23-7172

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JASON B. NICHOLAS,

Petitioner,

-against-

JUDY A. CAMUSO, Commissioner,
Maine Department of Inland Fisheries
& Wildlife,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Should the Court require Government-imposed restrictions on the 809-year-old personal right to occupational liberty, long-recognized by this Court as protected by the Constitution, be supported with credible evidence submitted by the Government, instead of justified by judges with speculation, unsupported by any evidence?

2. Are the First and Ninth Circuits correct that Burford v Sun Oil Co. 319 US 315 (1943) allows courts to abstain from lawsuits demanding damages, even civil rights lawsuits filed under 42 USC § 1983, or are the Third, Fourth and maybe Second correct that it does not? Are the Third and Fourth Circuits correct that Burford should never apply to First Amendment claims, or is the First Circuit correct that it does?

3. Does this Court's intermediate scrutiny standard of judicial review for Government restrictions on First Amendment rights allow courts to speculate the restrictions are justified--instead of requiring proof they're justified and at least somewhat tailored?

4. Can a district court dismiss a lawsuit on the merits without a proper motion to dismiss on the merits by a defendant or court notice?

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SUMMARY OF ARGUMENT

The Constitution does not authorize the perpetual punishment of one-time criminal offenders. A lawful conviction and sentence of imprisonment extinguishes most of a convict's constitutional rights only while they are serving that sentence. Once that sentence expires, the Constitution does not authorize the continued suspension of that offender's constitutional rights--with one exception. The only Constitutional right the Constitution allows felons to be permanently deprived of is the right to vote. US CONST. AMEND. XIV, § 2. As the Seventh Circuit held in Schultz v City of Cumberland, 228 F3d 831, 852-53 (7th Cir 2000), "'We know of no doctrine that permits the state to deny to a person First Amendment liberties other than the right to vote solely because that person was once convicted of a crime or other offense.'" Id. at 852 (quoting Genusa v Peoria, 619 F2d 1203, 1219 n.40 [7th Cir 1980]).

Yet, in this case, the courts below defied the plain text of the Constitution and upheld Respondent's decision denying Petitioner's application for a Maine fly-fishing guide license because he was convicted of committing a felony in 1990. Because working as a guide is protected by the First Amendment right to free speech/association and the Fourteenth Amendment right to occupational liberty, the license denial is tantamount to a

lifetime ban on Petitioner's exercise of constitutional rights--even though his sentence expired 14 years before.

In order to, in effect, carve out an exception to the Constitution for former felons, the courts below used the knife this Court's New Deal predecessors armed it with.

That blade was originally intended to be used to correct the vast socio-economic inequality that spawned the Depression, by authorizing courts to rubber stamp wide-ranging economic policy regulations that can "reasonably be deemed to promote public welfare." Nebbia v New York, 291 US 502, 537 (1934). "Reasonable relation" review--or, as it is called today, "rational basis"--was designed to effectively immunize broad economic policies from judicial review--granting Government regulators previously unthinkable administrative power, to defeat a previously unthinkable national economic crisis.

To correct the excesses and outliers its lax rationality standard of judicial review could be expected to at least occasionally create, the Court relied on Democracy to work.

"'For protection against abuses by legislatures, the people must resort to the polls, not to the courts.'" Williamson v Lee Optical, Inc., 348 US 483, 488 (1955)(citation omitted).

In effect, the New Deal-era Supreme Court privileged the public interest over the Bill of Rights--as Justice James McReynolds observed in dissent in Nebbia. Id. 291 US at 545-46.

"If now liberty or property may be struck down because of difficult circumstances," he wrote, id., "we must expect that, hereafter, every right must yield to the voice of an impatient majority when stirred by distressful exigency."

This Court proved Justice McReynold's pessimistic prophecy correct.[1] For example, it soon deemed individual occupational licensing decisions comparable to national economic policy. Restrictions on the constitutional right to occupational liberty are judged by the same "rational basis" standard. See, e.g., Schware v Board of Bar Examiners, 253 US 232, 238-39 (1957).

When applied to immense corporations designed and constructed to extract maximum profit without social conscience, "rational basis" review makes sense. It serves the public interest to encourage reasonable Government regulation with a forgiving and easily-satisfied standard of judicial review. But when applied to individual citizens' claims their constitutional rights are violated by a Government refusal to grant them an occupational license, rational basis review makes less sense.

That's because ordinary, everyday people lack the enormous, asocial economic power to create wide-spread public harms large corporations and other financial institutions like banks possess.

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[1]McReynolds has a bad reputation. He made mistakes. It proves Petitioner's point: everybody should have a second chance. Not just the rich, powerful, popular or well-connected.

More to the point, ordinary, everyday people also lack the political power large corporations wield to leverage lawmakers to their will.

And when applied to political minorities and disfavored groups, like former felons, rational basis review becomes a tool of majority oppression--at war with the rights that are supposed to be guaranteed to all by the Bill of Rights.

All this is proved true by the record before the Court.

Almost 100 years after this Court granted Government *carte blanche* to regulate any kind of economic activity at all in response to literally unbearable political pressure ("the switch in time that saved nine"), the federal government together with towns, cities and states across America have enacted--in the name of protecting the public--so many laws and regulations making it so hard for former felons to find good-paying jobs they created an underclass out of the 77 million Americans marked for life with indelible, digitized criminal records.

As that incredibly large number shows, former felons are not generally able or capable of actuating the levers of political power needed to coax lawmakers into reform. By making "rational basis" the measure of the constitutionality of occupational restrictions, the Court trapped 77 million people with criminal records in socio-economic captivity--with laws

like the one challenged in this case. A Nation with 1/4 of its population relegated to second-class status cannot truly thrive.

This is an unheralded national emergency, in Petitioner's view. The Court needs to put America back to work. This case is a good place to start.

There's also a circuit split to settle. Does Burford v Sun Oil Co. 319 US 315 (1943) allow courts to abstain from suits in law demanding damages? It does, say the First and Ninth circuits. Not so say the Third, Fourth and maybe the Second.

