No. _____

In The Supreme Court of the United States

BRONWYN RANDEL,

Petitioner,

v.

RABUN COUNTY SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

KRISTINE ORR BROWN
ORR & BROWN LLC
P.O. Box 2944
Gainesville, GA 30503
(770) 534-1980

MATTHEW C. BILLIPS
BARRETT & FARAHANY
1100 Peachtree St.
Suite 500
Atlanta, GA 30309
(404) 214-0120

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Due Process Clause provides that no person may be deprived of life, liberty or property without due process of law. Due process requires notice, an opportunity to be heard, and an unbiased decisionmaker. A hearing that meets due process standards must ordinarily be held prior to the deprivation.

The question presented is:

> Does the existence of a state post-deprivation process preclude a procedural due process claim
>
> (a) only where a pre-deprivation process that satisfied constitutional standards would be impracticable, such as because the deprivation was a random or unauthorized act of an errant state official (the rule in ten circuits and under decisions of the highest courts in eight states), or
>
> (b) in any case in which, even though compliance with constitutional standards in a pre-deprivation process was practicable, the state post-deprivation process provides some form of remedy for the constitutional deficiency of the pre-deprivation process (the longstanding rule in the Eleventh Circuit)?

PARTIES

The parties are Bronwyn Randel and Rabun County School District.

DIRECTLY RELATED CASES

Randel v. Rabun County School District, No. 21-12760, Eleventh Circuit Court of Appeals, judgment entered April 22, 2022

Randel v. Rabun County School District, No. 2:20-cv-00268-RWS, United States District Court for the Northern District of Georgia, judgment entered July 13, 2021

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OTHER AUTHORITIES

Petitioner Bronwyn Randel respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on April 22, 2022.

OPINIONS BELOW

The April 22, 2022, opinion of the court of appeals, which is unofficially reported at 2022 WL 1195655, is set out at pp. 1a-8a of the Appendix. The July 13, 2021, decision of the district court, which is not reported, is set out at pp. 9a-20a of the Appendix. The June 23, 2022, order denying rehearing en banc is set out at pp. 21a-22a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on April 22, 2022. A timely petition for rehearing en banc was denied on June 23, 2022. On September 16, 2022, Justice Thomas granted an application extending the time for filing a petition until October 21, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISION INVOLVED

Section one of the Fourteenth Amendment provides in pertinent part, "No State shall ... deprive any person of life, liberty, or property, without de process of law...."

INTRODUCTION

The Due Process Clause is of unique importance because of the exceptionally wide range of property and liberty interests which it protects. Members of the public regularly assert procedural due process claims to prevent or correct seizure or destruction of their homes, seizure or destruction of personal property from automobiles and firearms to the remains of loved ones, termination of professional and business licenses, and the loss of property rights in employment. The Eleventh Circuit for 38 years has adhered to a uniquely narrow interpretation of the Due Process Clause, establishing a barrier that few claimants can overcome, and routinely denying due process claims that would have been sustained in other circuits.

The decisions of this Court establish a fundamental distinction between pre-deprivation and post-deprivation determinations and procedures. Due process requires notice, an opportunity to be heard, and a determination by an unbiased individual or body. Ordinarily, a state must provide a procedure that satisfies those constitutional requirements *before* depriving someone of liberty or property. This Court has recognized, however, that where it would be

impracticable to provide such constitutional protections prior to the deprivation, the Due Process Clause requires only that there be a post-deprivation process that satisfies those due process requirements. *Parratt v. Taylor*, 451 U.S. 527 (1981).

Correctly applying those well-established principles, ten circuits and the highest courts in eight states have held that the existence of a post-deprivation process is only relevant where it would have been impracticable to provide a pre-deprivation procedure that satisfies the constitutional due process requirements. Those courts of appeals and state courts thus look to the existence and sufficiency of post-deprivation procedures solely in cases in which the deprivation of liberty or property was the result of a random or unauthorized action, or in which it would have been otherwise impracticable to provide a pre-deprivation process that met due process standards. That standard was applied by then-Judge Alito while on the Third Circuit, by then-Judge Barrett while on the Seventh Circuit, by then-Judge Sotomayor while on the District Court, and by Justice Souter in a First Circuit case decided following his retirement from this Court.

For more than a third of a century, however, the Eleventh Circuit has followed and repeatedly applied a very different constitutional standard, under its 1994 en banc decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 513 U.S. 1110 (1995). In cases in which it *would* have been possible to provide a pre-deprivation procedure that satisfied constitutional standards, and in which a state's failure

to do so was (in the Eleventh Circuit's own words) an "error" or "procedural deprivation," a state can "cure" and "correct" a failure to meet the constitutional requirements at the time of its pre-deprivation decision if it creates some form of post-deprivation administrative or judicial mechanism in which the aggrieved person can seek redress. The existence of such a remedial mechanism bars a procedural due process claim.

The defendant in the court below correctly described this principle as the "well-established" Eleventh Circuit standard, and the court of appeals below, applying *McKinney*, repeatedly described that decision and subsequent such Eleventh Circuit decisions as "binding precedent." App. 3a, 6a. The constitutional standard established by *McKinney* has been applied in dozens of Eleventh Circuit decisions and in a large number of district court decisions in that circuit.[1]

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[1] In addition to the district court decision in the instant case, the *McKinney* standard was applied in a dozen other cases in 2021 to reject procedural due process claims. *Lakoskey v. Floro*, 2021 WL 5860460, at *3-*4 (11th Cir. Dec. 10, 2021); *Fincken v. City of Dunedin, Florida*, 2021 WL 1610408, at *10, *12 (M.D. Fla. April 26, 2021); *Whitfield v. City of Hallandale Beach, Florida*, 2021 WL 4987938, at *7 (S.D. Fla. May 14, 2021); *Kessler v. City of Key West*, 2021 WL 1146562, at *5 (S.D. Fla. Feb. 12, 2021); *625 Fusion, LLC v. City of Fort Lauderdale*, 526 F.Supp.3d 1253, 1266 (S.D. Fla. 2021); *Orr v. Rogers*, 2021 WL 456632, at *6 (N.D. Ga. Jan. 6, 2021); *Marbury v. Etowah County Detention Center*, 2021 WL 2189158, at *2-*3 (N.D. Ala. April 26, 2021); *B.R.W. Contracting, Inc. v. Hernando County, Florida*, 2021 WL 2258331, at *3 n.2

STATEMENT OF THE CASE

Legal Background

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law...." Due process requires notice, an opportunity to be heard, and an impartial tribunal. This Court's "precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993).

