

STATEMENT OF FACTS AND PROCEDURAL HISTORY

As the parties in this case will likely provide extensive facts and procedural history, amicus ACLU-NJ will instead summarize the information pertaining to the Intensive Supervision Program [hereinafter “ISP”] and Robert Edward Forchion that are of greatest import to this case.

1. Intensive Supervision Program

Since 1983, ISP has a component of the Probation Services Division of the New Jersey Administrative Office of the Courts and provides “a form of intermediate punishment between incarceration and probation – for certain carefully screened non-violent offenders.” State v. Clay, 230 N.J.Super. 509, 512 (1989). As explained by the New Jersey Superior Court, Appellate Division: “In response to the prison overcrowding crisis the legislature funded an intensive supervision program to be operated by the Administrative Office of the Courts on an experimental basis.” Id., (citing the Intensive Supervision Program Pamphlet). There are six steps that must be passed in order for an inmate to enter the program, the sixth of which is approval by the ISP Resentencing Panel. State v. Cannon, 128 N.J. 546, 553, 608 A.2d 341, 344 (1992). “Once accepted, the participant is continually monitored and must periodically appear before the Panel.” Id. The foremost issues to be considered in determining eligibility are “the

safety of the community, and thereafter the amenability of the defendant to rehabilitation, and the likelihood of achieving such rehabilitation....” Id. at 554.

Although the ISP Panel is comprised of retired Appellate Division judges, the Panel arises out of an administrative agency (i.e., the Probation Services Division of the New Jersey Administrative Office of the Courts); it is not under the umbrella of any judicial division of the New Jersey Superior Court. Further, appeals of the Panel’s decisions to the New Jersey courts are not permitted. Id. As specifically stated in the New Jersey Court Rule 3:21-10(e): “Because of the nature of the program, there shall be no administrative or judicial review at the several levels of eligibility established under the program. No further appellate review of the panel’s substantive decision shall be afforded.” Id.

2. Robert Edward Forchion

Plaintiff, Ed Forchion, has been an unrelenting advocate for legalization of marijuana for many years. In 2000, Mr. Forchion ran for the United States Congress and Burlington County freeholder under the banner of the Legalize Marijuana Party which, as its name suggests, has the legalization of marijuana as the main plank in its platform. See “Out of the Joint: ‘Weedman’ Gives Up Pot as Part of ISP,” Trentonian, April 8, 2002.

Mr. Forchion received 2,706 votes for freeholder and 1,983 votes for congress. Id.

On September 20, 2000, Mr. Forchion pled guilty to a crime involving the sale of marijuana. See Violation of the Intensive Supervision Program report [hereinafter “Violation Report”], Exhibit L to Affidavit of Robert Edward Forchion. As part of his plea, he was sentenced to ten years in jail with the understanding that he would serve only six months in jail before being placed on ISP, which was to last for 27 months. See Forchion Aff. at 3. Mr. Forchion was release from prison into ISP on April 3, 2002 (after serving more than sixteen months of his sentence). Id. As a condition of ISP Mr. Forchion was ordered not to advocate the use of illegal drugs. Id. at 9.

While on ISP, Mr. Forchion has been subjected to drug tests twice a week – and his tests show that he has remained completely drug-free. Mr. Forchion has also been gainfully employed and has attended the required ISP Group Meetings. See Violation Report at 4, Exhibit L to Forchion Aff. Further, while steering clear of any illegal activity pertaining to marijuana, Mr. Forchion continued his advocacy for a change in the drugs laws and continued to express to the media and on his website the ways in which he

believes the drugs laws, and his arrest pursuant to them, are unfair. Mr. Forchion's ISP officers have objected to his advocacy activities.

Mr. Forchion was arrested by his ISP officers on June 6, 2002, immediately after his ISP officers discovered he had been disseminating a flier protesting the drug laws. Forchion Aff. at 7. The Violation of Intensive Supervision Program report lists a number of infractions; however, the two infractions regarding distribution of fliers received the harshest sanctions. Violations Reoprt at 1-4, Exhibit L to Forchion Aff. For his first distribution of fliers and for "ignoring our instructions on giving interviews...Robert received the following sanction: Placed on Home Confinement ankle bracelet." Id.¹ For the second flier distributions, Mr. Forchion was placed in custody. Id.

After being released on June 10, 2002, Mr. Forchion continued his free speech activity. His ISP officers found out some time after August 15, 2002, that Mr. Forchion produced a video advocating for a change in the drug laws. Addendum to Violation Report at 1-2, Exhibit M to Forchion Aff. Mr. Forchion was re-arrested on August 18, 2002. Id. Most of the reasons given for his arrest pertained to his videos, his website, and his

¹ Defendants may claim that this sanction was also for having missed work on that day as that fact is discussed in the same paragraph; however, it is

interviews with media. Id. Both of Mr. Forchion's arrests are described more fully supra. at ___-___. Mr. Forchion has been confined now for almost five months without a final determination on confinement being reached by the ISP Panel.

On Thursday, January 9, 2003, Thomas Russo, Esq., sent a letter to the ISP Panel stating that ISP would be withdrawing "the charges relating to the promotion of marijuana use." Letter signed by Thomas Russo, Esq., dated January 9, 2003, at 3. Mr. Russo makes clear that he is still seeking to remove Mr. Forchion from the ISP Program and to keep him incarcerated. In the letter, Mr. Russo asks the Panel to now rely only on the non-free speech violation but in so doing continues to extol at length the virtues of the free speech restrictions placed upon Mr. Forchion and explains how Mr. Forchion's advocacy is or could be harmful to himself and others on ISP. Id. at 2-3.

