23-458

No. 22-3089

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

TOM A. DE COLA,
Petitioner,
v.
STARKE COUNTY COUNCIL ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION ON REVIEW

Whether the comity of state and federal court reviews of Petitioner, Tom A. DeCola's respective administrative appeal and concurrent 42 U.S.C. § 1983 civil tort claim bared a miscarriage of justice in conflict with prevailing federal and state law procedures by not differentiating an administrative appeal and its companion 42 U.S.C. § 1983 civil tort action?

LIST OF RESPONDENTS

1. Starke County Council
2. Dave Pearman
3. Freddie Baker
4. Kay Gudeman
5. Robert Sims
6. Howard Bailey
7. Kathy Norem

LIST OF ALL RELATED PROCEEDINGS

1. Marshall Superior Court 2, 50D03-2005-MI-36, *TOM A. DE COLA v. STARKE COUNTY COUNCIL*, Date of Entry of Judgment: December 22, 2020.

2. Indiana Court of Appeals, 21A-MI-120, *TOM A. DE COLA STARKE COUNTY COUNCIL*, Date of Entry of Judgment: November 23, 2021.

3. Marshall Superior Court 3, 50D03-2005-MI-36, *TOM A. DE COLA v. STARKE COUNTY COUNCIL*, Date of Entry of Judgment: March 30, 2022.

4. United States Northern District of Indiana Court, 3:20-cv-869-JD-MGG, *TOM A. DE COLA v. STARKE COUNTY COUNCILETAL.*, Date of Entry of Judgment October 20, 2022.

5. United States Court of Appeals for the Seventh Circuit, 22- 3089, *TOM A. DE COLA v. STARKE COUNTY COUNCIL ET AL.*, Date of Entry of Judgment: May 30, 2023.

6. Starke Circuit Court, 75C01-2102-CT-5, *TOM A. DE COLA v. STARKE COUNTY COMMISSIONERS ET AL.*, Date of Entry of Judgment: May 25, 2021.

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JURISDICTIONAL STATEMENT

This petition for a writ of certiorari seeks review over the United States Court of Appeals for the Seventh Circuit's ORDER decided and entered on May 30, 2023 into case No. 22-3089. See App. pp. 1a-4a. 28 U.S.C. § 1254(1) confers jurisdiction to the Court for reviewing said petition.

VERBATIMS OF LAW CITED

Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987),

> "Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.[5] Absent diversity of citizenship, federal-question jurisdiction is required.[6] The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. See *Gully* v. *First National Bank,* 299 U. S. 109, 112- 113 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.[7] See *The Fair* v. *Kohler Die & Specialty Co.,* 228 U. S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon") (Holmes, J.); see also *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson,* 478 U. S. 804, 809, n. 6 (1986) "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced"); *Great North R. Co.* v. *Alexander,* 246 U. S. 276, 282 (1918) ("[T]he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case")." 30

Clay v. Marrero, 774 N.E.2d 520, 521 22 (Ind. Ct. App. 2002),

> "Appellants contend that the trial court erred in reversing the Board's decision. The trial court may examine a

board's decision to determine if it was incorrect as a matter of law. However, it may neither conduct a trial de novo nor substitute its decision for that of the board. Unless the decision is illegal, the decision must be upheld. On appeal, we are restricted by the same considerations. In essence, an abuse of discretion standard applies.[3] *Whitesell v. Kosciusko County Bd. Of Zoning Appeals,* 558 N.E.2d 889, 890 (Ind.Ct.App.1990) (citations omitted). In its judgment, the trial court specifically determined that the decision of the Board was "unsupported by substantial evidence, w[as] based, in part, on hearsay and innuendo, and consequently w[as] illegal, arbitrary, and capricious." We cannot agree. Clay introduced substantial evidence.[4] Citing the AOPA, Marrero contends that the Board's decision was improperly based entirely on hearsay. As mentioned above, however, the Board is not governed by the AOPA. Even under the AOPA, Marrero's argument would fail because he did not object to any evidence introduced at the hearing. *See* Ind. Code §4- 21.5-3-26 ("If not objected to, the hearsay evidence may form the basis for an order."). Furthermore, the trial court determined that the Board's decision "was based *in part* on hearsay and innuendo," (emphasis supplied), not that it was based *entirely* on such evidence." 34

Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County North BZA, 677 N.E.2d 544, 548-9 (Ind. Ct. App. 1997),

> "When determining whether an administrative decision is supported by substantial evidence, the reviewing court must determine from the entire record whether the agency's decision lacks a reasonably sound evidentiary basis. *Alcoholic Beverage Comm'n v. River Road Lounge* (1992) Ind. 549*549 App., 590 N.E.2d 656, *trans. denied.* Thus, we have noted that evidence will be considered substantial if it is more than a scintilla and less than a preponderance. *Id.* at 659. In other words, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We

think that the certiorari court's conclusion that the BZA's determination was supported by substantial evidence was not error." 34

