

No.

IN THE
Supreme Court of the United States

VINCENZO MILIONE, PETITIONER

v.

CITY UNIVERSITY OF NEW YORK; MATTHEW GOLDSTEIN AS
CHANCELLOR OF CITY UNIVERSITY OF NEW YORK AND
INDIVIDUALLY; QUEENS COLLEGE; JAMES MUYSKENS AS
PRESIDENT OF QUEENS COLLEGE AND INDIVIDUALLY; THE
JOHN D. CALANDRA ITALIAN AMERICAN INSTITUTE; AND
ANTHONY TAMBURRI AS DEAN OF THE JOHN D. CALANDRA
ITALIAN-AMERICAN INSTITUTE

*PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION - SECOND DEPARTMENT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Is the New York City Human Rights Law subverted and petitioner's right to recover for workplace discrimination based on national origin unfairly extinguished when he is collaterally estopped from making these claims in state court because a federal court had earlier denied him relief under Title VII even though he raised *different* claims in State court and the NYCHRL has far *broad*er and *more* employee-friendly standards for recovery than Title VII?

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OPINIONS BELOW

The unpublished Order of the Court of Appeals of New York in *Vincenzo Milione v. City University of New York et al.*, Motion No. 2017-1051, decided and filed on December 14, 2017, denying petitioner's motion for leave to appeal the Decision and Order of the Appellate Division of the New York Supreme Court, Second Judicial Department, is set forth in the Appendix hereto (App.1).

The published Decision and Order of the Appellate Division of the New York Supreme Court, Second Judicial Department, in *Vincenzo Milione v. City University of New York et al.*, Docket No. 2015-04342, decided and filed August 23, 2017, and reported at 153 A.D.3d 807; 59 N.Y.S.3d 796 (2d Dept. 2017), affirming the grant of summary judgment to respondents on petitioner's claims of national origin discrimination, retaliation and hostile work environment under the New York City Human Rights Law, is set forth in the Appendix hereto (App. 2-6).

The unpublished Decision and Order of the Supreme Court of New York, Nassau County, in *Vincenzo Milione v. City University of New York et al.*, Docket No. 14743-2013, decided and filed on December 1, 2014, and entered on December 3, 2014, granting summary judgment to respondents on petitioner's claims of national origin discrimination, retaliation and hostile work environment under the New York City Human Rights Law on grounds of collateral estoppel, is set forth in the Appendix hereto (App. 6-21).

JURISDICTION

The decision of the Court of Appeals of New York, the State court of last resort having jurisdiction to review the decisions of all inferior State courts, denying petitioner's motion for leave to appeal the decision and order of the Appellate Division of the New York Supreme Court, Second Judicial Department, was decided and filed on December 14, 2017 (App. 1).

This petition for writ of certiorari is filed within ninety (90) days of December 14, 2017, the date of the order of the State court of last resort having jurisdiction to review the decisions of all inferior State courts, denying petitioner's motion for leave to appeal the decision and order of the Appellate Division of the New York Supreme Court, Second Judicial Department. 28 U.S.C. § 2101(c). *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED**United States Constitution, Amendment XIV, § 1:**

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

New York Executive Law § 296–1(a) [New York State Human Rights Law]:

It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's...national origin...to discriminate against such individual in compensation, or in terms, conditions or privileges of employment.

New York City Administrative Code §§ 8-107(1)(a); 107(7); 107(13)(b); & 130 [New York City Human Rights Law]:

§ 8-107 Unlawful discriminatory practices.

1. Employment. It shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

....

§ 8-107(7) Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a

civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter....The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation,, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in such activity.

....

§ 8-107(13)(b) Employer liability for discriminatory conduct by employee, agent, or independent contractor.

....

b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one and two of this section only where:

- (1) the employee or agent exercised managerial or supervisory responsibility; or
- (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

....

§8-130 Construction.

a. The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.

b. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

c. Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a. of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include *Albunio v. City of New York*, 16 N.Y.3d 472 (2011), *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29 (1st Dept. 2011), and the majority opinion in *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dept. 2009).

STATEMENT

In response to longstanding complaints about national origin animus towards Italian Americans, respondent City University of New York ("respondent"

or “CUNY”) began in 1970 an open admission policy for New York City high school graduates which produced an influx of Italian-American students. In its aftermath, Italian-American students, faculty and staff expressed their dissatisfaction over the small number of professionals at the school who could respond to the unique needs of these students. Italian-American faculty and staff also reported discrimination by CUNY in the hiring, promotion and termination of their own number within CUNY.

Concern about this historical under-representation of Italian Americans on the CUNY faculty and staff evoked action in the mid-1970's by both CUNY and elected officials. In 1976, CUNY Chancellor Robert J. Kibbee in a written directive to the CUNY Council of Presidents (“the Kibbee Memorandum”) formally designated Italian Americans “as an affirmative action category for this University in addition to those so categorized under existing Federal statutes and regulations.” *Scelsa v. City University of New York*, 806 F. Supp. 1126, 1128 (S.D.N.Y. 1992).

In 1977 and 1978, New York State Senator John D. Calandra, Chair of the Italian-American Legislative Caucus, conducted hearings due to complaints about the lack of Italian-American courses, faculty and counselors at CUNY despite the Kibbee Memorandum. He issued a report by the Caucus noting the Kibbee Memorandum’s designation of Italian Americans as an affirmative action group, concluding that widespread discrimination against Italian Americans had taken place at CUNY and proposing the creation of an Italian-American Institute at CUNY to address this problem.