ARGUMENT

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84 (1987).

As such, the United States Court of Appeals for the Third Circuit has held

clear that the sanction for having missed work that day (i.e., placement on

that prisoners and parolees should not be subject to adverse action “for the exercise of a constitutional right.” Rausser v. Horn, 241 F.3d 330, 333 (3rd Cir. 2001) (case involving denial of parole for an inmate’s failure to participate in a religious program). Because the evidence in the present case overwhelmingly supports plaintiff’s contention that he was subjected to retaliatory action for the exercise of his constitutional right to free speech, he has established likelihood of success on his Section 1983 claim and injunctive relief is warranted.

In order to obtain a preliminary injunction, a moving party must generally show:

(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured pendente lite if relief is not granted. Moreover, . . . the district court should take into account . . . (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994). (quoting Delaware River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974)). Plaintiff clearly satisfies that standard in the present case.

Modified Home Confinement) is set forth in the paragraph prior.

I. THE EVIDENCE EASILY ESTABLISHES THAT PLAINTIFF IS REASONABLY LIKELY TO SUCCEED ON HIS FIRST AMENDMENT CLAIM.

“[G]overnment actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish and individual for the exercise of a constitutional right.” Allah v. Seiverling, 229 F.3d 220, 224-25 (3d Cir. 2000). In Rausser v. Horn, 241 F.3d at 333, the Court of Appeals for the Third Circuit identified the framework for analyzing such claims. A prisoner claiming retaliation for the exercise of a constitutional right must first establish (1) that the conduct that led to the alleged retaliation was constitutionally protected and (2) that the litigant suffered some “adverse action” at the hands of the officials. Once these threshold criteria are met, the burden-shifting procedure set forth in Mount Healthy Bd. of Ed. V. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568 (1977), is employed. The plaintiff bears the initial burden of establishing that the constitutionally protected conduct was “a substantial or motivating factor” in the challenged decision. Id. The defendant then bears the burden of “proving that they would have made the same decision absent the protected conduct for reasons reasonably related to legitimate penological interests.” Id. at 334.

In the present case, much to the chagrin of his Intensive Supervised Program ["ISP"] officers, Mr. Forchion engaged in protected free speech activity, namely: (1) speaking to the press about how he believes the drugs laws are wrong and how they affected his criminal and family court cases, (2) maintaining a website wherein those issues are set forth in depth and (3) creating advertisements seeking a change in the drug laws. It is clear (even from the ISP Violation Reports themselves) that a significant reason why Mr. Forchion was twice arrested and re-incarcerated by his ISP officers was for exercising those rights. As such, Mr. Forchion's raises a meritorious claim that warrants injunctive relief.

A. Mr. Forchion's Actions that Gave Rise to His Re-incarceration Were Constitutionally Protected.

The First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 445, 467 (1980). "Speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-5 (1968).

Indeed, protecting speech on public issues is the First Amendment's most important function. See Boos v. Barry, 485 U.S. 312, 318 (1988); Connick v. Myers, 461 U.S. 138, 145 (1983); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). When speech involves a public issue, courts must carefully scrutinize any restrictions on the activity. See e.g. United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702 (1983); Carey v. Brown, 447 U.S. at 467.

Mr. Forchion sought to disseminate his opinion on one such public issues – the effect of the drug laws of this country and whether they should be changed. This was clearly an issue Mr. Forchion’s ISP officers did not want him to discuss and his position was one that they did not want him to espouse. However, as the United States Supreme Court has held, if the First Amendment means anything, it means that ordinarily the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its contents.” Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).²

² There are only a limited number of exceptions to this general proposition, none of which apply to Mr. Forchion’s advertisements or discussions with the media. The speech at issue does not fall into any of the limited “unprotected” categories of speech: (1) speech “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); (2) fighting words “which by their very utterance inflict injury or tend to incite an immediate

The defendants in this case informed Mr. Forchion that, because he is on ISP, he has no rights, and therefore required him to comply with their demands even when it apparently infringed on his free speech. As previously stated, prisoners (including parolees) do not lose all constitutional rights due to their confinement. Turner v. Safley, *supra*. Conditions imposed upon parolees must be “reasonably related to rehabilitation,” *see e.g.*, United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979),³ and, when infringing on First Amendment rights, can not be broader than is necessary. *See, e.g.* Best v. Nurse, 1999 WL 1243055 (E.D.N.Y. 1999).

The Third Circuit reiterated just this week that conditions placed upon a released offender cannot include “a greater deprivation of liberty than is reasonably necessary to deter future criminal conduct and to protect the public.” U.S. v. Freeman, 2003 WL 57329 (3d Cir. Jan. 6, 2003). In Freeman, the Court held that, even for a convicted sexual offender, a total ban on internet access (thereby preventing “use of e-mail...and other common-place computer uses such as getting a weather forecast or reading a

breach of the peace,” Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); or (3) a “true threat,” Watts v. United States, 394 U.S. 705 (1969).

³ This holding was echoed by the New Jersey Supreme Court in State v. Black, 153 N.J. 438, 447, 710 A.2d 428, 433 (1997), wherein the Court noted that the primary purpose of parole “is to rehabilitate a prisoner in preparation for his or her eventual return to society” and restrictions placed upon parolees are to be “rehabilitative rather than punitive in purpose.” *Id.*

newspaper online”) where the offender had never before used the internet to contact young children, was “overly broad.” Id. There was no need to cut off, as a condition of probation, the offender’s “access to e-mail or benign internet usage when a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of material stored on Freeman’s hard drive or removable disks.” Id.

