

IN THE  
SUPREME COURT OF THE UNITED STATES

RAYMOND ZDUNSKI,

Petitioner,

v.

ERIE 2-CHAUTAUQUA-CATTARAUGUS  
BOCES, DAVID O'ROURKE, in his official  
capacity, JOHN O'CONNOR, in his official  
capacity, BRIAN LIEBENOW, LAURIE  
BURGER, and TRACY SMITH-  
DENGLER,

Respondents.

**NOTICE OF MOTION**

Second Circuit Case No. 22-547

SIRS:

PLEASE TAKE NOTICE that upon the attached Declaration of Kristina S. Heuser sworn to on July 1, 2023, and upon all the pleadings and proceedings had heretofore herein, plaintiffs will move this Court (via paper submission only) on the 17<sup>th</sup> day of July, 2023 or as soon as counsel can be heard, for an order directing the clerk to file the Petition for a Writ of Certiorari in the above-captioned matter out of time, together with such other and further relief as this Court may deem just and proper.

Dated: Locust Valley, New York  
July 3, 2023

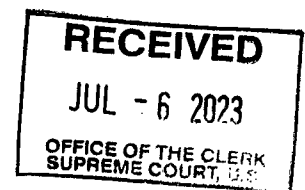
Respectfully Submitted,

KRISTINA S. HEUSER, P.C.

By:

*Kristina S. Heuser*

Robert Wanker, Esq. (of counsel)  
23 Birch Hill Road (rear)  
Locust Valley, New York 11560  
Tel. (516) 676-1565  
E-mail kheuser@heuserlawfirm.com



IN THE  
SUPREME COURT OF THE UNITED STATES

RAYMOND ZDUNSKI,

Petitioner,

v.

ERIE 2-CHAUTAUQUA-CATTARAUGUS  
BOCES, DAVID O'ROURKE, in his official  
capacity, JOHN O'CONNOR, in his official  
capacity, BRIAN LIEBENOW, LAURIE  
BURGER, and TRACY SMITH-  
DENGLER,

Respondents.

**DECLARATION IN SUPPORT**

Second Circuit Case No. 22-547

KRISTINA S. HEUSER, an attorney who meets all of the qualifications for admission to the bar of this Court and whose application for admission is currently pending, makes the following declaration pursuant to 28 U.S.C. §1746:

1. I am the attorney for plaintiff in the above-captioned action (my application to the Supreme Court bar is pending, but I represented Petitioner in all of the lower court proceedings an attorney of counsel to my firm is filing on my behalf in this Court until my motion for admission is granted). I am fully familiar with the facts and circumstances set forth herein.
2. I make this declaration in support of the within motion seeking an order to direct the clerk to accept the filing of a Petition for a Writ of Certiorari in this action out of time.
3. I am admitted to practice before the courts of the State of New York and United States District Courts for the Eastern, Southern, and Western Districts of New York since 2009. I am also admitted to practice before the United States Courts of Appeals for the Second and Eleventh Circuits, respectively. This Petition for a Writ of Certiorari will be my first filing ever made in the United States Supreme Court.

4. I was aware that filing of the petition must occur within ninety (90) days of the entry of judgment in the Circuit Court. I originally did have the deadline calendared as June 11, 2023 (see Exhibit A, which is an email exchange with the Vice President in charge of Allied Affairs at Alliance Defending Freedom, whom I was keeping abreast of the case because I am an Allied Attorney and the case was referred to me by ADF for this reason.)
5. On June 1, 2023, I exchanged emails with an appellate printer who had reached out to me regarding another matter, asking if they also handled filing of writ petitions with the United States Supreme Court. When that printer responded in the affirmative, I specifically inquired about this matter (*Zdunski v. Erie 2-Chataqua-Cattaraugus BOCES, et al.*). She advised me that the deadline for the filing of the Petition for a Writ of Certiorari in this action was July 3, 2023 (see Exhibit B). I relied upon that information (as can be seen from Exhibit A).
6. It was subsequently suggested to me to use a different appellate printer, whom ADF works with and had afforded ADF (and would afford me) substantial cost savings in connection with the filing. I contacted them last week and, much to my chagrin, they informed me that the deadline for filing the writ petition was actually June 11, 2023! That email correspondence is annexed hereto as Exhibit C.
7. I contacted the office of the Clerk of the United States Supreme Court, and was advised to file this motion together with the writ petition.
8. I pray that this Court will direct the Clerk to accept late filing of a Petition for a Writ of Certiorari in this matter, both due to the unusual circumstances leading to the

confusion about the filing deadline and the seriousness of the matter for which review is sought.

