No. 20-7706

In the Supreme Court of the United States

JAKARA VESTER,

Petitioner,

v.

HENLOPEN LANDING HOMEOWNERS ASSOCIATION, INC.; and PREMIER PROPERTY AND POOL MANAGEMENT, LLC,

Respondents.

On Petition For a Writ Of Certiorari
To The Supreme Court Of The State Of Delaware

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Delaware Supreme Court dismissed Petitioner's direct appeal of the Court of Chancery's decision denying Petitioner's claims that Respondent violated the Federal Fair Housing Act ("FFHA") and the Delaware Fair Housing Act ("DFHA"). The court did not address any of Petitioner's federal claims or any questions of federal law.

Instead, the Delaware Supreme Court dismissed Petitioner's appeal after Petitioner submitted four consecutive opening briefs that exceeded (or attempted to subvert) the page and word limits imposed by the court's rules. Before ordering the dismissal, the court provided specific guidance to Petitioner as to how she should correct her briefs, and the court warned that dismissal could result if Petitioner submitted a fourth non-compliant brief. The court's order dismissing Petitioner's appeal rested solely on state law grounds — *i.e.*, Petitioner's repeated violation of established the court's rules. Below, Petitioner did not assert that those rules were constitutionally deficient, and the court did not pass on that issue, either.

Petitioner presents numerous questions that, at base, ask this Court to review both her FFHA claims and the constitutionality of the dismissal of her appeal. However, Petitioner overlooks the limited nature of this Court's review.

Respondent, therefore, presents the question before this Court as follows: Does this Court have jurisdiction to review the Petitioner's federal claims given that the Delaware Supreme Court dismissed Petitionter's appeal for repeated violation of a state procedural rule and that Petitioner did not challenge the constitutionality of the rule below?

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Henlopen Landing Homeowners Association, Inc. discloses that it is a non-stock non-profit corporation, and there is no parent or publicly held company owning 10% or more of Respondent's stock.

COUNTERSTATEMENT OF FACTS

Respondent generally disagrees with Petitioner's description of the factual and procedural background of this case. First, Petitioner strays from, and contests, the facts as stipulated by the parties or found by the trial court. *See, e.g.*, Pet. 21 (mischaracterizing the court's findings regarding Petitioner's pretextual request), 27-28 (making unsupported assertions about homeowners' associations in general). Second, Petitioner improperly references facts outside the record. *See, e.g.*, Pet. 24-26. (listing personal reasons that Petitioner asserts excuse her default in the Delaware Supreme Court). But Petitioner has not moved to expand the record by lodging non-record material under Rule 32.3; nor would it be proper to do so when the extraneous materials consist of self-serving assertions that have not been trial tested.

To this end, Respondent identifies and relies upon the facts as stipulated by the parties, as found by the Delaware Court of Chancery at trial, and as found by the Delaware Supreme Court in its order dismissing Petitioner's appeal. For brevity, the factual and procedural posture is summarized below.[1]

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[1] Petitioner included the Delaware Court of Chancery's August 1, 2019, Memorandum Opinion at Tab B of her Appendix. The October 15, 2020, Order of the Delaware Supreme Court dismissing Petitioner's appeal is at Tab A. Respondent cites to these decisions as "Ch. Op." and "Dism.

A. Background of the Dispute.

This is a long-running dispute involving the Henlopen Landing planned community in southern, coastal Delaware. Petitioner is a homeowner, and Respondent is the community's homeowner's association. Ch. Op. 2. Like many similar associations, Respondent oversees enforcement of the community-wide deed restrictions that govern the community and to which homeowners bind themselves when purchasing a home in the community. *Id.* at 3-4, 6. These restrictions run with the land and are contained within a written, recorded document, known as a Declaration. *Id.* at 3-4. Among other things, the restrictions impose limitations and standards on improvements, and variance from the restrictions requires consent from Respondent. *Id.* at 4-5.

