No. 22-384

# 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**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIAN C. SMITH
*Counsel of Record*
PHILLIP L. HARTLEY
PEREIRA, KIRBY, KINSINGER & NGUYEN, LLP
340 Jesse Jewell Parkway, Suite 750
Gainesville, Georgia 30501
Tel: (770) 534-7341
bsmith@hhhlawyers.com
phartley@hhhlawyers.com

*Counsel for Petitioner*

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

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## INTRODUCTION

Petitioner seeks to paint the Eleventh Circuit as a rogue outlier among the circuit courts of appeals – one that uniquely limits the availability of remedy by the federal courts to claimed procedural due process violations. However, the facts of this case reveal that the School District provided Petitioner with extensive pre-deprivation due process, as provided under Georgia law. That process includes limitations on the causes for termination, advance written notice identifying witnesses and summarizing evidence, the right to counsel, subpoena power, and a hearing which follows the same rules as a nonjury trial in Georgia superior courts.

Petitioner does not, and more importantly, cannot argue that the procedures set forth under the Fair Dismissal Act of Georgia, including multiple levels of appeal, constitute insufficient due process. Rather, her true objection in the case below is that the hearing officer at her pre-termination hearing made incorrect evidentiary and procedural rulings. Petitioner attempts to utilize a Petition for Writ of Certiorari as a vehicle to have this Court require federal courts to oversee and review the myriad of evidentiary and procedural decisions made in the plethora of administrative hearings conducted under state-established procedures, even when the state has already established multiple levels of review for those decisions.

Petitioner's employment was terminated following an extensive hearing process that itself exceeds the requirements of due process under the Fourteenth

Amendment. Not only that, but Petitioner also exercised her right to appeal the hearing officer's rulings to the Georgia State Board of Education and superior court, after which she still had discretionary appeals available to the Georgia Court of Appeals and Supreme Court of Georgia. Yet despite these extensive pre-deprivation rights and post-deprivation remedies, she contends that she should separately have the ability to go straight to the federal courts to challenge procedural and evidentiary rulings made against her at her pre-deprivation hearing. The Eleventh Circuit, in line with every other circuit court of appeals, does not permit federal courts to be utilized in such a manner, when the state already provides a post-deprivation remedy to cure alleged errors in evidentiary and procedural decisions made at a pre-deprivation hearing.

## LEGAL AND FACTUAL BACKGROUND

### I. The Fair Dismissal Act of Georgia.

Initially passed in 1975 by the Georgia legislature, the Fair Dismissal Act of Georgia, O.C.G.A. § 20-2-940, *et seq*., provides extensive due process safeguards applicable prior to termination of a teacher's annual employment contact or prior to the nonrenewal of a "tenured" teacher's annual employment contract. For "tenured" teachers such as Petitioner, it provides the right to have their annual employment contracts renewed except for eight enumerated reasons that must

be proven in a hearing under specified procedures in the Act.

In order to nonrenew a "tenured" teacher's contract, the school district must first send written notice by certified mail or statutory overnight delivery with specific language informing the teacher of the procedural safeguards available before their nonrenewal that contains copies of Georgia statutory provisions applicable to the proposed nonrenewal. O.C.G.A. § 20-2-942(b)(2). Those include notice of the reasons for the proposed action and the right to a hearing. *Id.* If the teacher requests a hearing, the school district has 14 days to provide written notice of the charges against the teacher that contains the following:

> (1) The cause or causes for his or her discharge, suspension, or demotion in sufficient detail to enable him or her fairly to show any error that may exist therein;
>
> (2) The names of the known witnesses and a concise summary of the evidence to be used against him or her. The names of new witnesses shall be given as soon as practicable;
>
> (3) The time and place where the hearing thereon will be held; and
>
> (4) That the charged teacher or other person, upon request, shall be furnished with compulsory process or subpoena legally requiring the attendance of witnesses and the production of documents and other papers as provided by law.

O.C.G.A. § 20-2-940(b). Teachers are entitled to be represented by legal counsel at the hearing. O.C.G.A. § 20-2-940(d).

