

No. 21-1537

In the Supreme Court of the United States

DONNIE T.A.M. KERN, PETITIONER,

v.

BOARD OF SUPERVISORS, ALLEGHANY COUNTY.

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

PETITION FOR REHEARING

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

(i)

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition remains unchanged.

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44, Petitioner respectfully petitions the Court for rehearing of the Court's decision to deny the Petitioner's Writ of Certiorari on October 3 2022. The Petition for Rehearing is being filed due to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented and it is presented in good faith and not for delay and involves a question of civil procedure.

FACTUAL AND PROCEDURAL BACKGROUND

In brevity, the Petitioner is the father of two children, both children having the same initials: CBK.

During the 2017-2018 school year CBK attended Mountainview Elementary School, a school within the Alleghany County Public School division, a school system under the control of the Respondent: the Supervisors of Alleghany County.

CBK was denied an individual evaluation by the school system on four separate occasions prior to April 4 2018¹

At or around March of 2018 CBK received an independent evaluation by the Virginia Tech Psychology Department (hereinafter the "study"). The study was provided by the parents to school

¹ Petitioner's Evidence-School Records: never having the opportunity to provide to the District Court.

administration and accepted by the school on April 4 2018 in which school administration admitted:

“504 plan accommodations at this time were not meeting the student’s needs”²

On May 11 2018 school records stated:

“the CBK needs specifically designed instruction to improve executive function skills...it is recommended the IEP team consider counseling as a related service to address anxiety....³

The appropriateness of special education of the student’s education must be decided on a case-by-case basis, in light of the unique needs of each eligible student⁴. According to the two- part *Rowley* test, a state must (1) comply with the procedures set forth in the IDEA, as well as (2) develop an IEP that is reasonably calculated to enable the child to receive educational benefits⁵.

In addition, this Court held, in *Endrew*, that to meet the second prong of the two-part Rowley test, regarding a school district’s substantive obligation under the IDEA, “. . . a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁶

² Petitioner’s Evidence-School Records: never having the opportunity to provide to the District Court.

³ Petitioner’s Evidence-School Records: never having the opportunity to provide to the District Court.

⁴ *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982)

⁵ *Id*

⁶ *Endrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (2017)

The Court stated that “. . . the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.*

The IDEA and its regulations establish a comprehensive format by which a school district must **identify and evaluate all children with disabilities who may require special education and related services**. This is known as the “**Child Find**” obligation, and includes a school district’s responsibility to assess the child in all areas of suspected disability. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(c)(1). The LEA then must identify the child’s area(s) of need, determine the IDEA eligibility category, and develop and implement an appropriate IEP that contains appropriate “educational instruction specially designed to meet the unique needs of the handicapped child . . . supported by such services as are necessary to permit the child to benefit from the instruction.”⁷ (emphasis added)

In this case, Alleghany County Public Schools and the Respondent has failed to meet either the Child Find requirements of the IDEA or the implementation requirements of Section 504

On May 23 2018 school administration went over new accommodations for CBK; approximately fourteen (14) which also included executive function services: a special education service. CBK would

⁷ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 at 188-89 (1982).

begin using these accommodations and services at the beginning of the 2018-2019 school year⁸

On July 1 2018 the Petitioner begins his term on the Alleghany County School Board. On August 17 2018 the Petitioner received a text message from school administration stating in-part:

“The school district does get more money for special education students but I assure you the special education department doesn’t see it and sure as heck wouldn’t trickle down to help CBK...”⁹

The Petitioner on August 20 2018 states publicly during a meeting of the Alleghany County School Board:

“...I was also informed by a school division employee that Alleghany County Public Schools cannot afford to provide 504 plan accommodations which are funded in part by Classroom Instruction funds. It is unfortunate to hear such news, while gratifying to see that we have a candid employee. I took the oath of office to serve students and their families. Due to these issues, I feel the best way to serve them now is to vote No on approving the July 9th minutes”¹⁰

⁸ Petitioner’s Evidence-School Records: never having the opportunity to provide to the District Court.

⁹ Petitioner’s Evidence-Text Message: never having the opportunity to provide to the District Court.

¹⁰ Petitioner’s Evidence-Public Records: never having the opportunity to provide to the District Court.

At or around August 28 2018 the Petitioner and spouse met with the school personnel approximately around 11:00AM. At the time of this petition only one school official has apologized to the parents of CBK for the disparaging situation; and it was done at this meeting¹¹. It was determined that the subsequent meeting scheduled for 12:00PM would convene only to clarify accommodations in CBK's Section 504 plan and that no changes would be made¹².

At or around August 28 2018 at 12:00PM the Petitioner and spouse met with another set of school personnel in which one individual was also present at the 11:00AM meeting. The 12:00PM meeting was to clarify and provide additional instructions to staff on how to carry out the accommodations¹³.

On August 30 2018 the Petitioner and spouse were notified by the school division that all but three (3) accommodations of the fourteen (14) had been removed from CBK's Section 504 plan included special education services: related to executive function. The notice stated that school personnel made the determination using: "grades, educational performance, assessment, classroom observations, staff and parent concerns"¹⁴

¹¹ Petitioner's Evidence-Audio Recording: never having the opportunity to provide to the District Court.