In 2011, Petitioner sought several variances from the community's restrictions. Most of the variances, such as construction of a gazebo and installation of an irrigation well, were granted and are immaterial. *Id.* at 7, 10.

Three variances are pertinent here. First, Petitioner sought to extend the height of her property's fence from four to six feet because Petitioner asserted that her autistic son could scale a four-foot fence and elope from the family's yard. *Id.* at 7. Respondent's Architectural Review Board,

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Order," respectively. Page citations are to the internal numbering of each decision.

or ARB, granted this request shortly after Petitioner made it; however, for reasons Petitioner never explained, Petitioner never constructed the taller fence. *Id.* at 9, 21.

Second, Petitioner sought a variance in the placement of her fence so that the fence could encompass more of the yard than otherwise permitted and thereby enclose the side entrance to her garage. *Id.* at 7-8. At the time, Petitioner asserted that the family wanted this variance was "to let [their] dog outside in inclement weather." *Id.* (citing the parties' pretrial stipulation and joint exhibits). The ARB denied this request. *Id.* at 9.

Third, Petitioner sought to widen her driveway. However, Petitioner's application did not include any information on the grading or slope of the driveway extension, so the ARB deferred decision until Petitioner submitted that information. *Id.* at 8-9.

In subsequent communications with the Respondent's property manager, Petitioner requested reconsideration of the fence placement variance, but again, Petitioner did not identify her son as the basis for the variance. *Id.* at 10-11. Petitioner also indicated that she had, and would provide, the grading and slope data. *Id.* at 11. Further communications between Petitioner and the property manager led to a genuine misunderstanding about whether the driveway was ultimately approved by the ARB. *Id.*

Believing the driveway was approved, Petitioner completed construction of the driveway in August 2011. *Id.* In reality, the ARB had not received the requested grading information and had not approved the driveway. The ARB requested an engineer's report confirming that the driveway would not adversely affect stormwater management. *Id.* at 12. The Declaration called for such a report, but the ARB had not regularly requested one in other cases. *Id.* In the interim, Respondent suspended Petitioner's pool access in August 2011 as a result of the continuing violation. *Id.* at 17. Petitioner submitted the report approximately a year later in August 2012. *Id.* at 13.

As the driveway saga escalated, so did the parties' overall dispute. In November 2011, Petitioner filed a housing discrimination complaint against Respondent with the Delaware Division of Human Resources ("DDHR"). *Id.* at 18. Petitioner alleged that she and her family were victims of discrimination on the basis of their race, familial status, or disability. The complaint was the first time that Petitioner asserted she sought a fence placement variance on behalf of her son, rather than her pet. Respondent had already been preparing for litigation when it received the complaint. *Id.* at 32-33 & n.142 (citing pretrial stipulation and joint exhibits). It answered the DDHR complaint in January 2012 and filed its complaint in the Court of Chancery on February 2012. *Id.* at 19.

B. Delaware Court of Chancery Litigation.

In its complaint, Respondent alleged that Petitioner had breached the Declaration through construction of the driveway and through other smaller infractions of the Declaration. Ch. Op. 19. Respondent filed its complaint after the DDHR proceedings but the parties agreed, and the court recognized, that the complaint was anticipated and prepared prior to the DDHR proceedings. *Id.* at 32-33 & n.142. Ultimately, Petitioner mooted Respondent's claims by curing the violations of the Declaration or providing the information requested by Respondent. Petitioner's pool access was restored in 2014, and the Court dismissed Respondent's claims as moot, subject to a mootness fee, in 2017. *Id.* at 18, 19.

Thus, Respondent became the driver of the litigation. The proceedings were long and mired in procedural maneuvers, including Petitioner's unsuccessful attempt to remove the case to federal court. *Id.* at 21. The matter finally went to trial in 2019. In advance of trial, the parties stipulated to numerous facts, and the parties also stipulated as to the appropriate legal standard, which the court accepted without independent review. *Id.* at 22 & n. 126.