The hearing is conducted before the local board of education employing the teacher, and the hearing is reported at the local board's expense. O.C.G.A. § 20-2-940(e)(1)-(2). The school district has the burden of proof in demonstrating cause for the nonrenewal, and except as otherwise provided in the Fair Dismissal Act, "the same rules governing nonjury trials in the superior court[s of Georgia] shall prevail." O.C.G.A. § 20-2-940(e)(4). The parties to the hearing may stipulate to a "disinterested member of the State Bard of Georgia [to] decide all questions of evidence and other legal issues arising before the local board." *Id.* If the parties do not stipulate to a hearing officer, then the chairperson of the local board of education decides questions relating to the admissibility of evidence and other legal matters, subject to the right of either party to appeal to the full board of education. *Id.*

If the local board decides to nonrenew the teacher following the extensive pre-deprivation due process provided by the Fair Dismissal Act, there are multiple levels of post-deprivation appeals available. The teacher has the right to appeal that decision to the Georgia State Board of Education. O.C.G.A. § 20-2-940(f); 20-2-1160. The State Board of Education has the power to "affirm, reverse, or remand the local board decision, or may refer the matter to mediation." O.C.G.A. § 20-2-1160(b). Either party then has the right to appeal the State Board of Education's decision

to the superior court of the county where the local board of education is located, where the appeal is decided by a judge sitting without a jury. O.C.G.A. § 20-2-1160(c), (e).

From the superior court, either party may seek a discretionary appeal to the Georgia Court of Appeals. O.C.G.A. § 5-6-35(a)(1). Finally, either party may then petition the Georgia Supreme Court for writ of certiorari from the decision of the Georgia Court of Appeals. O.C.G.A. § 5-6-15. It is from this extensive pre-termination and post-termination procedural background that Petitioner filed her Complaint in the United States District Court for the Northern District of Georgia to challenge decisions made by the hearing officer at her Fair Dismissal Act hearing.

## II. The Nonrenewal of Petitioner's Annual Employment Contract and Subsequent Appeals

Petitioner was employed for a number of years as a teacher in the Rabun County School District. Over the course of the 2017-2018 school year, despite repeated warnings and letters of directive, Petitioner refused to assist students in need, lacked preparedness during observations by school administration, and was generally unwilling or unable to perform the duties assigned to her. As a result, many students had to be removed from her class, other classes in the school became overcrowded, and nearly half of the students

assigned to Petitioner failed their courses by the end of the school year.

The Superintendent of the Rabun County School District, in accordance with Georgia's Fair Dismissal Act, sent notice to Petitioner on May 14, 2018 that she intended to nonrenew Petitioner's annual contract of employment. In response, Petitioner requested a hearing before the Rabun County Board of Education and notice of the reasons for her proposed nonrenewal. The notice of the charges supporting the proposed nonrenewal were sent to Petitioner's counsel on June 13, 2018 and, after rescheduling, the hearing was ultimately set for November 13, 2018. Pursuant to the Fair Dismissal Act, the Petitioner and the Superintendent stipulated to a "disinterested member of the State Bard of Georgia [to] decide all questions of evidence and other legal issues arising before the local board [of education]. . . ." O.C.G.A. § 20-2-940(e)(4).

Petitioner made several motions prior to and during the hearing regarding the procedures of the hearing. Those included a motion to dismiss the proceedings because of a "lack of due process in the notice provided," a motion to require the Rabun County Board of Education to appoint a tribunal because of a pending EEOC Charge of Discrimination, and a motion to continue the hearing after two of Plaintiff's witnesses left during the hearing for legitimate reasons. Plaintiff's motions were denied, and those decisions made at the hearing form the basis of Petitioner's claimed due process violations.

The Petition for Writ of Certiorari suggests that "the Board" decided the legal issues against her at the hearing, but the members of the Rabun County Board of Education did not make any decision Petitioner complains of – all were made by the hearing officer stipulated to by both parties to decide all legal issues arising out of the hearing before the local board of education. In fact, of the four decisions in the Petition claimed as due process violations, three were argued and decided outside of the presence of the local board of education at the outset of the hearing.

Following the hearing and the Local Board's vote to nonrenew Petitioner's employment contract, Petitioner appealed the decision to the State Board of Education pursuant to O.C.G.A. §§ 20-2-940 and 20-2-1160. The Georgia State Board of Education affirmed the decision of the Local Board and, pursuant to O.C.G.A. § 20-2-1160, Petitioner appealed the decision to the Superior Court of Rabun County.

