NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROTIMI SALU AND GERARD M. LYNCH,

Petitioners,

vs.

NEW YORK STATE JUSTICE CENTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Second Circuit Court of Appeals

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Questions Presented

The Second Circuit affirmed the district court's refusal to review Petitioners' federal due process claims alleging that a New York State agency, the Justice Center, failed to provide Petitioners—both healthcare workers— with any sort of hearing before finding Petitioner Lynch guilty of "category one" sexual abuse and Petitioner Salu guilty of "category three" neglect, resulting in both being fired from their employment. In 100% of Justice Center cases, guilt ("substantiation") is determined before any hearing is offered by the Justice Center. At a *de novo* hearing often 18 months or more thereafter, the Justice Center relies solely on hearsay evidence to adjudicate guilt in about 97% of its cases, even when credibility is at issue, thereby depriving the accused worker of the due process right to confront his or her accuser. Because the state courts routinely rubber-stamp Justice Center determinations on "substantial evidence" grounds, Petitioners first sought federal court review, which was denied resulting in this appeal. Recently the state court did review, and did rubber stamp, the Justice Center's due process-violative adjudications against Mr. Salu and Mr. Lynch.

Three questions are presented:

1. By declining inquiry into a State agency's denial of due process to accused healthcare workers (e.g., the Petitioners), but instead deferring to the State court's "article 78" administrative review procedures, did the Circuit Court abrogate its responsibility to protect the workers' due process right to a pre-determination hearing, and right to confront the evidence against them at the much-later administrative appeal hearing?
2. Does a state agency violate the due process clause of the 14th Amendment by routinely adjudicating health care workers as guilty of abuse or neglect without affording them any kind of pre-determination hearing , with the agency adjudication usually resulting in immediate termination of the workers' employment?
3. Does it violate due process for a state agency to routinely adjudicate accusations of wrongdoing on hearsay evidence alone (in about 97 percent of their adjudicatory hearings), denying healthcare workers the ability to face their accusers even when witnesses credibility is at issue?

List of Parties, Proceedings & Related Cases

All parties **do not** appear in the caption of the case on the cover page.

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

New York State Justice Center a/k/a the New York State Justice Center for the Protection of People with Special Needs (the only named respondent herein).

Denise Miranda, Elizabeth M. Devane, David Molik, Mary B. Rocco, Louis P. Renzi, Westchester Medical Center Health Network, and Westchester County Health Care Corporation.

Proceedings below include:

Salu et ano v. Miranda et al, U.S. District Court (SDNY), order dismissing all claims dated February 4, 2020, and Judgment filed February 5, 2020.

Salu et ano v. Miranda et al, U.S. Circuit Court of Appeals for the Second Circuit, No. 20-761cv, decided by Summary Order filed October 8, 2020, with request for rehearing denied November 16, 2020.

Related cases challenging the same denials of due process presented to the U.S. District Court:

Lynch v. Justice Center, N.Y.S. Appellate Div., Third Dept., No. 530536, Memorandum Decision dated January 7, 2021, reported at 2021 WL 55006.

Salu v. Justice Center, N.Y.S. Appellate Div., Third Dept., No. , 530535, Memorandum Decision dated January 7, 2021, reported at 2021 WL 54809.

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PETITION FOR CERTIORARI

Rotimi Salu and Gerard M. Lynch petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which judgment upheld the District Court's dismissal of Petitioners' amended complaint asserting due process deprivation by a state agency, the Respondent New York State Justice Center for the Protection of People with Special Needs ("Justice Center"). The Justice Center's acts and omissions deprived Petitioners of their constitutional right to due process, actionable under 42 U.S.C. § § 1983, and under 28 U.S.C. § 1331 and § 1343(4), with supplemental jurisdiction under 28 U.S.C. §1367.

Opinions Below

The case was filed in the U.S. District Court, 18 Civ. 10399, and then appealed to the U.S. Court of Appeals for the Second Circuit, No. 20-00761cv.

The trial court's order and judgment (A-63, A-64) filed February 4 and 5, 2020, respectively, are unreported. The opinion of the Second Circuit filed October 8, 2020 (appendix A-2 to A-13) is reported at 830 Fed.Appx. 341 (2020). The order denying Petitioners' request for rehearing (A-61), filed November 16, 2020, is unreported.

Jurisdiction

The Summary Order of the Second Circuit was entered on October 8, 2020, with timely request for rehearing denied on November 16, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amend. XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y.S. Social Services Law § 493, Abuse and Neglect Findings; Consequences

> 1. Within sixty days of the vulnerable persons' central register accepting a report of an allegation of abuse or neglect, the justice center shall cause the findings of the investigation to be entered into the vulnerable persons' central register. The justice center may take additional time to enter such findings into the vulnerable persons' central register; provided, however, that the reasons for any delay must be documented and such findings submitted as soon thereafter as practicably possible.
>
> 2. For substantiated reports of abuse or neglect in facilities or provider agencies in receipt of medical assistance, such information shall also be forwarded by the justice center to the office of the Medicaid inspector general when such abuse or neglect may be relevant to an investigation of unacceptable practices as such practices are defined in regulations of the office of the Medicaid inspector general.
>
> 3. (a) A finding shall be based on a preponderance of the evidence and shall indicate whether: (i) the alleged abuse or neglect is substantiated because it is determined that the incident occurred and the subject of the report was responsible or, if no subject can be identified and an incident occurred, that, the facility or provider agency was responsible; or (ii) the alleged abuse or neglect is unsubstantiated because it is determined not to have occurred or the subject of the report was not responsible, or because it cannot be determined that the incident occurred or that the subject of the report was responsible. A report shall not be determined to be substantiated or unsubstantiated solely because the subject of a report resigns during an investigation.
>
> (b) In conjunction with the possible findings identified in paragraph (a) of this subdivision, a concurrent finding may be made that a systemic problem caused or contributed to the occurrence of the incident.
>
> (c) The justice center shall notify the subject of the report, the facility or

> provider agency where the abuse or neglect was alleged to have occurred, the applicable state oversight agency and other persons named in the report, which includes the service recipient's parent, guardian or other person legally responsible for such person, of the findings of the investigation and, as applicable, the local social services commissioner or school district that placed the individual in the facility or provider agency, the office of children and family services and any attorney for the individual whose appointment has been continued by a family court judge during the term of an individual's placement, in accordance with applicable state and federal laws and regulations governing the use and disclosure of records. If the report is substantiated, the justice center shall also notify the subject of the report of his or her rights to request that the report be amended and the procedure by which he or she may seek to amend the report in accordance with section four hundred ninety-four of this article.

STATEMENT OF THE CASE

A. COMPELLING REASON FOR WRIT

There are compelling reasons for granting a writ of certiorari. First is the Second Circuit abdication of federal judicial responsibility to uphold the Due Process Clause against a small state agency's systemic due process deprivations.

Second, this case can provide a vehicle for this Court to resolve the split among the circuits 1) regarding abdication of judicial responsibility to supervise administrative agencies' provision of due process, and 2) regarding the right to confrontation in administrative proceedings (e.g., Justice Center and university date rape cases).