On top of this, no court appears to have ever applied Burford abstention to a First Amendment claim before the courts below in this case did. The Third and Fourth Circuits openly question whether Burford should ever apply to First Amendment claims, but the First did not hesitate to apply it here.

While Burford itself is relatively obscure, the importance of settling the conflict is not: its use appears to be growing. See, e.g., Kilroy v Mayhew, 841 FSupp2d 414 (DMe 2012).

Finally, the district court "so far departed from the accepted and usual course of judicial proceedings" that it calls "for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The District Court dismissed Petitioner's claims on the merits, without a proper motion by Respondent and without court notice, in clear violation of the Federal Rules of Civil

Procedure. The court of appeals "sanctioned such a departure by a lower court" by failing to fix it. This court must. Id.

OPINIONS BELOW

The court of appeals' opinion, App. 1, is not published. The district court's opinion, App. 4, is also not published.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered Feb. 20, 2024. A petition for rehearing *en banc* was denied Mar. 21, 2024. App.30. This petition was timely filed Apr. 3, 2024. Petitioner invokes this Court's jurisdiction under 28 USC § 1254(1).

RELEVANT PROVISIONS

The First Amendment guarantees:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment guarantees:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of the challenged Maine law is reproduced in the Appendix. App. 31-35.

STATEMENT OF FACTS

A. 77 Million Americans Exist in Social-Economic Captivity

77 million Americans have criminal records, according to the US Chamber of Commerce.[2] That's one out of four. The Chamber found it causes "extreme rates of unemployment" and loss of $78 to $87 billion in national revenue each year.[3]

"That is a moral outrage," Jamie Dimon, Chairman and chief executive of JPMorgan Chase & Company, said in a *New York Times* Op-Ed in 2021.[4]

"This group is ready to work and deserves a second chance--an opportunity to fill the millions of job openings across the country," Dimon wrote. "Yet our criminal justice system continues to block them from doing so."

As the Wall Street titan's editorial blast suggests, second chances are supposed to be as American as apple pie. Pres. Joe Biden recognized as much when he declared April 2023 Second Chance Month.[5]

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[2]https://www.uschamber.com/workforce/data-deep-dive-the-workforce-impact-of-second-chance-hiring-3

[3]https://www.uschamber.com/assets/archived/images/uscc_business_case_for_cj-second_chance_hiring_report_aug2021.pdf

[4]https://www.nytimes.com/2021/08/04/opinion/clean-slate-incarceration-work.html

[5]https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/31/a-proclamation-on-second-chance-month-2023/

> America has always been a land of second chances, founded on fresh starts, new possibilities, and the belief that every person deserves to be treated with dignity and respect.

However, for people with criminal records, actual second chances have become rare, Pres. Biden recognized.

> I believe in redemption--but for hundreds of thousands of Americans released from State and Federal prisons each year, or the nearly 80 million who have an arrest or conviction record, it is not always easy to come by.
>
> A criminal record can prevent them from landing a steady job, a safe place to live, quality health care, or the chance to go to back school. It can keep them from ever getting a loan to buy a home, start a business, or build a future. It can bar them from voting.
>
> As a result, three-quarters of formerly incarcerated people remain unemployed a year after their release--and joblessness is a top predictor of recidivism. We are not giving people a real second chance.

Like Dimon, the JPMorgan chieftain, the President called for action.

> Our justice system should instead be based on the simple premise that once someone completes their sentence, they should have the chance to earn a living, build a life, and participate in our democracy as fellow citizens.

Biden wasn't the first President to recognize the massive problem America made for itself with laws creating a national underclass of economically disadvantaged citizens totalling more than 1/4 of its total population. Biden's declaration is

reminiscent of Pres. George H. Bush's 2004 State of the Union speech.

> This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work or a home or help, they are much more likely to commit crime and return to prison ....
>
> America is the land of second chances, and when the gates of the prison open, the path ahead should lead to a better life.[6]

B. Petitioner: his Crime, Rehabilitation and Long Record of Achievements as an Officially-Credentialed Journalist, including a Working Trip to the White House in 2012

New York City was America's murder capital in 1990, with 2,605 homicides.[7] Petitioner was 19. He shot a man he believed was armed with a gun and attempting to rob him and three companions. The man, a 26-year-old career criminal known in street parlance as a "stick-up kid," died after running out-of-sight across a small railroad bridge. Petitioner and his friends thought the man hadn't been hit, because he didn't show any sign of being hit, and because he ran away. App. 28, 72.

Convicted of second degree manslaughter, Petitioner was sentenced to 6 1/3 to 19 years. App. 27, 37. In prison, counseling wasn't available to Petitioner because he was never mentally-ill. App. 60. However, de-escalation training was.

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[6] "Text of President Bush's 2004 State of the Union Address," Jan. 20, 2004, *Washington Post*.

[7] https://www.wnyc.org/story/25-years-25-days-1990-nycs-murder-rate-peaks/

Petitioner mastered it. He became a certified de-escalation trainor. He also facilitated the prison's "scared straight" program. Id. In addition, Petitioner

> earned a college degree and concentrated on the study of law. He has 'practiced' his craft as a jailhouse lawyer. On May 25, 1995, while at the Woodbourne Correctional Facility, Nicholas requested that the prison authorities allow him to form a Prisoners' Legal Defense Center (the 'Center'). Its stated goals were to disseminate information to the public and media on prison issues, to lobby the state and federal government in support of those issues, and to provide legal assistance to selected prisoners.

Nicholas v. Miller, 189 F3d 191, 192 (2d Cir 1999). New York State prison officials and Petitioner ultimately agreed to settle that lawsuit, in exchange for Petitioner dropping the Center's proposed paralegal services. Petitioner led the Government Education Organization until his parole in 2003.[8]

On parole, Petitioner lived in New York City and attended New York University. He also worked as an investigator and paralegal for criminal defense lawyer Ron Kuby. Kuby recalls:

> I quickly began to trust Nick both professionally (he could get the job done) and personally, as in, 'I'm stuck in court, can you pick up my 11-year-old daughter at school.' Seldom have I met a person who worked so hard to remake his life in prison. While he looked back with regret at what he had done, he never let it define him.