The Due Process Clause does not require a pre-deprivation process that meets constitutional standards where it would not be feasible for a state to provide such a pre-deprivation process. *Parratt v. Taylor*, 451 U.S. 527 (1981), was such a case. This Court there concluded that it would be "not only impracticable, but impossible," for a state to accord a pre-deprivation process meeting constitutional standards in a case "involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee." 451 U.S. at 541. Under those circumstances, the prior-hearing requirement was "excused." *Id*. All

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(M.D. Fla. June 3, 2021); *Dees v. Lamar*, 2021 WL 1953137, at *9 (N.D. Fla. March 4, 2021); *Kavianpour v. Board of Regents of the University System of Georgia*, 2021 WL 2638999, at *38 n.58 (N.D. Ga. Jan. 28, 2021); *Mosby v. City of Byron, Georgia*, 2021 WL 297129, at *7 n.9 (M.D. Ga. Jan. 28, 2021); *Brantley County Development Partners, LLC v. Brantley County*, 559 F.Supp.3d 1345, 1372-73 (S.D. Ga. 2021).

that due process mandated in such a situation was that the state provide some adequate post-deprivation process "for a determination of rights and liabilities." *Id*.

Hudson v. Palmer, 468 U.S. 517 (1984), applied that principle to random and unauthorized actions that involved the intentional deprivation of property. *Hudson* explained that "[t]he underlying rationale of *Parratt* is that when deprivations are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply 'impracticable'...." 468 U.S. at 533. "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Id*. In such cases, due process requires only that a state provide an "adequate state post-deprivation remed[y]." *Id*.

The Court explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1986), that "*Parratt*'s point" was that the circumstances of that case presented "a tortious loss of ... property as a result of a random and unauthorized act by a state employee." 455 U.S. at 436 (quoting *Parratt*, 451 U.S. at 541). "[T]he Court's decisions suggest that, absent 'the necessity of quick action by the State or the impracticality of providing any pre-deprivation process,' a post-deprivation hearing here would be constitutionally inadequate." *Id*. (quoting *Parratt*, 451 U.S. at 539).

Zinermon v. Burch, 494 U.S. 113 (1990), made clear that the central holding of *Parratt* and *Hudson* was

that due process does not require a constitutionally sufficient pre-deprivation process only when it would not have been possible for the state to provide such a process. "*Parratt* and *Hudson* represent a special case ... in which post deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." 494 U.S. at 127. *Zinermon* stressed that no pre-deprivation process was constitutionally required in *Parratt* or *Hudson* because the conduct in that case was "random" and "unauthorized." 494 U.S. 129, 130, 132. The defendants in *Zinermon* argued that their own conduct was random and unauthorized (494 U.S. at 132), and that due process therefore required only an adequate post-deprivation remedy. The Court concluded the defendants' actions were not random and unauthorized, and thus found that a pre-deprivation process meeting constitutional standards was required. 494 U.S. at 136.

Factual Background

Dr. Bronwyn Randel was a longtime teacher in the Rabun County School District. During the 2017-2018 school year, following the appointment of a new school administrator, administrators repeatedly criticized Dr. Randel on grounds she contended were unwarranted. On about April 19, 2018, Dr. Randel filed a charge of discrimination with the EEOC, alleging age-based discrimination. A month later, on May 14, 2018, the School District Superintendent recommended that Dr. Randel's contract not be renewed. Under Georgia law,

only the County Board of Education, not the Superintendent, could non-renew Dr. Randel's contract, and by so doing end her employment. Following that non-renewal recommendation, Dr. Randel filed a supplemental charge of discrimination with the EEOC.

In November 2018 the Rabun County Board of Education conducted a hearing on the Superintendent's non-renewal recommendation. Several aspects of the events at that hearing would become the bases of Dr. Randel's subsequent procedural due process claims. First, Dr. Randel filed a motion asking the Board to appoint an impartial tribunal to conduct a hearing and make an independent recommendation, a procedure authorized by state law. Dr. Randel argued that the Board itself could not be impartial, because it was the subject of Randel's pending EEOC charge. That motion was denied. Second, Dr. Randel contended that the Superintendent had failed to provide her with sufficient notice concerning the allegations against her, including failing to provide her with meaningful notice of what documents would be introduced and relied on at the hearing. The Board rejected Randel's request that it remedy that situation. Third, the Board granted the Board Attorney's motion to quash a number of subpoenas that Dr. Randel's attorney had issued for documents and witnesses. Fourth, because the Board permitted the Board Attorney's presentation to consume most of the day, by the time Dr. Randel's attorney was calling witnesses, several of her key witnesses had had to leave. Her attorney asked the Board to continue the hearing until the next day, or any other later date,

or to permit the witnesses to testify by electronic means, but the Board rejected that request and closed the hearing without having heard from those witnesses. The Board voted later that night to non-renew Dr. Randel, which terminated her employment. The Board did not issue any written explanation for its decision.

Dr. Randel appealed the decision of the County School Board to the State Board of Education. The State Board's jurisdiction was limited to a review of the record of the County School Board proceeding, and the State Board did not permit the introduction of additional evidence. A county school board's determination is upheld if there is "any evidence" to support it. The State Board of Education affirmed the decision of the County School Board.

Proceedings Below

Plaintiff filed this action in federal district court, alleging she had a property right in her continued employment that was extinguished when the School Board decided to non-renew her contract. She asserted that the School Board had conducted the predeprivation hearing in a manner that violated procedural due process. The due process violations asserted in her complaint included a denial of notice (as to the specifics of the allegations and the evidence at issue), a denial of an opportunity to be heard (because the Board had quashed her subpoenas and refused to continue the hearing so the key witnesses could testify),

and the denial of an unbiased forum (because the Board was biased by the pending EEOC charge).[2] The defendant moved to dismiss, arguing that the plaintiff's federal due process claims were all barred by the Eleventh Circuit standard in *McKinney* and its progeny.

