

ORIGINAL

No. 22-206

FILED  
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SUPREME COURT, U.S.

In The  
**Supreme Court of the United States**

BERNICE CURRY-MALCOLM,

*Petitioner,*

v.

NEW YORK STATE TEACHERS' RETIREMENT  
SYSTEM, HONEOYE FALLS-LIMA CENTRAL SCHOOL  
DISTRICT, RUSH-HENRIETTA CENTRAL SCHOOL  
DISTRICT, ROCHESTER CITY SCHOOL  
DISTRICT, ASSOCIATION OF SUPERVISORS AND  
ADMINISTRATORS OF ROCHESTER, AND BROWN  
HUTCHINSON LLP, ATTORNEYS AT LAW,

*Respondents.*

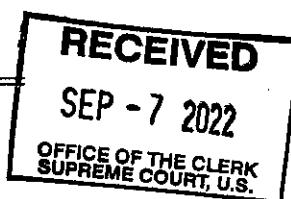
On Petition For A Writ Of Certiorari  
To The State Of New York Court Of Appeals

**PETITION FOR WRIT OF CERTIORARI**

BERNICE CURRY-MALCOLM, *pro se*  
6 Gingerwood Way  
West Henrietta, NY 14586

*Pro se Petitioner*

September 1, 2022



## **QUESTIONS PRESENTED**

The Questions Presented are:

1. The word “substantial” is not found in the governing statute, CPLR 5601 (a), or the New York State Constitution provision that provides for appeals as of right on constitutional grounds. N.Y. Const. art. VI, § 3(b)(1)-(2) There is a conflict in the circuits as to what the word “substantial” means, and whether dismissal of appeals as of right *sua sponte* deprives an aggrieved party of his or her due process rights under to constitutionally protected pension rights.
2. Whether the allegations of disparate treatment in the New York State Teachers’ Retirement System’s calculations of a members’ salary, service credits and pension and where the appeal involves the validity of a state or federal statute and support an appeal as a of right pursuant to CPLR 5601.
3. Petitioner’s argument that rejected by the courts below that she has a constitutionally protected right in her salary, service credits and pension, violates the Fifth and Fourteenth Amendments to the United States Constitution. Whether Petitioner raised a substantial constitutional objection to the violation of her due process rights thus entitling her to an appeal as of right under CPLR 5601.

**QUESTIONS PRESENTED – Continued**

4. Whether the State of New York Court of Appeals standing on *sua sponte* dismissal of appeals as of rights and final orders upon the grounds that no appeal lies as of right from the unanimous orders of the Appellate Division absent direct involvement of a substantial constitutional question with notice and opportunity to be heard prior to the dismissal was unconstitutional and violates a constitutional property rights where the same court conflicts with its holding in *Lippman v. Bd. of Educ. of the Sewanhaka Cent. High Sch.*
5. Where a state government infringes on and deviates from its own past practices and established rules and regulations, including by statute or law to deprive a public employee of his or her constitutional property rights to pension retirement benefits under the state retirement plan, was such a deviation and deprivation unconstitutional and whether the New York States Retirement System's arbitrary and outrageously capricious actions violate the impairment clause of the state constitution and whether the public employee becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits. New York State Const., V, § 7.

**QUESTIONS PRESENTED – Continued**

6. Pension benefits in a retirement plan are contractually and constitutionally protected property rights. Article V, § 7 of the New York State Constitution prohibits the diminishing and impairments of contracts, whether a public-school teacher, possesses a binding contractual relationship between employee and employer, and whether membership in a public retirement system is a contractual relationship that is subject to Article V, § 7 of the New York State Constitution and the parties collective bargaining agreement.
7. The Fifth and Fourteenth Amendments to the United States Constitution prohibits a state or government from infringement on and/or deprivation of a person's life, liberty, or property without due process of law and/or deny to any person within its jurisdiction equal protection of the laws. Whether petitioner's rights as a tenured teacher were denied prior to the taking of her pension benefits without due process of law in violation of the Fifth and Fourteenth Amendments and Education Law § 3020-a, and whether the taking of her entitlement to compensation and property rights was unconstitutional. NY Const., Article V, § 7, U.S. Const., amend. V, U.S. Const., amend. XIV, § 1.

**QUESTIONS PRESENTED – Continued**

8. Under this Court's precedents there are objective standards that require recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable, whether the same objective standard of the probability of actual bias be applied to agency decisionmakers where their arbitrary and capricious actions as a decisionmaker is too high to be constitutionally tolerable, whether State of New York Court of Appeals' *sua sponte* dismissal was unconstitutional on the grounds where there exists substantial constitutional questions directly involved to support an appeal as of rights and from the denial of a motion for leave to by the Appellate Division, Fourth Judicial Department.
9. Whether the New York State Teachers' Retirement System's access and physical possession of the 2007 Settlement Agreement between Petitioner and the Honeoye Falls-Lima Central School District, and where the System could have predicted and foreseen the deprivation of petitioner, a tenured teacher, constitutionally property rights to her pension, and was the petitioner entitled to timely notice and the opportunity to be heard prior to September 2017. Education Law, § 3020-a, CBA, NY Const., Article I, § 11, U.S. Const, amend. V, U.S. Const. amend. XIV, § 1.

## **PARTIES TO THE PROCEEDINGS**

### **Petitioner**

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- Bernice Curry-Malcolm, Petitioner Pro se

### **Respondents**

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- New York State Teachers' Retirement System, a defined benefit plan established in 1921 by the New York State Legislature, and provides retirement, disability, and death benefits to eligible New York State public school teachers and administrators
- Honeoye Falls-Lima Central School District, a Public School District and Municipal Corporation
- Rush-Henrietta Central School District, a Public School District and Municipal Corporation
- Rochester City School District, a Public School District and Municipal Corporation
- Association of Supervisors and Administrators, an unincorporated local labor union of administrators of the Rochester City School District
- Brown Hutchinson LLP, Attorneys at Law, a Limited Liability Partnership law firm located in the City of Rochester, Monroe County

## LIST OF PROCEEDINGS

The State of New York Court of Appeals  
Consolidated Appeals (CA 21-00402 and CA 21-00771)  
Nos. APL-2022-00029, Honorable Janet DiFiore, *Chief  
Judge, presiding, Judge Troutman* took no part