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[8]https://www.thefreelancenews.org/home/harlem-gangster-turned-activist-who-inspired-criminal-justice-reform-bible-the-new-jim-crow-is-dead

App. 71. Between working and school, at the direction of his parole officer, Petitioner attended counseling with a licensed therapist. App. 60. Parole officials allowed Petitioner to discontinue counseling in 2006. Id.

In addition to "graduating" counseling that year, Petitioner also graduated New York University: with a bachelor's degree, with honors. App. 133-35. He went to work as an independent news photographer, working for the *New York Post, the New York Daily News, the Daily Mail.com* and other news organizations. His news photography was syndicated around the world by the international news agency *Splash News*. He was officially credentialed as a journalist by the NYPD. App. 37, 51. He was also credentialed by the Secret Service to cover the President multiple times. App. 38, 78-128. That process involves a "Secret Service ... security check, including a background FBI investigation." Sherrill v. Knight, 569 F2d 124, 126 (DC Cir 1977).

Petitioner even covered an event inside the White House in Washington, DC, in 2012: President Barack Obama awarding the Presidential Medal of Freedom to Bob Dylan, Toni Morrisson and other American icons. App. 84-85.

Petitioner was released from parole supervision upon the expiration of his sentence in 2009. App. 37.

Starting in 2015, Petitioner worked primarily as an independent reporter. His reporting was published by *The Village Voice, The Daily Beast, Gothamist, NBC Universal* and other print and digital publications. His "beat" included crime and court reporting.[9] He also published in-depth investigative reports. Petitioner's work spurred enactment of new laws raising New York's age of criminal responsibility to 18[10]; the cancellation of a new $1 billion Rikers Island jail[11]; the reform of New York's parole revocation system[12]; and greater access to drug treatment for prisoners.[13]

It also led to the removal, within hours of its publication, of statues of Confederate generals Robert E. Lee and "Stonewall" Jackson from the Hall of Fame of Great Americans.[14] App. 38.

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[9]E.g.,https://gothamist.com/news/nypd-officers-testify-about-tessa-majorss-final-moments-search-suspects-continues

[10]https://www.thedailybeast.com/the-prison-guards-so-scary-they-drove-a-mentally-ill-inmate-to-suicide

[11]https://www.villagevoice.com/2016/11/18/construction-of-new-rikers-jail-is-officially-on-pause/

[12]https://gothamist.com/news/nycs-plan-to-close-rikers-undermined-by-lock-everybody-up-parole-enforcement-sources-say

[13]https://gothamist.com/news/rikers-island-dilemma-stop-taking-addiction-meds-or-stay-behind-bars

[14]https://gothamist.com/news/updated-robert-e-lee-stonewall-jackson-are-part-of-bronx-community-colleges-hall-of-fame

Along the way to making a career as a journalist, Petitioner defeated censorship by Hollywood heavyweight Steven Spielberg[15] and the NYPD. With Joel Kurtzberg of Cahill, Gordon & Reindel, they sued and reformed New York City's official press credentialing process so that it complied with constitutional due process requirements.[16] The National Press Photographers Association awarded Petitioner a Special Citation for "dedication and perseverance in protecting the rights of journalists" in 2021. App. 38, 131. He won the Kathy Acker Award for avant garde journalistic excellence in 2022. App. 129.

C. Petitioner's Application to Respondent for a Maine Guide License, Administrative Proceedings

Like many people inspired to change their lives because of the pandemic, Petitioner decided to become an outdoor guide specializing in fly-fishing for wild trout. Petitioner applied for a Maine guide license Dec. 15, 2022. App. 27, 56. Judy Camuso, Commissioner of the Maine Department of Inland Fisheries & Wildlife, informed Petitioner "your application for a guide license is denied" by letter dated Jan. 13, 2023. App. 56-7, 162. Respondent's reason was because Petitioner had once been convicted of a felony. App. 162. Respondent's letter advised

[15]https://nypost.com/2019/08/21/photog-sues-steven-spielberg-for-blocking-his-view-of-west-side-story-film-set/

[16]https://gothamist.com/news/the-nypds-new-rules-for-journalists-are-actually-a-huge-step-forward

Petitioner he could request a hearing, but "the denial will remain in effect pending the outcome of such hearing." Id.

Petitioner requested a hearing. An in-person hearing was held at the headquarters of the Department of Inland Fisheries & Wildlife in Augusta, Maine on Feb. 17, 2023. Before the hearing, Petitioner submitted 15 exhibits documenting his rehabilitation. App. 51, 77-135. He also submitted the written testimony of 10 character witnesses. App. 64-76. These are reproduced in full in the Appendix. Id. Two representative samples are quoted here:

Charles Eckert was a *Newsday* photojournalist for more than two decades. He met Petitioner on a remote residential block in Queens, New York, 2006. The NYPD's elite Emergency Services Unit was attempting to capture an escaped bull.

> There were three photographers at the cul-de-sac when I arrived. Two were long time colleagues. The other was Jason, whom I had never met. I was generally wary of new photojournalists. But my wariness of Jason changed moments later when the bull turned around and charged straight toward us ....
>
> He quickly identified a safe location the bull couldn't easily access--the porch of a nearby house--and dashed toward it, leading us to safety.
>
> Jason quickly became a valued colleague and friend. From the early days of our friendship, he was upfront and honest about the crime he had committed and the remorse he felt for it. It was clear that he was rehabilitated.

App. 64.

Colin Moynihan is a *New York Times* reporter who also met Petitioner covering breaking news on the streets of New York City in 2006. They've also been friends ever since. Petitioner

> made an important choice years ago to step out of a felonious cycle. Since then he's been resourceful in pursuing work and in finding ways to live that do not go down a criminal path.
>
> If officials in Maine are weighing whether or not Mr. Nicholas is rehabilitated enough to deserve to hold a guide license, then my opinion, as someone who has known him for more than 15 years, is that he is.

App. 66.

The Feb. 17, 2023 hearing was presided over by a panel of three people designated by Respondent Camuso. App. 57. Petitioner testified and one of his 10 character witnesses, Terry McCaffrey, testified live. Two of Petitioner's character witnesses, attorney Kurtzberg and journalist Eckert, testified via video link.

