No. _____

In The
Supreme Court of the United States

CARL LAWSON and GLORIA LAWSON,

Petitioners,

v.

BELL SPORTS USA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has made it clear that, where interactions between citizens and State actors directly impact issues relating to life, liberty, and property, the right to a hearing guaranteed by the Fourteenth Amendment's Due Process Clause is an expansive one, encompassing all forms of hearings as well as conferences. However, the Court has never specifically considered the extent to which the right to participate in a conference is protected by the Due Process Clause, when the "State actor" is a State court, and the conference at issue is mandated by a State court's own rules.

The Court has also made clear when the opportunity for live testimony of critical witnesses is required by the Due Process Clause in State court criminal proceedings, to assure that a defendant receives a hearing "appropriate to the case." However, the Court has never considered the question of when the opportunity to present live testimony is required in a State court civil action, or what other factors need to be considered to assure that State court civil litigants receive a hearing "appropriate to the case."

This petition provides the opportunity for the Court to address these important issues, by considering the following questions:

1. Whether the Fourteenth Amendment's Due Process Clause prohibits a State court from directly violating one of its own court rules, by failing to provide

QUESTIONS PRESENTED – Continued

the litigants in a civil action the opportunity to participate in conferences which a State court rule mandates be provided to them, with respect to issues material to the claims involved.

2. Whether the litigants in a State court civil action fail to receive a hearing "appropriate to the case," as required by the Fourteenth Amendment's Due Process Clause, when they are arbitrarily denied the benefits of a court rule intended to provide them with a fair opportunity to present the live testimony of a critical witness at the time of trial, and as a result of that denial are relegated to presenting the testimony of that witness via the inferior means of videotape.

3. Whether the Fourteenth Amendment's Equal Protection Clause is violated when, as the result of a State court's arbitrary application of its own court rules, the litigants in a State court civil action are relegated to presentation of the testimony of a critical expert witness via videotape, while an opposing party in the same case is provided with the opportunity to present the *live* testimony of its own expert witnesses.

PARTIES TO THE PROCEEDING

Petitioners are Carl Lawson, a former postal worker who is totally disabled as the result of a mountain biking accident occurring on September 30, 2006, and his wife, Gloria Lawson. Petitioners are residents of Freehold, New Jersey. Respondent Bell Sports, USA is a corporation engaged in the manufacture and distribution of bicycling helmets and other sports equipment, throughout the United States and in numerous foreign countries. The claims against Defendants K2 Sports USA, K2 Bike, SRAM Corporation, Ford Motor Company, Freehold Ford Inc., Bell Sports USA, and New Jersey Department of Environmental Protection Division of Parks and Forestry, were resolved prior to the trial which forms the basis of this Petition.

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The unreported opinion of the Appellate Division of the New Jersey Superior Court, issued on July 24, 2017, is included in Petitioners' Appendix, filed herewith. (Petitioners' Appendix ("App.") 1-23).

JURISDICTION

The Supreme Court of the State of New Jersey rendered its decision on June 12, 2018, denying Petitioners' petition for certification of the decision of the Appellate Division, and denied a petition for rehearing by Order dated September 5, 2018. (App. 33). This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This matter arises under Section 1 of the Fourteenth Amendment to the Constitution of the United States of America, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges 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; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners allege that the Bell Solar Helmet Petitioner Carl Lawson was wearing at the time of his mountain biking accident of September 30, 2006, manufactured by Respondent Bell Sports USA ("Bell"), was unreasonably dangerous. They contend that a projection at the rear of Mr. Lawson's helmet caused a "twisting" motion upon impact with the rear of the helmet, and that this defective design either produced or aggravated the severe neck injuries he sustained in that accident.

The New Jersey Superior Court scheduled numerous "Case Management Conferences," in connection with the litigation of Petitioners' products liability claims in this case. A primary objective of those Case Management Conferences was to assure that a trial date was set for this case which accommodated the schedules of the numerous out-of-state lay and expert witnesses for all parties.

The scheduling of trial dates for cases pending in the New Jersey Superior Court, whether accomplished in Case Management Conferences or otherwise, is subject to the dictates of Rule 4:36-3. Significantly, in its very first provision, Rule 4:36-3(a) makes it clear that if a case is not reached for trial at the time its initial trial date is reached, a "date certain" will be promptly

set for trial, but only "after consultation with counsel. . . ."

