No. 21-1569

In The
Supreme Court of the United States

SOUTHPOINTE PARTNERS, LLC,

Petitioner,

v.

LOUISVILLE METRO GOVERNMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals of Kentucky

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MICHAEL J. O'CONNELL
JEFFERSON COUNTY ATTORNEY
JOHN F. CARROLL,
Counsel of Record
200 S. Fifth St., Suite 300N
Louisville, KY 40202
(502) 574-6333
John.Carroll2@louisvilleky.gov

QUESTION PRESENTED

Whether a plaintiff may utilize 42 U.S.C. § 1983 to circumvent a state statute providing a limited right to appeal from an administrative decision and which provides an "exclusive remedy" to seek remedies otherwise unavailable under state law?

PARTIES TO THE PROCEEDING

The Petitioner appears in the caption of the case on the cover page.

The Respondents are Louisville/Jefferson County Metro Government (improperly styled as Louisville Metro Government), Louisville Metro Planning Commission (not sui juris, as an arm of Louisville/Jefferson County Metro Government), and Vince Jarboe, David Tomes, Robert Peterson, Emma Smith, Lula Howard, Marilyn Lewis, Jeff Brown, Rich Carlson, Ruth Daniels, and Donald Robinson in their official and individual capacities, and Joe Reverman, Jeff O'Brien, Lacey Gabbard, Jody Meiman, Kelly Jones, and Beth Allen in their individual capacities.

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The March 26, 2022 order of the Supreme Court of Kentucky denying Petitioner's motion for discretionary review is unpublished and reproduced in Petitioner's appendix. Pet.App.55. The Opinion of the Kentucky Court of Appeals is unpublished but available at 2021 WL 1936084 (Ky. App. May 14, 2021). It is also reproduced in Petitioner's appendix. Pet.App.3-33. The opinions of the Jefferson County Circuit Court are unpublished and reproduced in the Petitioner's appendix. Pet.App.34-54.

JURISDICTION

On March 16, 2022, the Supreme Court of Kentucky denied Petitioner's Motion for Discretionary Review of the Kentucky Court of Appeals' May 14, 2021 Judgment. Pet.App.55. This Court has jurisdiction under 28 U.S.C. § 1257(a) as final judgment or decrees rendered by the highest court of a state may be reviewed by this Court by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

> thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall make or enforce any law which shall … deprive any person of life, liberty, or property, without due process of law … .

42 U.S.C. § 1983, entitled Civil Action for Deprivation of Rights, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered

> to be a statute of the District of Columbia.

Ky. Rev. Stat. Ann. ("KRS") § 100.347(2) provides, in pertinent part:

> Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit Court of the county in which the property, which is the subject of the commission's action, lies. Such appeal shall be taken within thirty (30) days after such action. Such action shall not include the commission's recommendations made to other governmental bodies. …

COUNTERSTATEMENT OF THE CASE

This case concerns well-settled law. It has long been the case that an appeal from an administrative decision is a matter of legislative grace—not of right. Consequently, when an appeal from an administrative decision is granted by statute, a plaintiff must scrupulously conform to the statute's structure for all things, including the applicable statute of limitations, procedural hurdles, and available remedies. Importantly, when a remedy is provided for within the statutory scheme, a plaintiff is not entitled to—nor can he obtain—additional relief.

Here, SouthPointe Partners, LLC ("SouthPointe") seeks compensatory damages for an alleged constitutional violation. However, SouthPointe appeals from an administrative decision of the Louisville Metro Planning Commission. SouthPointe

obtained relief consistent with the applicable statute in state court. Its request for additional relief in the form of compensatory damages pursuant to Section 1983 is a collateral attack on the Commission's initial decision to deny SouthPointe's waiver request and conditionally approve its minor plat application. The relief it seeks is inappropriate and unavailable under the applicable law. The petition for a writ should be denied.

A. Factual Background

SouthPointe is a commercial developer constructing a large commercial development in Louisville's Fern Creek neighborhood. As is common with large developments, SouthPointe faced considerable push back by community members and others against development. Some community members filed suit to prevent SouthPointe's development. *Mauney, et al. v. Louisville Metro Council, et al.*, 2016 WL 4255017 (Ky. App. Aug. 12, 2016). However, SouthPointe prevailed against those claims. Yet, because of that litigation, SouthPointe's development was delayed for several years.