9. To inform the Court of substance of the matter for which review is sought, I have attached hereto the Complaint filed in the United States District Court for the Western District of New York (Exhibit D). The decisions of that court, the Second Circuit, and a fuller description of the matter are set forth in the Petition for a Writ of Certiorari and accompanying Appendix filed simultaneously herewith.
10. It is imperative that the Court hear this matter to remedy the particular harm done to Mr. Zdunski solely on account of him being a Christian unwilling to violate the dictates of his conscience and sincerely held religious beliefs to preserve his employment, but more importantly to ensure that Christians across this nation are not forced to make the same choice. The government (and employers generally) should not have license to terminate persons of faith who refuse to submit to non-traditional ideology regarding sex and gender. If the Second Circuit's opinion in this matter is allowed to stand, this will be the result.
11. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of July, 2023

*Kristina S. Heuser*

---

KRISTINA S. HEUSER

EXHIBIT A

**RE: Tingley cert petition (Zdunski)**

Ali Kilmartin <akilmartin@adflegal.org>

Thu 6/1/2023 11:04 PM

To: Kristina S. Heuser, Esq. <kheuser@heuserlawfirm.com>

Thanks for the update, Kristina. We will watch for the application.

---

**From:** Kristina S. Heuser, Esq. <kheuser@heuserlawfirm.com>

**Sent:** Thursday, June 1, 2023 8:57 AM

**To:** Ali Kilmartin <akilmartin@adflegal.org>

**Subject:** Re: Tingley cert petition (Zdunski)

**\*EXTERNAL\***

---

Hi Ali -

I just wanted to let you know that I calendared the due date of the cert petition based on the date of the Opinion originally, but now that I am working on it I looked again and calculating from the date of entry of Judgment, I actually have until the beginning of July to file the cert petition. I just filed a grant funding application, I am still working on admission to the court, and I hope to have a draft of my petition to you mid-June. Thank you! I hope all is well.

Kristina

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

Locust Valley, New York 11560

Tel. (516) 676-1565

Fax (516) 676-6382

E-mail: [kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)

---

**From:** Ali Kilmartin <akilmartin@adflegal.org>

**Sent:** Monday, May 1, 2023 11:37 PM

**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>

**Subject:** FW: Tingley cert petition

Kristina, here is a word version of our as-filed Tingley cert petition. I hope this is helpful to you! Thanks,  
Ali



Ali Kilmartin  
Sr. Counsel, VP of Allied Legal Affairs  
+1 571 707 4655 (Office)  
1-814-404-7167 (Direct Dial)  
[akilmartin@adflegal.org](mailto:akilmartin@adflegal.org)  
[ADFlegal.org](http://ADFlegal.org)

---

**From:** Cindy Eville <[ceville@adflegal.org](mailto:ceville@adflegal.org)>  
**Sent:** Monday, May 1, 2023 9:22 PM  
**To:** Ali Kilmartin <[akilmartin@adflegal.org](mailto:akilmartin@adflegal.org)>  
**Subject:** Tingley cert petition

Here's the word version you wanted.



Cindy Eville  
Senior Paralegal  
+1 480 444 0020 (Office)  
+1 480 388 8220 (Direct Dial)  
[ceville@adflegal.org](mailto:ceville@adflegal.org)  
[ADFlegal.org](http://ADFlegal.org)

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PRIVILEGED AND CONFIDENTIAL - ATTORNEY-CLIENT COMMUNICATION/ATTORNEY WORK PRODUCT.

EXHIBIT B



RE: Mauro v. Cuomo - 23-501

Karen Belsky <kbelsky@appellateinnovations.com>

Thu 6/1/2023 8:58 AM

To: Kristina S. Heuser, Esq. <kheuser@heuserlawfirm.com>

I calculate 90 days at July 3, 2023. However, if you want to verify the date, you may want to also speak with the court. As I mentioned, they are extremely strict with this deadline.

Sincerely, Karen

**KAREN BELSKY**

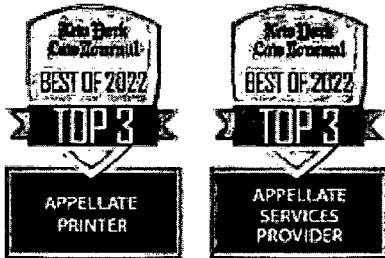
Senior Appellate Consultant



1 Barker Avenue, Suite 305, White Plains, NY 10601

212.655.9542 | 516.869.4030

[www.appellateinnovations.com](http://www.appellateinnovations.com) | [vCard](#)



---

**From:** Kristina S. Heuser, Esq. <kheuser@heuserlawfirm.com>

**Sent:** Thursday, June 1, 2023 8:54 AM

**To:** Karen Belsky <kbelsky@appellateinnovations.com>

**Subject:** Re: Mauro v. Cuomo - 23-501

So what does that make my deadline according to your calculations?

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

Locust Valley, New York 11560

Tel. (516) 676-1565

Fax (516) 676-6382

E-mail: [kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)

---

**From:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>  
**Sent:** Thursday, June 1, 2023 8:48 AM  
**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Subject:** Mauro v. Cuomo - 23-501

Per the Docket –

04/03/2023 80 JUDGMENT MANDATE, ISSUED.[3493218] [22-547] [Entered: 04/03/2023 08:57 AM]

We will send you a link this morning.