On September 21, 2020, the Superior Court reversed the decision of the Local Board based on a determination that the Local Board "violated [Plaintiff's] due process rights when it failed to appoint an impartial tribunal to conduct her non-renewal hearing." The School District appealed the Superior Court's decision to the Georgia Court of Appeals on November 18, 2020, which was docketed on December 11, 2020. On October 21, 2021, the Georgia Court of Appeals ruled in favor of the School District, reversed the decision of the Superior Court, and remanded the case back to the Superior Court to to address any remaining arguments to

the extent they have been properly preserved. *Rabun Cnty. Bd. of Educ. v. Randel*, 361 Ga. App. 323, (2021), cert. denied (Mar. 22, 2022). Petitioner then filed a Petition for Writ of Certiorari to the Supreme Court of Georgia, which it denied on March 22, 2022.

## REASONS FOR DENYING THE WRIT

Although Petitioner attempts to paint the decision below as the result of a single rogue circuit court of appeals, the Eleventh Circuit's decision is entirely consistent with prior decisions from this Court and other circuit courts of appeals when the actual circumstances are properly considered.

Petitioner does not and cannot argue that the extensive hearing procedures of the Fair Dismissal Act violate the Due Process Clause. The Eleventh Circuit has long held that "The Fair Dismissal Act of Georgia not only meets, but exceeds, the due process standard set out in [*Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970)]." *Holley v. Seminole Cnty. Sch. Dist.*, 755 F.2d 1492, 1497 (11th Cir. 1985). Instead, Petitioner challenges evidentiary and procedural decisions made at the Fair Dismissal Act hearing itself by the hearing officer, all of which have been subject to multiple levels of review at multiple levels of appeal through the state appeals processes.

Petitioner's argument focuses on this Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984). In *Parratt*, a state

prisoner brought a 42 U.S.C. § 1983 action because prison employees negligently lost materials he had ordered by mail. *Parratt* at 529. Although the prisoner was deprived of property under the color of state law, this Court noted that the deprivation did not occur as the result of some established state procedure, but instead "occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." *Id.* at 543. Furthermore, there was no contention that the procedures themselves were inadequate nor was there any contention that it was practicable for the State to provide a pre-deprivation hearing. *Id.* Instead, a state law tort-claim procedure was available by which he could have recovered the value of the materials. *Id.* 543-44. This Court ruled that the tort remedy was all the process the prisoner was due, because any pre-deprivation procedural safeguards that the State did provide, or could have provided, would not address the risk of this kind of deprivation. *Id.* Additionally, even though the state procedure would not provide all of the relief that would otherwise be available under Section 1983, this Court held that the state remedies nevertheless satisfied due process because they could fully compensate the prisoner for the loss he suffered. *Id.* at 544.

In *Hudson*, this Court extended this reasoning to an intentional deprivation of property. A prisoner alleged that, during a search of his prison cell, a guard deliberately and maliciously destroyed some of his property, including legal papers. *Hudson*, 468 U.S. at 520. Again, there was a tort remedy by which the

prisoner could have been compensated. *Id.* at 534-35. This Court held that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." *Id.* at 533. In reaching that holding and the reasoning of *Parratt*, the Court explained:

> The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned. 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. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

*Id.*

Several years later, the Eleventh Circuit applied the decisions in *Parratt* and *Hudson* in a slightly different context than the destruction of physical property by a state employee. In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), an employee argued that his procedural due process rights were violated by a biased decisionmaker – the Board of County Commissioners that conducted the employment termination hearing. Sitting en banc, the Eleventh Circuit held that "even if McKinney suffered a procedural *deprivation* at the hands of a biased Board **at his termination hearing**, he has not suffered a *violation* of his procedural due process rights **unless and until the State of Florida refuses to make available a means to remedy the deprivation**." *McKinney*, 20 F.3d at 1563 (italics in original, emphasis added). The basis for its decision was this Court's precedents in *Hudson* and *Parratt*, which the Eleventh Circuit characterized as holding that "due process did not require pre-deprivation hearings where the holding of such a hearing would be impracticable." *McKinney* at 1562. "All that due process requires, the [Supreme] Court said, is a post-deprivation 'means of redress for property deprivations satisfying the requirements of procedural due process.'" *Id.* (citing *Parratt*, 451 U.S. at 537; *Hudson*, 468 U.S. at 533). The Eleventh Circuit then explained:

> even if McKinney suffered a procedural deprivation at the hands of a biased Board at his termination hearing, he has not suffered a violation of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the

> deprivation. As any bias on the part of the Board was not sanctioned by the state and was the product of the intentional acts of the commissioners, under *Parratt*, only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation.