Equicor Dev. Inc. v. Westfield-Washington Tp. Plan Com'n, 758 NE2d 34, 36-7 (Ind. Sup Ct. 2001),

> "Equicor filed a Petition for Writ of Certiorari in the trial court, contending that the Commission's denial was "arbitrary, capricious, illegal, and contrary to law." The trial court affirmed the decision of the Plan Commission, concluding that the decision was supported by substantial evidence establishing that the denial was based on Equicor's failure to designate the number and location of parking spaces for the development. The Court of Appeals agreed with the trial court that there was substantial evidence supporting the Commission's denial of Equicor's plat, but nevertheless reversed. *Equicor Dev., Inc. v. Westfield-Washington Township Plan Comm'n*, 732 N.E.2d 215 (Ind. Ct. App. 2000). The Court of Appeals found the Commission's decision was "arbitrary and capricious" because the Commission's true motive was a concern for density and because similar plats had been approved without requiring the designation of parking spaces. *Id.* at 220-24. The Court of Appeals did not address Equicor's argument that the Plan Commission, having failed to notify it of the alleged parking deficiency, was estopped from denying its permit on that basis.
>
> **Standard of Review**
>
> Indiana Code section 4-21.5-5-14 prescribes the scope of court review of an administrative decision. That section provides that a court may provide relief only if the agency action is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. See also *Dep't of Natural Res. v. Ind. Coal Council, Inc., 542* N.E.2d 1000, 1007 (Ind. 1989) *37.

("[A]n administrative act is arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion."). Section 4-21.5-5-14(a) further provides that "[t]he burden of demonstrating the invalidity of the agency action is on the party ... asserting invalidity." In reviewing an administrative decision, a court is not to try the facts de novo or substitute its own judgment for that of the agency. Ind. Code § 4-21.5-5-11 (1998); accord *Ind. Dep't of Envtl. Mgmt. v. Conard,* 614 N.E.2d 916, 919 (Ind.1993). This statutory standard mirrors the standard long followed by this Court. *See Town of Beverly Shores v. Bagnall,* 590 N.E.2d 1059, 1061 (Ind.1992). On appeal, to the extent the trial court's factual findings were based on a paper record, this Court conducts its own de novo review of the record. *Cf. Houser v. State,* 678 N.E.2d 95, 98 (Ind.1997) ("Because both the appellate and trial courts are reviewing the paper record submitted to the magistrate, there is no reason for appellate courts to defer to the trial court's finding that a substantial basis existed for issuing the warrant."). If the trial court holds an evidentiary hearing, this Court defers to the trial court to the extent its factual findings derive from the hearing. *GKN Co. v. Magness,* 744N.E.2d 397, 401 (Ind.2001). Here, the trial court held an evidentiary hearing which focused primarily on the Commission's motives for rejecting Equicor's proposed primary plat and heard similar arguments on a motion to correct error. There was also a record of minutes of the Commission's meetings and legal briefs filed to the court. To the extent findings turn solely on this paper record, review is de novo. *Id.*" 34

Indianapolis Downs, LLC v. Herr, 834 NE 2d 699, 703-4 (Ind. Ct. App. 2005),

"A party is not allowed to split a cause of action, pursuing it in a piecemeal fashion and subjecting a defendant to needless multiple suits." *Indiana State Highway Comm'n*

v. Speidel, 181 Ind. App. 448, 392 N.E.2d 1172, 1175 (1979). However, two or more separate causes of action may arise from the same occurrence, and in such case a judgment on one action does not bar suit on the second. *Gorski v. Deering,* 465 N.E.2d 759, 762 (Ind. Ct. App. 1984) *704. In *Gorski,* a vehicle driven by Deering collided with a truck driven by Gorski in which Gorski's son and daughter were passengers. Gorski sued Deering for injuries sustained by his daughter in the accident. A jury returned a verdict in Deering's favor. Gorski thereafter sued Deering for his own injuries, lost wages, and property damage. The trial court granted Deering's motion for summary judgment on the basis of *res judicata.* On appeal, we reversed, noting that the first action sought damages for the daughter's injuries and the second for Gorski's injuries. Although both claims arose from the same incident, each required proof of injury and damages the other did not require, and therefore the second action was not barred by claim preclusion. *Id."* 32

Irwin Mortg. Corp v. Marion City. Treasurer, 816 N.E. 2d 439, 447 (Ind. Ct. App. 2004),

