ORIGINAL

No. 22-409

IN THE UNITED STATES SUPREME COURT

ALEXANDER MOSKOVITS,

Petitioner,

vs.

BANK OF AMERICA, N.A., SCHOEMAN UPDIKE KAUFMAN & GERBER LLP, BETH L. KAUFMAN, SILVIA S. LARIZZA, CALVIN B. GRIGSBY, ROGER J. BERNSTEIN, BARRY R. OSTRAGER, SUED INDIVIDUALLY AND AS A JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, DOES 1 THROUGH 10,

Respondents.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals, Second Circuit

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PETITION FOR WRIT OF *CERTIORARI*

Alexander Moskovits
Pro Se Petitioner
1050 Grand Boulevard
Deer Park, New York 11792
Tel: +55(48)98465-9211
Email: alexander.moskovits@hotmail.com

QUESTIONS PRESENTED

This case presents a Constitutional question of fundamental public importance: whether instituting sealed proceedings in a civil case (in next day reaction to a request for disclosure of judicial recusal grounds) violates Constitutional rights guaranteed under the Due Process and the Equal Protection Clauses of the 14th Amendment and customary international law, allowing claims under 42 U.S.C. §§ 1983, 1985(2),(3), 28 U.S.C. § 1350, and a claim of "fraud on the court." This case presents the question of whether the unique sealing can be held to be non-actionable and shield both state and private actors involved from liability, given the historic error of Constitutional magnitude "***so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power***". *See* Rule 10 of the U.S. Supreme Court (emphasis added). This case also presents the questions of whether an exercise of this Court's "supervisory power" would be warranted where such "fraud on the court" is involved or to correct a failure to follow the correct substantive law and U.S. Supreme Court law. In addition, newly discovered information of recusal grounds, n.1, *infra*, submitted for judicial notice, which required the state court to recuse *ab initio* poses the question of whether exercising this Court's "supervisory power" is also warranted to correct the Second Circuit's failure to determine whether the state court had jurisdiction or immunity under the correct state substantive law. *See* Rule 10, *supra*. Finally, this case presents a suitable vehicle to address the question of whether "ex-felons" are members of a class protected by § 1985.

PARTIES AND RULE 29.6 STATEMENT

Petitioner Alexander Moskovits was Plaintiff in District Court, and Appellant in Circuit Court. Petitioner is an individual, so he has no disclosures to make under Rule 29.6 of the U.S. Supreme Court. Respondents are Bank of America N.A., Schoeman Updike Kaufman & Gerber LLP, Beth L. Kaufman, Silvia S. Larizza, Calvin B. Grigsby, Roger Bernstein, and Barry Ostrager sued individually and as a Justice of the Supreme Court of the State of New York.

DIRECTLY RELATED PROCEEDINGS

The following are the proceedings in the state and the federal trial and appellate courts, including proceedings in this Court, that are directly related:

Moskovits v. Bank of America Merrill Lynch, et al., Index No. 650617/2019 (Sup.Ct. N.Y. Cty) (Commercial Division) (Ostrager, Barry, Justice). (Decision/Order filed November 12, 2020)

Moskovits v. Bank of America Merrill Lynch, et al., Appellate Division, First Department Case No. 2021-01543 (Decision/Order filed December 21, 2021)

Moskovits v. Bank of America Merrill Lynch, et al., Motion 2022-92 (For Leave to Appeal to N.Y. Court of Appeals), 38 N.Y.3d 1003 (2022) (Decision/Order filed April 28, 2022)

Moskovits v. State of New York, N.Y. Court of Claims, Claim 135693 (Decision/Order filed August 3, 2021).

