No._____

IN THE

Supreme Court of the United States

RATTAN NATH

Petitioner

v.

STATE OF NEW JERSEY

Respondent

On Petition For Writ of Certiorari

From The Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

Rattan Nath
1417 Pleasant Valley Way
West Orange, NJ 07052
732-910-7244; 973-486-9610 (H)
Pro se Petitoner

QUESTIONS PRESENTED FOR REVIEW:

I. Can New Jersey courts provide cover to racial discrimination by imposing strict criminal liability—even when there is no public nuisance or any compromising of public safety, or health— under a vague ordinance used for revenue generation that criminalizes recycling and requires Petitioner to create a public hazard by dumping loose leaves and recyclable debris/mulch on active roadways: all to raise revenue from singled out minority Petitioner by dispensing with Due Process?

II. Is it a taking when New Jersey's regulation enforcement vests unfettered discretion in State actors to single out Petitioner for deprivation of meaningful control over his property taken as a whole in order to impose public burdens, such as raising revenue, which, in all fairness and justice, should be borne by the public as a whole?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases: Page

Federal:

State:

Constitution and statutes:

Federal:

State:

PETITION FOR WRIT OF CERTIORARI

This is a case about the extent to which taxes/criminal fines can selectively be imposed on South Asian Petitioner with US Constitutional Rights providing no protection against curtailment of First Amendment, Fourth Amendment, Fifth Amendment, Eighth Amendment, Thirteenth Amendment and Fourteenth Amendment guarantees because local ordinances impose strict criminal liability on private property in dictating details to the point of limiting the number of leaves allowed to less than two even in Fall to force the rest to be hazardously dumped on a busy roadway. Recycling the leaves resulted in the imposition of strict criminal liability to collect criminal fines even when courts had previously authorized Petitioner to recycle leaves etc. This New Jersey ("NJ") revenue raising model uses misdemeanors.

In the enforcement model tested out in West Orange, New Jersey, property inspectors have unlimited discretion to enter upon any property—all properties are necessarily in violation of ordinances drafted to ensure reasonable cause is always present. Unlimited discretion exercised by property inspectors makes discriminatory revenue collection possible with fines even for alleged zoning violations based on conditions conceded to not cause a public nuisance, threaten public safety, or public health.

This Court's decision in *Nieves v. Bartlett*, (Docket No. 17-1174, 587 U.S. _ (2019)) immunized enforcement officers from claims of retaliatory violation of First Amendment rights provided probable cause existed for some violation—unless it could be shown that the state officers "typically exercise their discretion" not to take action in similar circumstances. NJ officials need not take similar action in similar circumstances with strict criminal liability—even the number of leaves on a property in Fall specified ensuring conviction for some violation can always be had.

A jury provides a valuable check on prosecution for non-crimes just to raise revenue. Its mere presence causes officials to behave differently. The unavailability of jury trials for quasi-criminal misdemeanor offenses coupled with coercive criminal penalties by way of bench warrants and steep financial fines—here the fine is of $1250 per day—leaves no room for Constitutional concerns and extracts guilty pleas regardless of actual guilt. Petitioner's request for a jury trial was rejected by the trial court.

There is no requirement for a hearing prior to punitive regulatory action even though this Court unanimously held that an opportunity for a hearing is required prior to punitive regulatory actions recently in *Sackett v. EPA.* 132 S. Ct. 1367 (2012).

NJ Courts follow a presumption based proof in quasi-criminal trials not subject to jury oversight.

The presumptions on which convictions are based need not be spelled out at trial making challenging them impossible. Even new charges are framed by NJ courts as part of appellate review with no opportunity for contesting them by evidence.

This presents the issue that does the Fourteenth Amendment require giving weight to objective evidence over presumptions? In *Vlandis v. Kline*, 412 U.S. 441 (1973) this Court taught that due process is violated by a proof based on an irrebuttable presumption to deny an individual the opportunity to present evidence to contest it. This Court reversed and required that the opportunity to overcome the presumption must be provided.

West Orange Ordinances have been interpreted so broadly by NJ courts that every property in West Orange is unavoidably in violation thereof, but by policy only a few are prosecuted—including based on ethnic origin and/or retribution.

With the power to fine by imposition of strict criminal liability, the de facto control over private property passes to NJ officials with the power to overrule First Amendment protected preferences of the property owner and no need to pay just compensation for this acquisition of property rights—Petitioner was rebuffed upon demanding this at trial.

Below, Petitioner was charged by New Jersey with not cutting down a Maple tree that leaned over from his neighbor's property onto his property due to erosion of the neighbor's slopes—notwithstanding

that Petitioner arguably did not have the clear title to the tree. The neighbor was not charged. (App. E at 36a:30-35). Petitioner was held criminally responsible with intent not an element of the offense. Petitioner trimmed the portions over the public sidewalk and rescued the Maple tree. The tree now has a horizontal trunk on Petitioner's property with branches going vertically up—in keeping with Petitioner's religious beliefs (App. E at 26a:16-19, 32a:6-21). A tree flat on the ground tree is safe.

This case presents the issue that whether in the absence of public nuisance, or threat to public safety, or public health, New Jersey can enter upon private property and discriminatorily regulate with steep criminal fines—to solely target the exercise of religion and free speech and acts like recycling or reducing erosion to raise revenue?

