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, 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

REPLY BRIEF FOR PETITIONER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES AND REGULATIONS

ARGUMENT

I. The Petition Raises Appropriate and Sufficient Reasons for Certiorari

A. Procedural Due Process

a. This case is the Right Vehicle for The Court to Broadly consider and apply its current collective updated Jurisprudence regarding the Right to Cross Examination in Administrative and Civil Cases, particularly those that can have criminal law implications.

This case is the right vehicle to provide this Court with an opportunity to consider and apply its collective jurisprudence regarding The Right to Cross Examination in administrative and civil cases. It's particularly important to do so in the context of this case because the East Hampton zoning law that was implicated at the ZBA hearing is a hybrid civil/criminal law.

In *Hemphill v. New York*, SCOTUS #20-637 (Jan. 20, 2022). This Court agreed with Hemphill that New York's cross examination jurisprudence fell short of what the Sixth's Amendment's Confrontation Clause required. It states at III. A.:

> "One of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment, which states: 'In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him."

Hemphill explains the history of case law which has now firmly rejected the admission of testimonial statements of a person who was not cross-examined even if a judge determines that such statements had "adequate indicia of reliability."

Hemphill acknowledges that the "Sixth Amendment leaves States with flexibility to adopt reasonable procedural rules governing the exercise of a defendants' right to confrontation" but found New York's door-opening principle to be a "substantive principle of evidence that dictates what material is relevant and admissible in a case." It explained that the Clause commands not that evidence be reliable but that reliability be assessed in the particular manner: by testing in the crucible of cross-examination because that is how reliability can best be determined.

This petition asks this Court to keep moving in that same direction by also examining New York's cross examination jurisprudence in the civil and administrative contexts, in order to refine and balance relevant constitutional principles (Amendments I, IV, IX, XIV) where the state government and its municipal subdivisions exercise enormous power over the use of real property which is privately owned.

This Court has been inching toward announcing precedential guidelines that address what occurred in this scenario.

In *Sprint v. Jacobs*, 571 U.S. 69 (2013), this Court made clear that where an administrative agency performs multiple functions in many roles which may seem blurred, we look to the nature of the specific

function being performed to guide the judicial analysis (holding federal abstention improper in *Sprint* because the Iowa Utilities Board performed multiple functions and *Younger* abstention applies only to the three "exceptional circumstances identified in *NOPSI* but no farther.") See *New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350, 373 (1989), explaining *Younger v. Harris,* 401 U.S. 37 (1971). It also held that: "Abstention is not in order simply because a pending state-court proceeding involves the same subject matter."

In *Dept. of Commerce v. New York*, 588 U.S. __ (2019), this Court made clear that the judiciary plays an important role in reviewing whether or not the administrative agency's determination was pretextual and inadequate, thus requiring a deeper look upon remand.

Petitioner argues that a correct application of *Mathews v. Eldridge*, 424 US 319 (1976) should not have led to a Rule 12 dismissal because Petitioners' allegedly "vested" rights to a commercial land use were tantamount to an established entitlement in *Goldberg v. Kelly*, 397 U.S. 254 (1970). Thus, Petitioner should have been afforded the right to cross examination at the local administrative land use board hearing in the Town of East Hampton because New York State law does not guarantee Petitioner that right to cross-examination at the CPLR Article 78 hearing which is the only limited (and procedurally flawed) judicial review that New York statutory law affords to him.

New York has lagged behind in its cross-examination jurisprudence. Both *Hemphill* and *Goldberg* were cases from New York.

The application of principles of Due Process cannot remain so "flexible" and amorphous that federal and state judges across the country are compelled to guess at its relevance for land use matters that concern the "legal infrastructure" of the hearing itself rather than the board's day to day "operations". Moreover, what is required at the local land use boards may vary from state-to-state, depending upon whether or not a State has enacted a statute that affords a *de novo* review and cross-examination of all witnesses once the judicial review commences. Petitioner's main point is that he had no guaranteed right of cross-examination either in the Town of East Hampton nor in the New York State Court system.

