No. 23-7172

IN THE
SUPREME COURT OF THE UNITED STATES

JB NICHOLAS,

Petitioner,

v.

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

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner JB Nicholas, who was convicted of manslaughter in 1991, applied for a Maine guide license. Maine guides are professionals who are licensed to sell their guiding services to others for hunting, fishing, trapping, and other outdoor and wilderness recreational activities.

A person seeking a Maine guide license must apply to the Commissioner of the Maine Department of Inland Fisheries and Wildlife and satisfy certain qualifications. Me. Rev. Stat. Ann. tit. 12, § 12853 (Supp. 2024); 09-137 C.M.R. c. 24, §§ 24.03, 24.08 (2023). In addition, the Commissioner may refuse to issue a guide license if an applicant "has been convicted of committing a crime in the State or any other jurisdiction that is punishable by imprisonment for a term of one year." Me. Rev. Stat. Ann. tit. 12, § 10908(1)(D) (2021). An applicant whose application is preliminarily denied based on a felony conviction may request an administrative hearing where the applicant may offer evidence in support of the application. Following the hearing, the commissioner may issue a guide license "if the commissioner determines that the applicant has been sufficiently rehabilitated from the conviction to warrant the public trust or the nature of the conviction or the circumstances surrounding it do not warrant disqualification from licensure." *Id.* § 10908(1)(D)(1) (2021). Timely review by Maine courts is available if an applicant is aggrieved by the agency decision. Me. Rev. Stat. Ann. tit. 5, §§ 11001-11002 (2013).

In this case, Petitioner sought to avail himself of that administrative process and, at the same time, filed a federal action that impliedly included an as-applied First Amendment challenge to that state process. The Question Presented is:

Whether the First Circuit erred when it abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), from resolving Petitioner's as-applied challenge.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Judy Camuso, Commissioner of the Maine Department of Inland Fisheries and Wildlife ("Commissioner Camuso"), respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, issued on February 20, 2024, reproduced in the Appendix to the Petition at Pet. App. 1-3. The First Circuit's opinion denying Petitioner's request for rehearing is reproduced in the Appendix at Pet. App. 30. The District Court's opinion is reproduced in the Appendix at Pet. App. 4-26.

STATEMENT OF THE CASE

A. Factual and Legal Background

Maine law requires that "a person who receives any form of remuneration for that person's services in accompanying or assisting a person in the fields or forests or on the waters or ice within the jurisdiction of the State while hunting, fishing, trapping, boating, snowmobiling, using an all-terrain vehicle or camping at a primitive camping area," first obtain a license from the Department of Inland Fisheries and Wildlife ("IF&W"). Me. Rev. Stat. Ann. tit. 12, § 10001(28) (Supp. 2024) (definition of "guide"); *see also* Me. Rev. Stat. Ann. tit. 12, § 12853(1) (Supp. 2024) ("a person may not act as a guide without a valid license under this chapter."). First-time applicants for a guide license must demonstrate their qualifications, including: (1) "a minimum of 100 hours within the past 4 years of field experience"; (2) certification "that the applicant has received training and demonstrated proficiency in" first aid and wilderness medicine; and (3) passing written and oral examinations.

09-137 C.M.R. c. 24, § 24.03 (2023); *see also* 09-137 C.M.R. c. 24, § 24.08 (2023) ("The privilege to conduct a guiding business requires a level of field experience that enables the Guide to lead a person or group safely and legally in the outdoors, with professional conduct and the highest standards of ethics.").

The Commissioner of IF&W may refuse to issue a guide license if "an applicant for a guide license has been convicted of committing a crime in the State or any other jurisdiction that is punishable by imprisonment for a term of one year." Me. Rev. Stat. Ann. tit. 12, § 10908(1)(D (2021)). An applicant whose application for a guide license is denied based on a felony conviction may request an administrative hearing, at which the applicant may offer testimony and other evidence in support of their application. *Id*. Following the hearing, "the commissioner may issue a guide license . . . if the commissioner determines that the applicant has been sufficiently rehabilitated from the conviction to warrant the public trust or the nature of the conviction or the circumstances surrounding it do not warrant disqualification from licensure." Me. Rev. Stat. Ann. tit. 12, § 10908(1)(D)(1) (2021).

