No. 18-1098

In The

Supreme Court of the United States

DANIEL E. WITTE,

Petitioner,

v.

JAYDEN HUYNH nka JAYDEN SCACCO,

Respondent.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Faretta v. California*, 422 U.S. 806, 829-32, 830 n.39, 833-34, 834 n.46 (1975), this Court held that state courts may not compel pro se litigants in *criminal* cases to use an attorney (unless the pro se litigant's conduct is of such a "serious," "obstructionist," "extreme," "aggravated," "noisy, disorderly, and disruptive" nature that it is virtually or "wholly impossible to carry on" with the court's proceeding, as per *Illinois v. Allen*, 397 U.S. 337, 338, 346 (1970)). In dicta, the *Faretta* Court also appeared to say or infer that *civil* pro se litigants in state court have an analogous federal constitutional right of self-representation. This petition asks this Court to squarely reach and affirm what this Court earlier indicated about the federal constitutional right of a civil pro se state court litigant in the *Faretta* dicta.

QUESTION #1. Is a pro se civil litigant's right of self-representation in state court protected as a fundamental federal constitutional right subject to the strict scrutiny test under the United States First Amendment (Free Speech, Free Exercise, Petition Clauses) as incorporated by the Fourteenth Amendment?

QUESTION #2. Is a pro se civil litigant's right of self-representation in state court protected as a fundamental federal constitutional right subject to the strict scrutiny test under the United States Fourteenth Amendment (Due Process and Privileges and Immunities Clauses)?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Petitioner Daniel E. Witte ("Witte," who was "Respondent" in some of the trial proceedings and referred to as such in connection with the petition to modify, as well as the appellant before the Utah appellate courts) and Respondent Jayden Huynh nka Jayden H. Scacco ("Huynh"), in relation to their son D.M.W. Along with a regular interlocutory appeal, an extraordinary writ was sought against the Utah Third District Court in connection with the requests for review to the Utah Court of Appeals and the Utah Supreme Court. Witte seeks review under both theories.

CORPORATE DISCLOSURE STATEMENT

The dispute involves natural persons and the Utah Third District Court only, and Mr. Witte is a natural person acting pro se on his own individual behalf. No corporations or other artificial legal entities are private parties to this dispute.

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INTRODUCTION

The Founders of the United States and the Framers of its Constitution "believed that self-representation was a basic right of a free people" and that self-representation of one's own person in civil court proceedings (as well as in criminal cases) was a "natural right" of free citizens enshrined in the state and federal constitutions. *See Faretta*, 422 U.S. at 829-32, 830 n.39, 833-34. Along with the United States First Amendment, which protects "the right of the people . . . to petition the Government for a redress of grievances" in court in relation to religious liberty and other matters,[1] the Founders of the United States enacted § 35 of the Judiciary Act of 1789, which has continuously operated to require all federal courts to honor the right of self-representation in civil matters.[2] *See id.*; 28 U.S.C. § 1654 (current statutory guarantee of civil self-representation in federal courts); *see also Iannaccone v. Law*, 142 F.3d 553, 557-58 (2d Cir. 1998); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 866-67 (2d Cir. 1982). The original colonies and many subsequent states also put explicit protection for self-representation in

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[1] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

[2] The longstanding federal statute in place since 1789 has typically operated to prevent the need for federal court litigants to resort to the First Amendment or other provisions in the United States Constitution as a means for vindicating the right of self-representation in connection with litigation of federal court civil law matters.

state constitutions, including (ostensibly) Utah. *See Faretta*, 422 U.S. at 829-32, 830 n.39, 833-34; Utah Const. art. I, § 11 ("[N]o person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.").

Despite these protections, problems still occurred in which some localities or states attempted to suppress racial and religious minorities from being able to access the courts and use self-representation (as well as attorneys of their own choice) to petition for a redress of their grievances. *See Iannaccone*, 142 F.3d at 557-58 (many litigants needed self-representation to guarantee access against practical, expense, and ideological barriers otherwise associated with being forced to use members of the local bar, especially when colonial religious liberty objectors, political dissenters, or abolitionists were involved). To solve the problem and ensure that everyone, including former slaves, would be protected against deprivation of their natural, civil legal, and constitutional rights, privileges, and immunities of a citizen—including, but not limited to, the right to access the court system, self-represent or voluntarily choose one's own legal counsel, and petition for a redress of grievances in court based upon one's own desired positions—this nation enacted the Fourteenth Amendment of the United States Constitution.[3]

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[3] U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .").

The right to self-represent was necessary to ensure that a litigant would not be forced to use attorneys who might sabotage the litigant's cause, or who might be more fearful of retribution from local judges, government officials, and special interest groups than their ethical duty to zealously advocate the actual positions of their client.[4] *See Faretta*, 422 U.S. at 821-22

[4] It is also clear that the expressive content of a petition to a court or other governmental body is protected against any tactic (of which denial of the right to self-represent would be a most extreme manifestation) designed to accomplish prior restraint, censorship, or sanction based upon substantive content. *E.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, 1730-31 (2018) (vacating and remanding Colorado Civil Rights Commission proceedings because of differential treatment accorded to the fined litigant; "Just as 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,' it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."); *Matal v. Tam*, 137 S.Ct. 1744, 1762-64 (2017) (examiner could not strike application petitioning for trademark simply because the Patent and Trademark Office examiner and some portion of the public found viewpoints expressed therein to be offensive; "Speech may not be banned on the ground that it expresses ideas that offend."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (basic substantive and procedural due process requires opportunity to meaningfully and timely voice one's petition for redress before a neutral tribunal); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002) (requiring "breathing room" for legal claims and assertions to a court; "the genuineness of a grievance does not turn on whether it succeeds. . . . [We] have protected petitioning whenever it is [objectively or subjectively] genuine, not simply when it triumphs. . . . [E]ven unsuccessful but reasonably based suits advance some First Amendment interests."); *cf. also Dixon v. Shuford*, 671 So.2d 1213, 1215 (La. Ct. App. 1996) (finding that the "right of self-representation" can be drawn from Louisiana state constitutional language which is modeled after the federal First Amendment, which protects "the right of a person to petition government for a redress of grievances").