B. LOWER COURTS' ABROGATION OF RESPONSIBILITY TO PROTECT DUE PROCESS RIGHTS

The Second Circuit Court of Appeals has authorized the district courts to abrogate their responsibility to rule on cases involving state government violation of due process of law, by deeming violation of due process as something that must be

sought exclusively in the state courts. This ignores this Court's teachings in *City of Chicago* and *Knick, infra.*

The federal courts must not refuse to adjudicate due process violations by state agencies merely because the state courts are also empowered to rectify due process violations. Petitioners, who are healthcare workers, filed in the U.S. District Court federal and state due process claim for relief (under 42 U.S.C. § 1983 and the court's supplemental jurisdiction[1]) alleging that the Justice Center did not provide constitutionally-required due process in its handling of social services law abuse and neglect allegations. Other claims unrelated to due process were also asserted.

Petitioners have basically asserted that the Justice Center is institutionally unfair. It is a small agency. Its mission, as expressed in its full name, is the "protection of people with special needs." It fulfils this mission in a due process-violative and inherently conflicted manner, resolving all factual issues against the allegedly neglectful or abusive healthcare workers, and in the process justifying its existence as an agency (and its prosecutors and its ALJs employment) in the process.[2]

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[1] The state claim was under CPLR Article 78, which is the state's codification of the common law writ of certiorari used to review administrative action.

[2] *See, e.g*, *Bethany Bump,* NY agency offers little justice for disabled*, Times Union, July 23, 2018 (Albany, NY), available online at:* https://www.timesunion.com/news/article/5-years-in-critics-say-NY-agency-offers-little-13098350.php (New York Assemblyman Thomas Albinanti: "They seem to encourage reporting of the most insignificant incidents and insist on a finding of substantiation to boost their numbers, …. Yet for actually serious criminal conduct, they are less than helpful."). *See also, Partlan & Winston, Is the Justice Center Just*?, RIVERHEAD LOCAL, August 1, 2019, *available online at:* https://riverheadlocal.com/2019/08/01/zeldin-n-y-justice-center-not-doing-justice-for-people-with-special-needs/.

In its lengthy Summary Order, the Second Circuit Court of Appeals declined to discuss its abrogation of responsibility to defend the Due Process Clause of the Bill of Rights, other than to state at the end of its summary order: "[f]inally, as to the Article 78 claim, the district court did not abuse its discretion by declining to exercise jurisdiction."

As argued below, Second Circuit practice is to refuse to review due process violations. This Court's *Knick* case corrected this federal judicial abrogation of responsibility in cases involving the takings of land without due process, abrogating the state remedy exhaustion requirement of *Williamson County , infra.* This Court should do likewise here, by reversing the Second Circuit's even more damaging abrogation of judicial power. First, by its abdication in due process cases, the Second Circuit is failing to uphold the Supremacy Clause by declining to impose constitutional constraints upon bureaucratic agencies with derelict officials violating citizens' constitutional rights. Healthcare workers, no less than college students, have a right to federal court redress when federal due process requirements are ignored. The federal courts below should have provided Petitioners Salu and Lynch with redress, and appropriate declaratory relief could stop the Justice Center from routinely depriving hundreds if not thousands of healthcare workers of basic due process rights each year.

Second, by denying federal redress, healthcare workers such as Petitioners Salu and Lynch are forced to seek relief from a state court whose response is almost

always the rubber-stamping of the Justice Center's administrative action on the purported ground of "substantial evidence."

With continued federal court abdication of judicial responsibility, and in the absence of this Court's corrective action, the Justice Center will continue to embody an "administrative agency run amuck"—an agency that violates individual rights with impunity, in a Kafkaesque manner befitting Stalinist Russia or Maoist China.

C. JUSTICE CENTER'S SYSTEMIC DUE PROCESS VIOLATIONS

In the absence of federal judicial supervision, New York State is allowing the Justice Center to deny justice and the equal protection of the law in its agency decision-making. Specifically, its procedures deprive people who have chosen to work as low-wage workers in the healthcare field of basic due process protections in several respects, two of which being the focus of this certiorari petition—

- The administrative adjudication of guilt without any pre-determination hearing whatsoever.

This adjudication, called "substantiation," more often than not results in the accused healthcare worker's employer immediately terminating the worker's employment. For the small percentage of workers willing and able to pursue an administrative appeal, a "de novo" hearing is eventually provided by the Justice Center 18 months or so thereafter, where the second systemic due process violation takes place—

- in over 95 percent of Justice Center administrative prosecutions, including Salu's and Lynch's, the Justice Center hearing officers ("ALJs") allow hearsay evidence alone to support a finding of guilt. Because credibility is often at issue, this deprives healthcare workers such as Salu and Lynch of a basic constitutional right to test the evidence and face their accusers.

The right to a pre-determination hearing, and to confront the State's evidence through cross-examination when witness credibility is at issue, are two due process rights vital to a fair adjudicatory process, as this Court has long held. By granting certiorari, this Court can instruct that governmental agencies such as the Justice Center, and also governmental institutions such as public universities, must provide procedures that comport with this Court's due process teachings.

D. SPLIT AMONG CIRCUITS: CROSS-EXAMINATION IN COLLEGE "DATE RAPE" DISCIPLINARY MATTERS

Of great interest in recent years is the extent to which due process rights must be afforded to public (and also private) university students accused of sexual misconduct. A college student accused of "date rape" will likely be expelled from college if the accusation is substantiated as being true. The college student facing expulsion based upon an accusation is akin to a healthcare workers facing permanent exclusion from his or her occupation based upon a Justice Center "substantiation" of an accusation ("report") of patient abuse or neglect.

In college disciplinary matters, there is already a split among the Circuits as to the extent due process requires that an accused be given the opportunity to cross-examine his or her accuser. The Second Circuit has recently stated its view in a non-precedential Title X case, finding no bias and stating its judicial view that:

> "Just as John Doe was barred from directly cross-examining the complainants, they were barred from cross-examining him."

See, Doe v Colgate Univ., 760 Fed Appx 22, 33 (2d Cir 2019). This is somewhat akin to stating in a criminal case that because the rape victim did not get to examine the

alleged perpetrator, the alleged perpetrator does not get to cross-examine his accuser. Of course, only the alleged perpetrator is facing prison.

By declining to find a due process right of confrontation, the Second Circuit places itself at odds with all the other Circuits recently reviewing college disciplinary procedures.[3] The present case can help avoid the creation of a split among the circuits that presently exists in the various Circuits' college disciplinary holdings regarding the right of confrontation. It can also help resolve the apparent split among the circuits as to Circuit Court abrogation of judicial responsibility to safeguard due process rights. A recent New York State case demonstrates both problem, as due process was denied through undue state court deference to the bureaucracy when the constitutional right to due process was at stake, and the substantive due process right of confrontation was also ignored, where the New York court allowed hearsay and the "substantial evidence" standard of review in a college misconduct case. *See, e.g., Haug v. State Univ. of New York at Potsdam*, 32

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[3] *See*, *Doe v. Baum,* 903 F.3d 575 (6th Cir. 2018) (a public university student accused of sexual misconduct and facing discipline including expulsion is entitled to face his accuser); *Doe v Univ. of Scis.*, 961 F3d 203, 215 (3d Cir. 2020)(*emphasis added*). ("Basic fairness in this context does not demand the full panoply of procedural protections available in courts. But it does include the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses' credibility through some method of cross-examination.")(*emphasis added*).