Moskovits v. The State of New York,
Appellate Division, First Judicial Department
Case No. 2022-00715 (Decision/Order entered
September 27, 2022)

Moskovits v. Bank of America, N.A., et al., S.D.N.Y.
Case No. 20-CV-10537-LLS (Stanton, Louis L.,
Senior Judge) (Order of Dismissal and Judgment
filed March 12, 2021) (federal civil rights action)

Moskovits v. Bank of America, N.A., et al.,
Second Circuit Case No. 2021-886
(Summary Order affirming judgment of district court
filed April 19, 2022; Rehearing denied June 2, 2022)

Moskovits v. Bank of America, N.A., et al., U.S.
Supreme Court, Application 22A58 (Justice Sonia
Sotomayor granted extension of time to file petition
for writ of *certiorari* until September 26, 2022, further
extended by the Clerk under Rule 14.5 for correction).

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PETITION FOR WRIT OF *CERTIORARI*

Alexander Moskovits petitions for a writ of *certiorari* to review the Second Circuit Court of Appeals' Order and Judgment in *Moskovits v. Bank of America, N.A.*, 21-886, 2022 WL 1150626 (4/19/22).

ORDERS AND OPINIONS BELOW

Said Order and Judgment of the Second Circuit affirming the order and judgment of the district court is reported at *Moskovits v. Bank of America, N.A.*, 21-886, 2022 WL 1150626 (reproduced at App. 1-6).

The "Order of Dismissal" by the district court is reported at *Moskovits v. Bank of America, N.A.*, Case No. 20-CV-10537 (Stanton, Louis, L. Senior J.), 2021 WL 965237 (3/12/21) (reproduced at App 6-10).

The "Order to Amend" by the district court is reported at *Moskovits v. Bank of America, N.A.*, Case No. 20-CV-10537 (Stanton, Louis, L. Senior J.), 2021 WL 230193 (1/20/21) (reproduced at App. 10-24).

The Order of the Second Circuit denying the Petition for Panel Rehearing in *Moskovits v. Bank of America N.A., et al.*, 21-886 (6/2/22) is reproduced at App. 24-25.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1343, 1350, and "supplemental jurisdiction" under 28 U.S.C. § 1367.

Questions of federal civil rights law and customary international law are presented. There is diversity of citizenship, and the district court had "supplemental jurisdiction" as to the claim of a "fraud on the court." The Second Circuit had jurisdiction. 28 U.S.C. § 1291. Justice Sonia Sotomayor granted an extension of time to file until October 31, 2022. *See* Application 22A57.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution, 14th Amendment, provides:

"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 ... property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution, 1st Amendment, provides:
"Congress shall make no law ... abridging the freedom of speech, or of the press; ...and to petition the Government for a redress of grievances."

See Levy v. Weksel, 143 F.R.D. 54, 56 (S.D.N.Y. 1992): (sealed "*Star Chamber* courts of old, contrary to the ***spirit*** of the First Amendment....") (emphasis added).

28 U.S.C. § 1350. Alien's action for tort:
The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

42 U.S.C. §1983, civil action for deprivation of rights, provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable....

42 U.S.C. § 1985, conspiracy to interfere with civil rights, provides in relevant part:

(2) Obstructing justice... if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State ..., with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State ... conspire, ...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of

the laws, or of equal privileges and immunities under the laws, ...in any case of conspiracy set forth in this section if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

A. Introduction

This *pro se* lawsuit involves issues of fundamental Constitutional importance, as the sealing of all "past and future" entries in a commercial case (in next day reaction to a request for disclosure of recusal grounds and before responses to motions to dismiss were due) violates due process, the equal protection of the laws, and the right to impartial courts. Sealed proceedings violate customary international human rights law. By affirming dismissal, the Second Circuit allowed all who instituted and participated in a gross violation of rights to enjoy civil impunity. The Second Circuit has given its approval to a judgment that instituting and participating in sealed proceedings is not actionable against either the public or private conspirators or aiders and abettors. This is "***so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power***". U.S. Supreme Court Rule 10 (emphasis added).