Bernice Curry-Malcolm, *Petitioner* v. New York State Teachers' Retirement System, Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, Rochester City School District, Brown Hutchinson LLP, Attorneys at Law and the Association of Supervisors and Administrators of Rochester, a Defined Benefit Plan, three Public School Districts, a Law Firm and Local Labor Union, *Respondents*

Date of Final Order: June 14, 2022, Entered June 14, 2022

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New York State Supreme Court, Appellate Division,  
Fourth Judicial Department

Consolidated Appeals Docket Nos. CA 21-00402 and  
CA 21-00771

Bernice Curry-Malcolm, *Plaintiff-Petitioner* v. New York State Teachers' Retirement System, Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, Rochester City School District, Brown Hutchinson LLP, Attorneys at Law and the Association of Supervisors and Administrators of Rochester, a Defined Benefit Plan, three Public School Districts, a Law Firm and a Local Labor Union, Defendants-  
Respondents

**LIST OF PROCEEDINGS – Continued**

Date of Motion For In-Person Oral Argument Denied:  
January 25, 2022

Date of Final Order: February 4, 2022, Entered Febru-  
ary 4, 2022

Date of Motion For Leave To Appeal To Court of Ap-  
peals Denied: April 22, 2022

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New York State Supreme Court

Originating Monroe County Clerks' Index No. 2019/  
4349, Honorable Gail A. Donofrio, J.S.C.

Bernice Curry-Malcolm, *Plaintiff-Petitioner* v. New York  
State Teachers' Retirement System, Rush-Henrietta  
Central School District, Honeoye Falls-Lima Central  
School District, Rochester City School District, Brown  
Hutchinson LLP, Attorneys at Law and the Association  
of Supervisors and Administrators of Rochester, a De-  
fined Benefit Plan, three Public School Districts, a Law  
Firm and Local Labor Union, *Defendants-Respondents*

Date of Final Order: August 3, 2020, Entered August 4,  
2020

Date of Final Order: December 2, 2020, Entered De-  
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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Bernice Curry-Malcolm (“Petitioner, Curry-Malcolm”), appears before the Court as an unrepresented *pro se* litigant, but not by choice, and respectfully makes request that this court grants her petition for a writ of certiorari to review the judgment of the State of New York Court of Appeals, in the action of *Bernice Curry-Malcolm v. New York State Teachers’ Retirement System, Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, Rochester City School District, Brown Hutchinson LLP, Attorneys at Law and the Association of Supervisors and Administrators of Rochester, State of New York Court of Appeals consolidated Appeals No. APL-2022-00029 (Honorable Janet DiFiore, Chief Judge, presiding), Judge Troutman took no part.*

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**PARTIES TO THE PROCEEDINGS BELOW**

Petitioner Bernice Curry-Malcolm (“Curry-Malcolm” or “Petitioner, Curry-Malcolm”) was the sole *pro se* plaintiff -petitioner in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Gail A. Donofrio, J.S.C), and sole *pro se* plaintiff-petitioner in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, consolidated Docket Nos. CA 21-00402 and CA 21-0071, and sole *pro se* plaintiff-petitioner in the consolidated appeals before the State of New York Court of Appeals, Docket No. APL-2022-00029).

Respondent New York State Teachers' Retirement System was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Gail A. Donofrio, J.S.C. and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, consolidated Docket Nos. CA 21-00402 and CA 21-0071, and in the consolidated appeals before the State of New York Court of Appeals, No. APL-2022-00029).

Respondent Rush-Henrietta Central School District was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Gail A. Donofrio, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, consolidated Docket Nos. CA 21-00402 and CA 21-0071, and in the consolidated appeals before the State of New York Court of Appeals, Docket No. APL-2022-00029). Respondent Rush-Henrietta Central School District did not appear on appeal before the State of New York Court of Appeals and did not submit a subject matter jurisdictional response even though the State of New York Court of Appeals invited the respondent to do so.

Respondent Honeoye Falls-Lima Central School District was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Gail A. Donofrio, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division,

Fourth Judicial Department, consolidated Docket Nos. CA 21-00402 and CA 21-0071, and in the consolidated appeals before the State of New York Court of Appeals, Docket No. APL-2022-00029). Respondent Honeoye Falls-Lima Central School District did not appear on appeal before the State of New York Court of Appeals and did not submit a subject matter jurisdictional response even though the State of New York Court of Appeals invited the respondent to do so.

Respondent Rochester City School District was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Gail A. Donofrio, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, combined Docket Nos. CA 21-00402 and CA 21-0071, and in the consolidated appeals before the State of New York Court of Appeals, Docket No. APL-2022-00029). Respondent Rochester City School District did not appear on appeal before the State of New York Court of Appeals and did not submit a subject matter jurisdictional response even though the State of New York Court of Appeals invited the respondent to do so.

Respondent the Association of Supervisors and Administrators of Rochester was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 20194/349 (Honorable Gail A. Donofrio, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, consolidated Docket Nos. CA 21-00402 and CA 21-0071,

and in the consolidated appeals before the State of New York Court of Appeals, Docket No. APL-2022-00029). Respondent Association of Supervisors and Administrators of Rochester did not appear on appeal before the State of New York Court of Appeals and did not submit a subject matter jurisdictional response even though the State of New York Court of Appeals invited the respondent to do so.

Respondent Brown Hutchinson LLP, Attorneys at Law was the defendant-respondent in the New York State Supreme Court, originating Monroe County Clerk Index No. 2019/4349 (Honorable Gail A. Donofrio, J.S.C.), and defendant-respondent in the New York State Supreme Court, Appellate Division, Fourth Judicial Department, consolidated Docket Nos. CA 21-00402 and CA 21-0071, and in the consolidated appeals before the State of New York Court of Appeals, Docket No. 2022-00029). Respondent Brown Hutchinson LLP, Attorneys at Law did not appear on appeal before the State of New York Court of Appeals and did not submit a subject matter jurisdictional response even though the State of New York Court of Appeals invited the respondent to do so.

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#### **OPINIONS BELOW**

The decision of the State of New York Court of Appeals *sus sponte* dismissal can be found at and is available in (Pet. at App., *infra*, App. 23).