At trial, Petitioner relied primarily on her own testimony, as well as hearsay, to support her claims. *Id.* at 20. Although the court found Petitioner

sincere in her beliefs, the court concluded that Petitioner's account of events was unsupported by the broader record. *Id.* For example, Petitioner misremembered the timeline and other community members disputed Petitioner's recollection of statements and events. *See id.* at 27. Petitioner also never offered a clear explanation why she disclosed her son's autism in the context of the fence height request but at the same time, maintained a right not to disclose it as the basis for the fence placement request. *Id.* at 31. Nor did Petitioner explain why, in seven years, she had not constructed a taller fence. *Id.* at 21. And Petitioner abandoned many of her nebulous claims over the course of the litigation. *See id.* at 27 (Petitioner's abandonment of discrimination claims); 32 & n. 141 (Petitioner's abandonment of retaliation claims).

In the end, the Court of Chancery reached an unremarkable conclusion: Petitioner simply had failed to prove her case under the legal standard to which the parties stipulated. Because Respondent planned this litigation before Petitioner's DDHR complaint, and because Respondent's suit reflected a good faith attempt to resolve the parties' on-going dispute, the litigation did not constitute retaliation for Petitioner's complaint. *Id.* at 33-34. And, notably, the ARB had promptly approved Petitioner's request for extended fence height, demonstrating that, when presented with the truth by Petitioner, the ARB was not hostile to Petitioner or her family. *Id.* at 35.

Likewise, the court concluded Respondent barred Petitioner's pool access based upon a non-discriminatory reason — Petitioner's alteration of the driveway without ARB approval. And Petitioner failed to show a similarly situated person who was treated differently. *Id.* at 26-27.

Lastly, the court concluded that Petitioner's request for the fence placement variance was not a request for an accommodation under the FHA because Petitioner continuously asserted upon pretextual reasons for the variance until after she filed her DDHR complaint. *Id.* at 29-30. That is, Petitioner "never requested [that] accommodation for [her] son's autism." *Id.* at 30. But, even as the court ruled against Petitioner's claims, the court noted that Petitioner retained the right to pursue the fence placement variance for the actual reason. *Id.* at 31.

C. Delaware Supreme Court Dismissal.

Petitioner timely appealed to the Delaware Supreme Court. However, when it came time for Petitioner to file her opening brief, she submitted a brief far in excess of the court's page and word limits. Dism. Order 1. Delaware Supreme Court Rule 14 limits briefs to 10,000 words or 35 pages. *Id.* at 1-2. Petitioner's brief, by contrast, was 80 pages long. Upon Respondent's motion, the court struck Petitioner's brief and directed her to file a new, compliant opening brief. *Id.* at 2.

She did not. Instead, Petitioner filed an even longer 85-page brief. *Id.* Despite the increased length, Petitioner falsely certified that the brief was within the court's 10,000 word limit. *Id.* Petitioner acknowledges that, in violation of the court's rules, she omitted footnotes from her word count. Pet. 24-25.. The Delaware Supreme Court struck this second brief, too, but again granted Petitioner leave to file a compliant brief. Dism. Order 2-3.

At 65 pages, Petitioner's third brief was shorter, but still in excess of the court's limits. *Id.* at 3. This time, Petitioner included footnotes but omitted spacing between words and around punctuation. *Id.* For example, she did not include spacing before or after commas in the brief. The court again granted Respondent's motion to strike but again, spared Petitioner dismissal of her appeal. *Id.*

In granting Petitioner a final chance, the court even included a footnote that, using one of Petitioner's paragraphs as an example, illustrated the spacing errors that Petitioner needed to correct throughout the brief. *Id.* at 3-4 & n.4. The court also advised Petitioner that if she submitted another noncompliant brief, the court would issue a notice to show cause why her appeal should not be dismissed for failure to follow the court's rules. *Id.* at 3-4.