n.18. Thus, pursuant to the First and Fourteenth Amendments, a modern civil litigant has a fundamental federal constitutional right to self-represent in state court as well as federal court. *Cf. id.* at 829-32, 830 n.39, 833-34; *Lattanzio v. Joyce*, 308 S.W.3d 723, 727 (Ky. Ct. App. 2010); *Scott v. Hunt Oil Co.*, 152 So.2d 599, 603 (La. Ct. App. 1963); *Ockey v. White*, 2004 UT App. 11 at *1 (unpublished).

Even if, arguendo,[5] a pro se civil litigant has somehow violated a court rule or engaged in misconduct of

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[5] For purposes of Witte's petition to this Court, Witte is not requesting that this Court re-examine the accuracy of the various ad hominem attacks made in the District Court's order. Instead, Witte is asserting that the District Court's order (App. A1) to be constitutionally insufficient to justify denial of self-representation even when this Court reads the order at face value. Nevertheless, to be clear for the record, it is also Witte's position that no cognizable or material misconduct occurred on his part at any time, let alone of any serious variety, in connection with any of his Petition proceedings before the District Court. Witte considers the District Court's order to be a raw and pretextual exercise of judicial will instead of a proper judicial judgment. The order is devoid of specific, verifiable details or evidence in relation to the ad hominem aspersions made, to the point that some other attorney's name could have been generically swapped in for Witte's in most paragraphs of the order without any ability to prove or disprove the vague statements. Witte disputes any and all assertions to the contrary that have been made by either the District Court or by Huynh at any time, or made in any filing submitted in connection with trial court proceedings or at any level of appellate proceedings. The District Court's own order conceded that Witte had uncovered serious unrectified fraud by Witte's former spouse, and that Witte's fundamental case was legally sound, and yet proceeded to mischaracterize and condemn Witte's supposed intemperate reaction to the years of dilatory wrongdoing instead of condemning the actual misrepresentations

some other kind, a court typically cannot deprive the pro se litigant of the fundamental First and Fourteenth Amendments' rights to self-represent, and certainly cannot engage in deprivation of such a right, without first satisfying the strict scrutiny test. *See Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2226-27 (2015); *United States v. Caroline Products Co.*, 304 U.S. 144, 152 n.4 (1938).

Put another way, a trial court must demonstrate that any imposition upon the right of self-representation is narrowly tailored, and that the court has utilized the least restrictive means available to vindicate whatever compelling state purpose has been asserted for impinging upon the right. *Id.* In the context of the right to self-represent, this means the trial court must articulate specific facts demonstrating that the pro se litigant has deliberately transgressed in some manner far beyond violation of a minor rule, and has instead engaged in conduct of such a "serious," "obstructionist," "extreme," "aggravated," "noisy, disorderly, and disruptive" nature that it would be virtually or "wholly impossible to carry on" with the court's proceeding unless the right to self-representation was abrogated.[6]

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and concealments conveyed from Huynh (through the inaccurate filings and verbal courtroom statements of her attorneys) to the District Court. App. A2, A5-A6, ¶¶ 1, 9, 11.

[6] *See Allen*, 397 U.S. at 338, 346 (despite repeated clear warnings and opportunities to cease, pro se prisoner threatened in presence of jurors to kill judge and commit other violence, openly vowed to disrupt trial in every possible way, and persisted in shouting down judge in courtroom to the point the trial could not proceed unless litigant was bound, gagged, and removed from

Daniel E. Witte ("Witte") is a divorced, single father involved in a contentious dispute with his former wife about enforcement of a stipulated April 10, 2014 divorce settlement decree and attendant questions involving fundamental questions related to his parental rights, relationship with his minor child born into the marriage, and the religious upbringing of his minor child. Witte was and is a licensed attorney in good standing.[7] Witte is the natural father of his son, co-equal joint legal custodian, and currently exercises parent time on a regular basis. Using official pre-approved

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the courtroom); *see also Faretta*, 422 U.S. at 834 n.46 (endorsing the *Allen* standard); *Lattanzio*, 308 S.W.3d at 727 ("In light of . . . a party's right to plead and conduct one's own case . . . the trial judge abused his [Rule 11] discretion in ordering Lattanzio to proceed with his litigation only under the supervision of an attorney"; as a matter of law, "[s]uch an extreme remedy was simply not reasonable" regardless of whether an underlying Rule 11 violation of some kind had been committed, since trial court had alternate means short of abrogating self-representation such as fines, striking the offending filings, or imposition of other restrictions). Witte contends that the District Court has not, and cannot, satisfy the *Faretta/Allen* standard.