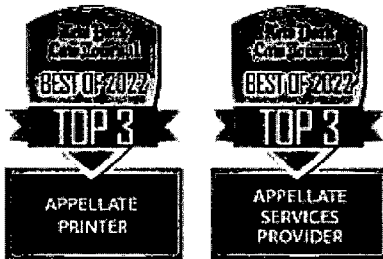
Sincerely, Karen

**KAREN BELSKY**

Senior Appellate Consultant



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212.655.9542 | 516.869.4030  
[www.appellateinnovations.com](http://www.appellateinnovations.com) | [vCard](#)



---

**From:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Sent:** Thursday, June 1, 2023 8:46 AM  
**To:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>  
**Subject:** Re: Mauro v. Cuomo - 23-501

I think I originally calendared the deadline counting from the date of the opinion, but now that I count from the date of entry of judgment, I have significantly more time. Would you mind checking the docket and verifying?

Regarding the Mauro matter, please send me the link and I will upload the documents. Thank you.

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

Locust Valley, New York 11560

Tel. (516) 676-1565

Fax (516) 676-6382

E-mail: [kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)

---

**From:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>  
**Sent:** Thursday, June 1, 2023 8:37 AM  
**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Subject:** RE: Mauro v. Cuomo - 23-501

Good morning, You can either send us the lower court docket numbers of the documents you want added into your Joint Appendix or if you have already downloaded these papers off of PACER, we can send you a link to upload them directly to our server.

The deadline for filing a Petition for Writ of Certiorari is very strict.

You must file your petition for a writ of certiorari within 90 days from the date of the entry of the final judgment in the United States court of appeals or highest state appellate court or 90 days from the denial of a timely filed petition for rehearing.

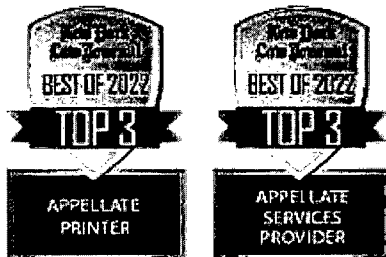
Sincerely, Karen

**KAREN BELSKY**

Senior Appellate Consultant



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212.655.9542 | 516.869.4030  
[www.appellateinnovations.com](http://www.appellateinnovations.com) | [vCard](#)



---

**From:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Sent:** Thursday, June 1, 2023 8:29 AM  
**To:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>  
**Subject:** Re: Mauro v. Cuomo - 23-501

Dear Karen:

I will be sending you the documents for the appendix in the Mauro matter shortly. Regarding the other matter (Zdunski v. BOCES, et al), I think I actually have more time than I thought. Can you check for me to make sure I am not crazy? The Second Circuit Docket Number is 22-547. Judgment was entered 4/3, which I think gives me until the beginning of next month (July) to file. Please confirm. Thank you.

Kristina

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

Locust Valley, New York 11560

Tel. (516) 676-1565

Fax (516) 676-6382

E-mail: [kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)

---

**From:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>  
**Sent:** Wednesday, May 31, 2023 1:46 PM  
**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Subject:** RE: Mauro v. Cuomo - 23-501

In the Second Circuit a Joint Appendix and Brief get filed. The Joint Appendix is made up of the following documents –

- 1) Table of Contents – we prepare this for you
- 2) Lower Court Docket entries – we can print this out for you from PACER
- 3) Relevant portions of pleadings, charge, findings or opinion, transcripts, exhibits
- 4) Order/Judgment appealed from and Notice of Appeal

You also need to consult with opposing counsel and see what they want included, as well. Mostly the documents you are both citing to in your Brief is what is included in your Joint Appendix. You will need to advise us which documents you want included so that we can download them off of PACER.

Attached is a sample Petition for Writ. Once you have an idea of the approximate page count, I can work up an estimate for you.

The Petition portion includes –

Questions Presented  
List of Parties  
Table of Contents and Table of Authorities  
Appendix Index  
Opinions Below  
Statement of Jurisdiction  
Statutory Provisions Involved  
Introduction  
Statement of the Case  
Reasons of Granting the Writ  
Conclusion

The Appendix portion includes those relevant documents that you are citing to.

The format of the Petition for Writ is a small 8 ½ x 9 ¼ booklet. All documents from the lower court must be retyped to fit into this size booklet.

Let me know if you have any additional questions.

Sincerely, Karen

## **KAREN BELSKY**

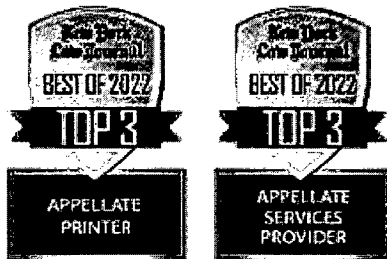
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---

**From:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>

**Sent:** Wednesday, May 31, 2023 1:31 PM

**To:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>

**Subject:** Re: Mauro v. Cuomo - 23-501

Is it necessary to submit an appendix or do we have the option of proceeding on the full record? The case was decided in a motion to dismiss so it is a pretty abbreviated record.