The decision order of the State of New York Supreme Court denying Petitioner's motion to Strike and for Default Judgment can be found and is available in (Pet. at App., *infra*, App. 8).

The decision order and judgment of the State of New York Supreme Court (Honorable Gail A. Donofrio, J.S.C.) dated August 4, 2020 can be found at *2020 N.Y. Slip Op 34765 (U)*, and is available in (Pet. at App., *infra*, App. 1 – App. 8).

The decision order and judgment of the State of New York Supreme Court Honorable Gail A. Donofrio, J.S.C.) dated December 8, 2020 can be found at *2020 N.Y. Slip Op 00761* and is available in (Pet. at App., *infra*, App. 9 – App. 13).

The Appellate Division, Fourth Judicial Department Order dated and entered February 4, 2022 [CA 21-00402] can be found at *2020 NY Slip Op 34765 (U)*, *2020 WL 13134019 [Sup. CT., Monroe County 2020]*, *202 A.D. 3d 1444 (N.Y. App. Div. 2022, 158 N.Y.S. 3d 729)* and is available in (Pet. at App., *infra*, App. 16 – App. 18).

The Appellate Division, Fourth Judicial Department Order dated and entered February 4, 2022 [CA 21-00771] can be found at *2020 NY Slip Op 00761*, *2020 WL 13134019 [Sup. CT., Monroe County 2020]*, *202 App. Div. 3d 1445* and is available in (Pet. at App., *infra*, App. 19 – App. 20).

The Appellate Division, Fourth Judicial Department Order denying petitioner's motion for in-person

oral argument can be found and is available in (Pet. at App., *infra*, App. 14 – App. 15).

The Appellate Division, Fourth Judicial Department Order denying petitioner's motion for leave to appeal to the Court of Appeals can be found and is available in (Pet. at App., *infra*, App. 21 – App. 22).

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## **JURISDICTION**

The State of New York Court of Appeals *sua sponte* order was decided and entered on June 14, 2022 and received by petitioner by United States Postal mail. The State of New York Court of Appeals *sua sponte* decision order and judgment is available in the (Pet. at App., *infra*, App. 23). The jurisdiction of this Court to review the Judgment of the State of New York Court of Appeals is invoked under 28 U.S.C. § 1257(a).

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## **CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS**

Pertinent statutory provisions are reprinted in the appendix to this petition. (Pet. at App., *infra*, App. 24 – App. 33).

Section 7 of Article V of the Constitution of the State of New York provides: After July [1, 1940], membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual

relationship, the benefits of which shall not be diminished or impaired.

Article 1, § Section 11 of the Constitution of the State of New York, provides that no person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Education Law, § 3020 governs the discipline of tenured teachers and provides that “[n]o person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause” and in accordance with statutory procedures.” This statute is the exclusive method of disciplining a tenured teacher in New York State.

The United States Const., amend. V, in pertinent part, states that no person shall be deprived of life, liberty, or property, without due process of law.

The United States Const., amend. XIV, § 1, in pertinent part, states that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Rights Act of 1964 forbids disparate treatment as well as forbids employment discrimination based on “race, color, religion, sex, or national origin,” 42 U.S.C. §2000e-2(a), and its anti-retaliation provision forbids “discriminat[ion] against” an employee or job applicant who, *inter alia*, has “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation, §2000e-3(a).

The ADEA provides that “[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. § 623(a)(1). “In order to establish a *prima facie* case of age discrimination, the plaintiff must show (1) that [the plaintiff] was within the protected age group, (2) that [the plaintiff] was qualified for the position, (3) that [the plaintiff] experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination.” *Green v. Town of E. Haven*, 952 F.3d 394, 403 (2d Cir. 2020).

42 U.S.C. §1983 provides: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable.

Under NYSTRS' reportable workers' compensation payments regarding reporting workers' compensation payments to the System, Workers' Compensation payments to NYSTRS members having an employer-employee relationship (i.e., the employee is entitled to benefits under the negotiated agreement) and being paid directly by their employer are pensionable and must be reported to the System.

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## INTRODUCTION

Everybody that works whether in the public and/or private sector looks forward to the day that they can retire without harassment and without discrimination after putting in the hard-earned work to become eligible to receive pension benefits. No public employee who is employed by a state public employer should have to worry about the taking, diminishing, impairment and/or reductions of his or her retirement pension benefits at retirement and/or after retirement. No public employee who is a vested member of a state public retirement fund under the contractual protection for public pension should have to worry about the taking, diminishing, impairment and/or reductions of his or her retirement pension benefits at retirement and/or after retirement.

The New York State Teachers' Retirement System is defined benefit retirement plan. Both public

employees and public employers contributes. Article 11 of the Education Law (“Tier 1”) contains the provisions governing the benefits provided to teachers with a membership date prior to July 1, 1973. The benefits provided to System teachers with a membership date between July 1, 1973 and July 26, 1976 are governed by the provisions of Article 11 of the Education Law as modified by the provisions of Article 11 of the Retirement and Social Security Law (“Tier 2”). The benefits provided to teachers with a membership date after July 27, 1976 are governed by Article 15 of the Retirement and Social Security Law (“Tier 4”). Benefits provided to Tier 4 members after July 27, 1976 are governed by Article 15 of the Retirement and Social Security Law.

Petitioner joined the New York State Teachers’ Retirement System (“NYSTRS” or “System”) on September 1, 1997. She is an “active” Tier 4 member and has not retired and has not made application to retire. Petitioner can retire under Article 14 of the Retirement and Social Security Law (“Tier 3”) and/or Article 15 of the Retirement and Social Security Law (“Tier 4”), whichever of the better options. Employer contributions – Each participating employer as in this case, the Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District and Rochester City School District contributes a percentage of its member payroll, and member contributions. Tier 4 members contributed 3% of reportable salary to the pension fund until they had been members for 10 years or credited with 10 years of service, whichever comes first.

Petitioner contributed 3% of her reportable salary to the pension fund for 10 years. By Letter dated June 2007, Petitioner received notice from the NYSTRS' Subsequent Service Unit, George M. Phillip, Executive Director that she had met the requirements under Article 19 of the Retirement and Social Security Law and the law ceases required 3% contributions for Tier 4 members of participation or service credit and that the System had notified my employer, which was the Honeoye Falls-Lima Central School District at that relevant time that the school district should no longer withhold contributions from my salary effective July 1, 2007. The Letter stated, "This will not reduce your present or future retirement benefits." (R. 298).