The district court dismissed the complaint. It held that "[t]o state a federal procedural due process claim under § 1983, an individual must show that 'the state refuse[d] to provide a process sufficient to remedy the procedural deprivation.'" App. 13a (quoting *McKinney v. Pate*, 20 F.3d at 1557). "In other words, '[i]t is the state's failure to provide adequate procedures to remedy the otherwise procedurally flawed deprivation of a protected interest that gives rise to a federal procedural due process claim.'" App. 13a (quoting *Cotton v. Jackson*, 216 F.3d 1328, 1331 (11th Cir. 2000)). That Eleventh Circuit standard was dispositive, the district court reasoned, because there were "[s]everal state law remedies available to Ms. Randel which provided sufficient due process for the alleged deprivations she suffered in this case." App. 14a. The district court did not suggest that the action of the Rabun County Board of Education was random or unauthorized, or that it

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[2] Prior to commencing this federal action, Dr. Randel had filed suit in state court, seeking review of the decisions of the County and State Board of Education. The Georgia Superior Court ruled (before the district court decision) that Dr. Randel had been denied her due process right to an unbiased tribunal, but (after the district court decision) the state court of appeals reversed that holding. *Rabun Board of Education v. Randel*, 361 Ga. App. 323 (Ct. App. Ga. 2021).

would have been impracticable to provide the procedures (such as appointing an impartial tribunal) that Dr. Randel asserted were required by due process.

On appeal, the defendant argued that Dr. Randel's federal due process claim was barred by longstanding Eleventh Circuit precedent. "[W]ell-established Eleventh Circuit law precludes a federal procedural due process claim where adequate state remedies are available to address a claimed deprivation of a plaintiff's due process rights."[3] "It is well-established that Plaintiff has no cognizable due process claim as a matter of law when there are adequate state remedies available. This Court's decision in *McKinney* ... and *Cotton* ... could not make this any clearer."[4] The defendant insisted that "the district court correctly applied 25 years of Eleventh Circuit precedent."[5] Counsel for the defendant did not argue that his client's actions were random or unauthorized, or that it would have been impracticable to provide the procedures that Dr. Randel asserted were required by due process.

Plaintiff argued on appeal that the Eleventh Circuit precedent in *McKinney* and its progeny was inconsistent with this Court's more recent decision in *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019). App. 2a. The court of appeals rejected that argument, holding that "we are bound by our prior precedent [in *McKinney* and *Cotton*]." App. 7a; see App. 3a

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[3] Brief of Appellee, 7, available at 2021 WL 5768973.

[4] *Id*., at 9.

[5] *Id*., at 9.

("prior binding precedent"), 6a ("binding precedent forecloses Randel's argument").

> In *McKinney*, we held that, "[w]hen a state procedure is inadequate," the state does not violate the plaintiff's due process right "unless and until the state fails to remedy that inadequacy." 20 F.3d at 1560. The plaintiff's need to seek state remedies is a requirement to state a procedural due process claim. *Cotton*, 216 F.3d at 1331, 1331 n.2. To provide an adequate remedy for an alleged procedural due process violation, a state need not provide all the relief that could be available in a § 1983 claim.... Rather, "the state procedure must be able to correct whatever deficiencies exist and to provide plaintiff with whatever process is due." *Cotton*, 216 F.3d at 1331.

App. 4a-5a. "Because we conclude that the state did not entirely fail to provide Randel with a process to challenge here non-renewal of employment, the district court properly granted the state's motion to dismiss." App. 7a. Applying the longstanding Eleventh Circuit standard, the district court concluded that even if, as plaintiff alleged, the County Board had denied her notice, an opportunity to be heard, and an unbiased tribunal, "she still does not present a due process violation." App. 7a. Like the district court, the court of appeals did not suggest that the action of the Rabun County Board of Education was random or unauthorized, or that it would have been impracticable to provide the procedures that Dr. Randel asserted were required by due process.

The court of appeals denied a timely petition for rehearing en banc. App. 21a-22a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A LONGSTANDING CONFLICT REGARDING THE MEANING OF THE DUE PROCESS CLAUSE

This case presents a straightforward, longstanding, and fundamental conflict regarding the meaning of the Due Process Clause. In ten circuits, and under the decisions of the highest courts of eight states, the existence of a post-deprivation remedial process is irrelevant if the pre-deprivation determination that deprived a claimant of liberty or property did not meet applicable due process standards. The only circumstance in which the sufficiency of a post-deprivation process matters is where (as under *Parratt* and *Hudson*) a defendant's pre-deprivation determination did not have to meet due process standards, because doing so would have been impractical. In that situation, those courts hold, the post-deprivation process matters because that is the only process that is required to satisfy due process standards.

The Eleventh Circuit standard could not be more different. Even when constitutional due process standards *do* apply to a pre-deprivation process, and even if the pre-deprivation process at issue *is* constitutionally deficient, the existence of a post-deprivation process is relevant, and determinative. Where the

pre-deprivation process does not meet constitutional standards, and is (in the Eleventh Circuit's words) "procedurally deficient," or "error," there still is no due process claim if the state has some post-determination process that might provide "a sufficient remedy to a[n] ... alleged procedural due process violation." App. 5a. A denial of notice, of an opportunity to be heard, or of an unbiased tribunal, which in and of itself transgresses federal due process standards, ceases to be actionable – in the Eleventh Circuit ceases even to be a federal constitutional "violation" – if a state has established some post-deprivation procedure which might provide a remedy. A state can accomplish that simply by providing a general ability to seek review in state court, state processes that need not even mention due process or federal constitutional rights. App. 5a (citing *Cotton*, 216 F.3d at 1332, and *Doe v. Valencia Coll.*, 903 F.3d 1220, 1234-35 (11th Cir. 2018)).