[7] Aside from the instant case in dispute, Witte has had (and continues to have, in his other legal matters representing clients) a highly successful 20 year professional record as an attorney litigating commercial, constitutional, family law, and civil rights matters in state and federal courts of Utah and numerous other jurisdictions, as well as investigation and litigation of fraud disputes. Neither Witte nor his clients have been subjected to any kind of Rule 11 or ethical sanction in any other case. Among other things, Witte is also a former federal circuit court judge law clerk and an Equity Member of his law firm of approximately 30 attorneys, which has attorneys regularly litigating and following trends across the State of Utah. Accordingly, Witte disputes any attempt by the Third District Court, Huynh, or opposing counsel to smear him or to characterize him as unable, unfit, or undeserving to represent himself.

court templates, Witte filed a September 2014 petition to modify (Docket Number (hereinafter "Doc.") 127, the "Petition") in Utah District Court seeking physical custody and various other relief associated with interference with his legal and interactive rights with his son, alimony fraud, abusive relocation, and other matters.

While in the process of litigating his Petition in this case, Witte discovered that some of the judicial officers in the Utah Third District Court have the regular and improper practice of issuing rote orders reciting that divorced fathers (including Witte) should get no physical custody and the *minimum* (not average, maximum, or optimal) amount of parent time for fathers permitted under a Utah statutory scheme (*e.g.*, U.C.A. §§ 30-3-35 (2), 30-3-37 (3-4, 6). The Utah laws in question, and the procedures and hearings associated with them, were designed to stop abusive practices by state judges who had been unfairly depriving divorced parents (typically fathers) of adequate interaction with their children. In addition, these judicial officers of the Utah Third District Court would hold perfunctory relocation and petition to modify proceedings without allowing fathers (including Witte) to conduct meaningful discovery and most especially, to depose or otherwise testimonially examine in motion hearings or other court proceedings the mother making assertions and trying to dispossess the father of his relationship with his child. The end result was that the Utah Third District Court, in Witte's case and others, was using practices which effectively circumvented the intent of various Utah statutes and rules. It was (and is) the rough family law equivalent of a judge in a criminal

case automatically handing out rote maximum criminal sentences to all criminal defendants who appear, without conducting meaningful and individualized sentencing hearings to determine whether customized or less harsh sentencing might be appropriate under a statute requiring such an assessment.

Witte contended that these practices left the Utah Third District susceptible to fraudulent schemes, concealments, and misrepresentations committed by ex-spouses seeking to relocate children from their divorce as a "move-away" tactic designed to circumvent custody evaluator screening of new partners and facilitate fraudulent collection of alimony overpayments. In order to preserve his rights to argue due process and other doctrines on appeal, Witte politely and properly placed objections to these practices on the record. However, the judicial officers of the Utah Third District Court were incensed that Witte would have the temerity to object to their practices for divorced fathers on the ground that such were constitutionally defective on a systemic basis.

Witte has twenty years of training and experience as a fraud investigator and litigator. Using the skills that he has acquired, Witte used legal means to uncover profound and systematic fraud on the trial court committed by his former spouse, which was accomplished by means of demonstrably inaccurate representations conveyed from his former spouse to the trial court through her attorneys.[8]

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[8] Documentation and citations in relation to the discovery, admissions, and findings set forth in the next paragraphs are

In August 2017, Witte finally managed to secure Huynh's admission to some discovery questions, which revealed that she had indeed concealed an ongoing adulterous and sexual relationship with a San Francisco artist named John Scacco, since early 2013 (prior to the original divorce and at least a year prior to the 2014 relocation), continuing and concealed until June 2016. A torrent of additional revelations followed, and only an illustrative sample is set forth herein.

In December 2017, and on other drastically delayed and untimely occasions, Petitioner also admitted that since 2016, she and Scacco had secretly relocated with the parties' (Witte and Huynh) minor child, 380 miles from San Jose, California, to a different residence in Southern California. She had also moved in October 2014 into a residence newly purchased for her by John Scacco, and entered into a secret marriage disclosed only on a delayed basis after it had occurred and after her attorneys had attempted to close off discovery in the litigation. It also emerged, among other things, that the California residential "lease" produced to Witte and the District Court in Fall 2015 by Huynh through her attorneys had been altered to obscure "landlord" John Scacco's name. Additionally, even though Huynh was already engaged to be married to John Scacco at

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discussed at length in the trial court record. *E.g.*, Doc. 1232, at 13-15, 13-15 nn.18-22. However, such intricate factual citation detail is not reproduced here, since this Court is asked to facially analyze the disputed District Court orders (App. A1) and not to reexamine all the factual findings or details. The information is provided more as general narrative background so that the Court can understand the causative origin of the disputed trial court order.

least as early as September 2015, her attorneys had inaccurately told the court that the "landlord" whose name had been blotted from the lease produced as evidence was unlikely to have any information potentially leading to relevant evidence for Witte's Petition.

Once Witte uncovered the fact that his former wife had concealed an adulterous sexual relationship incepting before the divorce, secretly relocated into a house purchased by his former wife's paramour, secretly married, and relocated 380 miles from where the court had been told the former wife and child were living, Witte resisted the efforts of opposing Pranno Law counsel and the trial court to pressure Witte into settling the dispute. Instead, Witte insisted on first obtaining discovery adequate to intelligently understand who was living with his son, where his son was living, who was caretaking his child and providing other needs, where his former wife was employed, and the scope and nature of the misrepresentation and concealment of his former spouse and her various attorneys stretching over the course of at least five years.

The District Court was displeased that Witte objected to its relocation and petition to modify procedures, and that he chose to continue litigating the matter rather than simply acquiescing or settling to accept the minimal amount of parent time courts are permitted to accord divorced fathers under Utah law. The District Court also disliked the fact that Witte had said that Huynh was engaging in misrepresentation and concealment through misinformation she was feeding to the District Court through her attorneys (the five-year concealment of John Scacco, and various

details involving him, is undisputed; Huynh's attorneys assert that they were *subjectively unaware* of their client's intricate scheme to conceal various aspects of the John Scacco relationship and marriage from 2012 to August 2017 (and beyond)).[9] The District Court was also displeased because Witte filed a motion (in proper form pursuant to Utah Rule of Civil Procedure 63 (Docs. 1131-37)), requesting that the District Court judge be recused or disqualified for, among other things, expressing improper prejudgments in connection with the outcome of the litigation, expressing an improper bias against Witte because of his views concerning the proper religious upbringing of his child, and various other reasons which case precedents cited in Witte's filings had affirmatively approved as part of justifying actual previous disqualifications.