I have a petition for a writ of certiorari due 6/9 and I have never done one on my own before. Also, the client does not have \$ so I am financing this, so I really need to keep costs down. Can you assist with that?

Thank you.

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

Locust Valley, New York 11560

Tel. (516) 676-1565

Fax (516) 676-6382

E-mail: [kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)

---

**From:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>

**Sent:** Wednesday, May 31, 2023 1:23 PM

**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>

**Subject:** RE: Mauro v. Cuomo - 23-501

Hi Kristina,

Thank you for getting back to me. According to our records, your Joint Appendix and Brief are due to be filed by June 26<sup>th</sup>. Once you are ready to proceed, you can provide us with the lower court docket numbers of the documents you want included in your Joint Appendix and we can put together a draft of your Joint Appendix. We would need this list by the week of June 19<sup>th</sup> in order to timely proceed.

Yes, we do handle Petitions for Writ to the US Supreme Court.

If you have any questions, anytime, please let me know.

Also, my direct line is 212-655-9542.

Thank you!

Sincerely, Karen

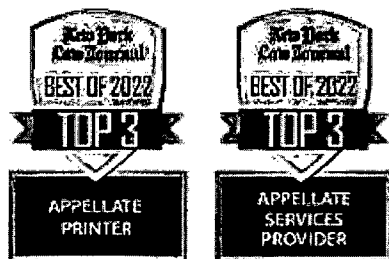
**KAREN BELSKY**

Senior Appellate Consultant



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---

**From:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Sent:** Wednesday, May 31, 2023 1:19 PM  
**To:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>  
**Subject:** Re: Mauro v. Cuomo - 23-501

Hello. I do need help with this, so thank you for reaching out. Do you also handle cert petitions to the US Supreme Court?

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

Locust Valley, New York 11560

Tel. (516) 676-1565

Fax (516) 676-6382

E-mail: [kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)

---

**From:** Karen Belsky <[kbelsky@appellateinnovations.com](mailto:kbelsky@appellateinnovations.com)>  
**Sent:** Thursday, May 25, 2023 11:48 AM  
**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Subject:** Mauro v. Cuomo - 23-501

Dear Ms. Heuser,

We hope to assist you on your upcoming appeal. According to the PACER system, your Joint Appendix and Brief are due to be served and filed by June 26, 2023.

In addition, the documents to be included in your Joint Appendix are as follows –

- 1) Table of Contents – we prepare this for you
- 2) Lower Court Docket entries – we can print this out for you from PACER
- 3) Relevant portions of pleadings, charge, findings or opinion, transcripts, exhibits
- 4) Order/Judgment appealed from and Notice of Appeal

Appellate Innovations entered its 20<sup>th</sup> year of business. Our company is comprised of educated, dedicated, caring individuals, some who have been in this industry for more than twenty years. I started working in this industry at Counsel Press, became an investor with AppealTech and now represent the creative thrust of Appellate Innovations.

Appellate Innovations has completed thousands of appeals in various courts throughout New York and the United States. We are fortunate to have worked with some of the largest and most prestigious law firms in the country. Some of our clients include, K&L Gates, Morris Duffy Alonso & Faley, Lewis Brisbois, Wilson Elser Moskowitz Edelman & Dicker, and Milber Makris Plousadis & Seiden.

Also, our firm works exclusively with the New York City Transit Authority on all appellate related matters. Over the past 20 years, we have forged a mutually rewarding relationship based on trust and mutual respect. Our conscientious staff of professionals serves as a valuable extension to the NYCTA Torts Division and NYCTA Office of the General Counsel Law Department.

**Below is a link to our new video and information regarding our company.**

Please contact me if you have any questions.

Thank you!

Very truly yours,



**KAREN BELSKY**  
Senior Account Manager



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3 Barker Avenue, 2nd Floor, White Plains, NY 10601



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recipient, please notify us immediately by phone or by reply email and delete this email transmission from your system(s) and destroy all copies hereof.

EXHIBIT C

**43966 Heuser RE: petition**

Cockle Legal Briefs <contact@cocklelegalbriefs.com>

Tue 6/27/2023 2:40 PM

To: Kristina S. Heuser, Esq. <kheuser@heuserlawfirm.com>

Kristina,

Thank you for providing the appendix documents. I have begun my review but I wanted to check in regarding the due date which we have marked down as 7/3. Looking at the documents provided, I am calculating that the petition was due on June 11<sup>th</sup>. Per Rule 13.3, the 90 day filing period runs from the date of judgment and *not* from the issuance of the mandate (see

<https://www.supremecourt.gov/filingandrules/2023RulesoftheCourt.pdf#page=14>). Pacer and the stamp seem to indicate the 4/3/23 Judgment is considered to be a Mandate.