Despite this, Petitioner filed a fourth non-compliant brief that again omitted appropriate spacing and resulted in a misleading word count. *Id.* at 4. The court's clerk struck the brief, and the court

issued the notice to show cause. *Id.* In response, Petitioner blamed her *pro se* status, asserted that her continued non-compliance was inadvertent, and for the first time, requested an extension of the word count requirements. *Id.* Petitioner did not assert that enforcement of the word count was unconstitutional in any way.

The Court found that Petitioner had failed to show cause for her continued non-compliance. *Id.* The Court dismissed her appeal and denied her extension request as moot. *Id.* at 4-5.

Petitioner moved for reargument and also a rehearing *en banc*. Petitioner's filings largely rehashed her responses to the court's Notice to Show Cause, and the court denied both motions in summary fashion. *See* Pet'r Appx. at A, D. Again, Petitioner did not raise, and the court did not address, any constitutional challenge to Delaware Supreme Court Rule 14 or its application.

Petitioner now seeks review of her case in this Court.

REASONS FOR DENYING THE PETITION

Petitioner urges this Court to render numerous advisory opinions about the purpose and application of federal housing law. But, even if the Court were otherwise disposed to take up those questions, this Court lacks jurisdiction to review the decision of the Delaware Supreme Court. That court's decision rested entirely on state law — specifically, it

dismissed Petitioner's appeal after she repeatedly refused to file a brief within the page and word limits prescribed by the Court's rules. Petitioner did not challenge that decision as unconstitutional below, and she is precluded from doing so now. In any event, this case is a poor vehicle to address any of the questions presented by Petitioner. Accordingly, this Court should deny the petition.

A. This Court lacks jurisdiction over this case because the Delaware Supreme Court's decision rested solely upon state law.

Although this Court is empowered to review judgments of "the highest court of a State," that review is limited to state decisions involving a federal question. 28 U.S.C. § 1257(a) "[I]n the partitioning of power between the state and federal judicial systems," this Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Absent unusual circumstances not asserted here, this Court will not review a state court judgment that "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

This jurisdictional bar applies regardless of whether the state law grounds are procedural in nature. *Beard v. Kindler*, 558 U.S. 53, 60 (2009); *Herndon v. Ga.*, 295 U.S. 441, 443 (1935). More than

a century of this Court's decisions demonstrate that a procedural default at the state appellate level precludes review by this Court if the procedural default prevented the state's highest court from "actually or constructively" reviewing "[the] Federal question" presented by the appellant. *Newman v. Gates*, 204 U.S. 89, 95 (1907). *See also Cent. Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 195 (1925); *John v. Paullin*, 231 U.S. 583, 587 (1913). Nor does it matter if the underlying procedural rule is discretionary. *Beard*, 558 U.S. at 60. In short, "violation of 'firmly established and regularly followed' state rules. . . will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

That is the situation presented here. In the Delaware Supreme Court, opening briefs are limited to 10,000 words or, if filed by an unrepresented party without access to a word processor, 35 pages. Del. Sup. Ct. R. 14(d)(i), (iii). The court gave Petitioner three opportunities over six months, yet Petitioner never submitted a brief within the word limits or shorter than 65 pages. In giving Petitioner a fourth and final opportunity, the court provided Petitioner specific guidance how to correct her mistakes, and the court warned Petitioner that dismissal could result if she submitted a fourth deficient brief. When Petitioner submitted another non-compliant brief, and failed to show cause for doing so, the court dismissed her appeal for violating Rule 14(d).

Petitioner asserts that this Court has jurisdiction to review the Delaware Supreme Court's decision under 28 U.S.C. § 1257(a). Pet. ix. But the Delaware Supreme Court did not base its decision upon any federal right asserted by Petitioner. Rather, the Delaware Supreme Court dismissed Petitioner's appeal for her procedural default of a state rule.

This Court, therefore, lacks jurisdiction to review the decision and should deny the petition.

B. Petitioner has also forfeited her right to challenge Delaware Supreme Court Rule 14, or its application, in this Court because Petitioner did not raise the issue in the Delaware Supreme Court.

