3/25/24

No. 24-62

IN THE

SUPREME COURT OF THE UNITED STATES

YAN PING XU

Petitioner,

v.

NEW YORK CITY, other
THE NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
BRENDA M. MCINTYRE

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Dated: 3/22/2024

Pro Se, Petitioner

QUESTIONS PRESENTED

1. Whether a permanent employee who has served for less than five years in the noncompetitive class in the City of New York could be summarily discharged on the ground of an evaluation of alleged negative performance provided after the termination without due process.

2. Whether petitioner's request for the certified question regarding the above question to the New York Court of Appeals is properly denied. As an alternative, petitioner respectfully requests that this Court certify the above question.

LIST OF PARTIES

The petitioner in this case is Yan Ping Xu, M.S., *pro se* plaintiff-appellant. The respondents are New York City, the New York City Department of Health and Mental Hygiene, and Brenda M. McIntyre, defendants-appellees.

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ORDERS BELOW

The summary order of the Second Circuit (Circuit Judges Gerard E. Lynch, Raymond J. Lohier, Jr., Maria Araujo Kahn) in June 2023 is not published but is available as 2023 U.S. App. LEXIS 16609 (2d Cir. 2023). The order for denying the petition for panel, or in the alternative, for rehearing *en bane* rehearing without opinion for No. 21-1059-cv in October 2023 is not available (Appx. B). The final order of the Southern District of New York ("S.D.N.Y.") for No. 08 Civ. 11339 in March 2021 is not published but is available as 2021 U.S. Dist. LEXIS 62984 (S.D.N.Y. 2021).

JURISDICTION

The summary order of the Second Circuit was entered on 6/30/2023. (Appx-A). A timely petition for rehearing and/or rehearing en banc was denied by the Second Circuit on 10/27/2023. (Appx. B). The application (23A623) was granted by Justice Sotomayor extending the time to file this petition until 3/25/2024, entered on 1/5/2024. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONS AND STATUTES INVOLVED

Federal Fifth, Fourteenth Amendments, 42 U.S.C. § 1983, New York State Constitution Art. I § 6, NYS Civ. Serv. L. §§ 42, 63, 75, 55 RCNY Appendix A §§ I, 2.2, 3.4.4, 5.2.1(b), 5.2.7(a), 5.3.14, 6.4.1, 7.5.5(a)(b), 7.5.6(b), the City Chapter § 821(e), N.Y. Comp. Codes R & Regs. tit. 4 § 4.5, 22 NYCRR § 500.27, the Second Circuit Local Rule § 27.2 are produced in Appx. C.

STATEMENT OF THE CASE

A. Relevant Backgrounds

Pro Se petitioner, Yan Ping Xu ("Xu"), M.S., brought unlawful employment termination claim, pursuant to Federal Fifth, Fourteenth Amendments, 42 U.S.C § 1983 and other related to Federal, NYS and local statutes, against her former employer, the City of New York ("the City"), and its agency Department of Health and Mental Hygiene ("DOHMH") as well as its authorities Brenda M. McIntyre ("McIntyre") merely[1] the City employee; Jane R. Zucker ("Zucker") and Dennis J. King ("King"), federal employees who were Xu's supervisors in a federal funded Vaccine for Children Program ("VFC") jointly administrated by the City DOHMH and the Centers for Disease Control & Prevention ("CDC"), seeking appropriate relief.

On 3/13/2008, Xu, at age 57, a woman and U.S. citizen of Chinese national origin, a former City Research Scientist[2] (CRS) for VFC, had her employment suddenly terminated with the City.

On 3/14/2008, *after* her surprise summary discharge, Xu received the only evaluation of her alleged negative performance presented to her.

Until the termination day, Xu still had received only positive feedback on her work.

At her termination, Xu was a permanent civil servant in the non-competitive class since she was appointed to the position[3], effective 6/4/2007. She was also a member of a union.

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[1] The order erred in saying that "*various*" DOHMH employees were sued by Xu. (3a) (emphasis added).