A. The Eleventh Circuit Standard Is Well-Established

The standard established by *McKinney*, and applied in the Eleventh Circuit for more than three decades, is a straightforward (although fatally flawed) interpretation of the Due Process Clause. In that circuit, two distinct elements must be established to establish a violation of the Due Process Clause: the plaintiff must prove *both* that the defendant's pre-deprivation actions failed to provide the notice, opportunity to be heard, or unbiased tribunal required by the Fourteenth Amendment, *and* that the state failed

to create a post-deprivation process that at least generally would provide some sort of remedy for that procedural deprivation. "A ... claim is not stated unless inadequate state procedures exist to remedy an alleged procedural deprivation...." *Cotton v. Jackson*, 216 F.3d at 1331 "Assuming a plaintiff has shown a deprivation of some right protected by the due process clause, we ... look to whether the available state procedures were adequate to correct the alleged procedural deficiencies." *Id.* "[P]rocedural due process violations do not become 'complete' unless and until the State fails to provide due process." *Ogburia v. Cleveland*, 380 Fed.Appx. 927, 929 (11th Cir. 2010). "[T]he unavailability of adequate remedies is an element of a procedural due process claim." *Flagship Lake County Development Number 5, LLC v. City of Mascotte, Florida*, 559 Fed.Appx. 811, 815 (11th Cir. 2014).

In the Eleventh Circuit, if an adequate post-deprivation remedy exists, a constitutionally deficient predeprivation process is not a constitutional violation at all. Thus, the court of appeals explained in *McKinney* that "[e]ven if McKinney's bias allegations are true, the presence of a satisfactory state remedy mandates that we find that no procedural due process violation occurred." *McKinney*, 20 F.3d at 1564. "[P]rocedural due process violations do not even exist unless no adequate state remedies are available." *Cotton v. Jackson*, 216 F.3d at 1331 n.3. "[I]n *McKinney*, ... because there was an adequate state remedy available ... no due process violation existed." *Bell v. City of Demopolis, Alabama*, 86 F.3d 191, 192 (11th Cir. 1996). The court below

explained that "[i]n *McKinney* we held that, '[w]hen a state procedure is inadequate,' the state does not violate the plaintiff's due process right 'unless and until the state fails to remedy that inadequacy.' " App. 4a.

This is not a rule for or limited to cases like *Parratt* and *Hudson*, in which a post-deprivation remedy was sufficient because the deprivation was random and unauthorized. The Eleventh Circuit decisions applying the *McKinney* standard virtually never suggest that the deprivation at issue was random or unauthorized, and there was not such argument or holding in the instant case. To the contrary, the Eleventh Circuit two-element definition of a constitutional violation is applied to and intended for cases in which plaintiff alleges, and the court assumes, that the pre-deprivation process, in and of itself, *was* subject to and failed to meet due process standards. *Cotton v. Jackson*, 216 F.3d at 1331 ("a deprivation of some right protected by the due process clause"); *Duva v. Board of Regents of the University System of Georgia*, 654 Fed.Appx. 451, 455 (11th Cir. 2016) ("deprivation of a due process right"); *Flagship Lake County Development Number 5, LLC v. City of Mascotte, Florida*, 559 Fed.Appx. 811, 814 (11th Cir. 2014) ("deprivations of procedural due process"); *Ogburia v. Cleveland*, 380 Fed.Appx. 927, 929 (11th Cir. 2010) ("a procedural due process deprivation"); *East v. Clayton County Georgia*, 436 Fed.Appx. 904, 913 (11th Cir. 2011) ("depriv[ation] ... of due process"); *Horton v. Board of County Commissioners of Flagler County*, 202 F.3d 1297, 1300 n.3. (11th Cir. 2000) ("depriv[ation] ... of a procedural guarantee

protected by the Fourteenth Amendment"). Thus, the panel explained that the rule in *McKinney* applies "[w]hen a state [pre-deprivation] procedure is inadequate" (App. 4a; quoting *McKinney*), and where the defendant's alleged conduct (but for the state remedy) would constitute a "procedural due process violation." App. 4a.

Because the absence of an adequate state post-deprivation remedy is a necessary element of any procedural due process claim, in the Eleventh Circuit judicial analysis usually begins with that issue. "A federal district court would put the following question to the defendants: 'If the evidence proves the claimed deprivation, does the plaintiff have an adequate state law remedy, and if so, what is it?' " *Horton v. Board of County Commissioners of Flagler County*, 202 F.3d at 1200 n.3. Judicial analysis usually ends with that question, because under the *McKinney* rule a defendant in the Eleventh Circuit ordinarily can easily establish the existence of such a remedy. Thus, as in the instant case, in *McKinney*, and in most opinions applying *McKinney*, federal courts do not decide or even analyze whether the pre-deprivation actions of the defendant agency or officials complied with the procedural guarantees of the Fourteenth Amendment.

McKinney and its progeny reason that a constitutionally defective pre-deprivation process is not a violation because the Fourteenth Amendment permits a state to "cure" such a constitutional defect. "[T]he state may cure a procedural deprivation by providing a later procedural remedy" *McKinney*, 20 F.3d at 1557. But

McKinney does not require that a state "cure" a constitutional defect by actually determining whether the pre-deprivation process was constitutionally defective, and providing a remedy if it was, or by deciding the underlying dispute in a constitutionally compliant manner, such as a tort action. A state "cures" a constitutional defect merely by establishing some general remedial measure that might, if invoked, provide some sort of remedy. *Lindbloom v. Manatee County*, 808 Fed.Appx. 745, 750 (11th Cir. 2020); *Ladd v. City of West Palm Beach*, 681 Fed.Appx. 814, 818 (11th Cir. 2017). Where such a remedial scheme exists, it simply does not matter whether the pre-deprivation process did not meet constitutional standards. "We hold ... that the failure to provide ... notice in advance was irrelevant. It is a well-settled principle of law that 'the state may cure a procedural deprivation by providing a later procedural remedy.'" *Bass v. Perrin*, 170 F.3d 1312, 1318-19 (11th Cir. 1999) (quoting *McKinney*, 20 F.3d at 1557).

Application of the *McKinney* doctrine does not turn on whether state courts would actually provide a remedy for the alleged procedural violation; it is sufficient that the state courts *usually* might provide a remedy for a due process violation.

> The *McKinney* rule is not micro in focus, but macro. It does not look to the actual involvement of state court ... in the specific case now before the federal court. Instead, the *McKinney* rule looks to ... whether the state courts, if asked, *generally* would provide an adequate

> remedy for the procedural deprivation the federal court plaintiff claims to have suffered.