> 4:36-3. Trial Calendar
>
> (a) Notice of trial . . . If a case is not reached during the week in which the trial date falls, it shall be forthwith scheduled for a date certain *after consultation with counsel.* . . .

Rule 4:36-3(a), New Jersey Rules of Court (emphasis supplied).

On February 8th of 2013, at one of the numerous Case Management Conferences held in Petitioners' case, September 9, 2013 was set as the date for the trial of Petitioners' claims. Nevertheless, on September 4th, 2013, only five days before this initial trial date was reached, Petitioners' counsel received a notice, via letter faxed to him by counsel for Respondent Bell, informing him as follows:

> "Please be advised Judge Perri has adjourned the September 9th trial. The Court will be contacting the parties shortly to schedule a conference and select a new trial date.
>
> If you have any questions, please contact my office."

Despite the representation in this letter indicating that "[t]he Court will be contacting the parties shortly to schedule a conference and select a new trial date," almost a year passed without any contact from the Court whatsoever. As a result, on August 12, 2014,

more than eleven months after the initial trial date was adjourned, *sine die*, by the court itself, Petitioners filed a Motion returnable on September 5, 2014, requesting that a new trial date be established at a Case Management Conference, on a peremptory basis, with input from all parties, as had been done at the previous Case Management Conference conducted in February of 2013.

Counsel for Respondent Bell initially joined in Plaintiffs' request for a Case Management Conference, so that a new "agreed upon" "peremptory trial date" could be set, after consultation with all counsel. That procedure would have been in accordance with the dictates of both Rule 4:36-3(a), requiring that cases not reached on their initial trial date may be scheduled for a date certain only "after consultation with counsel," and the established procedures for setting peremptory trial dates in New Jersey State courts. However, on August 20, 2014, eight days after Petitioners' Motion for a Case Management Conference and new trial date was filed, but before that Motion could even be heard, despite the dictates of Rule 4:36-3(a) and established procedures mandating "consultation with counsel" *before* setting a "date certain" for trial, without ever consulting Petitioners' counsel the Superior Court issued a notice setting March 23, 2015 as the new "peremptory date" for the trial of Petitioners' case.

In addition, on August 22, 2014, the Presiding Civil Judge entered an Order, *sua sponte*, also *without* consulting Petitioners' counsel, reaffirming March 23, 2015 as the date for trial, and ordering that "no further

adjournments would be granted." (App. 24-25). Significantly, in his entry of this *sua sponte* Order, the Presiding Civil Judge failed to mention that the issuance of this new trial date had been triggered by Petitioners' own Motion for a Case Management Conference and new trial date, after almost a year of complete inaction by the court itself. He also failed to mention that it was the court itself that had adjourned the *last* trial date, almost a year earlier.

Petitioners learned almost immediately after this new peremptory trial date was set that Zafer Termanini, M.D., the orthopedic surgeon and biomechanics expert who was acting as Petitioners' design defect and causation expert, and who was their sole liability expert, was unavailable during the week of March 23, 2015, because he was scheduled to attend the Annual Conference of Orthopedic Surgeons during that week, and would likely be unavailable the next week as well. As a result, Petitioners immediately sought an adjournment of the new trial date pursuant to Rule 4:36-3(b) and (c), the subdivisions of Rule 4:36-3 which, in pertinent part, unambiguously provide for at least one adjournment request, to accommodate the scheduling conflict of a proposed expert witness, stating as follows:

> (b) Adjournments, Generally. *An initial request for an adjournment for a reasonable period of time to accommodate a scheduling conflict or the unavailability of an attorney, a party, or a witness shall be granted if made timely in accordance with this rule*. . . .

> (c) Adjournments, Expert Unavailability. *If the reason stated for a prior request for an adjournment was the unavailability of an expert witness, no further adjournment request based on that expert's unavailability shall be granted*, except upon a showing of exceptional circumstances, but rather that expert shall be required to appear in person or by videotaped testimony taken pursuant to R. 4:14-9. . . .

Rule 4:36-3(b) and (c), New Jersey Rules of Court (emphasis supplied).

