No. _____

In the Supreme Court of the United States

DONALD A. VANDERVEER,

Petitioner,

v.

ZONING BOARD OF APPEALS TOWN OF EAST HAMPTON, JOHN P. WHELAN, ZONING BOARD OF APPEALS CHAIRPERSON, SAMUEL KRAMER, ZONING BOARD OF APPEALS CHAIRPERSON, ROY DALENE, MEMBER OF THE TOWN OF EAST HAMPTON ZONING BOARD OF APPEALS, THERESA BERGER, MEMBER OF THE TOWN OF EAST HAMPTON ZONING BOARD OF APPEALS, TIM BRENNEMAN, MEMBER OF THE TOWN OF EAST HAMPTON ZONING BOARD OF APPEALS, ANN M. GLENNON, TOWN OF EAST HAMPTON PRINCIPAL BUILDING INSPECTOR, ELIZABETH L. BALDWIN, ASSISTANT EAST HAMPTON TOWN ATTORNEY, TOWN OF EAST HAMPTON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PATRICIA WEISS, ESQ.
Counsel of Record
78 Main Street – Suite 14
Post Office Box 751
Sag Harbor, NY 11963-0019
Telephone (631) 725-4486
Facsimile (631) 725-0295
PWESQSAG@AOL.COM

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Since 1947, Petitioner Vanderveer's Family has owned 3+ acres of land (with a small barn) in the Town of East Hampton, New York. Petitioner asserts he has a "grandfathered" commercial use for "storage, warehouse and distribution facilities" as it's shown on the real property tax bills for decades, and that is how they used the land. In 2015, the Town placed the land on a list of properties for potential acquisition and appraisals, and it also began to criminally prosecute Petitioner for its use for a commercial storage location. Following his convictions on 7 charges (all later reversed in April 2021), Petitioner sought to have the Town Zoning Board of Appeals issue a written certification for the land's use for indoor and outdoor storage under the Town's Code applicable to legally pre-existing non-conforming uses (i.e., uses before 1957, when the area was first zoned as residential). Petitioner was unsuccessful in preventing the extinguishment of his vested right to use the land commercially because of the Town's land-use boards' policy of denying all hearing participants, including an "applicant-*party*" like Vanderveer, any opportunity to exercise his Right to Cross-Examine adverse witnesses who speak at board hearings and/or submit letters to the boards.

1. Whether the Second Circuit's Summary Order directly conflicts with *Goldberg v. Kelly*, 397 U.S. 254 (1970), which has interpreted the Due Process Clause as requiring that cross-examination of adverse witnesses be afforded to a party where any property or liberty interest is

being subjected to the risk of deprivation or extinguishment by the government through the mechanism of board hearings, where New York State's substantive and procedural law routinely deprives a landowner applicant-party of the right to cross-examine adverse witnesses in later state court judicial proceedings whenever the local land-use board previously failed to permit the applicant-party landowner to cross-examine witnesses?

2. Whether the District Court's decision, and its affirmance, transgressed Petitioner's First Amendment Right to Cross-Examine adverse witnesses at a local zoning board hearing by imposing unjustified restrictions on speech at a land-use board hearing where the board's rules lacked a plainly legitimate sweep and evinced an unconstitutional Prior Restraint of Speech of a "party"-applicant with a direct interest in the outcome?

3. In light of Article I, § 8's protection of the right to engage in commerce, whether an "unconstitutional appropriations" type of "physical taking" identified in *Horne v Department of Agriculture*, 59 U.S. 513 (2013) can be satisfied where the local government appropriates unto itself a substantial part of the annual income derived from commercial use of the land by commercial activity that is neither "highly regulated" nor "statutorily regulated"?

4. Whether the Equal Protection claim should have survived the Rule 12 motion (although not meeting the District Court's expectation of exactitude) because the legal viability of any alleged comparator is a close jury question, and a high degree of similarly required under *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) isn't constitutionally compelled for a traditional Equal Protection claim which can be based on any "bad faith" reason, particularly in *sui generis* real property matters where there are some distinctions in the land itself and accordingly some variances in the governmental processes related to the land use issues?

5. Whether Petitioner's request for a preliminary injunction should have been granted *pendente lite* to prevent further criminal local misdemeanor prosecutions by the Town of East Hampton's own Town Attorney because all the criteria described in *Whole Woman's Health v. Jackson*, 594 U.S. ___, 141 S. Ct. 2494 (2021) are satisfied, and the Town's continuing criminal prosecutions to enforce its zoning code without a neutral unbiased prosecutor concretely demonstrates a *bona fide* risk of future harm to Petitioner?

6. Whether the District Court's order which failed to state any reason for not granting the requested leave to amend the complaint, coupled with the Circuit's recognition of the state appellate court's April 2021 reversal of the 7 criminal convictions for local zoning code

violations in *People v. Vanderveer,* 2021 NY Slip Op 51356 (U) (2d Dept. App. Term, 9th & 10th, 2021) should have sufficiently entitled Petitioner to a chance to amend his complaint insofar as that reversal satisfied the "favorable termination" element for a federal malicious prosecution claim, the elements of which are being examined in *Thompson v. Clark* (SCOTUS #20-659)?

PARTIES TO THE PROCEEDING

The Petitioner in this case is Donald A. Vanderveer.

The Respondents are the Zoning Board of Appeals Town of East Hampton, John P. Whelan, Zoning Board of Appeals Chairperson, Samuel Kramer, Zoning Board of Appeals Chairperson, Roy Dalene, Member of the Town of East Hampton Zoning Board of Appeals, Theresa Berger, Member of the Town of East Hampton Zoning Board of Appeals, Tim Brenneman, Member of the Town of East Hampton Zoning Board of Appeals, Ann M. Glennon, Town of East Hampton Principal Building Inspector, Elizabeth L. Baldwin, Assistant East Hampton Town Attorney, and Town of East Hampton.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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The decision of the Court of Appeals for the Second Circuit is a Summary Order which is reported at ___ Fed. Appx. ___ (2d Cir. 2021), 2021 U.S. App. LEXIS 25503, 2021 WL 3745741 (Pet. App. 1-10). The District Court's order is unreported and electronically published at 2020 WL 7042669. (Pet. App. 11-34).

JURISDICTION

The decision of the Second Circuit Court of Appeals was entered on August 25, 2021. Pet. App. 1. A petition for rehearing/rehearing en banc was denied on October 14, 2021. Pet. App. 34-35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The jurisdiction of the District Court was invoked under 42 U.S.C. § 1983.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The state statutory provisions directly involved are New York Civil Practice Law and Rules § 7803 and 7804, New York Municipal Home Rule Law § 10, New York Town Law § 136, and New York Real Property Tax Law § 305(2), and the relevant portions are all reproduced in Appendix E. Pet. App. 39-40, 42-47.