Horton, 202 F.3d at 1300 (emphasis added). There need not be a specific state law authorizing a remedy for the particular type of underlying claim at issue, or even specifically for due process violations; a general right to seek review of state or local agency actions will suffice. Thus, the Eleventh Circuit has held that in Florida the general right in state court to seek certiorari review of any government action is an adequate remedy, *Hogan v. City of Fort Walton Beach*, 817 Fed.Appx. 717, 722 (11th Cir. 2020), and that in Georgia the general right to seek mandamus in state court regarding any government action also meets the *McKinney* standard. App. 5a; *Cotton v. Jackson*, 216 F.3d at 1332-33. Those decisions regarding those broadly applicable Florida and Georgia judicial actions mean that in those states there would be an "adequate remedy," barring federal due process claims, for most government denials of procedural due process. It does not matter whether, in the case at hand, state courts actually refused to provide a remedy. In several cases, the Eleventh Circuit has held that the *McKinney* rule requires the federal courts to dismiss a procedural due process claim even though in the specific case before them the state courts were certain to deny any remedy because of state immunity doctrines. *Lakoskey v. Floro*, 2021 WL 5860460, at *6 (11th Cir. Dec. 10, 2021); *Rittenhouse v. DeKalb County*, 764 F.2d 1451, 1450 (11th Cir. 1985).

The *McKinney* rule applies even if a defendant itself, by removing a federal due process claim from state court, prevented the plaintiff from obtaining any remedy in the state forum. In *Horton v. Board of County Commissioners of Flagler County*, the defendant removed to federal court a federal due process claim, and then moved to dismiss that claim on the ground that state law provided in state court a remedy for the alleged federal due process denial. The Eleventh Circuit held that the district judge had erred in refusing to apply *McKinney* merely because in that case "the Defendants ... obstructed the Plaintiffs' attempt to obtain a state remedy." 202 F.3d at 1299. The standard under *McKinney*, the court of appeals explained, was whether the state court, if asked, "generally" would provide an adequate remedy. 202 F.3d at 1300. It did not matter that no such remedy was available in the case at hand, even if that was due to the actions of the defendants. If a federal due process claim was removed from a state court that "generally would provide an adequate remedy," the federal court must dismiss it with prejudice. "[T]hat claim is not sent back to state court." *Id*.

As the defendant school board argued on appeal, and as the panel below emphasized, the precedent established in *McKinney* is deeply embedded in Eleventh Circuit law. Twenty-six years ago a panel refused to reconsider *McKinney*, explaining that "[t]his panel ... is bound by prior panel decisions of the Eleventh Circuit, and, of course, the decisions of the en banc court, such as *McKinney*." *Bell v. City of Demopolis, Alabama*, 86 F.3d 191, 192-93 (11th Cir. 1996). In 2005, the court of

appeals applied "the rule established in *McKinney v. Pate*." *A.A.A. Always Open Bail Bonds v. DeKalb County, Georgia*, 129 Fed.Appx. 522, 525-26 (11th Cir. 2005). Then in 2009, the court of appeals pointed out that "[i]t is well-settled that a constitutional violation is actionable under § 1983 only when the state refuses to provide a process sufficient to remedy the procedural deprivation." *Reams v. Irvin*, 561 F.3d 1258, 1266 (11th Cir. 2009) (citations and quotation marks omitted). In 2014, the Eleventh Circuit emphasized that "[a]gain and again, this Court has repeated the basic rule that a procedural due process claim can exist only if no adequate state remedies are available." *Flagship Lake County Development Number 5, LLC v. City of Mascotte, Florida*, 559 Fed.Appx. 811, 815 (11th Cir. 2014). In that same year, a different panel reiterated that "[w]e have repeatedly articulated the basic rule that a procedural due process violation has not occurred when adequate state remedies are available." *Goodman v. City of Cape Coral*, 581 Fed.Appx. 736, 740 (11th Cir. 2014). In 2017, the court of appeals again pointed out the "well-established" nature of the *McKinney* doctrine. *Ladd v. City of West Palm Beach*, 681 Fed.Appx. 814, 818 (11th Cir. 2017). And in that year, the Eleventh Circuit noted the longstanding nature of the *McKinney* rule, explaining that "[f]or nearly a quarter of a century, the law of this circuit has been that 'the presence of a satisfactory state remedy mandates that we find that no procedural due process violation occurred.'" *Ingalls v. U.S. Space and Rocket Center*, 679 Fed.Appx. 935, 943 (11th Cir. 2017) (quoting *McKinney*, 20 F.3d at 1564).

B. Ten Circuits Reject the Eleventh Circuit Interpretation of the Due Process Clause

Ten circuits have correctly construed the Due Process Clause, and interpreted this Court's decisions, to mean that the availability of post-deprivation remedies is only relevant when it would have been impracticable to provide prior to the deprivation a process that met constitutional standards.

The First Circuit holds that the existence of an adequate post-deprivation remedy bars a procedural due process claim only when it would have been impracticable to provide a pre-deprivation process that meets due process requirements, and insists on careful judicial scrutiny of a claim that a particular deprivation was random and unauthorized. "When an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation." *Cotnoir v. University of Maine Systems*, 35 F.3d 6, 12 (1st Cir. 1994). "[C]ases distinguish sharply between deprivations caused by 'random, unauthorized' conduct of state officials, and deprivations caused by conduct 'pursuant to established state procedure.' " *Watson v. Caton*, 984 F.2d 537, 541 (1st Cir. 1993) (quoting *Hudson v. Palmer*, 468 U.S. at 532). In the case of a deprivation "properly categorized as a random and unauthorized error ... due process is adequately served by a post-deprivation hearing." *Rich v. LaPoint*, 484 Fed.Appx. 572, 575 (1st Cir. 2012) (opinion by Souter, J.). "Before invoking the *Parratt-Hudson* doctrine, however, courts must give a

hard look at allegations that conduct is 'random and unauthorized.'" *Chmielinski v. Massachusetts*, 513 F.3d 309, 315 (1st Cir. 2008).