In accordance with the requirements of Rule 4:36-3(b), Petitioners immediately submitted a request to the civil division case manager, asking that the new trial date, set without any input from Petitioners' counsel, be moved to a date either two weeks *earlier* or two weeks *later* than March 23, 2015, in light of Dr. Termanini's scheduling conflict. (App. 34). However, Respondent Bell's counsel objected to this request. They obviously recognized that, as the result of the Presiding Civil Judge's extraordinary decision to simply *ignore* Rule 4:36-3(a), and set a "date certain" for trial in the absence of any consultation with Petitioners' counsel, the peremptory trial date that had been set would enable Respondent to present the live testimony of its own experts, while relegating Petitioners to the inferior option of having to present the testimony of their sole liability expert via videotape.

Ironically, even though it was obviously the triggering event for the new "peremptory trial date" of

March 23, 2015 that was set without even consulting them, Petitioners' Motion for a Case Management Conference and to set a new trial date, filed on August 12, 2014, was never heard. Instead, the Presiding Civil Judge simply proceeded to issue a second Order, on September 19, 2014 and, without any hearing declared Petitioners' Motion for a Case Management Conference to be "moot," on the grounds that "a Trial Order was already issued scheduling a peremptory date of March 23, 2015" (App. 28), even though the "Trial Order" he was referring to had been issued at least a week *after* Petitioners' Motion had been filed. This ruling effectively deprived Petitioners of any chance to be heard, with respect to the setting of a new "peremptory trial date," despite the fact that this was the very first adjournment request ever made by Petitioners on any grounds, in almost four years of litigation, and the first and only adjournment request to accommodate a scheduling conflict for Dr. Termanini, their sole liability expert; despite the fact that Petitioners' request was timely, and in full compliance with Rule 4:36-3 in every other way; and despite the fact that Petitioners had no responsibility whatsoever for the trial court's adjournment of the initial trial date of September 9, 2013, set almost a year earlier.

Petitioners then followed with a formal motion, again in full compliance with the procedures established in Rule 4:36-3, formally moving for adjournment of the peremptory trial date that had been set without their input. Nevertheless, following the lead of the Presiding Civil Judge, the judge assigned to hear that

motion proceeded to likewise *ignore* the dictates of Rule 4:36-3 as well, and she concluded there was "no reasonable basis for the adjournment," despite the fact that it was indisputably the first adjournment request made by Petitioners, to accommodate a scheduling conflict for Dr. Termanini; was made by Petitioners in full compliance with Rule 4:36-3(c); and Petitioners' counsel explained in detail the existence of Dr. Termanini's scheduling conflict, and why that conflict would foreclose his ability to appear personally, at the time of trial.

It is clear, however, that the judge who heard Petitioners' formal adjournment motion was merely "rubber stamping" the *sua sponte* Orders of the Presiding Civil Judge, because she noted at the outset, that the trial date Petitioners were seeking to adjourn had been set by the Presiding Civil Judge, with the assistance of the civil case manager's office. Moreover, although she stated that she "seriously doubted" that Dr. Termanini's scheduling conflict would be an issue, and that "if some minor accommodation is needed, we do that routinely in all trials," she failed to issue any Order so providing.

Petitioners' counsel knew that, in New Jersey, it was likely that a different judge would be assigned to preside over the actual trial of Petitioners' case, who would not be bound by anything short of an Order from a judge hearing a pretrial motion, requiring an accommodation for any conflict with Dr. Termanini's schedule at the time of trial. Thus, in light of the denial of their formal adjournment motion, without such an

Order, Petitioners were left with a Hobson's choice: if they did not place Dr. Termanini's expert testimony on videotape, prior to the time set for trial, Petitioners would be risking the outright dismissal of their claims, in the event Dr. Termanini was unavailable at the time when his testimony was required, by virtue of his attendance at the Annual Convention of Orthopedic Surgeons; on the other hand, if Petitioners did place Dr. Termanini's testimony on videotape, once they did so they would be providing a highly prejudicial advantage to Respondent, who would have Dr. Termanini's video testimony available prior to trial, and also be able to then proceed to present the *live* testimony of their own experts, at the time of trial.

