

**In the
Supreme Court of the United States**

DAVID A. ROMANOSKI,

Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
Commonwealth Court of Pennsylvania**

**BRIEF IN OPPOSITION
OF RESPONDENT
NORFOLK SOUTHERN RAILWAY COMPANY**

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QUESTION PRESENTED

Whether the Court lacks jurisdiction to review the decision below involving a state administrative agency's straightforward application of its own jurisdictional limitations as set forth in a state statute.

RULE 29.6 DISCLOSURE STATEMENT

Norfolk Southern Railway Company's parent corporation is Norfolk Southern Corporation, a publicly held corporation (NYSE: NSC) that holds at least 10% of Norfolk Southern Railway Company's stock.

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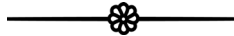
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BRIEF IN OPPOSITION

Respondent Norfolk Southern Railway Company respectfully submits this Brief in Opposition to the petition filed by petitioner David A. Romanoski.

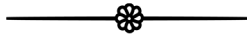


INTRODUCTION

This case involves a state administrative agency's straightforward application of its own jurisdictional statute. Romanoski initiated this action asking the Pennsylvania Public Utility Commission ("PUC") to allocate maintenance responsibilities for a retaining wall ("Wall"). The PUC properly dismissed the action because it lacked jurisdiction pursuant to Pennsylvania law. Romanoski appealed the jurisdictional determination twice on exclusively state law grounds, and the dismissal was summarily affirmed. Further review is therefore precluded because the underlying decision rests on adequate and independent state grounds.

Rather than commence an action in the appropriate forum, Romanoski elected to file the instant petition ("Petition"), which improperly raises questions of federal law for the first time since the inception of this litigation. Romanoski impermissibly seeks review of the PUC's determination under the pretext of vague and unsubstantiated claims of due process violations. In so doing, Romanoski omits a key fact: these arguments were never raised before the PUC or the state appellate court.

Romanoski's assertions (Pet. at 2) that he was "den[ie]d any evidentiary process" and was not "afford[ed] a meaningful opportunity to be heard" misapprehend the foundation of the PUC's decision. The PUC determined that Romanoski's complaint and his own supporting documentation failed to establish that the PUC had jurisdiction to allocate maintenance responsibility for the Wall. Thus, the PUC did not deprive Romanoski of his rights—it preserved them by promptly dismissing the case upon determining that it lacked jurisdiction over the Wall. "[A]s an administrative agency created by statute, [the PUC] has only those powers expressly conferred upon it by statute or those powers which are necessarily implied from its express powers." *Cnty. of Bucks v. Pennsylvania Public Utility Commission*, 684 A.2d 678, 682 (Pa. Commw. Ct. 1996).



STATEMENT OF THE CASE

The underlying dispute involves the PUC's determination that it lacked jurisdiction over the Wall that was built after an abutting railroad-highway crossing was abolished. In 1919, the predecessor of the PUC issued an order ("1919 Order"), *inter alia*, abolishing several railroad-highway crossings in Derry Township, Pennsylvania and directing the Philadelphia & Reading Railway Company ("PRRC") to construct the Wall across five parcels of land, three of which are currently owned by Romanoski. The 1919 Order was silent regarding maintenance responsibilities for the Wall, which gave rise to the underlying dispute.

In September of 2023, Romanoski initiated the instant action before the PUC against the PUC and Intervenor, the Pennsylvania Department of Transportation (“PennDOT”), Derry Township (“Township”), Dauphin County (“County”), and the PRRC’s successor, Norfolk Southern Railway Company (“Norfolk Southern”), to determine maintenance responsibilities for the Wall. Ultimately, the PUC dismissed the action for lack of jurisdiction pursuant to 66 Pa.C.S. § 2702, which vests the PUC with jurisdiction to determine maintenance responsibilities only of existing railroad-highway crossings or components thereof.

On appeal, the Commonwealth Court of Pennsylvania issued an opinion affirming the PUC’s dismissal on state law grounds. In doing so, it cited to an analogous, precedential case, *County of Bucks v. Pennsylvania Public Utility Commission*, 684 A.2d 678 (Pa. Cmwlth. Ct. 1996). In *County of Bucks*, the Pennsylvania Commonwealth Court held that the PUC lacked jurisdiction to order the closure or maintenance of a pedestrian bridge constructed per an order of the PUC’s predecessor agency in conjunction with the abolition of a public railroad-highway crossing, because the plain language of Section 2702 limits the PUC’s jurisdiction to existing public railroad-highway crossings. *Id.* at 682.

The same is true here, where the 1919 Order of the PUC’s predecessor agency compelled construction of the Wall in conjunction with the abolishment of the railroad-highway crossing. Where also as here the Wall is not adjacent to or a component of an existing public railroad-highway crossing, the PUC lacks jurisdiction under Section 2702 to allocate maintenance responsibility. *Id.*

The Supreme Court of Pennsylvania denied review of this well-settled issue, and the instant Petition ensued. Rather than commencing an action in a court of general jurisdiction, Romanoski now asks this Court to review a state court's interpretation of a state administrative agency's own jurisdictional statute. This Petition, which couches itself in unavailing allegations of due process violations, is meritless.