In the above non-Second Circuit cases, the Circuit Courts addressed the due process issues. However, as argued below, the Second Circuit appears to abdicate its review authority, relegating such claims to state court Article 78 review. *See, e.g., Horton v Westling*, 765 Fed Appx 531, 532 (2d Cir 2019) (alleging hearing officer violation of student's rights).

N.Y.3d 1044, 0146-47, 112 N.E.3d 323, 326 (2018) ("credibility determination" based upon hearsay evidence was enough "substantial evidence" to find guilt).

Because the loss of one's career and livelihood is a more grievous property and liberty loss than expulsion from a university, this case will present a better vehicle for addressing due process interests than college "date rape" cases, notwithstanding that a date rape case may be "sexier" than a patient care technician (Mr. Salu) taking his eyes off a patient for a moment or a substance abuse counselor (Mr. Lynch) allegedly making a salacious comment and touching an upper buttock.

E. BACKGROUND & LOWER COURT JURISDICTION

Petitioners Rotimi Salu and Gerard Lynch were both employed as healthcare workers by the Westchester Medical Center or its affiliates (collectively "WMC"). Mr. Salu was employed at WMC's juvenile psychiatric hospital as a patient care technician and Mr. Lynch at a WMC residential facility as a substance abuse counselor.

F. JUSTICE CENTER GUILT DETERMINED BEFORE ANY HEARING

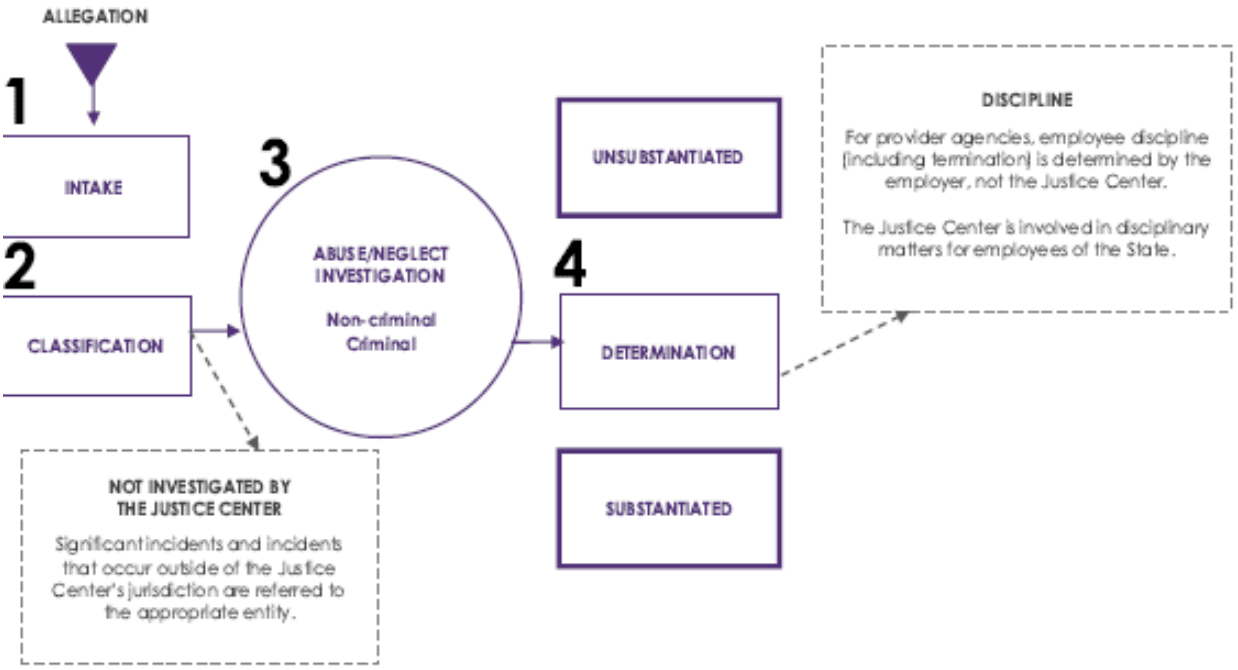
Mr. Salu and Mr. Lynch each had a "report" of abuse and neglect lodged with the Justice Center. Each was thereafter fired from his WMC employment after the Justice Center adjudicated guilt with a "substantiated" finding before any hearing was provided. Specifically, the Justice Center's finding of guilt as to each man was made without providing either man any sort of pre-determination hearing.

Mr. Salu was found guilty of "category three" neglect (the least serious category).

Mr. Lynch was found guilty of "category one" sexual abuse and neglect, which also resulted in his being placed on an "exclusion list" that permanently barred him from work in his chosen occupation.

As stated on the agency's official website, the Justice Center was established in 2013 and has jurisdiction over more than 1,000,000 individuals receiving services across six State Oversight Agencies.[4] Accordingly, many healthcare workers are subject to potential Justice Center investigation and administrative prosecution. Petitioners Salu and Lynch are two of many low-level healthcare workers subjected to a procedure whereby guilt is established before any hearing. Here is the process:

❖ **Process of a Justice Center Investigation**



This chart, showing no pre-determination hearing, is contained in the Justice

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[4] *See*, e.g., https://www.justicecenter.ny.gov/about-nys-justice-center.

Center's 2019 Annual Report[5] :

Through 2019, a total of 652 individuals have been placed on the Justice Center's exclusion list, and presumably each of them was found "guilty" (the "substantiated" finding) without first receiving any hearing whatsoever. As indicated in the Justice Center official reports, many more thousands of healthcare workers were found guilty of category two and category three abuse or neglect. For example, of the 15,188 "reports" of abuse or neglect made to the Justice Center in 2019, the Justice Center "substantiated" 3,745, or about 25 percent.[6] It appears that over 50% of these healthcare workers (417) lost their employment based upon Justice Center "substantiation" (as were Salu, Lynch and, as referenced in the district court complaint, also the similar case of Ms. Kerry Walker[7]).

Thus, as to these fired workers, it was no consolation that they were afforded a "de novo" hearing close to two years later. Perhaps this explains why the Justice Center conducted a mere 200 hearings in 2019 (as a hearing that will not restore the lost employment nor award back pay). From the Justice Center's reports, it appears that, as to the workers who actually went to hearing, approximately 30%

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[5] See, Justice Center Annual Report, p. 17, available at https://www.justicecenter.ny.gov/system/files/documents/2020/04/2019-annual-report-final_0.pdf.

[6] See, *id*., at pages 19, 22, 24 and 25.

