Case No.: 21-986

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 and 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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner argues that he should be able to use a relatively large mostly undeveloped lot with a small barn in one corner that has been for residentially zoned for over sixty years for broadly-defined "commercial" purposes based upon challenges to state and local procedural and substantive law governing whether and to what extent a property owner acquires a protected interest in a particular usage that they claim pre-dates and has continued since the enactment of the applicable zoning law. The questions presented by the Petition are:

I. Whether the Due Process Clause or the First Amendment require local land use boards to adopt a trial-like procedure wherein speakers are sworn and cross-examination is invited rather than public meetings where boards have discretion, but are not required in every instance, to swear witnesses and allow cross-examination?

II. Whether residential zoning, in general or as pertains to New York's law governing the existence and scope of vested property rights for pre-existing non-conforming uses, is an unconstitutional taking of private property for public use without just compensation in violation of the Fifth Amendment?

III. Whether, if someone is attempting to allege an Equal Protection Clause claim involving a highly individualized and discretionary land use determination, *Engquist v. Oregon*

Dep't of Agr., 553 U.S. 591 (2008) and all of this Court's prior guidance should be overturned in favor of Petitioner's claim that such matters should receive extremely heightened scrutiny wherein arguments regarding whether a proposed comparator's situation is sufficiently similar to constitute circumstantial evidence of unlawful intent or conclusory allegations of bad faith would be automatically treated as questions of fact for a jury and exempt from, *inter alia*, the plausibility pleading standard?

IV. Whether, notwithstanding their complaint failing to state a claim, and where the claims the litigant attempted to plead did not directly relate to a then-ongoing petty offense prosecution, a litigant is entitled to a broad injunction against future criminal prosecutions based upon arguments for a change in well-established state law?

V. Whether, under the circumstances of this case, the District Court and Court of Appeals erred in not granting leave to amend based upon a conclusory request in Petitioner's opposition, where Petitioner was unable to identify any additional facts or arguments that would plausibly support an amended pleading?

VI. Whether this Court should consider, for the first time on a Petition for Certiori, new arguments, evidence or hypothetical future causes of action that have not been previously considered by any other court?

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ZONING BOARD OF APPEALS TOWN OF EAST HAMPTON, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORI

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (Pet. App. 2, *et seq*.) is an unpublished summary order, but is available at 2021 WL 3745741. The Order of the District Court (Pet. App. 11, et seq.) is not yet published but is available at 2020 WL 7042669. The state court decision and order is unpublished but available in the Court of Appeals Appendix ("CAA") at page 612, *et seq*.; the Zoning

Board of Appeals' determination is unpublished but can be found at CAA. 77, *et seq*.; and the Town's Principal Building Inspector's determination that is the subject of the actions is found at CAA. 423.

JURISDICTION

Jurisdiction over some or all of these claims is questionable based upon ripeness and this Court's exclusive jurisdiction to review state court adjudications only by writ of certiori from "[f]inal judgments or decrees rendered by the highest court of a State." 28 U.S.C. § 1257; *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *but see Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) *and Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 644, n.3 (2002). However, the matter was dismissed for failure to state a claim without addressing that issue, and it does not affect the outcome.

STATEMENT OF THE CASE

Petitioner was the beneficial owner[1] of an approximately four acre lot in the Town of East Hampton, consisting of undeveloped land other than a small barn in one corner. (Pet. 2; CAA 78). The lot is located in a residential neighborhood with one-acre single-family zoning. (CAA. 79). Three years before

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[1] Pursuant to this Court's Rule 35, we have been advised by Petitioner's counsel that Donald Vanderveer passed away on January 30, 2022. Mr. Vanderveer brought, and the Town accepted and considered, the application that is the subject of this action based upon his interest in the property as a beneficiary of his mother's estate, although he never became the record owner, and never completed probate of his mother's estate after being named executor in 1986. (CAA. 673).

the Town enacted its first zoning ordinance in 1957, Petitioner's father asked its Board of Assessors to reassess the value of this property based upon the structure being a barn rather than a residence, and the board agreed to "change the designation to 'barn'" notwithstanding that the "appearance from the outside suggests a residence," and revised its assessment accordingly. (CAA. 72).

I. ADMINISTRATIVE AND ONGOING STATE COURT REVIEW OF PETITIONER'S APPLICATION FOR A CERTIFICATE OF OCCUPANCY

In 2017, after sixty years of residential zoning and with no intervening permits or other application history, Petitioner applied for a certificate of occupancy acknowledging a legally pre-existing non-conforming use. (CAA. 83, 430). In his application to the Town's Chief Building Inspector and his administrative appeal to its Zoning Board of Appeals, Petitioner explained that prior to the enactment of zoning his father had stored lumber and building materials inside the barn and in piles at the edge of the woods along the perimeter of the property. (CAA. 317, 479). Shortly after the Town's zoning law was enacted, Petitioner used the lot as a staging area for the construction of his nearby marina, and then over the ensuing decades used it to store wooden pilings and other items from the marina. (CAA. 500 – 501).