The relevant portions of Town of East Hampton Code § 255-1-40 is reproduced at Appendix E. Pet. App. 41.

The constitutional provisions involved are Article I, § 8, ("Commerce Clause") Article VI, cl. 2 ("Supremacy Clause"), and the First, Fourth, Fifth, Ninth, and

Fourteenth Amendments, and they are all produced at Appendix E. Pet. App. 36-38.

STATEMENT OF THE CASE

A. Background

The Vanderveer Family has owned the 3.5+ acre parcel of land since 1947. It's improved by a small barn that was erected by the Edwards Family, the only other owners since before the Revolutionary War. The small barn lacks electricity and water. Vanderveer succeeded to the title as Sole Executor and Sole Legatee after his widowed mother died.

As his parents before him, Vanderveer has used the property in a commercial manner since its purchase in 1947. After residential zoning came into being in 1957 as the default category for the area, Vanderveer continued to use the property in a commercial manner as "storage, warehouse, and distribution facilities", which is the statewide property classification of "440" stated on all of the real property tax bills which were paid. The property has been commercially used in an income generating manner for storage of such items as landscaping equipment by a local landscaper and also to store items which Vanderveer needs to store on the land's higher elevation in connection with his commercial business, a nearby marina situated on low-lying land.

The property right that Vanderveer asserts is a vested property right created under New York law by numerous cases cited in Vanderveer's complaint, memoranda of law, letters to the District Judge, and appellate briefs. Together they hold that any legal

"abandonment" must be supported by the intention to abandon, not simply a discontinuation of a use, that "100%" abandonment is required to trigger legal abandonment, and that (for properties of mostly raw land that is not significantly improved from its natural state) abandonment is avoided by related off-premises activity, such as administrative office work that requires electricity. The liberty interest is his corresponding right to engage in commerce on that land, i.e., the Unenumerated Right to work to earn a living to support himself and his family.

The outdoor storage of tractors and vehicles exposed them to inclement weather, and the storage of some smaller items was accomplished by using "truck bodies", i.e., removable and road-worthy vehicular chattel that do not require building permits or certificates of occupancy. Vanderveer mowed the grass, moved things around the property and generally tended to its needs, without any intent to abandon his commercial use. In 2015, the Town officials created a list of properties that it wished to potentially appraise and purchase, and Vanderveer's property was included on the list. Vanderveer did not submit the paperwork to allow an appraisal. Thereafter, one of the Town's local code enforcement officers signed several accusatory instruments for the Town's salaried Town Attorney to criminally prosecute in the Town's Justice Court. Vanderveer was convicted and paid a $7,000 fine. (These convictions were all reversed in April 2021, and the fines were later remitted.)

Vanderveer also applied for a written certification of the vested commercial use of the property, first to

the Building Inspector and then to the East Hampton Town Zoning Board of Appeals. He was unsuccessful in obtaining the written certification he sought, because he was not afforded any opportunity to cross-examine adverse witnesses against him under the Town's local policies concerning land-use hearings. By New York's statutory scheme of CPLR Article 78, Vanderveer unsuccessfully petitioned the New York Supreme Court to vacate the ZBA's unfavorable determination, but he was again denied cross-examination. Weeks before the New York court signed and entered the Judgment affirming the ZBA's determination, Vanderveer filed this 42 U.S.C. § 1983 federal civil rights suit in early July 2019. The complaint (which Vanderveer quickly amended to identify "comparators" for the Equal Protection claim) is based on several grounds, but did not allege federal malicious prosecution claims because "favorable termination" did not occur until April 2021. New York's appellate court has yet to decide Vanderveer's "as of right" appeal of the Judgment.

B. The District Court Decision by EDNY USDJ Frederic Block

After a telephonic oral argument in November 2020, the District Court's decision issued. It granted Defendants' Rule 12 motion and it denied Vanderveer's Rule 65 motion for preliminary injunctive relief, almost as an afterthought. The decision did not grant Vanderveer's Rule 15 request for an opportunity to filed an amended pleading if the District Court found any pleading imperfections. The memorandum and order expressed no reason for its failure to grant Vanderveer an opportunity to amend the pleading.

C. The affirmance by the Second Circuit in a Summary Order

The Second Circuit placed the appeal on the expedited track, and oral argument "in person" was heard on August 20, 2021. It affirmed Judge Block's decision *in toto*. Petitioner promptly filed a petition for rehearing/rehearing *en banc*.

D. Petitioner's Petition for Rehearing/Rehearing En Banc

The petition for rehearing, also denied, was critical of the Summary Order. It is included below in full, with the portions of the judges' decision in boldface type for emphasis, and citations to the record. Petitioner readopts these arguments in this Petition, thus explaining, through numbered text, where the issues were raised below.

Introduction

1. The panel's Summary Order (Exhibit "1") conflicts with *Goldberg v. Kelly*, 397 U.S. 254 (1970). That raises constitutional questions of exceptional importance under 42 U.S.C § 1983 concerning traditional Due Process analysis and the "Takings Clause" jurisprudence recently developed in *Knick v. Township of Scott,* 588 US __ (2019) and *Cedar Point Nursery v. Hassid,* 594 U.S. __ (2021).

2. The Summary Order merits reconsideration *en banc*.

3. The Summary Order overlooks that Vanderveer had a state-created, "grandfathered" property right for commercial use under State law. It also overlooked that the Town used unconstitutional acts of over-policing, sham criminal prosecutions, and deficient ZBA procedures to take away Vanderveer's vested Right To Income from a commercial property. The Town engaged in a pretextual reliance on sections of its local town code to find there was an "abandonment" of a vested "commercial" use, notwithstanding the Town tax bill's commercial "440" classification. Vanderveer's situation differs from *Murr v. Wisconsin,* 582 U.S. __ (2017) and *Palazzolo v. Rhode Rhode Island,* 533 U.S. 606 (2001) where State Legislatures wrote laws.

4. This petition focuses on errors in the Summary Order ("SO") in boldface type. The first is SO*1's statement: "**over fifty years after the Town enacted its first zoning ordinance and designated Vanderveer's property as residential**". That area was designated as "residentially zoned" in 1957, but Vanderveer's specific land was not designated "as residential" because it was used commercially before the Town's zoning laws existed. State property law and the commercial tax bills he paid kept his land as commercial. The word "grandfathered", means a continuing, pre-existing, preserved legal land-use for a particular parcel although new legislation is introduced townwide. SO*4 confuses the land's value: "**the value of the property, which is listed for tax purposes**

as exceeding $300,000 in every year". The "assessed value" for tax purposes doesn't approximate a "market value" determined by compliance with NYRPT Law 305(2)'s guidelines, requiring townwide reappraisals every 4 years (which the Town hasn't done).