The complaint squarely raised the issue of Respondents' denial of cross examination to Petitioner, citing to case law that supports that right.

This case illustrates why this Court should consider the need for greater clarity on the relevance on the right to cross examination in zoning board hearings across the nation. Such hearings have further implications under state substantive, evidentiary, procedural, and criminal law. In New York, local code violations can result in local judges' sentences of jail time for misdemeanors or violations, and judges in New York's local courts need not be law-trained.

This Court has held unconstitutional some State procedures that were constitutionally inadequate in

terms of the "legal infrastructure" being utilized by the State decision makers. See *Armstrong v. Manzo,* 380 U.S. 545 (1965) (finding a Texas post-adoption hearing was not sufficient to satisfy the "meaningful opportunity to be heard" prong of Due Process because the burden of proof had been shifted to divorced biological father to prove his parental rights were entitled to Due Process protection, under Texas's circuitous logic). See also *Zinnermon v. Burch*, 494 U.S. 113 (1990) (Florida's established procedures for voluntary and/or involuntary placement in mental institutions did not satisfy Due Process because mental competence was not examined before admission insofar as a "voluntary" characterization logically requires the prerequisite mental competence).

This is a case worthy of full consideration by a grant of certiorari because it affects important real property rights which are constitutionally protected under both the Due Process Clauses and the Takings Clause.

Although this case concerns the Applicant-Landowner's right to utilize cross-examination at zoning board hearings, this Court would also be able to more broadly consider the corollary related issue of whether there are "interested persons" (non-parties, such as neighbors) who should have also had the right to cross examination of the Applicant and the Applicant's witnesses (e.g. architects, landscape designers, environmental experts).

In *Carillon Cmty. Residential v. Seminole Cty*, 45 So.3rd 7 (Fla. 5th Dist. 2010), Florida's appellate Court upheld a denial of interested persons' request to cross examine the applicant. Florida's Supreme Court denied

review. However, by contrast, in *People ex Rel Kaeren v. Lisle*, 202 Ill. 2d 164 (Ill. 2002), the Illinois Supreme Court recognized the rights of such interested persons, writing:

> "The primary issue presented by this appeal is whether a landowner whose property abuts a parcel subject to the proposed annexation, special use, and rezoning petition can be wholly denied the right to cross-examine witnesses at a public hearing regarding the petition. … The appellate court held that the complete denial of the right of interested parties to cross-examine witnesses at the village's joint public hearing was improper … We agree and hold that, because the joint hearing included a special use petition, due process required that interested parties be afforded the right to cross-examine witnesses."

The Illinois Supreme Court's 2002 opinion in *Kaeren* supports cross-examination. Yet, Respondents' brief cites to *Cyrus One LLC v. City of Aurora*, *Illinois*, No. 18 C 272, 2019 WL 1112254 (N.D. Ill. Mar. 11, 2019) (appeal pending) for the opposite holding. Therefore, a closer examination of Judge Jorge L. Alonso's memorandum opinion and order becomes important.

By the time Judge Alonso wrote his opinion in *Cyrus*, the Illinois State Legislature had already promulgated an amendment to Illinois law that had changed the legal landscape. Judge Alonso concluded that the State Legislature had legislatively recharacterized that sort of municipal hearing as a "legislative" one rather than a "quasi-judicial" one.

Finding that the "corporate authorities of municipalities and counties are not well-suited to conduct mini-trials" (quoting legislative record), the Legislature made a significant change to the statutory law so that whatever occurred at the municipal hearing (i.e., whether there was cross-examination by applicants, interested persons or not), those zoning proceedings would be considered "legislative", and thus they would all be "subject to *de novo* judicial review where new evidence may be presented before the trial court" under Illinois case law. Judge Alonso explained:

> "The crux of CyrusOne's claim is based on *E&E Hauling*, which is outdated. Zoning proceedings are no longer considered "mini-trials" or administrative in nature where judicial review is limited to an existing record. Instead, zoning proceedings are considered legislative and are subject to *de novo* judicial review where new evidence may be presented before the trial court. *See Conaghan v. City of Harvard*, 60 N.E.3d 987, 999 (Ill.App.Ct. 2016)…"

Vanderveer would be in a different situation if New York State law afforded him an opportunity for a *de novo* judicial review where he would have had a guaranteed right to subpoena and cross-examine adverse witnesses in a *de novo s*etting. But NY CPLR 7803 and 7804 didn't afford Vanderveer an assured *de novo* review nor any opportunity to subpoena and cross-examine witnesses, neither "adverse" nor "friendly".

Importantly, in analyzing the Due Process concerns, Judge Alonso looked at the *Cyrus* case to judicially analyze the coordination between the local municipal

board initial proceeding and later more thorough scope of judicial review. That's the type of review sought in this Petition. See, for example, Kentucky's two-tier scheme for a *de novo* judicial review of a decision from a local judge who isn't law-trained, *North v. Russell*, 427 U.S. 328 (1976).

Which "interested persons" have the right to cross examine at a land use hearing may depend on criteria recently announced by this Court in *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021), i.e. whether or not there exists sufficiently concrete, imminent or actual, harm or injury to establish the denial of cross examination to a person who is adversely affected by something more than simply a bare procedural violation which would be inadequate to establish Article III standing.

Insofar as "special use" permits for land use is concerned, where important real property rights can be taken away by governmental action and processes, the Right to Cross-Examination should be no less than the Right to Cross-Examination under the Confrontation Clause, as embraced in *Hemphill*. The word "may" used in some text can be problematic because it leaves too much discretion to a judge, as *Hemphill* did.

b. There exists an "Intolerable Nationwide Divergence" over the "Minimal Standards" Required Under the Due Process Clause for "Local Board's Application of Local Rules"

Respondents cite cases contrary to the Right of Cross- Examination for which Petitioner argues. They

demonstrate that the constitutional issue frequently arises, which makes this Petition important. This Court accepts petitions where even a single Circuit Court is the outlier if the issue is important. See *Thompson v. Clark*, # 20-659, ___ U.S. ___ (2021).

Respondents acknowledge that Petitioner alleges that there are some "minimal standards" which Respondents failed to meet. Certainly this Petition doesn't contain a survey of the applicable statutory law in every State, as Justice Ginsburg annexed to her dissent in *BMW v. North Am., Inc. v. Gore*, 517 U.S. 559 (1996). But it is apparent that a great divergence exists, and it's the type of divergence that is "intolerable" if our American democracy is to survive what appears to be a global trend toward increasingly authoritarian forms of governments. Citizens are unjustly deprived of use of their real property in such regimes. Respondents' citations should "raise a suspicious judicial eyebrow", *id*. at 583, that the lack of a full and fair opportunity to be heard actually exists without such Cross-Examination.

Respondents suggest that if all witnesses at zoning board hearings must be cross-examined, then an applicant-landowner would be burdened by having to make his/her own witnesses available for live cross-examination rather than by submitting their sworn affidavits. In *Missouri v. McNeeley*, 569 U.S. 141 (2013) this Court considered the favorable impact that available modern technology has had on "blood draw" warrants used to test the blood alcohol level of drivers driven to hospital emergency rooms by ambulances or officers. ("Well over a majority of States allow police

officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as email, and video conferencing.") Similarly, because ZOOM, SKYPE, and MICROSOFT TEAMS technology is nowadays so readily available for all municipal land use boards to use at hearings (and during the pandemic such technology has actually been used), the opportunity for Cross-Examination should be a regular feature of zoning board hearings. (ZOOM technology arguments were raised from inception.) Respondents' justification that the lack of any Cross-Examination is somehow a boon to Petitioner is a silly, fabricated pretext. As in *McNeeley*, use of technology should be recognized and encouraged by this Court because a more robust board hearing *ab initio* would ultimately lessen some of the burdens on the federal judiciary.