I have included a snip below showing my calculation. Please let me know if you have received an extension from the Court, I searched for the party names on the docket but did not find one.

22-547-cv

*Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES, et al.*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, the Thurgood Marshall United States District Court for the Southern District of New York, on the 13<sup>th</sup> day of March, two thousand twenty-three,

PRESENT: JOSÉ A. CABRANES,  
ROSEMARY S. POOL,  
JOSEPH F. BIANCO,  
*Circuit Judges*

RAYMOND ZDUNSKI,

*Plaintiff-Appellant*

v.

ERIE 2-CHAUTAUQUA-CATTARAUGUS  
DAVID O'ROURKE, in his official capacity,  
JOHN J. O'CONNOR, in his official capacity,  
LIEBENOW, LAURIE BERGER, TRACY SMITH-  
DENGLER,

*Defendants-Appellees.*

FOR PLAINTIFF-APPELLANT:

KRISTINA S. HEUSER, Kristina S. Heuser,  
PC, Locust Valley, N.Y.

FOR DEFENDANTS-APPELLEES:

ADAM C. FERRANDINO, Feldman Kieffer,  
LLP, Buffalo, N.Y.

Sincerely,

Kaitlin Naylor  
Cockle Legal Briefs  
2311 Douglas Street  
Omaha, NE 68102  
(800) 225-6964

JoneSoft Date Calculator

Start Date: Monday, March 13, 2023

Calculate: new date

Days: 90 Fortnights: 0

Weekdays: 0 Months: 0

Weeks: 0 Years: 0

Reset

New Date: Sunday, June 11, 2023

Close

About

[contact@cocklelegalbriefs.com](mailto:contact@cocklelegalbriefs.com)  
[www.cocklelegalbriefs.com](http://www.cocklelegalbriefs.com)

**Better Briefs Win.**

**\*\*NOTE\*** I am in the office on Tuesdays and Thursdays from 9:30AM-5:30 PM Central. Please call the main line (800-225-6964) and one of my coworkers will be happy to assist you in my absence. Thank you!

Visit our [blog](#) for resources, statistics, and practitioner's tips.

This information is not intended to constitute legal advice or the creation of an attorney-client relationship between sender and receiver

---

**From:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Sent:** Tuesday, June 27, 2023 1:01 PM  
**To:** Cockle Legal Briefs <[contact@cocklelegalbriefs.com](mailto:contact@cocklelegalbriefs.com)>  
**Subject:** Re: petition

Attached is the second circuit judgment.

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

Locust Valley, New York 11560

Tel. (516) 676-1565

Fax (516) 676-6382

E-mail: [kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)

---

**From:** Cockle Legal Briefs <[contact@cocklelegalbriefs.com](mailto:contact@cocklelegalbriefs.com)>  
**Sent:** Tuesday, June 27, 2023 1:46 PM  
**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Subject:** RE: petition

Your email was received - thank you. A representative will contact you once an initial review of your documents has been completed.

Sincerely,  
Cockle Legal Briefs

800-225-6964

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**From:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>

**Sent:** Tuesday, June 27, 2023 12:41 PM

**To:** Cockle Legal Briefs <[contact@cocklelegalbriefs.com](mailto:contact@cocklelegalbriefs.com)>

**Subject:** Re: petition

Andy,

Here are the two decisions. I am going to review the rule now. Thank you again!

Kristina

*Kristina S. Heuser, Esq.*

Kristina S. Heuser, P.C.

23 Birch Hill Road (rear)

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**From:** Cockle Legal Briefs <[contact@cocklelegalbriefs.com](mailto:contact@cocklelegalbriefs.com)>

**Sent:** Tuesday, June 27, 2023 10:30 AM

**To:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>

**Cc:** [kristina.heuser@gmail.com](mailto:kristina.heuser@gmail.com) <[kristina.heuser@gmail.com](mailto:kristina.heuser@gmail.com)>

**Subject:** FW: petition

Kristina:

Thanks for your response. Yes, send the appendix immediately. Start with the Circuit and District Court opinions, which *may* be all you must attach (see Rule 14.1(i)). But we know those are required so that we can begin with those. The Court directs the appendix documents must also be formatted, so we can help if you still need to do it, but either way, please send the appendix soon. Our calendar is filling quickly. So please get in touch with me today. I hope this helps, but let me know if you have questions. My direct dial is (402) 403-1006.

Sincerely,

*Andy*

Andy Cockle

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**From:** Kristina S. Heuser, Esq. <[kheuser@heuserlawfirm.com](mailto:kheuser@heuserlawfirm.com)>  
**Sent:** Monday, June 26, 2023 5:48 PM  
**To:** Cockle Legal Briefs <[contact@cocklelegalbriefs.com](mailto:contact@cocklelegalbriefs.com)>  
**Subject:** petition

Hello:

Thank you so much for getting back to me. I apologize I did not return your call today. I was in a deposition all day and have another one tomorrow. I intend to have the brief camera ready. I am not sure what the appendix is required to consist of. I have to look into that and get back to you. Would it just be the circuit court opinion or do they need the district court record such as complaint and answer and summary judgment motion papers and decision? I can send you all of that tomorrow or Wed. at the latest if that is needed.