Accordingly, without waiting for depositions, custody evaluation, any motion testimony from Huynh or John Scacco, or any trial in connection with the

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[9] Witte has not based his Petition claims or motion defenses on the issue of when Huynh's attorneys first subjectively appreciated the nature of the various concealments and inaccurate representations made to the District Court. Instead, it is his contention that Huynh herself certainly knew what was occurring, that Huynh's deception has wide-ranging significance to the claims of the Petition, attorney fee issues, Rule 11 defenses, and many other points, and that if Huynh's attorneys were complicit in misleading the District Court it would merely exacerbate an already poor position from Huynh's point of view. Witte's position is, further, that whenever Huynh's counsel became subconsciously aware of various inaccuracies perpetrated toward the District Court during the years of representation from 2014 onward, they acquired an affirmative duty from that point forward to submit remedial correction to the District Court.

Petition, the District Court held a premature[10] hearing for the kind of Rule 11 dispute placed at issue. The trial court's Rule 11 hearing did not involve a single document or item of evidence introduced into the record against Witte, nor was a single adverse witness introduced against him, nor was a single aspect of Witte's testimony rebutted. Doc. 1205 (transcript of Oct. 20, 2017, hearing). The trial court expressly prohibited Witte from offering a single objection in his defense during hearing. Doc. 1205, Hrg. Oct. 20, 2017 at Tr. 3:9. Witte was not allowed to subpoena or call any witnesses or evidence on his behalf (trial for the 2014 Petition has not yet occurred as of February 2019).

After conducting what amounted to a sham Rule 11 proceeding, the Commissioner issued an order (App. A1-A9) expressing the view that Witte's accusations and Petition pleadings both had merit, but truth and unclean hands were not permissible defenses to the Rule 11 accusations against Witte. App. A2, A5-A7, ¶¶ 1, 9, 11, 14. What mattered instead, the Commissioner ruled, was that Witte's "response" to the revelations of the multi-year fraud had "been extraordinarily intemperate" and had caused Witte to adopt "an accusatory, combative tone" regarding Huynh and her

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[10] *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 152 (4th Cir. 2002) (notice of Rule 11 accusations must be served promptly after the accused filing or be waived, but Rule 11 decisions from the Court are not ripe until separate evidentiary hearing after trial or other final disposition such that an "adequate opportunity to develop . . . proof" has occurred); *Birch v. Kim*, 977 F. Supp. 926, 938 (S.D. Ind. 1997) (quoting Advisory Committee Notes) (" 'the sanctions issue under Rule 11 normally will be determined at the end of the litigation' ").

attorneys.[11] App. A2, A5-A7, ¶¶ 1, 9, 11, 14. The Commissioner acknowledged an inability to identify any individual action on the part of Witte that could be viewed as anything more than "mere instances of poor judgment by a party in the midst of a difficult domestic conflict,"[12] but he then baldly asserted that unspecified, uncited, and unquoted "inappropriate communications to the Court and to counsel"[13] demonstrated in some unexplained way that Witte "is acting out of malice and an intent to use the legal process for punitive purposes." App. A5, ¶7. The Commissioner indicated that Witte's objections and proffers on the record to preserve issues

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[11] During the hearing, the Commissioner conceded that Huynh's deception and the acrimony Huynh and her legal team had directed toward Witte might constitute a form of incivility. Doc. 1205 (Hrg. Oct. 20, 2017, at Tr.54:19-23 ("I'm not even sure it's [the alleged violation of the Rules of Civility] not somewhat in both directions. . . .").

[12] The only specific violations identified in the Commissioner's order were 1) a document entitled "Objection to Request to Submit for Decision Rule 11 Sanctions" (App. A3, ¶ 2) that the Commission thought procedurally improper (even though the Utah Court of Appeals has expressly allowed such objections to requests to submit, *see Steffensen-WC, LLC v. Volunteers of America of Utah, Inc.*, 2016 UT App. 49, at ¶¶ 12-18 (objection may be filed in response to request to submit)) and 2) "filing papers with lengthy footnotes" in one or more unspecified documents (App. A3-A4, ¶¶ 2, 6) (the District Court judge later conceded that single-spaced footnotes were actually permissible and the attorney involuntarily imposed on Witte would be allowed to use them (Doc. 1476 (Hrg. May 4, 2018 at Tr. 26:4-7))).

[13] Not a single such communication is specifically quoted and identified by the Commissioner. This is due to the fact that not a single adverse testifying witness, document, or other item of admissible evidence was even *introduced* against Witte in connection with the relevant Rule 11 hearing and motion.

for appeal displayed "a lack of understanding about proper Court procedure" (App. A4, ¶ 3), and asserted that Witte's Rule 63 motion request for recusal or disqualification constituted a "personal attack" against the Third District Court that justified depriving Witte of his right to self-representation (App. A4, A7, ¶¶ 4, 12).

