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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Court's review of the First Circuit's *Burford* abstention ruling is warranted because: (i) the decision below widens a circuit split about when, if at all, *Burford* allows dismissal of damages claims in cases seeking both discretionary relief and damages; (ii) the First Circuit's interpretation of *Burford* conflicts directly with this Court's decisions forbidding broad application of the doctrine; and (iii) the First Circuit's failure to consider the strong federal interests posed by Petitioner's First Amendment claim cannot be reconciled with this Court's decisions recognizing that abstention of any kind is particularly inappropriate in First Amendment cases. Respondent fails to respond convincingly to these three arguments, and her claim that this case is not an appropriate vehicle to consider these issues lacks merit.

ARGUMENT

I. The First Circuit's Dismissal Of Petitioner's Damages Claim Deepens A Pre-Existing Circuit Split.

The Petition explains that the First Circuit's dismissal of Petitioner's as-applied First Amendment challenge—which prayed for damages in the form of lost wages, along with injunctive and declaratory relief—exacerbated a pre-existing circuit split about the interpretation of this Court's decision in *Quackenbush* v. *Allstate Ins. Co.*, which reversed dismissal of an action solely seeking damages on *Burford* grounds, because "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." 517 U.S. 706, 731 (1996).

Since then, the courts of appeal have struggled with—and reached conflicting conclusions about—how to apply *Quackenbush*'s holding to cases seeking ***both*** damages and equitable or otherwise discretionary relief. The First Circuit's decision in this case adds to the confusion and

directly contradicts *Quackenbush*'s holding that dismissal is appropriate in *Burford* cases "only where the relief sought is equitable or otherwise discretionary." *Id.*

The Ninth Circuit holds that *Quackenbush* sometimes, but not always, permits dismissal of damages claims under *Burford*—specifically, if they are "only incidental to equitable claims," Opp. at 11 (quoting *Blumenkron* v. *Multnomah County*, 91 F.4th 1303, 1308 (9th Cir. 2024)), meaning that the damages "cannot be awarded" without first declaring unconstitutional a state statute establishing an administrative process or a proceeding or order from an administrative agency "on a matter committed to the states." *Blumenkron*, 91 F.4th at 1317. In contrast, in *Merritts* v. *Richards*, the Third Circuit interpreted *Quackenbush* to proscribe dismissal of damage claims under *Burford* under any circumstances. 62 F.4th 764 (3rd Cir. 2023). The Third Circuit held that "*Burford* abstention does not allow a federal court to dismiss claims for damages," because "when a federal plaintiff prays for damages, the equitable discretion upon which abstention rests does not permit dismissal." *Id.* at 773. Here, the First Circuit took yet a third approach by dismissing a claim for damages under *Burford* without even considering the limitations imposed by *Quackenbush.* App. A, at 3.

Respondent attempts to reconcile these cases by arguing that all of the courts of appeal have applied the same standard in determining whether *Burford* may apply to Section 1983 claims seeking both damages and equitable relief—namely, that dismissal is appropriate as long as the equitable relief sought bars "the ongoing enforcement of state law" and the damages sought "requir[e] review of defendants' application of state law." Opp. 15. That, however, is neither true nor a standard that any of the courts of appeal have articulated. It is also entirely inconsistent with the Third Circuit's holding in *Merritts*.

Respondent's suggestion that *Merritts* dismissed damages claims under *Burford* only because the equitable relief sought was not prospective is incorrect. While *Merritts* did discuss the fact that the relief sought in that case was not prospective, it did so only in the context of analyzing whether *Younger* abstention was appropriate, not whether *Burford* abstention was. 62 F.4th at 772. And, in discussing *Burford* abstention, *Merritts'* language was unequivocally at odds with Respondent's reading of the case, in that the court plainly held, without qualification, that under *Quackenbush*, "*Burford* abstention does not allow a federal court to dismiss claims for damages" because "when a federal plaintiff prays for damages, the equitable discretion upon which abstention rests does not permit dismissal." *Id.* at 773; *see also id.* at 773–74 ("[b]ecause Merritt's §1983 claims…seek damages, they cannot be dismissed on abstention grounds."). The Third Circuit said nothing about dismissal being appropriate only because the equitable relief sought was not prospective.