More specifically related to Mr. Forchion’s videos, website, and contact with the press, numerous U.S. courts have held that conditions that burden a parolee’s rights to freedom of speech or freedom of association must be reasonably related to the legitimate purposes of parole and must not overly encroach on such rights. For example, in Best v. Nurse, 1999 WL 1243055, the district court distinguished activity or associations pertaining to illegal conduct from “the right to free speech quite independent of any criminal activity.” Id. at *3. In addressing a general anti-loitering parole condition, the court in Best noted that parole restrictions “can be no greater than needed where they infringe on First Amendment rights.” Id. Likewise, in U.S. v. Smith, 618 F.2d 280 (5th Cir. 1980), the Fifth Circuit held that while there is “no intrinsic infirmity in a parole condition which proscribes ‘the inducing of others to violate the law’ ...or associating with persons who do...” (internal citations omitted), the challenged parole condition was

infirm in that the restrictions covered not just the offense for which the defendant was convicted but extended to advocating “disobedience to any law.” Id. at 282.

Here, the “overly broad” nature of the conditions (see U.S. v. Freeman, supra.) concerns not the extension of prohibitions to unnecessary subject matter but, rather, the extension of prohibitions from advocating immediate “disobedience to [the] law” to prohibiting lawfully advocating for a change in the current law. See also Leary v. U.S., 431 F.2d 85, 89 (5th Cir. 1970) (holding that Timothy Leary should not be denied bail even for advocating the use of marijuana since such speech would be protected if the advocacy fell “short of actual incitement to imminent unlawful conduct”); Conant v. Walters, 309 F.3d 629 (9th Cir. Oct 29, 2002) (holding that while a doctor’s assistance to a patient in acquiring marijuana could be proscribed, the mere recommendation of medical use of marijuana by a doctor is protected by the First Amendment).⁴

⁴ It is also questionable whether his right to tell others to violate the law, unless intended to provoke *imminent* lawlessness, can be proscribed where it is not related to legitimate penological needs. As stated by the Supreme Court: “[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Brandenburg v. Ohio, 395 U.S. at 447. See also Leary v. U.S., 431 F.2d at 89 (forbidding bail proscription against advocacy that fell short of

A condition that someone under ISP cannot advocate imminent lawlessness or violation of current law proscribing use of marijuana is one thing; merely expressing an opinion that current laws should be changed, however, is quite another. To the extent that Mr. Forchion's release under ISP was conditioned upon his agreement to refrain from advocating illegal activity, that condition should not, and cannot, be interpreted to extend to a prohibition against advocating the completely legal and peaceful activity of seeking a change in the law. It is highly questionable whether such a restriction was ever intended, but even if it were, such an expansive restriction against political advocacy would be both overbroad and vague, in violation of the First and Fourteenth Amendments to the Constitution. See generally LoFranco v. United States Parole Commission, 986 F.Supp. 796, 809-11, aff'd, 175 F.3d 1008 (2nd Cir. 1999) (striking down parole condition as unconstitutionally vague); see also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (“we insist that laws give the person of ordinary intelligence

“actual incitement to imminent unlawful conduct”). Indeed, there has been no showing that Mr. Forchion ever told others to specifically violate the law, much less that he was likely to provoke *imminent* lawlessness with any of his statements. See, e.g., Cohen v. California, 403 U.S. 15 (1971) (holding that the defendant could not be prosecuted for wearing a jacket bearing the words “Fuck the Draft” in the Los Angeles Courthouse). Further, he had not advocated marijuana use to other ISP participants during their meetings (the proscription of which would be related to legitimate ISP interests).

a reasonable opportunity to know what is prohibited, so that he may act accordingly”).

Indeed, for Mr. Forchion’s exercise of his First Amendment rights to express his opinion that certain New Jersey criminal laws should be changed or repealed could be viewed as indicative of his progress towards rehabilitation. Such behavior, combined with a clean record of drug tests during ISP, indicates a willingness to abide within the current legal system to address his beliefs related to current drug laws pertaining to marijuana. In the final analysis this is the ultimate object of parole – namely, to encourage lawful behavior even when an individual believes that current laws are unjust, unnecessary or even unconstitutional. Prohibition of such advocacy cannot therefore be reasonably related to the objective of rehabilitation.

Further, in addition to his right generally to speak, make ads, or maintain a website regarding the impact of the drug laws on both his criminal and family court cases, Mr. Forchion’s right to speak with the press is clearly protected. Indeed, subject only to legitimate penological interests, contact with the press is protected even for persons confined to prison.

Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874 (1989); Nolan v. Fitzpatrick, 451 F.2d 545, 551 (1st Cir. 1971) (striking down ban on sending letters to the press); Castle v. Clymer, 15 F.Supp.2d 640 (E.D.Pa. 1998)

(prisoner may not be transferred from one institution to another for engaging in constitutionally protected activity of corresponding with the press and advocating on the behalf of inmates with life sentences). The ISP officers cannot now do with a carrot (of affording Mr. Forchion release on ISP on the condition he agrees to give up this right) what they could not do with a stick.

B. Mr. Forchion Has Suffered “Adverse Action” At the Hands of ISP Officials.

A plaintiff “need not prove that he had an independent liberty interest in the privileges he was denied” for a retaliation claim to be successful; rather, he must simply prove that he suffered “adverse action.” Rausser v. Horn, 241 F.3d at 333. That criterion is easily met here. Mr. Forchion was subjected to arrest and re-imprisonment by his ISP officers. He remains incarcerated to this day. Indeed, the mere threat of incarceration by his ISP officers would have sufficed, as a plaintiff satisfied the “adverse action” requirement “by demonstrating that the action ‘was sufficient to deter a person of ordinary firmness from exercising his constitutional rights.’” Id., citing Allah v. Seiverling, 229 F.3d at 225.