For approximately five years prior to applying for a certificate of occupancy, beginning in or around 2012, Petitioner rented the property to a landscaping company, leading to an influx and accumulation of vehicles, machinery, and equipment throughout the parcel. (CAA. 501). The landscaping company had

previously stored its trucks and equipment behind a metal working shop in a commercial-industrial district. (*See* CAA. 356-357). Petitioner had never previously rented the property, but argued that there were occasions where he or his father had allowed neighbors or friends to keep things there. (CAA. 79-80). Neighbors complained about nuisances, including noise and the accumulation of "junk." (CAA. 442-443). Upon investigation, the Town initiated a code enforcement action related to "truck bodies" on the parcel; however, the charges were later dismissed on appeal because — notwithstanding uncharged violations that may have applied — they were based upon the Town's building code, not its zoning law, and the accusatory instruments did not allege facts showing that any of the "truck bodies" qualified a "building or structure" to which that portion of the code applied. *People v. Vanderveer*, 71 Misc. 3d 133(A) (N.Y. App. Term., 2d Dept., 2021).

The initial adverse result in the code enforcement action prompted Petitioner to ask the Town to issue a certificate of occupancy recognizing a broadly defined grandfathered commercial use for "indoor and outdoor storage and warehousing," and he argued that the operations of the landscaping company were a continuation of that use. The Town's Principal Building Inspector found that there was no evidence of a sixty-year-old outdoor storage business, and the presence of a pre-existing non-conforming barn did not change the overall residential use of the property. (CAA. 423). Petitioner appealed to the Zoning Board of Appeals and, although given the opportunity to do so, did not request that the zoning board consider a discretionary variance but instead

relied solely on his grandfathered use argument. (CAA. 377-378).

The Zoning Board of Appeals upheld the Building Inspector's determination. The Board noted that the appeal solely related to "commercial outdoor storage" and the issue of "commercial indoor storage in the barn," which had only received passing reference in Petitioner's application, was not before it. (CAA. 305, *et seq*.). The Board issued a detailed determination finding that Petitioner had failed to establish the existence of the alleged pre-existing non-conforming use for outdoor storage, with multiple alternative grounds for denying the appeal (including that operating a landscaping company would be a different use). *Id*. Multiple people spoke for and against the application during the public hearing, but the Board's determination did not involve any credibility assessments. *Id*. Petitioner was represented by counsel; was not held to the rules of evidence; and was neither cross-examined by any members of the public nor did he or his counsel make a request during the meeting to cross-examine any of the speakers.

After the zoning board upheld the building inspector's decision, Petitioner pursued a further appeal via a special proceeding in state court for judicial review as to whether the determination was "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." C.P.L.R. § 7803. The zoning board's decision was upheld by the state trial-level court, and Petitioner appealed as of right to New York's intermediate appellate court, which remains pending. (CAA. 612, *et seq*.).

II. THIS FEDERAL ACTION

After an adverse decision was issued by the state trial-level court but before judgment was entered, Petitioner commenced this action raising the same arguments and explicitly seeking declaratory relief to impact ongoing state court proceedings, while also including a request for damages under 42 U.S.C. § 1983. (CAA. 4, 38, 63-64, 110, 612, 619, 680). The action was dismissed for failure to state a claim, which was affirmed by the Second Circuit Court of Appeals.

The Second Circuit explained, as to the Takings Clause, that the complaint "failed to plausibly allege that the economic impact of Defendants' actions could support a Takings Clause claim," or "that Defendants interfered with Vanderveer's reasonable, investment-backed expectations" because he is "permitted to develop the lot residentially, and it maintains significant value." (Pet. App. 5). Moreover, "clearing growth is *de minimis*, and tax payments are not an 'investment.'" Id.

As to the Equal Protection Clause claim, the Court of Appeals explained that Petitioner "has not identified any reasonably similar comparators," and the property he focused on as his most similar proposed comparator is "adjacent to commonly owned parcels for which the owners obtained a certificate for a pre-existing 'residence and tool shed' over fifty years before Vanderveer applied for his permit." (Pet. App. 6). The Second Circuit also found that Petitioner's request to amend, which was made via a conclusory statement within his opposition and not addressed by the District Court, should have been denied, as he had 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." (*Id*., at 7). (brackets omitted).

As to the Due Process Clause claims, the Court of Appeals reasoned that, not counting the still-pending state court appeal, Petitioner's application was subject to "three levels of review" that "greatly reduced the likelihood of erroneous deprivation;" and his "complaint about the lack of cross-examination" was "unwarranted" because the zoning board "did not rely on a credibility determination, and there is no reason to believe that cross-examination would have affected its result." (Pet. App. 8).

SUMMARY OF THE ARGUMENT

This matter merely involves the application of well-established principals of state and federal law. The matter does not raise important questions of federal law, but instead Petitioner raises arguments that are far attenuated from the facts of the case in an effort to have this Court reconsider decades of precedent and vastly alter its guidance regarding the Due Process Clause, Takings Clause, and Equal Protection Clause.