Following the close of *Mauney* and other third-party litigation, SouthPointe was free to resume its development work. Its first course of action was to complete a minor plat application. As part of its minor plat application, SouthPointe proposed naming its main street "SouthPointe Boulevard." SouthPointe completed and filed its minor plat application in 2018.

Although the street name "SouthPointe Boulevard" was approved by the Commission in 2010, the Commission learned of a road with a similar name in Louisville upon review of the 2018 minor plat

application. Accordingly, Louisville Metro Government ("Louisville Metro") requested SouthPointe to change its proposed street name. It did so, changing its proposed street name to "SouthPointe Commons Boulevard." However, the newly proposed street name ran afoul of a different land development code section—that all public street names contain sixteen characters or less. So, in addition to its minor plat application, SouthPointe filed a waiver request concerning the length of its proposed street name.

On April 18, 2019, the Metro Planning Commission ("Commission") held a public hearing on SouthPointe's application and waiver. At the hearing, members of the Louisville Department of Emergency Services ("LDES") contended that the 18-character street name posed safety hazards to the community. After the hearing, the Commission voted 4-2 (with four members absent) to deny SouthPointe's waiver request. But the Commission voted 6-0 (with four members absent) to conditionally approve SouthPointe's request for a minor plat. The approval was conditioned on SouthPointe proposing a street name that conforms with the land development code. The Metro Planning Commission's decision relied heavily on the testimony from LDES members. Commission members Jarboe, Lewis, Robinson, and Smith were not present and therefore did not vote.

B. Proceedings Below

On April 23, 2019, SouthPointe filed its first Complaint in Jefferson County Circuit Court, Division 9 ("Division 9"), Case No. 19-CI-002529. SouthPointe alleged several causes of action, including a Section 1983 claim, against Louisville Metro, the Commission,

and its ten Commission members in their official capacities. SouthPointe's claims stemmed from the Commission's actions. In Claim IV, SouthPointe alleged that the Commission violated its constitutional right to due process. SouthPointe sought to use Ky. Rev. Stat. Ann. ("KRS") § 100.347 to appeal the Commission's decision, and 42 U.S.C. § 1983 as a vehicle to recover damages.

Two-and-a-half months later, on July 26, 2019, SouthPointe filed a Motion for Partial Summary Judgment requesting relief for Claims I and II, which concerned the street name for a road within its development project. In the Motion, SouthPointe sought approval of a minor plat. This was the exclusive relief available to SouthPointe pursuant to KRS § § 100.347. Division 9 granted SouthPointe's Motion and relief pursuant to Ky. Rev. Stat. Ann. § 100.347. Specifically, Louisville Metro and the Commission were ordered to approve SouthPointe's minor plat and other relief pursuant to KRS § 100.347(2).

Louisville Metro, the Commission, and the ten named Commission members in their official capacity only then filed a Motion for Summary Judgment to dismiss SouthPointe's remaining claims. The motion was filed on August 13, 2019. They argued in it, in relevant part, that (1) all parties were immune from suit and (2) KRS § 100.347 does not provide for monetary damages or the recovery of attorney's fees.

While the Motion for Summary Judgment in Case No. 19-CI-00259 was considered by Division 9, SouthPointe moved for leave to file an Amended Complaint. The proposed Amended Complaint would

add three advisory officials with Louisville Metro Planning and Design Services, three advisory officials with Louisville Metro Emergency Services, and ten more Commission members in their individual capacities—six of whom either were not present at the meeting or voted in favor of SouthPointe. Ultimately, Division 9 denied SouthPointe leave to file its proposed Amended Complaint. SouthPointe moved for reconsideration and, after full briefing, Division 9 denied reconsideration once more.

Dissatisfied with Division 9's refusal to reconsider its motion for leave, on October 15, 2019, SouthPointe decided to file suit *again* in Jefferson County Circuit Court to secure a different judge, this time using its proposed Amended Complaint essentially as the original Complaint. SouthPointe's new case landed in Jefferson County Circuit Court, Division 13 ("Division 13"), Case No. 19-CI-06441).