[2] The order erred in asserting that Xu "worked as a research *assistant*..." (3a) (emphasis added).

[3] The order erred in stating that Xu worked in a "*probationary* position." (3a) (emphasis added). An employee placed on a specified probationary term after hiring is not in a probationary position. *See* NY Civ. Serv. L. § 63; N.Y. Comp. Codes R & Regs. tit. 4 § 4.5(b)(1).

B. Relevant Court Procedures

1. Federal Court

On 12/30/2008, Xu commenced this action in S.D.N.Y. No. 08-cv-11339.

For more than fifteen (15) years litigation, the Second Circuit had summarily ordered twice that orders of S.D.N.Y. for Fed. R. Civ. P. 12 (c) motions of defendants were affirmed in part, and in part vacated and remanded for further proceedings. In its 2017 order, it dismissed Xu against federal defendants in *toto*. *See Xu v. City of New York*, No. 14-1671, 612 Fed. Appx. 22 (2d. Cir. 2015) and No. 16-4079, 700 Fed. Appx. 62 (2d. Cir. 2017).

Recently, on 6/30/2023, for No. 21-1059, it dismissed Xu's case in *toto* by affirming the order of S.D.N.Y. "granting summary judgment in favor of [d]efendants-[a]ppellees on Xu's procedural due process and employment discrimination claims, and denying Xu's cross-motion for summary judgment on her due process claim." (Appx-A). It further denied

Xu's petition for rehearing and/or rehearing *en banc*, including her request for the certified questions to the New York Court of Appeals, pursuant to 22 NYCRR § 500.27 and the Second Circuit Local Rule § 27.2. (Appx-B; No. 21-1059, Doc. # 126, Xu Petition, dated 10/06/2023).

Previously, Xu had filed her petitions for writ of certiorari to the Second Circuit aforementioned orders in this Court, case Nos: 15-7713 and 18-69. This Court denied her petitions. *See Xu v. City of New York,* 136 S.Ct. 1823 (2016) and 139 S.Ct. 236 (2018), respectively.

2. State Court

On 7/13/2007, Xu commenced a New York Article 78 proceeding against DOHMH for wrongful termination and an unlawful performance evaluation, seeking appropriate relief. No. 109534/08.

For about a decade of litigation, the Appellant Division of New York State Supreme Court reinstated Xu's petition twice and remanded the matter for further proceedings. *Xu v. NYC Dept. of Health,* 77 A.D. 3d 40 (N.Y. 1st Dept. 2010) and 121 A.D. 3d 559 (N.Y. 1st Dept. 2014).

Xu presented for review of the questions as to her retaliatory claim to the New York Court of Appeals, which denied Xu's motion for leave to appeal. Motion No. 2017-525. *See Xu v. NYC Dept. of Health,* 29 N.Y.3d 1051 (2017).

After that, this Court denied her petition for writ of certiorari to the New York State Supreme Court of Appellate Division in this Court. No. 16-557. *See Xu v. NYC Dept. of Health,* 137 S.Ct. 641 (2017).

Additionally, on 3/13/2009, Xu commenced a plenary action for the retaliatory termination against the City and its DOHMH, seeking appropriate relief. No. 103544/2009.

The state plenary action was dismissed. *See Xu v. the City of New York,* 82 A.D.3d 559 (N.Y. 1st Dept. 2011).

After that, the New York Court of Appeals denied Xu's leave to appeal of the order of the Appellant Division. *See Xu v. City of New York,* 18 N.Y.3d 855 (2011).

REASONS FOR GRANTING THE PETITION

A. Nature of This Court Review

Pursuant to 28 U.S.C. § 2106, this Court's "supervisory power over the judgments of the lower federal courts is a broad one." *U. S. v. Munsingwear Inc.*, 340 U.S. 36, 40 (1950) (citations omitted). This Court "has power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires." *Villa v. Van Schaick,* 299 U.S. 152, 155 (1936). This Court reviews the rulings that "have a significant further effect on the conduct of public officials--both the prevailing parties and their coworkers--and the policies of the government units to which they belong." *Camreta v. Greene,* 131 S.Ct. 2020, 2030 (2011).

