No. 21-1324

IN THE

Supreme Court of the United States

JOHN ZARBA; SUSAN LEMOIE-ZARBA,
Petitioners,

v.

THE TOWN OF OAK BLUFFS, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION BY RESPONDENTS RONALD RAPPAPORT, MICHAEL GOLDSMITH, AND THE LAW FIRM OF REYNOLDS, RAPPAPORT, KAPLAN AND HACKNEY

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this case is inappropriate for certiorari review because the Petitioners have failed to state any "compelling reasons" required by Supreme Court Rule 10 inasmuch as they have failed to identify any split among the Circuit courts or conflict with the U.S. Supreme Court or any important issues of federal law undecided by the Supreme Court?

2. Whether the First Circuit properly affirmed the dismissal of Plaintiffs' lawsuit because, as a matter of law, they failed to state a claim for relief against the Defendants under 42 U.S.C. § 1983 for alleged civil rights violations of procedural or substantive due process, equal protection, or taking without just compensation, arising from the denial of an occupancy permit based on a property line dispute and/or the issuance of parking citations?

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INTRODUCTION

Respondents Ronald Rappaport, Michael Goldsmith and the Law Firm of Reynolds, Rappaport, Kaplan and Hackney LLC (collectively "Town Counsel Defendants"), respectfully request that this Honorable Court *deny* Susan and John Zarba's ("Petitioners"") Petition for Writ of Certiorari.

This case arises out of a years-long property dispute regarding the Plaintiffs' construction of a "guest house" on their property at 14R South Street, Oak Bluffs, that resulted in litigation between the Plaintiffs and their neighbors and the Town concerning the use of an access road to the guest house and its conformance with Town's Zoning Bylaws. Petitioners' App. 23a-31a.[1]

As the Petitioners acknowledge, this case was already litigated in the Massachusetts Land and Superior Courts (Case 1:19-cv-1136-LTS). The Petitioners thereafter dressed up their property dispute as constitutional and state court claims, and filed a lawsuit in Federal District Court. The Petitioners' claims were summarily dismissed by that Court, which decision was affirmed by the Court of Appeals for the First Circuit and also affirmed by an *en banc* panel of the First Circuit.

Now, in a last-ditch attempt to salvage their meritless claims, the Petitioners have filed this Petition for Writ of Certiorari based on nothing more than *ad hominem* attacks on the Respondents and unfounded conspiracy theories against and between Town Counsel and the other various Respondents,

[1] The Respondents refer to the Petitioners' Appendix to their Petition for Writ of Certiorari as "Petitioners' App." followed by a page number.

including in their "Introduction," and attempting to raise issues that they never even raised below.

For these reasons and those discussed below, this type of mud-slinging should not be countenanced by this Supreme Court. This Court thus should *deny* the Plaintiffs' Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Statement of Facts

The Petition does not include a "concise statement of the facts material to consideration of the questions presented" nor does it specify the stage in the proceedings when the federal questions sought to be reviewed were raised, as required by Supreme Court Rules 12(g) and 12(g)(i).

This lawsuit arises from Petitioners' construction of a "guest house" on their property at 14R South Street, Oak Bluffs, Massachusetts, resulting in litigation between the Petitioners and their abutting neighbors, as well as the Town of Oak Bluffs, concerning the use of an access road to the guest house and its conformance with the Town Zoning Bylaws. The crux of the lawsuit is the Town withholding a final occupancy permit for the guest house due to a dispute over whether the residence was constructed too close to the property line in violation of local set-back regulations. There was also a parking dispute wherein the Town cited the Petitioners for parking regulations.[2]

In reviewing the grant of a motion to dismiss, the Court accepts all well-pleaded factual allegations as true, but it need not credit conclusory legal

[2] It is undisputed that no fines were ever imposed on the Plaintiffs.

allegations.[3] *See A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013). The First Circuit affirmed the District Court's decision for substantially the reasons stated in the District's Court's Order of August 11, 2020. *See* Petitioners' App. P. 3a. Respondents refer this Court to that decision in that respect.

B. The Proceedings Below

In their Federal lawsuit, Plaintiffs filed an Amended Complaint on January 16, 2020, which was met with three Motions to Dismiss: one by the Town, one by the Town Officials who were sued individually, and one by the Town Counsel and their law firm. In a detailed 11-paged Memorandum and Order dated August 11, 2020, the Trial Court (Sorokin, J.), granted all of the Defendants' Motions to Dismiss. Petitioners' App. 42. Plaintiffs' Notice of Appeal followed.