If an applicant is aggrieved by the Commissioner's decision, the applicant may seek judicial review of the decision in Maine Superior Court. Me. Rev. Stat. Ann. tit. 5, § 11002 (2013) ("Proceedings for judicial review of final agency action or the failure or refusal of an agency to act shall be instituted by filing a petition for review in the Superior Court . . . ."). In that proceeding, an aggrieved applicant may raise constitutional or other challenges. Me. Rev. Stat. Ann. tit. 5, § 11007 (Supp. 2024). If an applicant is aggrieved by the decision of the Maine Superior Court, the applicant

may appeal, as of right, to the Maine Supreme Judicial Court. Me. Rev. Stat. Ann. tit. 5, § 11008 (2013). If an applicant is aggrieved by the decision of the Maine Supreme Judicial Court, he or she may seek review by this Court by filing a petition for a writ of certiorari.

B. Procedural History

Petitioner JB Nicholas was convicted of second-degree manslaughter in 1991 and sentenced to a maximum of 19 years imprisonment. Pet. App. 37. In December 2022, Petitioner applied for a Maine guide license, Pet. App. 56, which application was denied by Commissioner Camuso on January 13, 2023, Pet. App. 162. Commissioner Camuso's denial referenced Petitioner's felony conviction and informed Petitioner of his right to have an administrative hearing to appeal her denial, pursuant to Me. Rev. Stat. Ann. tit. 12, § 10908(1)(D)(1) (2021). *Id*.

Petitioner requested an administrative hearing, which was held on February 17, 2023. Pet. App. 7. At the hearing, Petitioner was "given an opportunity to present evidence" that he had been rehabilitated, including inviting witnesses to "testif[y] on [his] behalf, both in writing and during the hearing." *Id*. at 7. On April 6, 2023, Commissioner Camuso issued her decision denying Petitioner's application for a guide license. *Id*. at 7-8; *see* Pet. App. 27-29. After making findings based on the evidence presented at the hearing, Commissioner Camuso affirmed the denial of Petitioner's application for a guide license, concluding, "I do not find that Nicholas has been sufficiently rehabilitated to warrant the public trust for the issuance of a Maine guide license." Pet. App. 8; *see* Pet. App. 29.

Petitioner had the right to seek judicial review of Commissioner Camuso's April 6, 2023 decision in Maine Superior Court. Me. Rev. Stat. Ann. tit. 5, § 11002 (2013). In his state-court proceeding, Petitioner could have raised his constitutional or other challenges. *See* Me. Rev. Stat. Ann. tit. 5, § 11007 (Supp. 2024). To date, Petitioner has not filed such an action in state court.

Meanwhile, on January 9, 2023, *before* Commissioner Camuso had taken any action on his application for a guide license, Petitioner filed the complaint in this action. Pet. App. 7, 25. Petitioner's complaint alleged that Maine law governing the licensure of guides for fishing, hiking, and camping violates the United States Constitution because it permits denial of a guide license based on a felony conviction. Pet. App. 48. Petitioner sought a declaration that "Maine's guide licensing regime" was "unconstitutional on its face." Pet. App. 49. He also sought an injunction prohibiting Commissioner Camuso "from enforcing Maine laws Title 12 MRS §§ 12853(1-2), 12857(1)" … until Commissioner Camuso "promulgates regulations that satisfy the Constitution." Pet. App. 49-50. In addition to declaratory and equitable relief, Petitioner sought damages. Pet. App. 50 (seeking damages for "violations of constitutional rights and lost employment.").

On April 10, 2023, Commissioner Camuso moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 146-61. In her motion, Commissioner Camuso argued, *inter alia*, that Petitioner failed to assert a cognizable "facial" claim that Maine's guide licensing laws violated the First Amendment, Pet. App. 150, and that the District Court should abstain pursuant to *Burford v. Sun Oil Co.*, 319 U.S.

315 (1943), from considering Petitioner's arguments regarding her application of Me. Rev. Stat. Ann. tit. 12, § 10908(1)(D)(1) to his request for a Maine guide license. Pet. App. 155-57.