Kurtzburg told the hearing panel, in sum or substance, that if Plaintiff isn't rehabilitated, "no one is."[17]

None of it mattered to Respondent. To her, the only thing that mattered was Petitioner once committed a felony, in 1990. Respondent confirmed her earlier denial of Petitioner's application in a written decision dated Apr. 6, 2023. App. 27.

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[17] The testimony that Kurtzberg and Eckert made live is not in the record. The District Court allowed Respondent to cherry-pick which parts of the record she submitted. Respondent's designee failed to respond to Petitioner's request for a copy of the record after the hearing. App. 58.

She simply recited the facts of Petitioner's crime in detail. Id. Based on those stale 33-year-old facts alone, Camuso concluded, "I do not find that Nicholas has been sufficiently rehabilitated to warrant the public trust. Therefore, the denial of Nicholas' guide license application is affirmed." Id.

Respondent also faulted Petitioner for allegedly not receiving "counseling": "there is no evidence in the record that Nicholas has received counseling." Id. Respondent's designees did not ask Petitioner whether he received counseling at the hearing. App. 59-60. In fact, Petitioner did participate in counseling with a licensed therapist at the direction of the New York State Division of Parole from 2004 until 2006. App. 145.[18]

D. Proceedings in the District Court and Court of Appeals

Petitioner sued Respondent under 42 USC § 1983 on Jan. 9, 2023. App. 36. In his Complaint and subsequent "Affirmation in Opposition to Defendant's Motion to Dismiss and in Further Support of my Motion for a Preliminary Injunction," Petitioner alleged both that (1) Respondent's guide licensing regime and (2) Respondent's decision to deny him a guide license violated

[18] Included in the Petitioner's Appendix is a letter from the licensed clinical social worker who counseled Petitioner from 2004-06, while he was on parole. Her letter was not included in the original record of the hearing because neither Respondent nor the hearing officers indicated counseling was an issue. Petitioner asks the Court to consider it here as an offer of proof, since he is appealing from the dismissal of his § 1983 lawsuit pursuant to Fed.R.Civ.P. 12(b)(6). App. 145.

his Constitutional rights. Specifically, his First Amendment rights to speech/association as well as his Fourteenth Amendment rights to occupational liberty and due process of law. App. 48-9, 56-63. Respondent's decision effectively finding Petitioner is an unrehabilitated, dangerous felon is not supported by any evidence. The licensing regime is unconstitutional on its face because it:

(1) presumptively disqualifies former felons even if, like Petitioner, they are no longer subject to any criminal justice supervision whatsoever;

(2) fails to impose any time limits on officials to issue or deny guide license applications;

(3) gives unbridled discretion to officials responsible for issuing guide licenses, including vague criteria; and

(4) lacks a fundamentally fair hearing process because it places the burden of proof on former felons to prove they're "sufficiently rehabilitated" without defining what that means or how to show it.[19]

Respondent moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1)&(6). App. 146. Notably, Respondent's motion to dismiss did not seek to dismiss Petitioner's First and Fourteenth

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[19] Maine's regulations place the burden of proof on license applicants who have been convicted of a felony to prove they're "sufficiently rehabilitated to warrant the public trust." But Maine's regulations do not define either what "sufficiently rehabilitated to warrant the public trust" means or how an applicant proves they're "sufficiently rehabilitated to warrant the public trust." Like the "good moral character" criteria for a law license at issue in Konigsberg v. State Bar of California, 353 US 252 (1957), "sufficient rehabilitated to warrant the public trust" is unconstitutionally vague. See id. at 263.

Amendment claims on their merits. App. 146-60. The only claim Respondent moved to dismiss on the merits was Petitioner's claim under the Privileges and Immunities Clause. App. 152. Petitioner opposed the arguments made by Respondent in her moving papers. App. 56-63.

The District Court (Woodcock, J.) proceeded directly to the merits of Petitioner's facial challenge to the constitutionality of Respondent's guide licensing regime and dismissed it pursuant to Fed.R.Civ.P. 12(b)(6). App. 12-21. Because guiding depended on protected First Amendment speech, Respondent's restrictions on former felons were subject to intermediate scrutiny but survived it. App. 12-18.

"The licensing of guides," the Court found, "reasonably implicates the state's significant interest in public safety," App. 16 (emphasis added). "The requirement of a background check is an important and relatively non intrusive means to serve that end." Id.

Placing the burden of proof on license applicants to prove they are rehabilitated, even under a vague standard, did not violate due process either. App. 18-20.

Petitioner's as-applied challenge failed, not on the merits, but because whether Petitioner should be licensed was not a question for the federal courts--it was solely a question for Maine's state courts. App. 21-26. Another New Deal-era

decision, Burford v Sun Oil Co., 319 US 315 (1943), empowered it to abstain.

Petitioner appealed to the First Circuit. In addition to arguments of the merits of his causes of action, Petitioner argued the District Court violated the Federal Rules of Procedure and Due Process by dismissing his lawsuit on a legal basis not asserted by Respondent. The panel ignored it. Circuit Judges Kayatta, Gelpi and Montecalvo upheld the District Court's dismissal of Plaintiff's § 1983 lawsuit in a summary, unpublished order dated Feb. 20, 2024. App. 1.

REASONS FOR GRANTING THE WRIT

"Equal justice under law" are the words inscribed on this Court's Vermont marble facade. Maine's unequal, two-track, Apartheid-like administrative regime for judging guide license applications--one for ordinary citizens, one for all former felons--is at war with that command and the Bill of Rights. As noted, the Constitution does not authorize the perpetual punishment of one-time felons--unless they've been sentenced to life. The only Constitutional right the text of the Constitution allows states to permanently deprive convicted felons of is the right to vote. Once a convict's sentence expires, and s/he is free from probation, prison or parole, the Constitution does not authorize the continued suspension of that former felon's constitutional rights.