By 1979, the State legislature created the Italian-American Institute at CUNY. Originally

independent from CUNY, the legislature reorganized the Institute in 1984 within the Office of Vice Chancellor for Student Affairs at respondent Queens College (“respondent” or “Queens”), part of CUNY’s college system. Overseen by Dr. Joseph V. Scelsa (“Dr. Scelsa”) since 1984, the Institute conducted research into the role, place and problems of Italian Americans in New York City and within CUNY’s college system, integrating its work with CUNY’s other campus activities. Dr. Scelsa created the Italian-American Faculty and Staff Advisory Council (“IAFSAC”) comprised of representatives from the affirmative action committees from each of CUNY’s colleges who sought to implement Italian-American affirmative action for faculty and staff at CUNY.

As it began to fulfill its mission, the Institute became the epicenter for Italian-American activism, engaging in outreach programs aimed at improving relations with other ethnic and cultural groups. In 1986, CUNY Chancellor Joseph Murphy reaffirmed the 1976 Kibbee Memorandum’s designation of Italian Americans as a protected affirmative action category within CUNY. In 1987, Governor Mario Cuomo officially renamed the Institute The John D. Calandra Italian-American Institute (“respondent” or “Calandra”).

Petitioner Dr. Vincenzo Milione (“petitioner” or “Milione”) began working for CUNY in 1987, principally at Calandra. By 1988, he was its Assistant Director of Research and Education. Petitioner has a B.S. in Physics and an M.S. in Earth and Space Science from the State University of New York (SUNY) Stonybrook, and a Ph.D. from SUNY Buffalo. His doctoral work focused on population groups, demographics and the design of systems to address

social problems. In 1995, petitioner was promoted to Director of Research and Education at Calandra and he held that position until 2007 when CUNY demoted him.

At Calandra, petitioner worked with affirmative action officers at each college of CUNY and together with the IAFSAC created an Italian-American availability pool. CUNY acknowledged Italian-American discrimination at its colleges but failed to maintain any data by which to measure this group's representation among its faculty and staff. By 1990, the so-called Massaro Commission (named after its Chair, State Supreme Court Justice Dominic R. Massaro) was formed by Italian-American politicians and community activists to investigate and redress continued discrimination against Italian Americans at CUNY. It recommended that Calandra be given more power, that it be associated with CUNY's Graduate School and that Dr. Scelsa be named its Dean.

After Dr. Scelsa, petitioner and Calandra in June of 1990 brought a class action with the Department of Labor claiming a discriminatory pattern and practice towards Italian-American by CUNY, however, CUNY officials attempted to extinguish Calandra's outreach, counseling and research activities. They decided to relocate the Institute from Manhattan to the College of Staten Island and to remove Dr. Scelsa as its Director, transferring him to the admissions office where he could no longer pursue Calandra's mission. As Judge Constance Baker Motley later characterized it, Dr. Scelsa had become a "thorn in the side of the University." *Scelsa*, 806 F. Supp. at 1130.

In response, Dr. Scelsa in September of 1992 sought a preliminary injunction against CUNY and its Chancellor in federal district court for the Southern District of New York claiming unlawful discrimination

against Italian Americans and that his demotion was in retaliation for his protected conduct (*Scelsa v. City University of New York, supra*). On November 18, 1992, Judge Motley issued a preliminary injunction barring CUNY pending trial from changing Calandra's location or its mission, from demoting Dr. Scelsa or from discriminating against Italian Americans. *Id.* at 1147. The district judge noted in her decision that petitioner, testifying credibly on behalf of Dr. Scelsa, had himself been discriminated against by CUNY on the basis of his own Italian-American heritage: not only did CUNY refuse to interview him for a position for which he was extremely well qualified based upon his education, training and experience but it also hired someone else for the job who was found to have plagiarized large sections of petitioner's work. *Id.* at 1132.

In addition, petitioner provided the crux of the statistical evidence in *Scelsa* which convinced the district judge that "regardless of its stated intention to increase Italian-American representation on the staff and faculty, the percentage of Italian Americans in the CUNY workforce is significantly less than the available labor pool," an unconscionable result for which CUNY had no legitimate explanation "given the existence of [its] affirmative action commitment." *Id.* at 1132-1133. Judge Motley found that "CUNY's current policy represents either an attempt to renege on the promises of the past or, by denying that such promises were ever made or intended to be kept, a reaffirmation of the original finding of discrimination against and underrepresentation of Italian-Americans that motivated the original Kibbee Memorandum and its reaffirmation with the Murphy letter." *Id.*

In 1994, the parties in *Scelsa* settled their lawsuit. Among other things, CUNY promised to continue to treat Italian Americans as an affirmative action category, to continue to affirmatively recruit Italian Americans and to appoint an Expert Panel in 1995 which would analyze how each department within CUNY and each rank within those departments could accommodate these affirmative action objectives on behalf of Italian Americans.

As Calandra's Director for Research and Education, petitioner in 1995 was responsible for monitoring CUNY's compliance with the *Scelsa* settlement agreement. CUNY not only continued to discriminate against Italian Americans but also failed to establish the Expert Panel by May 1, 1995, to analyze how and where in its system affirmative action recruiting of Italian Americans for its faculty and staff was needed which, in turn, hindered the targeting of Italian-American faculty and staff for recruitment and promotion. This failure caused Dr. Scelsa to commence another civil action against CUNY for breach of the 1994 settlement agreement which produced another settlement agreement in 1999 extending the establishment of an Expert Panel until August 31, 2000.

