

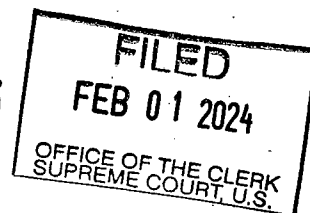
23-6940

No. 23A408

ORIGINAL

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IN THE  
**Supreme Court of the United States**



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MICHAEL MARRARA,  
MICHAEL DOTRO,  
*Pro Se* Petitioners,

v.

THE STATE OF NEW JERSEY,  
PHILIP D. MURPHY,  
STEPHEN SWEENEY,  
CRAIG COUGHLIN,  
JOHN DOES 1-10,  
JANE DOES 1-10,  
*Respondents.*

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**On Petition for Writ of Certiorari To  
The United States Court of Appeals  
For the Third Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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Michael Marrara # 1171151  
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## QUESTIONS PRESENTED FOR REVIEW

*Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973) held that claims seeking the restoration of time credits were not cognizable in a § 1983 action, making a habeas corpus the only avenue for relief.

Both the United States District Court for the District of New Jersey and the Third Circuit's application of *Preiser* to this case presents the first of two questions for review.

1. Does *Preiser*'s holding that the restoration of time credits were not cognizable in a § 1983 action persist when there is a direct civil rights challenge of an unconstitutional legislation, making a habeas corpus the only avenue for relief?

*Ex Parte Young*, 209 U.S. 123, 158-60 (1908) held that a private party would be treated as "persons" under § 1983, allowing suit to be filed in the official capacity if the party is sued for declaratory and prospective relief, and if the party violated federal law, suit would be treated as actions against a state.

The United States District Court for the District of New Jersey's non-application of *Ex Parte Young*, aided by the Third Circuit not considering the "persons" argument, present the second of two questions for review.

2. Does *Ex Parte Young*'s holding that a private party can be treated as a "person" in a § 1983 action stand when the private party is a state officer being sued for prospective injunctive relief due to an ongoing violation of federal law and civil rights?

### **PARTIES TO THE PROCEEDING**

The *pro se* Petitioners are Michael Marrara and Michael Dotro, both New Jersey State prisoners at East Jersey State Prison, in Rahway, New Jersey. The Respondents are the State of New Jersey, Philip D. Murphy, the current governor of New Jersey, Stephen Sweeney, the former President of the New Jersey Senate, Craig Coughlin, the current Speaker of the General Assembly, John Does 1-10 and Jane Does 1-10.

**CORPORATE DISCLOSURE STATEMENT, PER RULE 29.6**

The Respondents are all government entities, and no party is a corporation, therefore a corporate disclosure statement is deemed unnecessary.

**LIST OF ALL PROCEEDINGS, PER RULE 14.1 (B) (iii)**

This case arises from the following proceedings in the New Jersey Superior Court, Law Division, Middlesex County, the United States District Court for the District of New Jersey, the United States Court of Appeals for the Third Circuit and this United States Supreme Court, as seen below:

1. New Jersey Superior Court

- a. Docket Number: MID-L-6279-21,
- b. Case Caption: MICHAEL MARRARA, MICHAEL DOTRO, v. THE STATE OF NEW JERSEY, PHILIP D. MURPHY, STEPHEN SWEENEY, CRAIG COUGHLIN, JOHN DOES 1-10, JANE DOES 1-10 and
- c. Entry of Judgment: Case venue transferred to United States District Court for the District of New Jersey, entered May 9, 2022,

2. United States District Court for the District of New Jersey

- a. Docket Number: 2:22-cv-02056-ES-ESK,
- b. Case Caption: MICHAEL MARRARA, MICHAEL DOTRO, v. THE STATE OF NEW JERSEY, PHILIP D. MURPHY, STEPHEN SWEENEY, CRAIG COUGHLIN, JOHN DOES 1-10, JANE DOES 1-10,
- c. Case Citation: Michael Marrara, *et al.*, v. Philip D. Murphy, *et al.*, 2023 U.S. Dist. LEXIS 18370, Civil Action No. 22-02056 (D.N.J. Feb. 3, 2023) and
- d. Entry of Judgment: Opinion and Final Order entered February 3, 2023,

