UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DANIEL GOLDSTEIN *et al.*

Plaintiffs,

06-CV-5827 (NGG) (RML)

- against -

ECF Case

GEORGE E. PATAKI *et al.*,

Defendants.

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AARON PILLER *et al.*,

Plaintiffs,

07-CV-0152 (NGG) (RML)

- against -

ECF Case

GEORGE E. PATAKI *et al.*,

Defendants.

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PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR OBJECTIONS TO MAGISTRATE JUDGE LEVY'S REPORT AND RECOMMENDATION DATED FEBRUARY 23, 2007

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PRELIMINARY STATEMENT

Burford abstention is "an extraordinary and narrow" doctrine that applies "only in the exceptional circumstance." *See New Orleans Public Serv, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 362 (1989) ("*NOPSI*"); *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 813 (1967); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). As the Supreme Court and the Second Circuit have repeatedly admonished, the question under *Burford* is not simply whether the exercise of federal jurisdiction will interfere with state affairs, but rather whether such interference will be "*undue*." *See NOPSI*, 491 U.S. at 362; *see also Dittmer v. County of Suffolk*, 146 F.3d 113, 117 (2d Cir. 1998); *Williams v. Lambert*, 46 F.3d 1275 (2d Cir. 1995).

So unusual is *Burford* abstention that the Supreme Court has not endorsed its application in more than a half-century, and the Second Circuit has permitted it in only a handful of circumstances. Undoubtedly recognizing this when they first moved to dismiss, Defendants devoted a mere two pages in support of their *Burford* argument in their initial brief before the Magistrate Judge.

In determining whether interference with state affairs will be so "undue" that this "extraordinary and narrow" exception applies, a variety of factors are relevant. Although no single consideration is talismanic – except the strict prerequisite that there must be an adequate alternative forum that can provide the claimant with "complete" relief, *see Bethpage Lutheran Service v. Weicker*, 965 F.2d 1239, 1246 (2d Cir. 1992) – it is plain that a court cannot abstain unless a *substantial combination* of factors is present. There must be, among other things: (1) state law claims presenting unsettled issues of state law; (2) federal claims that will involve the court in intricate matters of state law; (3) a system of state judicial review concentrated in a single forum such that the reviewing state court has developed particular expertise in the subject

matter at issue; (4) the absence of federal claims, especially civil rights or constitutional claims; (5) disruption of a coherent state policy (6) the likelihood of entanglement in state law scheme that is highly specific or complex; and (7) resolution of the case must tread upon matters of peculiarly local concern.

When examined carefully and honestly, not a single one of these *Burford* consideration militates in favor of abstention. At a minimum, it cannot be said that so many of them are present, and with such strength, that this Court should abdicate its "virtually unflagging" obligation to adjudicate Plaintiffs' federal constitutional claims.

ARGUMENT

A. The History of *Burford* Abstention Demonstrates That the Doctrine Is Extremely Narrow and Applies Only Under Rare Circumstances That Are Not Presented Here

Defendants reference the "exhaustive survey" of the case law that Plaintiffs proffered as a "lengthy preamble" to their opening brief. ESDC Br. at 5. Tellingly, however, Defendants make no attempt to respond in kind. Their brief – which, like Plaintiffs' brief, exceeds the Court's customary page limitation – seldom discusses the facts of cases at all. There is an obvious reason for Defendants' diffidence: the facts of the cases are terrible for them. Not only does the overwhelming weight of the case law find *Burford* abstention inappropriate, but the idiosyncratic facts presented in the relatively few cases that do abstain demonstrate that the abstention question in this case is not close. The *Burford* doctrine is by no means simple, but the picture painted by the extensive constellation of *Burford* cases is clear. We are confident that when the Court scrutinizes this body of case law – including the facts of the cases going both ways – the Court will understand why Plaintiffs included a "lengthy preamble" and why Defendants did not.

