No. 23-220

# In the Supreme Court of the United States

MICHAEL PARIETTI, *Pro-Se,*

*Petitioner,*

-against-

ROCKLAND COUNTY EXECUTIVE ED DAY, ET AL.,

*Respondents.*

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On Petition for a Writ of Certiorari to the
New York Court of Appeals

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Under the Due Process Clause of the Fourteenth Amendment, state court judges must recuse themselves from presiding over a case "when, objectively speaking, the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Rippo v. Baker*, 580 U.S. 285, 287 (2017). Here, the New York State Appellate Division ("Appellate Division") affirmed the trial court's denial of Petitioner's recusal motion, concluding that, as a factual matter, Petitioner had "failed to set forth *any* proof of bias or prejudice on the part of the [court] which would have warranted recusal." Petition for Certiorari ("Cert. Pet.") 5a (emphasis added and internal quotation marks omitted). The question presented is whether the Appellate Division's determination that the trial judge's recusal was unwarranted for lack of *any* evidence of bias violated due process.

2. The Rockland County Legislature has enacted Local Law 6-2022 ("Local Law 6-2022), which, in relevant part, provides that all public comments at public meetings must be submitted to the Legislature by email when the legislative session is accessible to the public by videoconferencing regardless of whether the commentor personally attends the session or attends online. Local Law 6-2022 places no restrictions on the content or viewpoint of the comments accepted, nor on the individuals who may

submit them. Petitioner, who personally attended two legislative sessions that were also accessible by videoconference, wanted to present his comments to the Legislature by speaking at the session. He was not permitted to do so. The question presented is whether Petitioner's First Amendment right to free speech, made applicable to the states through the Fourteenth Amendment, was violated by Local Law 6-2022's email-only rule.

## INTRODUCTION

As part of his apparently ceaseless efforts to become an elected official,[1] *pro se* petitioner Michael Parietti ("Parietti") seeks this Court's intervention in his unsuccessful challenge to the Rockland County, New York 2023 Legislative Map (the "Map"), which has been rejected at every level of New York's judiciary. Not only are Parietti's constitutional claims meritless, but, procedurally, this case is the entirely wrong vehicle for raising them. Because Parietti's litigation was dismissed on standing grounds (which Parietti has not contested

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[1] Parietti has a notable history of electioneering. As the trial court found,

> Parietti has run for public office eight times (including three times for County Legislator). He has run as a Democrat, a Republican, and a candidate on the Preserve Ramapo Line and the Serve America Movement Line. All eight of his runs for office have been unsuccessful.

Cert. Pet. 14a.

in this Court), the Appellate Division's disposition of his due process and free speech claims is *obiter dictum*. As such, it is unworthy of this Court's consideration. Respondents Rockland County Executive Ed Day, the Rockland County Legislature, and the Rockland County Board of Elections (collectively, "Rockland County") therefore respectfully request that Parietti's certiorari petition be denied.

## STATEMENT OF THE CASE

On December 8, 2022, Parietti launched a state-court challenge to the Map. *See* Cert. Pet. 13a. The Map, which Rockland County adopted after the 2020 census, had been redrawn to reflect changes in the County's population. *See id.* at 12a. The legislature approved it by an affirmative vote of 13 to 1, with every Democrat and all but one Republican supporting the redrawn voting districts. *See id.* at 13a.

Nonetheless, in his nearly 900-page *pro se* state-court petition (with 76 exhibits), Parietti alleged that the Map resulted from sundry violations of federal and New York State voting rights laws. *See* Cert. Pet. 14a. Construed broadly, Parietti's pleadings intimated that the Rockland County legislature violated his First Amendment free speech rights by requiring him to submit his public comments to the proposed redistricting maps via email during legislative sessions held by videoconference rather than by delivering them

orally and in person. *See id.* at 9-10. Finally, during the trial court litigation, Parietti insisted that the judge should have recused herself from the case. *See id.* at 13-14.

The trial court dismissed Parietti's federal and state voting rights claims on the grounds that he lacked standing under federal law to bring them. *See* Cert. Pet. 23a-26a. It further dismissed his First Amendment claim because he failed to state any violation of his free speech rights. *See id.* at 45a. And it rejected his recusal motion as baseless. *See id.* at 128a, 178a. Those rulings were affirmed by the Appellate Division, and New York's highest court denied Parietti leave to appeal further. *See id.* 1a-7a.