The District Court granted Commissioner Camuso's motion to dismiss and entered judgment in favor of Commissioner Camuso. Pet. App. 4-26. The District Court distinguished between Petitioner's "facial" challenge to Maine's guide licensing statutes and his implied, "as-applied" challenge to the application of those statutes to his application.[1] Pet. App. 21-26. As to Petitioner's facial challenge under the First Amendment, the District Court held that the statutory requirement to submit to a background check and direction to consider any felony convictions were content-neutral and met the appropriate "intermediate scrutiny" requirement that they be "narrowly tailored to serve a significant governmental interest," namely, public safety. Pet. App. 12-18. The District Court further ruled that, to the extent Petitioner pleaded an "as-applied" claim based on Commissioner Camuso's denial of his application for a Maine guide license upon her finding that Petitioner was insufficiently rehabilitated to "warrant the public trust," Me. Rev. Stat. Ann. tit. 12, § 10908(1)(D)(1), the "difficult questions of state law bearing on policy problems of substantial public import," and disruption of Maine's "efforts to establish a coherent policy with respect to matters of substantial public concern," warranted the court's

[1] Because Petitioner filed this civil action before Commissioner Camuso had taken any action on his application for a Maine guide license, he could not, and did not, assert an "as applied" claim in his complaint. Pet. App. 21-22 ("Mr. Nicholas' Complaint does not reference any as-applied claims and it is unclear that he could have pleaded any at the time—given that he filed his Complaint before the Commissioner first denied his application.").

abstention pursuant to *Burford*. Pet. App. 22 (quoting *Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 29 (1st Cir. 2011). The District Court dismissed Petitioner's "facial" challenge under the First Amendment with prejudice and dismissed his "as-applied" challenge without prejudice.[2] Pet. App. 26.

Petitioner appealed the District Court's judgment to the First Circuit, which affirmed. Pet. App. 1-3. Like the District Court, the First Circuit rejected Petitioner's facial challenges to the Maine statutory and regulatory framework, determining that

> Maine's interest in screening guides who lead parties through Maine's great outdoors is substantial. Fingerprinting and criminal background checks for workers with responsibilities touching upon public safety are common.

Pet. App. 2. The First Circuit agreed with the District Court that the challenged Maine statutes and regulations satisfied intermediate scrutiny (as to the First Amendment claim). *Id.*

Addressing the "possibility that [Petitioner]'s allegations could portend an as-applied challenge," the First Circuit also affirmed the District Court's abstention from deciding that claim. The court concluded that:

> [t]he *Burford* doctrine is not expansive, but it is apt to the current situation, in which plaintiff is attempting to substitute federal litigation for the state government's own calibrated system of judicial review of legal claims, expressly including constitutional claims, in relation to its important public policy of vetting the guides who are authorized to lead parties through the wilderness.

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[2] A dismissal without prejudice permits Petitioner to assert his as-applied challenge in a new civil action. *See, e.g., Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 800 n.4 (2023) ("a stay of proceedings or dismissal without prejudice" constitute "a pause" of the underlying litigation). The District Court also dismissed as moot Petitioner's Motion for a Preliminary Injunction, which Commissioner Camuso had opposed. Pet. App. 26.

Pet. App. 3. The First Circuit denied Petitioner's petition for rehearing. Pet. App. 30.

After Petitioner filed a petition for a writ of certiorari, Respondent filed a waiver of her right to respond. The Court requested that Respondent file a response to Question 2 in the Petition.

REASONS FOR DENYING THE PETITION

The First Circuit's decision properly applied this Court's precedents and does not conflict with other circuit courts' decisions regarding *Burford* abstention when a plaintiff asserting a claim pursuant to 42 U.S.C. § 1983 (A) seeks damages in addition to declaratory and injunctive relief and (B) alleges that a defendant violated the plaintiff's rights under the First Amendment by applying a state regulatory framework. Accordingly, certiorari is not warranted.

Moreover, this case is a poor vehicle for reviewing the Question Presented. The contours of Petitioner's implied, as-applied challenge are unclear. That lack of clarity makes this case a poor vehicle through which to elaborate on the scope of *Burford* abstention.

I. The First Circuit's decision properly applied this Court's precedents and does not conflict with other circuit courts' decisions.

A. The First Circuit's decision properly applied this Court's precedents regarding *Burford* abstention.

The general contours of this Court's *Burford* abstention doctrine are well-established:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or

> orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) (*NOPSI*) ("[W]e have distilled the principle now commonly referred to as the "*Burford* doctrine.") (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-27 (1996). Under *NOPSI* and *Quackenbush*, *Burford* abstention is appropriate when a litigant invites a federal district court to bypass a state administrative framework and resolve issues of law and policy that are committed in the first instance to a state agency.