Respondent's attempt to explain away the circuit split on the ground that the Third Circuit's dismissal of the plaintiff's claims for declaratory and injunctive relief on unrelated grounds somehow means that "plaintiff was *not* seeking equitable relief as part of the lawsuit," Opp. at 14, fares no better. This is neither accurate nor consistent with the Third Circuit's actual *Burford* holding. *See Merritts*, 62 F.4th at 773. The plaintiff in *Merritts* sought ***both*** damages and injunctive and declaratory relief. *Id.* at 772–73. Just because the court disposed of the discretionary claims on non-*Burford* grounds does not mean that the plaintiff was not seeking equitable relief as part of the lawsuit. More importantly, this misses the point. Even with the plaintiff's declaratory and injunctive relief claims dismissed, the court could not have awarded damages on plaintiff's § 1983 claims without first determining (even if not separately declaring) that the plaintiff's constitutional rights under the Takings Clause had been violated. Given that,

the holding in *Merritts* is irreconcilable with the Ninth Circuit's approach in *Blumenkron*, which would deem the § 1983 damages claims in *Merritts* "incidental"—and thus dismissible—under its test for this very reason.

Respondent's attempt to reconcile the case law through this contorted reading of *Merritts* fails, not only because it is inconsistent with the Third Circuit's holding and analysis, but also because it is inconsistent with holdings of the Fourth, Fifth, and Sixth Circuits, each of which has read *Quackenbush* as expressly prohibiting dismissal of damages claims on *Burford* grounds in cases where both damages and prospective discretionary relief are sought. In *Johnson* v. *Collins Entertainment Co., Inc.*, for example, the Fourth Circuit explained that *Quackenbush* "held that *Burford* can support only a stay, and not the outright dismissal or remand, of a damages action." 199 F.3d 710, 727 (4th Cir. 1999). That distinction "will sometimes require that the damages portion of an action remain in federal court while claims for equitable relief are dismissed entirely." *Id.* Similarly, in *Gray* v. *Bush*, the Sixth Circuit held: "In the context of a complaint seeking 'both equitable [relief] and money damages' . . . 'a federal court's discretion to abstain from exercising jurisdiction does not extend so far as to permit a court to dismiss or remand, as opposed to stay, an action at law.'" 628 F.3d 779, 785 (6th Cir. 2010). Likewise, in *In re Entrust Energy, Inc.*, the Fifth Circuit held that "where a cause of action seeks damages, a federal court may not dismiss the claim and may only 'postpose adjudication of a damages action pending the resolution by the state courts of a disputed question of state law.'" 101 F.4th 369, 378, 394–95 (5th Cir. 2024). In all three of these cases, the discretionary relief sought was prospective, but the courts still declined to dismiss the damages claims, further calling into doubt Respondent's effort to explain away the circuit conflict on this issue.

This Court should bring clarity to this confused area of law by granting the petition.

II. The First Circuit's Application Of *Burford* To Petitioner's First Amendment As-Applied Challenge Is Contrary To This Court's *Burford* Jurisprudence.

Certiorari is also warranted because the First Circuit's decision cannot be reconciled with this Court's repeated holdings that *Burford* abstention represents an "extraordinary and narrow exception" to federal courts' "virtually unflagging" duty to adjudicate cases within their jurisdiction. *See, e.g.*, *Quackenbush*, 517 U.S. at 728; *New Orleans Public Services, Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 359 (1989) ("*NOPSI*"). Here, the First Circuit applied *Burford* to a constitutional challenge to an administrative ruling that raises none of the concerns *Burford* was intended to address.

This Court has repeatedly emphasized that *Burford* applies only in "extraordinary circumstances," *Quackenbush*, 517 U.S. at 726, i.e., only if a case "presents '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 if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Id.* at 726–27. As this Court made clear in *NOPSI*, "[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." 491 U.S. at 362.

The First Circuit's rationale for applying *Burford* to Petitioner's as-applied First Amendment claims consisted of a single sentence that did nothing more than parrot this standard without any real explanation as to how Petitioner's as-applied First Amendment challenge satisfied it. Specifically, the First Circuit held:

> The *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.

App. A-3.