C. Mr. Forchion’s Ads Promoting a Change in the Drug Laws, His Advocacy on His Website, and His Discussions With the Press Were Clearly “Substantial or Motivating Factors” in the Decision to Violate Him and Request Removal From ISP; Defendants Cannot Meet Their Burden of Establishing that They Would Have Made the Same Decision Absent the Protected Conduct.

The facts of this case easily establish that Mr. Forchion's protected free speech activities were not only a "substantial or motivating factor" in his September 3, 2002, arrest, continued confinement, and decision by defendants to request his removal from the ISP program, but also that the arrest would not have occurred but-for Mr. Forchion's exercise of free speech. Indeed, seven of the nine alleged "violations" for which Forchion was arrested and confined on August 18, 2002, pertained to the marijuana legalization videos or to his website. First, however, an explanation of the circumstances surrounding Mr. Forchion's first ISP violation arrest is quite revealing.

As explained fully below, even though the defendants are now suggesting that the ISP Panel not consider the free speech violations, there is no way to divorce the free speech "violations" from the non-free speech violations at this point. Indeed, it is clear that there is more than a reasonable likelihood that Mr. Forchion can establish that the decision by defendants to even bring him before the ISP Panel requesting removal from the program would not have occurred but-for the free-speech activities. This fact seems clear even from the language of the letter withdrawing the free-speech "violations." See Letter signed by Thomas Russo, Esq., dated

January 9, 2002. The factual circumstances of this case are quite telling in that regard.

The first “Violation of the Intensive Supervision Program” report for infractions that allegedly occurred between April 8, 2002, and June 5, 2002 (signed by defendants Warren Cambell, Thomas Bartlett, and Harvey Goldstein), notes seven infractions of ISP conditions. See Exhibit L to Forchion Cert. Four of those conditions related directly to free speech activity. Id. at 1. The other three infractions were for failing to inform his ISP officer that he would not be working on a particular day; failing to hand over a tape player that the ISP officer believed to be a cell phone; and leaving his home outside of restricted hours in order to attend an ISP group meeting. Id. For the three non-free speech infractions, the sanctions Mr. Forchion received were limited to verbal warnings and being placed on modified home confinement. Id. at 1-4.

Two of the infractions related to free speech were for speaking with the press. The report cites to no specific language that was violative of ISP conditions; rather, the mere fact that an interview was given apparently was deemed violative. Id. The other two free speech-related infractions were for handing out fliers at a county courthouse. The report for one of those infractions fails to identify why the flier was objectionable. However,

because of Mr. Forchion's "continued insistence on ignoring our instructions on giving interviews..." ISP ordered that, for this "violation," Mr. Forchion receive the sanction of being placed on a Home Confinement ankle bracelet. Id. at 3. The explanation regarding the second flier distribution "violation" was that the flier Mr. Forchion distributed "clearly indicate his advocating marijuana use." However, a review of the flier (attached to the Violation Report, see Exhibit L_____ to Forchion Aff.) establishes that it merely explains the history of Rastafarianism, the history of marijuana, and how Mr. Forchion believes he has been punished for his religious beliefs. It is extremely notable that it was immediately after the ISP officer learned of the distribution of this flier that Mr. Forchion was arrested. Id. at 4. Indeed, as noted in Rausser v. Horn, 241 F.3d at 334, "a suggestive temporal proximity between" the exercise of a constitutional right and the adverse action taken should be taken into account. Id., citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000) (stating that suggestive timing is relevant to causation in retaliation case).

It is clear that, even in deciding that these seven violations did not warrant re-incarceration, the focus was on the free speech activity:

Robert [Forchion] has thus far refused to comply with the panel's instructions that he not advocate the use of marijuana. Despite our attempts to bring him into compliance, he has repeatedly ignored the panel's

instructions and those of Supervisor Bartlett and myself. However, it is our opinion that Robert is capable of completing ISP supervision if he adheres to the instructions of the panel. [Violation Report at 4, Exhibit L to Forchion Aff.]

Obviously, since these violations did not result in continued incarceration, they have little value in identifying alternative causes (other than a growing frustration with Mr. Forchion's free speech activity) for Mr. Forchion's arrest on August 18, 2002. On the other hand however, the fact that Mr. Forchion was placed on Home Confinement and then ultimately arrested (and thereby received a short term of confinement) for two exercises of pure free speech activity is incredibly significant. The Addendum to the Violation Report, Exhibit M to Forchion Aff., makes clear that progressively punitive sanctioning should be attempted prior to return to custody. See id. at 4 ("Progressive punitive sanctions have been imposed to get him [Mr. Forchion] to comply. These sanctions have been unsuccessful"). Yet, at the time of his August 18, 2002, arrest, two significant "progressive" steps (namely, placement on home confinement ankle bracelet and a short period of incarceration) were imposed that were violative of Mr. Forchion's free speech rights. As such, Mr. Forchion's August 18th arrest should have been viewed with a significantly "cleaner" slate than was viewed by the ISP officers.

Immediately after the defendants became aware that Mr. Forchion produced and intended to air pro-drug-legalization videos he was again arrested. See Addendum at 2-3, Exhibit M to Forchion Aff. It is clear based upon the face of the Addendum itself as well as the suggestive timing of the arrest, that a “significant or motivating factor” in the determination to arrest Mr. Forchion was his First Amendment rights pertaining to the videos, his website, and his discussions with the press. Specifically, the Addendum cites the following violations:

Failure to follow the ISP’s directive [not] to promote drug use or any illegal activity by producing videos for distribution advocating same....