*Id.*

*Parratt* and *Hudson* addressed claims of property deprivation referred to as "random and unauthorized," which do not require a pre-deprivation hearing because it would be impractical or impossible to provide such a pre-deprivation hearing. Petitioner's claimed due process violations in this case are the very kind of "random and unauthorized" actions subject to *Parratt* and *Hudson*. Petitioner does not claim that Respondents failed to comply with the procedural requirements of the Fair Dismissal Act of Georgia, but instead claims that evidentiary and procedural decision made at the hearing itself violated due process – decisions which could have been made in favor of either party to the proceeding. No explanation is given as to what other pre-deprivation hearing could have been provided avoid to the impact of the hearing officer's decisions, as the decisions complained of were made at the very pre-deprivation hearing Petitioner was entitled to receive. Petitioner was afforded the opportunity to argue her position to the hearing officer in each of those rulings, but now claims that the Due Process Clause requires that each of those rulings at her termination hearing be correct in her view, and any post-hearing rights of

appeal or remedies available in the state courts are irrelevant. There is no practical way to predict what those decisions might be at the hearing itself, nor what issues might even arise – the very crux of "random and unauthorized" claims of property deprivation addressed by *Parratt* and *Hudson*.

Petitioner provides no meaningful analysis of how the standards of *Parratt* and *Hudson* affect the decisions below. Instead, Petitioner cherry-picks language from Eleventh Circuit decisions to paint the Eleventh Circuit as a rogue actor with an overly-broad interpretation of *Parratt* and *Hudson*. Essentially, Petitioner's argument is that the Eleventh Circuit might not properly follow *Parratt* and *Hudson* in another case with a completely different set of facts, as if Petitioner seeks to have the Supreme Court enter an advisory opinion to the Eleventh Circuit inapplicable to the facts of this case.

Despite Petitioner's attempts to paint a different picture, every other circuit court of appeal would reach the same result as the Eleventh Circuit if Petitioner's case were analyzed under their precedents.

The Seventh Circuit holds that a procedural due process claim based on a biased decision-maker – as Petitioner claims occurred here in challenging the hearing officer's determination that the local board was not biased and could decide the case – is a challenge to random and unauthorized conduct because such conduct is "inherently unpredictable." *Cannici v. Village of Melrose Park*, 885 F.3d 476, 480 (7th Cir.

2018) (citing *Michalowicz v. Village of Bedford Park*, 528 F.3d 530, 535 (7th Cir. 2008)). "In *Michalowicz*, the plaintiff, a former firefighter for the defendant, brought a due process claim. The basis of his claim was that the defendant deprived him of his rights by using the Board of Trustees, an allegedly biased hearing committee, rather than an independent hearing committee as proscribed by relevant statute. [The Seventh Circuit] found the due process claim based on a biased committee 'a challenge to the random and unauthorized actions of the state officials in question, i.e., to their unforeseeable misconduct in failing to follow the requirements of existing law.' [It] reasoned that, 'because such misconduct is inherently unpredictable,' the state is obliged 'to provide sufficient remedies after its occurrence, rather than to prevent it from happening.'" *Cannici* at 480 (citing *Michalowicz* 528 F.3d at 533-35) (internal citations omitted). Here, Petitioner makes nearly the same exact claim – that the hearing officer should have ruled that the local board was biased and should have appointed a tribunal to hear the case under the Fair Dismissal Act. Just like the Eleventh Circuit, the Seventh Circuit would not have permitted Petitioner's claims to proceed in federal court, since the state provides a means for redress after the hearing.

The First Circuit similarly holds that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law. *Hadfield v. McDonough*, 407 F.3d 11,

20 (1st Cir. 2005). In its view, "conduct is 'random and unauthorized' within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself." *Id.* Here, Petitioner makes such a claim – that the hearing officer erred in making several decisions at the hearing that deprived her of due process – but does not challenge the state law itself. As the Third Circuit recognized, "[b]ut for this limitation, federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances." *Herwins v. City of Revere*, 163 F.3d 15, 19 (1st Cir. 1998).

The Third Circuit also applies *Parratt* to errors in implementing a state procedure, as opposed to challenges to the state procedure itself. *Cohen v. City of Philadelphia*, 736 F.2d 81, 84 (3d Cir. 1984). The "unauthorized failure of state agents to follow proscribed procedures . . . did not deprive appellant of due process so long as the State provided him with a means by which to receive redress for the deprivation." *Id.* at 85-86. In doing so, the Third Circuit noted:

> We thus join the First and Seventh Circuits in holding that substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary. Any other holding would lead to the danger that:
>
> > "any plaintiff in state court who was asserting a right within the broadly defined categories of liberty or property and who

> lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. . . ." In this case, because Pennsylvania has provided a means of correcting the errors that will sometimes occur at the administrative level, no deprivation without due process of law has occurred.