Neighbors in Petitioner's forested neighborhood are not disturbed in their recycling of leaves and branches or their tending to their trees—leaning or straight, live or dead. Even New Jersey and West Orange on their properties close to that of the Petitioner recycle leaves and branches naturally.

On South Asian owned properties recycling in situ is a crime. This sort of racism easily satisfies the exacting requirements this Court laid out in *McClesky v. Kemp*, 481 U.S. 279 because each such Summons requires selecting a target and then making a charge under oath with omission of exculpatory evidence. This decision is the required

evidence of intentional discrimination by *McClesky*.to establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

Petitioner went to trial. To speed along to the criminal fine under the wrong statute, Judge Dowd terminated the trial before Petitioner completed his testimony or even started on his legal arguments declaring a proof beyond a reasonable doubt preventing contest (App. C at 10a:26-28). Petitioner protested in vain. The New Jersey Law Division and Appellate Division had before them State's admission that West Orange had the resources to uniformly enforce the ordinance but targeted Petitioner.

The New Jersey Supreme Court while aware of the New Jersey Municipal Courts delivering revenue over justice (highlighted in the 2018 *Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees* by a committee chaired by Justice Rabner) declined to correct the lower courts (App. A & B at 1a-2a). The push to raise revenue by criminal fines is a major problem all over the United States with the push to quick guilty pleas and fines in criminal matters corrupting the judicial process. *See, e.g., Criminal Justice Debt: A Barrier to Reentry* by Bannon et al., Brennan Center for Justice.

Therefore, clarification is required from this Court to preserve liberty and property rights. This Court need not and should not wait. Waiting will only leads to systematic wrongful convictions.

OPINIONS BELOW

The opinion of the New Jersey Law Division (App. E at 22a) is unpublished. The Order of the New Jersey Appellate Division denying Motion to Supplement (App. D at 19a) is unpublished. The opinion of the New Jersey Appellate Division (App. C at 3a) is unpublished. The orders of the New Jersey Supreme Court are (App. A at 1a) and (App. B at 2a),

JURISDICTION

The Judgment of the Appellate Division was entered on April 26, 2018. An appeal to the New Jersey Supreme Court was denied on November 13, 2018. A motion for rehearing was denied on March 5, 2014 in an order filed on March 8, 2019. The ninety day time period to file a petition for certiorari expires on June 6, 2019. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 on the ground of its being repugnant to the Constitution; and any other statute conferring jurisdiction.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a)

West Orange, N.J., Code §14-8.1(a)(1), §14-8.1(a)(2), §14-8.2 together with some definitions at West Orange, N.J., Code §14-1.2; its preamble at Code §14-1.3; and Code §14-2.1 and Code §14-3 are reproduced.

STATEMENT OF THE CASE

STATUTORY AND FACTUAL BACKGROUND

West Orange Township in New Jersey has adopted ordinances enforced by the West Orange Municipal Court as misdemeanors adjudicated in Quasi-criminal proceedings—mostly guilty pleas. Quasi-Criminal Trials are oral proceedings that can impose criminal fines of up to $1250 per day with strict criminal liability.

Petitioner was charged with having Fall leaves on his forested property with steep slopes in Fall and for recycling them along with branches while having vegetation on the slopes. The inspector prefers mowing of rocky slopes, which require the 'weeds'.

In *State v. Nath*, No. MA-2011-083 (Law Division, March 12, 2012) *aff'd*. A-4659-11 (App. Div. Apr. 29, 2013), *certif. denied*, 216 N.J. 365 (2013 unpublished), *cert. denied*, 134 S. Ct. 2736 (2014) (hereinafter "*Nath*") at 3:10-16, the court noted that under oath Inspector Grandusky confirmed that the mulch, leaves, and branches posed no risk to public health, or public safety and that other properties also received notices—evidence of no nuisance. He left out that the only other South Asian property in the neighborhood got Summons even though most looked similar and were excused. The record included pictures of neighborhood properties. The Law Division ruled that leaves, branches, and mulch about the sidewalk area could be covered only under

a sidewalk regulating sections and not the sections directed to landscaping. Specifically on page 7, "This Court also finds that the condition of appellant's property between the sidewalk and the street curb, particularly the tall grass/weeds and the accumulation of leaves, does not constitute a violation under §14-8.2(a)(2)."

A property owner's duties with respect to maintaining the sidewalk and surrounding area were ruled to be governed instead by the West Orange code dealing with the sidewalk and surrounding areas.

Since the sidewalk regulating section was not cited in the Summons charges based on the presence thereof were dismissed.

The *Nath* court also ruled that an unmowable slope was a lawn because Mr. Granduski said so in his testimony—and assessed a fine of $100 based on his credibility. Petitioner appealed the denial of Due Process in strict construction of the statue to recognize that an unmowable area cannot be a lawn by definition, but was unsuccessful. The slope/lawn was not a part of the original charges but was fleshed out on appeal with no opportunity to contest the specific slope with evidence, witnesses, and the clarification that the owner decides where his lawns are located cut no ice. The court notes at 3:18-32 that "Appellant described the property as having an irregular shape. Although appellant is able to mow the flat portions of the property, there are extremely

steep slopes located on the premises that hamper appellant's ability to mow."