Petitioners concluded that, faced with these choices, risking the outright dismissal of their claims was unacceptable, and their only viable option was to place Dr. Termanini's testimony on videotape, and present it to the jury in that fashion. Predictably, however, with Respondent afforded the opportunity to present the live testimony of its own experts, and Petitioners denied that opportunity, and relegated to the inferior option of presenting the testimony of their most important witness via videotape, the jury returned a verdict of "no cause of action" at the conclusion of the case.

Petitioners appealed from the adverse verdict to the Appellate Division of the New Jersey Superior Court. Significantly, the Appellate Division implicitly acknowledged that Petitioners were entitled to at least one trial date adjournment, to accommodate the scheduling conflict of an expert witness, pursuant to Rule

4:36-3(c). (App. 5-6). Moreover, they noted that they "agree[d] with plaintiffs that it is preferable for a peremptory trial date to be scheduled with the input of the parties," and that "in the absence of consent, the trial judge should conduct a conference pursuant to Rule 4:36-3(b) to select the date" for trial. However, even though both of these provisions of the Rule were blatantly ignored and violated in Petitioners' case, the Appellate Division concluded that, for the trial court to ignore the requirement of Rule 4:36-3(a), that a date certain for trial can only be selected "after consultation with counsel"; to fail to provide Petitioners with a conference to select a trial date, after Respondent objected to their adjournment request; despite the unambiguous language of Rule 4:36-3(b) providing for such a conference; and to deny Petitioners' first and only trial adjournment request, to accommodate the scheduling conflict of an expert witness, despite the provisions of Rule 4:36-3(c) to the contrary, was "not an abuse of discretion." (App. 5-7). The Appellate Division also ruled that, even though Petitioners were deprived of the opportunity to present the live testimony of their critical design defect and causation expert, in a products liability action in which that testimony was required to establish their claims, while Respondent Bell was *provided* with the opportunity to present the live testimony of its own experts, "plaintiffs were not deprived of the opportunity to present Dr. Termanini's testimony, albeit by videotape." (*Id.*).

Petitioners moved for reconsideration by the Appellate Division, but that motion was denied.

The Supreme Court of New Jersey refused Petitioners' request for review of the Appellate Division's ruling, and Petitioners' request for reconsideration of the New Jersey Supreme Court's ruling was also denied.

REASONS FOR GRANTING THE WRIT

A. THE COURT SHOULD REVIEW THIS CASE TO MAKE IT CLEAR THAT THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE PROHIBITS STATE COURTS FROM ARBITRARILY DENYING CIVIL LITIGANTS THE HEARINGS AND/OR CONFERENCES THEY ARE ENTITLED TO, PURSUANT TO A STATE COURT'S OWN RULES.

This Court has made it clear on numerous occasions that the right to a "hearing," which the Fourteenth Amendment's Due Process Clause guarantees to citizens in their interactions with State actors, is an expansive one, and encompasses all forms of hearings as well as conferences, where issues directly impacting life, liberty, and property are at stake. *See*, *e.g.*, *Goss v. Lopez*, 419 U.S. 565, 581 (1975) ("hearing" for students suspended from a public school for more than ten days was required by the Due Process Clause, even if it consisted simply of an informal conference in which a suspended student was permitted to tell his or her side of the story).

The Court has also made it clear that our State courts are "State actors" for Due Process Clause purposes, and repeatedly held that the adjudicatory procedures made available to civil litigants by our State courts are a species of property protected by the Fourteenth Amendment's Due Process Clause. *See*, *e.g.*, *Logan v. Zimmermann Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311, 313 (1950). Thus, State court action cannot be used to arbitrarily deprive a litigant of the value of the "property interest" that a "cause of action" represents. *Martinez v. California*, 444 U.S. 277, 281-282 (1980). The Court has also held that it does not matter whether the State action involved is imposed by a statute or by court rule, because a court rule is the equivalent of a statute, for Fourteenth Amendment Due Process Clause purposes. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

Although the Court has not yet considered these issues in connection with the hearings and/or conferences provided for civil litigants by a State court's own rules, taken together, these principles leave no doubt that Petitioners' Due Process rights were violated when, in direct violation of Rule 4:36-3, the Presiding Civil Judge set a peremptory date for the trial of Petitioners' products liability claims in this case *without* providing Petitioners the "consultation with counsel" required by subdivision (a) of Rule 4:36-3; and *without* providing Petitioners with the conference they were clearly entitled to, pursuant to subdivision (b) of that

Rule, after Respondent Bell objected to their adjournment request.