"Takings Clause" Jurisprudence

5. In June 2019, SCOTUS decided *Knick*, overturning decades-long "gate-keeping" precedent in *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985).

6. Landowners can now bring their Fifth Amendment "Takings Clause" cases in federal courts. Senator Sheldon Whitehouse wrote a critical commentary in the National Law Journal (7-1-19) proclaiming "The 5-4 decision emanating from a land dispute is a gift for big-money developers and regulated industries."

5. *Knick* applies fairly to all landowners. To convert that aspiration into reality, this Circuit is tasked with diligently reviewing land dispute procedures in New York under the Supremacy Clause (Art. VI, cl.2), eschewing "comity".

6. This Court should review Vanderveer's FAVC and the motions *de novo*, under correct "Takings", Due Process and Equal Protection analyses. The *Knick* minority's fear that federal courts would be overwhelmed by land-use disputes hasn't eventuated. See Ilya Somin, The Normality of *Knick:* A Response to Sterk and

Pollack, Fla. Law Rev. Forum, Vol. 72, pp. 38-47, 2021. Vanderveer's case may be this Circuit's first. Justice Kagan's dissent notes that *Knick* "sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in state land-use disputes."

7. "Takings Clause" analysis advanced in *Cedar Point Nursery v. Hassid,* 594 U.S. __ (2021). *Cedar Point* concerned the Right to Exclude and also addressed the Right To Income, considering "appropriations" derived from land, referring to *Horne v. Department of Agriculture* 569 U.S. 513 (2013). *Cedar Point* characterized both the government-authorized trespass [by labor organizers] and government-directed appropriations of personal property associated with the land [*Horne*'s 10% of all raisins grown on the land] as examples of "physical" takings that weren't to be treated simply as a "regulatory" "taking" under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *Horne* and *Cedar Point* demonstrate the "taking" need not be 100% to transgress the "Takings Clause". Here, the Town defendants' conjoined efforts abruptly took 100% of Vanderveer's Right To Income from the land in its current state. Vanderveer's lifetime income stream vanished, as did his ability to store his marina's dock pilings and his marina's boats at the property's higher ground during hurricanes. The Town didn't compensate him for that commercial taking, although the Town can access a Community Preservation Fund. The

Right To Income from a commercial use is a significant characteristic because the Constitution protects commerce in Article I, § 8. The land has a "commercial use" protected by its owners' constitutional rights.

8. *Horne* explains that the sovereign has been historically prohibited from appropriating the benefits that raw land provides when put to its use, dating to the Magna Carta (1215).

9. Vanderveer's case, *Cedar Point* and *Horne* all concern natural uses of land with a fundamental Right To Income afforded from use of raw land.

10. Zoning and regulation aren't synonymous. Vanderveer's "440" commercial use on his tax bills isn't in a "highly regulated industry"; it's "storage, warehouse, distribution facilities". It cannot be locally regulated. NY Town Law § 136. It's not a "closely regulated" business. *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) (warrant required). *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) held that a pit excavating law was constitutional under the town's "police powers". In New York, "[t]he power to zone is not a general police power, but a power to regulate land use." *Sunrise Check Cashing v. Town of Hempstead,* 20 N.Y.3d 481, 485 (2013).

11. SO*3 incorrectly presumed that the regulatory takings test in *Penn Cent.* was the only applicable test, stating:

> **"Where, as here, the government "imposes regulations that**

> **restrict an owner's ability to use his own property," we "generally appl[y] the *flexible* test developed in *Penn Central."***

12. But it overlooked that *Cedar Point* wasn't decided by *Penn Central*'s framework, but by the alternative "physicality" test for trespasses and appropriations. As here, *Cedar Point* involved "physical acts".

13. The panel incorrectly assumed that EH Town Code § 255-1-40 (a hybrid civil-criminal law) and its enforcement procedure were legitimate. It wasn't reexamined under modern Substantive and Procedural Due Process analyses. NY Municipal Home Rule Law § 10 authorizes "local governments to adopt and amend local laws "not inconsistent with the provisions of the constitution". New York's Constitution includes a Due Process Clause in Art. I, § 6. Although MHR Law § 10-1.(i) & (ii)(a)(11) & (12) allows local zoning laws for the "well-being of persons or property" and "protection and enhancement of its physical and visual environment", New York sets constitutional limits, as *Sunrise* demonstrates.

14. Vanderveer has a legally sufficient claim based upon the Town's "taking away" all of his commercial income stream from his presumptively vested commercial property because he obtained 2021's "favorable termination". There was a substantial financial loss due to the Town's over-policing of local

ordinances by its own local town attorneys to whom criminal prosecutorial authority was never directly delegated. See *People v. Viviani*, 2021 WL 1177916 (NY Mar. 30, 2021) (delegation of all criminal prosecutorial authority flows only from elected county attorney). Because the Town received $7,000 in court fines (still withheld), the Town "appropriated" money Vanderveer received from the landscaper for using Vanderveer's "grandfathered" raw commercial land for storage. Because $7,000 in fines isn't authorized by relevant regulation, *People v. Vanderveer*, No.2016-256 SCR, 2021 WL 1618053 (N.Y.App.Term 4-22-21), its characterization is "unconstitutional appropriation" via "sham" prosecutorial acts.

15. The Town pursued a scheme related to "scenic easement value". The Peconic Bay Region Community Preservation Fund is a public program for Suffolk County's five East End Towns. The first step was to devalue Vanderveer's land from a "commercial use" to a "residential". EH Town shouldn't get to put its "finger on the scale" to make Vanderveer's commercially "grandfathered" land worth substantially less so it can purchase it more affordably. In a "Takings Clause" case, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), Justice Holmes wrote:

> "... a strong public desire to improve the public condition is not

> enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for that change."

16. The property's commercial character was changed. The test for the unconstitutional interference by a "regulation" is described by Justice Stevens in *U.S. v. Karo*, 468 U.S. 705 (1984): i.e., whether the interference "profoundly" changed the character of the property. *U.S. v. Causby*, 328 U.S. 256 (1946).