Under the governing state substantive law in this diversity of citizenship case, as the seal required his disqualification, Respondent Justice was deprived of jurisdiction, and therefore lost his immunity cloak. As there was no motion to seal the case to adjudicate, and the Justice credited the "Court Administration" with directing the sealing of the case, no immunity is accorded to any of the judicial officers for the injurious ministerial act under the governing substantive law. Given the unique sealed *Star Chamber* proceedings, which grossly violate both fundamental federal rights under the Constitution and customary international human rights law, Petitioner stated sufficient claims under 28 U.S.C. § 1350, 42 U.S.C. §§ 1983, 1985, and he sufficiently pleaded a "fraud on the court" claim.

B. Course of Proceedings and Relevant Facts

"[Petitioner filed] a *pro se* summons and complaint in New York State Supreme Court, New York County, on December 26, 2018.... The State Court Action was filed against [Calvin B.] Grigsby; [Bank of America Merrill Lynch]; Raimundo Colombo ("Colombo"), Governor of the State of Santa Catarina, Brazil, in his individual capacity; and Jorge Siega ("Siega"). The State Court Action was also filed against the Federal Republic of Brazil [and 3 Brazilian states]. ...On May 6, 2019, the State Court Action was removed to the S.D.N.Y. by Defendant Federal Republic of Brazil.... On May 7, 2019, [Petitioner] filed a notice of voluntary dismissal dismissing the removing party Federal Republic of Brazil [and the 3 Brazilian states]. On May 14, 2019, [Petitioner] filed a motion to remand the action to state court....

On February 18, 2011, [Respondent] Grigsby contacted [Petitioner] to discuss potential business opportunities relating to oil in Brazil. [Petitioner] provided Grigsby with a loan structure which would allow Grigsby and [Bank of America Merrill Lynch] to secure credit for sub-sovereign state transactions guaranteed by the Brazilian Government, and provided Grigsby with potential clients for such transactions. For Moskovits's work, Grigsby promised compensation, valued at 35% of 1% of the transaction value for a transaction value over $500 million, or 35% of 2% for a transaction value under $500 million. The parties frequently corresponded about potential transactions by email. Between August 1 and 3, 2011, Grigsby traveled to Brazil to meet with the potential borrowers. [Petitioner] arranged for meetings with public officials and representatives of the public utility companies. These meetings were attended by, among others, Grigsby, Moskovits, and Siega. In the weeks following Grigsby's visit, Moskovits continued to work on the deal, including offering to deliver the Memorandum of Understanding from Grigsby to CELESC, the state-owned electric utility in Santa Catarina. ...Grigsby became confrontational in his responses, and evaded signing any compensation agreement with Moskovits. Grigsby also warned Moskovits against contacting CELESC, and cut off Moskovits's @grigsbyinc email address. Moskovits attempted to discuss the potential CELESC deal, valued at $400 million, with Siega, who denied any knowledge of the deal, despite his presence at the meetings and his presence on many of the emails between Grigsby and Moskovits discussing the deal. Moskovits alleges that he was purposefully cut out of

the deal. Bank of America and the State of Santa Catarina signed a $726 million credit agreement on December 27, 2012, allegedly using Moskovits's finance structure. Moskovits further alleges that three deals totaling $1.9 billion were consummated by Grigsby and [Bank of America Merrill Lynch], using his financial structure. To date, Moskovits has not received any compensation in relation to these deals."

Moskovits v. Grigsby, 2020 WL 3057754 (S.D.N.Y.) (remanding case) (brackets added; citations omitted).

After remand to state court in 2020, Bank of America Merrill Lynch requested transfer to the Commercial Division of the Supreme Court in N.Y. County, where it was assigned to Justice Barry R. Ostrager.

On September 1, 2020, Petitioner filed a letter requesting disclosure of recusal grounds referencing a 68-page data report on the Justice, which included all known assets, his related entities, adult relatives, and associates. The letter reads, in part, as follows:

"Plaintiff demands the full disclosure of the following transactions pursuant to NY law. *See also* 28 U.S.C. § 455(e) (full disclosure of potential grounds for recusal must be made on the case record). ...

