No. 22-384

In The Supreme Court of the United States

BRONWYN RANDEL,

Petitioner,

v.

RABUN COUNTY SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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I. The Existence Of A Circuit Conflict Is Not Really Disputed

Respondent does not actually dispute the existence of the circuit conflict described in the petition; it argues only (but mistakenly) that the differing interpretations of the Due Process Clause do not matter in this case. See pp. 4-12, *infra*.

The petition describes 34 decisions in ten circuits and eight states which hold that the existence of post-deprivation remedies matters *only* if it would have been impracticable to provide adequate due process prior to the deprivation, because the deprivation was random and unauthorized. Pet. 22-32. Respondent does not disagree with our characterization of the legal standard applied in those circuits and states. Respondent does not, for example, dispute our characterization of any of the cases set out in the petition. Nor does it assert that there are decisions in those jurisdictions, overlooked in the petition, which hold (as in the Eleventh Circuit) that in a case where compliance with due process standards prior to a deprivation would have been practicable, a state may nonetheless correct a denial of due process by providing some sort of post-deprivation remedy. Respondent refers to decisions outside the Eleventh Circuit only to note that they relied on post-deprivation remedies where the deprivation at issue was indeed random and unauthorized. Br. Opp. 13-21. But those citations are entirely consistent with the assertion in the petition that in those other

circuits, and in state courts, the existence of a post-deprivation remedy is relevant only when it would have been impracticable to require compliance with due process prior to the deprivation.

The petition describes 19 decisions in the Eleventh Circuit itself which adopt the contrary view, holding that the existence of a post-deprivation remedy satisfies the requirements of the Due Process Clause even where it would have been entirely practicable to provide adequate due process prior to the deprivation. Pet. 14-22. Respondent does not disagree with our characterization of that longstanding Eleventh Circuit standard. Respondent does not, for example, dispute our characterization of any of the Eleventh Circuit cases set out in the petition. Nor does it assert that there are any decisions in the Eleventh Circuit, overlooked in the petition, which hold (as in a total of eighteen circuits and states) that in a case where compliance with due process standards prior to a deprivation would have been practicable, a state may not correct a denial of due process by providing some sort of post-deprivation remedy. The most that respondent has to offer is an unexplained assertion that the petition "cherry-picks" quotations from Eleventh Circuit decisions. R. Br. 13. But respondent does not identify any specific quotation that it claims was taken out of context, or which it asserts is not indicative of the actual Eleventh Circuit standard.

Respondent mentions a single 1994 case which commented that it would have been impracticable in that particular case to hold a constitutionally sufficient

pre-deprivation hearing. R. Br. 11. But respondent does not actually contend that the Eleventh Circuit only permits reliance on post-deprivation remedies where it would have been impracticable to provide a pre-deprivation hearing that satisfied constitutional standards. The petition summarizes 18 Eleventh Circuit decisions subsequent to 1994 which held that a post-deprivation process can always satisfy due process standards; respondent does not contend that any of those later decisions suggested that the deprivation at issue in the case at hand was random and unauthorized, so that providing pre-deprivation due process would have been impracticable.

What occurred in the instant case is typical of more than twenty-five years of Eleventh Circuit due process decisions. In its motion to dismiss in this case, respondent did not assert that the deprivation was random or unauthorized; it simply argued (correctly) that under Eleventh Circuit precedent *all* denials of due process requirements can be corrected after the fact by some post-deprivation remedy. In granting the motion to dismiss, the district court applied those Eleventh Circuit precedents, and never suggested that, or even discussed whether, the deprivation in this case was random and unauthorized. App. 13a-14a. In the court of appeals, respondent again did not assert that the deprivation in this case was random or unauthorized; it only argued (correctly) that under Eleventh Circuit precedent *all* denials of due process requirements can be corrected after the fact by some post-deprivation remedy. In affirming the dismissal of

petitioner's due process claims, the court of appeals too applied those Eleventh Circuit precedents, and also never suggested that, or even discussed whether, the deprivation in this case was random and unauthorized. App. 4a-5a. Only in this Court does respondent, for the first time in this litigation, assert that any denial of due process rights that might have occurred would have been random and unauthorized.

Since September of 2022, courts in the Eleventh Circuit have continued to apply that circuit's standard to dismiss due process claims. *Huntsville Senior Services v. Alabama Dept. of Public Health*, 2022 WL 17650483, at *9 (N.D. Ala. Dec. 23, 2022); *Neely v. Elmore County*, 2022 WL 16556770, at *2-*4 (M.D. Ala. Oct. 31, 2022); *Taylor v. Board of Regents of University System of Georgia*, 2022 WL 4857906, at *10 (Oct. 3, 2022). None of these decisions held that, or even considered whether, the deprivation which had occurred was random or unauthorized. In the Eleventh Circuit, unlike in ten circuits and the highest courts of eight states, post-deprivation remedies bar due process claims even if the deprivation at issue was neither random nor unauthorized.