17. *Penn Central* regulatory takings analysis also plausibly applies because the totality of the Town's conduct "goes too far". It's unreasonable, unjust and farcical. *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014),

Due Process: Right To Cross-Examination & First Amendment

18. The vested property right involved also merits Due Process protection.

19. "Grandfathered" means "vested" in a way that is not defeated by a newly enacted zoning that applies to an entire area that becomes residentially zoned. New York State case law protects the continuation of those pre-existing, legal land-use rights. *Matter of Red Wing Properties v. Town of Rhinebeck,* 184 AD3d 577 (2d Dept. 2020), lv to appeal denied, 35 NY3d 918 (2020). (Br. 44). Protection continues until a municipality promulgates a constitutional local law under MHR Law § 10 to specifically

eliminate them. East Hampton Town's specific ordinance, § 255-1-40 supersedes any general local zoning code that imposed residential zones in 1957 and any later zones established for tradespersons. Specific laws supersede general laws. Reading Law: The Interpretation of Legal Text, Antonin Scalia & Bryan A. Garner (2012) ("General/Specific canon").

20. The Town's criminal prosecutions against Vanderveer propelled Vanderveer's application for a certificate memorializing the property's already vested commercial use (indoors and outdoors) to match his real estate tax bills.

21. Vanderveer's Due Process argument concerns his right to cross-examine adverse witnesses who spoke at the 2018 ZBA hearing, causing all income-producing commercial exploitation of his family's land to be divested, although Vanderveer had faithfully paid tax bills with a commercial classification. Without allowing cross-examination, the ZBA determination imposed the general 1957 residential zoning law, although Vanderveer's land is properly "grandfathered" under State law.

22. SO*6's statement that "**Vanderveer's application was subject to three levels of review**" is irrelevant. It's the quality of the State review that matters under the United States Constitution's Supremacy Clause, not the quantity of reviews by the Town's employed decisionmakers, coupled with an Article 78 review that denies any cross-examination or

substantial evidence review of all evidentiary testimony after the Town's decisionmakers opted to withhold Vanderveer's right to cross-examine witnesses before the zoning board.

23. SO*6 cites *Bens BBQ, Inc. v. County of Suffolk* No.20-3254, 2021 WL 1748480 (2d Cir. 5-4-2021) to support that **"[t]hese procedures greatly reduced the likelihood of erroneous deprivation.**" *Bens BBQ* incorrectly assumed that the restaurant could have filed "a special article 78 proceeding in which it would have had a hearing and presented evidence". There's no "evidentiary hearing" for Bens BBQ because no testimonial evidence was taken below "according to law". So CPLR 7803 & 7804 preclude a "substantial evidence review". (Br.'s, Reply Br.'s Point 6 & oral argument audio). *Crawford v. Washington*, 541 U.S. 36 (2004).

24. *Bens BBQ* directs us to *Luedeke v. Village of New Palz*, 63 F.Supp.2d 215, 222-23 (N.D.N.Y. 1999) (J.MacAvoy), which 1-) cites *Hamelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 2693, n. 9 (1991) (Scalia, J. ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."), 2 -) concludes that "[t]he mere availability of [an Article 78 proceeding does not comport with due process's guarantee of a meaningful opportunity to heard", and 3-) explains why SCOTUS held due process violations in *Goldberg* although *Goldberg*'s plaintiffs "could have commenced an

Article 78 or other proceeding challenging the decision to terminate their welfare benefits").

25. The ZBA dispute was about whether Vanderveer had "abandoned" the land's commercial nature for storage indoors and outdoors after 1956, not whether the landscaper engaged in commerce from 2012. Cross-examination was required, as in *Goldberg*. *Mathews v. Eldridge,* 424 U.S. 319 (1976) came later and didn't overrule *Goldberg*. SO*6-7 overlooked that cross-examination is required to challenge not only "credibility" but also "reliability" to ensure that the layperson ZBA Board would differentiate between "impermissible speculation" and "permissible inference" (*U.S. v. Pauling,* 924 F.3d 649 (2nd Cir. 2019)) when evaluating the witness's unscripted words during cross-examination:

> **"In any event, Vanderveer's complaint about the lack of cross-examination at the ZBA administrative hearing is unwarranted. The ZBA did not rely on a credibility determination, and there is no reason to believe that cross-examination would have affected its result."**

26. A judge's unproven speculation about whether "cross-examination would have affected its result" is not the correct standard to apply in hindsight. "Credibility" concerns lying, but "reliability" pinpoints accuracy and memory.

27. SO*6-7 is based on Judge Block's order ignoring SCOTUS precedent:

> "Additionally, state guidance documents identify the risk that a large public hearing will "get out of hand and degenerate into a name-calling session" as a reason to "limit" the right of cross-examination at zoning board hearings. New York State Division of Local Government Services, *Zoning Boards of Appeals*: *James A. Coon Local Government Technical Series*, 1, 32 (2015). The state therefore claims a secondary interest in conducting zoning board hearings in a relatively informal manner."

28. The FAVC and the motion papers show how ZBA procedures have a First Amendment Right To Petition aspect. "The right to free speech, of course, includes the right to attempt to persuade others to change their views and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 539 U.S. 703 (2000). See Justice Alito's concurrence in *Mahanoy Area School District v. B.L.*, 594 U.S. __(2001) about "bedrock principle" concerning "offensive or disagreeable" speech.

29. The State manual's use of "limit" doesn't mean "eliminate". *Herring v New York,* 422 U.S. 853

(1975) reversed a conviction where an ill-fated NY Criminal Procedure Law allowed judges to completely eliminating defense counsel's summation of evidence at criminal bench trials. *Herring* held summation is constitutionally required, although it may not change a judge's mind.

> "This is not to say that closing arguments in a criminal case must be uncontrolled, or even unrestrained. The presiding judge must be, and is, given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial."

30. The Coon manual should be judicially construed as disfavoring Prior Restraint of Free Speech. Censorship favors the *status quo* adverse to a landowner. Governments cannot use a "shorter cut" to the end. *Pennsylvania Coal v. Mahon.*

31. NY CPLR Article 78 places a landowner at a great disadvantage if the ZBA hearing doesn't include an opportunity for any cross-examination. The New York Court of Appeals

never expressly overruled *Matter of Colton v. Berman,* 21 NY 322*,* 329 (1967) decided 3 years before *Goldberg*. *Colton* concluded that cross-examination and a quasi-judicial characterization isn't required. *Colton* continues to unconstitutionally influence decisions. Yet, *Knight v. Amelkin,* 68 N.Y.2d 975 (1986) called special permit hearings "quasi-judicial". This Circuit's opinion should firmly adhere *Goldberg* into all of New York land-use board hearings, declaring a "right to cross-examination according to law". That would provide a later "substantial evidence review" under Article 78. It's a simple "fix".