Petitioner is not retired and is currently an "active" Tier 4 member of the NYSTRS. Petitioner have not to date applied for and/or informed any of the respondents that she intended to retire for the purpose of calculating salary and service credit for future retirement purposes. NYSTRS Rules and Regulation provides that workers' compensation payments to NYSTRS members having an employer-employee relationship (i.e., the employee is entitled to benefits under the negotiated agreement) and being paid directly by their employer are pensionable and must be reported to the System. These payments will be credited to the member's record as salary and may accrue service credit. The parties CBA also governs workers' compensation payments.

Pension benefits are protected property, contractual and constitutional rights. Membership in any

employee's retirement system of the State, or any political subdivision thereof shall be a contractual relationship and subject to NY Const., Article V, § 7, which states in pertinent part, "After July 1, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. NY Const., Article V, § 7."

Under the Bills of Rights, Article 1, § 11, the state constitution provides equal protection of laws and protection from discrimination based on race, color, creed or religion in ones' civil rights and states, " No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." NY Const., Article 1, § 11.

The Fifth Amendment provides equal protection of law as well as constitutional protection against the deprivation of life, liberty, or property without due process of law and in pertinent part states, " No person shall be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V.

The Fourteenth Amendment provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

This case is of significance and national importance because it will have a life changing significant and far-reaching impact on employees of all races, ages, color, gender/sex, and national origin, as well as on public employees who works for public employers and are members of a state retirement system, including having significant impact on private sector employees. This case involves the infringement by state government in its unconstitutional taking of public pension benefits that are constitutionally protected under both state and federal laws.

#### **A. The Impact of Respondents' Actions**

For petitioner, Curry-Malcolm education and teaching was her passion. Educating and attending to the educational needs of our youth is the best job anyone can ever have. Honestly, education is more than that. It is caring for the whole student in mind, body, and soul. Imagine having the job you love and then one day that all vanishes because your employer consciously decides that your race, color, age, sex/gender and/or national origin does not fit into its employment scheme after you complain of and/or oppose its unlawful

employment action and discriminatory practices. Imagine having a highly effective performance evaluation rating that was changed to developing because of your race and age. Imagine being told because you are black, that your all-white employer (HF-L), “Put the two black girls and/or darks girls in the “shit house.”

Imagine being forced to stay in a classroom where feces seepage fills the entire room from the toilet in your classroom and you are forced to remain there by your white supervisors and the Superintendent of Schools until it makes you so sick that you have to go to the doctor from the fumes of feces. Imagine having the bathroom locked so that you are not able to use it and white employees are allowed to. Imagine having to ask your white supervisor can you use the bathroom because she is blocking your entry and refuses to let you past her to go relieve yourself. Imagine being accused of accusing two of your white supervisors of sexual harassment when all of it was nothing more than an orchestrated lie by your employer. Imagine being falsely accused of such a horrific act. Imagine having your livelihood stripped away, where you have no income to contribute to support your family and you pay is \$0.00 dollars and all you can do is rely on your husband.

Imagine your identity being compromised and changed by these employers so many times, including as recent as August 29, 2022, by the Rochester City School District, who know claims my name to be Bernice Malcolm-Curry. In February 2016, the RCSD changed my name to Bernice Malcom. Now the school

district is claiming that Malcolm and Curry-Malcolm is my surnames. My given name is Bernice Curry and my father's surname is Curry, may God rest his soul and our family name is Curry and my maiden name is Curry. Petitioner was not born into the Malcolm family name. Petitioner married into it. Petitioner's employers and others in government keep changing petitioner's name to different aliases for whatever the self-serving and self-interest reasons are. So, imagine having to constantly having your name changed by your employer and/or anyone else for that matter and without your knowledge and/or consent.

Imagine ordering food from a drive-thru and an employee of that drive-thru who you don't know knows the employer and jerks off in your bagel and before you put it in your mouth the odor stops you and after inspection you realize that your order took so long because an employee of the donut shop took the time to jerk off in your food and treated it as mayo. Imagine trying to get a job and you can't because the local newspaper conducted an interview with your former employer (RCSD) and your name appears in the local public newspaper that you were terminated for all the local and surrounding school districts and community at large to see.

Imagine being the only Black/African female tenured teacher and Black/African female tenured unit member of the local labor union (HFLEA) in an all-white school district. Imagine in the history of the school that no white female tenured teacher was ever subjected to any Education Law § 3020-a hearing, let

alone two, and the only reason you were subjected to two was because of the color of your skin. Imagine having to go to work and the sign that says Welcome to Honeoye Falls Lima, says Welcome to Hell. Imagine having to go to work and satanic messages show up on your classroom chalkboard. Imagine being a member of three of the most powerful unions in the state of New York and you have to end up trying to defend yourself not because you want to, but because you are the only one that has your best interest at heart. Imagine your benefit deductions being withheld from your payroll salary and our employer failed to send the monies to the intended recipients and allows your short-term and long-term disability to expire. Imagine a law firm that you retained sold you out for their own self-interest and professional and monetary gain. Imagine no remedy, no accountability. Imagine being a unit member of a powerful labor union that lays down and instead of helping you they themselves contribute by aiding and abetting. Imagine, imagine, and imagine, Petitioner could keep going, but the memories have become too painful of a reality to have to keep having to relive. Now, imagine after all of that and after all your hard-earned work, the three school districts and the System wants to now reduce your retirement pension. Petitioner do not have to imagine because all of this happened to her.

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#### **STATEMENT OF THE CASE**

Petitioner Bernice Curry-Malcolm is an active vested member the New York State Teachers' Retirement

System. ("NYSTRS"), who worked as a fulltime active regular employee for several school districts – Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, and the Rochester City School District. The calculations of petitioners' salary, service credit and pension done by the System was arbitrary, capricious, error of law, done in bad faith and was not rationally based. Under New York State Teachers' Retirement System Rules and Regulations credit for member service days of service credit earned in a given school year (July 1-June 30) are the actual number of paid work or leave days (or parts thereof) reported to the System by NYSTRS participating employers.