This Court has long recognized that the effect of injunctive relief on a state's ability to establish a coherent policy on a matter of substantial public concern is one of the considerations justifying *Burford* abstention. *NOPSI*, 491 U.S. at 361; *see Colorado River*, 424 U.S. at 814 (abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." (citing *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)). In affirming the District Court's decision to abstain from adjudicating Petitioner's as-applied challenge, the First Circuit recognized that "[t]he *Burford* doctrine is not expansive." Pet. App. 3. The court of appeals nonetheless held that *Burford*:

> is apt to the current situation, in which plaintiff is attempting to substitute federal litigation for the state government's own calibrated system of judicial review of legal claims, expressly including constitutional claims, in relation to its important public policy of vetting the guides who are authorized to lead parties through the wilderness.

Pet. App. 3. In so ruling, the First Circuit relied on two prior decisions of that court, each of which in turn expressly relied on this Court's precedents. Pet. App. 3 (citing *Friends of Children, Inc. v. Matava*, 766 F.2d 35, 36-37 (1st Cir. 1985) (abstention appropriate "when federal adjudication would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'") (quoting *Colorado River,* 424 U.S. at 814)); and *Allstate Ins. Co. v. Sabbagh*, 603 F.2d 228, 232-34 (1st Cir. 1979) (relying on *Burford* and *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341, 348 (1951)).

To adjudicate Petitioner's as-applied challenge, the District Court would need to evaluate whether Commissioner Camuso's decision to deny Petitioner's application for a Maine guide license under the applicable Maine statutes and regulations was incorrect and impermissibly burdened Petitioner's alleged First Amendment right to sell his services as a Maine guide. *Cf. NOPSI*, 491 U.S. 350, 361 ("The present case does *not* involve a state-law claim, nor even an assertion that the federal claims are 'in any way entangled in a skein of state-law that must be untangled before the federal case can proceed[.]'" (quoting *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 674 (1963))) (emphasis added). The First Circuit correctly affirmed the District Court's decision to abstain from adjudicating that as-applied challenge under *Burford* and its progeny.

B. The First Circuit's decision does not conflict with decisions of the Second, Third, and Fourth Circuits with respect to *Burford* abstention.

The circuit court decisions cited by Petitioner, far from illustrating any conflict with the First Circuit's decision in this case, reflect case-specific application of the well-established factors controlling the appropriateness of *Burford* abstention as developed by this Court for over a half-century. *See County of Allegheny*, 360 U.S. at 192; *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30-31 (1959); *Colorado River*, 424 U.S. at 814; *NOPSI*, 491 U.S. at 362-64.

1. The First Circuit's decision does not conflict with decisions of the Second, Third, and Fourth Circuits regarding the applicability of *Burford* abstention to equitable claims brought pursuant to 42 U.S.C. § 1983 that also include a claim for damages.

Petitioner's complaint in this matter seeks equitable relief, including, "[d]eclaring Maine's guide licensing regime unconstitutional on its face," and "[e]njoining [Commissioner Camuso] from enforcing Maine laws . . . which punish and criminalize guiding and hiring a guide until [Commissioner Camuso] promulgates regulations that satisfy the Constitution." Pet. App. 49-50. Commissioner Camuso denied Petitioner's application prior to the filing of her Motion to Dismiss. The District Court therefore addressed Petitioner's argument, asserted in his Opposition to Commissioner Camuso's Motion to Dismiss, that Petitioner's "as applied" claim should not be dismissed. Pet. App. 22. Petitioner's claim for damages is, accordingly, a claim for damages arising out of Commissioner Camuso's allegedly unconstitutional application of Maine's guide licensing standards to his application

for a Maine guide license. Pet. App. 18 (seeking "[c]ompensat[ion] for damages, including violations of constitutional rights and lost employment.").

Petitioner contends that the First and Ninth Circuits "allow" courts to abstain from lawsuits demanding damages while "the Third, Fourth and maybe Second," do not. Pet. i, 5. That contention is incorrect and unsupported by the authority cited by Petitioner. Rather than standing for the proposition that litigants can immunize themselves from *Burford* abstention by adding a retrospective damages claim to a civil action asking a federal court to prospectively enjoin enforcement of state administrative action, the four cases cited by Petitioner from the Ninth, Second, Third, and Fourth Circuits each distinguish between claims that seek prospective equitable relief and those that seek *only* damages for past harms.