Such relevant facts were clarified in *Nath* under oath, with the details of which the Court of Appeals declined to allow supplementation of the record (App. D at 19a-21a) even though Petitioner's second trial was stopped before his testimony could be completed or his legal arguments made. Notably, on appeal the higher courts are bound by the evidentiary record of the Municipal Court. *State v. Loce*, 267 N.J. Super. 102, 104 (1991) *aff'd* 267 N.J. Super 10 (App. Div.) *certif. den.* 134 N.J. 563 (1993). The harm at the trial stage by a judge sculpting the record in violation of Due Process is irreparable.

The West Orange Municipal Inspector, William Ordonez, on November 20, 2015 issued a Notice of Violations on to Petitioner with the instruction "Please landscape your entire property by November 30, 2015" after allegedly observing "the hedges were overgrown, [and] the bushes, ... lawn, [and] grass [were] high." (App. C at 6a:25-27). The catch is that the incomplete record (Petitioner was not allowed to respond item by item to Mr. Ordonez at trial and his testimony cut short) misled the Court of Appeals right at the outset: there are no hedges on the property. Mr. Ordonez issued two Summons on December 1, 2015 swearing under oath that Petitioner violated three local ordinances.

Petitioner was not allowed by Judge Dowd of the West Orange Municipal Court to cross examine Mr.

Ordonez about whether he was truthful in making his charge under oath in the summons (App. E at 42a:33-35). Petitioner pointed out at trial and again on appeal that South Asians in the neighborhood were being singled out for over ten to twelve years for issuance of Summons to collect fines. (App. E at 31a:11-20). Petitioner was not allowed to find out why did Mr. Ordonez hop from one South Asian owned property to the only other South Asian owned property in the neighborhood skipping similar properties? (App. E at 33a:14-20, 21-28) Inspector Granduski confirmed under oath that deliberately only a few properties are cited. (App. E at 36a:16-23)

The Notice of Violations issued by Mr. Ordonez did not include anything beyond a general directive to landscape ignoring the decision of *Nath*. There was no allegation of the property looking worse compared to its peers. Petitioner realized that a fine was in his future no matter what he did from the treatment meted out to his South Asian neighbor, Mr. Aziz. After making him run around working on more than just his property, he still got a summons and had to plead guilty and pay a fine. Then Mr. Ordonez made a beeline for Petitioner's property. Mr. Aziz became a witness but was not allowed to testify about his interactions with Mr. Ordonez (App E at 26a:3-13) to prevent testimony of discrimination.

West Orange Town inspectors have unlimited discretion to target residents—including based on ethnic origin/retribution. They photograph a targeted

property in as unfavorable light as possible (App. E at 36a:35 to 37a:1-6—noting that debris deposited on Petitioner's property by township's agents was not photographed or even remarked upon while maligning Petitioner). The ordinances used are overbroad so that every property in West Orange is eligible for such criminal fines but only a very small fraction are singled out for these collections (App. E at 36a:16-23).

The ordinance in question here criminalizes natural composting of leaves and even the presence of more than one leaf even in Fall on any property—it defines trash as including 'leaves' but not 'a leaf'. However, the hazard created by dumping the leaves etc. on the active roadway is not addressed in the record. State cleverly did not lay out its plan for the leaves on Petitioner's property during the trial and Petitioner was not allowed to complete his testimony creating an incomplete biased record. All that is required to collect a fine in accordance with the interpretation upheld by Court of Appeals is a picture of two or more leaves or a wooden stake or mulch with innuendo etc. This is a nonsensical result.

South Asian origin Petitioner has been repeatedly selected for the collection of criminal fines. Petitioner's property was placed under surveillance with almost a hundred photographs of leaves in fall and winter collected as 'evidence' with practically none from other comparable non-South Asian

properties in Petitioner's neighborhood. Over the years about ten Notices of Violations and Summons have been issued, of which two underlie this request for a Writ of Certiorari.

The general policy for ordinances is §14.-1.2, (App at 54a). The other Ordinances used are focused on discretionarily dictating aesthetic choices using criminal fines to boldly violate the First Amendment and the Fifth Amendment.

§14.8.1 of the West Orange municipal code provides

> a. Hazards and Unsanitary Conditions.
>
> The exterior of the premises and all structures thereon shall be kept free of all nuisances, and any hazards to the safety of occupants, pedestrians and other persons utilizing the premises, and free of unsanitary conditions; and any of the foregoing shall be promptly removed and abated by the owner or operator. It shall be the duty of the owner or operator to keep the premises free of hazards which include but are not limited to the following:
> 1. Refuse, garbage and rubbish as defined in subsection 14-2.1 contained herein.[1]
> 2. Natural Growth. Dead and dying trees and limbs or other natural growth which, by reason of rotting or deteriorating conditions or storm damage,

[1] Code § 14-2.1 defines "Refuse" as "all putrescible and nonputrescible solid wastes," "Garbage" as "putrescible animal and vegetable waste," and "Rubbish" as "nonputrescible solid wastes consisting of both combustible and noncombustible wastes, such as paper, wrappings, cigarettes, cardboard, tin cans, yard clippings, leaves, wood, glass, bedding, crockery and similar materials." Ibid. (emphasis added).