B. The Importance to the Public

The instant case, indeed, is of exceptional importance. Squarely, public employees in non-competitive classes are a significant workforce in New York State, including the City of New York. Particularly, many provisional employees have been

reclassified into non-competitive positions since *Matter of City of Long Beach v. Civ. Serv. Employees Ass'n,* 8 N.Y.3d 465 (2007) ruled on the issue of provisional employees. The specific legal issues presented herein have not been decided by the New York Court of Appeals, the state highest court, and have been split among authorities for several decades.

Of course, it is of national importance to have this Court decide the questions involved. It is just as the same as the precedent employment cases decided by this Court, such as *Board of Regents v. Roth,* 408 U.S. 564 (1972), *Perry* v. *Sindermann,* 408 U.S. 593 (1972), *Cleveland Bd. of Ed. v. Loudermill,* 470 U. S. 532 (1985). No doubt, the public employment issues presented herein frequently recur in court.

C. Conflicts Among the Second Circuit and Highest Courts

The Second Circuit adjudicated that Xu had no "property" interest protected by the constitutional guarantee of due process of law (U.S. Const, 5th and 14th Amdts, N.Y. Const, art 1, § 6). (5a).

It wholly relied on NYS Civ. Serv. L. § 75(1)(c) that Xu did not complete "at least five years of continuous service" as its reasoning. (6a).

However, § 75(1)(c) involves only the alleged "incompetency or misconduct" that is "for cause" reflected in the City Chapter 35 § 821(e), not the alleged "unsatisfactory performance." The Second Circuit did not "reach that conclusion by first looking to the words of the statute." *Goshen v. Mutual Life Ins. Co. of New York,* 98 N.Y.2d 314, 324 (N.Y. 2002). *See, also,* most recently *Trump v. Anderson,* 601 U. S.

____ (3/4/2024) (Per Curiam) and the leading questions from Justices, such as the "officer of the United States" argument, on the *Trump* oral argument, dated 2/8/2024.

The Second Circuit denied the certification to the New York Court of Appeals concerning the aforementioned issue arising under state law as to the due process clauses of the State and Federal Constitutions. It contradicts that it "should be left to resort to state courts on the questions arising under state law." *Perry,* 408 U.S. at 602. In fact, State's highest court has been willing to hear it, which the magistrate judge realized and the federal judge adopted in S.D.N.Y. *See infra*:

> "[T]he New York Court of Appeals cited Voorhis in noting that it had 'no occasion to consider here the extent to which section 75 or the due process clauses of the State and Federal Constitutions protect a noncompetitive civil service employee who has completed the probationary period but has served for less than five years in the position.' *Montero v. Lum,* 68 N.Y.2d 253, 257 n.3 (1986). The Court of Appeals still has not had occasion to answer this question." *Xu v. City of New York,* 2020 WL 8679152, n.24 (S.D.N.Y. 2020).

The Second Circuit relied on merely its misapprehension of § 75(1)(c) for its decision. It completely ignored Constitutions, and other laws, such as N.Y.S. Civ. Serv. L. § 63, which the City has pursued to legitimately determine a probationary period for non-competitive employees; and Personnel

Rules and Regulations of the City of New York, 55 RCNY Appendix A ("Rules") §§ 5.2.1(b)[4], 7.5.5, etc. However, consideration must be given to all the language meanings of the statute, if possible. *See, e.g., Matter of Social I.E. Ass'n v. Taylor*, 268 N.Y. 233, 237 (N.Y. 1936); *Kaplan v. Peyser*, 273 N.Y. 147, 149-150 (N.Y. 1937).

Moreover, the Second Circuit rejected that "the one year service" requirement in the Collective Bargaining Agreement ("CBA") may be supplemented and superseded on the grounds, such as Xu's permanent employee status at her termination; rules, policy, memo, and acts of defendants. (6a). It conflicts with the controlling decision of this Court *infra:*

> "Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' And, 'the meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' ..... Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement,....." *Perry*, 408 U.S. at 602 (citations omitted).