On appeal, the Petitioners waived the claims brought in four of the Counts in their Complaint, stating the "Judgment entered for the Defendants on Counts IV, VI, VII, VIII are not at issue in Plaintiffs' appeal." *See* Plaintiffs' First Cir. Br., p. 7. Thus, the Court of Appeals for the First Circuit Court was called on to address five Counts: Count I alleging civil rights violations under 42 U.S.C. § 1983, mentioning Due Process (Procedural and Substantive) as well as Equal Protection guarantees; Count II alleging conspiracy to violate civil rights under 42 U.S.C. § 1985 by and among various Town officials and Town Counsel; Count III appearing to be a direct action

[3] The Plaintiffs' Statement of Facts before the District Court contained many conclusory assertions and inappropriate and improper characterizations as does their "Introduction" in their Petition to this Court.

under the Fourteenth Amendment alleging violations of Equal Protection, Substantive and Procedural Due Process; Count V alleging violation of the Fifth Amendment by "Inverse Condemnation," citing delays in issuance of an occupancy permit, restrictions on parking, an inaccurate survey, installation of a street sign and other actions; and Count IX, asserting claims of negligence and negligent infliction of emotional distress.

The First Circuit summarily affirmed the District Court's allowance of the Defendants' Motions to Dismiss, stating "[a]fter de novo review of the record and careful consideration of the parties' briefs on appeal, we affirm the district court's decision granting the defendants' motions to dismiss, for substantially the reasons stated in the district court's order entered August 11, 2020." Petitioners' App. 3a. Plaintiffs' Petition for Rehearing and for Petition for Hearing *En Banc* were subsequently denied on December 30, 2021. *See* Petitioners' App. 18a.

The Petitioners rest their current Petition on assertions of alleged erroneous factual findings and misapplications of properly stated rules of law—bases upon which a petition for a writ of certiorari is rarely granted. *Id.*; *see, e.g.,* Petition, p. 6 ("The district court was led to believe [list of allegedly erroneous facts]"; p. 14 ("The lower court … did not acknowledge and credit the Zarbas' evidence with regard to [list of allegedly erroneous facts]").

Furthermore, the Petitioners appear to launch wholly new and entirely baseless allegations regarding various heretofore unarticulated (and absolutely groundless) conspiracy theories (*see, e.g.,* Petition, p. 8 "The Town Counsel … knowingly misrepresented material facts to the Town Officials,

Board, Selectmen, and the lower court"); p. 19 (The Zoning board [*sic*] pre [*sic*] deprivation hearings were a sham…."); p. 26 ([Town Counsel] Rappaport and Goldsmith did not care what happened to the Zarba's [*sic*]").

As further grounds for their opposition, Town Counsel Defendants adopt and incorporate the Opposition Brief to filed by the Town of Oak Bluffs, Thomas Perry, Robert Whritenour, Kris Chvatal, Andrea Rogers, Peter Yoars, Michael Perry, Llewellyn Rogers, David Bailey and Mark Barbardo.

REASONS FOR DENYING THE PETITION

A review on a writ of certiorari is not a matter of right, but of judicial discretion. Supreme Court Rule 10. A Petition for a Writ of Certiorari will be granted only for compelling reasons. *Id.* The Petitioners have stated no compelling reasons to grant certiorari in this case. Indeed, the Petitioners have not even raised a question of Federal law because their claims do not articulate one.

I. The Petition Contains No Grounds for Certiorari Review

A. Petitioners' Stated Question(s) Were Never Presented to the Courts Below.

The Petitioners' "Question(s) Presented" are issues that were never presented below; namely that concerning the standard for dismissal under Rule 12 (b)(6) and municipal liability under § 1983 pursuant to the *Monell* doctrine.

This Court's normal practice is to refrain from addressing issues not raised in the Court of Appeals. *See, e.g., FTC v. Grolier, Inc.,* 462 U.S. 19, 23, n. 6, 103 S.Ct. 2209, 2212, n. 6 (1983); *Rogers v. Lodge,* 458 U.S. 613, 628, n. 10, 102 S.Ct. 3272, 3281 (1982);

E.E.O.C. v. Fed. Lab. Rels. Auth., 476 U.S. 19, 24, 106 S. Ct. 1678, 1681 (1986). This Court will generally not reach an issue which has not been raised, considered, or resolved in the court below. *See* 2A Fed. Proc., L.Ed. § 3.856, "Issues not raised below."

The narrow grounds upon which the Supreme Court grants certiorari review, as set forth in U.S. Sup. Ct. Rule 10, are (a) the ruling of the Appeals Court conflicts with decisions of other Circuits on the same issue; (b) the State's highest court ruling on a federal question conflicts with other state courts or Circuit Courts; or (c) the lower courts have decided an important question of federal law that should be settled by the Supreme Court (or conflicts with rulings by the Supreme Court). *See* U.S. Sup. Ct. R. 10. The Petition here presents none of these circumstances.

Instead, the Petitioners base their Petition on claims that the trial court decision allowing the Motion to Dismiss was "wrong" on the facts or the law, and that the decision was "unjust and facts of this matter are unprecedented." *See* Petition, pp. 13-25. Supreme Court Rule 10 governing Certiorari review, however, explicitly states "[a] petition for a writ of certiorari is *rarely granted* when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See* U.S. Sup. Ct. R. 10 (emphasis added). It is well-settled that "the issuance of the writ is discretionary." *Hammerstein v. Superior Ct. of Cal.*, 341 U.S. 491, 492 (1951) (stating the "presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction").