Turning first to the Ninth Circuit's decision in *Blumenkron v. Multnomah County*, that court held:

> A plaintiff's incidental insertion of a general claim for damages will not prevent the dismissal of a § 1983 case under *Burford* where the damages sought cannot be awarded without, in effect, first declaring unconstitutional either (1) a state statute establishing an administrative process for resolving a matter committed to the states, or (2) the proceedings or orders of a state administrative agency on a matter committed to the states.

91 F.4th 1303, 1317 (9th Cir. 2024) (citing *Martinez v. Newport Beach City*, 125 F.3d 777, 782 (9th Cir. 1997), *overruled on other grounds by Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001)); *see also Blumenkron*, 91 F.4th at 1308 ("[W]hen the requirements for [*Burford*] abstention are met, a federal court may dismiss damages claims that are only incidental to equitable claims."). The *Blumenkron* court's

reasoning follows this Court's precedent, approving abstention notwithstanding the assertion of a claim for damages where, "Petitioners will not recover damages under § 1983 unless a District Court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights." *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 113 (1981) ("We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity."). The courts of appeals in the Second, Third, and Fourth Circuits have consistently applied the same analysis as the Ninth Circuit did, as shown below.

Petitioner's cited authority from the Second Circuit expressly declined to go beyond a determination that, when a plaintiff's claims sought *only* damages and did not involve a federal court's equity jurisdiction, *Burford* abstention was not appropriate. *Tribune Co. v. Abiola*, 66 F.3d 12, 15 (2d Cir. 1995). Plaintiff in *Tribune Co.* sought damages arising out of allegedly fraudulent workers' compensation claims, enforced by a state workers' compensation board. *Id.* at 13. Plaintiff did not seek declaratory or injunctive relief. *Id.* Recognizing the distinction between equitable claims seeking to enjoin the future action of state government and claims seeking retrospective relief, the Second Circuit in *Tribune Co.* observed that claims seeking retrospective damages *only* did not implicate the interests motivating *Burford* abstention. *Id.* at 17 ("Injunctions are the most intrusive sort of judicial relief, and may directly interfere with 'the proceedings and orders of state administrative

agencies.'" (quoting *NOPSI*, 491 U.S. at 361)). Unlike *Tribune Co. v. Abiola*, this case involves a claim seeking prospective injunctive relief as well as damages.

The Third Circuit's recent decision in *Merritts v. Richards* addressed a claim that the government's compensation to the plaintiff for taking 0.5 acres of land contravened the Fifth Amendment. 62 F.4th 764, 774 (3d Cir. 2024). The District Court had dismissed the plaintiff's complaint with prejudice, relying in part on *Burford* abstention. *Merritts v. Richards*, 2019 WL 176182, at *3-7 (W.D. Pa. Jan. 11, 2019). The District Court had also dismissed the plaintiff's claims for declaratory and injunctive relief because plaintiff was not seeking prospective injunctive relief from an ongoing violation of federal law. *See Merritts*, 62 F.4th at 769.

After affirming the dismissal of plaintiff's purported claims for declaratory and injunctive relief,[3] the Third Circuit in *Merritts* was left with plaintiff's claim for damages: the alleged difference between the compensation that he was paid for the government's taking of his property and the compensation to which he claimed he was entitled under the Fifth Amendment. *Id*. at 772. Addressing plaintiff's sole remaining claim, the Third Circuit in *Merritts* observed that dismissal with prejudice of plaintiff's claim for damages for an alleged violation of the Fifth Amendment was not appropriate where the calculation of "just" compensation did not threaten, "complex state administrative processes [with] undue federal interference." *Id*. at

[3] Concluding that plaintiff's asserted claims for prospective relief, in fact, sought only a "reparative injunction" for monetary relief, the court of appeals agreed with the District Court that those claims should have been dismissed, but the Fourth Circuit held that the dismissal of those claims should have been without prejudice. *Merritts v. Richards*, 62 F.4th at 772 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)).