I. THE INDIVIDUAL RIGHT OF A PERSON TO WORK IS A FUNDAMENTAL CONSTITUTIONAL RIGHT BUT THIS COURT'S CURRENT STANDARD OF JUDICIAL REVIEW, RATIONAL BASIS, FAILS TO PROTECT IT

A. Occupational Liberty is "deeply rooted in this Nation's history and tradition"

The Fourteenth Amendment guarantees "No State shall ... deprive any person of life, liberty, or property, without due process of law." The first step in any due process challenge is determining whether state action deprived a person of "life, liberty, or property." Wilkinson v. Austin, 545 US 209, 221 (2005). "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." Bd. of Regents of State Colls. v. Roth, 408 US 564, 572 (1972). The "broad" meaning of "liberty" encompasses the right to occupational self-determination. In 1885, New York's highest court described this precious freedom thus:

> Liberty, in its broad sense as understood in this country, means the right ... of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.

Matter of Jacobs, 98 NY 98, 106 (1885).

This Court has long agreed.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure.'" Examining

Bd. v Flores de Otero, 426 US 572, 604 (1976)(quoting Truax v Raich, 239 US 33, 41 [1915]). It's both property and liberty. "The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as if not more than it is a property right." Local Loan Co. v. Hunt, 292 US 234, 245 (1934); see, e.g., Greene v McElroy, 360 US 474, 492 & 508 (1959); Konigsberg, 353 US at 273-74; Schware, 253 US at 238-39.

While parts of the Court's Fourteenth Amendment law appear to be in flux, Dobbs v Jackson Women's Health Organization, 597 US 215 (2022), its recognition of constitutionally-protected occupational liberty is not. Occupational liberty has "deep roots in our Nation's history and tradition," as Fifth Circuit judge James C. Ho detailed in his concurring opinion in Golden Glow Tanning Salon, Inc. v City of Columbus, Miss., 52 F4th 974, 981 (5th Cir 2022). For an even more detailed account of the history of the right to occupational liberty, dating back all the way to Magna Carta, see the Petition for Writ of Certiorari filed in Tiwari v. Friedlander, No. 22-42 (US July 12, 2022), cert. denied 2022 WL 17085182 (Nov. 21, 2022).

B. Rational Basis Review Fails to Protect Occupational Liberty

42 USC § 1983 requires federal courts protect Americans' constitutional rights--including the fundamental right to

occupational liberty. But, as Judge Ho detailed in his Golden Glow concurrence, the rational basis review standard this Court requires courts use to judge alleged violations of the right to occupational liberty fails to sufficiently protect it.

"Under the Court's approach to unenumerated rights, we privilege a broad swath of non-economic human activities, while leaving economic activities out in the cold. Scholars have suggested, however, that this may get things backwards." Id. 52 F4th at 982. For example, the "Fourth Amendment secures the people in their houses, papers, and effects, and the Fifth Amendment protects property from taking without just compensation. But it's virtually impossible for most citizens to obtain property without an income." Id. at 984.

Another critic is the Sixth Circuit's chief judge, Jeffrey Sutton. In Tiwari v Friedlander, 26 F4th 355 (6th Cir 2022) he observed:

> many thoughtful commentators, scholars, and judges have shown that the current deferential approach to economic regulations may amount to an overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights .... We appreciate the points and might add a few others.... But any such recalibration of the rational-basis test and any effort to create consistency across individual rights is for the US Supreme Court, not our court, to make.

Id. 26 F4th at 368-369 (citations omitted).

More short-comings of the rational basis test are exemplified by the legal trainwreck in the courts below.

Respondent moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1)&(6). Her motion did not seek to dismiss Petitioner's First and Fourteenth Amendment claims on their merits. App. 146-61. But that didn't stop the District Court from steamrolling directly to the merits of Petitioner's constitutional challenge and dismissing those claims on the merits, without any notice to Petitioner. App. 11-17. On appeal, the First Circuit didn't even bother to address Petitioner's argument that the District Court's dismissal of his claims without notice required reversal. App. 1-3, 30.

Instead, the First Circuit paid lip-service to Petitioner's occupational liberty claim, "Occupational liberty is a legally cognizable category of individual rights," then "found"--without any actual evidence or adversary process whatsoever--that "Maine's interest in screening guides who lead parties through Maine's great outdoors is substantial." App. 2. Based on that "finding," the court below found Respondent's special restrictions on licensing former felons were justified and constitutional because they are "common." Id.

Maine's "version here is not so odious as to be facially unconstitutional as drafted." Id.

As the record shows, this Court's lax rational basis standard of review encourages judges to take short-cuts and, worse, speculate. That's the opposite of how courts are supposed to operate. Courts are supposed to surgically separate fact from fiction under the harsh spotlight of cross-examination and other adversarial processes, before ultimately arriving at reliable truth. Courts aren't supposed to wing it; the judges below did. Rational basis review empowered them to do it.

C. Rational Basis Review Itself is Not Rational: it's a Popularity Contest Empowering the Majority to Deprive Unpopular Minorities of their Civil Rights

It's no accident rational basis review has spawned rules and regulations singling out former felons for substantial and even, as in this case, insurmountable burdens on their occupational liberty. As D.C. Circuit judges Janice R. Brown and David B. Sentelle wrote in their concurring opinion in Hettinga v United States, 677 F3d 471 (DC Cir 2012), the

> practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.

Id. at 482-83.

"The hope of correction at the ballot box is purely illusory." Id. at 483.

Petitioner first encountered the irrationality of so-called rational basis review in 1995. He was 25-years-old and trying to finish earning a bachelor's degree while serving his prison sentence. For years, PELL grant funding had been used in New York to fund prison education programs inside prisons. He'd already earned an associate's degree. 1994's Crime Bill ended those programs by outlawing the grant of PELL grants to prisoners. Not just in New York. Every prisoner, in every prison, everywhere. Petitioner sued under § 1983. Singling out an entire group of otherwise eligible PELL grant recipients based on their status as imprisoned felons, Petitioner argued, was vindictively motivated, invidious discrimination that violated the Equal Protection Clause.

Applying rational basis review, the district court disagreed. Nicholas v Riley, 874 FSupp 10, 13 (DDC 1995). The Court of Appeals affirmed, No. 95-5047, 1995 US App. LEXIS 32542 (DC Cir Oct. 10, 1995), and this Court denied certiorari.