CUNY finally appointed the Expert Panel in May of 2005, more than a decade after its formation was originally required. At about the same time, CUNY's Office of Faculty and Staff Relations issued a report which CUNY considered a utilization analysis for faculty and staff based on 2000 Census data ("the 2005 CUNY Report"). In response, petitioner in October issued his own report ("the October 2005 Milione Report") which demonstrated that CUNY's Report was more of a trend analysis that did not rise to the

level a utilization analysis employed for other federally protected affirmative action groups at CUNY.

Specifically, petitioner argued that CUNY's Report compared its workforce to the available Italian-American labor pool without incorporating that data analysis into the affirmative action plan for each CUNY college; he presented data showing that Italian-American representation among faculty and staff had actually *decreased* between 1978 and 2004; and he concluded that CUNY appeared to be continuing to engage in discrimination against this group, actually making it worse, and that its Report was an attempt to cover up this ongoing disparate treatment.

Petitioner followed this report up with another in December of 2005 which criticized all of CUNY's utilization analyses because they lacked appropriate data and failed to include worksheets for the 1000+ units that needed to be part of a proper analysis. Importantly, his report refuted CUNY's assertion that Italian-American representation at the school was adequate by citing data revealing continued underrepresentation of Italian-Americans as compared to the available labor pool in the market surrounding CUNY.

This confrontation between non-Italian American administrators and petitioner continued in 2006 when CUNY produced data showing that there was no college-wide underutilization of Italian Americans, claiming an *increase* of this group in its faculty and administrative staff from 1981 to 2006. Petitioner again refuted this analysis in his own report, concluding that the "Italian-American faculty and staff presence within the University has diminished."

By April 13, 2006, the Expert Panel finally established as a result of the 1999 settlement agreement, issued a preliminary version of its Initial

Report which *agreed* with petitioner, i.e., that CUNY continued to discriminate against Italian Americans. It noted that CUNY's University-wide analysis was unreasonable "because the senior and community colleges are hiring from somewhat different labor pools, especially with respect to faculty;" it recommended that any analysis "be done at the college level and, insofar as the colleges are aggregated, the distinction between these two tiers of the system must be preserved." It also *agreed* with petitioner that CUNY's approach was contributing to a distorted picture of Italian-American representation because of the low percentage of this group in the pool of promotable employees it used for its analysis. It found this group's representation among senior professors generally inadequate and "disturbing" at Queens College.

To CUNY's consternation, petitioner then went public with his opinion about CUNY's utter disregard of the ongoing Italian-American discrimination which exists in its system. On June 11, 2006, at an annual conference of New York Italian-American State legislators, petitioner presented a report critical of CUNY's failure to adhere to the *Scelsa* settlement agreement, its lack of effort to hire and promote Italian-American faculty and staff and its failure to eliminate discrimination against Italian Americans. In October of 2006, petitioner presented to the CUNY Chancellor's office an updated version of this earlier report critical of CUNY's affirmative action efforts.

In the midst of this ongoing argument between non-Italian American administrators and petitioner about its disparate treatment of Italian Americans, CUNY in the Fall of 2005, contrary to Judge Motley's earlier order in *Scelsa*, removed Dr. Scelsa as Calandra's Director, reassigning him to the Italian

American Museum, replacing him with an interim director with no knowledge of the discrimination of Italian Americans at CUNY, Calandra's prime mission. In June of 2006, non-Italian American respondents Goldstein and Muyskens ("respondents") hired respondent Anthony J. Tamburri ("respondent" or "Tamburri") as the Executive Director of Calandra,; even though Italian American, he was just another person with no experience or interest in pursuing Calandra's mission.

Respondents Take Adverse Employment Actions Against Petitioner.

In January of 2007, Tamburri, at the behest of CUNY's administrators including respondent Queens College President James Muyskens ("respondent" or "Muyskens"), undermined petitioner's authority and autonomy at Calandra by ordering him not to discuss or present any further reports about CUNY's treatment of Italian Americans in any forum without first obtaining his (Tamburri's) approval. This was in essence a gag order preventing petitioner from exposing CUNY's ongoing discrimination of Italian Americans which Judge Motley identified in her findings and rulings, which petitioner verified in his analytical reports and which the Expert Panel confirmed in 2006.

In 2007, Tamburri demoted petitioner from Calandra's Director for Research and Education to the position of Director of Demographic Studies, stripping him of his 5-person staff and forcing him to abandon his research and monitoring of CUNY's affirmative action efforts in the wake of the *Scelsa* settlement agreement. Tamburri followed up this demotion with negative evaluation reports, the first ever received by petitioner, and memos critical of petitioner's oral and written

skills, some of which were based on petitioner's stuttering disability. Petitioner, now reprimanded at least twelve (12) times by Tamburri, attempted without success to meet with non-Italian American Muyskens about his demotion and treatment, further isolating him from his co-workers and creating a hostile work environment.

Petitioner believed that this demotion was undertaken because of his national origin as an Italian American and due to his advocacy at Calandra on behalf of other Italian Americans. He also believed that it was in retaliation for his prior participation in the *Scelsa* litigation, his class action complaint against CUNY with the Department of Labor in 1990 and his most recent reports critical of CUNY's affirmative action efforts. He filed a charge of discrimination against respondents with the EEOC on January 10, 2008. The EEOC found reasonable cause to believe that CUNY had violated Title VII of the Civil Rights Act by discriminating and retaliating against petitioner. After conciliation failed, petitioner received a Notice of Right to Sue on April 15, 2010.

Petitioner's Federal Litigation.

Petitioner brought a civil action in the federal district court for the Southern District of New York against respondents. He claimed that respondents violated both Title VI and Title VII of the Civil Rights Act of 1964 when they discriminated against him on the basis of his national origin and his disability, demoting him in retaliation for advocating on behalf of Italian Americans as Calandra's Director for Research and Education.