B. Takings Clause: This Court Has Invited the Federal District Courts to "Carefully Examine" The Legal Infrastructure used in this Everyday "Decision-Making by Local Land Use Boards" in a way that can improve our constitutional democracy.

Respondents argue that federal courts have little or no role to play here, and that the "preclusion trap" identified in *Knick v. Township of Scott, Pennsylvania,* 139 S. Ct. 2162 (2019) does not apply to an Article 78 proceeding. That is incorrect. Quite miraculously, our country operates under a dual federal/state legal system and it's never been an "all or nothing" proposition for us.

One important role of this Court is to balance the respective rights of the federal and state governments. This Court has done so frequently in banking cases in which it has opined about the doctrine of federal preemption under the National Banking Act: *Barnett Bank of Marion County. N.A. v. Nelson*, 517 U.S. 25, 33 (1996) and *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007). Citing those cases, *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712 (2012) observed that: "The OCC recognizes that state laws that withstand preemption 'typically do not regulate the manner or content of the business of banking authorized for national banks, but rather establish the legal infrastructure that makes practicable the conduct of that business'. Bank Activities and Operations, 69 Fed. Reg. 1904, 1913 (Jan. 13, 2004). By prohibiting fraudulent business practices, the Unfair Competition Law does exactly that – it establishes a legal infrastructure."

Surely, there is a way for this Court to harmonize the scope of the "infrastructure" imposed by the Constitution, while allowing some State "flexibility".

C. Equal Protection Clause: The Second Circuit "Set the Bar Far Too High" in Petitioner's Case Because the Pleadings Contained More Than Conclusory Allegations of Bad Faith.

Respondents argue that *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008) somehow legitimizes all of their discretionary authority. It doesn't. *Engquist* is about a government employee, not a private citizen. The government acted as an employer and not as a

sovereign. See *Waters v. Churchill,* 511 U.S. 661 (1994) explaining the distinction.

Here, the government is a sovereign. The element of "bad faith" is met. *Engquist* famously includes the hypothetical example that a speeding driver isn't being targeted "in bad faith" simply because that driver was pulled over by a lone police officer who didn't also pull over every other speeding driver. But "bad faith" also exists even when a plaintiff doesn't claim to have been expressly targeted for a special characteristic or affiliation. "Bad faith" outside a "class of one context" exists when a police officer has a monthly quota of tickets to write under a governmental policy that will lead to adverse consequence to him/her if the officer fails to issue enough discretionary tickets. So "bad faith" is shown by an abuse of process. See *Hernandez v. Wells*, No. 01 Civ 4376, 2003 WL 22772982, at *9 (S.D.N.Y. Nov. 24, 2003) (MBM). The existence of "bad faith" turns on whether a municipal actor (i.e., board member, town attorney, town) intentionally put one's self-interest above society's. That sort of "intent" can be alleged in general terms because municipal defendants so rarely make it easy through their oral admissions.

Perhaps Respondents' narrow analysis of the Equal Protection Clause led Respondents to arrogantly eschew Cross-Examination as an essential component, although they were well aware that unsuccessful applicant-landowners aren't afforded *de novo* judicial review in New York.

II. Leave to Amend Should Have Been Granted

Respondents discount Petitioner's argument that he should have been given an opportunity to amend the complaint by augmenting the comparators with a fuller explanation, and by including a federal malicious prosecution claim in this same case.

Although the Equal Protection claim is sufficiently alleged, there is always the possibility that a District Judge would require more factual information. The District Court should have granted leave to amend.

Petitioner could not allege a federal prosecution claim until the "favorable termination" element was satisfied, which occurred when the dismissed case was already at the Second Circuit. Petitioner referred to the Appellate Term's reversal in his reply brief.

III. The Preliminary Injunction Should Have Been Granted

A preliminary injunction should have issued because the imminent and actual harm that Petitioner faces through criminal prosecution, unless his property rights are restored through a legal process involving cross-examination, is considered concrete under *TransUnion*: jail time.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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

February 28, 2022