ARGUMENT

I. THE PETITION DOES NOT RAISE APPROPRIATE OR SUFFICIENT REASONS FOR GRANTING CERTIORI

A. Procedural Due Process:

a. This Case is Not the Right Vehicle for The Court to Broadly Re-Evaluate a Half Century of Jurisprudence

Petitioner asks the Court to revisit its last fifty years of guidance regarding procedural due process, going back to *Goldberg v. Kelly*, 397 U.S. 254 (1970), in support of his argument that land use issues must be determined using trial-like procedures. However, neither the District Court nor the Court of Appeals engaged in any type of novel or controversial analysis on these issues, but instead faithfully applied this Court's precedents. (Pet. App. 24 *citing* *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Due process is a flexible concept, and administrative hearings do not always require trial-like procedures. *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 261–62 (1987); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985); *Dixon v. Love*, 431 U.S. 105, 115 (1977). Petitioner draws analogies to cases involving the termination of a previously established benefit or right, but asking the government to recognize an alleged property right in the first instance is not the same as a terminating an established entitlement. *Cf.* *Goldberg v. Kelly*, 397

U.S. 254 (1970); *Hecht v. Monaghan*, 307 N.Y. 461, 469 (1954).

In this complaint, Petitioner was not challenging the denial of a specific request for cross-examination that was made during the hearing, and the statements at the hearing did not present any factual conflict or require any type of credibility determinations, but Petitioner instead challenged an alleged "custom and policy" of limiting cross-examination. (CAA. 22). Petitioner argues in his complaint that his attorney could have elucidated during cross-examination that a person's observations were limited both as to timeframe and vantage point, but those limitations were readily apparent and none of the factual statements at the hearing were inconsistent with Petitioner's own narrative.

The Court of Appeals did not misapply this Court's precedents, and the analysis in its unpublished Order was specific to the facts of this case, allowing this case to be easily distinguished if appropriate in the event of a future due process claim arises from a situation where "cross-examination would have affected its result." (Pet. App. 8).

Petitioner also, for the first time in seeking certiori, attempts to raise an argument that cross-examination during administrative hearings is a protected First Amendment right. Mr. Vanderveer was fully heard, at a reasonable time, place, and manner, and arguments regarding the sufficiency of state and local procedures should be addressed under the Due Process Clause, not the First Amendment. Moreover, a First Amendment claim was not pled in the complaint beyond a reference to the Free Exercise

Clause in an attempt to invoke the principal of "do unto others" as part of a legal argument. (CAA. 37).

b. There is No "Intolerable Nationwide Divergence" Over the "Minimal Standards" Required Under the Due Process Clause for "Local Board's Application of Local Rules"

There is no national divergence over the issues of whether and when, under the Due Process Clause, cross-examination is required in connection with local land use determinations. The scant authority on the issue is fact-specific and highly dependent upon state and local law and procedure. Rather than pointing to a divergent body of federal case law on this issue, Petitioner is referring to the variation in the substance and procedure of state and local law that is inherent in the federal system.

In what may be the only other federal case to directly consider the issue of cross-examination during zoning board hearings, the Northern District of Illinois found that – after examining nuances of Illinois law – there was "no compelling authority showing that [the applicant] was entitled to traditional forms of cross examination at the zoning proceedings." *Cyrus One LLC v. City of Aurora*, Illinois, 2019 WL 1112254, at *10 (N.D. Ill. Mar. 11, 2019)(appeal pending).

The authority cited by Petitioner does not show a national divergence on a federal question, but instead uniformly discusses the need for flexibility in land use hearings, with the particulars dependent upon state and local law and case-specific circumstances. *See*

Welch v. Zoning Bd. of Appeals of Town of N. Branford, 158 Conn. 208, 213 (1969)(argument that cross-examination was necessary is waived if not raised at the time of the hearing); *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582 (2007)(upholding local regulation giving board discretion to impose "reasonable and equitable limitations on… cross-examination of witnesses"); *Jennings v. Dade Cty.*, 589 So. 2d 1337, 1345 (Fla. 3d. Dist. 1991)(despite informality, "ex parte lobbying" is not allowed); *Carillon Cmty. Residential v. Seminole Cty.*, 45 So. 3d 7, 12 (Fla. 5th Dist. 2010)(upholding denial of interested parties' request to cross-examine because "land use hearings are not in the same form as traditional adversarial hearings").

Petitioner refers without citation to Maryland law, which — by choice and policy, not constitutional mandate — uses a more trial-like process that includes but gives its zoning boards the discretion to limit cross-examination, in contrast to other administrative hearings in that state where the "rules of evidence do not apply" and so cross-examination is not the norm. *Mostofi v. Midland Funding, LLC*, 223 Md. App. 687, 701 (2015); *Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 610 (2014). Notably, this type of procedure would significantly increase the difficulty and burden on an applicant, such as Petitioner, by limiting them to supporting their application with live sworn testimony rather than being able to collect written supporting statements or submit other informal documentation.

Land use, by its nature, involves a range of state and local nuance, but there appears to be a

general consensus that local land use boards require flexibility in how their hearings are conducted and should have discretion to allow or limit cross-examination on a case-by-case basis. In *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 300 (Cal. 2d Dist., 1996), an intermediate appellate court in California surveyed national authority on the issue and observed that "whether to allow" cross-examination "should be 'left to the sound discretion'" of the officials conducting the hearing. Similarly, Minnesota has held that "cross-examination is not an essential of procedural due process" in zoning board hearings, and to the extent it may be appropriate in a particular case it is waived if not requested during the hearing itself. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978).