Failure to follow the ISP’s directive not to promote drug use or any other illegal activity when he contracted with Comcast Communications Inc. to air commercials....

Failure to follow the ISP’s directive not to promote drug use or any other illegal activity when he communicated with the Trentonian which promoted advertisements which he intended to have aired on cable TV channels...

Failure to follow the ISP’s directive not to promote drug use or any illegal activity when he continued to run an updated website titled “njweedman.com.”....

[Id. at 1.]

The only remaining claims involve the lack of forthcoming regarding the donations Mr. Forchion received from his website and whether those funds were used to finance the video. While this is a

violation of ISP policy, it is certainly unlikely that it would result in a revocation of ISP in and of itself, especially since it appears that Mr. Forchion ultimately disclosed that information to his ISP officers.

Indeed, as stated, absent the prior sanctions for clear protected free speech activity, Mr. Forchion would have been two full levels removed from the ultimate sanction the ISP officers can recommend, i.e. revocation and return to prison. The unlikelihood of the non-free speech violations resulting in revocation is even more evident with the recognition that the Administrative Office of the Court's does not consider revocation to be a common sanction for violations. See ISP Powerpoint Presentation at http://www.judiciary.state.nj.us/probsup/isp_overview/isp/frame.htm. (“Among the most commonly applied sanctions are increased curfew restrictions, home detention, and short term incarceration.”).

While the defendants have now, more than halfway through the ISP hearing, withdrawn the numerous advocacy charges from direct consideration by the ISP Panel, they should not now be permitted to use the remaining violation as a mere post-hoc subterfuge. Indeed, irrespective of the ISP Panel's decision regarding the remaining violations, it is abundantly clear from the evidence in this case that it is extremely unlikely that the officers would have ever arrested Mr. Forchion and brought him before the

ISP Panel to request removal were the free speech “violations” not part of (in fact, the most significant part of) their consideration. Even in the letter informing the ISP Panel of the withdrawal of the advocacy charges, the defendants make sure explain at length why the advocacy violations were appropriate and how Mr. Forchion’s past and continued advocacy can be detrimental to him and others. In short, while the advocacy violations are now no longer officially before the ISP Panel, it is clear: (1) that defendants would not have been requesting removal nor would they now continue to be requesting removal based on the other violations were it not for Mr. Forchion’s refusal to accept (and lack of contrition regarding) the defendants’ ban on advocacy, and (2) defendants have polluted consideration of the other charges with their actions to date and with their continued emphasis (even in their withdrawal letter) on the prohibition against advocacy and Mr. Forchion’s activities which they view as violative of that prohibition..

II. THE REMAINING THREE FACTORS ALL FAVOR ISSUANCE OF AN INJUNCTION.

As a general rule, “to show irreparable harm a plaintiff must ‘demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial.’” Acierno, 40 F.3d at 653 (quoting

Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989)). Here, it can hardly be disputed that Plaintiff will suffer irreparable injury absent an injunction. Plaintiff is currently confined in jail and will remain so unless and until an injunction reinstating him to ISP is entered. Further, the chilling effect on plaintiff's free speech rights continues each day that infliction of consequences for the exercise of those rights is permitted to stand.

Further, the defendants will suffer no harm should an injunction issue. Mr. Forchion has not been shown in any way to be a danger to the safety of the public while on ISP. Indeed, as noted, it has never been alleged that Mr. Forchion was involved in any illegal activity while on ISP and his drug screens have all been clean. Further, given the conditions of ISP, the defendants will retain tight control over Mr. Forchion even when removed from confinement.

The public interest also strongly weighs in favor of a preliminary injunction in this case. There is a clear public interest "in not having the State engage in conduct that results in an ongoing violation of federal constitutional rights." Doe v. Lee, 2001 WL 536730, *2 (D.Conn. 2001). See also, e.g., Planned Parenthood, et al. v. Verniero, et al., 41 F.Supp.2d 478, aff'd 220 F.3d 127 (3d Cir. 2000); Favia v. Indiana University of

Pennsylvania, 812 F.Supp.2d 578, aff'd 7 F.3d 332 (3d Cir. 1993) (“The public has a strong interest in the prevention of any violation of constitutional rights).

III. DUE TO THE NATURE OF THE ISP PANEL HEARINGS, MOST NOTABLY THE LACK OF APPEALABILITY OF ISP PANEL DECISIONS, NEITHER PRECLUSION NOR ABSTENTION PRINCIPLES APPLY.

A. Mr. Forchion Should Not Be Precluded from Raising His Federal Claims in the Present Case.

Even when a claim or issue is previously litigated in a state court, a federal court should not apply preclusion principles where the litigant “did not have a full and fair opportunity to litigate their case” in the state courts. Peduto, et al. v. City of North Wildwood, 878 F.2d 725, 728 (3d Cir. 1989). See also Kremer v. Chemical Construction Corp., 456 U.S. 461, 480-81, 102 S.Ct. 1883, 1897 (1982) (“We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a ‘full and fair opportunity’ to litigate the claim or issue”); Heir, et al. v. Delaware River Port Authority, 218 F.Supp.2d 627, 633 (D.N.J. 2002) (“Thus, ‘in considering fairness to the party whose claim is sought to be barred, a court must consider whether the claimant had a fair and reasonable opportunity to have fully litigated the claim in the original action’”). Indeed, the Court of

Appeals for the Third Circuit specifically noted regarding Section 1983 claims that it was Congress' intent "to provide a federal remedy...where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, although adequate in theory, was inadequate in practice." Peduto, 878 F.2d at 729, quoting Allen v. McCurry, 449 U.S. 90, 99, 101 S.Ct. 411, 417 (1980).