"Finally, Irwin correctly asserts that the ITCA's notice requirements are inapplicable to its federal § 1983 claims. *See, e.g., Meury v. Eagle- Union Cmty. School Corp.,* 714 N.E.2d 233, 242 (Ind. Ct. App. 1999) ("ITCA notice provisions are inapplicable to §1983 claims, even when presented in a state court forum"). Thus, since the Journey's Account statute saves Irwin's claims based on the statute of limitations, the ITCA is no bar to Irwin's § 1983 claims against any of the Marion County entities, i.e., the Auditor, Treasurer, and PTABOA."..... 32

Great Northern R. Co. v. Alexander, 246 U.S. 276, 282 (1918),

"The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a

case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum,* order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion."....29

Foster v. Pearcy, 387 NE2d 446, 448-9 (Ind. Sup. Ct. 1979),

"It is our view that the reasoning of *Slinkard v. Griffith, supra,* and *Imbler v. Pachtman, supra,* should not be limited to the cases where the prosecutor is acting only as the State's advocate in a court of law. The prosecutor, as an elected law enforcement official, has a duty to inform the public regarding cases which are pending in his office. He must be able to exercise his best judgment, independent of other irrelevant factors, in serving as the State's *449 advocate and in communicating such developments and events to the public. Were a prosecutor granted only a qualified immunity, the threat of lawsuits against him would undermine the effectiveness of his office and would prevent the vigorous and fearless performance of his duty that is essential to the proper functioning of the criminal justice system. "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler v. Pachtman, supra,* 424 U.S. at 424-5, 96 S.Ct. at 992, 47 L.Ed.2d at 140. We have considered the various authorities discussed in the opinion of the Court of Appeals. We are convinced however that they disregard the fact that the prosecuting attorney is duty- bound to keep the public informed as to the activities of his office. In the opinion of the Court of Appeals, 376 N.E.2d at 1209, they set out illustrations numbered 3 and 4, to the

Restatement (Second) of Torts § 591 (1977), which purport to show a distinction between an attorney general and a local district attorney, so far as immunity is concerned. We do not accept this distinction. Both the Attorney General of Indiana and the local prosecuting attorneys in this State exercise certain sovereign powers. It would be anomalous indeed to hold that the attorney general enjoys an absolute privilege, while the local prosecuting attorneys have only a conditional privilege for the same conduct. We therefore conclude that since it is a prosecutor's duty to inform the public as to his investigative, administrative, and prosecutorial activities, the prosecutor must be afforded an absolute immunity in carrying out these duties. While we base our decision primarily on the common law immunity traditionally accorded to prosecuting attorneys, we also note that the duty to inform the public can be characterized as a discretionary function and thus would fall within the absolute immunity granted under the Indiana Tort Claims Act. IC § 34-4-16.5-3(6) [Burns Supp. 1978]. This decision will ensure that the prosecutor will be able to exercise the independent judgment necessary to effectuate his duties to investigate and prosecute criminals and to apprise the public of his activities. It will also allay the apprehensions about harassment of prosecuting attorneys from unfounded litigation which deters public officials from their public duties. At the same time, our decision will not leave actual and potential criminal defendants wholly unprotected from unscrupulous prosecuting attorneys. As the Court noted in the *Pachtman* case, *supra,* prosecutors are still subject to professional discipline if their actions stray beyond the bounds of ethical conduct. See *Code of Professional Responsibility,* DR 7- 103, DR 7-107, EC 7-13 and EC 7-33. We express no opinion as to the liability of prosecuting attorneys or their deputies for acts outside the scope of their authority. We hold only that where, as here, the acts are reasonably within the general scope of authority granted to prosecuting attorneys, no liability will attach. Hence, appellee Noble Pearcy as Marion County

Prosecuting Attorney enjoys absolute immunity from liability for statements made by him or his deputies to the press regarding pending cases in his office. As far as Pearcy is concerned it is immaterial whether New's statements were within or beyond the scope of his authority as a deputy. If the statements were within the scope of New's authority, Pearcy, as we have just held, is absolutely immune. If the statements were beyond the scope of New's authority, Pearcy again cannot be liable, as government officers are responsible only for the official acts of their deputies acting within the scope of their authority. IC § 5-6-1-3 [Burns 1974]; *Boaz v. Tate* (1873), 43 Ind. 60. Consequently, the trial court committed no error in rejecting the theory of respondeat superior and thereby dismissing the complaint against Pearcy.". . . . 31