B. The Magistrate Judge's Analysis of the Factors Informing the *Burford* Inquiry Constitutes Plain Legal Error

Defendants concede, as they must, that the Magistrate Judge fundamentally misunderstood the legal framework that governs a proper *Burford* abstention analysis. *See* ESDC Br. at 7-8; *see also* Pls.' Br. at 20-22. They attempt to resuscitate the Report and Recommendation, however, by suggesting that the Magistrate Judge's error was without prejudice. Defendants begin with the premise that the second *Feiwus* factor allegedly is the same as the second *Bethpage* factor (because each, they say, "focuses on the existence of difficult and discretionary questions of state law"). ESDC Br. at 7-8 & n.4. From this premise, Defendants contend that the Magistrate Judge's legal error was harmless because *Burford* abstention can be appropriate in the absence of the second factor under either formulation. *See id.* at 8.

Defendants are wrong. As discussed more fully in the next section, the second *Bethpage* factor – the "necessity of discretionary interpretation of state statutes" – is *always* an important component of a proper *Burford* analysis, even when only the second strand of *Burford* (as formulated in *Colorado River*) is implicated. In other words, even where, as here, Plaintiffs assert exclusively federal claims – such that the first *Burford* strand plainly does not apply – it still is highly relevant to the *Burford* inquiry whether Plaintiffs' federal claims, although not directly arising under state law, nonetheless would somehow indirectly "entangle" the federal court in the "skein of state law," *McNeese v. Board of Educ. for Comm. Unit Sch. Dist. 187*, 373 U.S. 668, 674 (1963) – for example, by forcing the federal court, in the process of adjudicating exclusively federal claims, to examine and interpret detailed and complicated state agency regulations. *See infra* at 6-9.

Viewed this way, the Magistrate Judge's conceded legal error was most prejudicial, for it gave him false confidence that he was free to entirely ignore the fact that in the

case at bar, not only do Plaintiffs assert no state law claims, but their federal law claims do not require this Court to even indirectly muddy itself in any mess of complex state regulations. As discussed more fully in the next section, the complete dearth of state law issues in this case – the dearth of state law claims themselves, and the dearth of state law implications arising indirectly from federal claims – is highly relevant, and the Magistrate Judge's erroneous conclusion that *Burford* abstention is warranted flows directly from his mistaken assumption that he could ignore the complete lack of state law issues presented.

C. This Case Presents No "Difficult Questions of State Law"

With respect to the importance of whether a case presents difficult or novel questions of state law, there are two areas of disagreement between the parties – one notably modest, and one quite fundamental.

First, the parties modestly disagree about the degree to which the case law presents a formidable hurdle for Defendants regarding the "difficult questions of state law" issue. Plaintiffs contend that the Supreme Court has never affirmed a decision to abstain on *Burford* grounds where, as here, the central claims arise under federal law, not state law. *See* Pls.' Br. at 23. Although Defendants claim that the Supreme Court has done so once, they concede, at a minimum, that the Supreme Court has not done so in well over a half century. *See* ESDC Br. at 8-9.

The case law speaks for itself. In *Burford*, the Court abstained from hearing purely state law claims that were brought in federal court through diversity jurisdiction. *See* 319 U.S. 315, 317, 331 (1943). In *Allegheny*, Court refused to abstain even though the case *did* turn on state law. *See* 360 U.S. 185, 186-87, 189-90 (1959). In *Thibodaux*, the Court abstained because the claims turned on state law questions that were perplexing and entirely unsettled. *See*

360 U.S. 25, 30 (1959). In *McNeese*, the Court refused to abstain where there was "no underlying issue of state law controlling the litigation" and no "skein of state law that must be untangled before the federal case can proceed." 373 U.S. 668, 673-74 (1963). In *Colorado River*, the Court refused to abstain because the state law question presented "appear[ed] to be settled," emphasizing that even where federal adjudication could "conflict with similar rights based on state law," the "mere potential for conflict in the results of adjudications does not, without more, warrant staying exercise of federal jurisdiction." 424 U.S. at 815-16. Finally, in *NOPSI*, the Court refused to abstain where there was no state law claim. *See* 491 U.S. at 361.

Contrary to Defendants' mischaracterization, Plaintiffs did not contend categorically that abstention is *never* appropriate in the absence of complex state law claims. *See* ESDC Br. at 7. Plaintiffs merely asserted that "a finding that no 'difficult questions of state law' are presented *militates strongly* against *Burford* abstention." Pls.' Br. at 23 (emphasis supplied). That proposition is unquestionably correct, as the copious case law cataloged above vividly illustrates.