[7] Ms. Walker, Mr. Salu and Mr. Lynch have no connection to each other, and each sought the undersigned's professional help independently of each other. Ms. Walker encountered the same the Justice Center due process-violative procedures as Salu and Lynch. The district court dismissed her federal action seeking due process protection a few hours after the Second Circuit announced its decision in the present appeal. *See*, *Walker v. Greystone Programs Inc., et al*, 18 Civ. 7757 (SDNY). Ms. Walker's Justice Center adjudication (redacted) ,Adjud. Case # 521047076, is found on the Justice Center's website at: https://www.justicecenter.ny.gov/system/files/documents/2019/07/2018-088.pdf.

are exonerated.[8] Thus, using rough numbers, if 50% of workers are fired after substantiation, and 30% of substantiations are reversed by ALJs, this means about 15% of accused healthcare workers are wrongfully fired based upon the due process-violative substantiation procedure employed by the Justice Center. This would amount to about 562 cases in 2019 alone.

This is a systematic governmental abuse that the lower federal courts should have addressed, rather than abdicating responsibility by asserting that due process is solely the state courts' responsibility. The Second Circuit appears to split with the other Circuits, by refusing to provide judicial scrutiny over State-authorized due process violations.

G. RIGHT OF CONFRONTATION DENIED BY JUSTICE CENTER AT "DE NOVO" HEARING

Almost two years after the report of wrongdoing against Mr. Salu (17 months after substantiation and his job termination), and about 48 months after the alleged 2014 wrongdoing by Mr. Lynch (and 18 months after substantiation and his job termination), the Justice Center held a *de novo* hearing (appeal) before an agency lawyer assigned as a hearing officer. In each case, the Justice Center prosecutor relied solely upon hearsay evidence to affirm the prior substantiation of guilt, which evidence was introduced through an investigator. In each case, Mr. Salu and Mr. Lynch could have been exonerated had he been allowed to confront the witnesses against him.

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[8] If unbiased ALJs were used, this 30% figure would undoubtedly be much higher, because unbiased ALJs would not permit Justice Center prosecutors to rely solely on hearsay in 97% of their cases. *See*, note 14, *infra*, and Addendum B to Second Circuit record.

1. MISTAKEN IDENTIFICATION OF MR. LYNCH, OR "VICTIM" MISCHIEF?

Specifically, in Mr. Lynch's case, the Justice Center officially branding him a "sexual abuser" without providing him with any hearing whatsoever at the substantiation stage. This caused him to lose his employment and also to be permanently barred from similar work (through placement on the Justice Center's "permanent exclusion list"). At his de novo hearing, if Mr. Lynch had been allowed to confront and cross-examine his two female accusers (both drug addicts and friends who parroted each other claiming a male healthcare worker made salacious comments and touched or attempted to touch the upper buttocks of each), the Justice Center factfinder might have concluded that 1) the two women were accusing the wrong man, or 2) they invented the accusations out of whole cloth out of mischief, spite or mere fun. Mr. Lynch was given no opportunity. He was not allowed to confront his accusers, and thus the ALJ had no basis to question their veracity. The ALJ accordingly found their out-of-court statements "creditable" (perhaps meaning "credible").

The evidence against him was essentially the statements of two female friends who made written and oral statements asserting that, as to Woman No. 1, Mr. Lynch:

> "groped her buttocks and made lewd comments to her while she was a patient on the unit.

and that as to Woman No. 2, Mr. Lynch:

> "made sexually charged comments to her and tried to rub her buttocks."[9]

Mr. Lynch offered three in-person witnesses in his defense, who testified that this was likely a case of mistaken identity. Petitioner Lynch and his witnesses were ignored. Thus, based solely on hearsay evidence, the Justice Center affirmed its prior substantiation of sexual abuse and Mr. Lynch's placement on the permanent exclusion list, on the unchallengeable say-so of two drug addicts.[10]

Obviously, with no opportunity to confront his accusers, Mr. Lynch was unable to inquire into possible mistaken identity, or inquire into prior false claims of sex abuse, profit motive or other mischief by his accusers (both of whom were drug addicts with histories of psychiatric problems). Had Mr. Lynch been able to confront his accusers, cross-examination may have influenced the ALJ to heed the warning from the N.Y.S. Psychiatric Association, Inc. ("NYPA") that:[11]

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[9] *See, Lynch v. Justice Center*, N.Y.S. Appellate Div., Third Dept., Memorandum Decision dated January 7, 2021, at p. 3, available at 2021 WL 55006. The Justice Center's administrative determination can be viewed online on the Justice Center's website, in redacted form at: https://www.justicecenter.ny.gov/system/files/documents/2019/07/2018-092.pdf .

[10] *Id.* Petitioner Lynch filed his due process claims in federal court before filing the Article 78 proceeding in state court. He did so because his counsel believed, based upon prior Appellate Division decisions, that it would allow a finding of guilt notwithstanding the denial of the right of confrontation and related due process violations (as discussed in this certiorari petition).

Petitioner Lynch intends to seek leave to appeal to the N.Y.S. Court of Appeals. However, since he chose the federal forum as his first choice, it would be most appropriate for the federal courts (e.g., this Court) to instruct on the meaning of "due process."

[11] *See*, letter from NYPA to Justice Center Executive Director Jeff Wise dated September 25, 2015. *See also*, Appendix 3 to N.Y.S. OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES PART 625 HANDBOOK ("Guidelines for Frequent False Reporting of Abuse, Neglect, or Mistreatment"), updated September 2019, available at https://opwdd.ny.gov/system/files/documents/2020/01/final-part-624-hanbook-updated-9-2019.pdf (e.g., page 178—false reports of physical, sexual or psychological abuse).

> "patients with serious mental illness have learned that they can make baseless complaints to the Justice Center to gain attention, secure a forum to voice their baseless complaints and merely harass their treatment provider." (*emphasis added*)

2. NO HOSPITAL ACCUSER AS TO MR. SALU?

As with Mr. Lynch, if Mr. Salu had been allowed to confront his accuser or accusers from his employment, he could have convinced the factfinder that he did not commit a "neglect" because 1) an unsigned "constant observation" hospital policy was not strictly enforced nor rigidly construed, and in any case 2) the child he was supervising was not injured in any way, or put in danger.[12] Indeed, there may not even have been a hospital official willing, under oath, to accuse Mr. Salu of having committed a neglect. The case against him was simply too weak.

The evidence against Mr. Salu was essentially that he did not constantly have his eyes on a patient he was assigned to supervise "one on one." In particular, when another juvenile psychiatric patient asked Mr. Salu to step into his room, the psychotic patient did what psychotic patients sometime do, act psychotically. The juvenile jumped Mr. Salu. This caused him to lose "eyes on" contact with the child Salu was supervising. The child suffered no harm, nor was the child placed in any danger or articulated risk of danger. Yet the Justice Center substantiated a finding

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[12] The Court can examine the New York State Court's recent Article 78 proceeding adjudication in *Matter of Salu v. Justice Center*, Appellate Division, 3d Dept., 2021 WL 54809 (decided Jan. 7, 2021).