Hubbard v. Hubbard, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998),

"Father points to our well-settled rule that a trial court has inherent power to reconsider, vacate or modify any previous order so long as the case has not proceeded to final judgment; that is to say the case is still *in fieri*.[2] *Haskell v. Peterson Pontiac GMC Trucks,* 609 N.E.2d 1160, 1163 (Ind. Ct. App.1993); *McLaughlin v. American Oil Co.,* 181 Ind. App. 356, 358, 391 N.E.2d 864, 865 (1979). Once a trial court acquires jurisdiction, it retains jurisdiction until it enters a final judgment in the case. *Chapin v. Hulse,* 599 N.E.2d 217, 219 (Ind.Ct.App.1992), *trans. denied.* A final judgment disposes of the subject matter of litigation as to the parties so far as the court in which the action is pending has the power to dispose of it. *Matter of J.L.V., Jr.,* 667 N.E.2d 186, 188 (Ind. Ct. App.1996). We agree with Father that because this case had proceeded to final judgment prior to Mother's filing of her "motion to reconsider," Mother's motion cannot be considered a true motion to reconsider, as the court no longer had the power to rule on such a motion. Our review of the trial rules reveals that motions to reconsider are properly made and ruled upon prior to the entry of final judgment. *See* Ind.

Trial Rule 53.4(A).[3] After final judgment has been entered, the issuing court retains such continuing jurisdiction as is permitted by the judgment itself, or as is given the court by statute or rule. *Chapin,* 599 N.E.2d at 219. One such rule is Trial Rule 59 which provides the court, on its own motion to correct error or that of any party, the ability to alter, amend, modify or even vacate its decision following the entry of final judgment. Accordingly, although substantially the same as a motion to reconsider, a motion requesting the court to revisit its final judgment must be considered a motion to correct error. We decline to favor form over substance and, despite its caption, Mother's motion in the instant case should have been treated as a motion to correct error.[4]". 34

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 US 804, 809 - 10 (1986),

"This case does not pose a federal question of the first kind; respondents do not allege that federal law creates any of the causes of action that they have asserted.[6] This case thus poses what Justice Frankfurter called the "litigation- provoking problem," *Textile Workers* v. *Lincoln Mills,* 353 810*810 U. S. 448, 470 (1957) (dissenting opinion) — the presence of a federal issue in a state-created cause of action. Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. See *Healy* v. *Sea Gull Specialty Co.,* 237 U. S. 479, 480 (1915) ("[T]he plaintiff is absolute master of what jurisdiction he will appeal to"); *The Fair* v. *Kohler Die & Specialty Co.,* 228 U. S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon"). See also *United States v. Mottaz,* 476 U.S. 834, 850 (1986)" 30

Mitchum v. Foster, 407 U.S. 225, 241-43 (1972),

"Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights. The debate was not about whether the

predecessor of § 1983 extended to actions of state *242 courts, but whether this innovation was necessary or desirable.[32] This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

V

Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights— to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." *Ex parte Virginia,* 100 U. S., at 346. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. *Ex parte Young,* 209 U.S. 123; cf. *Truax* v. *Raich,* 239 U.S. 33; *Dombrowski* v. *Pfister,* 380 U.S. 479. For these reasons we conclude that, under the 243*243 criteria established in our previous decisions construing the anti- injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law." 29

Page v. State, 424 N.E.2d 1021, 1023 (Ind. Sup. Ct. 1981),

"In order to carry out our function of reviewing the trial court's exercise of discretion in sentencing, we must be

told of his reasons for imposing the sentence which he did. *Green v. State*, (1981) Ind., 424 N.E. 2d 1014 (On Remand). This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course such facts must have support in the record." 34

Patsy v. Board of Regents of Fla., 457, 499 - 502 US 496 (1982),

"The United States District Court for the Southern District of Florida granted respondent Board of Regents' motion to dismiss because petitioner had not exhausted available administrative remedies. On appeal, a panel of the Court of Appeals reversed, and remanded the case for further proceedings. *Patsy* v. *Florida International University,* 612 F. 2d 946 (1980). The full court then granted respondent's petition for rehearing and vacated the panel decision. The Court of Appeals reviewed numerous opinions of this Court holding that exhaustion of administrative remedies was not required and concluded that these cases did not preclude the application of a "flexible" exhaustion rule. 634 F. 2d, at 908. After canvassing the policy arguments in favor of an exhaustion requirement, the Court of Appeals decided that a § 1983 plaintiff could be required to exhaust administrative remedies if the following minimum conditions are met: (1) an orderly system of review or appeal is provided by statute or agency rule; (2) the agency can grant relief more or less commensurate with the claim; (3) relief is available within a reasonable period of time; (4) the procedures are fair, are not unduly burdensome, and are not used to harass or discourage those with legitimate claims; and (5) interim relief is available, in appropriate cases, to prevent irreparable injury and to preserve the plaintiff's rights during the administrative process. Where these minimum standards are met, a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine

in order to determine whether exhaustion should be required. *Id.,* at 912-913. The Court of Appeals remanded the case to the *500 District Court to determine whether exhaustion would be appropriate in this case.