NYSTRS states that school districts must forward any and all payment provisions relative to salary, service credits, settlement agreement, arbitration awards, and like kind must be forwarded to NYSTRS for evaluation, as per state education law. Under Section 520-1 of the Education Law, NYSTRS has the authority to require that each employer under its jurisdiction file with the Retirement Board any data necessary to carry out its statutory responsibility. Section 520 states that "each employer shall keep such records and from time to time shall furnish such information as the retirement board in the discharge of its duties may require." These provisions were neither new to the NYSTRS and neither the Honeoye Falls-Lima Central School District in July 2007. Neither were these provisions new to the Rush-Henrietta and Rochester City School Districts.

The New York State Teachers' Retirement System is a public retirement system of the state. Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, and the Rochester City School District are all public employers and are subject to the laws of the state as well as federal and constitutional laws of this great country. The System inaction and deliberate delay of twelve (12) years violates Petitioner's constitutional due process rights as well as equal protection rights under the Fifth and Fourteenth Amendments. Petitioner was a tenured teacher with the Honeoye Falls-Lima Central School District, and she had an employee with an employer-employee relationship with the school district and was a tenured unit member of the Honeoye Falls-Lima Education Association during all relevant times, including during the 2007-2008 school year. Pension is based on four factors: tier of membership, total service credit, age at time of retirement, and final average salary. Petitioner had an employer-employee relationship with the three school districts in question. She reported to specific district officials, employees within the school district's supervisory roles of responsibilities and duties monitored her work and gave performance evaluations, she had access to various fringe benefits such as paid leave, health insurance, she had teaching space and/or an administrative space and other resources, all in which she utilized.

Petitioner was not an itinerant/traveling teacher for none of the school districts but was a regular fulltime public employee. Petitioner worked for the

Rush-Henrietta School District during the July 1, 1997 through June 30, 2008 school year in the school district title of part-time math lab substitute and part-time computer teacher and worked for a she believes a few months with the school district before commencing work with the Rochester City School District on August 31, 1998. Petitioner worked for the Rochester City School District in the school district title of consultant special education teacher as a regular fulltime teacher from August 31, 1998 through June 30, 1999, July 1, 1999 through June 30, 2000 and was considered tenured as she was in her third year and under the CBA and Education Law before the law changed Petitioner was tenured and because she was in her third year she could not be terminated without due process of law. The RCSD terminated Petitioner on September 22, 2000 without affording her due process with the RTA CBA, as well as Education Law § 3020-a.

Petitioner worked for the Honeoye Falls-Lima Central School District from January 8, 2001 through June 30, 2001 as a long-term special education substituted for an employee out on maternity leave. Petitioner worked as a fulltime public employee for the Honeoye Falls-Lima Central School District from July 1, 2001 through June 30, 2008 in the school district in the school district title of special education teacher. Petitioner was granted tenured by the HF-L Board of Education on September 1, 2004 after serving a successful 3-years probationary period.

Petitioner worked as a fulltime regular public employee CASE within the Rochester City School District

during the July 1, 2015 through June 30, 2016 school year, July 1, 2016 through June 30, 2017 school year. Petitioner was wrongfully terminated by the school district on July 1, 2017 as a result of a layoff in which the school district used to terminate her. Twenty-two CASEs were not laid off. Petitioner was the oldest and only CASEs terminated. All other CASEs who did not resign remained in the school district employment and taught summer school and/or were promoted to higher level administrative positions with higher pay, including younger white males and females outside of the protected class, including but not limited to Jason George, white male, age 35, Yajaria Walker (Now Nguyen), white female, age 30. At that relevant time the Petitioner was 58 years old. The Petitioner was wrongfully terminated by the school district on April 23, 2018. Petitioner was a member of the collective bargaining agreement (s) between the parties, including the Honeoye Falls-Lima Education Association ("HFLEA"), the Rochester Teacher Association ("RTA"), and the Association of Supervisors and Administrators of Rochester ("ASAR"). The three school districts in question, Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District and the Rochester City School District, as well as Brown Hutchinson LLP, Attorneys at Law, whether by reporting, participating, engaging in whether verbal and/or written communications and providing information and having actual knowledge of the claims against them and where petitioner has a public interest in her tenure rights, and where all parties were involved in NYSTRS determination and calculation,

necessary joinder parties, whether the requirements of a notice of claim was met.

The Petitioner did not at any time enter into a Settlement Agreement with the Rush-Henrietta Central School District and nor did the Petitioner at any time enter into any Settlement Agreement with the Rochester City School District and/or agreed that she would not return to work on April 23, 2018 and/or agreed to a separation from employment on April 23, 2018. This was an elaborate scheme orchestrated by the RCSD. The NYSTRS received a copy of the Settlement Agreement from the Honeoye Falls-Lima School District on November 27, 2007 as pursuant to Education Law and NYSTRS Rules and Regulations requirements for the purposes of Education Law Section 501(4)(19). Petitioner did not resign and/or failed to return to work as a result of an administrative leave of absence as claimed by the Rochester City School District but was wrongfully terminated.

Petitioner was on payroll and received a bi-weekly salary from all three school districts during her employment tenure with them. None of the payments or salary earned were as a result of termination pay, resignation and/or for time not worked and/or in anticipation for retirement, and neither was petitioner on any unpaid leave of absence during the time claimed by the NYSTRS in regard to the Honeoye Falls-Lima Central School District as well as Rochester City School District. A hearing should have been held on the matter as some of the days taken by the NYSTRS were days in which Petitioner was physically at work within all

three school districts. NYSTRS simply ignored these material facts.

The lower court abused its discretion. Petitioner's objection to being denied relief and opportunity to join and to be heard regarding the three school districts, Brown Hutchinson LLP, Attorneys at Law and the Association of Supervisors and Administrators was preserved below in the August 3, 2020 Transcript below and was on record in the appeal at (R. 1229, lines 14-25 and R. 1230, lines 3-8, lines 16-21).

