SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners-Appellants,

-against-

NEW YORK DEPARTMENT OF FINANCIAL SERVICES and LINDA LACEWELL, in her official capacity as the Superintendent of the New York Department of Financial Services,

Defendants-Respondents-Respondents.

Docket No. 2018-998

Supreme Court New York County

Index No. 101880/15

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

ERIC R. HAREN, an attorney admitted to the practice of law in the State of New York, who is not a party to this appeal, under penalty of perjury affirms as follows:

1. I am a Special Counsel to the Solicitor General in the Office of Letitia James, Attorney General of the State of New York. I make this affirmation in opposition to the motion for leave to appeal to the Court of Appeals filed by Theo Chino and Chino LTD (petitioners).

2. By unanimous decision and order entered on April 23, 2019, this Court affirmed the dismissal on threshold grounds of petitioners' hybrid article 78 and declaratory judgment action challenging a final regulation,

promulgated by the Department of Financial Services (DFS), governing virtual currency business activity. *See* 23 N.Y.C.R.R. §§ 200.1-200.22 ("the Regulation"). Petitioners now seek leave to appeal to the Court of Appeals. Because this Court's decision turned on the unique facts of this case and implicated no division of appellate authority or legal issue of statewide importance, this Court should deny the motion.

3. In this proceeding, petitioners challenged a final DFS regulation that established a licensing regime for entities engaged in virtual currency business activity, and that further provided important consumer and market protections against the known and developing risks of business activity involving these new financial products and services. In early August 2015, shortly after DFS's promulgation of the Regulation, petitioners submitted an application for a virtual currency license. That application was patently incomplete in numerous material respects: as this Court observed, "the information petitioners provided was so sparse that no determination [on the application] could be made, including whether the business activity [petitioners] were seeking to engage in required licensing under the challenged regulation." *Chino v. New York Dept. of Fin. Servs.*, 171 A.D.3d 610, 610 (1st Dep't 2019).

4. DFS accordingly informed petitioners of the incompleteness of their application and emphatically declined to conclude whether petitioners were subject to the Regulation. As this Court found, petitioners "never sought to provide the missing information." *Id.* Moreover, petitioners never pursued efforts to clarify the agency's views and made no attempt to ascertain whether they could invoke the exceptions to the Regulation or its process for obtaining a conditional license subject to fewer regulatory requirements. Petitioners then inexplicably abandoned the licensing application altogether. And even though the Regulation provided a transitional period for existing business entities to continue operations until the affirmative denial of a license application, *see* 23 N.Y.C.R.R. § 200.21, petitioners made the voluntary decision to shut down their business.

5. Petitioners filed this action (the petition) within months of the Regulation's promulgation, while DFS was still considering petitioners' application. Petitioners raised multiple claims seeking to invalidate the Regulation in its entirety and to enjoin DFS from implementing or enforcing it. (Record on Appeal (R.) R. 48-59.)

6. Supreme Court, New York County (St. George, J.) dismissed

the petition. The court held that article 78 relief was unavailable because DFS had "not reach[ed] a final decision" on petitioners' patently incomplete application but had simply noted that the application was incomplete and returned it without further processing. (R. 20.) And the court further held that petitioners lacked standing to challenge the Regulation because they had "not shown sufficient economic loss" from the Regulation—indeed, they had not even paid the application fee. (R. 23.)

7. On April 23, 2019, this Court unanimously affirmed. This Court agreed with the court below that petitioners could identify no cognizable claim against DFS because, in light of the application's patent deficiencies, "DFS neither approved nor rejected the application." *Chino*, 171 A.D.3d at 610. The Court further held that "[p]etitioners neither exhausted their administrative remedies, nor demonstrated applicability of one of the exceptions to the doctrine of exhaustion," and that "the motion court correctly determined that petitioners lack standing, as they failed to show some actual or threatened injury to a protected interest by reason of the operation of an unconstitutional feature of the regulation at issue." *Id*. Indeed, "any injury suffered by petitioners was self-created,

by abandonment of the licensing process after submission of an incomplete application."[1] *Id.* at 610-11.

8. Leave to appeal should be denied because this case involves no novel issues or issues of public importance, nor any division of appellate authority on an important question of law. 22 N.Y.C.R.R. § 500.22(b)(4). To the contrary, the grounds on which this action was dismissed were fact-bound and unique to petitioners' own circumstances—specifically, petitioners' submission of a patently deficient application and then abandonment of any administrative remedies without any explanation. See *supra* ¶ 2. Petitioners have identified no conflict among the Departments of the Appellate Division on the issues decided by this Court.

