

No. 17-1282

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,

Respondents.

*On Petition for Writ of Certiorari to the
Appellate Division, Supreme Court of New York,
Second Judicial Department*

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Should the Court deny certiorari to review whether a state appellate court correctly applied New York's common law doctrine of collateral estoppel to hold that factual findings made upon dismissal of an employment discrimination action brought by petitioner in federal court, warranted dismissal of petitioner's claims alleging violations of the New York City Human Rights Law in a subsequent state court action?

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THE COURT LACKS JURISDICTION

The Court lacks jurisdiction under 28 U.S.C. § 1257 because the action does not involve a question of federal law.

PRELIMINARY STATEMENT

Respondents The City University of New York (“CUNY”) (s/h/a “City University of New York,” “Queens College,” and “The John D. Calandra Italian American Institute”), Matthew Goldstein as Chancellor of CUNY and Individually, James Muyskens as President of Queens College and Individually, and Anthony Tamburri as Dean of the John D. Calandra Italian American Institute and Individually (collectively, the “Respondents”), submit this brief in opposition to the petition for certiorari by Vincenzo Milione (“Petitioner”).

The petition seeks review of an August 23, 2017 decision from New York’s Appellate Division, which applied New York’s common law doctrine of collateral estoppel to affirm the dismissal in the Supreme Court of the State of New York of Petitioner’s claims alleging only violations of the New York City Human Rights Law (“NYCHRL”) and the New York State Human Rights Law (“NYSHRL”).

The petition should be denied because the Court lacks jurisdiction under 28 U.S.C. § 1257. The Court is without jurisdiction to review a state court decision applying New York’s common law doctrine of collateral estoppel because it does not involve a question of federal law. Petitioner’s federal claims—all of which arose from the same facts as his state claims—were dismissed in full by order of the United States District

Court for the Southern District of New York. *Milione v. City Univ. of New York*, 950 F. Supp. 2d 704 (S.D.N.Y. 2013). The dismissal was affirmed on appeal by the Second Circuit Court of Appeals, 567 F. App'x 38 (2d Cir. 2014), and this Court denied a petition for a writ of certiorari, 135 S. Ct. 964 (2015).

Even if there were jurisdiction in this Court, there is no “compelling reason” to grant a writ of certiorari. *See* SUP. CT. R. 10. The August 23, 2017 decision from New York’s Appellate Division involves no conflict among the courts, no question of federal law (important or otherwise), and no issue of national (or even local) importance. The parties—not the public—are the only ones impacted by this case. The petition argues the Appellate Division misapplied New York’s common law doctrine of collateral estoppel—which argument is wrong—but even the “misapplication of a properly stated rule of law” is generally an insufficient basis for granting a writ of certiorari. SUP. CT. R. 10.

STATEMENT OF THE CASE

In a prior related action filed by Petitioner in the United States District Court for the Southern District of New York arising from the same underlying facts, Petitioner alleged Respondents discriminated against him based on his Italian American national origin and his advocacy for Italian Americans. Petitioner also alleged he was retaliated against. Petitioner was and continues to be employed in CUNY’s John D. Calandra Italian American Institute (the “Institute”). The alleged adverse employment action was not a termination, pay cut, or failure to promote. Instead, Petitioner alleged that when respondent Anthony Tamburri became Dean of the Institute, Petitioner’s job

title and responsibilities changed. The complaint alleged violations of federal law, as well as the NYCHRL and NYSHRL.

On Respondents' motion for summary judgment, the Southern District of New York made factual findings, including:

- "Plaintiff [Petitioner] has given no evidence that Defendants [Respondents] changed his job title and responsibilities because Plaintiff is Italian American."
- "Plaintiff himself testified that he does not believe Dean Tamburri was motivated by Plaintiff's Italian American status."
- "Tamburri altered the functional titles and responsibilities of numerous employees and established Institute-wide policies that employees should consult with him before addressing outside groups on Calandra Institute matters."
- "Plaintiff fails to provide any evidence that Tamburri's plan to alter his job title . . . was motivated by retaliatory animus."
- "Plaintiff's job title was changed as part of Dean Tamburri's effort to refocus the Institute's attention to the promotion of Italian American higher education and academic and cultural research."
- "As a new supervisor, Tamburri was entitled to delineate the responsibilities and duties of his

employees and set his own agenda for the Calandra Institute.”

Milione, 950 F. Supp. 2d at 712-13.

Based on those factual findings, the District Court dismissed Petitioner’s federal discrimination and retaliation claims and declined to exercise supplemental jurisdiction over Petitioner’s NYSHRL and NYCHRL claims, thus resulting in their dismissal as well. *Id.*

The Second Circuit Court of Appeals affirmed the grant of summary judgment, noting that the change in Petitioner’s job title “accurately reflects his research activities and position below Dean Tamburri” and that “Tamburri, as the new Dean, was entitled to delineate the responsibilities and duties of his employees.” *Milione*, 567 F. App’x at 41-42.

Petitioner sought a writ of certiorari to review the Second Circuit’s decision. The Court denied certiorari. *Milione v. City Univ. of New York*, 135 S. Ct. 964 (2015).

Petitioner then sued Respondents again, this time in New York Supreme Court, alleging violations of the NYSHRL and NYCHRL. Respondents moved to dismiss pursuant to CPLR 3211(a)(7) and 3212. In granting that motion, the New York Supreme Court noted that although the standard for recovery on Petitioner’s NYCHRL claims is broader than under otherwise comparable federal and state human rights laws, collateral estoppel barred Petitioner’s NYSHRL and NYCHRL claims. *Milione v. City Univ. of New York*, Index No. 14743/2013 (Sup. Ct. Nassau Co. Dec. 1, 2014), *aff’d*, 153 A.D.3d 807 (2nd Dep’t 2017).