But Petitioner's as-applied First Amendment challenge does nothing to disrupt any state effort to establish the type of coherent policy with respect to a matter of substantial public concern that is a prerequisite to applying *Burford*. Unlike *Burford* itself, the record here is devoid of any evidence that even suggests that Maine has a need for a "coherent policy" in issuing guide licenses or that federal court challenges to the constitutionality of the licensing rules would threaten to disrupt Maine's efforts to ensure consistency in this area of law, any more than similar state court challenges would. Respondent's attempt to argue otherwise only demonstrates how this case fails to fall within the narrow circumstances required by this Court to trigger *Burford*.

That is because Respondent's as-applied First Amendment challenge is not inextricably intertwined with questions of state administrative law that require consistency—as was the case in *Burford* itself—and is thus not the type of constitutional challenge to a state administrative proceeding to which *Burford* applies. *NOPSI*, 491 U.S. at 362. In defending the court of appeal's holding, Respondent argues that "[t]o 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" (Opp. at 9), and thus "Petitioner's as-applied First Amendment challenge is . . . wholly dependent on his challenge to Commissioner Camuso's substantive application of Maine law in denying his application for a Maine guide license" (*id.* at 16). Not so.

In fact, the opposite is true. Rather than requiring the district court to revisit whether Respondent's denial of Petitioner's application was wrong under Maine law or to otherwise interpret or apply Maine guide licensing statutes and regulations, the adjudication of Petitioner's

as-applied First Amendment Challenge would instead focus on whether Respondent's decision to deny Petitioner's guide license violated his First Amendment rights, ***even if Maine applied Maine law correctly***. Specifically, the as-applied challenge asks:

- Does Maine's denial of a guide license based on Petitioner's conviction for a crime committed over 33 years ago violate Petitioner's First Amendment rights because there are numerous less-speech restrictive alternatives for protecting public safety, such as including a time cut-off for convictions?
- Does placing the burden on Petitioner of affirmatively establishing rehabilitation from a conviction for a crime committed over 33 years ago violate Petitioner's First Amendment rights?
- Does it violate Petitioner's First Amendment rights to place the burden on him to establish that the nature of a conviction for a crime committed over 33 years ago does not warrant Petitioner's disqualification from licensure?

Each of these questions are federal constitutional questions, not questions of state law. They ask whether Respondent's denial of Petitioner's application for a Maine guide license violated Petitioner's First Amendment rights because (1) they limited Petitioner's First Amendments rights without directly or materially furthering a substantial state interest or (2) there are a substantial number of less speech-restrictive alternatives to Maine's approach that would adequately further Maine's interest in public safety. *See Billups* v. *City of Charleston, South Carolina*, 961 F.3d 673 (4th Cir. 2020); *Edwards* v. *District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). Under *NOPSI*, *Burford* abstention is inappropriate because the claim is ***not*** "in any way entangled in a skein of state law that must be untangled before the federal case can proceed[.]"

NOPSI, 491 U.S. at 361. Rather, the federal claim asks if the state administrative decision violates the federal constitution, even if Respondent interpreted Maine law correctly.

Neither the First Circuit's decision, nor Respondent's opposition, offers any attempt to explain how the adjudication of these federal constitutional questions in federal court could disrupt any effort by Maine to establish a "coherent policy" with respect to a matter of substantial public concern or how or why having a state court hear Petitioner's as-applied challenge would be any less "disruptive" of Maine's efforts in this regard. Nor could they. Not only is Maine's licensing regime a far cry from the complex administrative processes at issue in *Burford* and its progeny, but Petitioner's remaining as-applied First Amendment challenge simply does not threaten the sort of disruption contemplated by the *Burford* doctrine. *Zablocki* v. *Redhail*, 434 U.S. 374, 380 n. 5 (1978) ("There is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy").

Respondent's brief also fails to contravene the case law cited in the Petition concerning the particularly strong federal interest in the federal adjudication of claims brought under §1983. *See* Pet. at 31–33. Again, the First Circuit's failure even to attempt to weigh Petitioner's and the public's interest in upholding the Constitution against any supposed local interest supporting abstention is inconsistent with this Court's precedents. *See Quackenbush*, 517 U.S. at 728 (Courts must balance the "strong federal interests in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests," and "[t]his balance only rarely favors abstention.").

III. The First Circuit's Application Of *Burford* To First Amendment Claims Cannot Be Reconciled With This Court's Decisions.