II. This Case Presents An Excellent Vehicle For Resolving The Question Presented

This case presents precisely the situation in which the circuit conflict is of controlling importance. Plaintiff asserts that she was denied due process because, inter alia, the School Board which fired her was biased

against her. The biased School Board was the entity that made the decision whether to fire the plaintiff, not because of any action by the hearing officer, but because Georgia law mandated that the Board itself do so in every case. Although under state law an advisory tribunal can be established prior to Board action, the Board itself still always makes the actual decision, and it is not bound by any recommendation from such a tribunal. The issue addressed by the hearing officer in this case was not whether the decision to fire the plaintiff would be made by an independent tribunal *instead of* the Board, but only whether the allegedly biased School Board would receive non-binding advice from such an advisory tribunal.

Plaintiff asserted that the School Board was a biased decisionmaker for two related reasons. First, several months prior to the termination hearing, the plaintiff had filed a discrimination charge against the Board with the EEOC; that charge and the administrative proceeding before the EEOC were still pending at the time of the Board hearing. Second, at the termination hearing, the School Board Attorney who presented to the Board evidence and argument in favor of dismissing plaintiff was simultaneously representing and advising the Board itself in the pending EEOC proceeding. The issues in the EEOC proceeding and in the termination hearing were substantially related. The grounds asserted by the school officials for the adverse actions at issue in the EEOC proceeding substantially overlapped with the grounds being asserted for dismissing the plaintiff. See Br. Opp. 5. If the Board

had rejected the criticisms of plaintiff's teaching, and declined to fire her, that would have seriously undermined the Board's efforts to convince the EEOC that the earlier adverse actions against the plaintiff were justified by some nondiscriminatory reason.

Recognizing that the Board itself would be biased, plaintiff asked that an independent tribunal be appointed to consider the dispute prior to action by the Board itself. But the recommendation of such a tribunal, even if favorable to the plaintiff, would not have controlled the decision of the Board; under state law, whatever the recommendation of such a tribunal, the actual decision to fire or retain a teacher would still be be made by the Board itself. "The hearing shall be conducted before the local board, or the local board may designate a tribunal ... to conduct the hearing and submit its findings and recommendations to the local board *for its decision thereon*." Ga. Code Ann. §20-2-940(e)(1) (emphasis added). "Where the hearing is before a tribunal, the tribunal shall file its findings and recommendations with the local board ... , and the local board *shall render its decision* thereon...." Ga. Code Ann. §20-2-940(f)(1) (emphasis added). A school board can refer a disciplinary matter to an independent tribunal, but the tribunal's role is advisory at most. The board itself always makes the decision whether to fire the employee.

In successfully opposing plaintiff's objection to the procedures in this case, the Board repeatedly pointed out that under Georgia law it would not matter whether an independent tribunal was convened,

because at the end of the day the Board itself would still make the decision whether to fire the plaintiff. "[A] tribunal would merely make recommendations to the Local Board, which retained the ultimate decision-making authority.... In other words, the local board makes the ultimate decision to renew or terminate an employment contract, even if it appoints a tribunal...." Brief of Appellant, Court of Appeals of Georgia, 12-19 (footnote omitted). The Board insisted that under the Georgia Constitution only a school board itself could decide whether to dismiss or retain an employee. *Id*. at 17-18. Determining whether "to terminate, demote, or suspend professional staff members ... [is] the constitutional role local boards play." *Id*. at 18; see Brief of Appellee Rabun County Board of Education, Superior Court of Rabun County, 9 ("a tribunal ... submit[s] ... recommendations to the local board for its final decision"); Brief of Appellee, Rabun County Board of Education, State Board of Education, 7 ("a tribunal ... submit[s] its ... recommendations to the local board for its final decision); Hearing of Aug. 4, 2020, Rabun County Superior Court, 25 ("even if [the Board had] appointed ... a tribunal,.... the Board still has to make the ultimate decision. So even appointing a tribunal does not avoid, under the statute, the Board having to ultimately make the decision.... [T]he Board in this circumstance ... [is] in no way bound by recommendations of the tribunal.... So [it] would still be making the same decision.... [It is] for the Board to make an actual decision.").

As respondent notes, the hearing officer declined to refer the dispute to an advisory independent tribunal. But even if the hearing officer had ruled otherwise, and had referred the dispute to such a tribunal, under state law the final decision regarding whether to terminate the plaintiff would still have been made—as required by state law—by the Board itself. The hearing officer did not determine that the biased Board would be the entity that decided whether plaintiff would be fired; Georgia law did that.