The Second Circuit "has repeatedly held that *Hudson* and *Parratt* apply only where the deprivation complained of is 'random and unauthorized.'" *Pangburn v. Culbertson*, 200 F.3d 65, 71 (2d Cir. 1999) (citing cases); see *Butler v. Castro*, 896 F.2d 698, 700 (2d Cir. 1990). "The Supreme Court distinguishes between deprivations ... occurring as a result of established governmental procedures, and those based on random, unauthorized acts by government officers." *Locurto v. Safir*, 264 F.3d 154, 172 (2d Cir. 2001). "The question for th[e] court[s] is whether the [defendant's action] was an established state procedure or instead a random, unauthorized act by state employees." *Bartlett v. New York State Bd. of Law Examiners*, 970 F.Supp. 1094, 1139 (S.D.N.Y. 1997) (opinion by Sotomayor, J.). The existence of a post-deprivation process does not preclude a procedural due process claim where the deprivation was "not a random act by a state employee," and thus a "pre-deprivation process is not impossible." *Id*. The Second Circuit has repeatedly held that the actions of an agency's "highest ranking official ... cannot be termed random or unauthorized." *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101, 115 (2d Cir. 2006).

The Third Circuit in *Stana v. School Dist. of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985), overturned a district court decision that adopted the same

interpretation of *Parratt* as that followed in the Eleventh Circuit.

> The [district] court read *Parratt* ... as holding that "a deprivation of property does not rise to the level of a constitutional violation so long as the state provides a forum within which redress may be had."... We conclude that the district court erred. Nothing in *Parratt* suggests that when a pretermination hearing is required ... , there is nevertheless no "deprivation" in a constitutional sense as long as the state provides some forum for post-deprivation redress.... Here ... pretermination hearing was neither impracticable nor impossible. Thus, even if Pennsylvania had a procedure that might have provided [the plaintiff some redress, ... , that does not diminish the nature of the [constitutional] deprivation....

775 F.2d at 128-29 (quoting *Stana v. School Dist. of Pittsburgh*, 598 F.Supp. 842, 844 (W.D. Pa. 1984)). That circuit holds that the existence of a post-deprivation remedy is sufficient only when the deprivation was a random unauthorized act, or when providing a sufficient pre-deprivation process was otherwise impracticable. *Ragland v. Commissioner New Jersey Dept. of Corrections*, 717 Fed.Appx. 175, 177 (3d Cir. 2017). "[A] due process claim based on random and unauthorized deprivation of property by a state actor is not actionable under § 1983 ... unless there is no adequate post-deprivation remedy available." *Alexander v. Gennarini*, 144 Fed.Appx. 924, 925 (3d Cir. 2005) (opinion joined by Alito, J.) (per curiam).

The Fourth Circuit also reads *Parratt* to apply only when a pre-deprivation process satisfying constitutional standards would be impracticable.

> *Parratt* "comes into play" only in the situation where "postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." "The lesson of *Zinermon*," declared the Fifth Circuit recently, "is that the *Parratt/Hudson* doctrine is restricted to cases where it truly is impossible for the state to provide pre-deprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor."…. We agree….

Plummer v. State of Maryland, 915 F.2d 927, 930 (4th Cir. 1990) (quoting *Zinermon*, 494 U.S. at 985) and *Caine v. Hardy*, 905 F.2d 858, 862 (5th Cir. 1990) (en banc)).

The en banc decision in *Caine v. Hardy*, quoted in the Fourth Circuit decision in *Plummer*, is controlling law in the Fifth Circuit. Thus, in *Alexander v. Leyoub*, 62 F.3d 709, 712 (5th Cir. 1995), the court of appeals held that "[o]ur examination of [the plaintiff's] allegations leads us to conclude that the *Parratt/Hudson* doctrine does not foreclose adjudication of her § 1983 suit because the 'random and unauthorized' element necessary for its application is absent." In *LeBeouf v. Manning*, 575 Fed.Appx. 374, 379-80 (5th Cir. 2014), the court of appeals explained that "a § 1983 action for

deprivation of procedural due process is barred under the *Parratt/Hudson* doctrine only if, inter alia, the deprivation was unpredictable or unforeseeable and pre-deprivation process would have been impossible or impotent to counter the state actor's particular conduct."

The Sixth Circuit in *Mitchell v. Fankhuaser*, 373 F.3d 477, 483-84 (6th Cir. 2004), definitively limited *Parratt* "to random, unauthorized deprivations of property." Citing that decision, the Sixth Circuit later explained that

> [t]his Court has ... clarified that the *Parratt* ... line of cases "applies only to random, unauthorized deprivations of property" as "distinct from a deprivation resulting from an established state procedure." ... Thus, where a plaintiff does not contend that she was "deprived of [her] property interest in [her] job pursuant to a random or unauthorized act" and where she instead challenges "established state procedures," the plaintiff is "required *neither to plead nor prove the inadequacy of post-termination state-law remedies* in order to prevail.").

Printup v. Director, Ohio Dep't of Job and Family Services, 645 Fed.Appx. 781, 787 (6th Cir. 2016) (quoting *Mitchell*, 375 F.3d at 482-84) (emphasis in *Printup*). "The rule requiring a § 1983 plaintiff to show the inadequacy of a state's post-deprivation corrective proceedings, articulated by the Supreme Court in *Parratt* ... applies only where the deprivation complained of is random and unpredictable, such that the state cannot

feasibly provide a pre-deprivation hearing." *Silberstein v. City of Dayton*, 440 F.3d 306, 315 (6th Cir. 2006).

The Seventh Circuit recognizes that "*Parratt* is limited to a narrow category of due process cases where the plaintiff claims he was denied a meaningful pre-deprivation hearing, but under circumstances where the very notion of a pre-deprivation hearing would be impractical and even nonsensical, and where the deprivation was not carried out through established state procedures." *Armstrong v. Daily*, 786 F.3d 529, 539 (7th Cir. 2015). "[T]he Supreme Court has never suggested that the pragmatic but narrow rule of *Parratt* applies to employee due process claims where pre-deprivation notice and an opportunity to be heard could be provided in a practical way." *Bradley v. Village of University Park, Illinois*, 929 F.3d 875, 879 (7th Cir. 2019). In *Cleven v. Soglin*, 903 F.3d 614 (7th Cir. 2018) (opinion by Barrett, J.), the Seventh Circuit explained the rationale of that narrow rule. "When officials act without authorization, '[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.' ... In this situation, a meaningful postdeprivation hearing satisfies due process...." 903 F.3d at 617-18 (quoting *Parratt*, 451 U.S. at 451).