773 (citing *Quackenbush*, 517 U.S. at 721); *see Quackenbush*, 517 U.S. at 706 (distinguishing between order "that *postpones* adjudication of the dispute" and one that dismisses a complaint with prejudice). The Third Circuit also relied on this Court's caselaw holding that abstention was not appropriate in Fifth Amendment just compensation claims expressly because the plaintiff was *not* seeking equitable relief as part of the lawsuit. *Id.* (citing *County of Allegheny*, 360 U.S. at 190); *see also Quackenbush*, 517 U.S. at 772 ("[Plaintiff] does not request prospective relief."). In other words, the Fourth Circuit rejected *Burford* abstention because it did not view the dispute as implicating concerns with ongoing state action underlying *Burford* and because the plaintiff was seeking damages, not prospective injunctive relief.

Petitioner's authority from the Fourth Circuit, *Nivens v. Gilchrist*, allegedly holding that *Burford* abstention is never appropriate when plaintiffs seek damages, does not even address *Burford* abstention: the circuit court addressed the applicability of *Pullman* and *Younger* abstentions. 444 F.3d 237, 244-249 (4th Cir. 2006). Thus, *Nivens* had nothing to do with *Burford* abstention. *Cf. id.* at 248 ("It was improper, however, to rely on the *Younger* doctrine to dismiss Appellants' damages claims.") and Pet. 33 (citing *Nivens* for the proposition that "*Burford* abstention does not allow a federal court to dismiss claims for damages.").

In short, the First Circuit's decision does not conflict with the decisions of the Second, Third, and Fourth Circuits on the issue of whether *Burford* abstention may apply to claims for equitable relief brought pursuant to 42 U.S.C. § 1983 that also include a claim for damages. The Second and Third Circuit decisions cited by

Petitioner are consistent with the Ninth Circuit's decision (*Blumenkron*), described above, not evidence of a circuit split. In each of those decisions, the circuit court's analysis supports a conclusion that *Burford* abstention may be appropriate where a litigant requests that a federal court grant equitable relief barring the ongoing enforcement of state law and simultaneously seeks damages requiring review of defendants' application of state law. *Tribune Co.*, 66 F.3d at 15; *Merritts*, 62 F.4th at 774.

2. The First Circuit's decision does not conflict with decisions of the Third and Fourth Circuits regarding the applicability of *Burford* abstention to equitable claims brought pursuant to Section 1983 that allege that a defendant violated the plaintiff's rights under the First Amendment by applying a state regulatory framework.

Consistent with this Court's caselaw, the District Court did not abstain from adjudicating Petitioner's facial First Amendment challenge to Maine's guide licensing laws: it, along with the First Circuit, concluded that Petitioner's facial challenge lacked merit. Pet. App. 2, 12-18. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507 (1985) (holding that *facial challenge* to state statute on First Amendment grounds did not implicate concerns justifying *Burford* abstention); *Strasser v. Doorley*, 432 F.2d 567, 568 (1st Cir. 1970) (holding that *Burford* abstention was inappropriate where *facial challenge* to constitutionality of statute meant, "there is no possibility of avoiding adjudication of the constitutional questions that plaintiffs raise.").

The only claim from which the District Court abstained under *Burford* is Petitioner's implied, as-applied Section 1983 challenge under the First Amendment.

Pet. App. 21-26; *see* Pet. App. 3. Petitioner contends that "his right to be a guide is protected First Amendment activity." Pet. App. 10. Petitioner's "as-applied" challenge apparently contends that Commissioner Camuso's decision to deny his application for a Maine guide license under the applicable Maine statutes and regulations was incorrect, and impermissibly burdened his purported First Amendment right to sell his services as a Maine guide. *See* Pet. App. 21-22.

Petitioner's as-applied First Amendment challenge is, accordingly, wholly dependent on his challenge to Commissioner Camuso's substantive application of Maine law in denying his application for a Maine guide license. Because Petitioner claims that Commissioner Camuso's incorrect decision on his application for a license to be a Maine guide incidentally burdened his First Amendment rights, a reviewing court would need to interpret and apply Maine's guide licensing statutes and regulations. The authority that Petitioner cites in support of a purported "circuit split" on this issue does not apply to a claim like this one, that a state government official's incorrect application of state law violated the First Amendment.