3. United States Court of Appeals for the Third Circuit

- a. Docket Number: 23-1379,

b. Case Caption: MICHAEL MARRARA, MICHAEL DOTRO, v. THE STATE OF NEW JERSEY, PHILIP D. MURPHY, STEPHEN SWEENEY, CRAIG COUGHLIN, JOHN DOES 1-10, JANE DOES 1-10,

c. Case Citation: Michael Marrara, *et al.*, v. Philip D. Murphy, *et al.*, 2023 U.S. App. LEXIS 17120, No. 23-1379 (3d Cir. July 7, 2023) and

d. Entry of Judgment:

i. Opinion and Judgment, summarily affirming District Court's orders, entered July 7, 2023 and

ii. Order denying petition for panel rehearing entered September 11, 2023 and

4. United States Supreme Court

a. Docket Number: 23A408,

b. Case Caption: MICHAEL MARRARA, MICHAEL DOTRO, v. THE STATE OF NEW JERSEY, PHILIP D. MURPHY, STEPHEN SWEENEY, CRAIG COUGHLIN, JOHN DOES 1-10, JANE DOES 1-10 and

c. Entry of Judgment: N/A

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## **PETITION FOR A WRIT OF CERTIORARI**

Incarcerated *pro se* Petitioners, Michael Marrara and Michael Dotro (hereinafter, collectively “Petitioners”), respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

### **OPINIONS BELOW**

The order from the Third Circuit denying a petition for panel rehearing is reproduced in the Petitioners’ Appendix (hereinafter, “App.”) at 1a. The panel opinion of the Third Circuit is unpublished and reproduced at App. 2a-8a. The opinion of the District Court is unpublished and reproduced at App. 9a-15a.

### **JURISDICTION**

The Court of Appeals issued its panel opinion and judgment on July 7, 2023. (App. 2a-8a). Said court then issued an order denying Petitioners’ timely petition for panel rehearing on September 11, 2023. (App. 1a).

Petitioners, on November 6, 2023, filed a timely application requesting a sixty (60) day extension of time to file this petition for writ of certiorari. This United States Supreme Court then issued an order granting Petitioners’ application, reflecting a new deadline of February 8, 2024, which is reproduced at App. 16a.<sup>1</sup>

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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<sup>1</sup> With the aid of *Supreme Court* Rule 29.2, Petitioners ask this Court to accept this petition as being timely because “[i]f submitted by an inmate confined in an institution, a document is timely filed if it is deposited to the institution’s internal mail system on or before the last day of filing, and is accompanied by a...declaration in compliance with 28 U.S.C. § 1746 setting out the date and stating that first-class postage has been paid.” Petitioners deposited this document to East Jersey State Prison’s internal legal mail system on February 1, 2024, with an accompanying declaration stating such.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners' Amended Complaint, in relevant part, is reproduced at App. 17a-32a.

The text of *N.J.S.A.* § 30.4-123.100 (1) (a) *et seq.* provides in relevant part:

[T]he commissioner also shall award inmates public health emergency credits in accordance with this section if the public health emergency: (1) arises as a result of a communicable or infectious disease; and (2) results in substantial modifications to department-wide correctional facility operations.

The text of *N.J.S.A.* § 30.4-123.100 (1) (b) *et seq.* provides in relevant part:

[P]ublic health emergency credits shall be awarded to any inmate in the custody of the Commissioner of Corrections who: (1) is serving a sentence or receiving jail credits applicable to the sentence; and (2) is scheduled to be released from the custody of the Commissioner of Corrections within 365 days.

The text of *N.J.S.A.* § 30.4-123.100 (1) (d) (1) provides in relevant part:

Public health emergency credits shall not be awarded to an inmate serving a sentence in a State correctional facility for: (1) murder pursuant to N.J.S.2C:11-3.

The text of 42 *U.S.C.* § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

The 1st Amendment of the United States Constitution provides:

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

The 5th Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The 11th Amendment of the United States Constitution provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section One of the 14th Amendment of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **CONCISE STATEMENT OF THE CASE**

#### **A. Factual background**

Petitioners presented their amended complaint against the State of New Jersey, Philip D. Murphy, current governor of the State of New Jersey (hereinafter "Governor Murphy"), Stephen Sweeney, former President of the New Jersey Senate, Craig Coughlin, current Speaker of the General Assembly, John Does 1-10 and Jane Does 1-10 (hereinafter, collectively "Defendants").

Petitioners' amended complaint, (D.E. No. 15-1, *Amended Complaint*)<sup>2</sup>, rightfully claims that, through the enactment of New Jersey Senate Bill No. 2519, *N.J.S.A. § 30.4-123.100* (hereinafter "Covid-19 Legislation"), the Defendants violated the U.S. and New Jersey Constitutions, 42 *U.S.C. § 1983*, the New Jersey Civil Rights Act (*N.J.S.A. § 10:6-2*) and the New Jersey Administrative Procedures Act (*N.J.S.A. § 52:14B1-B15*). Furthermore, the Covid19 Legislation awards up to eight months of public health emergency credits (hereinafter "PHEC") off of Petitioners' sentences, however, unconstitutional exclusions within the legislation awarded PHEC to on a select group of incarcerated persons.