In *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994), the Eighth Circuit overturned a district court decision which, like the Eleventh Circuit rule in *McKinney*, extended *Parratt* and *Hudson* beyond cases of random and unauthorized deprivations.

> The district court also held that [the plaintiff]'s section 1983 claims . . were barred under *Parratt* ... [and] *Hudson* ... , because the Arkansas replevin statute provides a meaningful postdeprivation remedy.... We do not agree that *Parratt* and its progeny apply to [the plaintiff]'s procedural due process claim.... [T]he availability of state law postdeprivation remedies bears relevance only where the challenged acts of state officials can be characterized as random and unauthorized.

40 F.3d at 262.

The Ninth Circuit has long followed the majority rule that a post-deprivation remedy is only relevant when it would have been impracticable for the state to provide a pre-deprivation hearing meeting constitutional standards.

> In *Parratt*, the Supreme Court held that a state may satisfy the constitutional requirements for a hearing through process provided as a remedy after a deprivation has occurred, in lieu of preventative process, when the deprivation is the result of random, unauthorized and negligent conduct by state officials, ... and where it is either impracticable or impossible for the state to provide preventative process because the state cannot have foreseen the potential deprivation.... [T]he Court in *Hudson* ... refused to endorse the constitutionality of remedial process where the deprivation is not random or where it would have been

> practicable for the state to provide process before the fact.

Piatt v. MacDougal, 773 F.3d 1032, 1036 (9th Cir. 1985) (en banc).

In *Gillihan v. Shillinger*, 872 F.2d 935 (10th Cir. 1989), the Tenth Circuit read this Court's decisions in the same way as every circuit except the Eleventh.

> Defendants contend that plaintiff has not been deprived of his property without due process because he has adequate administrative and state post-deprivation remedies. While defendants are correct that the United States Supreme Court has held that neither negligent nor intentional deprivations of property under color of state law that are random and unauthorized give rise to a § 1983 claim where the plaintiff has an adequate state remedy, ... those cases do not apply here. Both *Parratt* and *Hudson* deal with random and unauthorized deprivations of property....

872 F.3d at 939.

C. The Highest Courts of Eight States Reject the Eleventh Circuit Standard

Decisions of the highest state courts in eight states hold that the existence and adequacy of post-deprivation proceedings is legally relevant only when providing due process rights at a pre-deprivation hearing would not have been practicable.

In *Stallworth v. City of Evergreen*, 680 So.2d 229 (Ala. 1996), the Alabama Supreme Court disagreed with the Eleventh Circuit's reasoning in *McKinney*. "The [state] trial court's reliance on *McKinney* is misplaced ... because some of the reasoning underlying the holding in that case seems questionable in light of United States Supreme Court caselaw...." 680 So.2d at 234.

> [T]he Eleventh Circuit's reliance on *Parratt* ... to buttress its conclusion in *McKinney* that a denial of due process at the pretermination level can be fully remedied by a procedurally adequate post-termination hearing is questionable. *Parratt* involved a procedural due process claim brought by a prisoner who alleged that a prison employee had either negligently lost or intentionally stolen his personal property.... The situation where an employee is terminated is much different.... The holding of the post-termination hearing ... did not remedy and could not have remedied the earlier deprivation of [the plaintiff's] right to a constitutionally adequate pretermination hearing ...

680 So.2d 234-35.

In *White v. Busboom*, 901 N.W.2d 294 (Neb. 2017), the Nebraska Supreme Court followed the majority rule in federal courts that post-deprivation remedies cannot correct after the fact a denial of required due process safeguards at a pre-deprivation hearing.

> [T]he Eighth Circuit has implicitly acknowledged that where the Constitution demands pre-deprivation due process, postdeprivation proceedings will not cure a state's failure to provide the minimum pre-deprivation process. [T]he Eighth Circuit's 2012 [standard] is consistent with other federal court decisions addressing this issue in cases involving the discharge of a public employee with a protected property interest in employment. Together, these decisions represent the consensus of lower federal appellate courts.

901 N.W.2d at 736; see *Manning v. Dakota County School Dist. No. 22-0011*, 782 N.W.2d 1, 11 (Neb. 2010) ("The controlling inquiry is solely whether the state is in a position to provide pre-deprivation process") (quoting *Parratt*, 468 U.S. at 534).

The highest courts of Indiana, Kansas, Michigan, New Jersey, Ohio and Wisconsin have also concluded that the existence of post-deprivation remedies is relevant only when it would have been impracticable to provide the requisite due process protections at the pre-deprivation stage. *Kellogg v. City of Gary*, 562 N.E.2d 685, 701 (Ind. 1990) ("[s]ince there is nothing to suggest that a pre-deprivation hearing was clearly not feasible, the existence of an available state remedy does not preclude the citizens from pursuing a procedural due process claim under § 1983"); *Alvarado v. City of Dodge City*, 238 Kan. 48, 54 (1985) ("[a]n adequate postdeprivation remedy will suffice if the deprivation is caused by a random and unauthorized state act for which prior process is impracticable or

impossible"); *Mudge v. Macomb County*, 458 Mich. 87, 99 (1998) ("plaintiffs have alleged a § 1983 claim that is not automatically barred because of the existence of post deprivation remedies. That is because: (1) the deprivation of plaintiffs' monies was not necessarily random or unpredictable ... and (2) a pre-deprivation hearing could have been provided"); *Rivkin v. Dover Township Rent Leveling Board*, 143 N.J. 352, 374 (1996) ("a threshold question in any procedural due process case is whether the deprivation was caused by random and unauthorized conduct...."); *Cooperman v. University Surgical Associates, Inc.*, 32 Ohio St. 3d 191, 201 (1987) ("the rationale which underlies [*Parratt* and *Hudson*] is that where state officials deprive a claimant of property through illegal or unauthorized conduct, ... there is simply no pre-deprivation procedure which the state can practicably afford the claimant prior to the taking"); *Irby v. Macht*, 184 Wis.2d 831, 847 (1994).