Thank you!

Kristina

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EXHIBIT D



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

-----X  
RAYMOND ZDUNSKI,

Plaintiff,

Docket No. 19-cv-940

- against -

**COMPLAINT**

ERIE 2-CHAUTAUQUA-CATTARAUGUS BOCES,  
DAVID O'ROURKE, in his official capacity,  
JOHN O'CONNOR, in his official capacity,  
BRIAN LIEBENOW, LAURIE BURGER, and  
TRACY SMITH-DENGLER,

Jury Trial Demanded

Defendants.  
-----X

Plaintiff, RAYMOND ZDUNSKI, by and through his attorney, KRISTINA S. HEUSER,  
P.C., hereby complains of the defendants as follows:

I. PRELIMINARY STATEMENT

1. Plaintiff was employed by defendant ERIE 2-CAUTAUQUA-CATTARAUGUS BOCES as a Senior Account Clerk until his employment was terminated effective May 30, 2018 for declining to attend a training aimed at changing his religious beliefs about gender and sexuality. Attendance at the training would have caused him to violate the religious teachings to which he adheres. Plaintiff believed he could not simultaneously live out his Christian faith and attend the mandatory training. Defendants', without just cause, denied plaintiff's request for a religious accommodation. When plaintiff made the choice to not defy God and his conscience, defendants summarily terminated his employment. Plaintiff brings this lawsuit because he believes no employee in this country should be forced to choose between their faith and their employment, which is precisely the position he was put in.

## II. JURISDICTION AND VENUE

2. This court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 and over the pendent state law claim pursuant to 28 U.S.C. §1367.
3. Venue is proper in the Western District of New York pursuant to 28 U.S.C. §1391(b)(1) and (2) based upon plaintiff's residence, defendants' place of business and the location where the events giving rise to the claim occurred, respectively.
4. Plaintiff has exhausted his administrative remedies. The Right-to-Sue letter issued by the Equal Employment Opportunity Commission is annexed hereto.

## III. PARTIES

5. The plaintiff, RAYMOND ZDUNSKI (hereinafter referred to as "plaintiff"), is a resident of the County of Chautauqua, State of New York. He was employed by defendant ERIE 2-CAUTAUQUA-CATTARAUGUS BOCES for approximately 7 years before being summarily terminated in an act of religious discrimination. Plaintiff is a devout Christian.
6. Defendant ERIE 2-CAUTAUQUA-CATTARAUGUS BOCES (hereinafter referred to as "BOCES"), or Board of Cooperative Educational Services, is a public education collaborative in New York State that functions as an extension of local school districts. BOCES is an entity of the State of New York and is entirely publicly funded.
7. Defendant DAVID O'ROURKE (hereinafter referred to as "defendant O'Rourke") is the District Superintendent and Chief Executive Officer of BOCES. Upon information and belief, he resides within the jurisdictional reach of the United States

District Court for the Western District of New York. Defendant O'Rourke is sued herein in his official capacity only.

8. Defendant JOHN O'CONNOR (hereinafter referred to as "defendant O'Connor") is the Assistant Superintendent for Management Services for BOCES. As such, he oversees Human Resources – inclusive of all hiring and firing decisions – for BOCES. Upon information and belief, defendant O'Connor resides within the jurisdictional reach of the United States District Court for the Western District of New York. He is sued herein in his official capacity only.
9. Defendant BRIAN LIEBENOW (hereinafter referred to as "defendant Liebenow") is an employee of BOCES, holding the title of Labor Relations Assistant. Defendant Liebenow is the individual who terminated plaintiff on behalf of BOCES. Upon information and belief, defendant Liebenow resides within the jurisdictional reach of the United States District Court for the Western District of New York.
10. Defendant LAURIE BURGER (hereinafter referred to as "defendant Burger") is the Director of Human Resources for BOCES. Among other offenses, defendant Burger testified on behalf of BOCES before the New York State Unemployment Insurance Appeals Board in opposition to plaintiff's application for unemployment benefits. Upon information and belief, defendant Burger resides within the jurisdictional reach of the United States District Court for the Western District of New York.
11. Defendant TRACY SMITH-DENGLER (hereinafter referred to as "defendant Smith-Dengler") is the Central Business Office Manager for BOCES. She was plaintiff's immediate supervisor. Upon information and belief, the source of which is defendant Smith-Dengler's disclosure to plaintiff, said defendant is an atheist. Upon information

and belief, defendant Smith-Dengler resides within the jurisdictional reach of the United States District Court for the Western District of New York.