Invoking the district court's supplemental jurisdiction, petitioner also alleged a violation of the New York State Human Rights Law, New York

Executive Law § 296–1(a) (“NYSHRL”) (“It shall be an unlawful discriminatory practice...for an employer...because of an individual’s...national origin...to discriminate against such individual...in compensation or in terms, conditions or privileges of employment”) and New York City Human Rights Law, New York City Administrative Code § 8-107 (“NYCHRL”) (“It shall be an unlawful discriminatory practice...[f]or an employer ...because of the actual or perceived national origin...of any person, to discriminate against such person in compensation or in terms, conditions or privileges of employment”).

Respondents moved to dismiss petitioner’s complaint against respondents Queens College, Calandra, Goldstein, Muyskens and Tamburri; and they also moved for summary judgment in CUNY’s favor contending that petitioner had failed to establish a *prima facie* case of discrimination based on national origin or of a retaliatory demotion and that his claims under NYSHRL and NYCHRL should be dismissed as well. They argued there was a legitimate, non-discriminatory and non-retaliatory reason for petitioner’s change in title and responsibilities and there was no proof adduced to suggest that this reason was pretextual, i.e., a coverup for unlawful discrimination. Petitioner opposed the motion with his own and other deposition testimony together with other documents which anchored the facts alleged in his complaint.

On June 21, 2013, the district court, Hellerstein, J., granted respondents’ motions to dismiss and for summary judgment. *Milione v. City Univ. of N.Y.*, 950 F. Supp.2d 704 (S.D. N.Y. 2013). After dismissing the claims for relief under Titles VI or VII against the individual defendants and both Queens College and

Calandra, the district judge addressed CUNY's summary judgment motion with regard to petitioner's discrimination claim under Title VII based on his Italian American status and as an advocate for other Italian Americans. *Id.* at 710. Using the burden-shifting regime of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-807 (1973), the district court thought that while petitioner adduced proof that he belonged to the protected class, was qualified for the position he held and had arguably suffered an adverse employment action, he adduced no evidence that respondents changed his job or his responsibilities because he is an Italian American. *Id.*

As the court found, petitioner stated that he did not believe that Tamburri was motivated by his, i.e., petitioner's, status as an Italian American; and Tamburri himself is an Italian American, a member of the same protected class as petitioner, ignoring the fact that the non-Italian American respondents Goldstein and Muyskens hired Tamburri to carry out CUNY's discriminatory scheme. *Id.* Moreover, *none* of the district judge's findings addressed petitioner's claim that discrimination ensued *not* because *he* is Italian American but instead because he advocated on behalf of Italian Americans at CUNY.

As for the retaliation claim, the district court ruled that CUNY had met its burden under *McDonnell Douglas* to show a legitimate, nondiscriminatory reason for its employment decision, i.e., petitioner's job title like other employees at Calandra was changed to reflect more accurately his job activities and his position below Tamburri, leaving petitioner to prove that this explanation was a pretext for unlawful retaliation. *Id.* at 711-713. It concluded, however, that petitioner had not done so. *Id.* at 713. Ignoring

petitioner's opposition materials showing that Tamburri's "business reason" for stripping petitioner of his work title, his job objectives and his staff was to sabotage the seminal mission of Calandra, i.e., to address and advocate against the widespread discrimination against Italian Americans at CUNY in the hiring and promotion of its faculty and staff, the motion judge thought that "the record does not show that Tamburri intended to retaliate against [petitioner] because he advocated against Italian-American discrimination." *Id.* at 713. He thus found no pretext in Tamburri's "business decision" to diminish petitioner's job and thereby blunt his advocacy on behalf of Italian Americans. *Id.*

Having entered summary judgment in CUNY's favor on all of petitioner's claims, the district judge determined that there was no supplementary jurisdiction over his remaining state and local claims for workplace discrimination under NYSHRL and NYCHRL. *Id.* at 713-714. On May 21, 2014, the court of appeals unanimously affirmed the district court's judgment for the same reasons in a summary order. *Milione v. City Univ. of New York et al.*, 567 Fed. App'x 38 (2nd Cir. 2014). *Petitioner's State Litigation.*

After the district court's grant of summary judgment in the federal action, petitioner began this civil action against respondents on December 23, 2013, in the Supreme Court of New York, Nassau County, seeking relief under NYSHRL and NYCHRL for discrimination based on his national origin, for retaliation on account of his advocacy for Italian Americans at CUNY, and for creating a hostile work environment. Respondents moved for summary judgment on these claims and on December 1, 2014, the

Supreme Court, McCormack, J., granted the motion (App. 7-21).

The motion judge ruled that because the issues of pretext, lack of discriminatory animus and the legitimacy of respondents' reasons for the alleged acts of retaliation had already been raised, addressed and decided in the federal action, petitioner was collaterally estopped from pursuing his claims of national origin discrimination and retaliation under NYSHRL in this action (App. 14-15). The same was true for petitioner's claim of a hostile work environment under NYSHRL because it relied upon "the exact same conduct" as the national origin and retaliation claims; and even on the merits, the record showed only that there was "no love lost" between petitioner and respondents, insufficient to raise a viable claim of hostile work environment (App. 15-17).