Months later, this Court blessed gay Americans with their first victory, Romer v Evans, 517 US 620 (1996), in their long march to equality. Obergefell v Hodges, 576 US 644 (2015); Lawrence v Texas, 539 US 558 (2003). In Romer, the Court endorsed the exact same argument Petitioner made in Riley to strike down an amendment to Colorado's Constitution that banned special anti-discrimination laws protecting gay folk. This Court

explained that Colorado's across-the-board ban "fails, indeed defies, ... conventional inquiry." 517 US at 632. It

> has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id.

The exact same things could be said about Congress's wholesale ban on the grant of PELL grants to prisoners.

Petitioner lost not because he was wrong on the law. He lost because he was part of a disfavored minority who couldn't convince federal judges they deserved the equal protection of law the plain text of the Constitution promises everyone--including prisoners. Gay Americans, in contrast, were able to overcome centuries of discrimination and convince six judges on this Court it applied to them. The contrasting results prove rational basis review is neither rational nor real judicial review. It's nothing but a popularity contest. Winners enjoy civil rights. Losers languish in an under-class. Deprived the same rights and liberties the majority enjoys.

At least where individual rights are at stake, rational basis review should be relegated to history's dustbin.

II. THE COURTS BELOW WRONGLY ABSTAINED FROM DECIDING PETITIONER'S AS-APPLIED CHALLENGE BY EXPANDING THIS COURT'S VERY NARROW DECISION IN BURFORD V SUN OIL CO. (1943). BURFORD DISMISSED A SUIT "IN EQUITY" BETWEEN THREE OIL COMPANIES FEUDING OVER AN OIL FIELD IN THE MIDDLE OF WORLD WAR II, NOT A CIVIL RIGHTS SUIT "IN LAW" FOR DAMAGES UNDER 42 USC § 1983

Abstention is "abdication." It is "an extraordinary and narrow exception" to a District Court's duty to judge cases properly before it. It's only allowed in "exceptional circumstances." County of Allegheny v. Frank Mashuda Co., 360 US 185, 188-89 (1959). But, once again, a New Deal-era decision of this Court reaches out of the past to nullify constitutional rights in the 21st Century. This time it's abstention under Burford v Sun Oil Co., supra. In 2021, the Eleventh Circuit derided Burford abstention as "long-lost (or nearly lost)." Deal v Tugalo Gas Co., 991 F3d 1313, 1318 (11th Cir 2021). That didn't stop the courts below from resurrecting it to dismiss Petitioner's as-applied challenge. App. 3, 21-26.

No court appears to have ever applied Burford abstention to a First Amendment claim before the courts below did. Felmeister v Office of Attorney Ethics, Div. of New Jersey Administrative, 856 F2d 529, 534 n4 (3d Cir 1988). As the Fourth Circuit has recognized, First Amendment claims are "poor candidates for Burford abstention." Neufeld v Baltimore, 964 F2d 347, 350-51 (4th Cir 1992). The Third Circuit agrees, expressing "serious doubts as to whether Burford abstention ever would be

appropriate where substantial first amendment issues are raised," Felmesiter, 856 F3d at 534.

This Court generally rejects abstention of any kind from First Amendment claims. Zwickler v Koota, 389 US 241, 252 (1967). "In such cases to force the plaintiff who has commenced a federal action to suffer the delay of state-court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." Houston v Hill, 482 US 451, 467-68 (1985)(quoting Zwickler, 389 US at 252); see, e.g., Baggett v. Bullitt, 377 US 360, 378-79 (1964).

To show just how wrong it was for the First Circuit to apply Burford abstention to the constitutional claims in this case, a civil rights lawsuit filed under 42 USC § 1983, Petitioner breaks down the Court's 1943 Burford decision itself.

Burford involved an intensely-technical, three-way legal feud between two oil corporations and the Texas Railroad Commission--which regulates oil drilling in Texas. Burford obtained permits from the Commission to drill for oil. Sun Oil sued to stop Burford from drilling and void the permits. As the Supreme Court itself later characterized the dispute, the "principal issue presented in Burford was the 'reasonableness' of an order issued by the Texas Railroad Commission, which granted 'a permit to drill four oil wells on a small plot of

land in the East Texas oil field.'" Quackenbush v Allstate Ins. Co., 517 US 706, 723 (1996)(citing Burford, 319 US at 317).

The Court viewed "the case as 'a simple proceeding in equity to enjoin the enforcement of the Commissioner's order.'" Id. (emphasis added). "Having thus posed the question in terms of the District Court's discretion, as a court sitting 'in equity,' to decline jurisdiction, we approved the District Court's dismissal of the complaint on a number of grounds that were unique to that case." Id.

Those unique grounds were the Burford court's realistic recognition that regulating oil drilling presented especially complex questions of state law. Drilling is "'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.'" Burford, 319 US at 318 (quoting Railroad Comm'n of Tex. v Rowan & Nichols Oil Co., 310 US 573, 579 [1940]). It also implicated the potentially conflicting interests of several parties, several states, ordinary national interests and especially weighty war-time national-security interests. Burford, 319 US at 318-22. Given these awesome, extraordinarily unique and (war)time-limited complexities, this Court held federal courts may "refuse to enforce or protect legal rights" if it would be "prejudicial to the public interest." Id. at 318.

The Court rationalized its decision in blunt terms that seem incompatible with peace-time Democracy: it furthered

"harmonious relation between state and federal authority without the need of rigorous congressional restrictions ..." Id. 319 US at 333 (emphasis added).

In this case, unlike Burford, Petitioner's lawsuit was filed under 42 USC § 1983. App. 39. § 1983 was signed into law by Pres. Ulysses S. Grant in 1871. § 1983 represents Congress's express judgment the "public interest" requires state actors comply with the federal constitution. The statute is clear. "Every person" acting "under color of state law" who subjects another person to

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

42 USC § 1983 (emphasis added).[20]

When the First Circuit closed the federal courthouse door on Petitioner on the basis of Burford, and refused to consider his as-applied challenge under § 1983, the court committed what this Court has repeatedly called "treason to the Constitution." Federal courts "'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.'" New Orleans Pub. Serv., Inc. v. Council of New

[20] § 1983 allows only one exception: "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity." Respondent has not argued this exception applies to her.