On October 19, 2020, Governor Murphy enacted the Covid-19 Legislation. It was previously ratified through both the Senate, by former Senate President Stephen Sweeney, and the House, by then House Speaker Craig Coughlin, on September 24, 2020.

As the Covid-19 virus continued to infect the New Jersey prison population, at an alarming rate, Governor Murphy signed Executive Order No. 103, on March 9, 2020, declaring a public health emergency. It was then terminated by the signing of Executive Order No. 244, on June 4, 2021, only to be reinstated a second time, by the signing of Executive Order No. 280, on January 11, 2022, acknowledging the continued severity of the pandemic in an attempt to alleviate the prison population. After Plaintiffs submitted their amended complaint, Governor Murphy signed Executive Order No. 292 on March 4, 2022, effectively terminating the second declared public health emergency.

Petitioners' amended complaint alleges Defendants created the Covid-19 Legislation, which applied unconstitutional exclusions, which severed a qualified group causing Petitioners'

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<sup>2</sup> Documents referenced to as "D.E. No." are from this matter's District Court docket, Case No. 2:22-cv-02056-ES-ESK

civil rights violation. Defendants' actions demonstrated discriminatory animus and prejudice by denying Petitioners their qualified right to the PHEC, after Petitioners met the requirements set forth in the Covid-19 Legislation, while the same rights were given to similarly situated incarcerated persons.

The Covid-19 Legislation created requirements, which allotted the PHEC to be awarded to all incarcerated persons who languished through both the "arise[] of a communicable disease or infectious disease...and results in substantial modifications to department-wide correctional facility operations." *N.J.S.A. § 30.4-123.100 (1) (a) et seq.* Although Petitioners met said requirements, Defendants' unconstitutional exclusions surfaced when the legislation stated that they must be "scheduled to be released from the custody of the Commissioner of Corrections within 365 days." *N.J.S.A. § 30.4-123.100 (1) (b) (2).* An additional exclusion, affecting Petition Dotro, stated that "Public health emergency credits shall not be awarded to an [incarcerated person] serving a sentence in a State correctional facility for...murder pursuant to N.J.S.2C:11-3." *N.J.S.A. § 30.4-123.100 (1) (d) (1).*

The unconstitutional exclusions, denying Petitioners their PHEC based on the time remaining on their sentences and/or the annex of their crimes, created a discriminatory animus and prejudice towards the excluded Petitioner, ultimately violating 42 U.S.C. § 1983, their rights to the Equal Protection Clause of the U.S. Constitution, Due Process under the 5th Amendment, Ex Post Facto and Double Jeopardy and violated the New Jersey Administrative Procedures Act.

#### **B. Federal questions raised**

1. Does *Preiser*'s holding that the restoration of time credits were not cognizable in a § 1983 action persist when there is a direct civil rights challenge of an unconstitutional legislation, making a habeas corpus the only avenue for relief?



2. Does *Ex Parte Young*'s holding that a private party can be treated as a "person" in a § 1983 action stand when the private party is a state officer being sued for prospective injunctive relief due to an ongoing violation of federal law and civil rights?

### C. Proceedings Below

Defendants were served with summons and original complaint on March 9, 2022. (D.E. No. 1-2, *Original Complaint*). Due to a federal question, this matter was moved to this District Court by the Defendants on April 8, 2022. (D.E. No. 1, *Notice of Removal*). Defendants then on April 28, 2022 filed an initial motion to dismiss (D.E. No. 4-1, *First Motion to Dismiss*), leading the Plaintiffs to request leave to file an amended complaint, which was filed on July 7, 2022. (D.E. No. 15-1, *Amended Complaint*). Defendants followed up by filing a second motion to dismiss (D.E. No. 20, *Second Motion to Dismiss*) on August 4, 2022, which was fully briefed. (D.E. No. 20-1, *Moving Brief*; D.E. No. 28, *Brief in Opposition*; D.E. No. 33, *Reply Brief*). This ultimately led to an entry of judgment on February 3, 2023, in the form of an opinion, and final order, dismissing Plaintiffs' Federal § 1983 claims *with prejudice*, and remanding Plaintiffs' State law claims to the Superior Court of New Jersey, Middlesex County. (D.E. No. 36, *Opinion*; D.E. No. 37, *Order*).