On November 4, 2019, Division 9 granted Louisville Metro, the Commission, and the Commission members' motion for summary judgment. Notably, Division 9 found that all parties were entitled to sovereign immunity and that KRS § 100.347 offers only one exclusive remedy. SouthPointe appealed this decision to the Kentucky Court of Appeals, filing its Notice of Appeal on December 2, 2019.

On January 30, 2020, Division 13 dismissed SouthPointe's Complaint in Case No. 19-CI-06441 because it arose "from the same common nucleus of operative facts as those in [Division 9], and constitutes [SouthPointe's] attempt to impermissibly split its cause of action." Pet.App.7. SouthPointe appealed this

decision to the Kentucky Court of Appeals, filing its Notice of Appeal on February 3, 2020. The two cases were consolidated for review.

In its consolidated appeal to the Kentucky Court of Appeals, SouthPointe targeted three rulings: (1) Division 9's denial of SouthPointe's motion for leave to amend its original complaint; (2) Division 9's summary judgment for Louisville Metro on sovereign immunity grounds; and (3) Division 13's dismissal of SouthPointe's individual-capacity claims. Ultimately, the Kentucky Court of Appeals affirmed all three rulings and later denied SouthPointe's petition for rehearing. SouthPointe moved for discretionary review by the Supreme Court of Kentucky, which correctly denied review.

REASONS TO DENY THE WRIT

SouthPointe presents the following question for review by this Court: "Can a state statute providing a right to appeal from an administrative decision serve as an 'exclusive remedy' to bar separate federal claims under 42 U.S.C. § 1983?" (Petition for Writ at i). It characterizes its question as "one of fundamental significance, involving federalism and the extent to which states may construe their own statutes to effectively bar federal causes of action." (Petition for Writ at 13).

But SouthPointe's question is neither a unique one nor "of fundamental significance." In fact, SouthPointe presents a question that is inapplicable to it. Even if the answer to SouthPointe's question is 'no'—although the answer is most certainly 'yes'—it is still precluded from recovery under 42 U.S.C. Section 1983. SouthPointe suffered no actionable

constitutional harm by Louisville Metro, the Commission, or the Commissions' members from a mere delay. The writ should be denied.

I. There Are No Special or Important Reasons for the Writ to be Granted.

In its writ, SouthPointe did not provide a single compelling reason that this Court should grant its requested relief. SouthPointe attempts to frame the underlying issue in a compelling way, but its attempt is futile. The actual underlying question is well-settled law. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Review on certiorari does not provide a normal appellate channel in any sense comparable to the writ of error. *Fay v. Noia*, 372 U.S. 391, 436 (1963). The writ should be denied.

II. There Is Not A Circuit Split.

Generally, this Court uses certiorari jurisdiction "to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) ("The second reason justifying a denial of certiorari is the absence of a direct conflict among the Circuits.") SouthPointe does not point to a conflict among circuit courts of appeals concerning the meaning or application of federal law. The writ should be denied.

III. The Kentucky Court of Appeals Did Not Misconceive the Meaning of a Supreme Court Decision.

This Court may grant certiorari to consider a petitioner's claim when a state court misconceives the meaning of a relevant decision of this Court which the petitioner believes to be "controlling" regarding the issue. *Wilkinson v. United States*, 365 U.S. 399, 401 (1961), rehearing denied 365 U.S. 890 (1961). The Kentucky Court of Appeals did no such thing. The writ should be denied.

IV. Statutes Providing an Exclusive Remedy for Administrative Errors Preclude All Other Forms of Relief.

This case is somewhat unique. SouthPointe received a negative decision from the Planning Commission. Within its limited right under KRS § 100.347, SouthPointe appealed to the Jefferson County Circuit Court. SouthPointe requested relief under KRS § 100.347, which provides a general scheme outlining the rules governing the limited right to appeal a decision of the Commission. SouthPointe was granted relief not long after filing suit—namely, the Commission was ordered to approve SouthPointe's minor plat and waiver request. SouthPointe does not submit this writ for lack of ability under Kentucky law to challenge the Commission's decision. Nor does SouthPointe submit this writ because it was denied equitable relief by Kentucky courts. Rather, SouthPointe appeals because it wants more than Kentucky's General Assembly is willing to give it—compensatory damages, using Section 1983 as a vessel where it is unavailable.