As an initial matter, further review of the decision below is precluded by the adequate and independent state grounds doctrine. In addition to failing to overcome this jurisdictional hurdle, Romanoski has forfeited all issues raised in the Petition. Romanoski's arguments (Pet. at 12-14) are premised on purported due process clause violations. Romanoski did not raise the due process clause in connection with this case at any point prior to filing the Petition. Romanoski had the opportunity to raise the issues of alleged due process violations in several proceedings before the Pennsylvania Public Utility Commission and the Commonwealth Court of Pennsylvania. He failed to do so. As a result, he has forfeited those arguments.

Notwithstanding Romanoski's forfeiture, further review is not warranted. This case involves a limited and established jurisdictional issue that is expressly governed by a state statute. There is no Circuit split surrounding this issue, and no federal questions are implicated in this case.

The Petition should be denied.



REASONS FOR DENYING THE PETITION

I. THE UNDERLYING DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

It is well-settled that certiorari should be denied “[i]f the judgment below rests on an independent and adequate state ground. . . .” *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977). The independent and adequate state ground doctrine is jurisdictional. *Id.* Because the Court has no power to review the state law determination supporting the judgment, resolution of any independent federal ground for the decision would therefore constitute an impermissible advisory opinion. *Id.*

The Court has no jurisdiction to review the issue because the decision below is premised wholly on state grounds. The underlying dispute involves the Pennsylvania PUC’s determination that it lacked jurisdiction to determine maintenance responsibilities for a wall unconnected to a present public rail-highway crossing pursuant to 66 Pa.C.S. § 2702. This determination was premised on a state statute and precedent, and did not involve any federal laws, titles, privileges, or immunities. *See* 28 U.S.C.A. § 1257.

The decisions below were narrowly decided pursuant to a state statute, 66 Pa.C.S. § 2702, and a state law case interpreting that statute, *County of Bucks*. Section 2702 vests the PUC with jurisdiction to determine maintenance responsibilities only of existing public railroad-highway crossings or components thereof. Romanoski does not aver that Section 2702 implicates

any federal laws, titles, rights, privileges, or immunities. Similarly, *County of Bucks* is a precedential state court decision wherein the Pennsylvania Commonwealth Court held that the plain language of Section 2702 limits the PUC's jurisdiction to existing public railroad-highway crossings. *Cty. of Bucks, supra* at 682. Romanoski does not aver that *County of Bucks* implicates any federal laws, titles, rights, privileges, or immunities. Simply put, it is undisputed that the decision below rests entirely on state grounds. Consequently, the Court has no power to review the state law determination supporting the judgment.

II. THE COURT LACKS JURISDICTION TO REVIEW THE DECISION BELOW BECAUSE ROMANOSKI FAILED TO TIMELY AND PROPERLY RAISE A FEDERAL CLAIM.

“It is a long-settled rule that jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.” *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). To that end, “[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.” *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 (1970); *see also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) (“Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court’s Discretion”).

This Court has “consistently refused to decide federal constitutional issues raised [before the Court]

for the first time on review of state court decisions.” *Webb, supra* at 499 (internal citations omitted). This longstanding policy is supported by principles of federal-state comity, which “require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.” *Id.*

Where review of a state court decision is sought, the petitioner is required to aver the following:

[S]pecif[y] . . . the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court’s charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Sup. Ct. R. 14.

Romanoski fails to identify when the federal questions sought to be reviewed were raised because he is unable to do so. Here, the underlying dispute involved exclusively state law issues (*i.e.* the extent of a Pennsylvania state administrative agency’s juris-

diction as set forth in a Pennsylvania state statute). Romanoski himself acknowledges (Pet. at 11) that his appeal was premised on one narrow question of state law: “Did [t]he [Commission] have substantial evidence or any evidence at all in determining Swatara Station Crossing was converted into a pedestrian bridge or otherwise abolished not subject to its jurisdiction?” These jurisdictional issues were tied to 66 Pa.C.S. § 2702 and did not involve any federal questions or law.

Romanoski forfeited all issues raised in the Petition—which are based in federal law—by failing to adequately present them before the state courts. The arguments raised in the Petition (Pet. at 12-14) are premised on purported due process clause violations. Romanoski did not raise the due process clause in connection with this case at any point prior to filing his Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. Romanoski had the opportunity to raise the issues of alleged due process violations in appellate proceedings before the Pennsylvania Public Utility Commission and the Commonwealth Court of Pennsylvania. He failed to do so. Consequently, Romanoski has deprived this Court of jurisdiction to review the judgments below.

III. THE PETITION DOES NOT PRESENT ANY QUESTION WARRANTING THIS COURT’S REVIEW.

Even when all jurisdictional prerequisites are satisfied, “review on a writ of certiorari is not a matter of right, but of judicial discretion.” Sup. Ct. R. 10. “A petition for a writ of certiorari will be granted only for compelling reasons, [such as the following]:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.

Moreover, “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” *Id.*

The Petition raises issues of alleged due process violations that arose in the context of administrative and state appellate proceedings. (Pet. at 12). These issues were resolved on adequate and independent state grounds and, moreover, were forfeited due to Romanoski's failure to raise them at any point in the

underlying proceedings. *See* Sections I-II, *supra*. Notwithstanding those jurisdictional issues, Romanoski has failed to articulate a single reason why this Court should grant review of his issues.

Romanoski avers that the Pennsylvania courts misapplied 66 Pa.C.S. § 2702 when they affirmed the administrative agency's dismissal of his case. This purported error involves a limited and established jurisdictional issue that is expressly governed by a state statute. There is no Circuit split surrounding this issue, and no federal questions are implicated in this case. Accordingly, Romanoski has failed to identify a compelling reason warranting this Court's review.



CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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July 29, 2026