Furthermore, the Second Court completely ignored Xu's "permanent" employee status. But,

> " 'Permanent,' as defined by the dictionary, has different shades of meaning, like most words. One of these

> is 'something which *lasts or endures, constant,* as opposed to temporary.' (Webster's International Dictionary.) Bouvier's Law Dictionary defines 'permanent employment' as 'employment for an indefinite time, which may be severed by either party.' (See, also, 3 Words Phrases [second series], 970.)". *Arentz v. Morse D. D. Repair Co,* 249 N.Y. 439, 442 (N.Y. 1928) (emphasis added).

A permanent employee, therefore, has had one's continued employment, i.e., the property interest, already governed by the State's highest court almost one hundred (100) years ago. The meaning of "permanent" with a clear promise of continued employment is an ordinary person's "mutually explicit understanding." *Perry*, 408 U.S. at 601. It is regardless of employees' status, such as civil-service class and/or positions, governmental or non-governmental, etc., "it was the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people'—including government officials—are entitled to rely." *Jersey v. T.L.O.,* 469 U.S. 325, 346 (1985) (citation omitted).

The aforesaid permanent status, sections of the Rules, such as the distinction between permanent employees and probationary employees regarding appeals (§§ 7.55 and 7.5.6)[5], termination (§§ 5.2.7 and 6.4.1), etc.[6], an employment termination policy of DOHMH and a well-established pattern or practice of employment termination of defendants, including that "its ostensible belief that [Xu] was a probationary employee" at her termination, *Xu,* 121 A.D.3d at 561, "justify [Xu's] legitimate claim of

entitlement to continued employment absent 'sufficient cause.' ". *Perry,* 408 U.S. at 602, 603.

As noted previously, alleged "unsatisfied performance" is neither "incompetency" nor "misconduct", i.e., not "for cause" reflected by the statutes' plain language. It is also not the language of "for cause" to removal and other disciplinary action in Rules § 6.4.1. Squarely, § 5.2.7(a) is merely for a probationary employee. Therefore, an "unsatisfactory probationer" terminated in § 5.2.7(a) is inapplicable to discipline a permanent employee, Xu. Only "for cause" in § 6.4.1 is involved in removing a permanent employee, regardless of civil service class. "These rules shall have the force and effect of law." *See* Rules § 2.2.

Furthermore, Xu had no right to a predetermination hearing (5a), which conflicts with that, *e.g., infra*:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry,* 408 U.S. at 580 (citation omitted).
>
> "There are many statutes on the statute book relating to the employment and removal of police officers, clerks and *employees in municipalities*, which expressly or by implication require that the power of removal shall only be *for cause after* notice and hearing of the person whose

> removal is contemplated. The practice of legislation in this state has been to insert a provision for notice and hearing when this has been intended." *People ex rel. Fonda v. Morton,* 148 N.Y. 156, 164 (1896) (citations omitted) (emphasis added).

The Second Circuit also conflicts with *Tyson.* Tyson had her constitutional right confirmed by the New York Court of Appeals, although she was not entitled under § 75, being that she was an unclassified employee. *See below*:

> "As for her constitutional right, 'all the process that is due is provided by a pretermination opportunity to respond, coupled with posttermination' review procedures (*Cleveland Bd. of Educ. v Loudermill,* 470 US ___, ___, 105 S Ct 1487, 1496)." *Matter of Tyson v. Hess*, 66 N.Y.2d 943, 945 (N. Y. 1985).

See, also, Matter of Bigelow v. Board of Trustees of Inc. Vil. of Gouverneur, 63 N.Y.2d 470, 472 (N.Y. 1984) held that "the employee must first be given notice and an opportunity to be heard, or notice and an opportunity to submit a written response."

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[4] The Rules § 5.2.1(b) has the permanent tenure clause. But N.Y.S. Civ. Serv. L § 42 does not have it. Therefore, the said clause is invalid because the Rule I of Rules provides that regulation "shall not be inconsistent with or supersede the civil service law or the rules."

