No. 20-329

IN THE

SUPREME COURT of the UNITED STATES

JULIE M. SOWELL and GEORGE E. MENDILLO,

Petitioners,

v.

TINLEY, RENEHAN & DOST, LLP, ET AL.,

Respondents,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR REHEARING

John Gordon Manning
20 Munson Road
Middlebury, CT 06762

George Eli Mendillo
Counsel of Record
190 Carmel Hill Road
Woodbury, CT 06798
(203) 263-2910
gmendillo@aol.com

Counsel for Petitioners

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PETITION FOR REHEARING

Petitioner Julie M. Sowell respectfully requests rehearing of this Court's order dated November 2, 2020, denying the petition for a writ of certiorari in this case. Specifically, Sowell requests that the Court grant rehearing, grant certiorari, vacate the judgment below *against her and in favor of the respondents Jeffrey J. Tinley and John P. Majewski*, and remand for further proceedings (a "GVR order"). Sowell does not seek rehearing of the Court's denial of certiorari with respect to the judicial respondents.

A. Questions presented in the petition for certiorari:

1. Does the *Rooker-Feldman* doctrine apply to interlocutory orders that are entered in state court proceedings that end after the federal court action is commenced?

2. Does the *Rooker-Feldman* doctrine bar district court jurisdiction over claims petitioners did not have a full and fair opportunity to litigate in the state courts?

3. Is a lawyer who is authorized by the State to regulate the speech of an adverse party a state actor under 42 U.S.C. § 1983?

Rehearing is requested because on February 26, 2020, the United States Court of Appeals for the Second Circuit held that the

Rooker-Feldman doctrine does not bar federal district court jurisdiction where the state court decision did not pass on the merits of the case. *Edwards v. McMillem Capital, LLC,* 952 F.3d 32 (2d Cir. February 26, 2020). The *Edwards* decision had not been released when Sowell filed her reply brief in the Second Circuit Court of Appeals on January 23, 2020. There is reason to believe that the panel did not consider the *Edwards* decision when it issued its summary order. The Court of Appeals concluded without analysis that the *Rooker-Feldman* doctrine barred Sowell's damages claim against Tinley and Majewski notwithstanding the undisputed fact that Sowell was never a party to any state court action in which Tinley and Majewski were parties and notwithstanding the fact that there is no state court judgment determining the merits of Sowell's damages claim against Tinley and Majewski. *Edwards* makes clear that in the absence of a state court judgment on the merits of a claim, *Rooker-Feldman* doctrine is inapplicable because a federal plaintiff is not a state court loser with respect to the claim.

The Court of Appeals conclusion that Sowell's damages claim against Tinley and Majewski is barred by the *Rooker-Feldman* doctrine did not address the fact that the claim had not been determined on the merits in the state court. In light of *Edwards,* there is a reasonable probability that the Court would reject that conclusion if given the opportunity for further consideration. For reasons discussed below, such a redetermination may determine the ultimate outcome of the litigation.

B. The Supreme Court GVR orders

This Court has found GVR orders appropriate "in light of a wide range of developments, including [its] own decisions…, State Supreme Court decisions…, new federal statutes…, administrative reinterpretations of federal statutes, … new statues, … changed factual circumstances, … and confessions of error or other positions newly taken by the Solicitor General, … and state attorneys general." (citations omitted) *Lawrence v. Chater*, 516 U.S. 163, 166-167 (1996). The Court held:

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues, see *United States v. Johnson*, 457 U.S. 537, 556, n. 16 (1982) (citation omitted)… Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GRV order is ultimately appropriate depends further on the equities of the case. *Lawrence v. Chater,* 516 U.S. at 167-168.

On December 27, 2018, Sowell filed a claim against Tinley and Majewski, pursuant to 42 U.S.C. § 1983, seeking damages for the violation of her First Amendment rights. See Amended Complaint (Count Eleven) App. 81-127. Prior to that date Sowell had n*ever* been a party to *any* state or federal lawsuit in which Tinley or Majewski were parties. Indeed the only action in which Sowell was a party was *Sowell v. DiCara, et al.,* Conn. Superior Court Doc. No. UWY-CV-12-6016087-S, a wrongful discharge action. Tinley and Majewski represented two

defendants in that action. Tinley and Majewski were not parties. Sowell was not a party to the writ of error filed by Mendillo and determined by the Connecticut Appellate Court. Appendix D, App. 27-58. And she was not a party in *Mendillo v. Tinley, Renehan & Dost, LLP*, 329 Conn. 515 (2018). Appendix E, App. 59-73.