The *only* case Defendants point to in which the Supreme Court has ever even arguably abstained in the absence of complex or novel state law questions is *Alabama Pub. Serv. Comm. v. Southern Ry. Co.*, 341 U.S. 341 (1951). It is not surprising, therefore, that Defendants spend so much of their brief focused single-mindedly on *Alabama*. But there is no doubt, as Defendants recognize, that *Alabama did* involve a significant state law claim asserted through diversity jurisdiction. *See id.* at 343. That is in marked contrast to this case, which involves no question of state law *at all*. Moreover, as the Second Circuit has expressly held, the most important factor in *Alabama* was not the existence or nonexistence of state law claims, but rather the existence of a state law appeal procedure that concentrated review in a single state circuit

court with a single decisionmaker. *See Bethpage*, 965 F.2d at 1239. For this reason, *Alabama* – which was decided 56 years ago, long before *Allegheny*, *McNeese*, *Colorado River*, and *NOPSI* – is a particularly slender reed on which to rest a defense of the Report and Recommendation. The complete paucity of state law questions in this case (let alone complex or novel ones) – while perhaps something short of absolutely fatal – certainly inflicts a grave wound upon the argument that *Burford* abstention is warranted.

More fundamentally, as Plaintiffs alluded in the previous section, it is grossly misleading to suggest, as Defendants do, that "abstention can be appropriate under *Burford* even if the second *Bethpage* factor . . . is not satisfied." ESDC Br. at 8. As the Court explained in *Colorado River*, there are two basic types of *Burford* cases: (1) "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; and (2) where, although "the state question itself" is not "determinative of state policy," the "exercise of federal review of the question" would "be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." 424 U.S. at 814. Contrary to Defendants' suggestion, however, even where, as here, the first *Burford* strand is inapplicable (because Plaintiffs' claims arise exclusively under federal law), the second *Bethpage* factor – the "necessity of discretionary interpretation of state statutes" – is still very relevant to the second strand analysis.

The Second Circuit's opinion in *Hachamovitch v. DeBuono*, 159 F.3d 687 (2d Cir. 1998), is instructive. That case unquestionably was a second strand case, not a first strand case, because the plaintiff's lone claim was a federal due process claim; no state law claims were raised. *See id.* at 689, 697. The Second Circuit nonetheless analyzed and applied *each* of the three *Bethpage* factors, including the second factor. The Court found abstention inappropriate in

part because it concluded that as to "the second *Bethpage* factor," the state administrative regulations at issue were clear and would not "put the federal court in the business of interpreting the state regulatory scheme." *Id.* at 697-98. There is no question that the Second Circuit thought it important to apply the second *Bethpage* factor even though it was a strand two case. There plainly were no state claims, but it still was relevant whether the exclusively federal claims would require discretionary interpretation of state statutes. Because they would not, abstention was not warranted.

This point is driven home even further by the two Second Circuit cases Defendants cite – *Bethpage* and *Levy*. Although Defendants are correct that *Bethpage* was "a case raising exclusively federal claims," ESDC Br. at 11, the Court in *Bethpage* found abstention appropriate precisely because the federal claims "necessarily rais[ed] questions of state law" by asking the federal courts to set Medicaid rates governed by complex state statutes and regulations. *See* 965 F.2d at 1247. Similarly, although the claim in *Levy* was technically federal, the federal claim implicated a myriad complex state insurance law issues, and the Second Circuit expressly found that the federal claim was "almost identical to" a state law contract claim. *See* 635 F.2d at 962, 964.[1] The presence of significant state law issues was crucial in both cases, even though as a formal matter only federal claims were pled.

For all of these reasons, the lack of state law issues in this case – whether directly, in the form of state law claims, or indirectly, in the form of state law implications of federal claims – is doubly problematic for Defendants.

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[1] The court also found it "highly significant" that the federal McCarran-Ferguson Act "mandated that regulation of the insurance industry be left to the individual states," which the court held amounted to "an express federal policy of noninterference" in state law insurance matters. *Id.* at 963-64.