Notably, Parietti does *not* seek this Court's review of his standing to challenge the Map. *See* Cert. Pet. i-ii (stating two questions presented). In other words, he does not seek review for the only federal claim that could ultimately result in the Map's invalidation. Instead, he merely seeks review of his First Amendment claim for being precluded from personally addressing the county legislature during its working session, as well as the trial court's recusal ruling, which Parietti maintains is a violation of his due process rights.

## REASONS FOR DENYING CERTIORARI

### I. PETITIONER SEEKS REVIEW OF *DICTUM*

It has long been this Court's practice "to look beyond the broad sweep of [an opinion's] language and determine for [itself] precisely the ground on which the judgment rests." *Black v. Cutter Laboratories,* 351 U.S. 292 298 (1956). Consequently, when judicial writings on appeal constitute "pure dictum," the Court has concluded that "there is no reason to address them." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 516 n.11 (1988); *see also Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from denial of certiorari) ("We sit, after all, not to correct errors in dicta.").

Here, no one must look beyond the plain language of the Appellate Division's ruling to see that Parietti's action was dismissed because he lacked standing to maintain it. *See* Cert. Pet. 6a-7a. Again, he has *not* sought certiorari review of that holding. *Id.* at i-ii. And because Parietti's case was squarely decided on standing grounds, any misstatement of First Amendment or due process principles by the courts below (of which there are none) would be precisely "the kind of ill-considered dicta that [this Court is] inclined to ignore." *Kappos v. Hyatt*, 566 U.S. 431, 443 (2012).

## II. THE APPELLATE DIVISION'S DECISION DOES NOT CONFLICT WITH ANY RULING OF THIS COURT, NOR HAS PARIETTI IDENTIFIED A CONFLICT WITH ANY OTHER COURT.

But even if this were the rare case in which the Court might weigh the cert-worthiness of dictum, Paretti has not identified any decision – of this or any other court – that conflicts with the ruling below. To the contrary, the Appellate Division's reasoning is completely in line with the holdings of this Court, and thus presents no basis for certiorari.

### 1. *Parietti's Due Process claim is entirely without merit.*

According to Parietti, the trial judge should have recused herself because she "was *likely* biased and *might* have an interest in the outcome of the case due to her connections to the Rockland County political apparatus which strongly supported the reapportionment plan." Cert. Pet. 13-14 (emphasis added). He further insists that recusal was necessary because the judge "and members of her staff lived in Rockland County and would be impacted by the reapportionment." Cert. Pet. 23. The trial judge denied the motion and the New York Appellate Division affirmed that ruling. Cert. Pet. 13-18. In upholding the trial judge's decision, the Appellate Division explained that Parietti "failed to set forth any proof of bias or prejudice on the part of

the [court] which would have warranted recusal." Cert. Pet. 4a-5a (internal quotation marks omitted).

Citing this Court's decision in *Rippo*, Parietti maintains that the New York courts applied the wrong constitutional standard for recusal, thus warranting reversal. Cert. Pet. 21-22. That argument is frivolous.

Once again, Parietti disregards the fundamental rule that "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (citing *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions"). A lower court's variation in verbiage from this Court's articulation of a rule does not require reversal when the substantive application of law remains the same. Here, there was no deviation in substance.

In *Rippo*, this Court reiterated that "[r]ecusal is required when, objectively speaking, the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." 580 U.S. at 287 (internal quotation marks omitted); *see also Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (court "asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias") (internal quotation marks

omitted). This case comes nowhere close to meeting the constitutional test for recusal. As the Appellate Division stated, Parietti failed to set forth "*any* proof of bias or prejudice," Cert. Pet. 5a (emphasis added), much less objective proof that the "probability of actual bias or prejudice" is "too high to be constitutionally tolerable." *Rippo*, 580 U.S. at 287 (internal quotation marks omitted).

Instead, without offering any actual support for his assertion, Parietti hypothesized that the trial judge was "likely" biased and "might have an interest in the outcome" merely because she lived in Rockland County and, vaguely speaking, had political affiliations there. To require a judge's recusal, however, the Constitution requires *objective evidence* of much greater heft than Parietti's ill-defined and ungrounded speculation. *See, e.g., Rippo*, 580 U.S. at 287 (evidence that criminal prosecutor was also investigating trial judge during defendant's trial); *Williams*, 579 U.S. at 12-14 (state supreme court justice reviewing murder conviction was prosecutor who sought death sentence for defendant); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 885-88 (2009) (defendant donated $3 million to campaign of state supreme court justice hearing appeal). Parietti provided none.