Regarding said opinion and order, Plaintiffs dated and mailed a premature notice of appeal on February 22, 2023, which was then filed March 1, 2023, and docketed with the United States Court of Appeals for the Third Circuit on March 2, 2023, generating USCA case number 23-1379. (D.E. No. 40, *Notice of Appeal*; D.E. No. 42, *USCA Case Number 23-1379*).

On March 3, 2023, Plaintiffs dated and mailed a timely motion for reconsideration under Fed. R. Civ. P. 59 (e), asking this Court to amend or alter the order dismissing Plaintiffs' Federal

§ 1983 claims. Said motion was filed on March 14, 2023, and terminated, via text order dated March 20, 2023 (D.E. No. 44, *Rule 59 (e) Motion*; D.E. No. 45, *Text Order*, dated March 20, 2023).

On March 23, 2023, Plaintiffs filed a motion seeking a stay with the Superior Court of New Jersey, Middlesex County (Trans ID: LCV20231433535, Motion)<sup>3</sup>. On June 9, 2023, the Superior Court granted Plaintiffs' motion, granting a stay pending appeal (Trans ID: LCV20231774893, Order).

Due to the denied Rule 59 (e) motion, Plaintiffs dated and mailed an amended notice of appeal on April 4, 2023 to this District Court, which was filed on April 12, 2023, and sent to the Third Circuit on April 26, 2023 (D.E. No. 49, *Amended Notice of Appeal*; Document # 28, Confirmed Receipt of D.E. No. 49 from the District Court)<sup>4</sup>.

On July 7, 2023, the Third Circuit filed its opinion and entered judgment as they summarily affirmed this District Court's orders, pursuant to 3d Cir. L.A.R. 27.4 and 3d Cir. I.O.P. 10.6. (Document # 31; Document # 32). Petitioners, in their continued effort to plead for reconsideration, filed motions under Fed. R. Civ. P. 54 (b), filed July 18, 2023, (D.E. No. 51, *Rule 54 (b) Motion*) and Fed. R. Civ. P. 60 (b) (1), submitted for filing on January 8, 2024, (projected to be D.E. No. 54, *Rule 60 (b) (1) Motion*). As of the date on this writ, both motions are currently pending.

On November 6, 2023, Petitioners filed a timely application requesting a sixty (60) day extension of time to file this petition for writ of certiorari. This United States Supreme Court then issued an order granting Petitioners' application, reflecting a new deadline of February 8, 2024.

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<sup>3</sup> Documents identified as "Trans ID:" are from this matter's Superior Court docket, Case. No. MID-L-6279-21.

<sup>4</sup> Documents identified as "Document #" are from this matter's Third Circuit docket, Case No. 23-1379.

#### **D. Lower Courts' Jurisdiction**

1. Superior Court of New Jersey, Law Division, Middlesex County
  - a. Divisional jurisdiction of the Superior Court was invoked under *New Jersey Court Rule* 4:3-1 (a) (5) and
  - b. Venue of the Superior Court was invoked under *New Jersey Court Rule* 4:3-2 (a) (3),
2. United States District Court for the District of New Jersey
  - a. Petitioners' federal claims invoked jurisdiction under 28 U.S.C. § 1331 and
  - b. Petitioners' state claims invoked supplemental jurisdiction under 28 U.S.C. § 1367,
3. United States Court of Appeals for the Third Circuit
  - a. Jurisdiction was invoked under 28 U.S.C. § 1291 and
4. Supreme Court of the United States
  - a. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

#### **REASONS FOR GRANTING THE WRIT**

The *Preiser* and *Ex Parte Young* opinions implicate a division within the law. The first is how to read *Preiser*: whether restoration of credits contrasts a direct civil rights challenge of unconstitutional legislation or not. The second is how to read *Ex Parte Young*: whether a State officer can be sued in his or her official capacity, for specific relief, due to specific actions, is considered a "person" under § 1983 or not. The Third Circuit's application of *Preiser* was incorrect, and the District Court's non-application of *Ex Parte Young* was incorrect, and further, aided by the Third Circuit not considering the *Ex Parte Young* argument, makes review by this Court all the more critical.