First, as the Second Circuit squarely held in *County of Suffolk v. Long Island Lighting Co.* ("*LILCO*"), *Burford* abstention is especially inappropriate where, as here, no state law claims are pled. *See* 907 F.2d 1295, 1308 (2d Cir. 1990) ("The fact that here *only* a federal claim was present raises the level of justification [required for abstaining under *Burford*] even more.") (emphasis in original); *see also id.* at 1380-09 n.8 (citing approvingly the Ninth Circuit's "absolute rule" that *Burford* abstention *never* applies in the absence of state law claims).[2]

Second, as *Hachamovitch*, *Bethpage*, and *Levy* confirm, where, as here, no state law claims are pled, it still is crucial to the *Burford* analysis whether asserting jurisdiction over the federal claims necessarily will require the federal court to engage, however indirectly, in "discretionary interpretation" of state law. Because that is not even arguably the case here, abstention is doubly inappropriate.

It cannot seriously be questioned that the Magistrate Judge erred by failing to engage in any of this analysis *at all*. At a bare minimum, he should have acknowledged that the complete absence of state law issues in this case – directly or indirectly – militates strongly against abstention. He certainly should have acknowledged that no Second Circuit case – indeed, no case from any district court within the Second Circuit – has *ever* held that abstention under the

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[2] Defendants' attempt to evade *LILCO* reeks of desperation. *LILCO*'s unambiguous and common-sense holding that the absence of complex state law claims "raises the level of justification" required for *Burford* abstention plainly is not, as Defendants assert in conclusory fashion, "difficult to apply in any meaningful fashion." ESDC Br. at 12 n.7. To the contrary, the rule could hardly be more straightforward: either complex state law claims are presented or they are not, and if they are not, *Burford* abstention is significantly less appropriate than if they are. Defendants' bold and unsupported suggestion that *LILCO* was somehow "abrogated" by *Bethpage* is just as obviously incorrect. Far from overruling *LILCO*, *Bethpage* makes clear that the existence or nonexistence of complex state law claims is highly relevant to *Burford* analysis. *See* 965 F.2d at 1247. Indeed, the Second Circuit has cited this passage from *LILCO* approvingly in cases decided *after Bethpage*. *See Hachamovitch*, 159 F.3d at 696; *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122, 126 (2d Cir. 1995).

second strand of *Burford* was warranted when only two of the three *Bethpage* factors was satisfied.

D. No "Coherent [State] Policy" Is Threatened

Defendants contend that New York's EDPL embodies a "coherent policy" that would be threatened by adjudication of Plaintiffs' claims in this Court. The ESDC contends that the EDPL serves the important policy of ensuring "comprehensive [and] coordinated regulation of eminent domain in New York" by "supplant[ing] a mosaic of more than 150 scattered provisions" with a "uniform procedure." ESDC Br. at 15. This, they claim, is accomplished through a "*unitary* administrative and judicial process." *Id.* at 2 (emphasis supplied).

Other than their conclusory assertion that the EDPL's administrative and judicial review processes are "unitary," Defendants did not respond to Plaintiffs' observation that for *Burford* purposes, there is a world of difference between the significance of the EDPL's exclusive procedures for *arriving at* condemnation determinations – including the procedures governing notice, public hearings, and publication of final determinations – versus the EDPL's purportedly exclusive procedure for *judicial review* of condemnation determinations. *See* Pls.' Br. at 27.

The EDPL's procedures for *arriving at* condemnation determinations took place and have already concluded. They are a thing of the past. Those pre-determination procedures are not being challenged in this case, and this Court is not being asked to interfere with those procedures in any way. Accordingly, any state policy of applying uniform pre-determination procedures in all classes of eminent domain cases – including uniform procedures governing notice, public hearings, and publication of final determinations – will not be in any way threatened or undermined by exercising jurisdiction over Plaintiffs' claims. The *only* question

presented here is whether New York's purportedly "exclusive" *post-determination* judicial review procedure – not its pre-determination agency procedures – embodies a "coherent policy" worthy of *Burford* abstention.[3]

When the inquiry is properly focused on whether New York has any "coherent policy" reason for permitting judicial review of eminent domain determinations to take place in state court – but never in federal court – the conceded lack of centralized review under EDPL § 207 becomes crucial. As discussed in Plaintiffs' opening brief, section 207 does not concentrate review of eminent domain determinations in a single court in a single county. Rather, *all four* of the Departments of the State's Appellate Division are empowered to review eminent domain determinations. *See* EDPL § 207(A). Therefore, unlike in *Burford* or *Alabama*, no one court is acquiring any "specialized knowledge" regarding eminent domain issues, and no aspect of the EDPL serves to limit the possibility of disagreement among the various Departments with respect to the interpretation of state law.