The Commission is an administrative agency. Concerning administrative law, this Court's "strong tendency" is "to support capacious public authority to regulate property, economic activity, and even personal liberty for public purposes." Adrian Vermeule, *Common Good Constitutionalism* 61 (2022). "Agencies are … the living voice of our positive law, and the administrative law that surrounds and structures them is best understood to be as much *ius* as *lex*."[1] *Id.* at 151.

But administrative agencies are fallible, so in some cases judicial review of administrative decisions is appropriate. In Kentucky, judicial relief from an administrative agency's order is not a matter of right—but "a matter of legislative grace." *Nickell v. Diversicare Mgmt. Servs.*, 336 S.W.3d 454, 456 (Ky. 2011). Consequently, when a right to appeal is offered by statute, "failure to follow the statutory guidelines … is fatal." *Triad Dev./Alta Glyne, Inc. v. Gellhaus*, 150 S.W.3d 43, 47 (Ky. 2004). Upon review, administrative agencies are typically granted great deference by courts. *See Kisor v. Wilkie*, 588 U.S. ___, ___,139 S.Ct. 2400, 2412 (2019) ("Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond.").

However, judicial review of administrative decisions is limited to what the legislature deems appropriate. Short statutes of limitation are often imposed on agency appeals. Also, Congress and state

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[1] "*Lex* is the enacted positive law, such as a statute. *Ius* is the overall body of law generally, including and subsuming *lex* but transcending it, and containing general principles of jurisprudence and legal justice." Vermeule at 4.

legislatures routinely establish limitations on remedy. "Typically, parties can 'seek review of agency action in district court under any applicable jurisdictional grant.' But when Congress creates a special statutory review scheme, that scheme is presumed 'to be the exclusive means of obtaining judicial review in those cases to which it applies.'" *Bohon v. Federal Energy Regulatory Commission*, ___ F.4th ___, ___, 2022 WL 2203482 at *2 (D.C. Cir. June 21, 2022) (internal citation omitted) (quoting *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015)).

The same is true in Kentucky. "Under Kentucky law, where the statute both declares the unlawful action and specified the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Waugh v. Parker*, 584 S.W.3d 748, 753 (Ky. 2019) (citing *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985)); *see also Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 421 (Ky. 2010); *Mendez v. University of Kentucky Board of Trustees*, 357 S.W.3d 534, 545 (Ky. App. 2011). Put more forcefully by this Court, "where … 'a statute expressly provides a remedy, courts must be *especially reluctant* to provide additional remedies.'" *Sandoz Inc. v. Amgen Inc.*, 582 U.S. ___, ___, 137 S.Ct. 1664, 1675 (2017) (quoting *Karahalios v. Federal Employees*, 489 U.S. 527, 533 (1989)) (emphasis added); *see Republic Bank & Trust Co. v. Bear Stearns & Co. Inc.*, 683 F.3d 239, 260-61 (6th Cir. 2012). Whether a plaintiff can raise additional claims collateral to an administrative agency's decision hinges entirely on whether the applicable statute provides both the unlawful action and the remedy. KRS § 100.347 does provide a remedy, so collateral

attack is inappropriate. *See*, *e.g.*, *Arnold v. Versailles-Midway Woodford County Bd. Of Adjustment*, 2010 WL 668664 at *4 (Ky. App. Feb. 26, 2010) ("KRS 100.347 provides an exclusive statutory remedy for an appeal from the actions of the [the Commission]."); *Lyster v. Woodford County Bd. Of Adjustment Members*, 2007 WL 542719 at *5 (Ky. App. Feb. 23, 2007) ("where an exclusive statutory remedy such as KRS 100.347 has been provided, an action for declaratory judgment is improper.").