In New York, zoning boards are authorized to swear in witnesses, issue subpoenas, allow for cross-examination, and use more trial-like procedures where appropriate, but the hearings are generally informal and are not governed by strict rules of evidence. (N.Y. Town Law § 267(1, 10)). Although cross-examination is not absolutely required, there may be circumstances where denying a request to cross-examine a witness during a zoning board hearing would be reversible error, or would compel the state court to hold a hearing to supplement the record as provided for under N.Y. Town Law § 267-c(2), but this case does not present such a factual situation and New York's courts do not appear to have issued a published decision addressing such a situation. Indeed, Petitioner cites to a treatise published by New York State in connection with providing training and technical assistance to local governments that encourages zoning boards to permit relevant cross-

examination, while explaining the need for discretion and flexibility in how the hearings are conducted. (NYS Dept. of State, Div. of Local Gov't Svcs, "Zoning Board of Appeals: James A. Coon Local Government Technical Series," (Rev. Sep. 2021)) (https://tinyurl.com/2p8vxzyk)

Washington has taken a similar approach, but had occasion to rule upon a situation where it found that denial of a request to cross-examine was reversible error, explaining that:

> Generally speaking, in the ordinary zoning or rezoning hearing… the cross-examination of persons expressing their views may not be appropriate or contribute anything of value to the fact-finding process. Where, as here, however, the hearing assumes distinctly adversary proportions, the proponents and opponents are represented by counsel, expert witnesses are called, and complex, technical and disputed factors… are involved, it would appear particularly pertinent to an objective factual evaluation of the testimony presented to permit cross-examination in a reasonable degree.

Chrobuck v. Snohomish Cty., 78 Wash. 2d 858, 870 (1971).

Petitioner is not asking this Court to resolve a national divergence on a constitutional question. Instead, Petitioner is seeking to federalize a uniquely

state and local process and change how land use boards operate nationwide based upon arguments about an issue that was not of significance in Petitioner's own case.

B. Takings Clause: This Court Has Not Invited the Federal District Courts to "Carefully Examine" Everyday "Decision-Making by Local Land-Use Boards."

Neither *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), nor *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), nor *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015) drastically changed this Court's Takings Clause jurisprudence or expanded the District Court's jurisdiction so as turn everyday state law property issues into federal claims as suggested by Petitioner.

Petitioner argues that *Knick* "tasked" the lower federal courts with "eschewing 'comity'" and "diligently reviewing" state and local land use matters. However, *Knick* did nothing of the sort, and instead merely found that a claim is ripe for adjudication once the governmental action that is alleged to be a taking is final, and the availability of a state court inverse condemnation proceeding is not a substitute for a federal remedy. *Knick*, 139 S. Ct., 2169. The Court did not question the requirement of finality, or in any way limit the availability of abstention in an appropriate case. *Id. citing Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). The dissenting Justices expressed concern about *Knick* being misapplied in the manner posited by Petitioner so as to make "federal courts a principal player in state land use disputes," but – contrary to Petitioner's

arguments -- the majority did not hold that the federal courts should take on such a role. (*Id.*, at 2189)(Kagan, J., dissenting). The "core principles of federalism, comity, consistency, and judicial economy" that weigh against "parallel… two-track" litigation of the same issues in both state and federal court remain intact. *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019).

If Petitioner's approach of asking the U.S. District Courts to engage in concurrent and simultaneous review of day-to-day local land use determinations proliferates, the lower courts may need to examine how ripeness, the limits of the District Court's jurisdiction, and existing abstention doctrines should be applied under such circumstances. See, e.g., *Ferncliff Cemetery Ass'n v. Town of Greenburgh, New York*, 834 F. App'x 665, 667 (2d Cir. 2021) and *Sagaponack Realty, LLC v. Vill. of Sagaponack*, 778 F. App'x 63, 64 (2d Cir. 2019). There may be situations where federal jurisdiction is triggered by independently actionable conduct or other exceptional circumstances, but Petitioner's Takings Clause claim is a direct challenge to a substantive determination that is the subject of ongoing state court review. Unlike asking a litigant to commence an inverse condemnation proceeding in response to a legislative act, judicial review is integrated into New York's land use and zoning procedures as a safeguard against erroneous decision-making such that that state action may not be final in the constitutional sense until that process has run its course. The reasoning in *Knick* that a federal forum was being denied through a "preclusion trap" does not apply to an Article 78 special proceeding, which by its nature is a limited rather than plenary action such that only issue preclusion, rather than claim

preclusion, applies. *Knick*, 139 S. Ct., 2167; *compare San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 336 (2005) *with Davidson v. Capuano*, 792 F.2d 275, 278 (2d Cir. 1986).

Here, however, the lower courts agreed with Petitioner that they can and should exercise jurisdiction, considered the complaint, and found it lacking. The jurisdictional issue was not well developed before the District Court, which declined a request to abstain in a footnote (Pet. App. 12); and jurisdictional considerations were not addressed by the Court of Appeals and would not change the outcome.