> constitute a hazard to persons in the vicinity thereof. Trees shall be kept pruned and trimmed to prevent such conditions. All weeds shall be removed from the vicinity of any public sidewalk or roadway.

(Emphasis added)

§14-8.1 makes 'nuisances, and any hazards to the safety of occupants, pedestrians and other persons utilizing the premises, and free of unsanitary conditions' elements of the offense. No evidence to establish these was offered at trial and under oath State Inspector Grandusky testified in *Nath* that no such conditions were caused by leaves, branches and the like although the Court of Appeals below (App D) avoided this exculpatory evidence.

Fortunately, 'weeds' are not defined in the code §14-8.1 notwithstanding the colloquial meaning of the term 'weed'. There is no weed on Petitioner's property. The slopes are weeded to remove undesired plants unsuitable for combating erosion or posing a hazard. Nothing in the record shows otherwise.

§14.8.2(a)(2) of the West Orange municipal code provides:

> Landscaping. Premises shall be kept landscaped and lawns, hedges and bushes shall be kept trimmed where exposed to public view, and shall be maintained so as not to obstruct public access to sidewalks and roadways. All trees shall be kept trimmed so that they do not encroach onto the sidewalk or roadway from the ground to a height of seven (7) feet. Hedges and bushes shall be maintained so that they do not encroach onto the sidewalk. Lawns shall be trimmed and maintained

> and shall not exceed a height of eight (8) inches from the ground. All lawns, trees, hedges and bushes in violation of any and all provisions of this section shall be removed, trimmed, or cut to conform to the requirements set forth herein.

Emphasis added. None of the crucial elements like ownership of the trees before assigning responsibility for trimming a falling tree have established by evidence. To the extent the ordinances single out Petitioner's property to change its forested appearance while leaving neighboring properties with the forested appearance, they were pointed out to be in violation of First and Fourteenth Amendments at trial. Court of appeals rejected the First and Fourteenth Amendment protections.

Without actual proof of elements like the residential standards the Ordinances impose the duty to abate presumed hazards that include—but are not limited to—yard clippings, leaves and wood among other things. A forested neighborhood cannot be violation free as a result. And with such removal of vegetation, the soil is exposed to rapid erosion on hilly tracts like our areas creating potential hazards—as the leaning maple tree. In that case Petitioner intervened and mitigated the hazard but State ignored its own tree's health stripping the soil to remove weeds, It was across the street from the leaning tree. State's tree did fall in 2018. Residential standards that impose strict criminal liability but are unreasonably discretionary inherently violate the Fourteenth Amendment.

Strictly construed, the ordinances outlaw just about all plants to comply with the directive to avoid leaves. They make landscaping impossible because §14.8.2 requires generation of yard clippings by requiring trimming of lawns, hedges and bushes but with §14.8.1 demanding that premises be free of the same because as soon as yard clippings are generated, they become a hazard. No recycling or composting in situ is possible but is nevertheless engaged in by our neighborhood and the town and State properties and is necessary on forested properties.

Frankly, the ordinances cannot be interpreted intelligently to arrive at a dividing line that can single out Petitioner as a violator other than by racism for extortion or by marking every property in West Orange as necessarily and unavoidably in violation of the ordinances—but with racial discrimination dictating who is fined. This scheme necessarily requires unlimited discretion to unequally impose criminal penalties and extort fines even though the West Orange Code §14-1.3, and §14-3 provide for no such discretion unless West Orange Code §14-1.2 is read as a bound on the scope to direct enforcement only to the extent there is "menace to the health, safety, morals, welfare and reasonable comfort" and/or "blighting conditions and initiating slums". Such proofs are not possible. Still, the New Jersey Supreme Court rejected (App A & B) by letting stand the decision of the New Jersey Court of Appeals (App C). This makes the sections void for

vagueness because their metes and bounds cannot be determined. Petitioner's Motion to so declare was summarily denied by the trial court.

The rule of lenity requires that nothing can be termed 'Refuse, Garbage, and Rubbish' unless its owner consents or clear evidence of an actual hazard or nuisance is presented—but State has the problem that trying to establish a nuisance would establish discrimination instead because the same is present on comparable neighborhood properties (App. E:27a:17-20).

No actual evidence that rises to the level required for criminal convictions of hazard has been presented. Hazards determination, being technical in nature, the evidence must satisfy threshold requirements in criminal matters. *State v. Cassidy* September 12, 2018, Supreme Court of New Jersey Decided A-58 September Term 2016. The record includes no such evidence at all—just speculations (App. C: 13a: 34-35 & 14:1) and inflammatory photographs with none of the 'obvious' predictions panning out, but NJ did not correct its wild claims.

Although the absence of actual hazards makes intent immaterial, Petitioner addresses intent for completeness. Court of Appeals held that intent does not matter in New Jersey for ordinances and strict liability applies retroactively (App. C at 15a:21-32) for this 'serious problem' with no demonstrable hazard. This decision imposes ex post facto strict liability it was not imposed earlier and it conflicts

with prior decisions of the Courts. New Jersey Superior Court Law Division determined that for sidewalk related matters a different code section than the cited §14-8.1(a)(1), §14-8.1(a)(2), and §14-8.2 control. *See*, *Nath* on page 7: 20-22. This determination was discussed and affirmed by the New Jersey Court of Appeals, see *State of New Jersey v. Rattan Nath*, Docket No. A-4659-11T1 (decided April 20, 2013). In the renewed issuance of Summons to Petitioner, the Court of Appeals determined that the neighboring properties need not be compared to that of the Petitioner because they lack a sidewalk (App C at 17a:16-26)—even though they also have the leaves, branches and plants complained of in the instant case. States' own property in the vicinity has a sidewalk with leaves and branches recycled in situ and on the sidewalk. §14.8.1 was amended to include sidewalks to target Petitioner. This exculpatory evidence was not just hidden by State but Petitioner was forbidden to introduce it into the record—only photographs of Petitioner's property were admissible, then not even that when Petitioner offered one showing State's prior approved look.