SouthPointe petitioned for certiorari because it seeks a remedy that Kentucky's General Assembly did not deem appropriate. Specifically, SouthPointe seeks compensatory damages for the Commission's decision, under the guise of a Section 1983 damages action.[2] But damages are not a sanctioned—nor an appropriate—remedy under KRS § 100.347. The United States Court of Appeals for the Sixth Circuit recognized as such just five years ago: "Because Ky. Rev. Stat. Ann. § 100.347 offers plaintiffs an *adequate and exclusive remedy* (i.e., appeal to a Kentucky court) for grievances related to a planning board's decision, *a court must dismiss any collateral attack that seeks solely to rehash the same complaints*." *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 321 (6th Cir. 2017) (emphasis added) (referencing *Warren Cty. Citizens for Managed Growth, Inc. v. Bd. Of Comm'rs of City of Bowling*

[2] "Section 1983 provides a cause of action against any person acting under color of state law who subjects a person or causes a person to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Vega v. Tekoh*, 597 U.S. ___, ___ (2022) (slip op. at 4) (cleaned up).

Green, 207 S.W.3d 7, 17 (Ky. App. 2006); *see also Greater Cincinnati Marine Serv., Inc. v. City of Ludlow*, 602 S.W.2d 427, 428 (Ky. 1980)).

SouthPointe's claim for damages is fundamentally a collateral attack on the Planning Commission's original decision to conditionally approve SouthPointe's minor plat and to deny SouthPointe's waiver request. There is no other way to frame it. Like the *Robbins* plaintiffs, SouthPointe does not show that its harms arise from anything other than the Commission's decision. Its demand for damages is a collateral attack. And as the Sixth Circuit noted in *Robbins*, "a court must dismiss any collateral attack that seeks solely to rehash the same complaints." *Robbins*, 854 F.3d at 321. The Jefferson County Circuit Court did just that, finding that KRS § 100.347 "is the exclusive remedy for one aggrieved by the actions of the Planning Commission" and that the "statute does not provide for tort damages." (Opinion & Order, Oct. 7, 2019, Pet.App 42) The Kentucky Court of Appeals affirmed, (Opinion Affirming, May 14, 2021, Pet.App. 25-26, 33) and denied SouthPointe's petition for rehearing. Order Denying Petition for Rehearing, Jul. 19, 2021, Pet.App. 2. The Supreme Court of Kentucky denied discretionary review. Order Denying Discretionary Review, Mar. 16, 2022, Pet.App. 55. Now this Court should deny the petition for a writ.

V. Subsidiarity and Federalism Principles Require Denial.

SouthPointe argues that federalism principles grant it a right to judicial review by this Court—the highest in the land. This case concerns the proposed

name of a street within a proposed development in a Kentucky neighborhood that was resolved in Kentucky courts under Kentucky law. SouthPointe posits that its demand for damages related to a small delay in development, triggered by the Planning Commission conditionally granting SouthPointe's application for a minor plat and denying its waiver request, warrants review by the Supreme Court of the United States. SouthPointe misunderstands federalism and the subsidiarity principles that inform it.

The Founders were clear—"the States … retain all *preexisting* authorities which may not be exclusively delegated to the federal head[.]" THE FEDERALIST NO. 82 (Alexander Hamilton). There are but three types of cases where such exclusive delegation exists:

> where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible.

Id.

The subject case is not of these types. Still, in its petition for certiorari, SouthPointe weakly asserts that the Commonwealth of Kentucky violates the Supremacy Clause by providing an exclusive remedy to a limited right to appeal from an administrative decision. Oddly, SouthPointe claims that only faulty "interpretive methodology" led Kentucky's courts to hold that the sole remedy provided for in a statute

was, in fact, *the* sole remedy. (Petition for Certiorari at 15). SouthPointe asserts that such a reading violates the Supremacy Clause—and thus federalism. More striking is that SouthPointe cites Justice Scalia and Bryan Garner's classic text on interpretation for support. (Petition for Certiorari at 15) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 59 (2012)). SouthPointe seemingly misreads the late-Justice's landmark text on reading the law.

Kentucky's "interpretive methodology" does not run afoul of the Supremacy Clause. Quite the contrary. Kentucky follows the example set by this Court: courts must narrowly interpret statutory schemes which grant a right to appeal administrative decisions. *See*, *e.g.*, *Sandoz Inc.*, 582 U.S. at ___, 137 S.Ct. at 1675. By SouthPointe's reasoning, this Court's—the Supreme Court of the United States'—interpretive methodology runs afoul of the Supremacy Clause. This conclusion defies reason.