#### **A. New York State Supreme Court**

The New York State Teachers' Retirement System's final determination was dated June 26, 2019. Petitioner received the final determination by United States Postal mail. Petitioner Bernice Curry-Malcolm filed a timely notice of petition, verified summons, petition and complaint within the four months time limitations on October 22, 2019 with the Monroe County Clerk Office and received Index No. 2019-4349. Petitioner also filed a courtesy copy with the Supreme Court of the State of New York, Monroe County, Seventh Judicial District. All parties were properly served by the Monroe County and Albany County Sheriff Departments. The New York State Office of the Attorney General (Rochester, New York).

The lower court abused its discretion by denying Petitioner's motion to strike and for default judgment. On December 4, 2019, Petitioner filed motion to strike and for default judgment against all parties. As

pursuant to CPLR, the 20-days time limitation for defendants-respondents to respond, answer, and/or moved to dismiss the verified petition/complaint had expired. New York State Teachers' Retirement, by and through its counsel Ted O'Brien filed a notice to dismiss on December 9, 2019 and was in default. Rush-Henrietta Central School District and Honeoye Falls-Lima Central School District did not timely appear, answer and/or move to dismiss the complaint and was in default. Brown Hutchinson LLP, Attorneys at Law did not timely appear did not timely appear, answer and/or move to dismiss the complaint and was in default. Brown Hutchinson LLP, Attorneys at Law untimely appeared and move to dismiss on March 10, 2020 and was in default. The Rochester City School District did not timely appear did not timely appear, answer and/or move to dismiss the complaint and was in default. The Association of Supervisors and Administrators of Rochester did not timely appear did not timely appear, answer and/or move to dismiss the complaint and was in default.

The lower court's decision on August 3, 2020 was decided on submission and not by in-person opportunity to be heard. On August 3, 2020 and entered August 4, 2020, the lower court denied Petitioner's motion to strike and for default judgment against NYSTRS, three school districts, Brown Hutchinson and ASAR. The lower court further granted the untimely pre-answer motion pursuant to CPLR § 3211 by the Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, Rochester City School District,

Brown Hutchinson LLP, Attorneys at Law, and the Association of Supervisors and Administrators of Rochester and dismissed the petition/complaint. The lower court refused and failed to join the three school districts, the law firm and union as necessary joinder parties as pursuant to CPLR §1001.

All respondents had actually knowledge the nature of the claims against them. New York State Human Rights claims meets the notice requirements, as well as there is no notice requirement. Petitioner tenure rights are of public interest, and no notice was required for her to protect a tenured property right to her employment, salary, service credits and pension. The lower court denied Petitioner's motion to strike and for default judgment against NYSTRS. The lower court denied NYSTRS' untimely pre-answer motion to dismiss the petition/complaint gave the NYSTRS another bite at the apple, by allowing the retirement system to respond to the complaint. The lower court found that petition/complaint (Monroe County Clerk Index No. 2019-4349) failed to state a cause of action against Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, Rochester City School District, Brown Hutchinson LLP, Attorneys at Law, and the Association of Supervisors and Administrators of Rochester and that the three school districts were not notice in accordance with Education Law §3813, petitioner assertions that Honeoye Falls-Lima Central School District terminated her in 2008 and/or discriminated and/or retaliated against her, and that the Rochester City School District *inter alia*,

unlawfully terminated her employment and breached a contract and/or collective bargaining agreement and found that it's not related to the Article 78 and that the claims had already been adjudicated in federal and state court and were resolved in Honeoye Falls-Lima Central School District, Rochester City School District favor. The lower court gave the NYSTRS 20 days to answer the verified petition/complaint.

After NYSTRS answered the verified petition/complaint, a hearing was held on December 2, 2020 (Monroe County Index No. 2019-4349). Petitioner was restrained by the lower court in what she could say before the Court and was told that she could only direct her comments to the NYSTRS and that she could not direct any comments about the Rush-Henrietta Central School District, Honeoye Falls-Lima Central School District, Rochester City School District, Brown Hutchinson LLP, Attorneys at Law, and the Association of Supervisors and Administrators of Rochester and that she could say whatever she like to say, but that the focus was only on the NYSTRS. Petitioner placed her objection on the record and noted that the parties in question were joinder parties and that any decision made by the court, if reverse, would impact the three school districts.

On December 2, 2020, the same day of the hearing, the lower court made a final decision and judgment was entered December 8, 2020. In its decision, the lower court did not consider and/or incorporate any of the factual and material disputes by the petitioner and only focused on NYSTRS. The lower court found that

Petitioner entered a settlement agreement with the Honeoye Falls-Lima Central School District on July 16, 2007, as a result received a lump sum payment of \$97,427.28 from the school district. On record petitioner disputed this claim. The lower court found that NYSTRS removal of all monies paid under the agreement were not pensionable because the payments constituted credit for time not worked during those time periods during 2005-2006 (1 month), two months during the 2006-2007 school year and the entire year old the 2007-2008 school year regarding Honeoye Falls-Lima Central School District. Regarding the Rochester City School District, the lower court found that petitioner took a paid administrative leave of absence from the Rochester City School District from December 8, 2017 through April 23, 2018, and did not return to her position with the Rochester City School District after the leave of absence, and was terminated by the Rochester City School District on April 23, 2018. The lower court found in agreement with the NYSTRS that because the petitioner did not return to her position after her leave of absence, any service or salary was not pensionable and any earnings and service credit for the time period were therefore removed and was not pensionable earnings. The lower court also found that because petitioner service for the 2017-2018 school year was less than 20 days, no service credit was earned for that year. Petitioner disputed the school districts and NYSTRS' claims. The lower court also found that there was a rational basis for the NYSTRS' determination and that making its determination that the NYSTRS relied on the employment earnings reported by the

three school districts and information provided by the Rochester City School District with regard to the leave of absence and termination, as well as the terms of the settlement agreement and dismissed the verified petition/complaint against the NYSTRS' respondents.

**B. New York State Supreme Court, Appellate Division, Fourth Judicial Department**

Petitioner filed a timely notice of appeal. All parties were properly served. On appeal, the Appellate Division, Fourth Judicial Department consolidated the appeals, i.e., CA 21-00042 (Monroe County Clerk Index No. 2019-4349) dismissed against the joinder parties on August 3, 2020 and entered August 4, 2020 and CA 21-00071. (Monroe County Clerk Index No. 2019-4349) dismissed against the NYSTRS on December 2, 2020 and entered December 8, 2020. Oral Arguments was set for in-person oral argument but was rescheduled by the court for remote oral argument. Petitioner filed a motion to argue in person during a time when the returned to in-person oral argument. That motion was denied and the Court *sua sponte* submitted on the matter. The lower court's decision nor the Appellate Court's decision was supported by the record. On February 4, 2022, the Appellate Division dismissed the actions, unanimously confirmed with costs for the reasons stated in the decision at Supreme Court.