**A. THE COURTS ARE DIVIDED ON WHETHER  
RESTORATION OF CREDITS CONTRASTS A DIRECT  
CHALLENGE OF PROCEDURES AND CONDUCT THAT  
LED TO UNCONSTITUTIONAL EXCLUSIONS WITHIN  
THE LEGISLATION.**

En route to its February 3, 2023 Opinion, the District Court held that “habeas corpus, not Section 1983, is the exclusive remedy for state prisoners seeking to shorten the terms of their confinement.” (App. 13a, at n. 1) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 487-90 (1973)). In arriving at its July 7, 2023 per curiam Opinion, which summarily affirmed the District Court’s opinion judgment, held that Petitioners challenge “must be brought by way of a habeas corpus petition.” (App. 5a). The Court further stated that “[Petitioners] must therefore bring the federal claims by way of a petition for a writ of habeas corpus.” (App. 6a) (quoting *Preiser*, 411 U.S. at 500).

The Court erred in construing the relief sought by the Petitioners by overlooking the declaratory and injunctive relief sought to correct the procedures, process and conduct used to prevent an unconstitutional legislation, and not to their actual duration of confinement.

In the **Third Circuit**, the *Georgevich* plaintiffs filed claims under § 1983, stating that they had been denied equal protection because they had not received the same due process as similarly situated prisoners in county prisons. *Georgevich v. Strauss*, 772 F.2d 1078, 1082 (3rd Cir. 1985). The district judge granted defendants summary judgment on the ground of exhaustion. *Id.*, 1085. On appeal, the court vacated and remanded, holding that the district court erred in construing the relief sought by plaintiffs as habeas corpus relief and its attendant exhaustion requirement *Id.*, 1087. Because plaintiffs’ claim related only to process and not to the actual duration of confinement, the court held that the claim could properly have been brought as a § 1983 action. *Id.*, 1086. The court concluded that abstention was proper because plaintiffs were seeking an

injunction ordering defendants, 300 state judges, to provide parole procedures that defendants and the state attorney general maintained were already required by state law. *Id.*, 1089. The same Third Circuit Court found, contrary to *Preiser*, “the fact that a prisoner’s success in the litigation might increase the chance for early release does not, in itself, transform the action into one for habeas corpus.” *Id.*, 1087. Ultimately, the court did not make the distinction between process-based claims and those focusing on the outcome of a particular decision. *Ibid.* Since the *Georgevich* plaintiffs’ claim relates only to process and not to the actual duration of confinement, the court held that it could properly be brought as a § 1983 action. *Ibid.*

In the **United States Supreme Court**, the *Wolff* plaintiff, who was an incarcerated person within a Nebraska state prison, filed a complaint under § 1983 in the United States District Court for the District of Nebraska alleging that prison disciplinary proceedings did not comply with the due process clause of the Federal Constitution. *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974). Where the suit involved an action to the restoration of good time credits it also involved an injunction to correct the unconstitutional action. *Id.*, at 554. The *Wolff* court, contrary to *Preiser*, held suit can be brought under § 1983 for “the validity of the procedures, employed for imposing sanctions, included the loss of good time credits, [or] for serious misconduct.” *Ibid.* The Court further agreed that “such a declaratory judgment as a predicate, would not be barred by *Preiser* and because under that case only an injunction restoring good time credits improperly taken is foreclosed, neither would it preclude a litigant...ancillary relief, an otherwise proper injunction enjoining the prospective enforcement of regulations.” *Id.*, at 555. The Court further held that although an action seeking restoration of good time credits could be brought only as a petition for habeas corpus, a litigant could file for an injunction under § 1983 based on a claim that good time credits were lost without proper procedural protections. *Ibid.*

The **Third Circuit**, in *Wright*, considered an issue analogous to whether an incarcerated person who alleged that he was denied due process because his application for home furlough was arbitrarily and capriciously denied was required to exhaust state remedies. *Wright v. Cuyler*, 624 F.2d 455, 456 (3d Cir. 1980). This Court held that he was not, stating that *Wright*'s demand for fair application of the furlough eligibility criteria, as distinct from his demand for admission to the program, relates to the manner by which the prison authorities reached their decision and not the outcome of their decision. *Id.*, at 458, at n. 5. Thus, this particular claim of *Wright*'s unmistakably goes not to the fact or duration of confinement but rather to the fairness of the decision making process. Although impartial application of the furlough criteria to Wright might increase his chance to gain admission to the furlough program, injunctive relief ordering impartial application would not intrude upon or divest the prison administration of its ultimate discretion to grant or deny Wright's admission to the program. *Id.*, at 459.