The Court of Appeals inaccurately concluded that creation of hazards or the risk of blight etc was properly established by mere presence of plants, leaves, and branches, or the leaning tree due to erosion on Petitioner's neighbor's land without requiring the expert testimony required in criminal cases as per *State v. Cassidy*. On the other hand, Petitioner in an exercise of extreme landscaping

managed to get the tree to stay alive and lie horizontal. It is foolish to even argue that a horizontal tree trunk poses the hazard of falling on anyone even though the Court of Appeal tries anyway to palm it off as obvious/imminent. It is the safest tree in all of West Orange because it is already on the ground. Petitioner's reluctance to harm his own property is not defiance. In others words, the opinions below are defective because they are based on an incomplete record and 'facts' that are false and intentionally created to burden Petitioner with assertions he was not allowed to contest.

The New Jersey Supreme Court also erred in letting stand Court of Appeals' logical mistake that that an ordinance that is void for vagueness with respect to one defendant is not so as to another defendant (App. C at 13a:10-15):

> A statute may be challenged as being either facially vague or vague "as-applied."" State v. Lenihan, 219 N.J. 251, 267 (2014) (citations omitted). "'[I]f a statute is not vague as applied to a particular party, it may be enforced even though it might be too vague as applied to others.'" Ibid. (citation omitted).

This is nothing but a transparent cover for discriminatory enforcement. And likely is the reason Municipal Courts in New Jersey increasingly deliver revenue over justice like other trial courts in the United States. *See*, *e.g*, *Report of the Supreme Court Committee on Municipal Court Operations, Fines,*

and Fees (2018), which notes that reforms are needed.

At this point the Appellate Division has managed to craft conflicting opinions, one in this case and another in *State v. Golin*, 363 N.J. Super 474 (App. Div. 2003). In *Golin*, the Appellate Division held that strict construction was required and the Rule of Lenity had to be used in interpreting ordinances with Notice required of the prohibited conduct to avoid being found void for vagueness. Now, the Court of Appeals concludes that Rule of Lenity is unavailable and US Constitutional rights are truly dead—they are unavailable in New Jersey if they came between the Courts and revenue generation—because Municipal Ordinances are presumed to be valid even when frankly overruling the US Constitutional rights to generate revenue.

In *State v. Piemontese*, 282 N.J. Super. 307, 308 (App. Div. 1995), the Appellate Division held that the ordinance was unconstitutionally broad and vague because the phrase "overgrown and unsightly" failed to provide the public with reasonable notice of the prohibited conduct. *Id*. at 309. In the proceedings below it was held, obviously erroneously, that the 'kept trimmed' term allegedly avoided the Constitutional problem posed by "overgrown and unsightly". Petitioner is a scientist by training and finds the distinction plainly deluded.

Petitioner naturally and timely appealed to the New Jersey Supreme Court. On November 13, 2018

the New Jersey Supreme Court declined the Petition for Certification (App. B at 2a).

Petitioner filed a Motion for Reconsideration, which was denied on March 8, 2019.

REASONS FOR GRANTING THE PETITION

There are at least three major reasons for granting the petition.

First, the unavailability of jury trials for misdemeanor offenses has lowered the cost of convicting defendants, but also removed a valuable oversight over the use of the criminal justice system. Legislatures are tempted to adopt broad ordinances to raise revenue and local courts get busy delivering revenue instead of justice. Petitioner respectfully requests that guidelines are needed to prevent runarounds being devised to weaken property rights and liberties by clarifying that Due Process becomes more important not less when jury trials are not an option. The alternative is to reinstate jury trials. It is a rare jury that will convict a person for a zoning offense when the same is routinely the practice for the neighbors and State itself. Same with a jury buying into trials where the defendant is not allowed to testify, enter evidence, or testimony, or make legal arguments. Invariably such criminal procedure is a no go with a jury. This can be briefed once the Writ of Certiorari is granted.

Second, beyond the unavailability of jury trials, there is the issue of the purpose of non-discriminatory but discretionary enforcement of zoning laws as criminal violations using irrebuttable presumptions. These discretionary enforcement actions with waivers outnumbering actual enforcement have become a major source of racial discrimination and retaliation/retribution.

A starting point is to clarify that the holding of *Vlandis* that due process is violated by a beyond a reasonable doubt proof based on an irrebuttable presumption to deny an individual the opportunity to present evidence to contest it. Such presumptions should be laid out plainly in State's case to allow them to be conceded or contested to stay true to the all element rule for criminal trials. As a practical matter, for misdemeanors, the assumption has to be that the defendants will be pro se. It is not cost effective to not to simply defend yourself for small matters—as folks often do for parking violations and the like. Property should be the same way. Hard far lower limits are required on fines. There are additional ways to correct this slide down the slippery slope that can be briefed with the Writ of Certiorari granted.