Moreover, N.Y. Comp. Coded R & Regs. tit. 4 § 4.5(b)(1) states that the probationary term shall be provided to "every original permanent appointment to the noncompetitive." The said state rule indicates that noncompetitive appointees serve a probationary term since their tenure would become permanent in nature after passing the probationary period.

[5] Xu, permanent non-competitive employee, is eligible to appeal negative evaluation. *See Xu,* 121 A.D.3d at 561.

[6] Permanent non-competitive employees are eligible for promotions pursuant to Rules § 5.3.14. But employees in a probationary period are ineligible. Rules § 3.4.4 shows the rights of permanent non-competitive employees, not probationary employees, after reclassification.

D. Disagreements Among Lower Courts

The New York State Appellate Division recognized that § 75(1)(c) is inapplicable and irrelevant to Xu because its decision relied on only the Rules not involving § 75(1)(c) at all, after defendants frequently brought § 75(1)(c) issues before it. Nevertheless, the Second Circuit totally ignored *Xu, supra,* 121 A.D.3d 559, and adjudicated significantly differently, as noted previously.

Truly, there are disagreements regarding the grounds for applying § 75(1)(c) among authorities. Some courts applied § 75 on the grounds of alleged negative performance, such as *Xu,* that was decided by the Second Circuit.

Some authorities disagree. For example, *Brockman v. Skidmore,* 43 A.D.2d 572 (N.Y. 2nd Dept. 1973), *rev'd* on other grounds, 39 N.Y.2d 1045 (N.Y.

1976) (emphasis added) (§ 75 "provides *merely* for such action against a civil service employee on the grounds of incompetency or misconduct."); *Ricketts v. New York City Health and Hospitals Corp.*, 88 A.D.3d 593, 594 (N.Y. 1st Dept. 2011) ("Because petitioner was terminated based on 'misconduct shown after a hearing upon stated charges' (Civil Service Law § 75 [1]), the determination did not violate Civil Service Law § 75"); *Matter of Messenger v. NYS Dept. of Corr. & Comm. Supv.*, 151 A.D.3d 1433, 1434 (N.Y. 3rd Dept. 2017) (citation omitted) ("under Civil Service Law § 75 that the demotion was based on incompetence or misconduct."); *Tchodie v. Brann*, 2019 WL 4015056, *3 (N.Y. Sup. Ct. N.Y. Cnty. 2019) (the petitioner could only be removed from his position "if DOC established that he had engaged in 'incompetency or misconduct' at a hearing").

Furthermore, disagreements among the lower courts as to the property interest and due process rights of a permanent employee exist.

See, e.g., Rao v. Gunn, 121 A.D.2d 618 (N.Y. 2nd Dept. 1986), *rev'd.* on other grounds, 73 N.Y.2d 759 (N.Y. 1988), as follow:

> "A permanent civil service employee has a recognized property interest in his position, and may not be deprived of his right to continue employment without due process. (*see, Matter of Economico v. Village of Pelham,* 50 N.Y.2d 120; *Matter of Johnson v Director, Downstate Med. Center,* 52 A.D.2d 357, *affd.* 41 N.Y.2d 1061). At a minimum, the affected employee is entitled to notice of the proposed

> disciplinary action and an opportunity to be heard at a meaningful time and in a meaningful manner. (*see, Matter of Economico v. Village of Pelham*, *supra; Matter of Marsh v Hanley*, 50 A.D.2d 687)."

There is the equivalent of saying that a permanent employee is the inverse of a probationary employee, i.e., an employee's permanent status appears to give that employee a property interest in one's employment. *See, e.g., Meyers v. City of New York*, 208 A.D.2d 258, 262 (N.Y. 2nd Dep't 1995) ("It is well settled that a probationary employee, unlike a permanent employee, has no property rights in his position and may be lawfully discharged without a hearing and without any stated specific reason."); *York v. McGuire*, 63 N.Y.2d 760, 761 (1984) (citations omitted) (probationary employee may be terminated without a hearing or statement of reasons); *Finley v. Giacobbe*, 79 F.3d 1285, 1297 (2d Cir. 1996).

