No. [redacted]

In The
Supreme Court of the United States

[redacted]

Petitioner,

v.

[redacted]

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

[redacted]

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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit correctly ruled that the *Parratt-Hudson* doctrine bars Petitioner's procedural due process claim where Petitioner does not allege any flaw in the state's statutory pre-termination of employment process requirements but does allege that the conduct causing the alleged deprivation was intentional and violated the established, non-discretionary state law which, if followed, would have provided adequate pre-deprivation process, and where the state has provided an adequate post-deprivation remedy.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, defendants in the district court included [redacted]

[redacted]

All claims against defendants [redacted] and [redacted] were dismissed voluntarily in the district court, and the procedural due process claims against Special Sheriff [redacted] also were dismissed voluntarily in the district court.

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RELEVANT CONSTITUTIONAL PROVISION AND STATUTES

U.S. Const. amend. XIV

42 U.S.C. § 1983

Massachusetts G.L. c. 35, § 51

Massachusetts G.L. c. 126, § 8A

STATEMENT OF THE CASE

Several months before the November 2000 election of respondent [redacted] ("Sheriff [redacted]") as Sheriff of [redacted] County, Massachusetts, petitioner [redacted]), in May 2000, resigned voluntarily from his position at the [redacted] County Sheriff's Department ("[redacted]CSD" or the "department") as Captain-Field Services, in order to accept an appointment by then Sheriff [redacted] as Assistant Deputy Superintendent-Training ("ADS-Training"). At the time, [redacted] expressly acknowledged in writing[1] his "agree[ment] and understand[ing]" that in the new position, he would not have any rights under Massachusetts G.L. c. 35, § 51[2] to, among other things, termination for "just cause," notice and a pre-termination hearing, because the ADS-Training position was subject, instead, to Massachusetts G.L. c.

[1] Letter, dated April 28, 2000, from the [redacted]CSD Director of Human Resources to, and on May 11, 2000, endorsed and returned by, [redacted], Court of Appeals Jt. Appendix ("C.A. Jt. App.") p. 567; Affidavit of [redacted], ¶3, C.A. Jt. App. 563-64.

[2] Respondents' Appendix ("Resp. App.") 4.

126, § 8A,[3] which provides that persons subject to § 8A serve "at [the] pleasure" of the county sheriff.

In February 2001, soon after Sheriff [redacted] had assumed office, the [redacted]CSD conducted a series of interviews of the senior staff of the department, including, among others, all [redacted]CSD Directors and Assistant Deputy Superintendents, which resulted in the retention of numerous [redacted]CSD officials and employees despite their support for [redacted] against Sheriff [redacted] in the recent election campaign.[4] After [redacted] interview by the [redacted]CSD Chief of Staff and the [redacted]CSD Director of Human Resources, [redacted] employment was terminated on February 22, 2001,[5] because, as Sheriff [redacted] testified, he "lacked confidence" in [redacted] due to his poor performance in what even [redacted] himself admitted had been a "bad interview."[6, 7] There is no evidence in the record that the respondent county commissioners participated in any way in Sheriff [redacted] termination of [redacted] as ADS-Training without a pre-termination hearing.

[3] Resp. App. 7.

[4] Sheriff [redacted] deposition ("dep."), April 28, 2003, p. 153, ll. 8-13, C.A. Jt. App. 276; *id.* at p. 158, ll. 14-18, C.A. Jt. App. 278; *id.* at p. 162, ll. 14-24, C.A. Jt. App. 279; *id.* at p. 163, ll. 23-24, p. 164, ll. 1-3, C.A. Jt. App. 279; *id.* at p. 167, ll. 1-13, C.A. Jt. App. 280; *id.* at p. 167, ll. 14-22; C.A. Jt. App. 280.

[5] [redacted] dep., April 7, 2003, p. 90, ll. 15-21, C.A. Jt. App. 312 p. 111, ll. 22-24, p. 112, ll. 1-2, p. 113, ll. 22-24, C.A. Jt. App. 314; p. 114, ll. 1-4, C.A. Jt. App. 315; [redacted] dep., April 9, 2003, p. 272, ll. 13-20; p. 273, ll. 20-23, C.A. Jt. App. 333; Sheriff [redacted] answ. to int. No. 2.3, C.A. Jt. App. 432-33.