In this matter, the Petitioners filed suit under § 1983 for declaratory and injunctive relief solely challenging the actions of the Defendants and the procedure, process, and conduct, used to create an unconstitutional legislation. The Third Circuit, in its misconstrued understanding of the Petitioners' claims, stated that the "[Petitioners] are not challenging any procedures that led to their exclusion from the credits." (App. 6a).

Akin to the plaintiff in *Wolff*, the Petitioners were denied procedural protection and stated so, on multiple instances, throughout their amended complaint<sup>5</sup> how the Defendants, in their conduct, during the procedure and process "failed to exercise his absolute legal duty to the

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<sup>5</sup> Petitioners' amended complaint is the moving document in this matter (D.E. No. 15-1). It is included in the Petitioners' Appendix, however due to the document's length, it is included in relevant part, to include the cover page and all relevant pages, and is reproduced at App. 17a-32a.

Plaintiffs by allowing the enactment of the constitutionally impermissible legislation...” (App. 18a-19a, at ¶¶ 85-87; App. 21a-22a, at ¶¶ 106-108; App. 24a-26a, at ¶¶ 123-125; App. 29a-30a, at ¶¶ 142-144). Petitioners further stated how the Defendants’ “acts committed in creation of sanctions, provisions, exclusions and legislation” where in “violation of Plaintiffs’ and the class’s Constitutional Rights...” (App. 20a, at ¶ 102; App. 23a, at ¶ 119; App. 27a-28a, at ¶ 138; App. 31a, at ¶ 152). Similar to the plaintiffs in *Georgevich*, the Petitioners in this matter state that they were seeking an injunction to “enjoin this court of law as a judicial remedy to prevent conduct contrary to equity and good conscience to impose a mandatory declaratory relief requiring positive action to ensure the preservation of Civil Rights and Equal Protection, guaranteed by the New Jersey and U.S. Constitutions.” (App. 20a, at ¶ 104; App. 24a, at ¶ 121; App. 28a, at ¶ 140; App. 31a-32a, at ¶ 154). This additionally implicates the Third Circuit’s misapprehension of the Petitioners’ procedural challenges.

Furthermore, the Third Circuit attests that the “[Petitioners] also appear to seek money damages[]”, however, throughout the amended complaint, including the prayer for relief, the word “money” or “monetary” does not appear once. (App. 7a). The Petitioners agree with the Court as to “both § 1983 and habeas corpus allow prisoners to challenge conduct by state officer, [but] the two are not coextensive.” (App. 5a).

The Petitioners wholly challenge the process, procedures and conduct of the Defendants, and despite the outcome, analogous to *Wolff* and *Wright*, the “fairness of the decision making process” in the creation and implication of unconstitutional legislation, not the duration of confinement, in order to create uniformity and equal protection throughout the legislation thus allowing the suit to be brought forth under § 1983.

**B. THE COURTS ARE DIVIDED ON WHETHER A STATE OFFICER CAN BE SUED IN HIS OR HER OFFICIAL CAPACITY AND BE CONSIDERED A “PERSON” UNDER § 1983.**

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En route to its February 3, 2023 Opinion, the District Court disregarded long standing, landmark decisions deciding the parameters of suit against a state official in their official capacity, which should have been highly influential and dispositive on the issues presented in this matter. The District Court held that “a defendant must be a ‘person’ within the meaning of [Section 1983]” and “none of the Defendants are ‘persons’ under § 1983.” (App. 13a). The Third Circuit mistakenly aided this holding when it did “not consider the District Court’s ruling that the defendants cannot be considered ‘persons’ under § 1983.” (App. 6a, at n. 2).

In the **United States Supreme Court**, *Ex Parte Young* is seen as a foundational case dating back to 1908, that held a private party would be treated as “persons” under 42 U.S.C. § 1983 and suit can be filed against a party in the official capacity if that party is sued for declaratory and prospective relief, and further, if the party violated federal law, the suit would not be treated as actions against the State. *Ex Parte Young*, 209 U.S. 123, 158-60 (1908). The exception allowing suits for prospective injunctive relief against state officers for ongoing violation of federal law originated in *Ex parte Young*. The U.S. Supreme Court held that state officials could be enjoined from enforcing a railroad commission’s order requiring a reduction in rates. *Id.*, at 129. Because the act was alleged to be unconstitutional, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not, affect the state in its sovereign or governmental capacity. *Id.*, at 159. Thus, the proceeding against the state officer was not barred by the 11th Amendment. *Id.*, at 129.