As noted above, Rule 4:36-3(a) specifically provides that, "[i]f a case is not reached during the week in which the trial date falls, it shall be forthwith scheduled for a date certain *after consultation with counsel*." Rule 4:36-3(a), *supra*. The "consultation with counsel" provided for clearly qualifies as a "hearing," for Due Process Clause purposes, however informal it might be. *Cf*., *Goss v. Lopez*, 419 U.S. 565, 581. But in this case, even though it is undisputed that Petitioners' case was "not reached during the week in which the trial date" of September 9, 2013 fell, it is also undisputed that both the civil case manager's office and the Presiding Civil Judge simply ignored Rule 4:36-3(a), and proceeded to set a "date certain" for trial of their case *without* providing Petitioners the "consultation of counsel" that Rule 4:36-3(a) required. As a result, the obvious purpose of that Rule, to provide civil litigants with the benefit of participating in the selection of a "date certain" for trial *before* that selection is made, and the potential for consideration of alternative dates in light of the schedules of their critical witnesses is still possible, was irretrievably lost to Petitioners as soon as the Presiding Civil Judge proceeded to enter his *sua sponte* Order setting March 23, 2015 as the official date certain for trial in this case, with "no further adjournments." (App. 24). The failure of the Presiding Civil Judge to provide Petitioners with the hearing, in the form of the "consultation with counsel" that Rule 4:36-3(a) required, was therefore a blatant violation of

Petitioners' rights, pursuant to the Fourteenth Amendment's Due Process Clause. *Goss*, 419 U.S. 565, 581.

By the same token, subdivision (b) of Rule 4:36-3(b) unequivocally provides that "[i]f consent cannot be obtained or if a second request is made, the court shall determine the matter by conference call with all parties." Thus, when Petitioners requested adjournment of the date of March 23, 2015, by reason of the unavailability of their critical design defect and causation expert expert, Zafer Termanini, M.D., and Respondent Bell objected to that request, the "conference call" Rule 4:36-3(b) provided for, also qualified as a "hearing" for Due Process Clause purposes. *Goss*, 419 U.S. 565, 581. It is also undisputed, however, that the Presiding Civil Judge simply ignored that provision of Rule 4:36-3 as well, and never provided that conference call to Petitioners. Instead, he simply declared their request for a conference to select a trial date as "moot." (App. 28). His failure to provide Petitioners with that hearing was therefore also a blatant violation of Petitioners' rights, pursuant to the Fourteenth Amendment's Due Process Clause. *Goss*, 419 U.S. 565, 581.

Respondent may argue that the Orders entered by the Presiding Civil Judge, in direct violation of Rule 4:36-3, fail to rise to the level of Due Process Clause violations, because they involved only *de minimis* issues. However, New Jersey Court Rule 4:36-3 makes it clear, by its very terms, that it does not consider either the setting of a "date certain" for trial, or the request for a trial date adjournment, to accommodate the scheduling conflict of an expert witness, *de minimis*

issues. Were they *de minimis*, these issues would not require "consultation with counsel," a telephone conference call, or that litigants be virtually guaranteed at least a single adjournment request, to accommodate an expert witness's scheduling conflict. *Cf.*, Rule 4:36-3(a), (b), and (c). In fact, Rule 4:36-3 implicitly recognizes the importance of all of these issues, to the litigation process.

Moreover, Rule 4:36-3 also reflects an undeniable reality of trial practice that has been acknowledged both implicitly and explicitly by this Court, and by numerous other federal and State courts: the fact that the presentation of the *live* testimony of witnesses at trial is, in almost all circumstances, superior to the presentation of testimony via videotape, audiotape, or via some other alternative means. In fact, ironically, although it refused to acknowledge that reality in this case, in *Kurzke v. Nissan Motor Corp. in U.S.A.*, 320 N.J. Super. 386, 399 (App. Div. 1999), the Appellate Division of the New Jersey Superior Court cited this Court's own ruling in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947), in support of that very proposition, noting that "a deposition, even a videotaped one, is not a substitute for live testimony . . . '[T]o fix the place of trial at a point where litigants cannot compel personal attendance of witnesses and may be forced to try their cases on deposition, is to create a condition not satisfactory to the court, jury or most litigants.'" *See also United States v. Wilson*, 601 F.2d 95, 97 (3d Cir. 1979) ("Attendance of witnesses at trial . . . is the favored method of presenting testimony. . . . The antipathy to