¹² Petitioner's Evidence-Audio Recording: never having the opportunity to provide to the District Court.

¹³ Petitioner's Evidence-Audio Recording: never having the opportunity to provide to the District Court.

¹⁴ Petitioner's Evidence-School Records: never having the opportunity to provide to the District Court.

This was a false statement by school personnel ¹⁵. The staff member that did the observations was not present during the meeting. In addition, the majority of the support as stated in the notice was not discussed nor if it ever was discussed it would not have been sufficient to make such a determination as CBK was only able to use the fourteen (14) accommodations for approximately **four days** (4) of attending school due to **chronic illness** (emphasis added). It took approximately four years to get 14 accommodations and only four days to take them away; to make such a determination is not humanely possible.

The Petitioner advocated for the disabled, an African American and the Petitioner's own child against mistreatment and discrimination by the Allegheny County School Board. The Petitioner sought redress from the United States Office of Civil Rights. The Petitioner a member of the Allegheny County School Board, was petitioned by the Board of Supervisors of Allegheny County for removal from office due to the Petitioner's advocacy, and specifically the Petitioner having advocated for his own child. The Petitioner enacting 28 U.S.C. §1443, the civil rights removal statute thus removed the state trial into federal jurisdiction where it belonged.

On September 10 2021 the District Court remanded the case back to the Allegheny County Circuit Court without allowing the Petitioner to provide evidence. The Constitution guarantees the Petitioner who was litigating the matter *pro se* an

¹⁵ Petitioner's Evidence-Audio Recording: never having the opportunity to provide to the District Court.

opportunity to present evidence or even a hearing to show support of the Petitioner's claims of violations under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, 42 U.S.C. 1983, and 42 U.S.C. 1985; statutes all of which support removal into federal jurisdiction by the Petitioner to remove the state litigation matter into federal jurisdiction.

The District Court's remand order was a violation of this Court's precedence held in *Haines v. Kerner*, 404 U.S. 519 (1972)¹⁶ and *Boag v. MacDougall*, 454 U.S. 364 (1982)¹⁷ and more importantly *Georgia v. Rachel*, 384 U.S. 781 (1966)¹⁸. *Georgia v. Rachel* a landmark civil rights removal case under 28 U.S.C. §1443 where defendants like the Petitioner as was in this case also denied due process *Id.* In *Georgia v. Rachel* the Civil Rights act of 1964 provided the removability under 28 U.S.C. §1443¹⁹.

¹⁶*Haines v. Kerner*, 404 U.S. 519 (1972) "allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence...we conclude that he is entitled to an opportunity to offer proof".

¹⁷ *Boag v. MacDougall*, 454 U.S. 364 (1982)- "The Court of Appeals' ground for dismissing the complaint was erroneous as a matter of law. Federal courts must construe inartful pleading liberally in pro se actions"

¹⁸ *Georgia v. Rachel*, 384 U.S. 781 (1966) "[S]ince the federal district court remanded the present case without a hearing, the defendants as yet have had no opportunity to establish...if the federal district court finds that allegation true, the defendants' right to removal under § 1443(1) will be clear...". *Id.* at 781

¹⁹ *Georgia v. Rachel*, 384 U.S. 781 (1966) "The burden of having to defend the prosecutions is itself the denial of a right construed in *Hamm v. City of Rock Hill*..."

The Petitioner appealed the remand order to the Fourth Circuit under statute 28 U.S.C. §1447(d) and after a lengthy sparring of opinions between the Petitioner and Respondent, the Fourth Circuit decided to issue its own and thus determined that it too; like the District Court did not have jurisdiction therefore issued an unpublished opinion citing:

The Supreme Court has instructed that “§1447(d) must be read *in pari materia* with [28 U.S.C.] §1447(c), so that only remands based on grounds specified in §1447(c) are immune from review under §1447(d).” *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); see *Doe v. Blair*, 819 F.3d 64, 66-67 (4th Cir. 2016) we dismiss the appeal for lack of jurisdiction. App. A infra., at Pet.App.3.

The Fourth Circuit’s opinion was not based on the merits of the case, but an interpretation of an opinion provided by this Court held in *Things Remembered, Inc. v. Petrarca* 516 U.S. 124 (1995). The Fourth Circuit’s holding no longer has sustenance or binding precedence since the recent opinion of this Court in *BP, P.L.C., et al., v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021) was explicitly clear; the Court having opined:

[T]he only question before us is one of civil procedure: Does 28 U.S.C. §1447(d) permit a court of appeals to review any issue in a district court order remanding a case to state court where the defendant premised removal in part on the federal officer removal statute, §1442, or the civil rights

removal, §1443...because the courts of appeals disagree over the scope of their appellate authority under §1447(d), we agreed to take this case to resolve the question...because it is the [district court's removal] order that is appealable, **a court of appeals may address any issue fairly included within it** (*BP, P.L.C., et al., v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021) (emphasis added)).