Petitioner also argues that *Cedar Point* expanded what can constitute a physical taking, but it merely clarified when and how matters involving temporary access or occupation should be evaluated under the Takings Clause of the Fifth Amendment rather than as a search and seizure under the Fourth Amendment or as a trespass or similar common law claim. *Cedar Point Nursery*, 141 S. Ct., at 2079. Petitioner does not raise any issue whatsoever of compulsory access or physical occupation, and instead is challenging how a use restriction was applied under particular circumstances. Residential zoning, by itself, is not a taking, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974). A challenge to such an ordinance or its application is the quintessential example of when the more flexible regulatory takings analysis is appropriate. *Cedar Point*, 141 S. Ct., 2072.

Petitioner incorrectly claims that both *Cedar Point,* 141 S. Ct. 2063, and *Horne*, 576 U.S. 350, were

based upon an alleged "right to income," but neither of those cases reference such a right or contain any similar analysis. Rather, *Horne* held that "[r]aisins are… private property… physical taking of them for public use must be accompanied by just compensation." *Id.*, 576 U.S., at 367. California was not taxing or regulating the production of raisins, they were taking "actual raisins." *Id,* at 361. There does not appear to be any federal or state case, ever, that has adopted a Takings Clause analysis similar to what is suggested by Petitioner. Rather, as the Court of Appeals observed, when someone claims that the use of their property has been unconstitutionally restricted although no physical invasion occurred, the more flexible regulatory takings analysis applies. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Although the protection afforded by the Takings Clause is by definition not coextensive with state law, property rights "have their foundations in state law," and the bundle of rights a person acquires through ownership is driven by the "background principles of the State's law of property and nuisance already placed upon land ownership." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1937-1944 (2017). New York's law regarding when and to what extent a protected property right exists as to a particular usage is fully consistent with — and has informed and been informed by — this Court's Takings Clause jurisprudence. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1969); *See also Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974). New York and the Town of East Hampton clearly have a well-established rational basis for establishing zoning

districts. Petitioner has not stated a claim under existing Takings Clause jurisprudence, and the argument that regulation of "raw land" should be considered a public use of private property necessitating compensation is not supported by any prior or otherwise reasonable interpretation of the Takings Clause.

C. Equal Protection Clause: The Second Circuit Does Not "Set the Bar Far Too High" by Requiring That Pleadings Contain More than a Conclusory Allegation of Bad Faith

Petitioner's arguments reflect a different understanding of the Equal Protection Clause than anything suggested by this Court's prior decisions. The Court has established a sliding scale of scrutiny corresponding to the degree of deference given to government decision-makers and how the presumption of constitutionality applies, if at all, to particular contexts and types of classifications. Petitioner is challenging an individualized decision that does not involve making a classification at all, but to the extent it is subject to an Equal Protection Clause analysis the lower courts correctly applied well-established existing law that the decision would be subject to the most deferential standard of review. Petitioner, however, asks the Court to impose a standard of review that goes beyond strict scrutiny.

Ordinarily, there is a high degree of deference and a strong presumption of constitutionality such that governmental classifications will be upheld if they have a rational basis. *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012); *Romer v. Evans,* 517 U.S. 620, 632 (1996). However, "context

matters." *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003). When the classification involves a characteristic with a history of being used to irrationally and intentionally single out a particular group for unfair treatment, or the context otherwise suggests an unlawful or discriminatory purpose, then there is little to no deference and the courts will engage in heightened scrutiny to determine whether the classification is substantially related to an important governmental objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *United States v. Windsor,* 570 U.S. 744, 772 (2013). When classifications are based upon race or national origin such that they appear to facially conflict with the history and text of the Fourteenth Amendment, or overlaps with an apparent facial conflict with the core protections of the First Amendment, the presumption of constitutionality gives way to strict scrutiny and a presumption of unconstitutionality wherein such classifications can be reconciled with the Equal Protection Clause "only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S., 326.

An unlawful classification can be shown when someone is singled out and "intentionally treated differently from others similarly situated" if "there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

In some instances, the Second Circuit has held that the "existence of highly similar circumstances" by itself "provides the basis for inferring" unlawful intent, and thus "a plaintiff may prevail… based on prima facie identical circumstances alone" without

additional "proof of a defendant's subjective ill will." (Id., at 94). *Hu v. City of New York*, 927 F.3d 81, 92 - 94 (2d Cir. 2019). When a case calls for heightened scrutiny due to "protected status (e.g., race or a constitutionally-protected activity)," or if the circumstantial comparison evidence is being used in addition to other evidence of "personal malice or ill will," then disparate treatment from comparators with a lesser degree of facial similarity, but still a "reasonably close resemblance," can be used to support a claim. *Id.*, 91 and 99 (2d Cir. 2019).

This Court has made clear, however, that such an inference cannot be drawn based upon similarity alone where the nature of the governmental action at issue involves "discretionary decision making based on a vast array of subjective, individualized assessments" without "a clear standard against which departures, even for a single plaintiff, could be readily assessed," such as when a "zoning board" is "exercising discretionary authority based on subjective, individualized determinations." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602 – 603 (2008). While zoning boards may at times repeatedly apply a clear standard in very similar circumstances, such as in *Olech,* they are often tasked with making extremely individualized and fact-specific determinations such as those in this case.