#### IV. FACTUAL ALLEGATIONS

1. Plaintiff was hired by BOCES on July 5, 2011 into the title of Account Clerk.
2. He worked at the BOCES Central Business Office located in its LoGiudice Center in Fredonia, New York.
3. Plaintiff's duties included processing payroll for three different school districts, retirement reporting, quarterly tax preparation, and W-2 preparation.
4. Plaintiff had an unblemished record of employment. He had never been written up or in any way disciplined by any of the defendants.
5. Approximately one week before defendant's employment with BOCES was terminated, he was promoted to the title of Senior Account Clerk.
6. Plaintiff earned an annual salary of \$32,000. In addition to this, plaintiff received the following benefits as part of his compensation package: medical and vision insurance, 10 days paid vacation, 18 sick days per year, 13 paid holidays, enrollment in the New York State Retirement System.
7. In February 2018, plaintiff was directed by his employer to attend a mandatory training later that month. The training was to be put on by the local "Pride Center" and was titled "LGBTQ Cultural Competency".
8. Only employees at the LoGiudice Center (i.e., not all BOCES employees) were required to attend.
9. Plaintiff did not want to attend the training on the basis that he is a devout Christian and, as such, his beliefs regarding homosexuality are dictated to him by holy

scripture. Plaintiff did not want to be forced to listen to indoctrination that is in contradiction to the tenets of his faith.

10. Plaintiff advised defendant Smith-Dengler via e-mail that he was declining to attend the training. Plaintiff also requested in that e-mail that a similar training be offered to teach employees greater cultural sensitivity towards persons of faith to hopefully curtail the offensive religious slurs that plaintiff regularly heard in the office. That request was not acknowledged.
11. Plaintiff did not attend the February training and received no formal discipline or reprimand at that time.
12. Then, in May 2018, plaintiff received an e-mail from defendant Burger advising that all employees who were not in attendance at the February LGBTQ training must attend a make-up session on May 22, 2018.
13. Plaintiff responded to that e-mail inquiring as to the specific objectives of the training. Defendant Burger responded that the topics to be covered at the training included: "Recognizing the difference between sex & gender, understanding aspects of identity, understanding how beliefs/feelings/values perpetuate oppression" etc.
14. Plaintiff has deeply held religious beliefs on the enumerated topics, which are dictated to him by God and His Holy Word. Thus, plaintiff responded to the invitation by expressing his belief in the Bible and explaining that the teaching at the training would contradict God's Word and his religious beliefs.
15. Plaintiff further expressed in that same e-mail that he loves all people and does not treat any co-worker or any other person differently from anybody else based upon their sexual orientation.

16. Plaintiff also again requested that BOCES provide a similar training to counter discrimination against Christians.
17. Defendant Burger responded that plaintiff must attend the May training or face disciplinary action including possible termination.
18. Defendants again denied plaintiff's request for a religious accommodation exempting him from the LGBTQ training.
19. Defendants also ignored plaintiff's request to provide alternative or supplemental training that teaches employees about cultural sensitivities towards Christians and other persons of faith.
20. On May 18, 2018, plaintiff was directed by defendant Smith-Dengler to attend a meeting to discuss all of the foregoing as well as an Facebook post plaintiff made regarding the situation he was being faced with at work (which was clearly a pretext put forth by defendants as they prepared to terminate plaintiff's employment, as evidenced by the fact that this was not raised at the unemployment hearing as a basis for plaintiff's termination).
21. The aforescribed meeting occurred on May 21, 2018.
22. At the meeting, defendant was issued a "counseling memo" by defendant Smith-Dengler for alleged insubordination. Plaintiff was directed by that memo to attend the training the following day or else face discipline up to and including termination.
23. Plaintiff did not attend the training on May 22, 2018 due entirely to his commitment to his faith.
24. On May 30, 2018, defendant Liebenow took plaintiff into a room and asked him why he did not attend the training. Plaintiff explained that he is a Christian and that

attending the training would have violated his religious beliefs. Defendant Liebenow immediately handed plaintiff a letter terminating his employment effective immediately.

25. Thereafter, plaintiff applied for unemployment benefits. BOCES opposed plaintiff's application, alleging that plaintiff was fired for misconduct. Defendant Burger was the sole witness to give testimony in opposition to plaintiff's application before the Unemployment Insurance Appeals Board.

## V. LEGAL ALLEGATIONS

### **AS AND FOR A FIRST CAUSE OF ACTION** CIVIL RIGHTS ACT OF 1871, as amended, 42 U.S.C. §1983 DEPRIVATION OF 14TH AMENDMENT RIGHT TO DUE PROCESS

26. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 25 above as though fully set forth herein.
27. Plaintiff was an employee of BOCES.
28. BOCES is a government agency and/or is entirely taxpayer funded.
29. Plaintiff had a property right/interest in his job with BOCES.
30. Plaintiff was deprived of his employment without being afforded any due process by her employer, BOCES.
31. All defendants acted in concert under color of state law to deprive plaintiff of his right to due process.