depositions is due in large part to the desirability of having the factfinder observe witness demeanor. *Although this concern has been alleviated to a marked degree by the advent of modern audio-visual technology, the policy in favor of having the witness personally present persists*.") (emphasis supplied); *Schertenleib v. Traum*, 589 F.2d 1156, 1159 (2d Cir. 1978) (absence of live testimony is a "*very serious handicap*. . . ."); and *see* 42 *New Jersey Practice*, Discovery, § 1.14 ("In general, an audio-visually recorded deposition is not as effective as live testimony and most practitioners will not substitute an audio-visually recorded deposition for live testimony").[1]

Because the actions of the Presiding Civil Judge resulted in Petitioners being deprived of the fair opportunity to present the live testimony of their critical design defect and causation expert, and relegated them to the inferior alternative of doing so via videotape, the significance of his decision to simply *ignore* the provisions of Rule 4:36-3(a) and (c), for Due Process Clause purposes, is incontrovertible for this additional reason as well.

For all of these reasons, the Court should review and vacate the "no cause" verdict produced by the blatant violations of Petitioners' rights to the consultation

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[1] Even though the Seventh Amendment does not apply to State court actions, it is significant to note that, in its guarantee of a litigant's right to present his or her proofs "in open court," the Seventh Amendment also implicitly recognizes the value of presenting the *live* testimony of witnesses, as opposed to presenting a witness's testimony in some other fashion.

and conference they were entitled to, pursuant to Rule 4:36-3 of the New Jersey Court Rules, and make it clear both to the New Jersey State Courts, and to our other State courts as well, that the Fourteenth Amendment's Due Process Clause prohibits State courts from arbitrarily ignoring, and directly violating their own court rules, particularly with respect to the participation of civil litigants in hearings provided for by those rules, that are material to the ultimate proofs of their claims or defenses.

B. THE COURT SHOULD REVIEW THIS CASE TO CONSIDER WHAT CONSTITUTES A HEARING "APPROPRIATE TO THE CASE" IN A STATE COURT CIVIL ACTION, PURSUANT TO THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

The cases cited in Point A, *supra*, also recognize that State court civil litigants are not just entitled to a hearing, pursuant to the Fourteenth Amendment's Due Process Clause, they are entitled to a hearing "appropriate to the case." *See*, *e.g*., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

Nevertheless, while the Court has considered this issue in the criminal context, it has not yet considered what constitutes a hearing "appropriate to the case" in a civil action, for Due Process Clause purposes. Importantly, however, in those criminal cases where the Court has considered this issue, it has specifically considered it with respect to the availability of "live

testimony," as a factor in making that determination. For example, in *United States v. Raddatz*, 447 U.S. 667, 678-679 (1980), the Court ruled that a defendant who did not receive the benefit of "live testimony" in a suppression hearing, still received a hearing "appropriate to the case," because "the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself." By contrast, however, in *Barber v. Page*, 390 U.S. 719, 725 (1968), a defendant's conviction for armed robbery was reversed, because it was based upon the transcript of the preliminary hearing testimony of a critical prosecution witness, in lieu of that witness's *live* testimony, at the time of trial.

1. The Court Should Make It Clear That Claimants In A State Court Civil Action Are Deprived Of A Hearing "Appropriate To The Case" When They Are Arbitrarily Deprived Of The Live Testimony, At Trial, Of A Witness Whose Testimony Is Required To Establish Their Claims.

In light of its decisions in the *Raddatz* and *Barber* cases, there is good reason to believe the Court would conclude that, in the actual trial of State court civil claims, where the ultimate determinations of liability, causation, and damages are made, claimants denied the opportunity to present the live testimony of witnesses required to establish their claims, have failed to receive a hearing "appropriate to the case," as

guaranteed by the Fourteenth Amendment's Due Process Clause.