Petitioner incorrectly argues that the Seventh Circuit has questioned whether comparators are "truly necessary" and claims that it allows cases to proceed to discovery based solely upon conclusory allegations of bad faith. To the contrary, Petitioner is referring to a case where a particular complaint pled specific facts showing that someone was "clearly… targeted" with an "extraordinary pattern of baseless

tickets." *Geinosky v. City of Chicago*, 675 F.3d 743, 748 (7th Cir. 2012). While not requiring the plaintiff in that case to specifically name "another random person in Chicago," the Seventh Circuit did require that the complaint contain factual allegations plausibly alleging that "others were not being subject to the same kind of harassment." *Del Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 914 (7th Cir. 2012). Indeed, the Seventh Circuit has observed that any perceived split with other circuits "may be only superficial" because it takes "much the same approach" of requiring that plaintiffs "describe those who are similarly situated in all material respects (i.e., others who have been treated more favorably), how plaintiff was treated differently, and that there is no objectively reasonable basis for the defendant's action;" and, as "a practical matter," plausibly stating a claim under circumstances that are less "obvious" than *Geinosky* will require being "more explicit" about the proposed comparators. *Del Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 914 (7th Cir. 2012) *citing Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1218 (10th Cir. 2011). The Second Circuit does not appear to have been presented with a similar fact pattern to *Geinosky*, which is not remotely similar to Petitioner's circumstances.

Although not citing *Engquist,* Petitioner's fourth proposed question asks the Court to adopt a completely inconsistent approach from that case, and every other case, arguing that equal protection claims involving highly individualized land use decisions should be subject to a level of scrutiny exceeding that which is applied under any other circumstance and automatically sent to a jury to assess whether there was "any 'bad faith.'"

Petitioner has not been unconstitutionally singled out. On the face of the complaint, Petitioner received all applicable protections of the East Hampton Town Code, New York State law, and Federal law equally with every other person within the jurisdiction of the Town of East Hampton.

II. OTHER PERCEIVED MISSTATEMENTS OF FACT OR LAW IN THE PETITION THAT BEAR ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORI WERE GRANTED

Petitioner's arguments are largely based upon a fundamental misunderstanding of or attempt to up-end basic well-established tenets of various areas of state and federal law.

A. New York Law Regarding Zoning, Land Use, and Property Rights

To the extent Petitioner appears to argue, citing to the Magna Carta, that "raw land… cannot be locally regulated," this sovereign citizen type argument is both historically inaccurate and astoundingly inconsistent with all applicable authority and the basic nature of land use regulation. (Pet., at Pg. 9).

Municipal home rule, the "principle that all local concerns and affairs should be regulated by the voice and action of the local community," has been deeply engrained in New York since the State was first formed and largely continue its prior system wherein Towns, including East Hampton, each primarily controlled their own jurisdictions. *People ex rel. Hon Yost v. Becker*, 203 N.Y. 201, 206 (1911); *See also Rottenberg v. Edwards*, 103 A.D.2d 138, 140 (2d

Dept. 1984). Towns in New York have zoning authority, general police powers, and authority to supersede statewide laws unless specifically prohibited by the State from doing so. N.Y.S. Constitution, Art. 9, §§ 1 – 3; N.Y.S. Home Rule Law § 10.

Each Town's zoning law contains provisions governing the recognition and continuation of pre-existing land uses, consistent with – at a minimum – New York State law that "if, and only if, enforcement of the ordinance would, by rendering valueless substantial improvements or businesses built up over the years, cause serious financial harm to the property owner," *People v. Miller*, 304 N.Y. 105, 109 (1952), then a person is protected against the "immediate elimination" of that use, *Toys R Us v. Silva*, 89 N.Y.2d 411, 417 (1996), and entitled to continue the prior usage for at least a reasonable "grace period." *Vill of Valatie v. Smith*, 83 N.Y.2d 396, 400 (1994).

While the laws of each Town, Village, and City differ as to specifics, each has a mechanism to request a document (variously known as a certificate of occupancy, certificate of existing use, letter in lieu, or similar titles), defining the then-current usage and confirming that it complies with the applicable local code as a legally pre-existing non-conforming use.

In seeking recognition of a legally pre-existing non-conforming use, a property owner has a "high" "burden of persuasion." *Pelham Esplanade, Inc. v. Bd. of Trustees of Vill. of Pelham Manor*, 77 N.Y.2d 66, 70 (1990). A "party advancing a prior nonconforming use exception to a zoning ordinance must establish specific actions constituting an overt manifestation of its intent to utilize the property for the ascribed

purpose… at the time the zoning ordinance became effective." *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 138 (2010). While such applicants are not bound to the rules of evidence, a person alleging that a business pre-dates and has continued since the enactment of a zoning law is expected to support their application with the type of material "typically available to document a legitimate business operation." *Toys R Us*, 89 N.Y.2d, 423.