9. Moreover, this Court correctly applied settled precedent to resolve this case. Petitioners' inexplicable failures to pursue available administrative avenues before the agency conclusively establish that any

[1] The Court further held that petitioners' expansive request for discovery of a broad swath of internal agency communications, as well as third-party depositions of former DFS Superintendent Benjamin Lawsky and economist and *The New York Times* columnist Paul Krugman, were properly denied as moot.

injury they suffered was self-inflicted, not caused by the Regulation.[2] *Chino*, 171 A.D.3d at 610. It is well established that self-inflicted injury cannot confer standing on a plaintiff. *See New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004) (plaintiff must show harm caused by agency action); *Fallek v. Becker, Achiron and Isserlis*, 246 A.D.2d 394, 395 (1st Dep't 1998) (voluntary expenditures do not confer standing). It is equally well established that some actual or threatened enforcement against a party is required before a party may bring a declaratory-judgment action challenging a statute or regulation. *See Cherry v. Koch*, 126 A.D.2d 346, 350-51 (2d Dep't 1987). Here, no such action or threat has been made against petitioners—to the contrary, DFS expressly stated that it offered no opinion as to whether petitioners' business was subject to the Regulation. (R. 108.) Petitioners have thus

[2] Petitioners' motion incorrectly blurs the requirement to demonstrate actual injury with the exhaustion doctrine and its exceptions. Aff. in Supp. of. Mot. for Leave to Appeal ("Mot.") at 5 ("[a]ppellants have standing to challenge the Regulation *because of the exhaustion exceptions*" (emphasis added)). But, as Justice Gische explained at argument, "you still have to have standing, you have, right, it's not the same as exhausting, it's a different concept." *See* Oral Argument Video 2:20:48 (Mar. 28, 2019) ("Argument Video"), http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive2019_Mar28_13-58-47.

failed to demonstrate actual or threatened enforcement of the Regulation against them.[3]

10. Settled principles also required the dismissal of petitioners' article 78 claims. An article 78 challenge cannot proceed unless: "[f]irst, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Matter of Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 N.Y.3d 30, 34 (2005).

11. Neither of these well-established prerequisites to article 78 review is present here. First, as this Court correctly found, DFS never reached any "definitive position," *id.*, about whether the Regulation applied to petitioners' business—as petitioners "totally concede[d]" at oral argument in response to questioning by Justice Gische.[4] *See* Oral

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[3] Petitioners' attempt to use *federal* prosecutions under *federal* statutes to support an assertion of threatened action by a *state* agency (Mot. at 8-9) only further underscores that *DFS* never threatened any action against petitioners.

[4] Justice Gische explained that, "because your client did not finish the application process, quite frankly you didn't get a determination from DFS. All they said was, we don't have enough information to figure it one way or the other." Petitioners' counsel responded, "I totally concede that,

Argument Video 2:16:38 (Mar. 28, 2019) ("Argument Video"), http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive2019_Mar28_13-58-47. Second, the agency took no action that inflicted actual injury on petitioners—as petitioners agreed at argument still was "absolutely" required for their claims to proceed. Argument Video 2:16:20.[5] Indeed, when asked at argument by Justice Renwick to explain how the Regulation itself—and not petitioners' own decisions—caused them any injury, petitioners' only response was "I know that I'm not going to get this license." *Id.* 2:18:10. But pure speculation cannot substitute for agency action that inflicts actual, concrete injury. *Matter of Association for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 N.Y.3d 1, 9 (2014); *see also Novello*, 2 N.Y.3d at 211.

12. Finally, there remained numerous "steps available," *Matter of Best Payphones, Inc.*, 5 N.Y.3d at 34, to petitioners to prevent or significantly ameliorate any alleged injury. Among them were completing

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yes." Argument Video 2:16:28.

[5] Justice Gische articulated (correctly) that, regardless of any exhaustion exception, petitioners are still required to show actual injury. Argument Video 2:16:20 ("But even under the exceptions, you have to have an actual injury."). Petitioners' counsel responded, "yes, absolutely." *Id.* 2:16:24.

the licensing process; seeking clarification from DFS about whether petitioners' business was covered; operating under the Regulation's transitional provision, 23 N.Y.C.R.R. § 200.21; and seeking a conditional license, a type of license DFS included in the Regulation for small businesses. As a result, DFS caused petitioners no injury that could trigger article 78 review. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 520 (1986); *see also Chino*, 171 A.D.3d at 610-11 (noting that any injury was "self-created, by abandonment of the licensing process after submission of an incomplete application").

13. The Court correctly rejected petitioners' arguments that exceptions to the exhaustion requirement apply here.[6] Petitioners' bare-bones assertions of futility or unconstitutionally compelled disclosure are meritless. *See Matter of Schulz v. State of New York*, 86 N.Y.2d 225, 232 (1995). Petitioners' contention that DFS's actions were preempted by federal law borders on frivolous.[7] And petitioners' contention that DFS

[6] Moreover, petitioners' arguments regarding exhaustion exceptions are unpreserved because they raised none of them below.

[7] Petitioners below asserted preemption based on wholly irrelevant provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, but the provisions in question actually *preserve* state laws and do not purport to preempt any state

acted beyond its statutory authority was without substance and stated in only conclusory terms, such that this Court and the court below appropriately declined to consider that argument. *See Matter of People Care Inc. v. City of N.Y. Human Resources Admin.*, 89 A.D.3d 515, 516 (1st Dep't 2011).

14. This Court should accordingly deny petitioners' motion.

WHEREFORE, for the foregoing reasons, this Court should deny the motion for leave to appeal.

Dated: New York, New York
June 24, 2019

ERIC R. HAREN

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regulations. (*See* R. 184-187 (Respondents' Memorandum of Law in Support of Cross-Motion to Dismiss, explaining such provisions).)