As shown below, the two cases on which Petitioner relies for his assertion that "[n]o court appears to have ever applied *Burford* abstention to a First Amendment claim" (other than the First Circuit), Pet. 5, are inapplicable here because they involved facial challenges to state laws and, moreover, did not hold that *Burford* categorically does not apply to First Amendment claim–they were merely case-specific applications of *Burford*.

In *Felmeister v. Office of Attorney Ethics, A Division of the New Jersey Administrative Office of the Courts*, the Third Circuit addressed a New Jersey attorney's claim that restrictions on the content of attorney advertising imposed by New Jersey's Rules of Professional Conduct violated his rights under the First Amendment. 856 F.2d 529 (3d Cir. 1988). The Third Circuit in *Felmeister* expressly did not decide whether *Burford* abstention is ever appropriate when a plaintiff has asserted a First Amendment claim, instead ruling that the challenged regulation did not "present the sort of complex, technical, regulatory scheme to which the *Burford* abstention doctrine usually is applied." *Id*. at 534 ("Although we have serious doubts as to whether *Burford* abstention ever would be appropriate where substantial first amendment issues are raised, *we need not address this question* because, in our view, abstention is not implicated by the regulatory scheme at issue in this case.") (emphasis added). Thus, the Third Circuit in *Felmeister* did not rule that *Burford* abstention may not apply to a First Amendment claim – it concluded that New Jersey's regulation of attorney advertising was not a complex regulatory scheme implicating the interests underlying *Burford*. *Id*.

Similarly, the Fourth Circuit's ruling in *Neufeld v. Baltimore* arose from a property owner's claim that local ordinances restricting the size of his satellite dish violated, *inter alia*, his First Amendment rights and was preempted by FCC regulations. 964 F.2d 347, 350-51 (4th Cir. 1992). The Fourth Circuit based its conclusion that *Burford* abstention was not appropriate on the fact that plaintiff "*did not* attack the substantive basis of the Board [of Municipal and Zoning Appeals']

denial of his conditional use permit, but rather asserted that the application of the zoning ordinance as a whole was preempted by a FCC regulation." *Id*. at 350 (emphasis added). The court determined that plaintiff's First Amendment claim was likewise independent from, and did not require interpretation or application of, local land use laws. *Id*. at 351 ("This case, however, involves local land use issues only in a peripheral sense. And, to the extent that land use issues are involved, they are not presented in the context of difficult interpretations of state law of peculiar concern to Baltimore City."). Thus, the Fourth Circuit in *Neufeld* did not rule that *Burford* abstention may not apply to a First Amendment claim.

Petitioner's argument that there is a circuit split on the applicability of *Burford* abstention to any claim asserting a violation of the First Amendment is his unsupported gloss on decisions from the Third and Fourth Circuits applying this Court's test in *NOPSI*, 491 U.S. at 361: does consideration of the underlying claim require a federal court to "interfere with the proceedings or orders of state administrative agencies," by evaluating difficult questions of state law affecting broad public policies and/or "disrupti[ng] [] state efforts to establish a coherent policy with respect to a matter of substantial public concern."

In sum, Petitioner did not show that the First Circuit's decision here conflicts with other circuits' decisions as to the applicability of *Burford* abstention to "as-applied" First Amendment challenges.

II. This case is a poor vehicle for reviewing the Question Presented.

Petitioner's as-applied First Amendment challenge is only implied: it was not included in Petitioner's complaint nor described with any particularity in his filings below. Pet. App. 21-22 ("Mr. Nicholas' Complaint does not reference any as-applied claims and it is unclear that he could have pleaded any at the time—given that he filed his Complaint before the Commissioner first denied his application."). Accordingly, the contours of his as-applied challenge are, at best, unclear and appear to merely challenge the application of an allegedly facially unconstitutional state statute to his application for a Maine guide license. *See* Pet. App. 48 (asserting cause of action that "Maine's guide licensing regime, as alleged above and incorporated herein by reference, violated Plaintiff's First and Fourteenth Amendment rights to freedom of speech and to pursue an occupation of his own free choice . . . ."). An as-applied challenge is a challenge to the statute's application only to the party before the court. *See City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 758-59 (1988). Petitioner failed to allege any particularized challenge to Commissioner Camuso's application of Maine's guide licensing requirements to his application. The lack of clarity makes this case a poor vehicle through which to elaborate on the scope of *Burford* abstention.

CONCLUSION

For the reasons stated above, the Petition should be denied.

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Respectfully submitted,

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