In his petition, Petitioner argued that the First Circuit's application of *Burford* abstention to a First Amendment claim was a novel extension of the doctrine that was inconsistent with this

Court's general rejection of abstention of any kind from First Amendment claims. Pet. at 27. Respondent fails to identify a single decision where a court abstained from deciding a First Amendment claim under *Burford*, as the First Circuit did here, but suggests that any bar to applying *Burford* in First Amendment cases applies only in connection with facial First Amendment challenges. Opp. at 16. That distinction, however, makes no sense, as the rationale for not applying *Burford* in First Amendment cases—namely, that the delays caused by deferring to state court proceedings can chill the very speech that the action is brought to protect—applies equally to facial and as-applied challenges. *See City of Houston*, *Tex.* v. *Hill*, 482 U.S. 451, 467-68 (1987) ("[T]o 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." (quoting *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967))). In light of this Court's holdings, other courts of appeal have expressed "serious doubts as to whether *Burford* abstention would ever be appropriate where substantial First Amendment issues are raised." *Felmeister* v. *Office of Attorney Ethics, Div. of New Jersey Administrative Office of the Courts*, 856 F.2d 529, 534 (3d Cir. 1988).

This Court should grant certiorari here because the First Circuit's decision, which afforded absolutely no weight to the compelling federal interests implicated by Petitioner's First Amendment claim, contradicts this Court's precedents which, as the Sixth Circuit has recognized, at a minimum call for "careful scrutiny to the use of abstention when the First Amendment is involved," given the potential chilling effect that may result from abstention itself. *Garvin* v. *Rosenau*, 455 F.2d 233, 239 (6th Cir. 1972); *Felmeister*, 856 F.2d at 534. That is particularly true where, as here, Petitioner argued below that Maine's courts were subject to "extraordinary delays" that would make dismissal of his as-applied First Amendment claim here inappropriate. *See* June

26, 2023 Plaintiff-Appellant's Reply Brief, *JB Nicholas* v. *Camuso*, 23-1435 (1st Cir.), Doc. 00118023758, at 24.

IV. This Case Is An Appropriate Vehicle For Reviewing The Question Presented.

Respondent argues that this case is a poor vehicle because the district court's abstention ruling was targeted at a claim that was "only implied" and "not included in Petitioner's complaint nor described with any particularity in his filings below." Opp. at 19. This argument is inconsistent with the record below.

Here, it was Respondent that first placed the state administrative decision into the record and urged the district court to rule on the merits of Petitioner's as-applied First Amendment challenge to it, not Petitioner. *See* April 10, 2023 Defendant's Motion to Dismiss, *JB Nicholas* v. *Camuso*, 1:23-cv-00015-JAW (D. ME), ECF 10, at 10 ("To the extent Plaintiff's action is cognizable, it is a challenge to a licensing decision."). As a result, the parties fully briefed the merits of the as-applied claim, *see* April 13, 2023, Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss & in Further Support of Plaintiffs' Motion for a Preliminary Injunction, *JB Nicholas* v. *Camuso*, 1:23-cv-00015-JAW (D. ME), ECF 12, at 3-10; April 27, 2023, Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, *JB Nicholas* v. *Camuso*, 1:23-cv-00015-JAW (D. ME), ECF 16, at 2-4, and the District Court and the First Circuit both had no trouble analyzing and ruling on the as-applied challenge on the record presented below. *See* App. A, at 1-3, 21-26.

The contours of Petitioner's as-applied challenge are clear, have been fully briefed at all stages of this litigation, and have been extensively analyzed by both the district court and court of appeals. Petitioner brought a constitutional challenge, seeking damages in the form of lost wages, to a statute and administrative ruling that he claims violates his First Amendment rights by impermissibly placing the burden on him, an individual with a conviction based on a crime

committed 33 years ago, to prove that he has been rehabilitated. If there were any question about the scope of his *pro se* as-applied challenge, Petitioner must be given the benefit of the doubt as a *pro se* litigant. *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,' . . . and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.]'") (citation omitted). This case thus presents an appropriate vehicle for this Court to clarify this extraordinarily confusing area of federal law.

CONCLUSION

For the reasons state above, Petitioner respectfully requests that this Court issue a writ of certiorari.

Dated: September 13, 2024

Respectfully submitted,

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