### **C. State of New York Court of Appeals**

Petitioner filed a timely notice of appeal to the State of New York Court of Appeals. In the alternative, Petitioner also filed a timely motion for leave to appeal to the Court of Appeals before the Appellate Division. The Appellate Division denied the motion in April 2022. The Court of Appeals dismissed the consolidated appeals their Docket No. APL-22-00029 on June 14, 2022. The three school districts, the law firm and neither the union appeared before the State of New York Court of Appeals invitation to file a jurisdictional response. The Court of Appeals *sua sponte* dismissed the action. The Court's *sua sponte* dismissal stated the appeal was dismissed without costs, by the Court *sua sponte*, upon the ground that no appeal lies as of right from the unanimous orders of the Appellate Division absent direct involvement of a substantial constitutional question (see CPLR 5601). Judge Troutman took no part. This writ of petition for a writ of certiorari is timely and filed within the 90-days time limitation in which to file.

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### **REASONS FOR GRANTING THE PETITION**

Millions of Americans go to work every day and are members of a retirement and/or pension plan. These Americans have a vested property interest and the comfort of knowing that one day they will be able to retire and draw their pension. This case is of significance and national importance and impacts all people of all races of people who are employed by an employer.

that participates in a retirement or pension plan. And is its equally of significance and national importance and impacts all employees who involuntarily and is forced to enter into settlements agreements with public employers who full well know that they cannot enter into and the harmful impact that it could cause.

The New York State Teachers' Retirement System's unconstitutional method of taking of its members' retirement pension property rights because of the System's own untimeliness of evaluations and review of settlement agreements and/or arbitration awards by not taking reasonable care to ensure that its members are protected from employers who violates the System's Rules and Regulations and the law concerning the reporting of a member's salary and service credit. The lower court and Appellate Division's findings that the System's actions were not arbitrary or capricious and was rationally based amounts to nothing more than a "Rubber Stamp" of the agency's decision just because it made one. Ten years was too long for the System to wait to evaluate the Settlement Agreement between the Honeoye Falls-Lima Central School and the System where the System was in the possession of the settlement agreement in November 2007 and did not notify the Petitioner that there was a problem. From the time the System was in possession of the settlement agreement to its final determination on June 26, 2019, more than eleven (11) years had passed. Without notification prior to the taking of the deprivation of petitioner's property rights to her retirement pension, the System took two (2) years and eight (8) months of her salary and service credit.

Review of the *sua sponte* dismissal of Petitioner's Appeals As of Right by the State of New York Court of Appeals requires judicial review as to whether the court's *sua sponte* dismissal was unconstitutional by depriving Petitioner of notice and the opportunity to be heard prior to dismissal and whether the dismissal violates well-established state and constitutional laws to due process and equal protection of vested property rights of members to pension benefits in a retirement plan. The Supreme Court of the United States is authorized to review state court decisions holding state laws violative of the Constitution. Specifically, under 28 U.S.C. § 1257(a), final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by writ of certiorari. The Supreme Court decides only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. This case presents questions whose resolution will have immediate importance and impact on public employees who are members of a retirement pension plan that have a constitutionally protected property right to their pension without any fear of the benefits of which being taken, diminishes and/or impaired. New York Constitution, Article V, § 7. Section 7 of article V of the Constitution of the State of New York provides: The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

**I. This Court Should Grant Certiorari To Determine Whether The NYSTRS' Actions Violates Ny Const., Article V, § 7**

Seven states, including New York, have a constitutional provision that specifically states that public pension plans create a contract between the state and participant employees. See Farmer, *supra*; see also, e.g., N.Y. Const. art. V, § 7 (“[M]embership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.”); Mich. Const. art. IX, § 24 (“The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.”); Ill. Const. art. XIII, § 5 (“Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”).

**II. This Court Should Grant Certiorari To Determine Whether The NYSTRS' Actions Violates NY Const., Article I, § 11**

The NYSTRS and the three school district respondents violated Art. 1, § 11 by depriving Petitioner of equal protection and due process of law. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **III. This Court Should Grant Certiorari To Determine Whether The NYSTRS' Actions Was A Contractual Violation And Unconstitutional**

Forty-one states, including New York, protect pensions under contract theory. See Liz Farmer, How are Pensions Protected State-by-State (Jan. 28, 2014), <http://www.governing.com/finance101/gov-pension-protections-state-by-state.html> (last visited July 30, 2015); see *infra* Part IX.A (discussing breach of contract theory in New York with respect to pension entitlements). Legislators are prohibited from passing laws that impair pension contracts previously entered into, whether public or private. See Farmer, *supra*. The protections provided pursuant to contract theory vary by state. Compare, e.g., *Protect Our Benefits v. City and Cnty. of San Francisco*, 235 Cal. App. 4th 619, 628 (2015) (“A public employee’s pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment.” (citation omitted)), with *infra* – Part IV (explaining that, under New York law, pension rights are protected under the state constitution as a contractual relationship that vests in employees by the terms of the applicable statutory scheme).

**IV. This Court Should Grant Certiorari To Determine Whether The NYSTRS' Actions Were Unconstitutional And Violates U.S. Const., Amend. XIV, § 1**

In the United States, public sector pensions are offered at federal, state and local levels of government. A government pension plan is defined as “a savings device wherein government agencies (and sometimes their employees as well) make regular contributions during their employees’ careers.” Lowell R. Ricketts, State Pension Plans in Peril: The Need for Reform, Liber Economic Information Newsletter (2010), <https://research.stlouisfed.org/pageoneeconomics/uploads/newsletter/2010/201009.pdf> (last visited July 30, 2015). “The collective savings for all employees in a plan are invested in interest-bearing securities.” Id.