As did Mr. Lynch, Petitioner Salu filed the Article 78 proceeding claim in federal court before filing it is state court, and like Mr. Lynch, Petitioner Salu intends to seek leave to appeal to the N.Y.S. Court of Appeals. As did Lynch, he trusted in the federal forum to instruct on the meaning of "due process." As to Mr. Salu's (redacted) Justice Center administrative determination, this can be viewed online on the Justice Center's website, at: https://www.justicecenter.ny.gov/system/files/documents/2019/08/2018-120.pdf.

of neglect, which it affirmed at the de novo hearing 17 months later.

Mr. Salu could have established that he did nothing wrong if he had been allowed to confront any hospital accuser willing to state, under oath, anything contrary to the facts just described. However, no hospital accuser or any other hospital witness testified. There was only the Justice Center investigator offering written statements and an unsigned hospital constant observation policy. With that alone—and Mr. Salu being given no opportunity to confront the evidence against him, the Justice Center ALJ found category three (lowest level) neglect, and he left the healthcare field. (What healthcare employer would hire a person found guilty of healthcare neglect by this state agency? Likely few if any.)

Healthcare worker Ms. Kerry Walker is mentioned in the district court complaint as another victim of the Justice Center's process. Ms. Walker had a report lodged against her, received a Justice Center "substantiation" of neglect without being afforded any pre-determination hearing, was then fired as a result of the Justice Center finding, and when she finally received a de novo hearing 25 months later, Ms. Walker found the Justice Center's entire case against her was based on uncorroborated hearsay evidence, with no opportunity given to her to confront her accusers.[13]

Petitioners' undersigned attorney represented Mr. Salu and Ms. Walker at Justice Center de novo hearings, and began representing Mr. Lynch after his

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[13] Ms. Walker's Justice Center adjudication (redacted), Adjud. Case # 521047076, is found on the Justice Center's website at: https://www.justicecenter.ny.gov/system/files/documents/2019/07/2018-088.pdf.

hearing. The Justice Center's due process violations in each case involved no pre-guilt determination (substantiation) hearing, an essentially in-house (and thus inherently biased) Justice Center hearing officer, and a Justice Center prosecution that relied solely upon hearsay evidence that the accused could not confront (as a defense lawyer cannot cross-examine a piece of paper). Petitioners counsel and his staff eventually examined 588 cases posted on the Justice Center's website for the period 2016 through 2018, and discovered that in about 97 percent of these cases, the Justice Center prosecution relied solely upon hearsay evidence, usually offered through its investigator.[14] Many of these cases involved credibility issues. As to every case that involved a credibility issue (like Mr. Lynch's) or an issue where the evidence needs explanation, clarification or an accuser (like Mr. Salu's), the Justice Center deprives the healthcare workers of their ability to exonerate themselves by denying them the opportunity to confront the State's evidence and to face their accusers.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT IS ALLOWING THE FEDERAL COURTS IN NEW YORK TO IGNORE DUE PROCESS VIOLATIONS—ABROGATING THEIR JUDICIAL RESPONSIBILITY TO UPHOLD THE DUE PROCESS CLAUSE

In *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), this Court held that the federal constitution establishes what process is due in a takings case, and that an aggrieved person need not first seek redress from the state court. As Chief Justice Roberts wrote:

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[14] *See*, Addendum B to Second Circuit record below. The Justice Center's cases are available online. See, https://www.justicecenter.ny.gov/administrative-hearings-decisions.

> "The Civil Rights Act of 1871, after all, guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials,' and the settled rule is that 'exhaustion of state remedies' is *not* a prerequisite to an action under [42 U.S.C.] § 1983."

Id at 2167, citing *Heck v. Humphrey*, 512 U.S. 477(1994) (quoting *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501(1982)).

This case is much simpler than *Knick*. Petitioners allege pure violations of basic principles of constitutional due process—the right to a hearing before a governmental adjudication, and the right to confront the governmental prosecutor's evidence.

This case does not involve overruling a longstanding precedent as involved in *Knick*. Rather, it involves upholding bedrock principles of constitutional that appear to apply everywhere except in the Second Circuit's handling of New York cases. In the Second Circuit, the federal courts abdicate their judicial responsibility and refuse to hear due process cases, using the excuse that the state courts should deal with such mundane issues as the right to be heard or the right to confront in administrative proceedings.

In the absence of federal protection of constitutional rights, the result is the deprivation of rights such as seen in this case—an agency that adjudicates a healthcare worker as guilty of an abuse or neglect (a "substantiation"), followed immediately with the worker's employer firing the worker based upon the governmental adjudication, followed by perhaps a 1 ½ or 2 year delay before the worker is actually provided with a hearing before an agency hearing officer. And for the small number of workers who are able to administratively appeal their case this

far (a new job or lack of funds to hire an attorney are reasons not to go on), the healthcare workers then encounter a hearing that is largely a charade. The Justice Center prosecutor puts on an entirely "paper case"—written statements, not even necessarily affidavits—and previously "substantiated" guilt of the healthcare worker is then affirmed without the worker having had any opportunity to cross-examine or otherwise confront his or her accuser and the State's evidence.

Petitioner Lynch could not cross-examine the female drug addicts that accused him several years earlier (who may even have identified the wrong man).

Petitioner Salu was given no opportunity to cross-examine the Justice Center's witnesses against him. It is questionable whether there actually existed a hospital official who was willing to testify under oath that Mr. Salu committed a neglect. Thus, there might not have been a hospital accuser. Moreover, it is highly unlikely that a hospital supervisor or official would have testified under oath that the "constant observation" policy Mr. Salu allegedly violated was strictly enforced, or, in any case, that the child he was supervising was in any way endangered (an element of "neglect") since the child was only momentarily out of Mr. Salu's sight, standing in an entirely vacant hallway as Mr. Salu was attacked by a psychotic juvenile a few feet away.

"No administrative justice system is perfect," this Court might think. However, in examining three years of published Justice Center cases, what we discovered is that in about 97 percent of the Justice Center's hearings, the Justice Center prosecutor offered into evidence, and the Justice Center ALJ allowed, solely

hearsay evidence to establish its case of abuse or neglect.

Thus, Mr. Salu's and Mr. Lynch's situations are not aberrations in an otherwise sound administrative system for adjudicating guilt or innocence. Rather, this is a fundamentally flawed agency adjudicatory system that, in its published policy, adjudicates guilt without first conducting any hearing, and in its published decisions, reveals that 97% of its prosecutions are based upon hearsay alone. The Court can look for itself, as it is plain to see this presumptively due process-violative procedure on the Justice Center's official website.

Case after case—thousands in the last few years—where healthcare workers' "guilt" is "substantiated" without any sort of hearing whatsoever.

Case after case—hundreds in the last few years—where hearsay evidence alone results in the affirmance of the Justice Center's prior substantiation.