In *Edwards*, the Second Circuit held that for the *Rooker-Feldman* doctrine to apply, "four requirements must be met: (1) the federal-court plaintiff must have lost in state court; (2) the plaintiff must complain of injuries caused by a state-court judgment; (3) the plaintiff must invite district court review and rejection of that judgment; and (4) the state-court judgment must have been rendered before the district court proceedings commenced." (quoting *Sung Cho v. City of New York*, 910 F.3d 639, 645 (2d Cir. 2018)). The Court held that for a party to be a loser under the *Rooker-Feldman* doctrine the party's claims must have been decided on the merits in the state court.

Since Sowell was never a party to any state court lawsuit involving Tinley or Majewski, she could not possibly be a state-court loser under the *Rooker-Feldman* doctrine. The Second Circuit's holding

in *Edwards* is consistent with this Court's holding in *Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994) (*Rooker-Feldman* does not bar actions by a nonparty to the earlier state suit) and *Lance v. Dennis*, 546 U.S. 459, 466 (2006). ("The Rooker-Feldman doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they would be considered in privity with a party to the judgment.").

C. Application of the Supreme Court's "reasonable probability" test.

This Court applies a "reasonable probability" test in determining whether to issue a GVR order. The test considers whether there is a reasonable probability that "giving the lower court the opportunity to consider [the relevant] point anew will alter the result." *Lawrence v. Chater*, 516 U.S. at 172. In the present case, the Court of Appeals did not specifically address the applicability of the *Rooker-Feldman* doctrine to Sowell's damages claim against Tinley and Majewski. It appears reasonably probable that the Second Circuit's precedential decision in *Edwards* will alter the Court's decision with respect to the applicability of the *Rooker-Feldman* doctrine to Sowell's damages

claims against Tinley and Majewski because the claims were not determined on the merits by the State court and, therefore, Sowell cannot be a state court loser within the meaning of the *Rooker-Feldman* doctrine.

D. The Court of Appeals has not addressed the question whether Tinley and Majewski were state actors.

Because the Court of Appeals concluded that the district court did not have jurisdiction over Sowell's claims it did not address the question whether the respondents Tinley and Majewski were state actors. The Court of Appeals should address that question on remand.

E. CONCLUSION

In 1996, this Court made the following observation:

> As the prevalence of summary dispositions by the Courts of Appeals continues to increase with the burgeoning docket – in 1994, over 11% of Court of Appeals decisions on the merits, and many more procedural decisions, were summary – such cases will, no doubt, arise more frequently. In this context, it is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the court below '*might...*have relied on.' And we are well aware, as are Supreme Court practitioners and lower courts, that while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review. We

> are therefore more ready than the dissent to issue a GVR order in cases in which recent events have cast substantial doubt on the correctness of the lower court's summary disposition." (emphasis in original) *Lawrence v. Chater*, 516 U.S. 163 at 170.

The pressures on the federal courts described by this Court in 1996 have increased substantially. Congress has not provided relief. The lower federal courts - caught between a rock and a hard place - have resorted to the aggressive use of the *Rooker-Feldman* doctrine. "The doctrine has emerged as perhaps the primary docket-clearing workhorse for the federal courts …." [1] "Notwithstanding *Exxon Mobil's* efforts to return *Rooker-Feldman* to its modest roots, lawyers continue to invoke the rule and judges continue to dismiss federal actions under it." *VanderKodde v. Mary Jane M. Elliott, P.C.,* 951 F.3d 397 (6th Cir. 2020) (Sutton, J., concurring). [2] This Court's use of GVR orders in cases such as the present case is critically important to maintain public confidence in our judicial system.

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[1] Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating Its Jurisdictional Status*, 74 Notre Dame L. Rev. 1175 (1999) (citing Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085 (1999)).

[2] See the empirical study by Raphael Graybill, Comment, The Rook That Would Be King: *Rooker-Feldman* Abstention Analysis After *Saudi Basic*, 32 Yale J. on Reg. 591, 601 (2015) ("In sum, despite the Supreme Court's dual interventions in *Saudi Basic* and *Lance*, abstention analysis under *Rooker-Feldman* remains a popular enterprise at the district court. Hundreds of cases cite the doctrine each year, and the number continues to grow despite an unambiguous expression of disapproval by the Supreme Court.").

For the foregoing reasons, petitioner Sowell respectfully requests the Court grant the petition for rehearing, grant certiorari, vacate the judgment below against her and in favor of the respondents Jeffrey J. Tinley and John P. Majewski, and remand for consideration of *Edwards* and for consideration of the question whether the respondents Jeffrey J. Tinley and John P. Majewski were state actors.

Respectfully submitted,

John Gordon Manning
20 Munson Road
Middlebury, CT 06762

George Eli Mendillo
Counsel of Record
190 Carmel Hill Road
Woodbury, CT 06798
(203) 263-2910
gmendillo@aol.com

Counsel for Petitioner Sowell

November 2020

CERTIFICATE OF COUNSEL

As counsel of record for the petitioner Sowell, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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Counsel for Petitioner Sowell