As for these same claims under the more broad, employee-friendly NYCHRL, the motion judge first ruled that since the federal court already found that respondents' reasons for its actions were legitimate and that petitioner had failed to show these reasons were pretextual or that national origin animus was a motivating factor, even if not the motivating factor, "no jury could find against [respondents] on any evidentiary route," entitling petitioner to summary judgment on this claim (App. 17-18). In addition, even if petitioner could make out a *prima facie* case of retaliation, these prior rulings by the federal court prevented petitioner from relitigating "these critical issues" concerning his retaliation claim under the NYCHRL (App. 18-19). Finally, as for petitioner's claim of a hostile work environment, that same federal action failed to provide any evidence that petitioner "was treated less well than others because he is Italian

American,” justifying the entry of summary judgment on this claim(App. 19).

Petitioner appealed and on May 23,2017, the Appellate Division of the Supreme Court, Second Judicial Department, unanimously affirmed the entry of summary judgment on the grounds of collateral estoppel (App. 2-6). As it ruled, “[i]n the federal action, the District Court determined that the [respondents] had legitimate, nondiscriminatory reasons for their employment actions, that they were not motivated by retaliatory animus, their reasons were not pretext..., and the [petitioner] was not treated differently than other employees” (App. 5). These rulings of the federal courts “are dispositive of the...claims under NYSHRL and NYCHRL, even under the broader standard of the NYCHRL” (*Id.*) (citations omitted).

On December 14, 2017, the Court of Appeals of New York, the State court of last resort having jurisdiction to review the decisions of all inferior State courts, denied petitioner’s motion for leave to appeal the decision and order of the Appellate Division (App. 1).

REASONS FOR GRANTING THE PETITION

The Purpose and Intent of The New York City Human Rights Law Is Subverted and Petitioner's Right To Recover For Workplace Discrimination Unfairly Extinguished When He Is Collaterally Estopped From Making These Claims In State Court Because A Federal Court Had Earlier Denied Him Relief Under Title VII Even Though He Raised *Different* Claims In State Court And The NYCHRL Has Far *Broader* And *More* Employee-Friendly Standards For Recovery Than Title VII.

New York City's Human Rights Law intentionally establishes much *broader* protection for victims of workplace discrimination than Title VII; it expressly encourages courts to provide the most extensive remedies possible to victims like petitioner, regarding Title VII only as a floor to its coverage, *not* a ceiling; and it allows plaintiffs to employ a mixed-motive analysis to recover where discrimination was just *one* factor motivating its action even though other non-discriminatory factors were present. In the summary judgment context, it establishes a pro-plaintiff, employee-friendly bias against summary judgment so that if there's "any evidence" that just one of the employer's reasons for the adverse action may be false, misleading or incomplete, a jury trial is warranted; and by not undervaluing a plaintiff's evidence of pretext—even when that evidence was earlier undervalued while being filtered through a Title VII lens in the federal forum—it gives evidence of pretext markedly *more* probative force than under Title VII so that plaintiffs have the strongest possible safeguards against being deprived of a jury trial.

By deciding that the federal courts' unfavorable treatment of petitioner's proof of pretext in the prior action under Title VII now collaterally estops him from having this proof considered anew for purposes of his claims under the NYCHRL subverts the purpose and intent this expansive City legislation and unfairly deprives petitioner of having all his claims---including a claim for a hostile work environment which was *not* raised in the federal forum---considered under the NYCHRL's far broader and more employee-friendly standards for recovery. Petitioner was never given a full and fair opportunity to litigate his NYCHRL claims in federal court and denying him this opportunity now in State court on the grounds of collateral estoppel denies him due process.

In amending the NYCHRL in 2005, the New York City Council explained that its provisions ensuring freedom from workplace discrimination, among other things, had been construed too narrowly by courts since its enactment in 1991 and to avoid that event in the future, it expressly provided that the NYCHRL was to be construed independent from similar or identical provisions contained in the NYSHRL or Title VII. *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 34 (1st Dept. 2011). *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 66-67 (1st Dept. 2009). This independent analysis must be targeted to understanding and fulfilling NYCHRL's "uniquely broad and remedial" purposes which "*go beyond* those of counterpart state or federal civil rights laws." *Williams*, 61 A.D.3d at 66 quoting Restoration Act § 1 (emphasis supplied).

To bring about this change, the Act established two new rules of construction: First, it created a so-called "one-way ratchet" by which interpretations of

NYSHRL and Title VII will serve only “as a *floor* below which the [NYCHRL] cannot fall, rather than [as] a ceiling above which the local law cannot rise.” *Id.* at 66-67 (emphasis supplied). Second, any interpretation of the NYCHRL must be a liberal one which requires that *all* of its provisions be construed “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.” *Bennett*, 92 A.D.3d at 34 & n.6 quoting *Albunio v. City of New York*, 16 N.Y.3d 472, 477-478 (C.A.N.Y. 2011). As one of the principal authors of the Act explained, the NYCHRL “meld[s] the broadest vision of social justice with the strongest law enforcement deterrent.” C. Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law*, 33 Fordham Urb. L.J. 255, 288 (2006).

To foster these new values, New York courts have modified *McDonnell Douglas*’ three-step burden-shifting framework so that a discrimination claim brought under the NYCHRL must, on a motion for summary judgment, be analyzed under *both* the *McDonnell Douglas* framework *and* the more lenient “mixed motive” analysis. *Bennett*, 92 A.D.3d at 41. Thus a mixed-motive case, i.e., where both legitimate and non-legitimate reasons may have motivated the employer’s adverse action, will survive an employer’s motion for summary judgment by showing through either direct or circumstantial evidence that (1) the employer took an adverse employment action; and that (2) “actual or perceived age, race, creed, color, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship” was *a* motivating factor.” New York City Human Rights Law, § 8-107. *Bennett*, 92 A.D.3d at 40-41 citing *Williams*, 61 A.D.3d at 78 n. 27 (emphasis supplied). See *Mihalik v. Credit*

Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 110-111 n. 8 (2d Cir. 2013) (interpreting New York law).