As nonconforming uses are "detrimental to a zoning scheme," the "overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination." *Id.*, 89 N.Y.2d, 417. Thus, nonconforming uses are narrowly defined, and local laws generally prohibit any material change in the nature, scope, location, or intensity of the use. *See 550 Halstead Corp. v. Zoning Bd. of Appeals of Town/Village of Harrison*, 1 N.Y.3d 561, 562 (2003).

In East Hampton, uses other than those specifically listed for a particular zoning district are generally prohibited. (East Hampton Town Code § 255-2-40(b); Ch. 255, Attachment 2). Pre-existing "nonconforming uses are permitted to continue," but they cannot be "physically expanded" or "changed," and will be considered abandoned if they are discontinued for a certain period, with varying timeframes depending upon the circumstances, and in the case of vacant land consisting of the use being "discontinued for any reason for a period of 12 months or voluntarily for six months." (East Hampton Town Code § 255-1-40).

B. New York Law Regarding Administrative and Judicial Review of Land Use Decisions

Each town has a zoning board of appeals that hears appeals from decisions issued by administrative officials, but which has greater discretion than those officials and the ability to grant variances and similar relief. NY Town Law §§ 267-a and 267-b. Zoning boards are required to conduct their business as public meetings, conforming to New York's open meetings law, and the board's chairman has discretion to "administer oaths and compel the attendance of witnesses." (Town Law § 2677(1 and 10)). Generally, zoning board hearings are "quite informal and that the positions of the contending parties need not be put into the form of sworn testimony." *Von Kohorn v. Morrell,* 9 N.Y.2d 27, 32 (1961). *See also Sasso v. Osgood*, 86 N.Y. 2d 374, 384, n.2 (1995).

Persons aggrieved by a zoning board determination have the right to seek judicial review via a special proceeding under Article 78 of New York's Civil Practice Law and Rules. Article 78 has different procedures and standards of review depending upon whether the administrative appeal is from an agency that is required to use trial-like procedures or one that, like a zoning board, operates through open meetings like a legislative body. *Sasso*, 86 N.Y. 2d, 384, n.2 (1995). Generally, challenges based upon the record before an agency that is required to follow trial-like procedures are automatically sent to the State's intermediate appellate court, whereas matters involving entities that operate like a legislative body are considered by

the state's general jurisdiction trial court in the first instance, with the trial court's decisions subject to intermediate appellate review as of right from any final judgment and most interlocutory orders. C.P.L.R. § 7804(g); C.P.L.R. § 5701. As noted by Petitioner, agencies are sometimes referred to as "quasi" judicial or legislative, but those are imperfect descriptors; similarly, both types of administrative agencies may use the words "hearing," "testimony," or "record," notwithstanding different procedural contexts. *See Sasso*, 86 N.Y. 2d, 384.

In reviewing zoning board decisions, the issue before the state court is whether the determination was "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." C.P.L.R. § 7803(3). These four types of reversible errors incorporate, and are broader than, the Due Process Clause and other constitutional protections. *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 627 (2004). Although "deference must be given to the discretion and commonsense judgments of" local land use agencies, *Retail Prop. Tr. v. Bd. of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 196 (2002), state law expressly gives the reviewing court discretion in zoning board cases to re-open the administrative record to take testimony or other evidence, N.Y. Town Law § 267-c(2), and in any type administrative review the trial court has discretion to allow discovery, and is required to conduct a trial if the parties' written submissions present a "triable issue of fact." N.Y. C.P.L.R. § 7804(h); N.Y. C.P.L.R. §§ 409 – 410.

Article 78 proceedings, like other special proceedings under New York law, are an expedited procedure that is limited in scope. Litigants can seek monetary damages or join other claims in what is sometimes called a "hybrid" proceeding, but are not required to do so, and thus a judgment from a special proceeding will result in issue preclusion but not claim preclusion. *See Burgos v. Hopkins*, 14 F.3d 787, 791 (2d Cir. 1994).

C. Tax Assessment Property Type Descriptions Are Not Zoning Definitions

In referencing the assessed value of the parcel, the Court of Appeals was merely making the point that, on the face of the complaint and the documents incorporated therein, this remains a very valuable piece of property. (CAA. 186, 365 - 367). Contrary to Petitioner's arguments, the Second Circuit in no way suggested that the viability of this complaint hinged upon the precise valuation amount, nor can Petitioner make a non-frivolous argument that residential zoning has rendered this property valueless. The Wall Street Journal recently profiled the thriving residential real estate market in this neighborhood, describing it as "an enclave in East Hampton with sweeping views of Gardiners Bay… a community known as a haven for artists such as Jackson Pollock" and others. ("Welcome to Springs, an East Hampton Enclave That's Not Like the Others," by Claire Wilson, Wall Street Journal, August 18, 2021)(https://tinyurl.com/yckndwnt).

State-wide property type classification codes are broad categories that are used for statistical purposes; they are not the same, and nowhere near as specific as, local zoning code definitions. They also do

not impact valuation, except to the extent they may correlate as a factual matter to what properties an appraiser may choose to consider as part of their analysis. *See* N.Y. R.P.T.L. § 305-a. As with other local jurisdictions outside of New York City, real estate taxes in East Hampton are based upon a uniform percentage of property value, and the tax rates do not differ between commercial and residential properties (other than to the extent certain state-wide exemptions or discounts may only apply, for example, to a person's primary residence). See N.Y. R.P.T.L. § 305(2). Contrary to Petitioner's argument, the assessed value is market value, or a fixed percentage thereof. *Foss v. City of Rochester*, 65 N.Y.2d 247, 253 (1985). If Petitioner disputes the valuation of his property, there is a relatively simple procedure to grieve the assessment. (N.Y. R.P.T.L. § 700, et seq., et seq.).