(1) any and all transactions of any kind involving BARRY R. OSTRAGER and any Bank of America entity; ...(13) any and all transactions of any kind involving SIMPSON THACHER & BARTLETT LLP and any Bank of America entity; ... (17) any and all transactions at pp.10-20 ("Properties") of the 68-page

report in re: "BARRY R. OSTRAGER", which involved any Bank of America entity... ***I respectfully advise Your Honor that I have initiated a full investigation of this trial court and all of its extrajudicial affairs***...." (emphasis in original).

The Orders Entered by the N.Y. Supreme Court

In response, the N.Y. Supreme Court ordered the unique ("*Star Chamber*") sealing ***the next day***, September 2, 2020, which Order reads as follows:

"The County Clerk is directed to seal this case (***all past and future entries***) to everyone except the Court and the parties to this action. ***The County Clerk is also directed to seal NYSCEF Document No. 135 to the public, all parties to the action, and to the Court except for Justice Ostrager's Chambers***."

App. 42 (emphasis added). "Document No. 135" is the letter that sought "full disclosure" of recusal grounds, referencing an enclosed 68-page public data report. Petitioner's responses to motions to dismiss were due by September 15, 2020. In his responses, Petitioner preserved objection to the sealed court proceedings.

Petitioner moved in the Appellate Division for a stay of proceedings based on the sealing and the recusal issues. On October 7, 2020, Appellate Judge Dianne Renwick set a date for Respondents' response. ***The next day***, on October 8, 2020, Justice Ostrager filed a *sua sponte* order providing a *post hoc* rationale for the sealing, for the first time, as follows:

"***The Court Administration*** directed that the entire file be sealed except to the parties to the action and the Court ***because of the inflammatory and threatening nature of some of the filings by plaintiff.***"

See App. 43 (emphasis added). The "inflammatory and threatening" filings were not identified, but the *post hoc sua sponte* order was used by Respondents in their oppositions to the stay, and the stay was denied. Justice Ostrager dismissed the lawsuit. *Moskovits v. Grigsby*, 2020 WL 6704176; 69 Misc. 3d 1215[A], (N.Y. Sup. Ct. 11/12/2020).

The Petitioner's Federal Action

While appeal in the state courts was pending, Petitioner filed this action in district court (S.D.N.Y.) against Bank of America, N.A. and Calvin Grigsby, counsel for Bank of America Merrill Lynch in state court (Schoeman Updike Kaufman & Gerber LLP, Beth L. Kaufman, and Silvia Larizza), counsel for Calvin Grigsby in state court (Roger J. Bernstein), Justice Ostrager individually and as a Justice of the Supreme Court, and "Does 1-10," including but not limited to the persons in the "Court Administration" credited with having directed sealing the entire case. After Senior Judge Louis L. Stanton filed a *sua sponte* "Order to Amend", App. 10-24, Petitioner filed his Amended Complaint, App. 25-42, arising from the institution of and participation in sealed proceedings, pleading (1) a conspiracy to violate 14th Amendment rights to due process and equal protection pursuant to 42 U.S.C. § 1983 (private actors aided and abetted),

and 42 U.S.C. §§ 1985(2),(3) (state and private actors agreed to obstruct course of state justice motivated by a class-based discriminatory intent to deny Petitioner the due process of law and equal protection of the laws because he is an ex-felon); (2) a violation of customary international law under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, based on the denial of proceedings open to the public conducted by an impartial tribunal, *citing* Art. 10, United Nations Universal Declaration of Human Rights; and (3) a "fraud on the court." *See* App. 37-42 (Amended Complaint). The district court *sua sponte* dismissed the amended complaint, holding that Justice Ostrager and Does 1-10 (including the persons in the "Court Administration" credited with directing the sealing of the entire case) were immune from suit and that Petitioner failed to state a claim under §§ 1983, 1985(2),(3), or the ATS. The court also invoked *Rooker-Feldman* doctrine to dismiss the case. *See Moskovits*, 2021 WL 965237 (S.D.N.Y. 3/12/21) ("Order of Dismissal"); 2021 WL 230193 (S.D.N.Y. 1/20/21) ("Order to Amend")(reproduced at App. 6-24).