32. There is a trending constitutional right to cross-examination at administrative hearings at universities, *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

33. The Town's self-serving deliberate removal of cross-examination from an EH Town ZBA hearing greatly disadvantages a landowner. It isn't "content neutral". It thwarts *de novo* review. *Armstrong v. Manzo*, 380 U.S. 545 (1980)

34. Cross-examination is important for correcting Error with Truth by using the Cross-Examinee's own words to persuade ZBA members who observe the witness's unscripted words and demeanor. It can reveal a neighbor-objector's retaliatory, pre-textual agenda.

35. The format used, designed for expediency, allows the ZBA to only listen to "competing narratives".

36. Both words "commercial" and "abandonment" have specialized and multiple meanings. Local laws didn't contain definitions in the hybrid civil- criminal code. SO*7 states:

> **"We disagree that the Code 'fails to provide people of ordinary intelligence a reasonable opportunity to understand what it prohibits.' *Cunney v. Bd. of Trs.*, 660 F.3d 612, 621 (2d Cir. 2011), quoting *Hill v. Colorado*, 539 U.S. 703, 732 (2000). The Town Code provides a clear definition for 'abandonment'. See East Hampton Town Code § 255-1-40(d). And the term 'commercial' is commonly used and sufficiently definite in this context."**

37. But *Cunney* found that code section unconstitutionally vague, violating Substantive Due Process. Judge Block and Justice Leis were troubled by the lack of a definition of "commercial" [SPA19] so there's no "core" meaning. Acts of "abandonment" aren't identified, only timing. The ZBA focused on the absence of ancient rent receipts, ignoring Vanderveer's longstanding "commercial use" relating to his low-lying marina property. By case law, any discontinuance without an intent to abandon doesn't meet New York's legal definition for "abandonment".

38. *Cunney*'s "common understanding and practices" is unacceptable for a Due Process analysis for hybrid civil-criminal codes after *Johnson v. U.S.*, 576 U.S. 591 (2015) and *Sessions v. Dimaya,* 584 U.S. __ (2018), requiring clear text. Both require sharp definitional focus. *Hill v. Colorado* is outdated under current First Amendment analysis. *U.S. v. Stevens*, 559 U.S. 460 (2010). The absence of definitions causes members to perform "eisegesis" of the code's text, i.e., speculation about whatever the interpreter wishes to find or thinks he finds there.

The complaint was legally sufficient and leave to amend is proper.

39. The FAVC presented enough factual allegations and legal theories to survive a Rule 12 motion. "[U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case…" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). It is sufficient for the complaint to "raise a reasonable expectation that discovery will reveal evidence of illegal[ity]." *Arista Recs., LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *accord Citizens United v. Schneiderman*, 882 F.3d 374, 380 (2d Cir. 2018) (for plaintiffs to "nudge[] their claims across the line from conceivable to plausible, they must 'raise a reasonable expectation that discovery will reveal evidence' of the wrongdoing alleged, 'even if it strikes a savvy judge that actual proof of those

facts is improbable" (alternation in original) (quoting *Twombly*, 550 U.S. at 556, 570)

40. Vanderveer cautiously requested leave to amend under Rule 15 if the Court found any pleading imperfections. [A667-668]Br.8]. SO*5 states:

> **"Vanderveer has not "identified [any] additional facts or legal theories – either on appeal or to the District Court – [that he] might assert if given leave to amend," and so the district court did not err in dismissing his suit without granting him leave to amend. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d *Cir. 2014); see also, e.g., Hayden v. County of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("[W]here the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied.")**

41. Vanderveer demonstrated at oral argument that he can plausibly allege claims under the 4th/14th Amendments because all criminal convictions were "reversed, on the law". Reversal triggered the "favorable termination" element of a federal malicious prosecution claim by the decision's text. *Heck v. Humphrey*, 512 U.S. 477 (1994),

People v. Vanderveer. Kee v. City of New York, No.20-2201 (2d Cir. 8-30-21) There were "palpable consequences". *Swartz v. Insogna*, 704 F.3d 105 (2d Cir. 2013).

42. *Sacerdote v. NYU* #18-2707 (2d Cir. 8-16-21) explains leave to amend:

> "the court should grant such leave 'freely … when justice so requires' pursuant to Rule 15(a)(2). This is a 'liberal' and 'permissive' standard, and the only 'grounds on which denial of leave to amend has long been proper' are upon showing of 'undue delay, bad faith, dilatory motive, [or] futility. The period of 'liberal' amendment ends if the district court issues a scheduling order setting a date after which no amendment will be permitted…"

43. SO*5 states the "**district court did not err in dismissing his suit without giving him leave to amend**". A *de novo* review for "futility" is compelled when a district judge provides no explanation. *Pontiac* fn. 70, citing *Panther Partners Inc. v. Ikanos Communications, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012).

44. No scheduling order precluded amendment. Amendment of a complaint can include new comparators for the Equal Protection claim and additional facts for the "Takings" claim. It can include facts *dehors* the record, such as this: The

Town listed Vanderveer's land on its developing list of 119 properties to purchase with Community Preservation Fund monies. Criminal charges promptly followed the Town's April 2015 letter notification, seeking physical access to appraise. The Desk Appearance Ticket in May 2015 and the Informations in June 2015 demonstrate bad faith conduct. The Town's chronological pattern of conduct is plausibly consistent with an unlawful "Taking".

Equal Protection Clause

45. SO*5 states that "**Vanderveer's claim fails under either standard because he has not identified any reasonably similar comparators**", citing cases before *Hu v. City of New York*, 917 F.3d 81 (2d Cir. 2019). *Hu* explains the "high degree of similarity" for a "class of one" claim. *Hu* also explains that "high similarity" isn't mandatory for traditional Equal Protection claims, which can be based on any "bad faith" reason. Parcels of land are different. Demanding perfectly matching comparators would force every 42 USC § 1983 landowner plaintiff to prove a "class of one" claim. Whether another property's status is adequately "similar" for the needed comparisons is a close jury question, not for Rule 12.

Preliminary Injunction

46. Vanderveer's requested preliminary injunction should be granted to prevent criminal prosecutions by the Town's attorneys *pendente*

> *lite*. The standards in *Whole Woman's Health v. Jackson,* ___ U.S. ___ (2021*)* are satisfied. Vanderveer is likely to achieve a permanent injunction as AT2 already determined in April 2021 that the local code charges don't pertain to prohibit the truck bodies, which aren't buildings or structures. *Viviani* held that criminal prosecutorial authority must be directly delegated by elected county district attorneys, yet non-neutral Town Attorneys continue to prosecute code violations without it. Vanderveer is subjected to imminent risk. No Town official submitted an affidavit stating the Town will refrain from criminal prosecutions against Vanderveer *pendente lite.*

Conclusion

The panel should grant rehearing and decide the case in Vanderveer's favor. The Second Circuit should grant rehearing *en banc* because *Knick* and *Cedar Point* have together changed the legal landscape after 35 years, increasing the importance of *Goldberg's* required cross-examination jurisprudence at all levels.