But most importantly for purposes of resolving the issue before this Court, the District Court's orders did not cite any legal authority actually authorizing the Commissioner to abrogate self-representation. Nor did the orders acknowledge the constitutional issues asserted in support of self-representation, make a cogent attempt to analyze Witte's constitutional rights, or conduct any strict scrutiny analysis. The orders did not identify any adequate specific evidence, or articulate any findings, demonstrating that the District Court's purported concerns could not be adequately addressed by fines, striking pleadings, imposition of other sanctions, or narrowly tailored restrictions short of abrogating self-representation.

Quite to the contrary, the Commissioner acknowledged that he was able to strike any purportedly inappropriate statements or filings (none of which were actually identified), and that he could simply use prefiling screening orders and monetary sanctions in lieu of denying the right of self-representation. App. A6-A7, ¶¶ 10-12; A8, at page 7 of 8, ¶¶ 2-3. The Commissioner did not posit that denial of self-representation was an essential or least restrictive means for progressing the litigation; instead, he justified involuntary attorney representation on the ground that Witte "could clearly

afford counsel," had "obviously been spending large amounts of time" on Witte's "court papers" "when he might be better employed representing clients," and Witte "would benefit by having experienced, objective counsel represent and advise him in resolving the issues raised in the current proceedings." App. A6-A7, ¶ 12.

The District Court Judge Paul B. Parker, in a continuing endorsement of the Commissioner's improper order, made clear that his judicial purpose in forcing attorney Kyle Witherspoon's representation upon Witte—and in threatening Mr. Witherspoon thereafter—was not that Witte was somehow doing anything which would make it impossible for court proceedings to continue on a pro se footing.[14] Instead Judge Parker indicated he wanted to ensure Witherspoon would "filter" Witte's "thoughts" and "[d]rop" Witte's arguments from the litigation.[15] Doc. 1476 (May 4, 2018 Hrg. at Tr. 20:8-13, 21:14-25, 22:17-25).

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[14] After a separate hearing affording Huynh an opportunity to demonstrate harm or cost from conduct of Witte, the District Court found in a separate order not on appeal that Huynh could not demonstrate any actual prejudice in terms of fees or harm "specifically incurred" as a result of Witte's purported Rule 11 violations. *E.g.*, Doc. 1521, August 14, 2018 Order. Huynh's demand for $70,000 in Rule 11 sanctions was thus denied.

[15] Mr. Witherspoon immediately withdrew from representation of Witte after the May 4, 2018 hearing rather than attempting to continue representation in conformity with the demands imposed by the District Court, due to concerns that the judicial threats against him made it impossible for him to loyally, accurately, and zealously represent Witte's positions and interests in the litigation. *See* Doc. 1325 Respondent Witte's Response to Petitioner's Objection at 7 n.10 (filed Feb. 1, 2018) (noting that Witherspoon

Thus, even if, arguendo, all of the District Court's order is accepted at face value by this Court, that order is still facially insufficient to satisfy the constitutional standards, findings, and showings required to justify abrogation of Witte's fundamental right to self-represent himself and to petition the court system for a redress of grievances in relation to matters such as his son's religious upbringing. This Court is therefore respectfully requested to vacate the Commissioner's order infringing upon Witte's right of self-representation, require use of strict scrutiny least restrictive means analysis for any further effort to interfere with Witte's self-representation, and remand.

DECISIONS BELOW

The Commissioner of the District Court issued an unpublished minute entry on December 19, 2017 (Doc. 1225, App. A10), and then issued a substantially similar unpublished order on January 26, 2018 (Doc. 1305, App. A1). The minute entry and order provided the

owed Witte "a duty of loyalty to obey Witte's lawful instructions in regard to what positions Witte wishes to assert in court . . . by operation of the ethical rules" and stating that "If the Court were to somehow accept . . . [Huynh's] invitation to engage in any involuntary arrangement or threat of sanctions that would pressure Mr. Witte's attorney to violate ethical and legal duties toward Witte and his rights, it would essentially force [me, Mr. Witherspoon] . . . to withdraw from the case and prevent most (if not all) other reputable attorneys from assuming the representation for Witte going forward."); Doc. 1450, at 1-5 (explaining Witherspoon's withdrawal in reaction to District Court's pressure and threats).

only substantive rationale for depriving Witte of the right of self-representation, and were challenged in multiple timely written objections of various length along with various verbal objections and motions made during court hearings (these continue to be renewed on a recurring basis in the ongoing trial proceedings). On June 1, 2018, the Utah District Court issued an unpublished order summarily declining to vacate its earlier minute entry and order. App. A18. Witte sought interlocutory review under Rule 5 of the Utah Rules of Appellate Procedure and, alternatively, extraordinary relief pursuant to Rule 65B(d), (d)(2)(A-C) of the Utah Rules of Civil Procedure and Rule 19, 19(d) of the Utah Rules of Appellate Procedure. The Utah Court of Appeals summarily denied leave for interlocutory review on August 9, 2018 (App. A21), and the Utah Supreme Court summarily denied writ of certiorari on November 23, 2018 (App. A22).