The Second Circuit Order Affirming Dismissal

On his appeal from the dismissal of his lawsuit, Petitioner argued that the "ministerial act" of sealing an entire case as directed by a "Court Administration" is not shielded by any immunity under governing law. He argued that the state court lost jurisdiction under governing law upon sealing the entire case in reaction to a request for disclosure of recusal grounds, thereby losing its cloak of immunity. Petitioner argued that, even assuming *arguendo* that the Respondent Justice and those who constituted the "Court Administration"

that directed the sealing were shielded by immunity, such a shield could not be extended to private actors who aided and abetted the state actors' deprivation of rights under the color of state law. Petitioner argued he pleaded sufficient claims for aiding and abetting the deprivation of rights and for agreeing to obstruct the due course of state court justice with a class-based discriminatory intent to violate his due process and equal protection rights pursuant to 42 U.S.C. §§ 1983, 1985(2),(3). He argued that he also pleaded a legally sufficient claim pursuant to the ATS based on the "fraud on the court" embodied in sealed *Star Chamber* proceedings, which violated a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" as recognized by this Court. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Petitioner argued that he pleaded a legally sufficient claim of "fraud on the court" particularizing the overt acts by all Respondents in furtherance of the fraud. He also argued that the district court misapplied the *Rooker-Feldman* doctrine to dismiss the federal suit as the federal civil and human rights claims were independent of the *quasi*-contract and breach claims in state court. Petitioner also noted that other federal circuits recognize a "fraud exception" precluding the application of the *Rooker-Feldman* doctrine to bar a federal suit when state court judgments are procured by fraud, misrepresentation, or improper means.

The Second Circuit affirmed the "dismissal on the basis of judicial or *quasi*-judicial immunity and failure to state a claim, largely for the same reasons cited by the district court." App. 4 (2022 WL 1150626) (*citing* 2021 WL 965237, *2-3; 2021 WL 230193, *4-7).

The Second Circuit noticed that the district court did not explicitly address the "fraud on the court" claim, but concluded that the claim was properly dismissed, holding that the amended complaint fails to plausibly allege a "fraud on the court" as defined by the Circuit. The Second Circuit decided it did not need to reach the application of the *Rooker-Feldman* doctrine by the district court or the abstention doctrines raised by the parties as alternative grounds to dismiss. *See* App. 4.

REASONS FOR ISSUANCE OF THE WRIT

A. The "Fraud on the Court" embodied in the creation of sealed *Star Chamber* proceedings warrants exercise of the "Supervisory Power" of the U.S. Superme Court under its Rule 10

In the article *Sealing, Judicial Transparency and Judicial Independence*, 53 Vill. L. Rev. 939, 947 (2008), Senior U.S. District Judge T.S. Ellis III wrote: "My imagination is no doubt poverty-stricken, but ***I can think of no sound reason that would justify placing a civil case entirely under seal.***" (emphasis added). The Second Circuit order affirming the judgment dismissing the federal suit based on the unprecedented sealed *Star Chamber* proceedings is "***so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power***". *See* U.S. Supreme Court Rule 10 (emphasis added).

The Second Circuit "turned a willfully blind eye" to unprecedented *Star Chamber* proceedings, as if the sealing in reaction to a demand for full disclosure of judicial recusal grounds is court "business as usual."