II

The question whether exhaustion of administrative remedies should ever be required in a §1983 action has prompted vigorous debate and disagreement. See, *e. g.,* Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Cases in the Federal Courts, 92 Harv. L. Rev. 610 (1979); Note, 8 Ind. L. Rev. 565 (1975); Comment, 41 U. Chi. L. Rev. 537 (1974). Our resolution of this issue, however, is made much easier because we are not writing on a clean slate. This Court has addressed this issue, as well as related issues, on several prior occasions. Respondent suggests that our prior precedents do not control our decision today, arguing that these cases can be distinguished on their facts or that this Court did not "fully" consider the question whether exhaustion should be required. This contention need not detain us long. Beginning with *McNeese* v. *Board of Education,* 373 U. S. 668, 671-673 (1963), we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies. See *Barry* v. *Barchi, 443* U.S. 55, 63, n. 10 (1979); *Gibson* v. *Berryhill, 411* U.S. 564, 574 (1973); *Carter* v. *Stanton,* 405 U.S. 69, 671 (1972); *Wilwording v. Swenson,* 404 U.S. 249, 251 (1971); *Houghton* v. *Shafer,* 392 U.S. 639, 640 (1968); *King* v. *Smith,* 392 U.S. 309, 312, n.4 (1968); *Damico* v. *California, 389* U.S. 416 (1967). Cf. *Steffel v. Thompson,* 415 U.S. 452, 472- 473 (1974) ("When federal claims are premised on [§ 1983] — as they are here — we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this

Court has stated *501 categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese.* Therefore, we do not address the question presented in this case as one of first impression.

III

Respondent argues that we should reconsider these decisions and adopt the Court of Appeals' exhaustion rule, which was based on *McKart* v. *United States,* 395 U. S. 185 (1969). This Court has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered. However, in *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658, 695- 701 (1978), we articulated four factors that should be considered. Two of these factors — whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history and whether overruling these decisions would be inconsistent with more recent expressions of congressional intent — are particularly relevant to our decision today.[3] Both concern legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court *502 should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.[4] Therefore, in deciding whether we should reconsider our prior decisions and require exhaustion of state administrative remedies, we look to congressional intent as reflected in the legislative history of the predecessor to § 1983 and in recent congressional activity in this area." ..... 29 – 31

Snyder v. Snyder, 62 N.E.3d 455, 458 - 9 – (Ind. Ct. App. 2016),

> "Husband did not, however, file his notice of appeal within the allotted time. Instead, he filed what he styled a "Motion to Correct Error" with the trial court. *Appellant's Appendix* at 121. But, as this court has noted, motions to correct error are proper only after the entry of final judgment; any such motion filed prior to the entry of final judgment must be viewed as a motion to reconsider. *See Citizens Indus. Group v. Heartland Gas Pipeline, LLC,* 856 N.E.2d 734, 737 (Ind. Ct.App.2006) (explaining that "a party can only file a motion to reconsider with the court if the action remains *in fieri*" and "[i]f the trial court has issued a final judgment, the party must file a motion to correct errors rather than a motion to reconsider"), *trans. denied; Stephens v. Irvin,* 730 N.E.2d 1271, 1277 (Ind.Ct.App. 2000) (treating a motion labeled a "Motion to Correct Error" filed before the entry of final judgment as a motion to reconsider), 459*459 *trans. denied; Hubbard v. Hubbard,* 690 N.E.2d 1219, 1221 (Ind.Ct.App.1998) holding that that a "motion to reconsider" filed after the entry of final judgment must be considered a motion to correct error). This distinction is important because unlike motions to correct error, motions to reconsider do not toll the thirty-day timeframe within which a party wishing to undertake an appeal must do so. *See* App. R. 9(A) (providing that the thirty-day deadline to file a notice of appeal is tolled "if any party files a timely motion to correct error"); Ind. Trial Rule 53.4(A) (providing that a motion to reconsider "shall not extend the time for any further required or permitted action, motion, or proceedings under these rules"); *Johnson v. Estate of Brazill,* 917 N.E.2d 1235, 1239 (Ind. Ct. App. 2009) (explaining that "a motion to reconsider does not toll the time period within which an appellant must file a notice of appeal" (quoting *Citizens Indus. Grp.,* 856 N.E.2d at 737)). Indeed, this court has noted that filing a motion to reconsider following the entry of an appealable interlocutory order is an act "fraught with danger" because such a motion does not extend the deadline for

filing a notice of appeal. *Id.* (quoting *Hudson,* 383 N.E.2d at 72n. 9).....34

Ind. Code § 4-21.5-5-14,

"(a) The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity.

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(c) The court shall make findings of fact on each material issue on which the court's decision is based.