Over time, the exception to the official capacity standard expanded within the **United States Supreme Court**, finding a suit for prospective injunctive relief against state officers is also barred by Eleventh Amendment immunity when “the state is the real, substantial party in interest...” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 277 (1997) (quoting *Ford Motor Company v. Department of Treasury of the State of Indiana*, 323 U.S. 459, 464 (1945)). Moreover, the *Idaho court*, while in the **Ninth Circuit**, affirmed in part and reversed in part agreeing with its District Court that the 11th Amendment barred all claims against a State and its agents, as well as actions against officers. *Id.*, at Summary. The Court of Appeals later reversed, finding *Ex Parte Young* Doctrine applicable and allowed claims for Declaratory and Injunctive relief against officials to proceed insofar as they sought to preclude continuous violations of Federal Law. *Ibid.* This U.S. Supreme Court confirmed, granting certiorari based on the declaratory and injunctive relief finding the State is the real party in interest when “the essential nature and effect of the proceeding...” is not against the officer but against the state. *Id.*, at 278.

This was solidified nearly a century later, again in the **United States Supreme Court**, as seen in *Verizon* when the court approved an agreement between the petitioner and respondent phone companies respecting an agreement relating to the use of phone lines. *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 639 (2002). The Federal Communications Commission then issued a ruling, which was later vacated by the Court of Appeals for the District of Columbia Circuit. *Id.*, at 640. The petitioner then brought claims in federal court, seeking “a declaratory judgment that the Commission’s order was unlawful, and an injunction prohibiting its enforcement.” *Id.*, at 642. The U.S. Supreme Court held that this was a “straightforward” application of *Ex parte Young*, because the “complaint allege[d] an ongoing violation of federal law” and sought prospective injunctive relief. *Id.*, at 645.

The **Ninth Circuit** held that “[t]o make out a cause of action under section 1983, plaintiffs must plead that...the defendants [were] acting under color of state law” and plaintiffs were deprived of their “rights secured by the Constitution or federal statutes.” *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). “A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Further, held in the **Ninth Circuit**, and supported by the **Fifth Circuit**, was a holding that “[s]upervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy ‘itself is a repudiation of constitutional rights’ and is ‘the moving force of the constitutional violation.’ ” *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (quoting *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987)). “The requisite causal connection can be established...by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.” *Redman v. County of San Diego*, 942 F.2d 1435, 1448 (9th Cir. 1991) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

Most recently in the **United States District Court for the District of New Jersey**, the plaintiffs in *Planker* filed claims against the New Jersey Department of Corrections (hereinafter, “NJDOC”), and its officials, in regards to violations stemming from 1st and 14th Amendment violations where the State, its agencies and officials claimed they were not “persons” under § 1983. The Court, however, permitted claims against some officials, the State of New Jersey and the NJDOC in their official capacity for injunctive relief, only to dismiss suit for monetary damages in their official capacity. *Planker v. Atkins*, Civil Action No. 20-4264, U.S. Dist. LEXIS 75310, at \* 10, 16 (D.N.J. Apr. 28, 2023).

Similarly, as seen in the **United States District Court for the Eastern District of Missouri**, the plaintiffs in *Hall* claimed monetary damages against two defendants, in their official capacity, were dismissed and his claims for injunctive relief were allowed to proceed despite the defendants' claim that they were not "persons" under 1983 due to a "continuing state action that violates the Constitution, and that the [defendants were] the moving force behind the deprivation." *Hall v. Francis*, Civil Action No. 23-437, 2023 U.S. Dist. LEXIS 61938, at \* 12-13 (E. D. Mo. Apr. 7, 2023).

Following that very same reasoning, in this matter, Petitioners' claims under the 14th Amendment and those seeking declaratory and injunctive relief, were undeniably ignored and otherwise failed to be considered by the District Court, and ultimately the Third Circuit. The *Planker* court, the same District Court as in this matter, allowed the injunctive and declaratory claims against the defendants to proceed, as the court viewed the defendants as "persons" under the statute. *Planker*'s claims were dismissed only because he could "not provided sufficient facts suggesting that...Murphy could provide him with injunctive relief under § 1983." *Planker*, 75310, at \* 11. In turn, *Planker* was allowed the ability to amend the complaint to cure any deficiencies. *Id.*, at \* 16.