[6] Sheriff [redacted] dep., April 28, 2003, p. 178, ll. 22-24; C.A. Jt. App. 282; Sheriff [redacted] answ. to int. No. 2.3, C.A. Jt. App. 432-33.

[7] [redacted] dep., April 9, 2003, p. 293, ll. 12-14; C.A. Jt. App. 334.

By letter, dated February 28, 2001,[8] [redacted] requested a hearing before the commissioners. They rejected his request on the grounds that he was an at-will employee serving at the pleasure of the sheriff, whose status, as [redacted] had acknowledged on May 11, 2000, was governed by Massachusetts G.L. c. 126, § 8A, and under that statute, the commissioners lacked jurisdiction to conduct a hearing.[9]

The denial of a post-termination hearing by the commissioners triggered any right [redacted] may have had to proceed in state court to seek "reinstatement" to his position "without loss of compensation," if, as he claims, he was entitled to the protection of Massachusetts G.L. c. 35, § 51. *See Puorro* v. *Commonwealth*, 59 Mass. App. Ct. 61, 794 N.E.2d 624 (2003). He did not do so.

Instead, even though Sheriff [redacted] had retained numerous [redacted]CSD officials and employees who had supported [redacted] in the election campaign,[10] [redacted] and three former civil process deputy sheriffs, brought suit in the district court under 42 U.S.C. § 1983 claiming that their First Amendment rights had been violated when the plaintiff civil process deputies had been decommissioned by Sheriff [redacted] and when [redacted] employment as ADS-Training had been terminated, allegedly because of their election campaign-support for [redacted]. They also alleged violations of their Fourteenth Amendment procedural due process rights when they were decommissioned or terminated, as the case may be, without a pre-termination hearing to which they alleged they were entitled under Massachusetts G.L. c. 35, § 51.

[8] C.A. Jt. App. 217.

[9] Letter, March 20, 2001, to [redacted], C.A. Jt. App. 218.

[10] *See* note 4, *supra*.

[redacted] did not allege, and there is no evidence in the record, that there had been an established formal or informal state, county or [redacted]CSD procedure, policy or custom of denying a pre-termination hearing to a [redacted]CSD employee entitled to the protection of Massachusetts G.L. c. 35, § 51. Nor did [redacted] allege that the pre-termination requirements of G.L. c. 35, § 51 were constitutionally deficient.

The district court allowed respondents' motions for summary judgment on [redacted] First Amendment claims[11] and, on the procedural due process claims, the district court ruled:

> Assuming, without deciding, that plaintiffs were entitled to the protections of [Massachusetts G.L. c. 35, § 51] and had a constitutionally-protected property interest in continued employment, plaintiffs' due process claims fail under the *Parratt Hudson* doctrine. *See Lowe* v. *Scott*, 959 F.2d 323, 340 (1st Cir. 1992).[12]

[redacted] appealed the district court's rulings on both his First and Fourteenth Amendment claims to the United

[11] The district court held that "political loyalty is a legitimate job requirement for the position of [ADS]-Training," C.A. Jt. App. 1259-60, but denied the motion as to the other plaintiffs' First Amendment claims "[b]ecause political loyalty is not a legitimate job requirement for the position of Deputy Sheriff and sufficient factual disputes exist to warrant a trial on plaintiffs' claims." *Id.* Those claims were tried to a jury in the district court, which, on January 28, 2004, returned verdicts against them. C.A. Jt. App. 39.

[12] C.A. Jt. App. 1260. The district court explained that "*Parratt* and *Hudson* teach that if a state provides adequate postdeprivation remedies – either by statute or through the common-law tort remedies available in its courts – no claim of a violation of procedural due process can be brought under § 1983 against the state officials whose random and unauthorized conduct occasioned the deprivation." *Id.*

States Court of Appeals for the First Circuit, C.A. Jt. App. 1300, which affirmed the district court's decisions on both claims. 407 F.3d at 21. The other plaintiffs did not appeal.