Nothing about the Appellate Division's recusal holding deviates from the constitutional norm.

2. *Parietti's First Amendment claim ignores settled law.*

Parietti's argument that his free-speech rights were violated by Rockland County is equally infirm. His claimed entitlement to speak at legislative sessions at which redistricting maps were discussed *by legislators* fundamentally misconstrues this Court's forum analysis decisions. Because Parietti was simply required to comment by email and was free to express whatever view he wished, his constitutional rights were not infringed.

It is a given that the "Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions on policy." *Minnesota State Bd. for Community Colleges*, 465 U.S. 271, 283 (1984). Parietti does not dispute that premise. *See* Cert. Pet. 28 ("The public has no First Amendment right to speech in a public meeting of an elected body."). Instead, he maintains that Rockland County created a "limited public forum" when it scheduled "public hearings"[2] for the proposed redistricting maps, and thus any

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[2] Local Law 6-2022 was enacted "to allow remote attendance by members of the Legislature in extraordinary circumstances." Cert. Pet. 54a. Parietti tries to bolster his First Amendment argument by drawing an unfounded and self-serving distinction between Local Law 6-2022's supposed treatment of "public meetings" and what he describes as "public hearings or public participation periods." *Id.* at 34. There is no such distinction in Local Law 6-2022, however, and Paretti provides no support for drawing one.

restrictions on his right to speak at those events were subject to strict scrutiny. Pet. 34-35. He is plainly wrong.

Basic First Amendment doctrine recognizes that the "necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for certain discussion of certain topics." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015) (defining "limited public forum"). That said, government bodies "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, . . . nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (internal citations and quotation marks omitted). So long as the government's restrictions stay within those parameters, however, a limit on forum access "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. . . . Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.* 473 U.S. 788, 808-09 (1985) (emphasis in original).

Under those principles, and even assuming the Rockland County's legislative sessions qualified as limited public fora, Parietti suffered no First

Amendment deprivation. Because those sessions were held by videoconferencing, Local Law 6-2022 required that all public comments on the subjects covered be received solely by email. *See* Cert. Pet. 57a. The appropriate inquiry therefore asks whether that limitation – *i.e.*, comment by email alone – was: (1) reasonable considering the forum's purpose; and (2) based on a commentor's viewpoint. *See Rosenberger*, 515 U.S. at 829.

Taking the second question first, Local Law 6-2022's email-only requirement for public comments was in no way tied to the content or viewpoint contained in those comments. It was purely a regulation of medium, not message. Under the rule, *all* email comments received were distributed to the legislators.

As to the reasonableness of the restriction, this Court has instructed that the "existence to the right of access to [a claimed forum] and the standard by which limitations upon such a right must be evaluated differently depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Here, the claimed forum was a county legislative session *held by videoconference*. Consequently, the way in which that forum operated was necessarily constrained by the technology available to Rockland County.

The reasonableness of the email-only rule is firmly rooted in that functional reality. As the

legislative counsel told attendees before the online session began, "just as the Legislators participating remotely are treated the same as the Legislators in the room, members of the public, both virtual and in the room, are required to be treated the same." Cert. Pet. App. 84-85. She then clearly explained that, because "*we do not have a mechanism at this point for public comment to be provided virtually*, . . . what has been done since we began this way back in the beginning of Covid is that any public comments that wish to be submitted, either a general public participation or for the public hearing itself, must be submitted in email." *Id.* at 85 (emphasis added). Counsel emphasized that, by limiting public comments to emails only, "every member of the public is treated the same." *Id.*

Parietti might insist that there were other, *more* reasonable options for receiving public comments than limiting them to email submissions, but the legislature was not obliged to implement them. *See Cornelius*, 473 U.S. at 808 (limitation on access to charity drive permissible "because it would be administratively unmanageable if access could not be curtailed in a reasonable manner"). In the circumstances present here, the First Amendment, at most, requires that members of the public who wish to comment on legislative proceedings have a reasonable opportunity to do so. Because Parietti had that opportunity, this case is unremarkable.

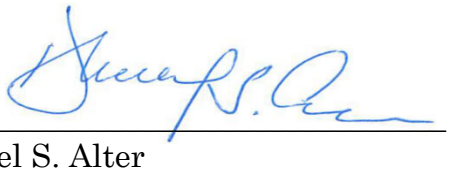
## CONCLUSION

For all these reasons, Parietti's petition for a writ of certiorari should be denied.

Dated: White Plains, New York

October 2, 2023

Respectfully submitted,



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