Under the NYCHRL, then, a plaintiff in order to survive a summary judgment motion by the employer need not eliminate all possible legitimate reasons for the employer's actions; he can prevail simply by showing that the employer's consideration of a protected characteristic was *a* motivating factor for the adverse action, *even though other factors may have also motivated it*. *Melman v. Montifiore Med. Ctr.*, 98 A.D.3d 107, 127 (1st Dept. 2012). The employer, on the other hand, is entitled to summary judgment only if, drawing all reasonable inferences from the record in the plaintiff's favor, it shows that "discrimination play[ed] *no* role" in its actions and that "no jury could find [it] liable under any of the evidentiary routes---*McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." *Melman*, 98 A.D.3d at 113 quoting *Bennett*, *supra*; *Williams*, *supra* (emphasis in original). *Furfero v. St John's Univ.*, 94 A.D.3d 695, 697 (2d Dept. 2012).

Under the NYCHRL, the plaintiff's burden in responding to evidence of an employer's legitimate, nondiscriminatory reason for the action is to show that it was motivated at least in part by discrimination or was "more likely than not based in whole or in part on discrimination." *Melman*, 98 A.D.3d at 127 quoting *Aulicino v. New York City Dept. of Homeless Servs.*, 580 F.3d 73, 80 (2d Cir. 2009). Specifically, the plaintiff must adduce "some [direct or circumstantial] evidence"--i.e., "any evidence," *Melman*, 98 A.D.3d at 128---that at least one of the reasons proffered by the employer is false, misleading, or incomplete; and if he does so, "a host of determinations properly made only by a jury come into play." *Furfero*, *supra*. *Bennett*, 92 A.D.3d at

43. “These will be jury questions except in the most extreme and unusual circumstances.” *Bennett, supra*.

As the *Bennett* Court made clear, NYCHRL’s bias is that a jury---*not* judges---should resolve questions of workplace discrimination:

We recognize that there has been a growing emphasis on using summary judgment in discrimination cases to promote “judicial efficiency.” But at least in the context of the [NYCHRL], the Restoration Act provides a clear and unambiguous answer: a central purpose of the legislation was to resist efforts to ratchet down or devalue the means by which those intended to be protected by the [NYCHRL] could be most strongly protected. These concerns warrant the strongest possible safeguards against depriving an alleged victim of discrimination of a full and fair hearing before a jury of her peers by means of summary judgment. In short, **evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied.**

92 A.D.3d at 44 (citations & footnotes omitted) (emphasis supplied).

Importantly, the Court in *Bennett* went further and *rejected* Title VII jurisprudence (reflected in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133,148-149 (2000) that summary judgment can be routinely granted even when the employee shows the employer’s reason for its action is false. *Id.* at 41-42. As it ruled, under NYCHRL’s “uniquely broad and remedial” regime, evidence that *even one* of the

employer's proffered reasons may be false, misleading or incomplete, immediately warrants a jury trial "except in the most extreme and unusual circumstances." *Id.* at 43.

In response to petitioner's *prima facie* showing that they violated the NYCHRL when they discriminated against him because of his advocacy of Italian Americans at CUNY, for retaliation on account of this advocacy, and for creating a hostile work environment, respondents proffered three non-discriminatory motives: first, that his demotion was a mere formality and that a "reorganization" of Calandra was made to "more accurately reflect" petitioner's duties and responsibilities; second, that Tamburri had a genuine "business reason" to make the changes that he did, "refocusing" Calandra away from opposing discrimination against Italian Americans at CUNY; and third, that Tamburri's directive to petitioner not to communicate publicly on behalf of Calandra in 2007 did not indicate any animus toward him since Tamburri gave this directive to all Calandra staff members.

Petitioner's opposing summary judgment materials, when read with the deference due them, provided proof that these reasons given by respondents were false, misleading or incomplete, thereby justifying a jury trial under the NYCHRL's regime. Instead of a mere formality or "reorganization" to "more accurately reflect" petitioner's duties and responsibilities, his evidence showed that he was, in fact, demoted and that as Calandra's Director for Research and Education, he had many *more* duties and responsibilities than his new position as Director of Demographic Studies. Indeed, the stark difference between the two positions and their attendant duties calls into question respondents'

credibility in asserting this contrived explanation, one which under *Bennett* immediately warrants a jury trial.

As for Tamburri's "business reason" in demoting petitioner, i.e., to "refocus" Calandra away from advocating for the equal treatment of Italian Americans at CUNY, petitioner showed that respondents followed *none* of the internal procedures for changing Calandra's core mission; they did not obtain approval of the CUNY Board of Trustees; and their suggestion that the newly-hired Tamburri could unilaterally change the seminal mission of Calandra, a University Institute, without administration approval simply because he felt it necessary to do so is so lacking in plausibility, i.e., a non-Italian American administration hiring an Italian American in order to sabotage a University entity dedicated to advocating for Italian Americans at CUNY, that a jury should decide whether this proffered reason is a pretext for unlawful retaliation.

After all, the most direct evidence of discrimination or retaliation by an employer is where it refuses to follow its own protocol thereby invoking the exercise of unchecked personal judgment or the application of inherently subjective criteria. See *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 988-989 (1988); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Moreover, an employer's asserted "business judgment," among other reasons, to demote an employee could be an attempt "to throw[] numerous non-discriminatory justifications against the wall and see[] which stick," *Bennett*, 92 A.D.3d at 43; and "[a] jury, after weighing all the evidence, might or might not conclude that a defendant was doing exactly that," masking its true intent to punish petitioner because of "old business"

with him. *Melman*, 98 A.D.3d at 134 (Acosta, J., dissenting).