Witte timely raised the right of self-representation, as protected by the First and Fourteenth Amendments of the United States Constitution, repeatedly, in writing, verbally in all available hearings, and at every stage of the proceedings before the Utah Third District

Court,[16] the Utah Court of Appeals,[17] and the Utah Supreme Court[18]. However, in their orders and decisions,

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[16] Witte repeatedly raised the right to self-representation issue and the related federal constitutional issues with the District Court in multiple filings and at every hearing, and continues to raise objection on a continuous and repeated basis even up to the present time. *E.g.*, Doc. 1232 Respondent's Verified Objection To Minute Entry (filed Jan. 2, 2018) at 3-4 (asserting the Minute Entry ban against self-representation violates "federal First Amendment rights" and the federal "Fourteenth Amendment," including such protections as "free speech," "free exercise," "petition to the government for redress of grievances," and "procedural and substantive due process," not to mention a wholesale deprivation of Witte's "ability to personally and adequately express his positions, concerns, defenses, and objections, to explain his narrative version of facts and events to the Court . . . and to make and protect a record for appeal"), 8-11, 8 n.9, 9 n.10, 10 n.14, 11 n.15 (raising denial of Mr. Witte's right of self-representation and asserting "profound and unlawful deprivations and censorship of Mr. Witte's rights under federal . . . constitutional law pertaining to the right to petition for a redress of grievances, the right to free speech and free exercise speech, the right to due process," and citing this Court's precedents); Doc. 1231 Motion for Leave to File at 1-3 (filed Jan. 2, 2018); Doc. 1253 Witte's Response at 2-5, 2-5 nn.1-6 (filed Jan. 10, 2018) (objecting to the "efforts to infringe upon Mr. Witte's right of self-representation" including but not limited to the effort to "impose a Court-selected attorney upon him" nominated by the opposing attorney and appointed by the Court, as a violation of "'a party's right to plead and conduct one's own case'" and the federal First and Fourteenth Amendments, citing many of the same precedents as in this petition); Doc. 1265 Witte Reply (filed Jan. 17, 2018); Doc. 1268 Witte Opposition at 11-12 (filed Jan. 18, 2018) (further assertion of right of self-representation); Doc. 1230 Notice of Limited Appearance at 1-6, 1-6 nn.1-4 (filed Jan. 2, 2018) (six-page notice and objection indicating that Witte's attorney was entering limited appearance under objection from Witte, and asserting on behalf of Witte this Court's precedents and also the right of self-representation, right to select one's own attorney, the First and Fourteenth Amendment rights to self-representation, right to petition, right to due process); Doc. 1325 Respondent Witte's Response to

Petitioner's Objection at 2-4, 2 nn.1, 3-4, 6-8, 6 n.9 (filed Feb. 1, 2018) (asserting Witte's right to "self-representation" "due process," and "uncensored petition to the government for redress of [Witte's] grievances," and against "being compelled to seek professional assistance" or having Witte's opponent select an attorney for the Court to impose upon Witte, and citing the "First" and "Fourteenth" Amendments to the "United States Constitution" along with this Court's precedents); Doc. 1326 Respondent Witte Objection and Notice at 4 (filed Feb. 1, 2018) (reasserting all arguments related to "deprivation of Witte's right of self-representation . . . the propriety of any coerced substitution of Mr. Witherspoon" and Witte's right to "due process"); Doc. 1476 (Hrg. May 4, 2018 at Tr. 18:7-24, 21:5-19, 22:5-6, 23:3-8, 23:24-25:13, 26:4-7) (Witte's involuntarily-appointed attorney raises verbal objection and motion in relation to "denying a constitutional right" in relation to the "self-representation issue" but is cut off and denied by District Judge); Doc. 1205 (Hrg. Nov. 13, 2017 at Tr. 52:3-11; 54:6-13; 55:3-57:1; 58:20) (Witte argues that attempt to use Rule 11 or Rules of Civility to censor substantive content through denial of self-representation is "unconstitutional"); Doc. 1171 (Verified Response at 4-10, 4-10 nn.6-15 (filed Oct. 1, 2017) (Witte asserts "fundamental" "federal" "First Amendment" and "Fourteenth Amendment" "rights," including without limitation "free speech," "free exercise," "petition to the government for redress of grievances," "procedural and substantive due process," and extensive case law from this Court, and arguing elimination of self-representation would constitute "improper interference," "censorship" "prior restraint" against "a fair and full opportunity" of a "litigant" to "pursue legal theories" and protect his son against potential abuse).

[17] *E.g.*, *Petition for Permission To Appeal, Alternatively, Petition For Writ of Mandamus/Extraordinary Writ* filed to the Utah Court of Appeals on June 21, 2018, at 14-17 (asserting that when the District Court "Barred Mr. Witte From Exercising the Right of Self-Representation" the District Court violated a right "protected by the United States First and Fourteenth Amendment," and also violated, among other things, the "right to petition for a redress of grievances" as well as "Mr. Witte's Due Process and First Amendment Guarantees" by focusing on the content of his expression to justify denial of self-representation, and that the District Court made "no specific findings" or "explanation" "on the

each of those courts utterly refused to so much as acknowledge the constitutional issues Witte timely raised.

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record" sufficient to "justify barring self-representation"), 20 (arguing that "[i]f the bar against self-representation is allowed to stand, Mr. Witte will be deprived of fair litigation and trial proceedings, including deprivation of due process and the right to freedom of petitional speech needed to accurately express his own views, contemporaneously and meaningfully raise facts and evidence in testimonial examination, oral presentations, written presentations, and the like, as Mr. Witte sees fit. If he is forced to wait for an appeal after additional litigation he irreparably loses precious time as to his minor child—which cannot be remedied after-the-fact.").

[18] *E.g.*, *Petition for Writ of Certiorari* filed to the Utah Supreme Court on October 10, 2018, at 1 (raising as an issue failure "to protect Mr. Witte's fundamental First and Fourteenth Amendment rights"), 5 (quoting U.S. Const. amend. I and XIV § 1 in full as provisions relied upon), 6-7 (asserting that the trial court's misuse of Rule 11 sanction authority "to censor Mr. Witte's arguments . . . and ultimately to deprive Mr. Witte of his right to self-representation . . . violated . . . the United States Constitution First and Fourteenth Amendment rights to petition for a redress of grievances and direct the religious upbringing of a child, as incorporated and supplemented through . . . the due process and privileges and immunities provisions of the Fourteenth Amendment."), 8 (asserting "the trial court failed to articulate any act, particular statement of wrongdoing, or specific evidence that would constitute a violation of Rule 11, let alone anything to justify the extreme and unprecedented [denial of self-representation] sanction imposed"), 18 and 21 (arguing the right of self-representation in a state civil court matter is "protected by the United States First and Fourteenth Amendment right to petition for a redress of grievances, as incorporated and supplemented through the due process and privileges and immunities provisions of the United States Constitution Fourteenth Amendment).