There is nothing that justifies such disregard for the right of these healthcare workers to a fair administrative hearing. If there truly existed a case against Mr. Salu, was it too much to ask for at least one hospital official to show up and testify? Or attend by videoconference? Or to call in by telephone? Was it too much to ask Mr. Lynch's accusers to show up, or appear by video or call in? For Ms. Walkers accusers to do so? For the witnesses in the hundreds of de novo hearings held in which a live witness could, depending upon the testimony, establish guilt or innocence? Healthcare workers' careers and livelihoods are at stake, and yet the Justice Center treats these workers as disposable items. Accusations (15,188 in

2019).[15] Guilt via substantiation (3,745 in 2019). *De novo* hearings (200 in 2019). From the Justice Center's Annual Report, it is impossible to determine how many of approximately 25% of employees who lose their job after substantiation will ultimately seek and obtain a *de novo* hearing.

Counsel to Petitioners Salu and Lynch began to see this picture when he represented Mr. Salu in his matter before the Justice Center, and also Ms. Kerry Walker in her case before the Justice Center. Each was denied a fundamentally fair administrative process, including, as alleged in the case at bar with Messrs. Salu and Lynch, a finding of guilt without any hearing whatsoever (substantiation) and a prosecution case based entirely on hearsay.

A. FEDERAL COURT DECLARATORY RELIEF WAS APPROPRIATE

The Justice Center due process violations described above were aggrieved Petitioners Salu and Lynch, for which the district court could have provided relief vacating the Justice Center's administrative adjudications. These are not procedural technicalities that might vary from one state to another. The right to a hearing before adjudication, and the right to face one's accuser, are basic constitutional principles.

The district court could also have issued a declaratory judgment and perhaps an injunction to stop the due process-violative abuse of the Justice Center and its officials, thereby protecting the federal constitutional rights of thousands of New York healthcare workers each year.

Instead, the lower courts ducked their duty and abrogated their

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[15] *See*, footnote 6, *supra*.

responsibility to uphold the Constitution, the Bill of Rights and its Due Process Clause. This abrogation of judicial responsibility was error.

B. PETITIONERS SELECTED THE FEDERAL FORUM

Petitioners had the right to trust in the federal courts to uphold their rights. This is particularly so in this case, because it was and is clear that the New York intermediate appellate court incorrectly interprets what the Constitution and this Court require as requisite due process.

For this reason, Petitioners' counsel purposefully chose the federal forum. Petitioners brought their due process claim (and other claims) in federal court. Immediately thereafter, because counsel was cognizant of the Second Circuit's disdain for due process claims and its insistence that these be brought in State court through a CLPR Article 78 proceeding, Petitioners Salu and Lynch each filed such a proceeding in the New York State courts. As is almost always the case, the state court found against them under the highly deferential "substantial evidence" standard of administrative review, paying no heed whatsoever (as counsel anticipated) to Petitioners' important due process rights (those raised herein).

The lower federal courts erred. They should have considered Petitioner's federal constitutional due process claims. Instead, the Second Circuit and District Court treated Petitioners' claim just as did the pre-*Knick* courts, which required litigation in the state courts under this Court's now abrogated holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

The Second Circuit has justified its abrogation of is jurisdiction in due

process case under the excuse that an Article 78 proceeding is somehow special and unique to New York State law. This Court rejected that argument long ago, in *City of Chicago v Intl. Coll. of Surgeons*, 522 US 156, 164-66(1997).

Petitioners argued to the Second Circuit, without success, that the federal courts should adjudicate the due process issues precisely because the Appellate Division, Third Department of the state supreme court was ignoring (or at least mis-interpreting) the Due Process clause in a manner that was depriving healthcare workers of basic due process. For example, the theory behind "substantial evidence" deference is that the agency factfinder (like a jury) observes trial witnesses and thus can determine credibility. However, the Appellate Division defers to the executive director (or her designee)'s final determination in a Justice Center adjudication, even over-ruling an ALJ who actually observed the witnesses.[16] As

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[16] The reason Article 78 requires review based upon a "substantial evidence" standard is because an actual factfinder (e.g., a hearing officer or ALJ) must be allowed to judge credibility. Yet the Appellate Division frequently ignores this basic principle. Examples are:

In re Roberts, 152 A.D. 3d 1021,1024 (3d Dept. 2017)(" the conflicting portrayals of the incident presented a credibility issue for the Justice Center to resolve.")*;*

In re Watson v. Justice Center, 152 A.D. 3d 1025 *(3d Dept. 2017)(same)*,

In re Cauthen v. Justice Center, 151 A.D.3d 1438, 1440 (2017)("victim" says "horseplay," yet hearsay assertion of a punch; Justice Center overruled ALJ finding of innocence: "The ALJ credited the testimony of petitioner and did not credit the statements of the eyewitness. In the final determination, the Justice Center credited the eyewitness's report….").

In re Kelly v. Justice Center, 161 A.D.3d 1344 (*3d Dept.* 2018)(Justice Center, overruling its ALJ, found that employee committed neglect by using the words "that's really retarded" at a staff meeting referring to mandated overtime work). The Justice Center decision can be found on the Justice Center website, No. 2016-040 ("ALJ found neither service recipient to be credible." p.4).

In these cases, the Third Department allowed the Justice Center full, unfettered discretion to overrule its own ALJ. This is akin to this Court permitting a trial judge to overturn a jury verdict because the judge viewed witness credibility differently than did the jury. Such is not the F.R.C.P. Rule 50 standard. Nor does it comport with due process.

the Appellate Division wrote in one such case:

> the conflicting portrayals of the incident presented a credibility issue for the Justice Center to resolve, and the Justice Center concluded that the accounts offered by the three eyewitnesses were 'strikingly similar and consistent [as to] the core allegations in the substantiated report.' To the extent that the ALJ reached a contrary conclusion, the Justice Center 'is not required to adhere to the ALJ's findings of fact or credibility, and is free to reach [its] own determination, so long as it is supported by substantial evidence in the record as a whole.'"

See, *Matter of Roberts v New York State Justice Ctr. for the Protection of People with Special Needs*, 152 AD3d 1021, 1024 (3d Dept. 2017). Yet this is akin to a judge or an appellate court overruling a jury (e.g., under FRCP Rule 50), which is basically allowed when no "substantial evidence" supports the verdict (to put it in Article 78 terms).

Thus, because the New York courts employ an unduly deferential "substantial evidence" review to ignore constitutional requirements, and do not properly apply even that test, there was good cause for Petitioners to seek federal court adjudication of their due process claims. Yet the District Court declined to exercise its jurisdiction over the due process claims, and the Second Circuit affirmed this federal judicial abdication.

C. SPLIT IN CIRCUITS REGARDING DUE PROCESS ADMINISTRATIVE REVIEW

As stated above, in university student disciplinary matters, the federal Courts of Appeals provide review of due process claims except in the Second Circuit. *See*, *Doe v. Baum,* 903 F.3d 575 (6th Cir. 2018) (a public university student

accused of sexual misconduct and facing discipline including expulsion is entitled to face his accuser); *Haidak v Univ. of Massachusetts-Amherst, 933 F3d 56, 68 (1st Cir 2019) (inquisitional method of confronting accuser); Doe v Univ. of Scis.*, 961 F3d 203, 215 (3d Cir. 2020)(*Title X sex discrimination)*; *cf.*, *Horton v Westling*, 765 Fed Appx 531, 532 (2d Cir 2019) (Second Circuit declined review of alleged hearing officer violation of rights).