This Court is "a court of review, not first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), so this Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Webb v. Webb*, 451 U.S. 493, 499 (1981) (internal quotations and citation omitted). *See* Sup. Ct. R. 14.1(g)(i) (requiring petitioners to identify where issues were raised in the record of the courts below).

Petitioner did not fairly argue that Rule 14 or its application was unconstitutional in her responses to the Delaware Supreme Court's deficiency notices or the court's Rule to Show Cause. That failure forecloses Petitioner's effort to raise those issues now.

At most, Petitioner vaguely referenced a "constitutional right to be heard" in one sentence on page 2 of her "Motion for Rehearing En Banc Under Rule 4(F) of the Court's 10/15/20 Order Dismissing Appeal. But Petitioner never asserted that the purported right was a federal right rather than a state right. Such passing reference is insufficient to present or preserve a federal issue.

In *Webb*, for example, the petitioner contended that the Georgia Supreme Court failed to give full faith and credit to a Florida child custody decision. 451 U.S. at 494. The petitioner used the phrase "full faith and credit" in the state proceedings. *Id.* at 496. But she never cited a federal statute or constitutional provision; it was plausible she was referencing provisions from a state statute; and the Georgia Supreme Court decided the case without addressing a federal issue. *Id.* at 497-98. Because the federal question had not been raised appropriately in the state proceedings, this Court concluded it had no jurisdiction to address the petitioner's claim in the first instance. *Id.* at 501-02. The same result is called for here, too.

If that were not enough, Petitioner's passing reference also came too late. Raising an issue only after dismissal is insufficient to preserve the issue for this Court's review. "[T]he attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon*, 295 U.S. at 443. *See also Webb*, 451 U.S. at 501 &

n.4. As with its primary decision, the Delaware Supreme Court also denied Petitioner's two post-dismissal motions without addressing any federal questions. Accordingly, this Court lacks jurisdiction to consider those claims in the first instance now.

Regardless, Petitioner's argument does not merit granting the petition. "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, . . . and the rules of practice to be applied in its exercise," even "when federal rights are in controversy. . . ." *Paullin*, 231 U.S. at 587. *See City of Edwardsville*, 269 U.S. at 195. There is nothing novel, arbitrary or irrational about a court setting or enforcing page or word limits for appellate briefs. Neither Petitioner's *pro se* status, nor any other reason she has identified, render page and word limits unconstitutional. The cases that Petitioner cites addressing pleading standards, such as *Haines v. Kerner*, 404 U.S. 519, 520, (1972), have no import at the appellate level, much less here. The pertinent parts of Rule 14 were enacted in 2016, and Petitioner had fair notice and numerous opportunities to comply. And, this Court has refused to "disregard state procedural rules that are substantially similar to those to which" federal courts "give full force." *Beard*, 558 U.S. at 62. *Compare, e.g.*, Del. Sup. Ct. R. 14(d) (setting word and page limits for briefs) *with* Sup. Ct. R. 33 (same).

Instead of making a constitutional argument below, Petitioner contended, among other things, that the court should excuse her deficient briefs

because she represented herself and because Rule 14 did not expressly require spacing between words or following commas. Petitioner makes those arguments here, too, even as Petitioner refuses to acknowledge the leniency, guidance and chances that the court below extended to her.

Again, however, Petitioner's issues are simply not reviewable. What Rule 14 expressly or impliedly requires is also an issue of state law — and outside of this Court's jurisdiction — so long as the rule is not "so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *City of Edwardsville*, 269 U.S. at 195. *See also Ring v. Arizona*, 536 U.S. 584, 603 (2002) (recognizing that a State's high court's "construction of the State's own law is authoritative"); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Even if Petitioner had not forfeited her claims regarding Delaware Supreme Court Rule 14, the claims would not provide a basis for this Court's review.

As such, this Court should deny the petition on this ground, too.