App. 4 (Second Circuit concluding "fraud on the court" claim was properly dismissed as amended complaint fails to plausibly allege "fraud which does or attempts to[] defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.") (*citing Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir. 1994); *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988) ("fraud on the court" claims must involve conduct that "seriously affects the integrity of the normal process of adjudication")). The court opinion is a *non sequitur* as a *Star Chamber* defiles the Court and adversely affects the integrity of normal process. The courts were willfully blind to the unique sealing. To affirm dismissal on immunity grounds and for failure to state a claim, the panel ignored *Zarcone v. Perry*, 572 F.2d 52, 55 (2d Cir. 1978) (§1983 action against judge) ("It cannot be that it is less important to deter intentional deprivations of fundamental constitutional rights, such as the unlawful dragooning before a *Star Chamber* proceeding that occurred here, than it is to deter intentional injuries to personal property interests. Therefore, we reject the notion that there is something inherent in civil rights cases, whether or not based on race discrimination, which precludes the award of substantial punitive damages"). By ruling an action was not stated against the public or private parties who instituted and participated in the proceedings, the courts allowed an egregious violation of federal civil rights and human rights to enjoy civil impunity. If the writ is denied, this Court's *imprimatur* would pose a threat to the rights to public court proceedings.

To preserve the fairness, integrity, and reputation of the judicial system, this petition should be granted. The question of whether *Star Chamber* proceedings can support an action pursuant to 28 U.S.C. § 1350, or 42 U.S.C. §§ 1983, 1985(2),(3), or an action for a "fraud on the court" merits review. *Star Chamber* proceedings violate Constitutional rights to the due process of law and the equal protection of the laws, human rights law developed by the United States, as well as the "spirit" of the First Amendment. *See Levy v. Weksel*, 143 F.R.D. 54, 56 (S.D.N.Y. 1992):

"Without such routine exposure to the sunshine of public scrutiny, what is sometimes called the "least dangerous branch" might tend to acquire or to appear to acquire unfortunate aspects of the ***Star Chamber*** courts of old, ***contrary to the spirit of the First Amendment, ... and the public trial concept specifically vouchsafed in criminal cases by the Sixth Amendment*** ***but relevant in civil cases as well***. Indeed, Article 10 of the United Nations Universal Declaration of Human Rights, the development of which was ***led by the United States*** and which was adopted by the General Assembly on December 10, 1948, states: "***Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations....***" ***No justification for the equivalent of a closed trial has been established in this civil securities fraud case***."

(emphasis added). The seal in response to a demand for disclosure of recusal grounds is an egregious abuse that should shock the conscience of this Court.

The writ should issue to prevent the serious threat to the basic right to public court proceedings conducted in impartial tribunals that would be posed by this Court stamping its *imprimatur* of approval on sealed *Star Chamber* proceedings. This Court should exercise its "supervisory power" under its Rule 10.

B. "Supervisory Power" of this Court should be invoked to correct failure to follow the correct substantive law and U.S. Supreme Court law

As the sealed *Star Chamber* proceedings held to be non-actionable have no similar precedent in the history of American jurisprudence, and the sealing of the entire case was a ministerial act "directed" by the "Court Administration", rather than an adjudication, issues of great importance are involved. *See* App. 43 ("The Court Administration directed that the entire file be sealed except to the parties to the action and the Court because of the inflammatory and threatening nature of some of the filings by plaintiff."). Sealing the entire case as directed by the "Court Administration" without any motion, is not an adjudication shielded by immunity, and "immunity is not accorded to a judicial officer who performs a ministerial act so as to injure another." *Sassower v. Finnerty*, 96 A.D.2d 585, 587 (2d Dep't 1983).

Under New York state substantive law, applicable in this diversity of citizenship case, *see Gross v. Tell*, 585 F.3d 72 (2d Cir. 2009) ("Diversity of citizenship cases, though brought pursuant to federal subject matter jurisdiction, are decided on the basis of state substantive law") (looking to state law on immunity), Respondent Justice was also deprived of jurisdiction.