*Id.* (quoting *Ellis v. Hamilton*, 669 F.2d 510, 514 (7th Cir.), cert. denied, sub nom. *Ellis v. Judge of the Putnam Circuit Court*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982)).

The Second Circuit holds that *Parratt* and *Hudson* "clearly distinguishe[s] between a claim that an established state procedure does not afford procedural due process and a claim that a property right was lost because of a random and unauthorized act by a state actor." *Marino v. Ameruso*, 837 F.2d 45, 47 (2d Cir. 1988). "In the latter case, the existence of an adequate post-deprivation state remedy for the loss affords due process." *Id.* (citing *Hudson* 468 U.S. at 531-33; *Parratt* 451 U.S. at 543-44). In *Marino*, an employee challenged an alleged erroneous evidentiary ruling by an ALJ in his pre-termination hearing as denying him due process, just as Petitioner claims in this case. But just like

the Eleventh Circuit decided below, the Second Circuit in *Marino* held that the employee's claim lacked the essential elements of a deprivation of procedural due process because New York law provided for the judicial review of administrative agency error. *Id.*

In the Ninth Circuit, "A state official's failure to abide by constitutionally adequate procedures does not . . . give rise to a cause of action under § 1983 for violation of procedural due process if a meaningful post-deprivation remedy is available." *Corcoran v. Olson*, 102 F. App'x 522, 523 (9th Cir. 2004) (citing *Hudson*, 468 U.S. at 533; *Parratt*, 451 U.S. at 540-42). "[T]here is no due process violation when an adequate state remedy is available because a state action is not complete until the state provides, or refuses to provide, an adequate remedy for a state actor's failure to comply with established procedures. Accordingly, when a plaintiff alleges that he suffered from an unauthorized deprivation of procedural due process, and there is an adequate state remedy, the plaintiff has no cause of action under § 1983." *Id.* (citing *Hudson*, at 533). Similar to Petitioner's claims in this case, the plaintiff in *Corcoran* alleged that the Oregon State Board of Nursing failed to abide by the state's established procedures for revoking professional licenses, not on an allegation that the procedures themselves were inadequate. Because adequate post-deprivation remedies were available, Corcoran's complaint was properly dismissed. *Id.* at 524.

The Sixth Circuit holds that *Parratt* distinguishes "between a challenge to an established state procedure

as lacking in due process . . . and a property damage claim arising out of the alleged misconduct of state officers." *Vicory v. Walton*, 721 F.2d 1062, 1064 (6th Cir. 1983).

In the latter case, as here, "'the state action is not necessarily complete,' because state law provides a means for the plaintiff to be made whole for the loss of property." *Id.* (citing and quoting *Parratt*, 451 U.S. at 542). "If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury." *Jefferson v. Jefferson Cnty. Pub. Sch. Sys.*, 360 F.3d 583, 587-88 (6th Cir. 2004) (citing *Hudson*, 468 U.S. at 533). Just as in the Eleventh Circuit, a "[p]laintiff may not seek relief under Section 1983 without first pleading and proving the inadequacy of state or administrative processes and remedies to redress her due process violations." *Id.* at 588 (citing *Parratt*, 451 U.S. 527).

The Eighth Circuit holds that *Parratt* and *Hudson* are applicable to a situation in which an adequate statutory procedure is available, but a state agency failed to properly implement that procedure. In *Zar v. S. Dakota Bd. of Examiners of Psychologists*, 976 F.2d 459 (8th Cir. 1992), "the state had an appropriate statutory procedure that allowed a party to file briefs and present oral argument in a contested case when a majority of the agency decision-makers had not familiarized themselves with the record." *Zar* at 465. An administrative assistant failed to notify the Board of Examiners of Psychologists of Dr. Zar's request to invoke that procedure, and the Board failed to implement the

procedure. *Id.* The Eighth Circuit held that the failures by the Board and the administrative assistant were unpredictable and unauthorized and therefore impossible to prevent, but immediate review and reversal of the Board's action provided an adequate state remedy. *Id.* "Because an adequate post-deprivation remedy existed, no actionable federal due process violation occurred." *Id.* Just as in *Zar*, Petitioner here claims that she was denied due process because the Fair Dismissal Act of Georgia was not properly implemented. Yet the Eighth Circuit would prohibit her due process claims as well, because an adequate state remedy was available to correct the claimed errors through review and reversal of the board's failure to properly implement the state procedure.