As stated by the Third Circuit in *Doe v Univ. of Scis.*, 961 F3d 203 (3d Cir 2020), a private university student disciplinary case:

> "Procedural fairness is a well-worn concept. Pennsylvania courts have made clear that, at private universities, 'basic principles of ... fundamental fairness [are] adhered to [when] the students involved[ ] ... [are] given notice of the charges and evidence against them, [are] allowed to be present and to participate in the hearing assisted by faculty, to call their own witnesses and to cross-examine the witnesses against them, and [are] fully apprised of the findings of the [h]earing [p]anel.'"

Id., at 214. In this *Doe* case, the investigation and adjudication used, and held to be insufficient by the Third Circuit, was quite similar to the Justice Center's:

The Second Circuit's insistence on refusing to consider due process claims may eliminate many cases from the federal courts' docket. Yet it denies people constitutionally-required due process protection.

Informative is the Second Circuit's 2001 decision in *Locurto v Safir*, 264 F3d 154 (2d Cir 2001), which case illuminates how far the Second Circuit has strayed from its constitutional duty to uphold the Bill of Rights. In *Locurto*, Plaintiffs public employment was terminated for wearing blackface, which they challenged claiming that the decision-maker (police commissioner) was biased. The Second

Circuit explained all the reasons why due process was available through an Article 78 proceeding, including, in relevant part, as follows:

> "The remaining question is what process was due. *** Although due process guarantees notice and a hearing prior to the termination of a tenured public employee, the requisite hearing is a minimal one. Thus, as the Supreme Court explained in *Loudermill,* a pre-termination hearing does not purport to resolve the propriety of the discharge, but serves mainly as a check against a mistake being made by ensuring there are reasonable grounds to find the charges against an employee are true and would support his termination. Requiring more than notice of the charges, an explanation of the nature of the employer's evidence, and an opportunity for the employee to respond would impede the government's interest in quickly removing from service an unsatisfactory employee. In reaching this result, *Loudermill* relied heavily on the fact that the state had afforded the plaintiff a full adversarial hearing subsequent to termination.
> ***
> We fully agree with the view that the costs to the state of additional pre-deprivation guarantees (in this case, a neutral adjudicator) outweigh possible benefits to the employee, given the availability of a full post-deprivation hearing. Second, every circuit that has addressed this question has reached a conclusion similar to the one we reach.
>
> This holding is necessarily limited to the situation where the state affords plaintiff, subsequent to his termination, a full adversarial hearing before a neutral adjudicator. In the case at hand, plaintiffs do not dispute that New York afforded them such a hearing via an Article 78 proceeding in New York State Supreme Court. An Article 78 proceeding permits a petitioner to submit affidavits and other written evidence, and where a material issue of fact is raised, have a trial of the disputed issue, including constitutional claims.
> ***
> An Article 78 proceeding therefore constitutes a wholly adequate post-deprivation hearing for due process purposes."

See, Locurto v Safir, 264 F3d 154, 174-75 (2d Cir 2001).

Locurto is quoted at length above, because its assumptions regarding Article 78 review are either not correct or inapplicable to the review of a Justice Center prosecution. First and foremost, unlike a Justice Center case, when a public employee is wrongfully terminated, the employee is able to obtain a complete

remedy through an adequate post-deprivation hearing, namely, job reinstatement with back pay. In contrast, a healthcare worker whose guilt is "substantiated" by the Justice Center is routinely fired immediately, and if he or she has the wherewithal to administratively appeal and is then exonerated one or two years later at a Justice Center "de novo" hearing, it is a pyrrhic victory. The Justice Center cannot order employee job reinstatement or award back pay or front pay. Justice Center exoneration at a post-deprivation hearing is, for most healthcare workers, a worthless exercise. An ALJ's reversal provides insufficient remedies, if any remedy at all, for fired workers.

Thus, under this Court's teachings in *Goldberg*, *Mathews v Eldridge* and their progeny, a predeprivation hearing is a necessity. *See, Mathews v Eldridge*, 424 US 319, 341 (1976) ("… the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."),

Second, *Locurto* challenged decision-maker bias. Petitioner Salu's case here reveals him asserting hearing officer bias, yet with no remedy whatsoever (no *voir dire* was permitted at the Justice Center hearing, the federal courts below would not entertain the challenge, nor did the Appellate Division in the Article 78 proceeding). Thus, it is a fiction to think that either the federal or state courts will allow a challenge for ALJ bias even where, as here, the in-house ALJs are the employees of and hired from within the Justice Center's ranks, where upholding findings of guilt that justify this small agency's existence helps ensure ALJ job

security. *Cf.*, *Butz v. Economou*, 438 U.S. 478, 513-15 (1978) (indicia for deeming a judge).

Third, as to the supposedly adequate remedy available through an Article 78 proceeding, this too is fiction. There are thousands of "substantiations" yet only a few administrative appeals, and as to those, the Appellate Division affirms all with very rare exceptions. This reflects the institutionalized judicial countenance of a state agency's violation of due process rights. The Appellate Division even affirms the Justice Center's executive director (or designee) overruling the Justice Center ALJ, where credibility was in issue and only the ALJ observed the witnesses testimony. *See*, *Cauthen, Roberts, Kelly, supra, note 16.*

Most egregiously, the Appellate Division routinely affirms abuse or neglect determinations based upon hearsay evidence alone. Certainly direct testimony of firsthand witness is not always necessary to prove a fact. Yet a review of three years' of Justice Center online decisions revealed that in 588 cases, the Justice Center prosecutor's entire case was built on hearsay alone, with the ALJ always allowing this.[17] It defies statistical probability that many if not most of these cases involve accuser credibility or other factual issues requiring in-person testimony by the employer. Instead, as a review of the Justice Center's online cases reveals, the ALJ accepts, and basically assumes to be true, the Justice Center's hearsay evidence. The healthcare worker's burden is then to disprove what is stated on paper, with no ability to test such evidence through cross-examination. Admittedly

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[17] *See*, note 14, *supra*.

an elderly or handicapped witness must be treated with respect and care. A Justice Center ALJ could certainly supervise cross-examination sufficiently so that an elderly or handicapped individual is treated respectfully, just as courts allow, and supervise, the cross-examination of children in criminal cases.

However, the Justice Center's policy of essentially always basing its case on hearsay, and thus always depriving the accused of the right to contest the prosecution's evidence, is a fundamentally and constitutionally-flawed system.

In reviewing established Second Circuit precedent it is clear that the reasons given for denying federal court review of the due process claims are, as in *Locurto*, inapplicable. For example, in *Hellenic Am. Neighborhood Action Comm. v City of New York*, 101 F3d 877(2d Cir 1996), the Second Circuit abstained from addressing an alleged property deprivation without due process through a "random and unauthorized act." The Court correctly held, per this Court's precedent, that the state post-deprivation procedure (e.g, an Article 78 proceeding) provides the process due. *See*, *Hudson v. Palmer,* 468 U.S. 517 (1984). However, Petitioners case, and the Justice Center policy and practice, are not "random and unauthorized acts." Rather, the Justice Center's due process violations reflect official governmental policy. As to this, the federal courts are responsible for providing a forum. *See, e.g.*, *Patsy v. Board of Regents, supra*; *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 435–36 (1982).