Far too many poor or even middle class folks are bullied routinely into paying massive fines by defective prosecutions that punish harshly for the simple refusal to plead guilty. Folks like the Petitioner cannot plead guilty when they are

innocent factually—even if the fines are ruinous. We rather strive to fix a broken system by working with it from within.

The issues presented here are commonplace across the country. Natural landscaping is politically fraught and a target for suppression despite the scientific findings of the US EPA and such agencies recommending practices that are treated as crimes under local ordinances.

Examples of the alarms being raised due to defective prosecutions to raise revenue or just close cases as solved are easy to spot. New Jersey is no stranger to such problems as the *Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees* (2018) shows Municipal Courts raising hundreds of millions in revenue while beggaring citizens. That this is an aspect of a pervasive problem is readily seen from learned writings like *Seven Steps for Progressive Prosecutors* by Joseph Margulies in Justia Verdict, *Criminal Justice Debt: A Barrier to Reentry* by Bannon et al., Brennan Center for Justice, and *Fines, Fees, and Bail* by Council of Economic Advisors Issue Brief (December 2015.

Petitioner respectfully suggests that the reforms are needed in local ordinance enforcement all over the nation to ensure compliance with the US Constitutional requirement instead of devising run around solutions to undermine liberty and property

rights. These can be briefed once the prayed for Writ of Certiorari is granted.

Deviations from equal treatment cannot be based on the subjective and unsupported whim of a local official by making the official's will the required uncontestable legal factual finding when independent objective evidence exists.

Most disturbingly, merely being in compliance with the neighborhood practices or engaging in safe conduct is not enough to avoid criminal liability despite the Fourteenth Amendment guarantees of equal treatment.

Further, a judicial determination apparently has been made in New Jersey that at least when property rights and right of expression are involved, many ordinary criminal procedural safeguards are dispensable with defendants presumed to be guilty once charged. This results in close to 100% conviction rates in the race to revenue-raising fines.

The New Jersey Supreme Court, while aware of the uneven revenue driven decisions of Municipal Courts, erred in providing cover to racial discrimination by imposing strict criminal liability— even when there is no public nuisance or any compromising of public safety, or health— under a vague ordinance used to primarily generate revenue and provide cover for racism and retribution, where enforcement requires Petitioner to create a public hazard by dumping loose leaves and recyclable debris/mulch on active roadways: all to raise revenue

from singled out minority Petitioner in proceedings that violate Due Process guarantees by not allowing the Petitioner to confront and refute the charges.

The NJ Supreme Court ignored the very ills that it spelled out in its own report (*Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees*) on Municipal Courts' shortcomings. Ignoring Due Process and Substantive issues encourages Municipal Courts' revenue seeking decisions instead of delivering justice. This gets worse by the favoring of the use of irrebuttable presumptions to gain convictions.

Petitioner was convicted of violating §14.8.1 & §14.8.2 of the West Orange municipal code as qualified by Definitions in §14-2.1 and its purpose provided in a preamble in §14-1.3. The code is being used to racially discriminate even between owners of adjoining properties with no prosecution for one while heavy fines for the South Asian Petitioner—the example being the leaning maple tree that belongs to both Petitioner and his neighbor being on the property line but only Petitioner got charged.

The purpose of the code is undermined not advanced by such prosecutions. Specifically the purpose of the code is spelled out as (emphasis added):

> 14-1.3 Purposes.
>
> The purpose of this Code is to *protect the public health, safety, morals and welfare* by establishing *minimum standards* governing the maintenance,

> appearance, condition and occupancy of residential and non-residential premises, to establish minimum standards covering utilities, facilities and other physical components and conditions essential to make the facilities fit for human habitation, occupancy and use; to fix certain responsibilities and duties upon owners and operators, and distinct and separate responsibilities and duties upon occupants to require the licensing and regulation of lodging houses, boarding houses and nursing homes; to authorize and establish procedures for inspection of residential and nonresidential premises; to fix penalties for the violations of this Code; to provide for the right of access across adjoining premises to permit repairs; and to provide for the repair, demolition or vacation of premises unfit for human habitation or occupancy or use. *This Code is hereby declared to be remedial and essential for the public interest and it is intended that this Code be liberally construed to effectuate the purpose as stated herein*.
>
> . . .

The purpose of the Statute expressly is to promote public health, safety, morals and welfare. Merely meeting the purpose should preclude criminal liability. Here the actual purpose of enforcement is to create a public hazard by requiring dumping of leaves on busy roadways—and prevent erosion reduction by removing cover from steep slopes. This alone would require dismissal of the charges.

In the proceedings below an irrebuttable presumption that Petitioner's First Amendment right to practice his religious belief is not impaired is required to impose criminal liability on Petitioner

Although Petitioner was not allowed to testify or make his legal arguments, the Court of Appeals, upheld by the NJ Supreme Court, dismissed his free speech and right to practice his religion as frivolous because the record did not explain what they were—and got the religion wrong based on its presumption that the record is reliable and complete. (App. C at 17a:30-35 & 18a:1-4). This was just buying State's contention lock stock and barrel that Petitioner could explain his preferences without being allowed to testify or make his legal arguments.

