's Opinion and Award, he found that "Byrne engaged in a course of action designed to force [Plaintiffs] out by threatening to have a hearing which would culminate in their certain termination" and that such threats "comprised a breach of [Plaintiffs'] statutory and due process rights to a hearing based on evidence which Byrne

steadfastly and consistently refused to outline in even a general way."

151. Moreover, Arbitrator Stein factually determined that at the time Plaintiffs' retirements were extracted, the Department had no information whatsoever suggesting that the Plaintiffs had engaged in actionable misconduct and that the Department was threatening to take action which it had no right to take.

152. On January 2, 2019, a jury acquitted Grant of all charges.

153. After the trial, a juror told reporters that Grant "never should have been charged," and that Banks should have been prosecuted instead.

154. Thus, the juror's statements support an inference that innocent officials, such as the Plaintiffs, were given up as scapegoats to protect higher ranking officials, such as the Commissioner.

155. Indeed, the juror told reporters that the entire jury panel believed that Grant was duped, describing him as being a "flunky" and a "pawn."

156. During the trial, subordinates who worked for Michael Endall ("Endall"), Commanding Officer of the License Division, testified that Endall was part of the bribery scheme.

157. Upon information and belief, Endall was never interviewed by the FBI about the Corruption.

158. Even though Bratton stated that anyone touched by the investigation had to leave the

NYPD, Endall was permitted to stay on the job for an additional ten (10) months, until he was faced with actual charges, which he accepted before he retired. As well, other high-ranking officials were allowed to stay, including McCarthy, McGinn, and Deddo.

159. This testimony supported that Plaintiffs were simply made the "fall guys".

160. In fact, Endall's immediate subordinates offered testimony during trial directly implicating Endall, Bratton, and other high-ranking officials and IAB members, not criminally charged and not driven out of the Department.

161. Moreover, Harrington was the only single NYPD member convicted of any crime in connection with the Corruption, and his conviction was made as part of a plea arrangement.

162. Further, NYPD insiders have opined that Harrington's alleged offenses are only questionably federal crimes, and that typically the actions to which he allocuted would be prosecuted only as internal NYPD violations.

163. That Harrington was criminally prosecuted again suggests that the NYPD was not interested in internal investigations which might expose corruption at the highest levels of City government and NYPD administration, but were instead looking merely for scapegoats.

164. Harrington was Banks's executive officer, and thus made an easy fall guy—an official high

enough and close enough to Banks, yet not Banks himself.

165. By leveraging Plaintiffs for their resignations, Defendants avoided potential wider probes and exposure which could have resulted from Plaintiffs' defense of charges.

166. Indeed, if Defendants had issued charges against the Plaintiffs, the Plaintiffs would have been entitled to discovery.

167. On June 8, 2017, Rodriguez submitted a letter of reinstatement to the NYPD. To date, Rodriguez has received no response to his request to be reinstated.

168. On June 15, 2017, Capul submitted a letter of reinstatement to the NYPD. To date, Capul has received no response to his request to be reinstated.

169. On June 17, 2017, DeBlasio submitted a letter of reinstatement to the NYPD. To date, DeBlasio has received no response to his request to be reinstated.

170. In June 2017, Colon submitted a letter of reinstatement to the NYPD. To date, Colon has received no response to his request to be reinstated.

FIRST CAUSE OF ACTION

(Fourteenth Amendment- Due Process via 42 U.S.C. § 1983)

171. While acting under color of law, the individual Defendants constructively terminated the Plaintiffs who had a protected property interest in their continued employment. Prior to the termination, the individual Defendants did not provide to Plaintiffs a notice of the charges against them, a hearing, or other any other minimal opportunity to be heard. The Defendants who made the decisions causing the termination are high-level officials—the Commissioner and Deputy Commissioners—individuals at the highest levels of the NYPD command structure, individuals within the inner circle of the Commissioner of Police and/or who are the Commissioner of Police, and individuals with final authority over employment decisions, including those at issue here. Moreover, New York State and City Law, as well as internal NYPD rules, provide the procedure for terminating the Plaintiffs. Accordingly, the individual Defendants' acts were not random and unauthorized.

172. Defendant, the City, is liable under *Monell v. Dep't of Soc. Servs.,* because the Commissioner directed, approved of, or acquiesced in the decisions causing the deprivations herein. Moreover, the decisions herein constitute a policy of the City. As discussed herein, the Defendants, in consultation with or at the direction of the Mayor, coordinated to terminate these Plaintiffs' employments to

effectuate the policy of finding "fall guys" who would deflect and absorb negative press coverage of the Corruption at the highest-levels of the NYPD administration.

WHEREFORE, Plaintiffs demand judgment against Defendants, where applicable, for all compensatory, emotional, physical, and punitive damages (where applicable), injunctive relief including a temporary restraining order, preliminary injunction, and permanent injunction compelling Defendants to immediately reinstate Plaintiffs, liquidated damages (where applicable), interest, and any other damages permitted by law. It is further requested that this Court grant reasonable attorneys' fees and the costs and disbursements of this action and any other relief to which Plaintiffs are entitled. Plaintiffs demand a trial by jury.

Dated: May 13, 2019
Syosset, New York

Respectfully submitted,
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