Defendants do not deny, nor could they, that the Supreme Court has *never* affirmed a decision to abstain under *Burford* except where state law provided for concentrated judicial review proceedings *before a single state court in a single county*. Instead, Defendants attempt to draw the sting out of this painful fact by stating – without any support, and in entirely conclusory fashion – that the various Departments of New York's Appellate Division serve as "working partners" to condemning agencies. ESDC Br. at 20; *see also id.* at 3-4. The only case they cite to prop up this specious claim is *Holmes*, but there the Second Circuit expressly held

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[3] It is noteworthy that the voluminous legislative history proffered by the City Defendants and the Forest City Ratner Defendants amply supports the notion that the Legislature thought it important to establish uniform *pre-determination* procedures for agencies to use in *arriving at* condemnation decisions, but the legislative history says nothing significant about the importance of uniform *post-determination* judicial review procedures.

that *Burford* and *Alabama* were special cases precisely because state judicial review was "specially concentrated . . . *in one state court*." 398 F.2d at 267 (emphasis supplied); *see also Bethpage*, 965 F.2d at 1245 (explaining that abstention was warranted in *Burford* and *Alabama* in large part because of the "centralized system of judicial review" that was "concentrated" before "one circuit court," thereby advancing the "important state interest" in a "unified decisionmaker" "acquir[ing] a specialized knowledge").

Indeed, Defendants' bold assertion that every single one of the *fifty-eight* Justices sitting on all four of New York's Appellate Divisions are "working partners" with state agencies in arriving at condemnation decisions is belied by their repeated observation that the EDPL was designed to apply a uniform procedure to the use of eminent domain by *literally thousands* of different state and local government agencies and departments bestowed with the authority to condemn property. *See, e.g.*, Forest City Ratner Br. at 5-6. *Burford* and *Alabama*, in stark contrast, both involved a *single state agency* (the Texas Railroad Commission and the Alabama Public Service Commission, respectively) and a *single reviewing state court* (the District Court of Travis County and the Circuit Court of Montgomery County, respectively). These *singular* courts were true "working partners" with these *singular* agencies. The nearly *five dozen* Appellate Division Justices, who hail from and sit in literally every county in New York, have no particular expertise, and plainly are not "working partners," in eminent domain decisions made by literally *thousands* of disparate state and local condemning authorities. *See International College of Surgeons v. City of Chicago*, 153 F.3d 356, 364-65 (7th Cir. 1998) (*Burford* abstention inappropriate because judges of the Circuit Court of Cook County have no particular expertise, and are not "working partners," in landmark designation proceedings).

The case law is so clear regarding the importance of a concentrated judicial

review procedure before a single court that the Seventh Circuit has expressly held that its existence is an *absolute prerequisite* to *Burford* abstention. *See Property & Casualty Ins. Ltd. v. Central Nat. Ins. Co. of Omaha*, 936 F.2d 319, 323 (7th Cir. 1991); *see also Tucker v. First Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991) (holding that *Burford* abstention is appropriate only in cases where the state has concentrated suits involving the local issue in a particular court); *Nasser v. City of Homewood*, 671 F.2d 432, 440 (11th Cir. 1982) (finding no state interest in uniformity which would be disrupted by federal review of zoning ordinances because state had not concentrated decisionmaking on zoning matters in particular or centralized forum); *Moe v. Brookings County*, 659 F.2d 880, 883 (8th Cir. 1981) (distinguishing case from *Burford* because state had not provided for review in specialized state courts).