Further, when this Court "interpret[s] a federal statute pertaining to a subject traditionally governed by state law," it is "reluctant to find pre-emption." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993). Whether KRS § 100.347's exclusive remedy "is invalid under the Supremacy Clause" by thwarting Section 1983's Congressional remedy "depends on the intent of Congress." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). "The purpose of Congress is the ultimate touchstone." *Retail Clerks Intern Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 103 (1963). 42 U.S.C. Section 1983, by its own terms, does not expressly preempt state law. In fact, Section

1983 only preempts state law when a state law "immunizes government conduct otherwise subject to suit under § 1983." *Felder v. Casey*, 487 U.S. 131, 139 (1988). Availability of a Section 1983 remedy, "[i]n all cases," in part, "turns on whether the statute, … is not foreclosed 'by express provision or other specific evidence from the statute itself.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 108 (1989) (quoting *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431 (1987)). Here, relief under Section 1983 is expressly foreclosed by KRS. § 100.347. The writ should be denied.

VI. SouthPointe Did Not Suffer an Actionable Constitutional Harm Under Section 1983.

SouthPointe asserts that it should be permitted to raise a 42 U.S.C. Section 1983 damages action against Louisville Metro, the Commission, and the Commission's members. Although not all wrongs committed under color of state law are actionable under Section 1983, *see*, *e.g.*, *Paul v. Davis*, 424 U.S. 693, 700 (1976); *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-20 (2005), due process violations can be. However, a federal cause of action alleged under Section 1983 or otherwise, simply does not arise from every alleged wrong committed under color of state law. *Studen v. Beebe*, 588 F.2d 560, 566 (6th Cir. 1978). SouthPointe asserts that Louisville Metro, the Planning Commission, and the Commission's members violated SouthPointe's right to due process.

Agencies are subject to the Constitution's due process guarantees in some contexts. *See generally Mathews v. Eldridge*, 424 U.S. 319 (1976) (applying

due process to a state agency). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Id.* at 332. A property interest within the meaning of the Due Process Clauses can be "statutorily created." *Id.* When a property interest is at stake, "some form of hearing is required before" the government can justly deprive an individual of that interest. *Id.* at 333 (referencing *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974)). Yet, what due process requires is not fixed. "'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Due process's flexibility is the key to understanding its role in administrative law and its application to particular jurisdictions.

SouthPointe's petition for writ is futile because even if SouthPointe is correct that KRS § 100.347 cannot foreclose a collateral attack for damages through Section 1983—though it must—SouthPointe's claim that it suffered a deprivation of due process is insufficient for at least three reasons.

First, the root of SouthPointe's claim—a temporary delay of a few months on the approval of its minor plat application—does not offend due process. SouthPointe's argument to the contrary is without

merit. *See Studen*, 588 F.2d at 566; *Tucker v. City of Chicago*, 907 F.3d 487, 492-94 (7th Cir. 2018) (holding that a six-month administrative delay does not offend due process); *Kantner v. Martin County*, 929 F.Supp. 1482, 1487-88 (S.D. Fla. 1996), aff'd 142 F.3d 1283 (11th Cir. 1998) (conditional approvals do not offend due process).

Second, SouthPointe lacked a property interest in the first place—a fatal blow. SouthPointe did not suffer a taking in any recognized sense of the word. It is illogical to contend that SouthPointe's non-existent property interest was infringed. *See Tucker*, 907 F.3d at 492 ("A plaintiff cannot be deprived of property without due process of law before that plaintiff is deprived of property").

Finally, negligent acts of state or local officials that cause unintended loss or injury to life, liberty, or property, simply do not offend due process. *Daniels v. Williams*, 474 U.S. 327, 330-34 (1986). The writ should be denied.

CONCLUSION

The petition for writ of certiorari, lacking merit, should be denied.

Respectfully submitted,
MICHAEL J. O'CONNELL
JEFFERSON COUNTY ATTORNEY
JOHN F. CARROLL
Counsel of Record
200 S. Fifth St., Suite 300N
Louisville, KY 40202
(502) 574-6333
John.Carroll2@louisvilleky.gov

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