See Harkness Apartment Owners v. Abdus-Salaam, 232 A.D.2d 309, 310 (1st Dep't 1996) ("As disqualification under the statute deprives the Judge of jurisdiction, all decisions and orders made in the course of the proceeding are null and void") (disqualification statute and 22 NYCRR §100.3(E)(1) "to similar effect"); *Wilcox v. Supreme Council of Royal Arcanum*, 210 N.Y. 370, 377 (1914) ("In this state the statutory disqualification of a judge deprives him of jurisdiction"). The court lost jurisdiction under state law, and thusly its immunity, upon performing the injurious ministerial act of sealing the case as the "Court Administration directed", mandating recusal. *See* 22 NYCRR § 100.3(E)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"); *accord Liteky v. United States*, 510 U.S. 540, 555 (1994) (recusal for an appearance of partiality is required if ruling shows "deep-seated favoritism or antagonism that would make fair judgment impossible") (analyzing 28 U.S.C. § 455(a)) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). The Second Circuit concluding otherwise also conflicts with *Mireles v. Waco*, 502 U.S. 9 (1991) followed in a case involving the same judge. *Brady v. Ostrager*, 834 Fed. Appx. 616, 618 (2d Cir. 2020) (no immunity for "nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity"; nor "actions, though judicial in nature, taken in the complete absence of all jurisdiction.") (*citing Mireles*). A ministerial act "directed" by the "Court Administration" is not entitled to immunity under the correct substantive law. *Sassower*, *supra*.

In affirming the dismissal of the ATS claim, *see* 28 U.S.C. § 1350, based on the "fraud on the court" embodied in instituting and participating in sealed *Star Chamber* proceedings in violation of customary international law, the Second Circuit failed to follow *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) ("courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."). The basic right to public proceedings is a right in Anglo jurisprudence since at least 1641, when the *Star Chamber* was abolished as an abuse of British royal power. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 420 (1979) ("... by the 17th century the concept of a public trial was firmly established under the common law. Indeed, there is little record, if any, of secret proceedings, ***criminal or civil***, having occurred at any time in known English history. Apparently, not even the Court of *Star Chamber*, the name of which has been linked with secrecy, conducted hearings in private.") (emphasis added).

In affirming the dismissal of the § 1983 action, the Second Circuit failed to follow *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980), where the Court explained that § 1983 "does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or state agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *See also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 212 (1970)

(private person acts under color of state law "when he acts in conjunction with a state official").

C. This Case is a Suitable Vehicle to Determine Whether Ex-Felons are a Class Protected under Federal Constitutional or Statutory Provisions

In affirming the dismissal of the § 1985 action, the Second Circuit was willfully blind to historic error which would support a reasonable inference that such an egregious violation of basic constitutional rights and customary international law was motivated by a class-based discriminatory intent to violate the equal protection rights of Petitioner since he is an ex-felon. Bank of America, N.A. and Justice Ostrager cited *Baker v. Cuomo*, 58 F.3d 814, 820-822 (2d Cir. 1995) to propose that felons are not a protected class under any federal constitutional or statutory provision, but the Second Circuit opinion involved constitutional and statutory provisions that deny felons the right to vote. *See Baker* at 820 (*citing Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974) (upholding constitutional and statutory provisions disenfranchising felons, including ex-felons who served their sentences unless the right to vote restored by court order or pardon)); *id.* at 54 (noting that "the exclusion of felons from the vote has an affirmative sanction within § 2 of the Fourteenth Amendment."). *Baker* is limited to felon disenfranchisement. The Schoeman Law Firm argued that the claims under the Equal Protection Clause are invalid because Petitioner's status as an ex-felon does not make him a member of any "protected class," *citing City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Lee v. Governor of New York*,