D. The Conflict Is Well-Recognized

Nebraska courts have repeatedly noted this disagreement among the lower courts. "[Some] courts have ... held that there is no cure for a pretermination violation of due process.... The availability of postdeprivation grievance procedures does not cure a due process violation.... However, other courts have held that due process violations may be cured...." *Scott v. Richardson*, 789 N.W.2d 41, 51-52 (Neb. 2010) (citing, inter alia, *McKinney*). "[T]here is authority for the proposition that a failure to provide sufficient pretermination

process may be corrected by a curative posttermination hearing in which due process is provided.... Other jurisdictions conclude that if the employment of an employee is terminated in violation of the employee's due process rights, the availability of posttermination procedures does not cure the violation." *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb.App. 585, 593-94 (1998) (citing, inter alia, *McKinney*).

Prior to 2004, there were within the Sixth Circuit both panel decisions holding that pre-deprivation denials of due process rights cannot be cured, and panel decisions holding (as does the Eleventh Circuit) that they can be. In *Mitchell v. Fankhauser*, 375 F.3d 477, 482 (6th Cir. 2004), the Sixth Circuit recognized that these were "contradictory lines of authority." 375 F.3d at 482.

Faced with these conflicting standards, federal district courts follow whichever has been adopted by the circuit in which they are located. In one district court case, when the defendant invoked the Eleventh Circuit standard, the court rejected that standard as contrary to the applicable Tenth Circuit standard. "Due to [the] Tenth Circuit authority directly on point, the Court will not follow *McKinney v. Pate*...." *Terlecky v. City of Ruidoso Downs*, 2006 WL 8444547, at *3 (D. N.M. Jan. 24, 2006). The district judge noted that "the law on this question is in disarray...." *Id*., at *3 n.4.

In a concurring opinion in *San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465 (1st Cir. 2012) (en banc), Judge Lipez attributed differences among

lower court judges to the difficulty of reconciling the decisions of this Court. 687 F.3d at 496. Judge Lipez expressed his "hope that the [Supreme] Court will soon provide much-needed clarification...." 687 F.3d at 494. A decade later, with the Eleventh Circuit continuing to apply a standard emphatically rejected by almost all circuits and numerous state courts, the time for clarification "soon" has assuredly arrived.

II. THE ELEVENTH CIRCUIT INTERPRETATION OF THE DUE PROCESS CLAUSE IS CLEARLY INCORRECT

The Eleventh Circuit standard is inconsistent with this Court's decisions in *Parratt*, *Hudson*, *Zinermon* and *Logan*. Those decisions make clear that the existence of some form of post-deprivation procedure is irrelevant unless it was impracticable to provide a pre-deprivation process that satisfied constitutional standards

McKinney asserted, improbably, that *Zinermon* had held that a state can always "cure" a failure to provide a constitutionally adequate pre-deprivation process.

> [A] procedural due process violation is not complete "unless and until the State fails to provide due process." ... In other words, the state may cure a procedural deprivation by providing a later procedural remedy....

20 F.3d at 1557 (quoting *Zinermon*, 494 U.S. at 126). But that obviously is not what *Zinermon* held. In that case it was undisputed that the state did provide an

adequate post-deprivation process. 494 U.S. at 142 (O'Connor, J., dissenting). If the existence of such post-deprivation remedies could under *Zinermon* "cure" a denial of due process at the pre-deprivation stage, *Zinermon* would have been decided in favor of the defendant.

Under the Eleventh Circuit standard, a state or local agency may at its discretion provide a hearing that meets due process requirements either before or after the deprivation. But this Court's decisions emphatically insist that the Due Process Clause requires a constitutionally adequate pre-deprivation hearing if one is practicable. "[I]n situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon*, 494 U.S. at 132. That statement would make no sense if an "adequa[te] ... postdeprivation tort remedy" would automatically "cure" the absence of a constitutionally sufficient pre-deprivation process.

The Eleventh Circuit rule is assuredly inconsistent with this Court's decision in *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019). *Knick* overturned the decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson County*, 473 U.S. 172 (1985), which had held that that an owner whose property has been taken by the government may not pursue a federal court section 1983 action unless he or she had first unsuccessfully sought just compensation in state court. The rule in *McKinney*

is even more harsh than that in *Williamson*, because under *McKinney* a claimant whose state court action has failed still is not permitted to bring a federal action.

Knick rejected the notion that lies at the heart of *McKinney*, that a constitutional violation that has been "cured" by the existence of some remedial procedure is not a violation at all.

> A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damage action renders negligent conduct compliant with the duty of care.

139 S.Ct. at 2172. *Knick* explained that *Parratt*, which had been relied on by *Williamson County*, did not support the holding in that case. "The point of *Parratt*," *Knick* explained, was that "[it] is not even possible for a State to provide pre-deprivation due process for the unauthorized act of single employee." 139 S.Ct. at 2174. Just as such unauthorized acts of a single employee (in *Parratt*) are "quite different from" a taking of property in *Knick*, *id*., so too are they very different

from a non-random deprivation of property (in the instant case).

Knick pointed out that *Williamson County* had created an unwarranted exception to the "'general rule' ... that plaintiffs may bring constitutional claims under § 1983 'without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.'" 139 S .Ct. at 2172-73 (quoting D. Dana & T. Merrill, Property: Takings 262 (2002)). *McKinney* creates an equally unjustifiable exception to that general rule.

> The Civil Rights Act of 1871, after all, guarantees "a federal forum for claims of unconstitutional treatment at the hands of state officials," and the settled rule is that "exhaustion of state remedies 'is not a prerequisite to an action under [42 U.S.C.] § 1983,'" *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (quoting *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982)). But the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.

139 S.Ct. at 2167. Absent action by this Court, that guarantee of a federal forum will continue to ring hollow for plaintiffs in the Eleventh Circuit alleging violations of the constitutional guarantee of procedural due process.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

KRISTINE ORR BROWN
ORR & BROWN LLC
P.O. Box 2944
Gainesville, GA 30503
(770) 534-1980

MATTHEW C. BILLIPS
BARRETT & FARAHANY
1100 Peachtree St.
Suite 500
Atlanta, GA 30309
(404) 214-0120

Counsel for Petitioner