The Second Circuit denied rehearing without commentary. *En banc* rehearing allows the active judges to also review the text in *People v. Vanderveer* (in the context of leave to amend) and then speak uniformly about the "favorable termination" element in this Circuit's malicious prosecution jurisprudence (as Judge Bianco explained in *Kee*). See also *Thompson v. Clark*, SCOTUS #20-659 (granting cert).

E. The Denial of Rehearing/Rehearing En Banc without explanation

The Second Circuit denied hearing without commentary.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's erroneous decision cannot be reconciled with various decisions of this Supreme Court including *Goldberg v. Kelly*, because it conflicts with this Court's modern constitutional jurisprudence in numerous cases that recognize the importance of a party's Due Process Right to Cross-Examine witnesses in governmental proceedings that directly affect a legally protected property or liberty interest, where the municipality's zoning board's denial of such Right to Cross-Examine at a hearing on a landowner's application prejudicially creates a substantial risk of economic harm to a landowner by profoundly changing the nature of the land's use from commercial to residential.

Cross-examination is a fundamental part of Due Process in the civil justice system. As explained in Justice Scalia's discussion in *Crawford v. Washington*, 541 U.S. 36 (2004), the right was recognized in the colonies under the common law here and as far back as Sir Walter Raleigh's time in England for land ("copyhold") matters. It's afforded protection to the aeronautical engineer in *Greene v. McElroy*, 360 U.S. 474 (1959) who had worked for a private defense contractor and been subjected to an unconstitutional deprivation at an administrative hearing. With the

narrow exception of medical reports in *Richardson v. Perales*, 402 U.S. 389 (1971), the right to cross-examination is constitutionally embedded into administrative proceedings that are quasi-judicial.

Yet despite its general acceptance by legal scholars, some State officials and State Attorney Generals nevertheless resist it. That's occurred recently in the "date rape" context where universities seek to expel students for violation of a campus code of conduct. See *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (holding that Due Process compels the accused's right to cross-examine the purported "victim" and the campus investigators). When Secretary of Education Elisabeth DeVos created federal regulations that required cross-examination at such administrative hearings nationwide wherever federal grants were accepted by the colleges, Secretary DeVos was sued by 18 State Attorneys General. Yet both federal district judges opined that Due Process required that the accused students (or their representatives) be afforded an opportunity for cross-examination. *Commonwealth of Pennsylvania v. DeVos*, 480 F.Supp.3d 47 (D.D.C. 2020), No. 20-cv-01468 (CJN)(Aug. 12, 2020). *New York v. U.S. Dept. of Educ. & DeVos*, 477 F.Supp.3d 279 (S.D.N.Y. 2020), No. 20-cv-04260 (JGK) (Aug. 9, 2020).

The questions presented concern the nature and extent of the Right to Cross-Examine in the context of zoning board hearings and thereafter at the state judicial hearings which provide the first tier judicial review. How can this Court strike the proper balance of the rights of the parties, non-party participants, other "affected" or interested persons and the public interest?

If this Court rejects the District Court's misplaced reliance on New York's mid-level appellate case in *Matter of Halperin v. Board of Appeals of Zoning of City of New Rochelle,* 24 AD3d 768 (NY 2d Dept. 2005), a rejection for which Petitioner advocates, what legal analysis will be substituted in its place in New York?

Fortunately, there's a former federal judge who previously served on Florida's appellate bench and examined this same issue. In his concurring opinion in *Jennings v. Dade County,* 589 So.2d 1337 (Fla. 3d DCA 1991) (on rehearing), Judge Wilkie Ferguson, Jr. explained: "It is also fairly settled in this state that granting of variances, and special exceptions or permits, are quasi-judicial actions." This predicate statement was elucidated to emphasize the unanimous holding: "In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses and be informed of all of the facts upon which the commission acts." *Jennings*, and the cases following in its path, informed the Florida law explained in *Carillon Community Residential Association et al. v. Seminole County, Florida*, 45 So.3d 7 (Fla. 5th DCA 2010):

> "… The "core" of due process is the right to notice and an opportunity to be heard. *LaChance v. Erickson*, 522 U.S. 262 (1998); see also *Mathews v. Eldridge*, 424 U.S. 319 (1976). When assessing whether or not a violation of due process has occurred "the court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such deprivation there

> can be no denial of due process. *Economic Dev. Corp. of Dade County, Inc.* v. *Stierheim*, 782 F.2d 952, 953-54 (11th Cir. 1986) *** When applying these general due process principles to the specific context of quasi-judicial administrative hearings, it is important to distinguish between parties and participants. The extent of procedural due process afforded to a party in a quasi-judicial hearing is not as great as that afforded to a party in a full judicial hearing…. *** Nevertheless, a party to a quasi-judicial hearing, by virtue of its direct interest that will be affected by official action, "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts"…"

Carillon, however, distinguished the nature of the due process rights for neighboring landowners at rezoning hearings, finding that Florida doesn't require that non-party participants have the right to cross-examination of witnesses.

In *Eisenstein v. City of New York,* 556 U.S. 928 (2009), this Court opined that the status of a "party" is actually quite different than the status of a mere potential intervenor who is simply entitled to receive initial notice of the existence of a legal matter. Thus, there is precedent for closely examining the "status" or "role" before judicially determining the scope of rights associated with that particular role.

The Second Circuit erred by affirming the District Court's analysis that all cross-examination could be entirely eliminated at a local board hearing about a

land-use matter where the applicant-*party*, Petitioner Vanderveer, argued that his right for the continuation of the land's commercial use was already vested by virtue of the establishment of such commercial use prior to 1957 (when zoning code created a residential use in the area going forward for properties that did not already have such a "grandfathered" commercial use).

A party's Right to Cross-Examine adverse witnesses at a zoning board cannot be eliminated altogether in advance because of a fear that the hearing will become boisterous. "Democracy is messy, and it's hard. It's never easy." (attributed to Senator Robert Kennedy). "… [T]he magnitude of the legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 591 U.S. __ (2020). Governmental prohibition (or excessive limitation) of Petitioner's Right to Cross-Examine adverse witnesses (and to directly cross-examine the narrative soliloquy of his supporting witness) is tantamount to a "heckler's veto" that undermines our democracy and, as this case demonstrates, also facilitates a Takings Clause violation and unjustly subjects the landowner to criminal misdemeanor repercussions where the local code is a hybrid criminal-civil law.