For the record, Petitioner did not declare himself to be a Hindu per se but a karmayogi. The distinction is important to the Petitioner. Same applies to Petitioner's right of free speech that was simply disregarded. (App. C at 18a:5-11).

Petitioner urges recognition of the rule that a local Ordinance imposing a preference for the arbitrary preferences of a State official over that of the property owner in the absence of any issues of public nuisance, public safety, or public health is presumptively unconstitutional.

This Court previously explained that zoning ordinances have a basis in the law of nuisances—which requires proving the existence of a nuisance or a public interest, such as public safety and/or public health—to justify ordinances curtailing the private right to control property. The only evidence in the record is testimony from Mr. Aziz confirming that there was no nuisance. He was not cross-examined as

State conceded his evaluation only to discount it later because he was of South Asian origin.

This Court taught, in overturning a municipal ordinance as unconstitutional, that "[a] special respect for individual liberty in the home has long been part of our culture and our law". *City of Ladue v. Gilleo*, 512 U.S. 43, 58(1994). In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, at 388 (1926) this Court clarified that

> the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.

New Jersey Municipal Courts and those of other states do not follow that holding of this Court. A decision is needed to reinforce the liberty and property interest and reverse the rush to raise revenues by way of fines—disproportionately from minorities.

This Court has also recognized that only a compelling State interest justifies restrictions on the right of expression, which may even include burning a cross. *See*, *e.g.*, *Virginia v. Black*, 538 U.S. 343 (2003). It has long been established that environmental concerns are at the very least a part of the political discourse. Therefore, in order to criminally penalize environmentally friendly practices State is required to show by evidence some

impairment of public welfare. This the municipal court in West Orange simply presumed and treated as a political question already resolved in favor of any and all regulation in which the political opinion of the municipal court was the only required proof. This is not the correct understanding of a compelling state interest under *Virginia*.

Unable to prove several elements in the plain language of the underlying statute, State argued that a presumption of satisfying each and every element was sufficient to constitute the prima facie case and the required proof beyond a reasonable doubt.

Could proof beyond a reasonable doubt required in a criminal trial for a conviction admit as established by presumption two facts that are frankly in conflict? In *Vlandis*, 412 U.S. 441, 446-454 (1973) this Court provided guidance, often referred to as the Irrebuttable Presumption Rule, which provides that the Due Process Clause of the Fourteenth Amendment does not permit denying an individual the opportunity to present evidence on the basis of a permanent and irrebuttable presumption when that presumption is not necessarily or universally true in fact. Thus, the ordinance calling something a hazard does not make it so, or create a workaround in the form of reasonable cause the Fourth Amendment to allow inspectors to trespass freely and engage in surveillance of Petitioners for

months on end to fish for violations—which they have failed to find so far.

This Court has not expressly required avoidance of irrebuttable presumptions when alternative fact determinations are not only possible but have been made. It is time that it did as much in view of the wave of wrongful convictions affecting criminal proceedings with decades of imprisonment and even executions resulting from lax criminal procedures.

It is well accepted that prosecution must provide a criminal defendant with all relevant evidence in State's possession--particularly exculpatory evidence. This is not the case in New Jersey Municipal Court Proceedings. Prosecution hides information routinely—including State's admission that Petitioner's premises were in compliance.

Nevertheless, on appeal the courts below upheld the conviction by adopting presumptions trumping even State's own independent assessments.

The alleged presence of hazards was an irrebuttable Presumption based on the presence of leaves and branches but not established by expert testimony required for criminal trials under State v. Cassidy in view of similar leaves and branches inexplicably not being a hazard on other adjoining properties or in other towns

Ordinarily State interference with private property ownership or the Right of Free speech or that of Free Exercise of Religion requires a showing of a compelling State interest. A local ordinance, like

the one in question here, directed at curtailing First Amendment rights and raising revenue by criminal penalties is presumed to be unconstitutional. Therefore, evidence of a compelling state interest—by demonstrating a public nuisance, a threat to public safety, or a threat to public health—is required. Such evidence should satisfy threshold requirements in criminal matters. *Cassidy* at 13 of 84: The "Court has not altered its adherence to the general acceptance test for reliability in criminal matters." The record includes no such 'general acceptance test passing proofs for the reliability of the inferences of hazards State draws from the presence of leaves or branches on Petitioner's property. Indeed, in some townships the presence of leaves is encouraged while in others criminalized. Therefore, the proofs are deficient as a matter of law and reason.

In *In re Winship*, 397 U.S. 358 (1970) this Court declared unambiguously that as a matter of due process, a person charged with a criminal offense can be found guilty only after the prosecution has proven every element of the crime "beyond a reasonable doubt."

This Court provided further guidance for interpreting the 'beyond a reasonable doubt' standard in *Cage v. Louisiana* - 498 U.S. 39 (1990). This court specifically found a "reasonable doubt" instruction constitutionally defective if it even suggests a higher degree of doubt than is required for

acquittal under the reasonable-doubt standard. Here the burden of proof was shifted to the Petitioner for producing evidence that he is not allowed to produce at trial—such as the details of his faith. This procedural step creates doubt all by itself being higher than the *Winship* standard

In *Sullivan v. Louisiana* - 508 U.S. 275 (1993), this Court taught that the *Winship* reasonable doubt standard applies in both state and federal criminal proceedings but that a *Cage*-type jury instruction is not "amendable to harmless-error analysis" and "will always invalidate the conviction."