The circuit court held that [redacted]'s procedural due process claim was barred by the *Parratt-Hudson* doctrine, and, accordingly, did "not decide [redacted]'s proper employment classification under Massachusetts law." 407 F.3d at 19.[13] Instead, it assumed, *arguendo*, that [redacted] had a property interest in continued employment under Massachusetts G.L. c. 35, § 51. *Id.*

The circuit court summarized the holdings of this Court in *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), stating that the *Parratt-Hudson* doctrine,

> shields a public entity from a federal due process claim where the denial of process was caused by the random and unauthorized conduct of government officials and where the state has provided adequate post-deprivation remedies to correct the officials' random and unauthorized acts.

407 F.3d at 19-20.

> Our cases establish 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. [Citations omitted.] In other words, *conduct is "random and unauthorized"*

[13] Sheriff [redacted] and the commissioners contended below that [redacted] was an at will employee covered by Massachusetts G.L. c. 126, § 8A, and therefore did not have G.L. c. 35, § 51 rights to termination for cause and a pre-termination hearing. *See Looney* v. *Flynn*, 1990 WL 252170 (D. Mass. December 21, 1990) (An Assistant Deputy Superintendent in a Massachusetts county sheriff's department serves "at the Sheriff's pleasure" under Massachusetts G.L. c. 126, § 8A.)

> *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.* [Footnote omitted.]

Id. (Emphasis added.) The court restated what it had said in *Herwins* v. *City of Revere*, 168 F.3d 15, 19 (1st Cir. 1998), that "but for" the *Parratt-Hudson* doctrine,

> "federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances."

Id.

The circuit court distinguished *Zinermon* v. *Burch*, 494 U.S. 113, 136-138 (1990), finding that, unlike the Florida officials in *Zinermon*, Sheriff [redacted] had no "state sanctioned discretion" whether to grant [redacted] a pre-termination hearing. The circuit court said,

> [redacted] was denied a hearing because *the due process defendants erred (if they erred at all) by misapplying Massachusetts civil service law. This determination was not discretionary or governed by a formal or informal policy.* [Footnote omitted.] *Cf. Zinermon* v. *Burch*, 494 U.S. 113, 136-138 (1990) (holding that the *Parratt-Hudson* doctrine does not apply where the denial of predeprivation process resulted from the state-sanctioned discretion of the official to decide what process is necessary). . . . *Rather, if error, it was simply a misapprehension of state law. This is the sort of random and unauthorized conduct to which Parratt-Hudson applies. . . .*

407 F.3d at 20. (Emphasis added.)

Because Massachusetts G.L. c. 35, § 51 provides a "sufficient postdeprivation remedy," the circuit court held that the district court's entry of summary judgment

against [redacted] and in favor of respondents on [redacted]'s procedural due process claim was correct. 407 F.3d at 21.

REASONS FOR DENYING THE WRIT

Petitioner [redacted] claims that the circuit court's application of the *Parratt-Hudson* doctrine to dismiss his § 1983 procedural due process claim is at odds with this Court's rulings in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985) and *Zinermon*, which he claims is "indistinguishable" from the present case. In addition, [redacted] argues that this Court should grant certiorari in order to resolve a split among the circuits in the way they apply the *Parratt-Hudson* doctrine. He also argues that the post-termination remedy under Massachusetts G.L. c. 35, § 51 is not adequate.

This Court should deny the Writ because the First Circuit's application of the *Parratt-Hudson* doctrine in this case is entirely consistent with this Court's precedent and there is no split of authority among the circuits regarding any issue *relevant* to the application of the *Parratt-Hudson* doctrine to this case. Moreover, Massachusetts G.L. c. 35, § 51 provides an adequate post-termination remedy.