In this matter, the Third Circuit went as far as incorrectly stating that the "[Petitioners] are not challenging any procedures that led to their exclusion from the credits. (App. 6a). Contrarily, in their amended complaint, Petitioners challenged the procedures leading to the Covid-19 Legislation, put forth by the Defendants in their official capacity, while claiming Constitutional violations of Equal Protection, Due Process, Ex Post Facto and violations to the New Jersey Administrative Procedures Act. (App. 18a-19a, at ¶¶ 85-87; App. 21a-22a, at ¶¶ 106-108; App. 24a-26a, at ¶¶ 123-125; App. 29a-30a, at ¶¶ 142-144). The Third Circuit then found the

Defendants to be arms of the State and the constitutionality of the legislation could not be challenged.

Another contrasting holding is seen, again in the **Third Circuit**, when the *Rode* court held a sufficient connection between the defendant and the offending conduct exists where the defendant has a duty to enforce the offending regulation, not merely a general power to review and approve regulations.” *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1980). The *Rode* court further determined that neither the governor nor the attorney general, both of whom were named as defendants, were charged with the “duty to enforce” an allegedly offending regulation regarding the Pennsylvania State Police simply because they had the “power to review and approve a departmental regulation for form and legality...” *Ibid.* The Third Circuit, again showed divergence when compared to this matter, when holding that by naming the persons who are mandated the “duty to enforce” and review the regulations, “[the *Rode* plaintiff] was able to challenge the constitutionality of the regulation...” *Id.*, at 1209-10.

In this matter, Petitioners, by bringing suit against the Defendants in their official capacity, fit the criteria set forth by this **United States Supreme Court**, when holding that

[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

A government official in the role of a personal-capacity defendant thus fits comfortably within the statutory term “person.”

“[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because ‘official-capacity actions for prospective relief are not treated as

actions against the State.’ ” *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985)). In *Hafer*, the employees of the Pennsylvania Auditor General’s Office, based on their dismissals from their jobs by the Auditor General, filed suit against the Auditor General’s actions under 42 U.S.C. § 1983. *Id.*, at Summary. The employees sought monetary damages in that case, as well as reinstatement, and while the *Hafer* court dismissed all the § 1983 actions stating that the defendants were not “persons” under 42 U.S.C. § 1983, the judgment was reversed by the Third Circuit Court of Appeals. *Ibid.* The Court held that when defendants act under the color of the state, and when brought suit against for injunctive relief, while in their official capacities, are “persons” subject to liability under § 1983. *Id.*, at 27. This exception is designed to preserve the constructional structure by allowing private citizens to petition a Federal Court to enjoin State officials acting in their official capacity, from engaging in future conduct violating the Constitution or a federal statute. *Christ the King Manor, Inc. v. Sec’y U.S. Dep’t of Health and Human Servs.*, 730 F.3d 291, 318 (3d Cir. 2013).

In addition, the Petitioners are seeking prospective and declaratory relief, without seeking monetary compensation, against Defendants for Federal constitutional and civil rights violations.<sup>6</sup> By the Defendants voluntarily removing this case from the Superior Court of New Jersey to the District Court, they waived their immunity and consented to suit which then overrides its State’s common law immunity, thus making them “persons” in the eyes of the courts. There is a clear direct link between the Defendants and the deprivation caused by the unconstitutional legislation with the Defendants being the moving force behind a violation that is still ongoing.

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<sup>6</sup> The Third Circuit’s opinion erroneously stated that the [Petitioners’] also appear to seek money damages.” (App. 7a). This finding is clearly inaccurate, as the words “money”, “monetary” or even the symbol “\$” are nowhere to be found in Petitioners’ amended complaint (D.E. No. 15-1).

While filing suit against Defendants in their official capacity, the Petitioners did not ask for monetary relief, but rather only the District Court to enjoin the law and provide declaratory relief to allow an unconstitutional legislation to go forth with constitutional equality. The District Court erred by dismissing Petitioners' amended complaint *with prejudice*, after stating that Defendants are not "persons" under § 1983 because suit against the Defendants was filed "solely their official capacity." (App. 13a). The Third Circuit failed to correct this injustice because it was affirmed that the "[Petitioners] could not bring their federal claims in a § 1983 action...therefore the [Third Circuit did] not consider the District Court's ruling that the defendants cannot be considered 'persons' under § 1983." (App. 6a, at n. 2).

The Petitioners are two *pro se*, incarcerated persons who made a simple mistake, with regards to alleging claims against an individual defendant, thus severing Petitioners' ability to amend their complaint a second time to correct their novice judicial oversight. This caused an unjust denial of suit against state officials when Petitioners' civil rights were violated. The District Court undeniably ignored and otherwise failed to consider long standing U.S. Supreme Court findings and failed to consider the merits of the Petitioners' case based, solely due to a simple layman's oversight.

### CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated: February 1, 2024

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