STATEMENT OF JURISDICTION

On November 23, 2018, the Utah Supreme Court denied writ of certiorari, thereby leaving in place the Utah Court of Appeals refusal to grant leave for interlocutory review of the Commissioner's order as adopted by the Utah Third District Court, which appeals were on various grounds, including that denial of the right of self-representation violates the First and Fourteenth Amendments of the United States Constitution. This Court thus has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution governs and is quoted in the Introduction section, infra footnotes 1 and 3.

STATEMENT OF THE CASE

I. Factual Background

To facilitate streamline understanding and brevity, the relevant background facts were adequately overviewed in the Introduction section and in the Procedural Background section. Facts from those sections are incorporated here by reference.

II. Procedural Background

Pursuant to a detailed divorce decree order and settlement entered on April 10, 2014, Witte is a co-equal natural parent and legal custodian of his son from the divorce (d.o.b. Feb. 2013). (Docs. 100-102, 106, 717). On September 17, 2014, Witte filed a "petition to modify" his stipulated divorce decree (Doc. 127) in response to a relocation notice from his ex-spouse, Petitioner Jayden Huynh. Witte used pre-approved "petition to modify" court forms.

On October 3, 2014, before the Commissioner had held hearing or ruled on relocation, Petitioner Huynh abruptly left Utah with the parties' minor child D.M.W. and relocated to San Jose, California. Since then, Huynh has fiercely resisted being deposed, cooperating with discovery, or personally appearing in any court proceeding. As of the current date, and despite constant efforts by Witte from September 2014 to present, the District Court Judge has still never even met Huynh or John Scacco, let alone allowed or heard testimonial examination from either of them.

In June 2016, Huynh sent an email to Witte admitting that she was married, but not disclosing the name of her husband John Scacco. A torrent of revelations followed, and only a brief illustrative sample is set forth herein.

As of August 2017, Witte finally managed to secure Huynh's admission to some discovery questions, which revealed that she had concealed an ongoing adulterous and sexual relationship with a San Francisco

artist named John Scacco, since early 2013, continuing and concealed until June 2016. In December 2017, and on other drastically delayed and untimely occasions, Petitioner also admitted that since 2016, she and Scacco had secretly relocated with the parties' (Witte and Huynh) minor child, 380 miles from San Jose, California, to a different residence in Southern California. She had also moved in October 2014 into a residence newly purchased for her by John Scacco, and entered into a secret marriage disclosed only on a delayed basis after it had occurred and after her attorneys had attempted to close off discovery in the litigation. It also emerged, among other things, that the California residential "lease" produced to Witte and the District Court in Fall 2015 by Huynh through her attorneys had been altered to obscure "landlord" John Scacco's name. Additionally, even though Huynh was already engaged to be married to John Scacco at least as early as September 2015, her attorneys had told the court that the "landlord" whose name had been blotted from the lease was unlikely to have any information potentially leading to relevant evidence for Witte's Petition.

On October 20, 2017, the assigned domestic court Commissioner conducted a Rule 11 hearing based on the notion that Witte had unfairly disparaged his ex-wife's attorneys by pointing out that they had altered lease document evidence and conveyed representations from his ex-wife to the court which were not true. (District Court Doc. 1205 (transcript).) As previously explained in the Introduction section, the Commissioner's Rule 11 hearing did not involve a single

document or item of evidence introduced into the record against Witte, nor was a single adverse witness introduced against him, nor was any witness testimony or other evidence introduced to rebut Witte's own testimony at the hearing.[19] The Commissioner expressly prohibited Witte from offering a single objection in his defense during hearing. Witte was not allowed to subpoena any witnesses to the hearing for testimony—including his ex-wife, who had made the accusations, or subpoena any other evidence on his behalf for the hearing.[20]

The Commissioner entered an official written recommendation via minute entry on December 19, 2017 (Doc. 1225, App. A10) granting sanctions, including immediately barring Witte from further self-representation. *Id.* The District Court then countersigned a substantially identical formal order on January 26, 2018 (Doc. 1302, App. A1).

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[19] There is apparently no dispute that Huynh and her Pranno Law attorneys produced lease document evidence which had been altered to obscure "landlord" John Scacco's name, or that Huynh's attorneys had told the District Court on repeated occasions that the "landlord" would not have any information capable of leading to discoverable evidence. There is apparently no dispute that Scacco had a sexual relationship with Huynh since at least 2013, had been purchasing residential property for Huynh to occupy since at least October 2014, and had been Huynh's declared fiancée at least as early as September 2015.

[20] Trial for the Petition filed in September 2014 has still not yet occurred as of the date of this filing, nor has discovery or custody evaluation been completed, due to the surreptitious marriage of Witte's ex-wife and her secret relocation of nearly 380 miles to a new residence with Witte's son.

Witte was forced to use attorney Kyle Witherspoon to file objection to the disputed order and various other filings, and also argue at hearing, to have the order vacated. (*E.g.*, Doc. 1230, 1232, 1257). The District Court Judge conducted a hearing on the objection on May 4, 2018 and on June 1, 2018—at which no witnesses, evidence, or testimony were allowed—and declined to vacate the previous order or restore the right to self-representation. (Doc. 1472, App. A18).