D. Criminal Enforcement of Town Code Violations

Petitioner's complaint did not assert any causes of action related to the petty offense prosecution, and merely referenced it and the then-pending appeal as background for why Petitioner brought his application for a certificate of occupancy recognizing an alleged pre-existing nonconforming use. (CAA. 14 - 15). Ordinarily, if there are related issues, a zoning board determination would be made first, as filing a zoning board appeal triggers an automatic stay of all related proceedings except in situations presenting imminent peril to life or property. (N.Y. Town Law § 267-a). Here, however, Petitioner did not seek a certificate of occupancy until after a guilty verdict. The proceedings also did not involve the same factual questions or

evidentiary standards, and the zoning board correctly recognized that the proceedings were separate and distinct, did not give the conviction with a then-pending appeal any preclusive effect, and made a completely independent determination. (CAA. 307).

With respect to prosecutorial authority, New York's unified court system has multiple types of limited jurisdiction lower-level trial courts that hear matters involving small claims, traffic infractions, and petty offenses, which includes "justice courts" whose jurisdiction is limited to particular towns and villages. N.Y.S. Const, Art. VI, §17; N.Y.S. Uniform Justice Court Act §§ 201 and 2001, *et seq*. The District Attorney is an elected county official who oversees prosecutions in "the courts of the county," (N.Y.S. Cons. Art. XIII, § 13; N.Y. County Law § 700), but state law also provides that each town can authorize its town attorneys to prosecute town code violations in the justice court for that town. (N.Y.S. Const, Art. VI, §17; N.Y. CPL § 10.10; Town Law § 268; *Town of Brookhaven v. Durao*, 21 A.D.3d 1083, 1084 (2d Dept. 2005); *Town of Babylon v. Inv. Properties, Inc.*, 85 A.D.3d 1013, 1013 (2d Dept. 2011). Although arguments similar to Petitioner's have been repeatedly rejected by the state courts, "to avoid any future confusion" Suffolk County's District Attorney has expressly delegated prosecutorial authority for code enforcement actions to the respective towns' attorneys. (A. 250 – 251).

With respect to the specific charges, all of the charges were brought under Chapter 102 of the Town Code, the Town's building and fire safety code, without reference to Chapter 255, the Town's zoning code. (CAA. 532 – 540). The complaint does not allege

a malicious prosecution action and, when describing the circumstances as part of the factual background, does not allege any type of malice, but instead explains that the code enforcement officer was "newly employed." (CAA. 14).

III. THE COURT OF APPEALS PROPERLY DECLINED PETITIONER'S REQUEST FOR LEAVE TO AMEND

Petitioner did not move to amend, did not submit a proposed amended pleading, and did not – either before the District Court, before the Court of Appeals, or here – propose any viable amendment, but instead simply asks in conclusory fashion for blanket leave to amend. On appeal, Petitioner argued that if given leave to amendment he would reiterate his arguments for a change in the law regarding what level of similarity among comparators is necessary for different treatment, by itself, to support an Equal Protection Clause claim.

Here, Petitioner raises entirely new arguments in seeking certiori, claiming that the Town added the property to a list of properties to be appraised, and that if allowed to amend they would assert a malicious prosecution claim. However, appraising the property is completely benign and, indeed, Petitioner also argues that the Town should do so more often. A malicious prosecution claim would be meritless for many reasons, but has never been pled, is separate from the certificate of occupancy request that this complaint related to, and was not raised let alone adjudicated on the merits in connection with Petitioner's request for leave to amend.

IV. PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION IMMUNIZING THIS PROPERTY FROM COMPLIANCE WITH THE TOWN CODE WAS PROPERLY DENIED

Petitioner's claims lacked merit, and his request for an injunction did not even relate to the claims that he attempted to assert but instead to ancillary arguments for a change in state law on an issue that was merely referenced in the complaint for background purposes. Petitioner essentially asked the Court to grant him some type of fiefdom where he would be immune from state and local law. Aside from the remarkable absence of merit, the risk of facing a hypothetical future summons for a petty offense, with all applicable procedural safeguards, is far from irreparable harm.

Petitioner argues that such an injunction is compelled by *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021), but other than articulating the preliminary injunction standard it is not clear how that case has any bearing on these issues. If anything, this Court declining to issue an injunction against the enforcement of a state law notwithstanding a serious constitutional issue due to procedural and jurisdictional concerns that had not yet been addressed by the lower courts weighs strongly against Petitioner's request for an injunction in this case.

CONCLUSION

WHEREFORE, it is respectfully requested that the petition for a writ of certiori be denied; together with such other and further relief in Respondents' favor as is deemed just, equitable, and proper.

Dated: February 14, 2022

Respectfully submitted,

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