87 F.3d 55, 60 (2d Cir. 1996); and *Zigmund v. Foster*, 106 F. Supp.2d 352, 362 (D.Conn. 2000)). However, the caselaw is inapposite. *City of Cleburne* at 446-47 (refusing to recognize mentally retarded as *quasi*-suspect class, while noting that "mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law"); *Lee* at 60 ("prisoners either in the aggregate or specified by offense are not a suspect class"); *accord Zigmund* at 362 (heightened standard of review not applied to prisoner claims as prisoners "either in the aggregate or specified by offense" are not deemed a suspect class) (*quoting Lee*). Petitioner and millions of similarly situated ex-felons who have served their sentences constitute a readily distinguishable class of individuals who are subjected to class-based discrimination. The lack of authority on whether ex-felons are members of a class protected under § 1985 begs for this Court's review of the issue. Otherwise, anyone can conspire to obstruct the due course of state court proceedings with a class-based discriminatory intent to violate the equal protection rights of parties who are ex-felons with impunity.

CONCLUSION - RELIEF REQUESTED

A court holding that instituting and partaking in sealed *Star Chamber* proceedings enjoys impunity by law would have been unimaginable to the Framers. Given the historic error of Constitutional magnitude, the writ should issue.[1] *Star Chamber* proceedings are

[1] Research found that Justice Ostrager gave disclosure of recusal grounds and recused himself as required by the law in a different case based on grounds that required his recusal from this case

"***so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power***". *See* Rule 10, *supra* (emphasis added). In addition, given newly discovered information of undisclosed recusal grounds, n.1 ("Bank of America Merrill Lynch" client "regularly" advised by Simpson Thacher Bartlett LLP which paid the Justice a pension in 2020 with a value of over $1Million); *see* App. 44 (Recusal Order in *Stuyvesant Town-Peter Cooper Village Tenants' Association, et al. v. BPP St Owner LLC, et al.*), this Court should invoke its "supervisory power" to decide whether the court lost jurisdiction *ab initio* under the

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ab initio and vacation of all orders because Respondent Bank of America Merrill Lynch and other Bank of America entities are major clients of Simpson Thacher and Bartlett LLP, which paid Justice Ostrager a "pension" with a value of over $1Million during the relevant year of 2020. *See* App. 44 (Recusal Order in *Stuyvesant Town-Peter Cooper Village Tenants' Association, et al. v. BPP St Owner LLC, et al.*, Index No. 152397/2020) ("I recuse myself from this case and the related case *Roberts v. BPP PCV Owner* (100956/2007). On March 25, 2021 I made a disclosure to the parties concerning defendant *BPP St Owner LLC*, which I learned is a Blackstone affiliate. Specifically, prior to my appointment to the bench, I was a partner at Simpson Thacher & Bartlett LLP. Blackstone was and is one of Simpson Thacher & Bartlett LLP's largest clients. I currently receive a pension from Simpson Thacher & Bartlett LLP which is derived at least in part from the substantial revenue the firm receives from Blackstone."); App. 46 (2020 financial disclosure report showing $1Million to $3Million pension and "Merrill Lynch" investment); App. 48 (Simpson Thacher Bartlett LLP publishing it has "regularly advise[d]... Bank of America Merrill Lynch"). Judicial notice of such documents should be taken. Here, rather than provide the requested full disclosure of recusal grounds and recuse, the Justice sealed the case. Under the substantive law governing this diversity case, the Justice never had jurisdiction.

correct state substantive law in this diversity case, *see Harkness* and *Wilcox*, *supra*, and his immunity cloak for performing the injurious ministerial act of sealing the case as "directed" by the "Court Administration." *See* App. 43; *Sassower*, *supra; see also Mireles*, *supra.*

Respectfully submitted,

Alexander Moskovits
Pro Se Petitioner
1050 Grand Boulevard
Deer Park, New York 11792
Tel: +55(48)98465-9211
Email: alexander.moskovits@hotmail.com

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