C. This case is a poor vehicle to consider the questions presented in the petition.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion[]" to be exercised "only for compelling reasons." Sup. Ct. R. 10. Certainly, housing discrimination is a serious issue, especially for the classes of persons protected by the

FHA. And Petitioner's passion for her cause is clear from her petition. But even if this Court had jurisdiction to address the broad questions that Petitioner presents, several factors make this case a poor vehicle for answering those questions.

First, error correction is not a basis for a grant of certiorari. A writ of certiorari is rarely warranted when a petitioner primarily seeks review of factual findings or the application of a properly stated legal rule. *See* Sup. Ct. R. 10. *See also Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) ("[E]rror correction. . . is outside the mainstream of the Court's functions and. . . not among the 'compelling reasons'. . . that govern the grant of certiorari") (quoting S. Shapiro, *et al.*, *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) (alterations in original)). Although Petitioner presents a plethora of legal questions, Petitioner's brief largely rehashes the factual and procedural background and notes points of disagreement with the trial court. And Petitioner identifies no decisions of other states or of federal appellate courts that reached different conclusions based upon similar facts. Had Petitioner not forfeited her right to seek review in this Court, review would nonetheless be unwarranted.

Second, the record below does not present the legal questions Petitioner poses. Contrary to Petitioner's contentions, the trial court did not decide an important question of federal law or deviate from established federal law. Rather, the

parties stipulated to the elements of Petitioner's federal claims in their pretrial order, and the Court of Chancery "accepted [the] stipulation, without independently confirming its accuracy." Ch. Mem. Op. at 22, n.126. Even if the Court of Chancery reached the wrong conclusion or misapplied the law, the court did so in the unique context of a stipulated legal standard, not the context of broader federal law. And below, Petitioner abandoned many of the arguments that she improperly seeks to resurrect here. For example, in her post-trial briefing, Petitioner only identified one allegedly discriminatory act — suspension of pool access — as being supported by trial evidence; Petitioner waived all of her other earlier prior arguments. Ch. Op. 23, 27. These unusual circumstances do not present an opportunity to clarify the law or to guide lower courts.

Third, and relatedly, the factual record precludes clean consideration of the legal issues Petitioner presents. Petitioner's lengthy attempt to reargue the factual record, and her insertion of facts outside the record, undercuts her conclusory assertion that the record is clean and the facts undisputed. Among her several questions, Petitioner seeks determinations of what information a person must disclose when requesting an accommodation under the FHA. More specifically, Petitioner seeks a determination of whether a person may refuse to disclose a disability, or may offer a pretextual reason, in seeking an accommodation request so as

to preserve the requestor's sensitive information. Pet. v, 13, 31. But this record however, does not allow consideration of those issues.

Petitioner identified her son's autism when requesting a variance for extended fence height, yet in the same application, Respondent identified her dog as the reason for requesting a variance for fence placement. Assuming that Petitioner's son was the reason for both requests, Petitioner never offered a cogent explanation why she identified a pretextual reason for one request but not the other. Because Petitioner actually disclosed her son's disability to Respondent, this case does not present an opportunity for the Court to consider whether the FHA permitted Respondent to withhold that information when requesting an accommodation.

Finally, many of the questions presented by Petitioner seek improper advisory opinions. Just as this Court does not review questions of state law, address issues not raised below, or engage in error correction, this Court also refuses to offer advisory opinions on issues that would not affect the outcome of a case. This Court's "power is to correct wrong judgments, not to revise opinions." *Herb*, 324 U.S. at, 125-26. Because of Petitioner's procedural default, a ruling on the federal questions presented by Petitioner would not change the outcome of Petitioner's case.

But even past that, the Court of Chancery determined that Petitioner did not make a request

for an accommodation under the FHA. Because Petitioner did not make a request, the record does not support any determination regarding what the FHA requires in response to a request.

For all of these reasons, this case presents a poor vehicle for addressing any of the questions raised by Petitioner.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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