The Second Circuit made its ruling also relying on *infra* (6a):

> "The 'mere fact that her position is characterized as permanent means only that she has passed her probationary period. It does not establish that she is entitled to the tenure protections afforded by section 75'. *Voorhis v. Warwick Valley Cent. Sch. Dist.*, 92 A.D.2d 571, 57[2] (N.Y. 2d Dept. 1983)"

While *Montero, supra,* cited *Voorhis*, "the Court of Appeal still has not had occasion to answer this

question." *Ante,* at 7. *Montero* asserted "this question," which is Xu's question presented herein. *Ante,* at i.

Palpably, Voorhis is not relevant to the "five years" language in § 75(1)(c) because she was terminated in 1981 after she completed her probationary period in 1972. Contrary to S.D.N.Y., regardless of its version, no language in § 75 or other statutes show that "some other provision of subsection (c) prevented her from satisfying § 75." *Xu,* 2020 WL 8679152, n.23. Thus, *Voorhis* is unreliable at the outset.

The Second Circuit additionally relied on *Wright v. Cayan,* 817 F.2d 999, 1003 (2d Cir. 1987). (6a). *Wight* has favorably cited *Voorhis. Wight* ruled that *"all* civil service employees are *required* to undergo a probationary period." *Id.* (emphasis added). In fact, Wright had an exempt class position. *Wright,* 817 F.2d at 1000. That position has been under NYS Civ. Serv. L. § 41 Exempt class. § 75 has not involved public employees in the exempt class.

Undeniably, *Wright* contradicts, e.g., *Matter of Avalon v. Allen,* 12 A.D.2d 480 (N.Y. 1st Dept. 1960; McKinney's Civil Service Law § 63 Note ¶ 4) (No probationary period is required in connection with a noncompetitive position in the New York City Civil Service unless it is prescribed by the rules of the City Civil Service Commission.).

Avalon can also be read for Xu as follows:

> "An [ ]challenged uniform and continuous practice of [ ] requiring [ ] probationary period for persons appointed in the noncompetitive class

> for such a long period involving a great many employees constitutes a practical construction of the statute which is entitled to great weight in determining its application." *Avalon,* 12 A.D.2d at 481.

Squarely, § 63 reflects that "a probationary period is not always required, as for example for a non-competitive position." New York 3 McQuillin Mun. Corp. § 12:134 (3d ed.) (2021 update). Under § 63, only "a position in the competitive class *shall* be for a probationary term." (emphasis added). As such, § 75 governs the different requirements between competitive and non-competitive employees as to termination "for cause."

It is undisputed that "a probationary period was for the legislature to determine." *Russell v. Hodges*, 470 F.2d 212, 218 (2d Cir. 1972). A probationary period for non-competitive employers is a six-month period in the City. *See Xu,* 121 A.D. 3d at 562. It is not five years of service in § 75(1)(c) that "was intended to provide a probationary period to evaluate the performance of these employees." *Russell,* 470 F.2d at 219.

Thus, "the contours of [p]lantiff's property right—the right to which [s]he can argue a 'legitimate claim of entitlement'—are drawn not by reference to Section 75 alone, they must incorporate the terms of [§ 63 and the Rules, etc.] that apply to the factual situation at hand." *Ciambriello v.County of Nassau*, 137 F. Supp. 2d 216, 223 (E.D.N.Y. 2001); " 'One section of an act may not be read alone; it must be considered in connection with every other section. All must be given effect. Each must be qualified and limited by the others so that all may operate in

harmony. (*Matter of Kaplan v. Peyser,* 273 N.Y. 147, 149, 150.)' " *People ex rel. Powott Corp. v. Woodworth,* 260 A.D. 168 (N.Y. 4th Dept. 1940).