Specifically, the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In the proceedings below, the 'but-for test' shows that the presumptions are required to ascertain guilt. Therefore, these facts should be ascertained and not presumed.

Here the judge was also a fact finder with a conflict of interest who was trying to raise revenue by way of criminal fines, which not surprisingly led to biased fact-finding compared to that by a disinterested fact-finder like a jury along with cutting corners. Judge Dowd was in a hurry to get to the juicy fine—a quest not checked by the NJ Supreme Court (App A & B).

The failure to show how a hazard is created on Petitioner's property but not on an adjoining

property by leaves and branches is a failure to prove a required element of the charge. It is safe to say that at the very least a 'reasonable doubt' is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. A reasonable doubt is raised by systematic ignoring of evidence in the record, particularly evidence in the form of State's own admissions and independent determinations and exculpatory evidence that State labored to keep out of the proceedings.

Therefore, the NJ Supreme Court erred by ignoring that the West Orange municipal court adopted presumptions that charge defendants with proving their innocence in a burden shifting analysis that places the burden of production on defendants in criminal trials. No defendant can meet this burden of production imposed by presumptions favoring State with the use of overbroad ordinances.

If left unchecked, the proceedings below establish the framework for raising revenue from racial minorities by exempting them from Constitutional Due Process constraints. As seen the state machinery amended §14.8.2(a)(2) to target Petitioner with conflicting evidence kept out of the record by a pliant judge. Court of Appeals' was misled by the incomplete sculpted record into approving this runaround. It was not checked by the NJ Supreme Court resulting in steep fines even when the decisions made by the Petitioner are sound.

Indeed, the trial court did not even allow cross examination of the inspector to allow understanding of what he considered a hazard and why was he targeting South Asians—because it was considered to be irrelevant in the march to a fine. (App. E at 42a:33-35).

Petitioner provided evidence that his landscaping was better than that encountered in their actual neighborhood by providing images of other properties in the neighborhood (App C at 21a 11-25) or even by State itself. The evidence was not even entered into the record to make a review of the merits impossible.

The hazards created by New Jersey include increased erosion—by removal of natural growth, mulch, leaves, branches from steep slopes—leading to destabilization of trees on slopes and the dumping of leaves on active roadways. There is no reason why Petitioner should be held guilty of a crime for something State is busy causing.

This is a taking and/or imposition of involuntary servitude since it imposes costs and extracts labor using criminal sanctions with no identifiable limits.

The ability of State to impose costs and labor on private property owners with no more than irrebuttably presumed public benefits violates the express prohibitions against taking property without compensation and imposition of involuntary servitude. Although involuntary servitude is

permitted under the Thirteenth Amendment of the United States Constitution upon conviction, creating crimes to extract involuntary servitude is not an acceptable workaround the Thirteenth Amendment contrary to State's arguments in the proceedings below.

Third, there is a tension between the need to provide just compensation for using private property for public purposes and normal regulation. When the Fourteenth Amendment guarantees of equal treatment are missing, the legal presumption ought to be of a taking with compensation due and not criminal fines. Such a rule will provide the corrective measure to discourage revenue raising discriminatory undermining of property rights.

This Court addressed the line separating regulation from taking rather eloquently in *Armstrong v. United States* 364 U.S. 40 (1960). In *Armstrong* this Court explained that

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here. Cf. Thibodo v. United States, 187 F.2d 249.

In the matter at hand, the ordinances impose a public burden on all in principle but are enforced to burden just some people by deliberate decision.

Assuming *arguendo* the ordinances do benefit the general public, the failure to spread the burden by uniform enforcement requires that the some people actually burdened by the ordinance enforcement be compensated for the taking of their property. This is the just result in equity as well as law and carefully balances the guarantees of equal treatment in the Fourteenth Amendment against regulation for the public good. It provides the required balance to discourage State from taking advantage of minorities by beggaring them or imposing in voluntary servitude on them by abusing police power in order to benefit the majority.

Here it is plain that if all properties of West Orange were similarly burdened to obey a whim of town official—no matter how unreasonable—with no opportunity to meaningfully negotiate, there would be a political storm. Then, burdening responsible conduct in managing private property with fines and treating it as a crime deserving strict criminal liability is a taking, which has to be the cost of irresponsible discriminatory regulation.

For State to impose its officials' aesthetic preferences on individual properties by way of selective enforcement, the criterion for selecting a target must be made public or just compensation paid for imposition of such preferences. This Court unanimously held that an opportunity for a hearing is required prior to punitive regulatory actions recently in *Sackett v. EPA.* 132 S. Ct. 1367 (2012).

Like the private property owners, the Sacketts were, Petitioner is open to additional and severe penalties and loss of his property unless the right to contest unfair demands is real.

CONCLUSION

The Court should grant this Petition for the Writ of Certiorari to reinforce the requirement to follow the tried and tested criminal procedures consistent with the US Constitution and allow issuance of proper timely guidance.

Respectfully submitted

Rattan Nath

1417 Pleasant Valley Way,

West Orange, NJ 07052,

Date:_____

Pro se Petitioner