The Third Circuit, in assessing the parameters of this exception to the preclusion rules, definitively held: "The issue of a 'full and fair' opportunity to litigate includes the possibility of a chain of appellate review." Crossroads Cogeneration Corporation v. Orange & Rockland Utilities, Inc., 159 F.3d 129, 137 (3d Cir. 1998). See also Wehrli v. County of Orange, 175 F.3d 692 (9th Cir. 1999) (same). In the present case, because no "chain of appellate review" was permitted in the litigation before the ISP Panel, Mr. Forchion did not have the "full and fair opportunity to litigate" his claims as is required for preclusion to apply.

The Crossroads case from the Third Circuit and the Wehrli case from the Ninth Circuit are both highly informative. In Crossroads, the plaintiff had previously fully litigated its claims before the New York Public Service Commission and lost. Plaintiffs then immediately brought a claim for relief in federal court. The district court dismissed the claims based upon

preclusion principles and an appeal to the Third Circuit ensued. The Third Circuit first dismissed plaintiffs' argument that there was a distinction between a decision by an administrative agency and one by a state court noting that, under New York law, agency decisions were given the same preclusive effect as state court decisions. 159 F.3d at 135. Further, it was clear that the plaintiff had the opportunity to litigate its claim before the NJPSC, and in fact did so. Id. However, the Third Circuit then held:

More importantly, looking only to Crossroads' opportunity to litigate before the NYPSC is not the legally relevant perspective. The issue of a "full and fair" opportunity to litigate includes the possibility of a chain of appellate review. See, e.g., Kremer v. Chemical Construction Corp., 456 U.S. 461, 484, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); Reubens v. New York City Dep't of Juvenile Justice, 930 F.Supp. 887, 892 (S.D.N.Y. 1996). Crossroads has an opportunity to appeal the NYPSC's decision through the state court system, and Crossroads will have an opportunity in those proceedings to raise its claims regarding the merits....In short, in determining whether a litigant has been given a "full and fair" opportunity to litigate a claim, we must take into account the possibility of appellate review. Since such review was available in this case, and there is no allegation that it would be inadequate to consider Crossroads' arguments, Crossroads has been given a full and fair opportunity for preclusion principles. [Crossroads, 159 F.3d at 137.]

The following year, the Ninth Circuit in Wehrli v. County of Orange, supra., applied the principles enunciated by the Third Circuit in Crossroads. In Wehrli, the Ninth Circuit "agree[d] with the Third Circuit that 'the issue of a full and fair opportunity to litigate includes the possibility of a chain of

appellate review.” 175 F.3d at 695. Wehrli had initially lost an administrative hearing regarding employment claims against the county. The hearing was presided over by a municipal judge, however, “the hearing rules provide that ‘the decision of the panel judge shall be final and binding on all parties and shall not be subject to judicial review.’” Id. at 693. Due to the non-appealability of the municipal court judge’s decision, the Ninth Circuit refused to preclude Wehrli’s subsequent filing in district court. Id. at 695, citing Crossroads, 159 F.3d at 137.

The Restatement (Second) of Judgments §28, which New Jersey has adopted for purposes of preclusion (see Watkins v. Resorts Int’l Hotel & Casino, 124 N.J. 398, 423, 591 A.2d 592 (1991)), explains the reasoning behind the Third and Ninth Circuit holdings:

[T]he availability of review for the correction of errors has become critical to the application of preclusion doctrine. There is a need for an...exception to the rule of preclusion when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled as a matter of law from obtaining review by appeal or, where appeal does not lie, by injunction, extraordinary writ, or statutory review procedure. Such cases can arise, for example, because the controversy has become moot, *or because the law does not allow review of the particular category of judgments*. [Restatement (Second) of Judgments §28, comment a (emphasis added).]

See also Restatement (Second) of Judgments § 28 (“Although an issue is actually litigated and determined by a valid and final judgment,...relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action...”).

The ISP Panel before which Mr. Forchion previously litigated his First Amendment issues is similar to both the NYPSC in Crossroads and the municipal judge in Wehrli in that they are all quasi-judicial administrative panels. However, unlike NYPSC decisions, the decisions of the municipal judge in Wehrli and of the ISP Panel in the present situation are final, with no opportunity for appeal. As stated in R. 3:21-10(e): “Because of the nature of the [ISP] program, there shall be no administrative or judicial review at the several levels of eligibility established under the program. No further appellate review of the panel’s substantive decision shall be afforded.” As such, like the plaintiff in Wehrli, Mr. Forchion was afforded no “full and fair opportunity to litigate [that] includes the possibility of a chain of appellate review.” Precluding Mr. Forchion from raising his claims in the present case is therefore improper.

B. Abstention under Rooker-Feldman or Younger Is Inappropriate.

“[T]he federal courts’ obligation to adjudicate claims within their jurisdiction [is] ‘virtually unflagging.’” New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 358, 109 S.Ct. 2506, 2512 (1989). As such, abstention “is the exception and not the rule.” Marks v. Stinson, 19 F.3d 873, 881 (3d Cir. 1994). While defendants may request that this court abstain from deciding the merits of plaintiffs’ claims under either the Rooker-Feldman or Younger abstention doctrines, such abstention would be inappropriate for the same reasons stated above regarding claim and issue preclusion.