Additionally, S.D.N.Y. constructed a logical argument, i.e., just as the CBA prevails over § 75, Rules § 5.2.1(b) and other Rules can modify or replace § 75 (1)(c). It, "however, is not supported by any case." *Xu,* 2020 WL 8679152, n.27.

E. Necessity of Certification

> "The law of New York and Second Circuit Local Rule § [27.2] permit us to certify to New York's highest court 'determinative questions of New York law [that] are involved in a case pending before [us] for which no controlling precedent of the Court of Appeals exists.' 22 N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a) (2008)." *Briggs Avenue L.L.C. v. Insurance Corporation of Hannover,* 516 F.3d 42, 46 (2d Cir. 2008).

New York has not permitted a district court to certify a question to its highest court. But it permits this Court to do so. New York has no time limit on when certification may be sought. (22 NYCRR § 500.27).

Furthermore, this Court recognizes that certification of unsettled questions of state law for authoritative answers by the State's highest court, a federal court "does, of course, *in the long run,* save time, energy, and resources, and helps build a cooperative judicial federalism." *Lehman Brothers v. Schein,* 416 U. S. 386, 391 (1974) (emphasis added).

See, also, Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997). As the Supreme Court of Ohio has explained, "[c]ertification ensures that federal courts will properly apply state law." *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St. 3d 39 (Ohio, 1991) (per curiam). This Court has certified state law questions to state court, such as *Virginia v. Amer. Booksellers Ass'n*, 484 U.S. 383 (1988).

The order of the Second Circuit conflicted with the settled standard and practice for certifying a question. For example,

> "Given that lower state courts have split on this issue, and absent clear guidance from the New York Court of Appeals, we conclude that certification of the question to the New York Court of Appeals is preferable to resolving it ourselves. *See Ortiz,* 961 F.3d at 159; *CFTC,* 618 F.3d at 231." *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC,* 988 F.3d 634, 644 (2d Cir. 2021).

> "We have embraced certification where a question of state law raises important issues of public policy. See, *e.g., Shaffer v. Schenectady City Sch. Dist,* 245 F.3d 41, 47 (2d Cir. 2001)." *Briggs Avenue L.L.C.,* 516 F.3d at 48.

Palpably, this case not only involves a split of authority on the issues (especially at the intermediate appellate level among federal and the State), but also absents direct precedent from the

highest court of New York, as noted previously. The lower court rulings did not offer a strong prediction of how the New York Court of Appeals would rule this pure question of law. "[T]he question certified will control the outcome of [Xu's cross-motion for summary judgment on her due process claim]." *Penguin Group (USA) Inc. v. Am. Buddha,* 609 F.3d 30, 42 (2d Cir. 2010). It is determinative of the cause.

Unquestionably, S.D.N.Y. recognized that about a half century ago, the highest court of New York was willing to hear and decide this important and unsettled legal question. *Ante,* at 7. But the Second Circuit decided merely on one word, "deny," for certification. It bars the opportunity for the New York Court of Appeals, the State's highest authority, to adjudicate in the public interest at this time.

The Second Circuit also failed to seek certification *nostra sponte* after S.D.N.Y. relied for the first time on § 75 to continuously dismiss Xu again and again. *See, e.g., Chauca v. Abraham,* 841 F.3d 86, 93 (2d. Cir. 2016) (citation omitted) (" 'Although the parties did not request certification, we are empowered to seek certification *nostra sponte*.' *Kuhne v. Cohen & Slamowitz, LLP,* 579 F.3d 189, 198 (2d Cir. 2009)."); *Simmons v. Trans Express Inc.,* 955 F.3d 325, 330 (2d Cir. 2020); and *Elkins v. Moreno,* 435 U.S. 647, 662-663 (1978) (This Court "*sua sponte* certify this case to the Court of Appeals of Maryland in order to clarify state-law aspects of the domicile question.").

CONCLUSION

For the Foregoing Reasons, This Petition for a Writ of Certiorari Should Be Granted

Dated: Bay Shore, New York
3/22/2024

Respectfully submitted,

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APPENDICES