Respondents' third non-discriminatory motivation, that Tamburri's directive to petitioner not to communicate publicly on behalf of Calandra, could not have been animus toward him personally since Tamburri gave this directive to all Calandra staff members, was also shown to be false, misleading or incomplete. Petitioner's materials showed that for more than 12 years he was the *only* employee of Calandra with authority to address outside groups. As such, petitioner was the last independent person at Calandra with any real authority to hold CUNY accountable publicly for the commitment it made over the years to eliminate Italian-American discrimination at CUNY. *Thus the only person affected by Tamburri's directive was petitioner.* A jury could therefore reasonably infer that respondents singled out him out for demotion in order to mute his advocacy and their explanation otherwise is a pretext for unlawful discrimination and/or retaliation.

Beyond this, petitioner's summary judgment materials showed a longstanding pattern of institutional discrimination at CUNY against Italian Americans among its faculty and staff spanning decades. The 1976 Kibbee Memorandum designating Italian Americans as an affirmative action category under Federal statutes and regulations acknowledged this animus as did Senator Calandra's Caucus Report in 1978, Chancellor Murphy's reaffirmation of the Kibbee Memorandum in 1986, Judge Motley's findings in *Scelsa*, *supra*, in 1992, the settlement agreement reached in *Scelsa* in 1994, and Chancellor Goldstein's reaffirmation the Kibbee Memorandum in 1999.

These same materials showed that CUNY likewise attempted to undermine Calandra's core mission of advocating for Italian Americans in CUNY's promotion and hiring. It demoted Dr. Scelsa in 1992 for his vigorous advocacy only to be enjoined by Judge Motley from doing so. It ignored the 1994 *Scelsa* settlement agreement for as long as it could before finally removing Dr. Scelsa in 2005 and replacing him with an interim director who had no experience in pursuing Calandra's mission; and in 2006, it hired Tamburri as its new Director who had no experience or interest in such advocacy.

Thus when petitioner continued his advocacy following Dr. Scelsa's removal by opposing and then publicizing CUNY's continued failure to live up to its affirmative action obligations under the 1994 *Scelsa* agreement, CUNY—as it attempted to do with Dr. Scelsa in 1992—demoted petitioner by stripping him of his job title, his responsibilities, his staff and his ability to advocate on behalf of Italian Americans. Like Dr. Scelsa, petitioner had become a “thorn in the side of the University,” *Scelsa*, 806 F. Supp. at 1130, and it was Tamburri's job as Director of Calandra *not* to advocate for Italian Americans in the hiring and promotion among CUNY's faculty and staff but rather to demote petitioner in 2007 and thereby “neuter” Calandra's primary mission to expose and redress unlawful discrimination by CUNY. Moreover, Tamburri followed up this demotion with negative evaluation reports, the first ever received by petitioner, and memos critical of petitioner's oral and written skills, some of which were based on petitioner's stuttering disability. Repeatedly reprimanded by Tamburri, petitioner attempted without success to meet with respondent Muyskens about his demotion and treatment, further isolating him

from his co-workers and creating a hostile work environment.

Petitioner adduced numerous affidavits including those authored by Dr. Scelsa, co-worker William Schempp and others at CUNY averring to the fact that respondents' asserted justifications for actions taken against him were a sham; that the real reason for his demotion was that they were furious with him in the aftermath of his public comments in 2006 regarding their continued discrimination, a view at odds with their own false narrative otherwise; that Tamburri did not want Calandra focusing on this issue of Italian American discrimination; and that petitioner's activism, including helping a fellow Professor file an EEOC complaint against CUNY, required his demotion.

All of this opposition material adduced by petitioner describe an ongoing, decades-long relationship between him and respondents which details "old business" these respondents have had with petitioner as well as with Calandra and which coherently explains the real reasons these non-Italian American respondents hired Tamburri to demote petitioner, i.e., his advocacy on behalf of Italian Americans at CUNY. More important, it constitutes "some evidence that at least one of the reasons proffered by [the employer] is false, misleading or incomplete" under *Bennett's* rubric so that a jury trial of petitioner's claims under the NYCHRL must now be had. As the *Bennett* Court observed, because "discrimination rarely announces itself," petitioner has the right have a jury infer respondents' intent from the extensive evidence of pretext he adduced. 92 A.D.3d at 37.

That the federal courts incident to summary judgment earlier chose to ignore, undervalue or

disbelieve petitioner's evidence of pretext under the *McDonnell Douglas* framework incident to dismissing his claims under Title VII for national origin discrimination and for retaliation does not collaterally estop petitioner from now having this same evidence of pretext considered anew for purposes of a mixed-motive analysis incident to his claims under the NYCHRL for national origin discrimination, retaliation and hostile work environment.

Collateral estoppel applies only where "the issue in the second action is identical to an issue raised, necessarily decided, and material in the prior action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." *City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124, 128 (C.A.N.Y. 2007). Where the issues are actually litigated in a prior federal action, squarely addressed, and specifically decided against the plaintiff, he is collaterally estopped from relitigating those identical issues under the guise of state law claims. *Sanders v. Grenadier Realty Inc.*, 102 A.D.3d 460, 460 (1st Dept. 2013).