To be sure, the Second Circuit has not gone quite so far as to deem the existence of concentrated judicial review before a single state court an absolute prerequisite for abstention. But *Bethpage* made clear, at a minimum, that the absence of such concentrated review "lessens the case for abstention." 965 F.2d at 1245. Accordingly, it is undeniable that the fact that EDPL § 207 allows litigants to bring eminent domain challenges in any branch of the Appellate Division is yet another item on an ever-growing list of reasons why abstention is not appropriate in this case.[4]

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[4] Defendants' contention that refusing to abstain in this case would somehow conflict with the EDPL's provisions for "expeditious judicial review" does not withstand scrutiny. The supposedly "expeditious" review offered by the Appellate Division takes a minimum of six months. *See* 22 NYCRR § 670.18 (setting forth time frame for submitting papers and hearing of appeal). The *Anderson* petition was filed on January 11, 2007. Thereafter, the ESDC moved to expedite the proceeding. The Appellate Division denied the motion on February 22, 2007. Accordingly, the petitioner's brief is not due until May 9, 2007. The ESDC then has up to 30 days to serve its answering brief, and the petitioner then has 10 days to reply. Thereafter, the court will schedule oral argument and, eventually, issue a written decision on the petition. The Second Department of the Appellate Division does not sit for arguments in July or August. It

(continued...)

E. The "Degree of Specificity" of the EDPL Does Not Support Abstention

The Magistrate Judge recommended that this Court abstain under *Burford* for two reasons, the first of which is that the EDPL supposedly "sets forth a highly specific and comprehensive mechanism for condemnees to challenge any aspect of a condemnation." R&R at 35-36. This consideration is derived from the first *Bethpage* factor ("the degree of specificity of the state regulatory scheme"). *See* R&R at 35.

As Plaintiffs explained in their opening brief, there is nothing especially complicated or complex about the EDPL. *See* Pls.' Br. at 31-32; *see also Minnich v. Gargano*, No. 00-CV-7481, 2001 WL 46989, at *5 (S.D.N.Y. Jan. 18, 2001) (refusing to apply *Burford* abstention to a condemnation proceeding and holding that the "degree of specificity" factor "cuts in favor of the plaintiffs" because the EDPL is "not unduly complex"), *rev'd on other grounds*, 261 F.3d 288 (2d Cir. 2001).

Recognizing the significance of the analysis in *Minnich* on this point, Defendants contend that *Minnich* simply "misunderstood the nature of the inquiry." ESDC Br. at 22. Specifically, Defendants argue that *Minnich* incorrectly held that the EDPL is insufficiently complex for *Burford* purposes "because it did not involve complex issues of state law." *Id.*

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[4](...continued)
therefore is likely that the *Anderson* petition will not be decided until September at the earliest, a full nine months after it was filed.

Defendants' supposed newfound need for alacrity is especially unctuous here because Defendants have: (i) argued that Plaintiffs filed this case *prematurely*; (ii) successfully opposed Plaintiffs' motion to expedite discovery; (iii) sought and obtained a stay of discovery pending resolution of their motion to dismiss; and (iv) moved to dismiss based on various justiciability doctrines. All of this, of course, has held this case up for five months now. Had Defendants truly been interested in expeditious review, and were they confident that they did nothing wrong, they would have consented to expedited discovery, or at the very least limited their motion to dismiss to the merits of Plaintiffs' claims, thereby paving the way for a reasonably quick final judgment on the merits.

(quotation omitted). As discussed previously, however, the Supreme Court and Second Circuit case law is abundantly clear that abstention is not warranted unless complex state law questions are implicated – either directly, through the assertion of state law claims, or indirectly, through the assertion of federal claims that are inexorably intertwined with complicated state law issues. *See supra* at 4-9. It therefore was entirely appropriate for *Minnich* to hold, as it did, that the first *Bethpage* factor cut against abstention because the EDPL, while "highly specific," "is not unduly complex when compared to other schemes that have warranted abstention." 2001 WL 46989, at *5. That characterization of the EDPL is undeniably correct. There simply is nothing unusually complicated about it.

Defendants also argue that abstention is warranted because of the sheer "number of statutory provisions involved" in the EDPL and the UDC Act. *See* ESDC Br. at 23-24. But no case supports Defendants' suggestion that "size matters." To the contrary, the issue is the *nature* of the state law provisions at issue and, more to the point, whether federal court jurisdiction will, directly or indirectly, bog the federal court down in a "skein of state law." Regardless of how many provisions, pages, or pounds the EDPL and the UDC Act occupy in the McKinney's reporters, the fact remains that Plaintiffs' claims simply do not implicate complex state law questions – period. The same cannot be said about the Second Circuit cases they cite – *Levy*, *Corcoran*, and *Bethpage*, *see* ESDC Br. at 23-24 – all of which found abstention appropriate because the plaintiffs' ostensibly federal claims *did* implicate complex state law questions.