### **AS AND FOR A SECOND CAUSE OF ACTION** CIVIL RIGHTS ACT OF 1871, as amended, 42 U.S.C. §1983 DEPRIVATION OF 14TH AMENDMENT RIGHT TO EQUAL PROTECTION OF LAW

32. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 31 above as though fully set forth herein.

33. Plaintiff was terminated from his employment because of his religious beliefs, whereas other employees who have no objection to homosexuality or the other content being presented at the training did not have their jobs placed in jeopardy.
34. BOCES offered a cultural sensitivity training only regarding a select group of persons (i.e., homosexuals and those with non-traditional gender identities) but refused to offer a training regarding cultural sensitivity in the workplace, despite plaintiff bringing offensive conduct occurring in the workplace to defendants' attention.
35. Defendant Smith-Dengler is an avowed atheist and discriminated against plaintiff in the context of his employment solely because she knew him to be a person of faith.
36. The other defendants worked in concert with defendant Smith-Dengler to aid her in carrying out her discriminatory intent vis-à-vis plaintiff's continued employment with BOCES.

**AS AND FOR A THIRD CAUSE OF ACTION**  
CIVIL RIGHTS ACT OF 1871, as amended, 42 U.S.C. §1985  
CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

37. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 36 above as though fully set forth herein.
38. Defendants, and each of them, acting under color of state law, acted in concert to deprive plaintiff of his civil rights in the manner alleged herein.

**AS AND FOR A FOURTH CAUSE OF ACTION**  
CIVIL RIGHTS ACT OF 1871, as amended, 42 U.S.C. §1986  
NEGLECT IN PREVENTING INTERFERENCE WITH CIVIL RIGHTS

39. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 38 above as though fully set forth herein.



40. Defendants, and each of them, acting under color of state law, knew or should have known of the intent and/or overt act(s) of one or more of the other defendant(s) aimed at depriving plaintiff of his civil rights and filed to intervene, report, or take any measures whatsoever to prevent said deprivation of rights.

**AS AND FOR A FIFTH CAUSE OF ACTION**

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, as amended, 42 U.S.C. §§2000e-2  
EMPLOYMENT DISCRIMINATION ON THE BASIS OF RELIGION  
(FAILURE TO ACCOMMODATE)

41. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 40 above as though fully set forth herein.

42. Plaintiff is a Christian.

43. Plaintiff sought a religious accommodation exempting him from attending a training that he believed would cause him to violate his deeply held religious convictions.

44. Defendants denied plaintiff his requested religious accommodation.

45. It was within defendants' ability to grant plaintiff the requested accommodation and would not have caused undue hardship to BOCES nor any other defendant to do so.

**AS AND FOR A FIFTH CAUSE OF ACTION**

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, as amended, 42 U.S.C. §§2000e-2  
FOR EMPLOYMENT DISCRIMINATION ON THE BASIS OF RELIGION  
(DISPARATE TREATMENT AND DISPARATE IMPACT)

46. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 45 above as though fully set forth herein.

47. BOCES and, upon information and belief, one or more of the individually named defendants, made the decision to mandate some BOCES employees to attend a training regarding sexual orientation, gender, gender identity, homosexual culture and stereotypes, and other such topics as detailed above.

48. Defendants did not permit employees, such as plaintiff, with conflicting viewpoints based upon their religious affiliation and beliefs to be excused from the training.
49. Upon information and belief, this mandatory training was not precipitated by any workplace event nor was it reasonably related to the job duties required of plaintiff.
50. Solely because plaintiff adhered to the dictates of his faith by not attending the training, plaintiff was terminated from his employment.
51. Moreover, defendants opposed and defeated plaintiff's application for unemployment benefits.
52. These actions by defendants against plaintiff were motivated by nothing other than animus towards plaintiff because of his religion.

**AS AND FOR A FOURTH CAUSE OF ACTION**

NEW YORK STATE HUMAN RIGHTS LAW, N.Y. EXEC. LAW §§290, ET SEQ.,  
DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF RELIGION

53. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 52 above as though fully set forth herein.

WHEREFORE, plaintiff respectfully requests that this court restore plaintiff to his prior Employment with BOCES, an award of backpay including restoration of his lost paid leave time or a payout for same, an order enjoining BOCES from mandating plaintiff's attendance at any future trainings or other work activities that conflict with his religious beliefs, an order directing BOCES to amend plaintiff's personnel record to eliminate any negative mark related to the events described herein, and an award of compensatory and punitive damages to plaintiff in the combined sum of Ten Million Dollars (\$10,000,000.00), together with attorney's fees and costs and such other and further relief as this Court may deem just and proper.

Dated: Locust Valley, New York  
July 17, 2019

Respectfully Submitted,

KRISTINA S. HEUSER, P.C.

By: /S/  
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