Six states, including New York, take the approach that pensions are protected as a property right under the due process clause of the United States Constitution. See Farmer, *supra*; see also, e.g., *Morris v. NYCERS*, 129 F. Supp. 2d 599, 606–07 (S.D.N.Y. 2001) (holding former city employee had property interest in right to receive benefits of his membership in city pension system subject to the due process clause (collecting cases)); *Myers v. W. Virginia Consol. Pub. Ret. Bd.*, 704 S.E.2d 738, 747 (2010) (citations omitted) (“[T]he realization and protection of public employees’ pension property rights is a constitutional obligation. The State cannot divest the plan participants of their rights except by due process[.]”); *Hill v. State Employees Ret. Comm’n*, 851 A.2d 320, 328 (2004) (“It is undisputed

that, if he complies with the governing statutory conditions, he has a constitutionally protected property right to a pension benefit." (citing *Pineman v. Oechslin*, 488 A.2d 803 (1985)), cert. denied 859 A.2d 561 (2004).

**V. The Lower Court And Appellate Division Decision Are Unconstitutional And Is In Direct Conflict With The Court Of Appeal Standing In *Lippman v. Bd. Of Educ. Of The Sewanhaka Cent. High Sch. Dist.***

The New York Court of Appeals has emphasized that pension benefits are equivalent to contract payments: It is a substantial factor in entering the permanent Civil Service of the government, State or local, "career service" as some call it, that the employee can look forward to a pension or retirement allowance when his service is over. That reward or benefit is part of the compensation which he accepts in lieu of the greater rewards of private employment. The membership in a pension or retirement system is, therefore, substantially a contractual relationship when the member joins the system. The benefits which are the essence of that contract should not be diminished or impaired. *Lippman v. Bd. of Educ. of the Sewanhaka Cent. High Sch. Dist.*, 487 N.E.2d 897, 899 (1985) (citation omitted) (emphasis in original).

**VI. The State Of New York Court Of Appeals  
*Sua Sponte* Dismissal Is In Direct Conflict  
With Its Own Decision Regarding Rubber  
Stamping And Whether The Unconstitu-  
tional Rubber Stamping Of The Deferment  
Standard In State Courts Warrants Judici-  
ary Review By This Court**

The New York State Court of Appeals is the highest state court in New York that a petitioner can presents its claims to after the dismissal by the lower and appellate courts. The New York State Court of Appeals had jurisdiction over this cause and its *sua sponte* dismissal under CPLR 5601 was nothing more than a “rubber stamp” of the agency, lower court, and appellate division’s decision. The New York State Court of Appeals *sua sponte* dismissal on the grounds that no appeal lies as of right from the unanimous orders of the Appellate Division absent direct involvement of a substantial constitutional question was unconstitutional. The Appeals Court as a reviewing court failed to exercise a genuine Judicial function adequately and fairly but rather merely “rubber stamped.” Where a reviewing Court of Appeals invites all parties to submit a Jurisdictional Response to subject matter jurisdiction and the three school districts, the law firm and union failed to do so, was dismissal proper against the necessary joinder parties. The State of New York Court of Appeals had jurisdiction over the Petitioner’s appeals as of right and found a final order of the Appellate Division.

Although judicial review of an agency determination appears to be limited, the Court of Appeals has made clear that a reviewing court exercises a genuine judicial function and that review is more than a “rubber stamp” of an agency’s determination. See *Matter of New York City Tr. Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54, 577 N.E.2d 40, 45 (1991); *Matter of Reape v. Adduci*, 151 A.D.2d 290, 293, 542 N.Y.S.2d 562, 564 (1st Dept. 1989).

**VII. The Decision Below Involves Issues Of Overwhelming Public Importance And Will Have Substantial Impact Far Beyond This Specific Case**

Review should be granted because the *sua sponte* dismissal by the State of New York Court of Appeals presents a novel issue of significant public importance and has a much more far-reaching impact beyond the parties and involves issues of state-wide importance regarding settlement agreements, arbitration awards as well as a public employee entitlement to their pension benefits. Should the State of New York Court of Appeals *sua sponte* dismissal and the Appellate Division, Fourth Judicial Department, and the New York State Supreme Court decisions stand unchecked without any form of judicial review by this Court, millions of public employees who are vested members in a retirement or pension plan and who have a legitimate retirement expectation where the contractual relationship is governed by terms of pension code at the time the public employee becomes a member of the

retirement system stands to and will lose enormous, earned compensation, salary, service credit and pension benefits through the state run pension funds. The impact of causing a vested member financial hardship is paramount and should be of great concern to everyone.

**VIII. State Of New York Court Of Appeals *Sua Sponte* Dismissal Of Petitioner's Appeal As Of Right Was Unconstitutional And Violates Petitioner's Constitutional Rights To Her Pension And Is In Conflict With At Least Six Other States, Including New York As Well As Federal Circuits Regarding Retirement Pension Being A Constitutional Protected Property Right**

Pensions are constitutionally protected under state and federal law. Six states, including New York, take the approach that pensions are protected as a property right under the due process clause of the United States Constitution. See Farmer, *supra*; see also, e.g., *Morris v. NYCERS*, 129 F. Supp. 2d 599, 606-07 (S.D.N.Y. 2001) (holding former city employee had property interest in right to receive benefits of his membership in city pension system subject to the due process clause (collecting cases)); *Myers v. W. Virginia Consol. Pub. Ret. Bd.*, 704 S.E.2d 738, 747 (2010) (citations omitted) (“[T]he realization and protection of public employees' pension property rights is a constitutional obligation.

## **IX. The System Misapplication of Holbert To Unconstitutionally Take Retirement Benefits**

The New York State Teachers' Retirement System and the school district as public employers should not be able to have their cake eat it too by diminishing and/or impairing an employee's retirement pension. The NYSTRS' final determination in which it applied the holdings in Holbert was misapplied. In Holbert, the Appellate Division, Fourth Judicial Department upheld the System's determination regarding the exclusion of certain raises in a member's based annual salary from the member's three-year final average calculation. None of the circumstances applied to the taking of Petitioner's salary, services credits and pension. Should this petition be granted Petitioner will further brief on the merits.

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## **CONCLUSION**

For the foregoing reasons, this Court should grant the petition.

Dated: September 1, 2022

Respectfully, submitted,

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