F. Plaintiffs' Federal Constitutional Rights Outweigh Any State Policy or Interest

Plaintiffs previously explained that because this case presents solely federal

constitutional claims brought pursuant to 42 U.S.C. § 1983, it is a most unlikely candidate for abstention. *See* Pls.' Br. at 1, 33-35. Defendants contend that this proposition "cannot be squared with either Second Circuit or Supreme Court precedent." ESDC Br. at 12-13. To adopt Defendants' position is to conclude that the Second Circuit did not really mean it when it squarely held that actions under 42 U.S.C. § 1983 "involving vital questions of civil rights" are "the least likely candidates for abstention." *See Holmes v. New York City Housing Authority*, 398 F.2d 262, 265-66 (2d Cir. 1968).

Even assuming *arguendo* that there were anything to Defendants' strained contention that *Holmes* applies only to vital questions of civil rights "in a narrower sense" – whatever that means – Defendants nowhere explain how this case, in which Plaintiffs allege violations of their core right under the Bill of Rights (as applied through the Fourteenth Amendment) to be free from state seizure of property for private purposes or without due process or equal protection of the law – could possibly fall outside of Defendants' vague and concocted "narrowing." If this case does not present "vital questions of civil rights," then it is most unclear what kind of case would.

Defendants' other argument – that Plaintiffs' Public Use Clause claim is a particularly good candidate for abstention because of the deference that must be paid to legislative finding of public purpose, *see* ESDC Br. at 27-28 – fares no better. Defendants plainly are putting the cart before the horse. We understand their position that Plaintiffs' Public Use Clause claim fails on its merits, and we strongly believe that this Court should reach the merits and rule on that issue. But unless and until the Court dismisses Plaintiffs' claim on its merits, it would be most inappropriate – and an extreme form of bootstrapping – to abstain from

reaching the merits of Plaintiffs' claim under *Burford* because of the deference that will apply to that claim when it is ultimately adjudicated.

Defendants next argue, consistent with the Magistrate Judge's reasoning, that while cases asserting "facial" constitutional challenges to state regulations or statutes do not present *Burford* abstention concerns, cases that assert "as-applied" constitutional challenges do. *See* ESDC Br. at 28-30. To be sure, a number of cases refusing to abstain under *Burford* have done so because plaintiffs were pursuing claims that a statute or regulation was unconstitutional on its face, thus prompting the courts to observe that no state has the right to administer a scheme that is unconstitutional. *See* R&R at 38 n.29 (citing *Minnich* and *Dittmer*). It does not logically follow, however, that an as-applied constitutional challenge is especially suited to *Burford* abstention. Indeed, many courts considering as-applied constitutional challenges have refused to abstain under *Burford*. *See Hachamovitch*, 159 F.3d at 690-93; *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122, 125 (2d Cir. 1995); *G. & A. Books, Inc. v. Stern*, 604 F. Supp. 898, 906 (S.D.N.Y. 1985), *aff'd*, 770 F.2d 288 (2d Cir. 1985).

G. Eminent Domain Cases Are Not Fertile Ground for *Burford* Abstention

The proposition that eminent domain cases are especially suited to abstention under *Burford* is hardly "unassailable." ESDC. Br. at 24 (citing cases observing that eminent domain ordinarily is an issue of local concern). To the contrary, the Supreme Court squarely held that precisely the opposite is true in *Allegheny*. *See* 360 U.S. at 192-92 ("[T]he fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty."); *see also id.* at 192-96 (discussing approvingly the extensive history of federal court adjudication of eminent domain cases, and concluding that

"[i]t is now settled practice for Federal District Courts to decide state condemnation proceedings").

This is significant not because federal cases concerning issues related to eminent domain can *never* be candidates for abstention – they can be, *see, e.g., Thibodaux*, 360 U.S. at 30 (abstention appropriate in action concerning the novel, never before addressed question whether a particular governmental entity had the power to condemn under state law) – but rather because *Allegheny* held that a federal court reviewing solely the factual question of whether a taking violates the public use requirement does not unduly interfere with state affairs for *Burford* purposes.