1. The circuit court's application of *Parratt-Hudson* in this case is consistent with this Court's precedent.

1.1 This Court's decisions in *Parratt*, *Logan*, *Hudson*, *Loudermill* and *Zinermon*.

Procedural due process *usually* requires that a public employee, dismissible only for cause, be given some kind of pre-termination hearing. *Gilbert* v. *Homar*, 520 U.S. 924, 929

(1997); *Loudermill*, 470 U.S. at 542. There is no disagreement on this point. Although respondents maintain that [redacted] was an at will employee of Sheriff [redacted] under Massachusetts G.L. c. 126, § 8A and had no property interest in continuing his employment as ADS-Training, they acknowledge that if [redacted] were subject instead to Massachusetts G.L. c. 35, § 51, Sheriff [redacted] violated that statute by terminating him without a prior hearing.

This Court has recognized that while substantive due process violations occur at the time of the deprivation, procedural due process violations are not complete at the time of the deprivation, but only when the state fails to provide due process (because it is the lack of appropriate process, not the deprivation which is unconstitutional). *Zinermon*, 494 U.S. at 125-26. The critical inquiry is what process the state provided and whether it was adequate. *Id.*

In determining what process is due, a court must weigh several factors:

> 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. . . .

Zinermon, 494 U.S. at 127, quoting *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In *Loudermill*, the Court applied this balancing test to a claim that a school district violated its employees' procedural due process rights when it terminated their employment without a prior hearing. Although the terminated employees had a statutory right to appeal the termination, the statute made no provision for a pre-termination hearing. Concluding that due process normally requires at least a minimal

pre-deprivation hearing, this Court held that the terminated employees had stated a due process claim.

Like *Loudermill*, this Court's decisions in *Parratt*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), *Hudson* and *Zinermon* all apply the factors outlined in *Matthews* to determine what procedural protections are constitutionally required. In *Zinermon*, this Court stated:

> . . . *Parratt* is not an exception to the *Matthews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Matthews* equation – the value of predeprivation safeguards – is negligible in preventing the kind of deprivation at issue.

Id. at 128-29.

Under the *Parratt-Hudson* doctrine, when circumstances are such that is impossible or impractical for the state to provide pre-deprivation process, then no such process is required, and due process is satisfied if the state provides an adequate post-deprivation remedy. The *Parratt-Hudson* doctrine embodies important concepts of federalism and protects the federal courts from being swamped with lawsuits better resolved in state courts.[14]

[14] "The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach '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 . . . [].' . . . The *Parratt* principle respects the delicate balance between state and federal courts. . . ." *Albright* v. *Oliver*, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring), quoting *Parratt*, 451 U.S. at 531-532.

In *Parratt*, a state prisoner brought a § 1983 action because prison employees negligently had lost materials he had ordered by mail. While recognizing that a predeprivation hearing usually is required, this Court stressed the special situation in *Parratt*, noting that the loss was not due to "some established state procedure and the state cannot predict precisely when the loss will occur. It is difficult to conceive of how the state could provide a meaningful hearing before the deprivation takes place." 451 U.S. at 541. In *Parratt* the Court pointed out that the deprivation in that case,

> occurred as a *result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate* nor is there any contention that is was practicable for the State to provide a predeprivation hearing.

Id. at 543. (Emphasis added.)

In *Logan*, an employee filed a claim with the Illinois Fair Employment Practices Commission but the Commission, through inadvertence, failed to commence a fact finding conference within 120 days as required by statute and thereby lost jurisdiction to hear the case. The employee claimed that the state's established procedure, which divested the Commission of jurisdiction to hear the claim, violated his procedural due process rights. This Court agreed, holding that *Parratt* did not apply because the employee was challenging not the random and unauthorized conduct of a state employee but the established state procedure itself.

In *Hudson*, the Court extended the reasoning of *Parratt* to intentional deprivations of property, explaining that "[t]he state can no more anticipate the random and

unauthorized intentional conduct of its employees than it can similar negligent conduct." 468 U.S. at 533.