The gravamen of plaintiff's due process claim of a biased tribunal is not that the hearing officer made some sort of procedural "error" in permitting the biased Board to rule on plaintiff's continued employment. Br. Opp. 2. The hearing officer made no procedural ruling at all as to whether the Board would make the final decision about the plaintiff's termination; Georgia law mandated that the Board do so. It is not true that the decision as to whether the Board would retain the final authority over plaintiff's employment "could have been made in favor of either party." Br. Opp. 12. It could only have been made in favor of the Board doing so. It is not correct that "[t]here [was] no practical way to predict" (Br. Opp. 13) whether the School Board, rather than some other entity, would determine whether a teacher is fired; state law made that absolutely predictable. The claim here is not that Georgia law "was not properly implemented" (Br. Opp. 19) or that the making of the final decision by the School Board, rather than by some other entity, was "unauthorized (Br. Opp. 13); the claim is that state law

was followed to the letter. Georgia law simply had no provision for substituting another decisionmaker when a School Board is biased because of a conflict of interest.

There are precisely the circumstances in which, outside the Eleventh Circuit, the existence of a post-deprivation remedy would be irrelevant. The decisions in other circuits on which respondent relies all involved cases in which the due process violation was random and unauthorized because government officials had violated state procedures, not—as here—where they had complied with the applicable procedures. See *Cannici v. Village of Melrose Park*, 885 F.3d 476, 480 (7th Cir. 2018) (post-deprivation remedies sufficient in prior case because officials had "failed to follow the requirements of existing law"); *Hadfield v. McDonough*, 407 F.3d 11, 20 (1st Cir. 2005) (post-deprivation remedies sufficient where there was a "flaw in the official's conduct rather than a flaw in the state law itself"); *Corcoran v. Olson*, 102 F. App'x 522, 523 (9th Cir. 2004) ("A state official's failure to abide by constitutionally adequate procedures"); *Cohen v. City of Philadelphia*, 736 F.2d 81, 84 (3d Cir. 1984) ("unauthorized failure of state agents to follow proscribed procedures"); Br. Opp. 14 (in the First Circuit post-deprivation remedy sufficient if officials "misapplie[d] state law"), 18 (in the Eighth Circuit post-deprivation remedy sufficient if "an adequate statutory procedure is available, but a state agency failed to properly implement that procedure").

In the instant case, the fact that the allegedly biased School Board rather than some other entity made the decision whether to fire the plaintiff was not the result of any violation of state law or procedure, either by the Board itself or by the hearing examiner. Both were doing exactly what state law required.

The Eleventh Circuit's fatally flawed interpretation of the Due Process Clause entails a related circuit conflict regarding what a state must do if a constitutionally deficient deprivation was indeed random and unauthorized. Outside the Eleventh Circuit, if a constitutionally deficient deprivation has occurred, the remedy provided by the state must be a constitutionally adequate decisionmaking process. So where for example, the initial decisionmaker was biased, or a plaintiff was denied a meaningful opportunity to be heard, the state must make the disputed decision anew, with an unbiased decisionmaker and an opportunity to be heard. But in the Eleventh Circuit, all a state need provide is some sort of generally available review procedure to consider *whether* the initial proceeding was constitutionally defective at all. If a state usually provides some forum for doing so, a plaintiff is barred from bringing a section 1983 action to obtain a federal judicial determination of whether (contrary to that state review) the initial deprivation was constitutionally defective (see Pet. 14-22), and a plaintiff is barred from federal court even if the state forum, for some procedural reason, refuses to decide in his or her case whether the initial deprivation met constitutional standards. Pet. 18-20. Thus in the instant case the

State Board of Education, after rejecting plaintiff's constitutional challenge to the decision of the local School Board, upheld plaintiff's dismissal while deferring to the conclusions of the allegedly biased Board, and considering only the allegedly constitutionally defective record. If, as plaintiff claims, the initial deprivation was constitutionally defective, the State Board decision would itself be fatally tainted by those constitutional errors. But under the Eleventh Circuit standard, such a constitutionally flawed action by the State Board could not be challenged in a section 1983 action, even though the defendant does not contend that the action of the State Board itself was random and unauthorized, because the Board's action itself would usually be subject to judicial review.

The Eleventh Circuit scheme at issue in this case largely eviscerates procedural due process, and is far worse than the exhaustion requirements rejected by this Court in *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), and *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019). At least under the standards disapproved in *Patsy* and *Knick*, there would eventually come a time when, having devoted considerable time and effort to unsuccessfully seeking relief in some state forum, the victim of a constitutional violation could finally obtain redress in a federal section 1983 action. Under the Eleventh Circuit decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), and its progeny, that day never comes. This aberrational misinterpretation of a vital constitutional right has endured for over a quarter of a century. The Court

should grant review and conform the constitutional standard applied by federal courts in the Eleventh Circuit to the constitutional standard that exists in ten other circuit courts and under the decision of the highest courts of eight states, and that is mandated by this Court's own opinions.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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