Those who are appointed to serve on land-use boards have responsibilities to their communities and to the judges who later review their determinations. Cross-examination cannot be eliminated merely to reduce the time the members spend on each matter. New York's elimination of defense counsel's summation at criminal bench trials was swiftly rejected by this

Court in *Herring v. New York*, and a similar judicial analysis is appropriate here as well.

II. There currently exists an intolerable nationwide divergence in the scope of a landowner's Right to Cross-Examine witnesses at local zoning boards in the 50 States, and only this Supreme Court can clearly establish minimal standards made applicable to States under the Supremacy Clause to prevent violations of the First Amendment through unconstitutional Prior Restraint of Speech, violations of the Takings Clause through unconstitutional monetary "appropriations" of rental income from the natural use of unimproved land, and violations of both Substantive and Procedural Due Process through an untrained local board's application of local rules which contain undefined terms and vague standards in decisions that are not fairly reviewable by the usual judicial court system procedures which the State Legislatures deliberately circumvented.

Word limitations prevent a full explanation of the dizzying hodgepodge of cross-examination rules at State and municipal land-use hearings in America. It's clear that East Hampton Town's total elimination of the applicant-*party*'s Right to Cross-Examination at the local board hearing directly causes the elimination of the Right to Cross-Examine adverse witnesses at the first tier judicial review which is afforded under New York's only remedy: the CPLR Article 78 proceeding. If the zoning board hearing is not consistently characterized by New York as being "quasi-judicial"

(and indeed *Halperin* holds that it is not "quasi-judicial"), then cross-examination is not mandatory and consequently the "evidence [that] was taken" is not deemed to actually be taken "pursuant to direction by law" [CPLR 7803-4's criteria], as CPLR 7804(g) requires in order to obtain a "substantial evidence review" (with cross-examination sometimes afforded) in New York's judicial court.

So *Halperin*'s description of the ZBA hearing as not "quasi-judicial" (but merely "administrative") stands in direct conflict with Judge Ferguson's characterization of substantially the same type of ZBA hearing in Florida as "quasi-judicial". Despite *Halperin*'s (2005) characterization of a ZBA hearing as "administrative", in (1986) *Knight v. Amelkin,* New York's highest court referred to this category of zoning board application for something special as "quasi-judicial". That description puts New York on par with Florida in theory, even if not in practice. New York's Second Department Appellate Division essentially controls all of Long Island's cases because the highest state court has limited jurisdiction.

In Connecticut, an applicant-party has a right to cross-examine witnesses at the local zoning board hearing stage but not at the later judicial stage. See *Welch v. Zoning Board of Appeals*, 257 A.2d 795 (Conn. 1969). *Welch* appears to be constitutionally flawed where an applicant-party doesn't discover the facts of *ex parte* communications with a board member by a lobbyist who "registers" just days before the board hearing (the scenario in *Jennings*). That is why the *Jennings* panel commented that it had relied upon the

Florida appellate court's common law certiorari jurisdiction because the order sought to be reviewed constituted a departure from the essential requirements of justice by requiring a party to litigate a putative claim in a proceeding that could not afford him the relief requested and thus not affording him an adequate remedy.

Welch includes the right to cross-examine those who submit letters to boards, by requesting adjournments (so that those individuals can appear by subpoena).

The statute in Senator Whitehouse's State of Rhode Island limits a judicial court's review of a zoning board decision, effectively denying full plenary review and leaving much to unguided judicial discretion. Rhode Island General Laws – Title 45 -Towns and cities - § 45-24-69 Appeals to superior court.

Wayne, Illinois has decreed that "interested parties" have the right to cross-examine witnesses. Maryland board hearings may allow "formal cross-examination of any witness giving testimony before the board so long as the questioning is deemed by the board chairman to be relevant, material, and in proper form and so long as good order and respect of the witness can be maintained". It's a vague standard of limitation, given that both a patient temperament and tolerance for vitriol is a sensible requirement for a ZBA member who will likely be exposed at some point to a display of atrociously rude manners during questioning that is nevertheless constitutionally protected by the First Amendment. See *Mahanoy v B.L.* (J. Alito concurrence).

North Carolina requires that parties have opportunities for cross-examination at zoning board hearings. A well-articulated appellate court decision about the differing standards for first tier and appellate judicial is inspirational. *Cook v. Union County Board of Adjustment*, 185 N.C. App. 582 (N.C. Ct. App 2007). It shows how easily some constitutional principles can be summarized by a panel.

III. If uncorrected, the Second Circuit's erroneous decision will erode the significant gains in the recent advancement of modern constitutional "Takings Clause" jurisprudence, and it is only through *Knick* and *Cedar Point Nursery,* that federal courts have recently reacquired the jurisdictional authority to carefully examine, on a municipality by municipality basis, the constitutionality of the protocols employed in the decision-making by local land-use boards where the commercial use of property is legally protected in theory yet essentially unattainable in practice due to local enforcement of local criminal zoning laws which remain a formidable threat, where municipalities act to downgrade a property's constitutionally permissible use to minimize a local government's purchase cost for the land, and where local land-use boards hold the keys to reduce a State's housing shortages, unemployment and poverty.

Like the plaintiff in *Hachamovitch v. DeBuono*, 159 F.3d 687 (2d Cir. 1995), Petitioner's complaint "frames his suit as a general challenge to a supposedly unconstitutional procedural defect: the absence of any

mechanism", *id.*, that will afford him *and others* the constitutional protections to which he/they are entitled.

Federal courts already examine local zoning rules and their impact upon those required to make applications to land-use boards. Article II of the Americans With Disabilities Act prohibits discrimination in the "services, programs or activities" of a "government entity", including "counties, cities and towns". 42 U.S.C. § 12132 & 42 U.S.C. § 12131(A). Enforcement and administration of a zoning ordinance is a "service, program or activity" within its meaning. *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008); *START, Inc. v. Baltimore* County, 295 F. Supp. 569 (D. Md. 2003) (the administration of zoning laws is "service, program, or activity" within ADA's meaning). A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against disabled persons. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001). See 28 C.F.R. §35.130(b)(7). Federal law "preempts" a local municipal code that requires some statutory interpretation of text. The Supremacy Clause (US Const. Art. VI, cl. 2) applies. In *Sacred Heart Rehabilitation Center Inc v. Richmond Township, etc.* (ED Mich. 2010, 08-cv-12110) the DOJ's Civil Rights Division filed an amicus brief to support the land developer's standing and federal court jurisdiction.