Zinermon, on which [redacted] relies, is fully consistent with *Parratt*, *Logan* and *Hudson*, but involved circumstances that rendered the *Parratt-Hudson* doctrine inapplicable. In *Zinermon*, Burch had been admitted to a psychiatric institution as a "voluntary" patient but alleged that hospital staff had failed to obtain his informed consent and therefore, wrongfully had deprived him of his liberty. The defendants claimed that the *Parratt-Hudson* doctrine applied, but this Court disagreed, stressing the distinction made in prior cases between losses caused by random and unauthorized conduct (to which *Parratt-Hudson* applied) and losses resulting from established state procedure (for which a § 1983 claim could be brought). 494 U.S. at 130. Applying that distinction, the Court concluded that the loss suffered by Burch resulted because Florida's statutes delegated broad power to hospital staff to admit psychiatric patients (depriving them of their liberty), but failed to circumscribe that power by requiring that a member of the staff determine whether the prospective voluntary admittee was mentally fit to give informed consent to a voluntary admission:

> The Florida statutes, of course, do not allow incompetent persons to be admitted as "voluntary" patients. But the statutes do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient. . . .
>
> Florida chose to delegate to petitioners a broad power to admit patients to FSH, i.e., to effect what, in the absence of informed consent, is a substantial deprivation of liberty. . . .
>
> * * *

> *Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.*

Id. at 135. (Emphasis added.)

The Court in *Zinermon* distinguished *Parratt* and *Hudson* in three ways. First, due to the special nature of mental illness, it was foreseeable that under Florida's statutory scheme, which did not require a procedure to determine the competency of a patient before their voluntary admission, a patient seeking treatment for mental illness might not be competent and might be admitted despite a lack of informed consent. Moreover, the state could predict precisely when that deprivation of liberty would occur. In contrast, the Court noted that while the state in *Parratt* and *Hudson* might anticipate that on occasion a prison employee negligently or intentionally would lose or destroy an inmate's property, the state could not predict when those deprivations would occur. *Id.* at 136.

Second, the Court in *Zinermon* concluded that, unlike in *Parratt* and *Hudson*, pre-deprivation process was possible and would have been of value in avoiding the deprivation complained of. The Court noted that *Zinermon* was not a case like *Hudson* in which the employee was "bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards." *Id.* at 137. Had the state in *Zinermon* established procedures for obtaining informed consent, there was no reason to believe that the staff would not have followed those rules.

Finally, in *Zinermon*, the Court said that the conduct of the hospital staff in that case was not "unauthorized" within the meaning of *Parratt* and *Hudson*. Instead, the Court noted that the hospital staff had been delegated

broad discretionary authority that had not been delegated to the prison employees in *Parratt* or *Hudson*. The deprivation in *Zinermon*, the Court said, was "'unauthorized' only in the sense that it was not an act sanctioned by state law." *Id.* at 137-38.

1.2 The circuit court's reliance on the *Parratt-Hudson* doctrine was correct.

In the present case, the circuit court properly applied the *Parratt-Hudson* doctrine to bar [redacted]'s § 1983 procedural due process claim and in doing so was consistent with this Court's prior rulings.

Loudermill did not displace or limit application of the *Parratt-Hudson* doctrine in appropriate cases and is not controlling in the present case. *Loudermill* merely stated a general rule based on the *Matthews* balancing test and recognized the need for the state to provide pre-deprivation process because it was practicable and would have had significant value in preventing the deprivation. The *Parratt-Hudson* doctrine also is based upon a *Matthews* balancing test, only it applies to situations where, because the state actor's conduct is random and unauthorized and thus unforeseeable, predeprivation process is impracticable and would have no value in preventing the deprivation.

All of the cases discussed above recognize the distinction between losses caused by established state procedures and losses resulting from random and unauthorized conduct in violation of established rules. In *Logan* and *Zinermon*, the *Parratt-Hudson* doctrine did not apply because the losses resulted from flaws in the procedures while in *Parratt* and *Hudson* the claims were that employees had acted in violation of rules that, if followed, would have been sufficient. The present case strongly resembles *Hudson* in that [redacted]