The Rooker-Feldman abstention doctrine precludes a lower federal court from reviewing the final decision of a state court, since such review lies only in the United States Supreme Court. Parkview Associates Partnership v. City of Lebanon, 225 F.3d 321, 324 (3d Cir. 2000). The doctrine “has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion.” Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992); see also Gauthier v. Continental Diving Servs., 831 F.2d 559, 561 (5th Cir.1987) (declining to apply the Rooker-Feldman doctrine any more broadly than state preclusion principles).

As with preclusion, “the Rooker-Feldman doctrine ‘assumes that the proper recourse for an unsuccessful party in state court litigation is to appeal

the adverse judgment through the state court system, with discretionary Supreme Court review as the sole possible opportunity for federal review.”

Jordan v. Sargent, 2000 WL 33941876, at *4 (E.D.Pa. 2000), citing 18 James Wm. Moore, Moore's Federal Practice § 133.30[3][c][iii] (3d ed.2000). See also Parkview Associates Partnership, 225 F.3d at 324 (“Rooker thus stands for the elementary principle that a party’s recourse for an adverse decision in the state court is an appeal to the appropriate state appellate court, and ultimately to the Supreme Court under § 1257, not a separate action in federal court”). Indeed, it is the possibility for claims to be reviewed by the United States Supreme Court through certiorari, following a decision of a state’s highest court that assures that federal claims will be heard in a federal forum when the highest federal court deems that such review is warranted. Jordan v. Sargent, supra.; see also Lynk v. La Porte Superior Court, 789 F.2d 554 (7th Cir. 1986) (“an essential strut beneath the policy is the existence of jurisdiction in the Supreme Court to review any dispositive federal questions in the state proceeding). As noted by the Third Circuit in E.B. v. Verniero, et al. 119 F.3d 1077, 1091-92, cert. denied sub nom W.P., et al. v. Verniero, 522 U.S. 1109, 118 S.Ct. 1139 (1998):

As we have previously observed, the interests served by Rooker-Feldman are quite similar to those served by giving a

state court judgment res judicata effect in a subsequent federal proceeding. Marks v. Stinson, 19 F.3d 873, 885-86 n. 11 (3d Cir.1994); Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir.1992). If a litigant resorts to a state court and suffers an adverse judgment, a lower federal court must respect that judgment unless and until it is overturned. The litigant's only remedy is by way of *appeal through the state court system and by way of petition to the Supreme Court of the United States thereafter*. [Id. (emphasis added)]

See also Port Authority Police Benev. Ass'n, Inc. v. Port Authority of New York and New Jersey Police Dept., 973 F.2d 169, 177 (3d Cir. 1992) (“[I]f federal district courts are precluded, as they are, from reviewing the decisions of a state's highest court,...then federal district courts are certainly also precluded from reviewing decisions of lower state courts, *which are subject to correction and modification within the state court system.*”) (emphasis added).

As noted, Mr. Forchion has no recourse to appeal the ISP Panel’s decision “to the appropriate state appellate panel, and ultimately to the Supreme Court....” Parkview, 225 F.3d at 324). Abstention under Rooker-Feldman is therefore unwarranted. Such a decision is “consistent with the overwhelming precedent in this court [i.e., the Third Circuit] construing the Rooker-Feldman doctrine narrowly.” Parkview, 225 F.3d at 326.

Abstention under Younger abstention doctrine is likewise improper. Younger abstention applies when (1) there is an ongoing state proceeding;

(2) the proceedings implicate important state interests; and (3) there is an adequate opportunity in the state court proceedings to raise constitutional challenges. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521 (1982); see also Schall v. Joyce, 885 F.2d 101, 106 (3d Cir.1989). In the current situation, two of the three Younger requirements are not met.

First, the ISP Panel hearing and decision will likely be concluded at the time of the district court review of Mr. Forchion's claims and no further state review is permitted. As such, the district court will not be interfering with "ongoing state proceedings." The only appropriate analysis of abstention at that point would be pursuant to Rooker-Feldman (see above), not Younger. See, e.g., Norfolk & Western Railway v. Public Utilities Commission of Ohio, 926 F.2d 567, 572 (6th Cir. 1991) (Younger abstention did not apply since administrative hearing had concluded and no state appeal, even though permitted, had been filed).⁵

⁵ Given the lack of review of the ISP Panel's decision, after the Panel rules on whether Mr. Forchion should remain re-confined, Mr. Forchion will have exhausted his state remedies as to the illegality of his re-confinement. (The questions related to the illegality of his re-confinement are wholly separate from claims related to the illegality of his *initial* confinement, for which Mr. Forchion has not exhausted his state remedies.) Therefore, Mr. Forchion's habeas action would be ripe for review even if abstention or preclusion principles applied to his Section 1983 action.

Second, the state proceedings do not afford an “adequate opportunity” for Mr. Forchion to have his federal claims heard. Schall v. Joyce, 885 F.2d at 106. As with preclusion and Rooker-Feldman abstention, an “adequate opportunity” assumes that “the state provides an adequate forum for appellate review of all claims of a federal nature.” Port Authority Police Benevolent Association v. Port Authority Police Department, 973 F.2d at 169. See also Amanatullah v. Colorado Bd. of Medical Examiners, et al., 187 F.3d 1160, 1164 (10th Cir. 1999) (relying on the fact that judicial review of the administrative hearing was permitted in order to find that “the state provided an adequate forum to hear Amanatullah’s constitutional and civil rights claims”). Indeed, the United States Supreme Court explained that the deference accorded state proceedings under Younger should be relaxed “if ‘extraordinary circumstances’ render the state court incapable of *fairly and fully* adjudicating the federal claims before it.” Moore v. Simms, 442 U.S. 415, 423, 99 S.Ct. 2371, 2376 (1979) (emphasis added). As previously stated, based on the inability of review of a decision of the ISP Panel, there is no way to “fairly and fully” adjudicate the federal claims in state court.