Similarly, *in Campo v New York City Employees' Retirement Sys.,* 843 F2d 96, 103 (2d Cir 1988), the plaintiff was denied federal court review of a survivor

benefits claim, because, according to the Second Circuit, the process she was due could be obtained in state court. For this reason, Second Circuit saw no offense to the doctrine of nonexhaustion of state remedies set forth in *Patsy, supra,* and *Steffel v. Thompson*, 415 U.S. 452, 472–73(1974) . As stated in *Campo*:

> "Article 78 of the New York Civil Practice Law and Rules provides a summary proceeding which can be used to review administrative decisions. That article makes available types of relief which, before its enactment, were obtainable in New York's courts only by writs of certiorari, mandamus or prohibition."

See, Campo, supra, at 101. However, in contrast to *Campo*, here Petitioners Salu and Lynch were seeking declarations that the Justice Center policies and practices, as applied to them and everyone else, violate core principles of due process. Petitioner Salu asserted employment discrimination claims as well, and accordingly, it was not only permissible, but also most appropriate that all claims (including Petitioners' supplemental Article 78 claim) be brought in federal court. Nevertheless, what the courts below essentially imposed upon Salu and Lynch was an exhaustion requirement similar to the now-abrogated *Williamson County* requirement of state court exhaustion. *See, Knick, supra.*

The *Hellenic* and *Campo* cases involve facts and issues distinct from those at bar, and the *Locurto* case is misinformed. The result, however, is Second Circuit abdication of judicial authority in cases such as this one. It reflects Second Circuit disregard for the doctrine of non-exhaustion as to constitutional due process claims. The Second Circuit's error regarding due process justiciability must be corrected by this Court.

Finally, the Second Circuit's abrogation of judicial responsibility when a due process violation is alleged creates a *de facto* split among the circuits as to how due process claims are handled as to Justice Center-type administrative action and also in college disciplinary cases, as discussed above. Second Circuit consideration of both college discipline and Justice Center healthcare workers discipline cases are rejected out of hand with the assertion these belong in the state courts. This creates an actual split among the circuits that due process is adjudicated by the federal courts in the other Circuits, but not in the Second Circuit.

The Second Circuit deferral to the N.Y.S. Article 78 proceeding is a deferral that has been rejected by this Court long ago. In *City of Chicago, supra*, this Court made clear that an Article 78-type proceeding is cognizable in federal court.

This Court must grant certiorari, and reverse.

II. A STATE AGENCY'S POLICY OF DETERMINING GUILT WITHOUT FIRST AFFORDING A PRE-DETERMINATION HEARING OF ANY SORT OFFENDS FUNDAMENTAL PRINCIPLES OF DUE PROCESS

Whether this Court addresses the due process violations after hearing this case on the merits, or whether it remands the due process issues for Second Circuit and district court consideration, this Court should instruct the lower courts that the Due Process Clause has meaning in America, and that state agencies must recognize that due process requires notice and an opportunity to be heard at a meaningful time before the government deprives a person of a significant property or liberty interests (e.g., of employment and the ability to work in one's chosen occupation). *See, e.g., Goldberg, supra; Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985*).*

In some important ways, this case is similar to *Logan v Zimmerman Brush Co.*, 455 U.S. 422 (1982). First, in *Logan* as here, we have an "established state procedure," not "random and unauthorized acts." *Id.*, at 435-36. Second, in Logan as here, it is the state system itself that destroys the person's property interest. *Id.* The failure of the Fair Employment Practices Commission to conduct a timely hearing deprived the Logan complainant of his right to a hearing to contest being fired. The failure of the Justice Center to provide a timely hearing deprived Salu and Lynch of a fair hearing that would have allowed them to keep their employment, and keep Lynch off the permanent exclusion list. Finally, in Logan, this Court view a tort action as an unreasonable remedy. Likewise here, where success at a "de novo" administrative hearing or in a judicial action or proceeding would provide only name-clearing (Mr. Lynch being taken off the exclusion list) but no job reinstatement or back pay, As stated by this Court in *Logan*:

> "What the Fourteenth Amendment does require, however, 'is 'an *opportunity* ... granted at a meaningful time and in a meaningful manner,' 'for [a] hearing appropriate to the nature of the case.' It is such an opportunity that Logan was denied."

Id., at 437. And it was such an opportunity at the Justice Center "substantiation" stage that Salu and Lynch were denied.

III. THE JUSTICE CENTER'S ROUTINE DENIAL OF THE AGENCY ACCUSED'S RIGHT TO CONFRONT HIS OR HER ACCUSERS AMOUNTS TO A SYSTEMIC DENIAL OF DUE PROCESS

Likewise, this Court should instruct the lower courts that the Due Process Clause means that, especially when credibility is at issue, and a person's livelihood is at stake, due process requires that an accused be allowed to confront the evidence

against him, and to be allowed to face and cross-examine his or her accusers. *See, e.g.*, *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

The right to confront one's accuser should be considered "Due Process 101." It is perhaps the most basic notion in our common law adversarial system of justice. It is a "bedrock procedural guarantee." *See, Crawford v. Washington*, 541 U.S. 36, 42 (2004), quoting *Pointer v. Texas*, 380 U.S. 400, 406 (1965)("right of [a criminal] accused to confront the witnesses against him is likewise a fundamental right…"). "[N]o one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth…." *Id.* The right of confrontation is more basic than criminal law protection. It is a right that has "ancient roots" that "finds expression in the Sixth Amendment." *Id.* It is "'one of the safeguards essential to a fair trial.'" *Id.*,, 380 U.S. at 404, quoting *Alford v. U.S.*, 282 U.S. 687, 692 (1931)("It is the essence of a fair trial that reasonable latitude be given the cross-examiner,…"). In support of this right to confront, the Supreme Court in *Alford* cites the civil cases *Knapp v. Wing*, 72 Vt. 334, 47 A. 1075, 1077 (1900)(denying cross-examination .., deprived the defendant of a legal right.") and *Martin v. Elden,* 32 Ohio St. 282, 289 (1877)("…we think prejudice to the adverse party should be presumed to arise from the denial of the right to a fair and proper cross-examination."). In a non-criminal case, the U.S. Supreme Court explained that:

> "Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as

> narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness…"

See, The Ottawa, 70 U.S. 268, 271 (1865). As the Court emphasized in *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913), "…manifestly there is no hearing when the party … is not given an opportunity to test, explain, or refute."

Petitioners Salu and Lynch were not given the opportunity to test the Justice Center's hearsay statements, which hearsay statements did not sufficient explain things, thereby depriving Petitioners of the ability to refute. This was constitutional error that the District Court and Circuit Court should have addressed.

CONCLUSION

The petition for writ of certiorari should be granted.

_____/S /_____
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List of Appendices