(d) The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:

(e) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(1) contrary to constitutional right, power, privilege, or immunity;

(2) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(3) without observance of procedure required by law; or

(4) unsupported by substantial evidence."..... 34

Ind. Code § 34-17-1-1(1),

"An information may be filed against any person or corporation in the following cases:

(1) When a person usurps, intrudes into, or unlawfully holds or exercises a public office or a franchise within Indiana or an office in a corporation created by the authority of this state."..... 26

Ind. Code § 34-17-2-6(a)(c),

"This section applies to an information filed against a person for usurping an office. (c) When an information described in subsection

(a) is filed by any other person, the person shall state the person's interest in the matter and any damages the person has sustained." 27

Ind. Code § 36-2-3-3(b),

"The term of office of a member of the fiscal body is four (4) years, beginning January 1 after election and continuing until a successor is elected and qualified" 27

Ind. Code § 36-2-3-9,

"The fiscal body may:
(1) expel any member for violation of an official duty;
(2) declare the seat of any member vacant if the member is unable or fails to perform the duties of the member's office; and
(3) adopt its own rules to govern proceedings under this section, but a two-thirds (2/3) vote is required to expel a member or vacate a member's seat. ..... 31 – 32

Ind. Const. Art. 1 § 24,

"*No ex post facto* law, or law impairing the obligation of contracts, shall ever be passed." 27

U.S. Const. Art. I §§ 9, 10,

"* * * No Bill of Attainder or ex post facto Law shall be passed. * * * No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." .27

U.S. Const. Art. III § 2 cl. 1,

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all

18 U.S.C. §§ 241 *et* 242,

"If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured— They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death." 27

28 U.S.C. § 1254(1),

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1)
> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;". 25

28 U.S.C. § 2283,

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 29

42 U.S.C. § 1983,

> "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, 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." .... 29 – 32, 34

STATEMENT OF CASE

Petitioner, Tom A. DeCola, ("DeCola"), *pro se*, hereby brings a petition for a writ of certiorari to reverse a comity of federal and state miscarriage of justice over his now moot administrative appeal (expired in action on January 1, 2023), and concurrent 42 U.S.C. § 1983 civil tort claim (live in action) for relief against damages caused by the Respondents, Starke County Council, Dave Pearman, Freddie Baker, Kay Gudeman, Robert Sims, Howard Bailey, and Kathy Norem, represented by council, ("the Respondents").

DeCola appealed the District Court's OPINION AND ORDER entered on October 20, 2022, which disposed of DeCola's administrative appeal brought under the "expressly authorized" exception of 28 U.S.C. § 2283, for cause shown under 42

U.S.C. § 1983 as provided by *Mitchum v. Foster*, 407 U.S. 225, 241 – 43 (1972). See App. pp. 65a – 76a. DeCola's administrative appeal on injunctive request seeking reinstatement of his duly elected Starke County District 4 Councilman office was denied by the District Court within their order. See App. pp. 5a – 16a. DeCola notified the Seventh Circuit Court of Appeals of the inability of office reinstatement in view of DeCola's *de jure* term of office, which officially expired on January 1, 2023. In addition to the injunctive relief request, DeCola also brought along a civil tort complaint requesting compensatory and punitive damages for the right of action provided by 42 U.S.C. § 1983 against the Respondents for wrongful expulsion, and or damages, a cause of information under Ind. Code §§ 34-17-1-1(1),

-2-6(a)(c), causes of action for violations of U.S. Const. Amends. V, XIV § 1, *et* IX, and violations of U.S. Const. Art. I §§ 9, 10, *et* Ind. Const. Art. 1 § 24. The Respondents caused damages by subjecting DeCola to deprivation of the liberty, right, and salary associated with his duly elected Starke County District 4 Councilman office, under the color of law or illegality *ipso jure* as a civil conspiracy in violation of 18 U.S.C. §§ 241 *et* 242. The District Court disposed DeCola's civil tort complaint within their order. See App. pp. 5a – 16a.

On November 27, 2018, DeCola obtained a Certificate of Election to the Office of County Council Member. See App. p. 63a. On December 7, 2018, DeCola filed with the Starke County Clerk his Oath of Office. See App. p. 64a. DeCola took office on January 1, 2019 in accordance with Ind. Code § 36-2- 3-3(b). DeCola attended the first regular organizational meeting on January 22, 2019. See App. pp. 68a ¶4. Starting in November of 2018 and continuing through January 22, 2019 Starke County Commissioner Kathy Norem maliciously defamed DeCola by questioning his qualification for office. See App. pp. 68a ¶5. The Council voted to take action to expel DeCola at the January 22, 2019 Council meeting and did so at the February 18, 2019 Council meeting. See App. pp. 68a – 69a ¶¶6 –8.