Orleans, 491 US 350, 358 (1989)(quoting Cohens v Virginia, 6 Wheat. 264, 404 [1821]. The First Circuit's application of Burford to abstain from deciding the as-applied part of Petitioner's Section 1983 suit is tantamount to a repeal by judicial fiat of a 153-year-old civil rights law.

For this reason alone, it must be reversed.

Second reason. The courts below relied on the fact Petitioner could have brought a lawsuit in state court to challenge Respondent's denial of his application for a guide license. App. 3, 24-26. But for 63 years this Court has repeatedly held § 1983's "federal remedy is supplementary to" whatever state remedy may exist. Monroe v Pape, 365 US 167, 183 (1961). The state remedy "need not be first sought and refused before the federal one is invoked." Id.

Just five years ago, this Court reminded lower courts that the "'general rule' is that plaintiffs may bring constitutional claims under § 1983 'without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.'" Knick v Twp. of Scott, 588 US__, 139 SCt 2162, 2172-73 (2019)(quoting D. Dana & T. Merrill, Property: Takings 262 [2002]). Otherwise, Congressional intent in enacting § 1983 would be nullified if "assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court," McNeese v Board of Ed. for Community Unit

School Dist. 373 US 668, 672 (1963). In brief, Petitioner's federal right to federal judicial review of state action under § 1983 enjoys supremacy. US CONST., Art. VI, Cl. 2; Marbury v. Madison, 5 US 137, 166 (1803)("But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.").

Third, Petitioner's Complaint demanded damages. App. 50. This Court has squarely held Burford does not apply to damage claims. While Burford might empower district courts "to 'withhold action until the state proceedings have concluded,'" they are not permitted "to dismiss the action altogether." Quackenbush, 517 US at 730-31 (quoting Growe v Emison, 507 US 25, 32 [1993]); see, e.g., Lumbermen's Mut. Casualty Co. v Elbert, 348 US 48, 52-3 & 53 (1954)(declining to apply Burford abstention to a suit "in law" for damages).

Notwithstanding this clear authority, the Circuits are split as to whether Burford authorizes discretionary dismissal of plaintiffs' damage claims. The Ninth just held on Feb. 4 it can, if strict conditions are met, including a state court dedicated to the special, technical state legal issues presented, Blumenkron v. Multnomah Cnty., 91 F4th 1303, 1311 (9th Cir 2024). Both the Third and Fourth Circuits hold it

doesn't under any conditions. Merritts v Richards, 62 F4th 764, 774 (3d Cir 2024)("Consistent with that scope, Burford abstention does not allow a federal court to dismiss claims for damages."); Nivens v. Gilchrist, 444 F3d 237, 248-49 (4th Cir 2006)(same). The Second Circuit kept its options open for future cases, but rejected applying Burford under the facts before it in Tribune Co. v Abiola, 66 F3d 12, 15-8 (2d Cir 1995).

Finally, the courts below relied on what they called "important public policy" considerations. These allegedly outweighed Petitioner's § 1983 right to federal court review of Respondent's decision to deny him an occupational license. App. 3. But in § 1983 lawsuits this Court has clearly held there "is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." Zablocki v Redhail, 434 US 374, 379 (1978); accord Dombrowski v. Pfister, 380 US 479, 490 (1965)("If these allegations state a claim under the Civil Rights Act, 42 USC § 1983, as we believe they do, the interpretation ultimately put on the statutes by the state courts is irrelevant.")(citations omitted).

At bottom, the First Circuit's invocation of "public policy" to dismiss Petitioner's civil rights claim is stealthy, status-based discrimination on Petitioner and all former felons precisely like that struck down by this Court in Romer v Evans,

supra. Correctly translated, the First Circuit said Petitioner's right to federal judicial review under § 1983 is nullified because of his status as a former felon--even though his sentence expired in 2009.

Fortunately, as demonstrated above, revoking Petitioner's § 1983 right to federal judicial review of a state actor's action--because of his status as a former felon or any other reason--was not a call the courts below had the lawful authority to make. That's Congress's call to make and Congress's call only. Congress has not excluded former felons from filing lawsuits under § 1983, and no court can substitute its own "policy" judgment for Congress's on the question of federal court jurisdiction. New Orleans Pub. Serv., supra, 491 US at 358 (quoting Cohens v. Virginia, supra, 6 Wheat. at 404).

III. THE CONSTITUTION DEMANDS HARD EVIDENCE TO UPHOLD RESTRICTIONS OF FIRST AMENDMENT RIGHTS BUT THE COURTS BELOW SUBSTITUTED RANK SPECULATION. THEY CALLED IT INTERMEDIATE SCRUTINY BUT IN TRUTH IT WAS RATIONAL BASIS REVIEW.

Both courts below held Respondent's denial of Petitioner's application for a guide license restricted Petitioner's First Amendment rights. App. 2, 12-13. Both also said they recognized intermediate scrutiny was the correct standard of judicial review. App. 2, 12-13. But both courts did not actually apply intermediate scrutiny. Intermediate scrutiny requires Government restrictions be supported by some proof the particular

restriction being challenged is necessary and at least somewhat tailored. Instead of requiring Respondent to submit this proof, the courts below dismissed Petitioner's § 1983 lawsuit.

Instead of evidence, the courts below relied on nothing but sheer speculation. The Constitution requires more.

The Federal Rules of Civil Procedure require plaintiffs allege two things in their complaints. First, plaintiffs must allege a sound, viable legal theory or basis in law for the relief requested. Second, they must allege enough facts that, if proved, would entitle them to the relief they seek under the asserted legal theory. If plaintiffs do both, they're entitled under the Federal Rules of Civil Procedure to discovery. A defendant may test the legal sufficiency of a plaintiff's pleaded claim before discovery with a motion to dismiss under Rule 12(b)(6), but they cannot test allegations of fact. Neitzke v Williams, 490 US 319, 328 (1989). "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." Id. at 327.