On June 21, 2018, Witte filed a timely petition for permission to appeal pursuant to Utah Rule of Appellate Procedure 5 and, alternatively, for an extraordinary writ under Utah Rule of Appellate Procedure 19 and Utah Rule of Civil Procedure 65B(d), (d)(2)(A-C). (Doc. 1492, 1494). The primary purpose of the petition was to restore Witte's right to self-representation whether through interlocutory appeal or extraordinary writ. On August 9, 2018, the Court of Appeals issued a conclusory order denying Witte's petition for permission to appeal. App. A21.

Witte timely appealed to the Utah Supreme Court using the same legal theories, and pursuant to Utah Code § 78A-3-102 and 78A-3-102(3)(a). Doc. 1523. The Utah Supreme Court denied Petition for Writ of Certiorari on November 23, 2018. App. A22.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This case affords this Court an opportunity to squarely reach and clarify the important question of constitutional law discussed as dicta in *Faretta*, 422 U.S. at 821-22 n.18, 829-34, 830 n.39, 334 n.46, but apparently not yet squarely clarified and settled by this Court with a direct holding: Is a pro se civil litigant's right of self-representation in state court protected as a fundamental constitutional right subject to the strict scrutiny test under the United States Constitution First Amendment (Free Speech, Exercise, Petition Clauses) and Fourteenth Amendment (Due Process and Privileges and Immunities Clauses)?

This question is of momentous importance not only to Witte, but also to millions of other pro se litigants throughout Utah and the United States. Due to the exorbitant legal costs associated with divorce and other forms of litigation, as well as the pronounced political biases of many in the legal field, large numbers of litigants (indeed, often a majority in Utah and other states[21]) are forced to self-represent in order to achieve a legal resolution without going bankrupt (or to ensure that their views regarding religious liberty or other

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[21] Depending on the jurisdiction and type of civil matter, and especially in domestic cases, it is common to have 40%-80% of civil cases involve at least one pro se litigant. *See Boston Bar Association Task Force On Unrepresented Litigants Report On Pro Se Litigation*, at 4-6, *available at* https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_bostontaskforce.pdf (accessed Feb. 13, 2019).

contentious matters will receive a full and fair articulation in court).

State court judges must not be allowed to cast aside our nation's legal heritage of more than 250 years and disallow (or improperly threaten to disallow) self-representation on improper, inadequate, or coercive grounds. Utah courts, and various special interest groups hostile to self-representation and to candid petitional speech in court, are seeking to suppress and intimidate divorced fathers (and various other litigants with disfavored religious liberty or political views) from having the ability to meaningfully petition the legal system for a redress of grievances. By threatening and intimidating litigants and their attorneys, these courts are attempting to prevent cases from being filed, intimidate pro se litigants into premature settlement, and in some instances even conceal improper decisions and improper practices at the trial level by making it almost impossible for pro se litigants to advance to an appeals court for meaningful, timely, full, and fair review. Such a trend is a return to the bad old days when some religious minorities were unable to be heard in some colonial courts for want of an attorney willing to articulate unpopular views, and when African-Americans and others were denied a fair opportunity to have their legal theories considered in the courtroom during the eras of slavery and Jim Crow.

The Utah Third District Court and certain other Utah trial courts are engaged in abusive practices toward divorced fathers and various other pro se litigants in Utah. Some do not appreciate a pro se litigant

with the legal knowledge necessary to bring some of the most egregious practices against divorced fathers to the attention of this Court. There is widespread knowledge among the Utah legal community that the problems discussed in this Petition exist, but also widespread fear in the local family law bar of raising legal challenge for fear of retribution from the judicial officers with whom such attorneys must repeatedly deal for a livelihood.

By allowing its trial judges to needlessly deprive pro se litigants such as Witte of the right to self-representation, Utah and its court system has taken a position that is not only in conflict with Utah's own *Ockey* decision, but also at odds with this Court's *Faretta* opinion. The stance of Utah's court system is also at odds with the decisions of various other courts across the country such as, for example, the federal Second Circuit (*Iannaccone*, 142 F.3d at 557-58; *O'Reilly*, 692 F.2d at 866-67) and courts in various states like Kentucky (*Lattanzio*, 308 S.W.3d at 727) and Louisiana (*Scott*, 152 So.2d at 603).

Respectfully, this Court needs to put an end to this disturbing trend of civil rights abuse promulgated by special interest groups antagonistic to a robust operation of the First and Fourteenth Amendment in the courtroom. The right to self-represent in civil court proceedings—both state and federal—is a natural right, and a fundamental federal constitutional right subject to strict scrutiny and least restrictive means protection. This right of choice, agency, and candor is at the very bedrock of what separates the American

court system from the old star chambers of Europe and the current abuses of courts in places such as North Korea. Self-representation is not a right as to which uncertainty, deprivation, or a legal split of authority should exist, and this Court now has the opportunity to decisively resolve the issue.

CONCLUSION

Respectfully, for the reasons set forth above, and in Supreme Court Rule 10(b-c), and elsewhere, this Court is requested to grant the petition.

Respectfully submitted,

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH	
JAYDEN HUYNH, Petitioner, v. DANIEL E. WITTE, Respondent.	**ORDER FROM HEARING ON PETITIONER'S MOTION FOR RULE 11 SANCTIONS HELD ON OCTOBER 20, 2017 (DECEMBER 19, 2017 MINUTE ENTRY)** Civil No. 134903429 Judge Paul B. Parker Commissioner T. Patrick Casey (Filed Jan. 26, 2018)