DeCola's administrative appeal ensued whereby a grant of change of venue from the Starke Circuit Court to the Marshall Superior Court 2 was entered. See App. p. 24a. The Marshall Superior Court 2 then bared a miscarriage of justice within their dispositive order(s), which was appealed to the Ind. Court of Appeals. See App. pp. 25a – 34a. Meanwhile, DeCola filed an injunctive relief request to

enjoin the Marshall Superior Court 2's dispositive order(s) while bringing along a civil tort complaint on October 19, 2020. See App. pp. 65a – 76a. The District Court stayed the proceeding under order on April 29, 2021 until DeCola filed a supplemental request for injunctive relief over the Ind. Court of Appeals' abusive memorandum decision and subsequent Ind. Supreme Court denial of transfer, which finally disposed of DeCola's state administrative appeal within the state forum. See App. pp. 77a – 86a, 17a – 23a, 62a. The District Court then simultaneously disposed of DeCola's claims (administrative appeal and civil tort) within the same order and lifted the stay on the same day June 13, 2022, whereby the District Court Clerk entered the Respondents' MOTION FOR JUDGMENT ON THE PLEADINGS, which was outside the scope of procedure in view of the District Court's dispositive order. See App. pp. 87a – 90a. DeCola objected to the District Court's dispositive order by filing a timely MOTION FOR A NEW TRIAL on July 12, 2022. See App. pp. 91a – 99a. The District Court filed their order on October 20, 2022, whereby crediting the Respondents' MOTION FOR JUDGMENT ON THE PLEADINGS and disparaged DeCola's MOTION FOR A NEW TRIAL. See App. pp.5a – 16a. Meanwhile, DeCola filed a MOTION FOR RELIEF AGAINST JUDGMENT in the state trial court case to no avail, whereby his motion was dismissed. See App. pp. 35a – 41a.

JURISDICTIONAL STATEMENT OF COURT OF FIRST INSTANCE

DeCola is seeking an appellate review in whole from the District Court's order entitled OPINION AND ORDER that was entered on October 20, 2022. See App.

pp. 5a – 16a. DeCola filed a motion entitled MOTION FOR NEW TRIAL on July 12, 2022, which was denied by the aforesaid order and opinion, which was appealed to the Seventh Circuit Court of Appeals. See App. pp. 91a –99a.

The District Court's jurisdiction over DeCola's now moot administrative appeal (expired in action on January 1, 2023) is based upon U.S. Const. Art. III § 2 cl. 1, and 28 U.S.C. § 2283 for cause shown under the "expressly authorized" exception that is 42U.S.C. § 1983 as provided by *Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972) and *Great Northern R. Co. v. Alexander*, 246 U.S. 276, 282 (1918), which meets the same criterial and implied equitable application as the exception provision found under 28 U.S.C. § 2283 and the "no-exhaustion rule" applicability, see *Patsy v. Board of Regents of Fla.*, 457, 499 US 496 – (1982). [1] The District Court's original jurisdiction over DeCola's concurrent 42 U.S.C. § 1983 claim (live in action) for relief against damages against the Respondents is found under U.S. Const. Art. III § 2 cl. 1, which was brought along with the now moot administrative appeal (expired in action on January 1, 2023).

ARGUMENT

The District Court's opinion stated that DeCola split his cause of action as provided in *toto:*

> "Third, the claims Mr. DeCola raised in the current federal lawsuit were, or could have been, adjudicated in his state court action. As an initial matter, there is no dispute between the parties that Mr. DeCola's claims in both this case and his now-concluded state case arose from the Starke County Council's decision to expel him from his seat on the Council and recognizing that claim splitting is the lack of showing of element (1) of the

> "no-exhaustion rule", as provided in *toto*: "an orderly system of review or appeal is provided by statute or agency rule;".not allowed)." See App. p. 12a – 13a.

The District Court's opinion is premised upon not differentiating between civil tort claims and administrative appeals. Factually, an administrative appeal is not a civil case, but a second branch or legislative action under a third branch or judicial review which is separate and under totally different jurisdictional capacities, review standards, statute of limitation or lack thereof i.e., priority seeking, abilities to conduct discovery, ability for jury trial review or lack thereof, and legal capacities to be sued, and governmental immunity statuses thereof. See App. pp. 82a – 83a fn. 8. An administrative appeal filed in a limited jurisdiction court would increase risk of prejudicing a related civil tort claim in a general jurisdiction trial court if filed in that same forum and neglect the standing federal case law framework concerning the "no- exhaustion rule" found in *Patsy v. Board of Regents of Fla.*, 457, 499 - 502 US 496 – (1982) in combination with the "plaintiff is master of the claim rule", see *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 – (1987), and *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 US 804, 809 - 10 – (1986). The filing of an administrative appeal should not nullify or kill the two (2) year statute of limitation for a timely filed 42 U.S.C. § 1983 civil tort claim under the doctrine of *res judicata* because one was not prosecuted or brought along with the administrative appeal in a state or limited jurisdiction state trial court forum which does not stand as a trial court. DeCola has the right to be the master of his claim and to present a civil tort case in any forum of his choosing, which is