Further, assuming the ISP Panel refuses to release Mr. Forchion, there will be “immediate irreparable injury to the federal plaintiff” which therefore forecloses application of Younger, even were the three Younger

requirements to be met. Id. Absent release at the January 17th hearing, Mr. Forchione will suffer immediate irreparable injury each day he remains illegally confined due to the actions of the ISP officer (and of the ISP Panel). Despite attempting to have his claims heard in state court, there have been numerous adjournments by the ISP Panel that have kept him confined for over five months (in September, 2001, the panel failed to order Mr. Forchion to be brought to the hearing and rescheduled the matter for December 4th; on December 4th, because the hearing was not completed by the end of the business day, the panel adjourned until January 17th – a delay of an addition *six weeks*). Each time the Panel adjourned proceedings, motions were made for release pending the hearing process. The motions were denied by the ISP Panel and, as noted, are not appealable. (In fact, there was doubt as to whether the ISP Panel even had authority to authorize release pending its final determination.) Should Mr. Forchion fail to be released on January 17th and were this court to then fail to address the merits of this case, it is unclear how long Mr. Forchion will have to remain imprisoned before his federal claims are adjudicated. Applying the equitable doctrine of Younger would therefore be improper.

IV. DEFENDANTS' CLAIMS THAT THEY ARE ENTITLED TO QUALIFIED IMMUNITY AND ARE SHIELDED FROM SUIT BY THE ELEVENTH AMENDMENT ARE UNAVAILING.⁶

The test for qualified immunity, as most recently enunciated in the Third Circuit, is as follows:

(1) [has] the plaintiff[] alleged a violation of [her] statutory or constitutional rights; (2) was the right alleged to have been violated clearly established in the existing law at the time of the violation; and (3) should a reasonable official have known that the alleged action violated the plaintiff[']s rights.

Brown v. Armenti, 2001 WL 388752 (3d Cir. 2001), citing Rouse v. Plantier, 182 F.3d 192, 196-97 (3d Cir. 1999). But see, e.g., Sterling v. Borough of Minersville, 232 F.3d 190, 193 (3d Cir. 2000) (enunciating a two-part test for qualified immunity that essentially collapses the first and second parts of the test stated in *Brown* and *Rouse* into one); Showers v. Spangler, 183 F.3d 165, 171 (3d Cir. 1999) (same; decided the same day as *Rouse*); Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997) (same); Tofano v. Reidel, 61 F. Supp.2d 289, 298 & n.13 (D.N.J. 1999) (same). “[T]he test is not whether the current precedents protect the specific right alleged but whether the contours of current law put a reasonable defendant on notice that his conduct would infringe on the plaintiff’s asserted right.” Gruenke v. Seip, 225 F.3d 290, 302 (3d Cir. 2000), citing Anderson v. Creighton, 483 U.S. 635, 639 (1987).

A reasonable defendant should have known that the free speech activity involved in this case was protected and that attaching an “adverse

⁶ These defenses are raised in defendants’ Brief in Support of Defendants’ Motion to Dismiss.

action” to the exercise of that activity violated plaintiffs’ rights. While defendants apparently took the position that Mr. Forchion had no rights while on ISP, the seminal case in the area of prisoners’ rights, Turner v. Safley, supra., clearly established that their position was untenable. 478 U.S. at 84. Further, the Third Circuit Court of Appeals in Rausser v. Horn, supra., made patently clear that a prisoner or parolee may not be denied privileges “in retaliation for exercising a constitutional right.” 241 F.3d at 333. Finally, based on the numerous free speech cases cited herein, including the case decided in this circuit holding that a prisoner cannot be subjected to adverse action for corresponding with the press or advocating issues of public interest (see Castle v. Clymer, supra.), defendants should have clearly been on notice that Mr. Forchion’s free speech activities – i.e., advocating for a change in the drug laws through ads, interviews with the press, and his website – were constitutionally protected.

Likewise, defendants’ Eleventh Amendment defense is wholly without merit. It is not surprising that defendants, in discussing this claim in their Brief in Support of Defendants’ Motion to Dismiss, fail to even mention the seminal (and controlling) case in this area, Ex parte Young, 209 U.S. 123, 159- 60, 28 S.Ct. 441 (1908). The doctrine of Ex parte Young provides an exception to Eleventh Amendment immunity and allows a federal court to grant prospective relief against a state official in order to compel compliance with federal law. See, e.g., Koslow v. Commonwealth of Pennsylvania, 302 F.3d 161, 168 (3d Cir. Aug. 21, 2002) (“a person seeking purely prospective relief against state officials for ongoing violations of federal law may sue under the ‘legal fiction’ of Ex parte Young”). As explained recently by the Third Circuit, the doctrine of Ex parte Young ensures that the Eleventh Amendment is no bar to “suits against

individual state officers for prospective injunctive and declaratory relief to end an ongoing violation of federal law.” Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 323 (3d Cir. July 24, 2002). That is exactly what is currently sought in the present case.

CONCLUSION

For the reasons set forth above, amicus ACLU-NJ respectfully requests issuance of a preliminary injunction reinstating the Plaintiff to the Intensive Supervision Program pending the outcome of this matter.

Dated: January 10, 2003

Ed Barocas
Legal Director, ACLU-NJ