The Petition does not even suggest that the First Circuit's decision was in any way one that was

"in conflict with the decision of another United States court of appeals on the same important matter." *See* U.S. Sup. Ct. R. 10(a). Instead, the Petitioners cite a concurring opinion in *Tolan v. Cotton*, 572 U.S. 650 (2014) (Alito, J., concurring) to argue that certiorari review is warranted even in the absence of a conflict among the Circuit courts. *See* Petition, p. 14. The ruling in *Tolan*, however, did not address the standard of review on certiorari. *Tolan,* at 651-660. Moreover, the Petitioners never mentioned or argued anything relating to *Tolan* in the lower courts.

Absent a conflict among the Circuit courts, Rule 10(a) does not provide an avenue for certiorari review. *See* U.S. Sup. Ct. R. 10(a). *See also* Brief in Opposition of Co-Defendants, pp. 4-6, which Respondents incorporate herein by this reference. As stated by the Co-Defendants, this is not a case of sufficient importance to merit this Court's review. *Id.*

B. The First Circuit Properly Affirmed the Dismissal of the Petitioners' Claims

The Plaintiffs' Amended Complaint was properly dismissed for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

1. The Petitioners Failed to State a Claim Against the Town Counsel Defendants

The Petitioners' Amended Complaint was properly dismissed for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12 (b)(6). Each of the counts upon which the Petitioners appeal were deficient as a matter of law and fact. For example, the court properly rejected the procedural due process claim because the Petitioners received all the process that was due. *See Quinn v. Bryson*, 739

F.2d 8, 11 (1st Cir. 1984). And, the Petitioners provided no factual allegations as to how the state's post-deprivation remedial process was inadequate. Also, the substantive due process claim failed because "rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. *Torromeo v. Town of Fremont*, 438 F.3d 113, 118 (1st Cir. 2006). By way of further example, the Respondents refer this Court to the Opposition filed by the Town Defendants, which arguments as to the counts of the Petitioners' complaint are incorporated herein.

The Town Counsel Defendants also argued below that the doctrine of collateral estoppel precluded the Petitioners from relitigating findings in other actions that were good faith grounds for assrting that their guest house violated set back and parking ordinances. On April 15, 2020, Dukes County Superior Court Justice Brian Davis denied the Zarba's motion for fees and costs under Mass. Gen. Laws c. 231, §6F against their neighbors (the Murphys), rejecting the Zarba's argument that the neighbors' claims that the guest house violated setback and parking requirements were "wholly insubstantial, frivolous and not advanced in good faith." The Zarbas attempted to re-litigate essentially the same issues by arguing in this federal action that the Town's (and Town Counsel's) behavior was unconstitutional, "truly horrendous" and "shocks the conscience." This they could not do. *See Keystone Shipping Co. v. New England Power Co.*, 109 F.3d 46, 51 (1st Cir. 1997) ("The principle of collateral estoppel … bars relitigation of any factual or legal issue that was actually decided in previous litigation between parties, whether on the same or different claim.")

Petitioners' other claims suffer similar deficiencies. For example, the Petitioners had argued that the Town Counsel Defendants commissioned a "false" survey to fabricate a setback violation for the Zarba guest house. The Land Court, however, had already found that "[t]he ZBA's reliance on the Austin survey, even if it was wrong, was not so unreasonable as to constitute gross negligence . . . bad faith, or malice under [M.G.L. c. 40,] §17." The judge similarly found that the Murphy Family Trust's reliance on the Austin survey was not "wholly insubstantial, frivolous and not advanced in good faith," the standard set by M.G.L. c. 231, § 6F. These findings effectively bar any claim that the Town Counsel Defendants did anything improper in obtaining and relying on an independent survey of the Zarba boundary line—and unquestionably preclude a claim that their behavior was "truly horrendous" or "shocks the conscience."

In sum, the Petitioners are merely aggrieved by the dismissal of their lawsuit under the well-settled standard of review for Motions to Dismiss under Rule 12(b)(6). The Petitioners are seeking review solely based on their personal interest in the outcome. This, however, does not warrant review by this Court.

2. The Issue of Immunity

Defendant Town Counsel were entitled to qualified immunity. The principle of qualified immunity shields state actors performing discretionary functions from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Wilson v. Lane*, 526 U.S. 603, 609 (1999) (government officials performing discretionary functions typically are

granted qualified immunity). The Petitioners' civil rights claims against Town Counsel warranted dismissal on this additional basis.

II. Town Counsel Defendants Adopt and Incorporate by Reference the Arguments in the Brief of the Town Defendants

In a case involving multiple appellees, as here, Rule 28(i) of the Federal Rules of Appellate Procedure permits any party to adopt by reference a part of another's brief. Fed. R. App. P. 28(i). Pursuant to this rule, the Town Counsel Defendants adopt and incorporate by reference the arguments in the brief submitted by the Town Defendants.

CONCLUSION

The Petitioners have failed to satisfy the criteria for the issuance of a writ of certiorari. Wherefore, the Respondents respectfully request that the Petition be *denied*.

Respectfully submitted,
Respondents, Ronald Rappaport, Michael Goldsmith, and the Law Firm of Reynolds, Rappaport, Kaplan and Hackney LLC,
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