This Court's decision in *BP, P.L.C., et al., v. Mayor and City Council of Baltimore* premising removal under 28 U.S.C. §1442 was decided on May 17 2021, the Petitioner's notice of removal premising removal under 28 U.S.C. §1443 was only approximately four months later. The Fourth Circuit's unpublished opinion to not take up jurisdiction of the case condones the District's Court denial of the Petitioner Constitutional right of due process among other things.

This Court's precedence in *BP, P.L.C., et al., v. Mayor and City Council of Baltimore* having held:

...when a district court's removal order rejects all of the defendants' grounds for removal, §1447(d) authorizes a court of appeals to review each and every one of them. After all, the statute allows courts of appeals to examine the whole of a district court's 'order,' not just some of its parts or pieces (*BP, P.L.C., et al., v. Mayor and City*

Council of Baltimore, 141 S. Ct. 1532, 1538,
A (2021));

can now be bypassed putting every American at risk of their constitutional rights being violated a true and factual miscarriage of justice one that beckons this Court to intervene and grant certiorari.

REASONS FOR GRANTING THE PETITION

The Petitioner is absent a federal forum having been equipped by the American people with equal protections. Henceforth the Petitioner dehiscent the extraordinary opportunity for the Court to grant certiorari seeking reversal of the Fourth Circuit's decision to protect the Petitioner, and Petitioner's child's unalienable constitutional rights and make good on the Constitution's guarantee of due process.

I. Historic: not granting certiorari will violate the petitioner's U.S. Const. V rights of due process at every level of the federal judiciary: a feat that has never happened since the ratification of the United States Constitution in 1788; the world's longest surviving written charter of government.

On June 20 2022, the Respondent under Supreme Court Rule 15 waived its right to oppose the Petition for Writ of Certiorari filed by the Petitioner. The Respondent being represented by counsel affirmed with over 140 years of governmental litigation experience gracefully agreed that jurisdiction rests with the federal judiciary. The Respondent under Supreme Court Rule 15 admits there are no material

misstatements within the Petition for Writ of Certiorari, and that the Respondent with enamored integrity concedes of violating the Petitioner's civil rights.

The Respondent should be praised for its integrity. This Court can provide praise by granting certiorari and with simplicity reverse the Fourth Circuit's unpublished opinion. By not reversing the Fourth Circuit's incorrect opinion it will, for the first time since the ratification of the U.S. Constitution in 1788, fail to deliver on its guarantee of due process that is furnished to every American citizen.

II. Denying the Petition will establish precedence for ignoring Stare Decisis.

The Respondent agrees that to deny the Petition for writ of certiorari filed by the Petitioner would be a violation of stare decisis of this Court, and would establish a precedence that it is acceptable to deny Americans a unalienable guarantee of due process.

III. BP, a Global Fortune 500 company, was provided an appeal under 28 U.S.C. §1447(d) on May 17 2021. The Petitioner, an American citizen is denied an appeal under 28 U.S.C. §1447(d) on October 3 2022, both being litigated in the Fourth Circuit.

The fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made, and

fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve “the blessings of liberty,” wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed²⁰...This argument flouts the basic principle that **all people must stand on an equality before the bar of justice in every American court**²¹ (emphasis added).

Due process has not been obeyed nor present at every level of this quasi-criminal case. Due process of law means that all citizens be tried “by the law of the land” (*Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 18 How. 272 (1856)). This Court has held that an appellate court has jurisdiction to review an appeal of a remand when the removing party premises 28 U.S.C. §1443²², this became common law, and subsequently the law of this land. The Fourth Circuit was reminded of this precedence in *BP, P.L.C., et al., v. Mayor and City Council of Baltimore* by this Court²³. BP, P.L.C. is a

²⁰ *Chambers v. Florida*, 309 U.S. 227(1940) at 237

²¹ *Id* at 241

²² *BP, P.L.C., et al., v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021)

²³ *Id* at IV “...[T]he judgement of the Fourth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion. So ordered”

Global Fortune 500 company with a market of \$98.36 billion dollars, and the fourth largest investor owned oil company in the world²⁴ and was provided due process when this Court granted certiorari reversing the Fourth Circuit's precedence on May 17 2021. On October 3 2022 this Court denied the Petitioner this identical and a very special and precious Constitutional guarantee of due process. The United States Constitution does not specify who receives and who is denied due process, as due process is required to be afforded to all American citizens.

CONCLUSION

As opined by this court in *Halbert v. Michigan* "navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson"²⁵, and from experience this has never been truer. The Petitioner and now with the assistance of the Respondent under Supreme Court Rule 15, both agree jurisdiction is within the Federal judicial system. In order to make good on the promises furnished by the Constitution, this Court's precious time is requested to correct the Fourth Circuit's decision avoiding jurisdiction so that a peaceful and amicable solution can be obtained.

²⁴ BP, P.L.C., Wikipedia Retrieved from <http://en.wikipedia.org/wiki/BP>, Retrieved on 10/10/2022

²⁵ *Halbert v. Michigan*, 545 U.S. 605, 621 (2005)

Respectfully submitted.

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October 2022

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of Supreme Court and is presented in good faith and not for delay.

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