Unless "fanciful," "fantastic," or "delusional," Denton v Hernandez, 504 US 25, 33 (1992), "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson v Pardus, 551 US 89, 94 (2007); Hernandez v Mesa, 582 US 548, 550 (2017); Ashcroft v Iqbal, 556 US 662, 678 (2009). If a

plaintiff's legal theory is viable, the only question is whether they've alleged "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v Twombly, 550 US 544, 570 (2007). The "plausibility standard is not akin to a probability requirement," Iqbal, 556 US at 678.

Indeed, a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable," Twombly, 550 US at 556.

Because Petitioner is representing himself, he "must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" Estelle v Gamble, 429 US 97, 106 (1976)(quoting Haines v Kerner, 404 US 519 [1972]). Even after Twombly, this Court requires pro se submissions be "liberally construed." Erickson, 551 US at 94; Harris v Mills, 572 F.3d 66, 72 (2d Cir 2009). That means Petitioner's lawsuit "'can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id.(quoting Haines, 404 US at 520-521)(emphasis in original)(in turn quoting Conley v Gibson, 355 US 45-46 [1957]).

In any event, Petitioner's allegations satisfy Twombly.

In this case, the courts below accepted Petitioner's First and Fourteenth Amendment legal claims as viable. App. 2 (assuming Maine's guide licensing regime burdens "free speech

and to be subject to intermediate scrutiny."); App. 12 ("Mr. Nicholas is correct ..."). But, instead of allowing Petitioner's § 1983 lawsuit to proceed to discovery, as the Federal Rules require, they short-circuited it. In effect, they steamrolled directly to summary judgment and rejected Petitioner's claims on the merits, denying him the chance to prove his claims with discovery.

Besides violating the Rules, the decision by the courts below to dismiss Petitioner's lawsuit contravened this Court's case law. That's because both the district court and the court of appeals recognized that intermediate scrutiny was the correct standard of review to apply to Petitioner's First Amendment claims. App. 2, 12-13. But under this Court's case law intermediate scrutiny requires Government submit proof to support any claim its restrictions on the exercise of constitutional rights are justified. United States v. Playboy Entm't Group, supra, 529 US at 816-17; Edenfield v Fane, supra, 507 US at 770. "This burden is not satisfied by mere speculation or conjecture," Id. at 770-71. To survive intermediate scrutiny, Government must prove the harms it fears "are real, not merely conjectural," and it must also prove "the regulation will in fact alleviate these harms in a direct and material way." Turner Broad. Sys., Inc. v FCC, 512 US 622, 664 (1994); Fane, 507 US at 770-71.

There is ZERO evidence in the record to support the restriction of Petitioner's First Amendment rights. Respondent did not submit any evidence in the District Court to support the conclusion that either the guide licensing regime itself or her specific decision to deny Petitioner a guide license serves a legitimate State interest "in a direct and material way." Turner, 512 US at 664. The only material item proffered was Respondent's decision denying Petitioner's request for a waiver. App. 27. None of these submissions purport to articulate reasons even claiming to justify Respondent's special restrictions on licensing former felons whose sentences have expired. Even if they did, they don't show, as they must, that "the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." Greater New Orleans Broad. Ass'n v. United States, 527 US 173, 183 (1999).

IV. THE DISTRICT COURT VIOLATED FEDERAL RULES AND PETITIONER'S RIGHT TO DUE PROCESS OF LAW BY DISMISSING HIS LAWSUIT ON THE MERITS WITHOUT A PROPER MOTION TO DISMISS OR NOTICE. THE FIRST CIRCUIT FAILED TO FIX IT SO THIS COURT MUST.

The reason why Respondent didn't submit any actual evidence in the District Court was that even she recognized dismissal of Petitioner's First and Fourteenth Amendment claims on the merits under Fed.R.Civ.P 12(b)(6) was not justified. The only ground Respondent moved to dismiss on the merits was Petitioner's

Privileges and Immunities claim. App. 152. Respondent asserted Petitioner lacked standing, App. 148; that his claims weren't "ripe," App. 151; that his claims were barred by sovereign immunity, App. 153; and that his claims were barred by Burford, App. 155.

At no time did Respondent move on the merits to dismiss Petitioner's First and Fourteenth Amendment claims. App. 146-60.

Nonetheless, as noted, the District Court proceeded directly to the merits and dismissed Petitioner's claims.

On appeal, Respondent did not dispute that she failed to move to dismiss Petitioner's First and Fourteenth Amendment claims on the merits. Yet the Court of Appeals endorsed the District Court's failure to follow the Federal Rules of Civil Procedure and affirmed. The Rules are mandatory. They are not optional. "The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." Nelson v. Adams USA, Inc., 529 US 460, 465 (2000). The Federal Rules of Civil Procedure are called "rules" for a reason. They have to be followed. Full stop. Ríos-Campbell v U.S. Dep't of Commerce, 927 F3d 21, 24-6 (1st Cir 2019). They weren't in this case.

Lastly, the dismissal of Petitioner's First and Fourteenth Amendment claims on the merits, without notice, in violation of the Federal Rules, also violated due process.

Petitioner's causes of action are federally protected property rights. See Logan v. Zimmerman Brush Co., 455 US 422, 428 (1982); Mullane v. Cent. Hanover Bank & Trust Co., 339 US 306, 311-13 (1950). Before courts can legally extinguish any plaintiffs property rights, courts must follow "established adjudicatory procedures." Logan, 455 US at 430. The Due Process Clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Societe Internationale v. Rogers, 357 US 197, 211 (1958); see, e.g., Saunders v. Shaw, 244 US 317 (1917). Failing to give notice denies litigants "'an opportunity to be heard upon their claimed rights'" thereby depriving them of Due Process. Id. at 430-31 (quoting Boddie v. Connecticut, 401 US 371, 380 [1971]).

Dismissing Petitioner's constitutional claims, without proper notice, as the courts below did, violated not just the Federal Rules it violated Petitioner's right to due process too.

CONCLUSION

For all these reasons, the Court should grant this Petition for a Writ of Certiorari to the First Circuit.

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Respectfully Submitted,

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