In the first place, however, petitioner's claim of hostile work environment was *never* brought in federal court and *never* addressed there. This alone makes the application of collateral estoppel to this claim suspect, see *Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 987 N.Y.S.2d 338, 342-341 (App. Div.-1st Dept. 2014); *Jordan v. Bates Advertising Holdings, Inc.*, 292 A.D.2d 205, 206-207 (1st Dept. 2002), especially when under the NYCHRL petitioner proves the claim when he is treated less well than other employees because he advocated on behalf of Italian Americans for faculty and staff positions at CUNY. *Nelson v. Hsbc Bank U.S.*, 87 A.D.3d 995, 999 (2d Dept. 2011). Compare *Kim*,

987 N.Y.S.2d at 344 (plaintiff proved only “petty slights and trivial inconveniences”). His proof showed a significant reduction in his work responsibilities as the result of his protected activity which warranted a jury trial on the claim.

Second, where the earlier federal action first filters petitioner’s proof of pretext through the lens of Title VII, there is the “frequent risk that [this] evidence winds up being undervalued for City HRL purposes.” *Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, LLP*, 981 N.Y.S. 2d 89, 94 & n. 3 (App. Div.–1st Dept. 2014). Such is the case here where petitioner’s extensive evidence of pretext was ignored, undervalued, misunderstood or disbelieved by both federal courts which concluded that petitioner failed to show that Tamburri’s actions against him were motivated by discriminatory or retaliatory animus (App. 13-14; *Milione v. City Univ. of N.Y.*, 950 F. Supp. 2d at 710;713 (“Plaintiff has given no evidence that Defendants changed his job title and responsibilities *because Plaintiff is Italian American*” when petitioner’s actual claim was that he was discriminated against by CUNY’s non-Italian American administration *because he advocated on behalf of Italian Americans* for faculty and staff positions at CUNY.)).

Under the NYCHRL’s pro-plaintiff, employee-friendly regime, this evidence of pretext would not have been undervalued, misconstrued or disbelieved to justify an assessment that *no* evidence of pretext was forthcoming from petitioner. Under the NYCHRL, it was at least “some evidence” of pretext which under *Bennett* entitled petitioner to avoid summary judgment and have a jury infer respondents’ discriminatory or retaliatory intent from the proof he adduced. *Bennett*,

92 A.D.3d at 37. See *Albunio*, 16 N.Y.3d at 477-479 (acts which prompt retaliatory action by employer construed broadly consistent with NYCHRL).

If the state court addresses this extensive evidence of pretext under the NYCHRL, it will do so with that legislation's bias *against* summary judgment so that if there's "any evidence" that just one of the employer's reasons for the adverse action may be false, misleading or incomplete----and there is surely such evidence here----a jury trial is warranted; and this pretext evidence will not be undervalued but instead will be given markedly *more* probative force than under Title VII so that petitioner has the strongest possible safeguard against being deprived of a jury trial, all consistent with the intent and purposes of NYCHRL.

Petitioner's right to have a full and fair opportunity to have his state law claims under the NYCHRL heard----to have his day in court----is a valuable property right entitled to procedural due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); See *Boddie v. Connecticut*, 401 U.S. 371, 374-375 (1971). By deciding that the federal courts' unfavorable treatment of petitioner's proof of pretext in the prior action under Title VII now collaterally estops him from having this proof considered anew for purposes of his claims under the NYCHRL subverts its purpose and intent and denies him due process.

Finally, this petition presents the question of whether the federal courts will provide the necessary oversight of and accountability for the inequities created when employers like CUNY discriminate on the basis of national origin. Enforcement of federal and state laws now emphasize discrimination based on race while national origin discrimination has been

overlooked because of the lack of data collection on the issue which, in turn, has led a dearth of statistical evidence for the purpose of civil rights litigation in this area.

Even though CUNY has repeatedly affirmed since 1976 that Italian Americans will be treated as an affirmative action category in addition to those categorized under existing federal statutes and regulations, its collection and reporting of data on its affirmative action efforts has not reflected this commitment. While CUNY reports to the federal government its affirmative-action data on racially-based groups, it does *not* do so with data it has collected on Italian Americans. This case demonstrates the difficulty of assessing national origin affirmative action protection under existing federal civil rights statutes and regulations. Only a jury trial examining in detail the record developed in this case can confirm the discriminatory and retaliatory actions taken against petitioner on account of his advocacy for Italian Americans.

Most cases have interpreted Title VII's "national origin" protection narrowly, making cases which assert this kind of discrimination more likely to be dismissed because of the lack of data about this class of plaintiffs and their treatment in the workplace. This vacuum of information has led to a lack of oversight by the federal government and no accountability by CUNY for its treatment of this national origin group, a result inconsistent with the purpose and intent of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and it has engendered the kind of inequitable conduct by CUNY which this case represents. To this day, the Italian American workforce has continuously decreased

and is the most underemployed affirmative action group at CUNY.

Because of the absence of data and its resulting inequities, petitioner stood alone at CUNY as the only “watchdog” who could monitor CUNY’s compliance with its commitment to give Italian Americans national origin affirmative action protection like any other racially based affirmative action group under federal law. Insufficient data on national origin groups will inevitably lead to their disparate treatment; and to achieve the necessary oversight and accountability until such data is collected, the federal courts must expand existing civil rights legislation so that all population groups enjoy the same freedom from disparate and unfair treatment in the workplace.

CONCLUSION

For all of these reasons identified herein, petitioner respectfully requests that this Court grant his petition for a writ of certiorari and review the judgment and decision of the Appellate Division of the New York Supreme Court, Second Judicial Department, remand the matter to the Supreme Court of New York, Nassau County, for further discovery and trial or provide him with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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