Defendants' only attempt to dull the impact of this controlling precedent is to suggest that the litigation in *Allegheny* did not implicate any complex state regulatory scheme (because, at the time, there was no Pennsylvania eminent domain statute). *See* ESDC Br. at 25. But as discussed previously, neither do Plaintiffs' claims implicate any complex state law issues, as their claims both are entirely grounded in federal law and do not require any "discretionary interpretation" of state law.

H. EDPL § 207 Does Not Provide An Adequate Alternative Forum

Defendants agree, as they must, that the existence of an adequate alternative forum is a condition precedent to *Burford* abstention. Defendants insist that the Second Circuit's decision in *Brody v. Vill. of Port Chester*, 434 F.3d 121 (2d Cir. 2005), establishes that EDPL § 207 is adequate for *Burford* purposes. *Brody* establishes no such thing.

To begin with, *Brody* was a due process case, not a *Burford* case. Whether EDPL § 207 meets the minimum requirements of the Due Process Clause is a very different question than whether the availability of a section 207 proceeding requires *Burford* abstention. The

Burford doctrine, it bears repeating, is an "extraordinary and narrow exception" to the fundamental rule that a federal court has a "virtually unflagging" obligation "to adjudicate a controversy properly before it." *NOPSI*, 491 U.S. at 358-59; *Colorado River*, 424 U.S. at 813; *Allegheny*, 360 U.S. at 188. The minimum due process threshold is notably low. The threshold for refusing to hear a claim under *Burford* is notably high. Defendants have cited no case – because none exists – suggesting that *Burford*'s adequate alternative forum requirement is co-terminus with the minimum requirements of the Due Process Clause.

To the contrary, as the Second Circuit made clear in *Bethpage*, the adequacy test for *Burford* purposes is whether "a state court can provide a prompt *and complete* resolution of the dispute." 965 F.2d at 1246 (emphasis supplied) (citing *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 28 (1983)). To the extent the answer to that question is not clear, courts must err against abstaining when there is "any substantial doubt" about whether the state court proceeding would be sufficiently "complete." *Id.*

Here, there is no way that Plaintiffs can meaningfully litigate their claims – let alone "complete[ly]" – without discovery and factfinding. This is, after all, a *pretext* case in which Plaintiffs' theory is that Defendants' proffered rationale for exercising their power of eminent domain *is not their actual rationale*. How, then, could Plaintiffs possibly prove their case without discovery and factfinding? Defendants have put into the record in this case all of the materials that would be part of the record in a section 207 proceeding – materials that they *claim* evidence their public-spirited motivation for proceeding with the Project. One certainly would not expect any of the self-selected and self-serving materials that Defendants have proffered to contradict their story. By definition, Plaintiffs will not have a fair opportunity to present their claims unless they are afforded a meaningful opportunity to develop evidence and

demonstrate to a factfinder that Defendants' true motivations are not what Defendants' records may suggest. The conclusion that Plaintiffs cannot prove pretext without discovery and factfinding is inescapable.[5]

But this Court is not presented with the due process issue because, as discussed above, the *Burford* adequacy inquiry is fundamentally different from – and more searching than – the due process adequacy inquiry. Given the applicable standard – whether a section 207 proceeding would provide a "complete resolution of the dispute," with "any substantial doubt" resolved against abstention, *Bethpage*, 965 F.2d at 1246 – and given the nature of Plaintiffs' claims, and given the unavailability of discovery and trial in a section 207 proceeding, *Burford* abstention plainly is not warranted.

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[5] Viewed this way, Plaintiffs would have a more than colorable claim, were they forced to go to state court, that the lack of discovery available in a section 207 proceeding would violate their due process rights. *Brody* expressly reaffirmed that "due process is flexible and calls for such procedural *protections as the particular situation demands*." 434 F.3d at 134 (emphasis supplied) (quotation omitted). Due process cannot be satisfied where a procedure denies claimants access to information that is not just central to but, by definition, absolutely required in order to prove their claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Magistrate Judge erred in recommending that the Court abstain from hearing Plaintiffs' claims under *Burford*. Defendants' motion to dismiss should be denied.

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