The Fourth Circuit, in *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990), cert. denied, 498 U.S. 1068 (1991), analyzed a challenge to the dismissal of a college dean under this Court's decision in *Zinermon v. Burch*, 494 U.S. 113 (1990), rather than *Parratt* and *Hudson*: "*Zinermon* makes clear that to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state." *Fields*, 909 F.2d at 97. "[T]he federal procedural due process violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Fields* at 99 (quoting *Zinermon*, 110 S.Ct. at 983). After considering both pre-deprivation procedures and post-deprivation remedies, the Fourth Circuit determined

that Fields had received "an abundance of process" and held that he had failed to state a claim under § 1983. *Id.* Here, Petitioner received such an "abundance of process" when considering the extensive pre-deprivation procedures and post-deprivation remedies, and the Fourth Circuit would reach the same outcome as the Eleventh Circuit did in this case – even if the Fourth Circuit would do so under a slightly different approach than *Parratt* and *Hudson.*

The Fifth Circuit also takes a slightly different analytical approach to cases in which it is alleged that decisions made within the framework of an established state procedure were erroneous. It analyzes whether pre-deprivation process is adequate under the balancing of three factors in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991). The Fifth Circuit views *Zinermon* as an application of the *Parratt/Hudson* doctrine which in turn implemented *Mathews* balancing. *Id.* at 1413. Thus, "[t]he state has no constitutional duty to provide a

procedural regimen that guarantees faultless decisionmaking; the state's interests in safety and efficiency find expression in the tolerable level of risk. When that balance has been fairly struck, a person states no claim by asserting that such risk was visited upon him." *Id*. And at the time of its decision in *Caine*, the Fifth Circuit noted that "in our research, none of the courts as yet called upon to apply *Zinermon* has found a procedural due process violation in claims of particular regulatory abuses carried out within the framework of controlling regulations." *Id.* at 1415. Here, Petitioner essentially seeks "faultless decisionmaking" at the pre-deprivation hearing that she was provided, which the Fifth Circuit rejects as being guaranteed by the Fourteenth Amendment. Thus, Petitioner's claims would meet the same fate in the Fifth Circuit as they did in the Eleventh Circuit.

The Tenth Circuit, similarly to the Fifth Circuit, analyzes the adequacy of procedural due process claims by balancing factors set forth in *Mathews v. Eldridge*. *Gillihan v. Shillinger*, 872 F.2d 935, 940 (10th Cir. 1989). As discussed above, those factors do not lead to a claim of a procedural due process violation when the course of the alleged violation are claimed erroneous decisions by a hearing officer in the course of a state procedure that itself was properly followed, and would not lead to a different result in the Tenth Circuit.

While there may be some disagreements among circuits as to the precise extent of *Parratt* and *Hudson's* "random and unauthorized" standard in other

circumstance, this case does not serve to resolve any ambiguity that may exist. When it comes to claims of erroneous evidentiary and procedural decisions made at an employee's pre-termination hearing, as Petitioner asserts in her case below, the circuit courts of appeals consistently hold that the availability of adequate post-deprivation remedies foreclose procedural due process claims under Section 1983.

The Due Process Clause has never been held to subject each and every procedural or evidentiary ruling in an administrative hearing to separate litigation in federal courts after the hearing has concluded. In fact, this Court in *Parratt* warned against analogous overreach under its facts:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." We do not think

> that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

*Parratt*, 451 U.S. at 544 (citation omitted) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

Petitioner seeks to use the Fourteenth Amendment to superimpose a separate review system by federal courts of the multitude of evidentiary and procedural decisions made in numerous administrative hearings throughout the country, without regard to the extensive review procedures in place to guard against and cure any "random and unauthorized" errors that may occur. The drafters of the Fourteenth Amendment did not intend for that amendment to play such a role in society.

## CONCLUSION

For the above reasons, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

BRIAN C. SMITH
*Counsel of Record*
PHILLIP L. HARTLEY
PEREIRA, KIRBY, KINSINGER & NGUYEN, LLP
340 Jesse Jewell Parkway, Suite 750
Gainesville, Georgia 30501
(770) 534-7341
bsmith@hhhlawyers.com
phartley@hhhlawyers.com