New York's Appellate Division, Second Judicial Department affirmed, holding the lower court properly applied collateral estoppel to bar Petitioner's NYCHRL claims. *Id.* at 809. The Appellate Division reasoned the federal District Court had found "the Defendants had legitimate, nondiscriminatory reasons for their employment actions, they were not motivated by retaliatory animus, their reasons were not a pretext for discrimination, and the Plaintiff was not treated differently than other employees." *Id.* The District Court's factual findings were "dispositive" of Petitioner's NYCHRL claims "even under the broader standard of NYCHRL." *Id.*

Petitioner moved for leave to appeal to New York's Court of Appeals, which denied the motion. *Milione v. City Univ. of New York*, 30 N.Y.3d 907 (2017).

REASONS FOR DENYING THE PETITION

There is no compelling reason to grant certiorari. Review of a state court decision applying New York's common law of collateral estoppel does not fall within any of the compelling reasons set forth in SUPREME COURT RULE 10 for granting certiorari. The petition does not even argue that any of the considerations in SUPREME COURT RULE 10 are present here.

Even though not germane to this petition because of the absence of jurisdiction of this Court to entertain it, Petitioner is incorrect that the NYCHRL is weakened by the Appellate Division's decision. Applying the collateral estoppel doctrine to NYCHRL claims does nothing to limit the liberal construction afforded to the NYCHRL. Collateral estoppel does not mean that

dismissal of a federal discrimination claim will always or even generally bar a NYCHRL claim in a subsequent action. Rather, and as the Appellate Division held, collateral estoppel bars a NYCHRL claim only in the narrow circumstance where a prior action resulted in specific factual findings that are dispositive of the NYCHRL claim.

Although Petitioner attacks once again the factual findings of the District Court, which have been affirmed by the Second Circuit and as to which this Court declined to grant certiorari, even if there was error, such error is “rarely” a reason to grant certiorari. *See* SUP. CT. R. 10.

Further, this is the second time that Petitioner has sought certiorari to review the factual findings of the District Court. Petitioner sought review of the Second Circuit’s May 21, 2014 affirmance of the District Court’s June 21, 2013 decision, and the Court denied certiorari. *Milione v. City Univ. of New York*, 135 S. Ct. 964 (2015). As with the prior petition, granting certiorari here would cause no change to the NYCHRL and have no impact upon the public at large. The impact would be limited to the parties.

The decision of the Appellate Division was correct. It is consistent with other decisions from New York’s Appellate Division as to the application of collateral estoppel to NYCHRL claims. *See, e.g., Hudson v. Merrill Lynch & Co.*, 138 A.D.3d 511, 514 (1st Dep’t 2016) (collateral estoppel barred plaintiffs from re-litigating in state court the factual issues decided in a prior federal action, which resulted in dismissal of plaintiffs’ NYCHRL claim); *Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, LLP*, 116 A.D.3d 134,

139-40 (1st Dep't 2014) (applying collateral estoppel to preclude plaintiff from re-litigating an issue in her state court action alleging a NYCHRL claim where issue was already determined in prior federal action alleging discrimination and retaliation under Title VII).

Petitioner's argument that collateral estoppel should not apply because his federal and state actions raised different claims is plainly wrong: collateral estoppel may apply even where the subsequent and prior proceedings involve different causes of action. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984).

Finally, Petitioner's suit is without merit because Petitioner was not discriminated or retaliated against. The District Court's factual findings included "no evidence" that Petitioner's job title or responsibilities were changed because he is Italian American; that Petitioner's job title was changed as part of an effort to refocus the Calandra Institute's attention to promote Italian American higher education and academic and cultural research; and that Dean Tamburri was not motivated by Petitioner's Italian American status or any retaliatory animus. Accordingly, the Appellate Division summarized the District Court's factual findings as follows: "that the Respondents had legitimate nondiscriminatory reasons for their employment actions, they were not motivated by retaliatory animus, their reasons were not a pretext for discrimination, and the Petitioner was not treated differently than other employees." *Milione*, 153 A.D.3d at 809.

MISSTATEMENTS IN THE PETITION

Petitioner incorrectly states that he was demoted in 2007. Petitioner further incorrectly states that the purported demotion including “stripping him of his 5-person staff and forcing him to abandon his research and monitoring of CUNY’s affirmative action efforts.”

Petitioner incorrectly states that Dean Tamburri had no experience or interest in pursuing the mission of the Institute.

Petitioner incorrectly states that the seminal mission of the Institute was “to address and advocate against the widespread discrimination against Italian Americans at CUNY in the hiring and promotion of its faculty and staff.” Petitioner also incorrectly states that Respondents attempted to alter the mission of the Institute in 2006-2007.

Petitioner incorrectly claims that Respondents’ legitimate, nondiscriminatory reasons for their employment actions with respect to Petitioner were false, misleading, or incomplete.

Petitioner incorrectly claims his advocacy on behalf of Italian Americans resulted in an adverse employment action.

Petitioner inaccurately sets forth New York’s common law doctrine of collateral estoppel.

Petitioner incorrectly describes the following decisions: *Milione*, 950 F. Supp. 2d 704; *Milione*, 567 F. App’x 38.

Petitioner incorrectly interprets the NYCHRL.

Petitioner incorrectly sets forth the law with respect to due process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
April 12, 2018

Respectfully submitted,

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