The Town of East Hampton and its elected and appointed officials violated the Fifth Amendment's Takings Clause, as made applicable under the Fourteenth Amendment, because the local governmental

conduct unconstitutionally "appropriated" unto itself, in a "physical" (through unlawful criminal prosecutorial activity) manner in violation of this Court's precedent in *Horne v Department of Agriculture*, 569 U.S. 513 (2013). It appropriated a significant portion of the rental income monies which the landowner derived from commercial rental income arising from the vacant land's legal pre-existing non-conforming commercial nature as characterized in the Town's tax bills as commercial "storage, warehouse and distribution facilities".

The Town's failure to afford the landowner any Right To Cross-Examine the non-parties whose participation at the board hearing (and by submitted letters) posed a direct impediment to the landowner applicant-party's ability to obtain a written certification of the legal pre-existing non-conforming commercial use of the land, thereby subjecting the landowner to both past and continued harm by a substantially reduced market value of the land arising from the profound change which eliminated all income-generating commercial use in its natural unimproved state for storage, the involuntary imposition of a visual Scenic Easement to benefit the Town without any payment to the landowner, and it exposed Petitioner to risks of future imposition of monetary fines and jail time by the Town's own criminal enforcement of its zoning code by prosecutor unmonitored by the elected district attorney.

Justice Kagan's dissent in *Knick* recognizes that many more "complex state law issues" about "land-use disputes" will be adjudicated in federal courts, so it

makes good sense for this Court to formally announce rules concerning the scope of the Right to Cross-Examine that applies to applicant-parties, to interested or "affected" persons and to other participants who appear before a municipality's boards in land-use matters. It is even possible that imposing such rules on State and municipal boards (and State courts reviewing these local board decisions) will obviate the need for some federal litigation because the truth-finding function of the local boards will be enhanced at the first tier of review or, failing that, at the second tier review in the state judicial system. "There comes a point in time where we need to stop just pulling people out of the river. We need to go upstream and find out why they're falling in." (attributed to Desmond Tutu).

Our nation suffers as a whole when local land-use boards are permitted, under their State's civil procedure and "home rule" laws, to continue to subject landowners to unconstitutional procedures and vague codes about property use and the Ninth Amendment's unenumerated rights associated with that use. There are over 7,000,000 people who are homeless due to a shortage of available and affordable housing. There are homeowners who want to expand their houses (or obtain variances from bedroom occupancy limitations) to provide a loving home for grandchildren who will otherwise be placed in the foster care system due to miseries too painful to imagine. There are homeowners who seek to renovate a basement or a garage to accommodate a relative or close friend who is aged, infirmed, or is raising a young child all alone. There are homeowners who seek to use their homes for Bible study groups, to provide childcare for working parents,

and to offer children swimming lessons that may save their lives. And all of them have the constitutional right to cross-examine the opposing viewpoints of neighbors, some of whom can, in many jurisdictions, so easily fabricate past events and fears with impunity.

Without cross-examination, little hope exists for the thousands of people who require temporary housing in group settings built by landowner developers who have the financial wherewithal to help them safely recover from drug addiction due to a nationwide opioid crisis. To flourish both morally and economically, our society needs to have this Court weigh in.

Without cross-examination, our country's economy can be stymied as local boards consider applications for "working at home" permits during a pandemic.

New York's legislative scheme is concretely unconstitutional because it grants unbridled decision making to unelected local officials, without requiring compliance with the federal Constitution in addition to the State's, and then further limits appellate review though its Civil Practice Law and Rules Article 78 and its interpretive case law. The New York Legislature's intention to render federal courts, and perhaps even this Court, irrelevant by its artful drafting should be flatly rejected. See *Whole Woman's Health v. Jackson*, 595 U.S. ___, (2021). (Ch. J. Roberts' dissent: "…[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.").

The fundamental values envisioned by the Framers should be univocally affirmed through this Court's coercive authority under the Supremacy Clause.

IV. The Second Circuit's affirmance by Summary Order overlooked precedent which this Court has established concerning Rule 15's right to amend a complaint, the continued viability of Equal Protection Clause claims where the alleged "comparators" are sufficient to support a traditional "bad faith" claim without resorting to the high degree of similarity for a "class-of one claim", and the right to preliminary injunctive relief where the anticipated future harm is more than conjectural or hypothetical.

As explained in the petition for rehearing, Vanderveer should have been afforded a right to amend his complaint, should have been granted a preliminary injunction, and should have had his Equal Protection claim recognized as adequate.

Courts are generally required to articulate a reason for their decision making, *Clay v. U.S.*, 403 U. S. 618 (1971) so that it can be reviewed on appeal to ensure that there was no misplaced reliance on any unconstitutional grounds. There is no evidence that a chance to amend would have been futile.

An Equal Protection Clause claim under the traditional analysis continues to be based on "bad faith" and *Willowbrook v. Olech*, 528 U.S. 562 (2000) should not be misconstrued so as to permit the extinguishment of claims based on "bad faith" where the unique qualities of a parcel of land and its

neighboring parcels are necessarily going to differently impact the progress of the relevant governmental conduct. Indeed, the Seventh Circuit has doubted why any comparators are truly necessary where the "bad faith" is obvious. *Geinosky v. City of Chicago*, 675 F.3d 743 (7th Cir. 2012). The Second Circuit set the bar far too high for this land-use dispute, which is not simply a typical "regulatory taking".

The right to preliminary injunctive relief should be available where the consequences of the risk of waiting are so great that a landowner must endure the emotional uncertainty of not knowing from day to day whether he will be criminally prosecuted for local zoning code violations and lose his liberty interest by multiple consecutive jail sentences by a municipality's own local judge, where the criminal prosecutor is the Town of East Hampton's own salaried town attorney, to whom the elected Suffolk County District Attorney never directly delegated any criminal prosecutorial authority. These constitutionally intolerable past practices and facts demonstrated the concrete risk of harm to Petitioner's economic and liberty interests, and the Town of East Hampton never changed its course of conduct to meet what is nowadays required by *People v. Viviani*, 36 NY 3d 564 (NY 2021).

CONCLUSION

This is an important case which is certain to engender *amicus curiae* briefs from non-profit organizations who serve persons whose voices deserve to be heard and considered by this Court. Petitioner urges this Court to grant his petition so that States and local municipalities will be bound to ultimately adapt

their existing laws, codes, policies, customs and training to reflect the Constitution's guarantees embodied in the Bill of Rights and the Commerce Clause.

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/s/ Patricia Weiss, Esq.

PATRICIA WEISS, ESQ.
Counsel of Record
78 Main Street – Suite 14
Post Office Box 751
Sag Harbor, NY 11963-0019
Telephone (631) 725-4486
Facsimile (631) 725-0295
PWESQSAG@AOL.COM

Counsel for Petitioner