separate from his administrative appeal case upon or as shown herein brought along in a federal forum with the administrative appeal under an injunctive relief request timely within the two (2) year statute of limitation for a 42 U.S.C. § 1983 claim. DeCola has right to pursue an administrative appeal in a state forum and then subsequently upon adverse dismissal file an injunctive relief request in a federal forum as exemplified under the "no-exhaustion rule" provided by *Patsy v. Board of Regents of Fla.*, 457, 499 – 502 US 496 – (1982). The Ind. General Assembly provided no statutory guidance, administrative review, or appeal process for expelled county councilmembers seeking administrative appellate reinstatement, see stated above fn. 1. This rule allows persons to seek injunctive relief requests over inequitable limited jurisdiction state trial courts without continuing to pursue a course of vanity within the state forum. A governmental entity, the Starke County Council is immune from criminal liability. The councilmembers of the Starke County Council are absolutely immune only if they acted within the scope of their official duties, see *Foster v. Pearcy*, 387 NE2d 446, 448 - 9 – (Ind. Sup. Ct. 1979). The Council members could only exercise their expulsion power granted by the Ind. General Assembly under Ind. Code § 36-2-3-9 for a member violating an official duty. The Marshall Superior Court 2 within their ORDER ON DEFENDANT'S MOTION TO DISMISS, stated in pertinent part,

> "The Court finds that Defendant, Starke County Council, was not acting within its authority under Ind. Code § 36-2- 3-9 when it expelled Plaintiff from the Council. The alleged violations occurred before Plaintiff's term of office began. Thus, Plaintiff was not acting

> within his official duty when he attended the December 12, 2018 IAC meeting since his term of office did not begin until January 1, 2019. Therefore, Defendant could not lawfully expel him for violation of an official duty under Ind. Code § 36-2-3-9 for Plaintiff's alleged actions that took place before his term of office began.".

Additionally, the Starke Circuit Court stated that the Respondents' expulsion actions were *ultra vires*, hence illegal. See App. p. 39a ¶11.

Wherefore, DeCola could not have violated an official duty and therefore the Respondents committed a multitude of criminal and civil transgressions, see above stated ¶STATEMENT OF CASE. Only the governmental Respondent, Starke County Council as a governmental party entity could be mandated to reinstate DeCola's office under an administrative appeal and only the Respondents, the councilmembers within their own persons could be charged criminally and held liable for civil damages under 42 U.S.C. § 1983, see *Irwin Mortg. Corp v. Marion City. Treasurer*, 816 N.E. 2d 439, 447 – (Ind. Ct. App. 2004), which renders the ITCA's notice requirement inapplicable and allows a two (2) year statute of limitation for the filing of a 42 U.S.C. § 1983 claim that is wholly independent from the administrative appeal.

DeCola's administrative appeal and civil tort claim although did not arise from the same occurrence, one being an illegal action or decision by the Respondent, Starke County Council and the other being an illegal conspiracy by Respondents excepting the Starke County Council. As found in *Indianapolis Downs, LLC v. Herr*, 834 NE 2d 699, 703 – 4 – (Ind. Ct. App. 2005), as provided in

the combined precedents found in *Page v. State*, 424 N.E.2d 1021, 1023 – (Ind. Sup. Ct. 1981), *Clay v. Marrero*, 774 N.E.2d 520 – (Ind. Ct. App. 2002), *Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County North BZA*, 677 N.E.2d 544, 548, 549 – (Ind. Ct. App. 1997), *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 – (Ind. Ct. App. 1998), and *Snyder v. Snyder*, 62 N.E.3d 455, 458 – (Ind. Ct. App. 2016) concerning the statutory regime for administrative appeals under the Administrative Orders and Procedures Act as Ind. Code § 4-21.5-5-14, the standard of reviews thereof, and the procedural handling for final judgment in relation to motions to correct error and motions to reconsider, as well as the precedent for administrative appellate review found in *Equicor Dev. Inc. v. Westfield-Washington Tp. Plan Com'n*, 758 NE2d 34, 36, 37 – (Ind. Sup Ct. 2001). The Ind. Court of Appeals' memorandum decision upheld the Marshall Superior Court 2's abuses of procedure and law, which bared a miscarriage of justice, thus initiating DeCola to pursue a federal question 42 U.S.C. § 1983 stay action upon his administrative appeal under the "no-exhaustion" rule to the District Court. See App. pp. 17a – 23a. The District Court and the Seventh Circuit Court of Appeals carried the miscarriage of justice within their orders. See App. pp. 1a – 16a.

CONCLUSION

Wherefore, DeCola asks this Supreme Court to provide a writ of certiorari for imposing justice.

Respectfully submitted,
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