The denial to Petitioners of the opportunity to present the live testimony of their critical design defect and causation expert, at the time of the trial of their product liability claims in this case, raises issues directly analogous to those considered by this Court in *Raddatz* and *Barber*, and presents an excellent opportunity for the Court to finally address these same issues in the civil context. Indeed, it is obviously in implicit recognition of the widely recognized superiority of live testimony over testimony presented via videotape, particularly in the presentation of expert proofs, that on its face New Jersey Court Rule 4:36-3 appears to guarantee to every litigant at least one trial date adjournment, to accommodate the scheduling conflict of an expert witness, pursuant to subdivisions (b) and (c) of that Rule. *See* Rule 4:36-3(b) and (c), *supra*.

In addition, in most states, including New Jersey, expert testimony is required to establish products liability claims. *See*, *e.g.*, *Kurzke*, 320 N.J. Super. 386, 404. In fact, it is well recognized that the typical products liability action often boils down to a "battle of the experts," with expert witnesses presenting their competing opinions to a jury regarding the presence or absence of a product defect. *See*, *e.g.*, *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 831-832 (D.C. Cir. 1988); *Farrell v. City of Seattle*, 134 Wash. App. 1038, *5 (2006); *Lundstrom v. Brekke Enter., Inc.*, 115 Idaho 256, 262, 765 P.2d 667, 672 (Idaho 1988).

When considered together, the realities of trial practice favoring the presentation of the live testimony of witnesses at the time of trial; the critical importance of expert testimony in products liability actions in particular; and this Court's longstanding recognition that a "cause of action" is a species of property protected by the Fourteenth Amendment's Due Process Clause, are three factors which make it immediately clear that the value of the property interest represented by Petitioners' "cause of action" in this case was at the very least substantially diminished, if not destroyed completely, by the arbitrary refusal of the Presiding Civil Judge, and the New Jersey Courts below, to provide Petitioners with the benefits of Rule 4:36-3, to enable them to present the *live* testimony of their critical design defect and causation expert, rather than effectively compelling them to do so via videotape.

Indeed, in retrospect, the "no cause" verdict returned by the jury at the time of trial became a foregone conclusion in this case, as soon as the State court judges with authority over the scheduling of the date for the trial of Petitioners' claims arbitrarily decided to ignore the requirement of Rule 4:36-3(c), mandating that Petitioners' first and only trial adjournment request be granted, to accommodate the scheduling conflict of their critical liability expert, and Petitioners were left with no other viable option than to present the testimony of that critical expert via the inferior alternative of videotape, while Respondent Bell was able to present the live testimony of its own experts.

Although a different issue was involved, these extraordinary circumstances are directly analogous to those before this Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 424 (1982). In *Logan*, at issue was the appellant's claim for disability discrimination, under the Illinois Fair Employment Practices Act ("FEPA"). The timeliness of appellant Logan's claim was undisputed. However, the FEPA statute required the Fair Employment Practices Commission ("Commission"), to convene a fact-finding conference to investigate Logan's claim within 120 days of the date his claim was filed. Just as the initial trial date in this case was adjourned for reasons *beyond* Petitioners' control, and the trial court failed to take any action to set a new trial date for almost a year, in *Logan*, the Commission failed to comply with the 120-day time limit for convening its fact-finding conference, through no fault of Logan's, and for reasons completely beyond Logan's control. *Id*. at 424-426. But the Illinois Supreme Court still held that, because of the Commission's failure to comply with that 120-day requirement, it lacked jurisdiction to hear Logan's claim, and his claim had to be dismissed. *Id*. at 427.

Faced with these facts, this Court *reversed* the ruling of the Illinois Supreme Court in *Logan*, explaining its reasoning as follows:

> . . . the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of

> denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

Logan v. Zimmerman Brush Co., 455 U.S. 424, at 429-430.

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and *have its merits fairly judged*.
>
> . . . Logan is challenging not the Commission's error but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards. . . .
>
> What the Fourteenth Amendment does require . . . is "'an opportunity . . . granted at *a meaningful time* and in *a meaningful manner* . . . ' for a hearing *appropriate to the nature of the case*."

Id., 433-437 (citations omitted, emphasis supplied).

These same principles apply with equal force to the facts presented in this petition. Here, as in *Logan*, Petitioners are not challenging the Superior Court's "error" in refusing their adjournment request, to enable them to present the live testimony of their critical expert witness. What Petitioners are challenging is the "established state procedure" which obviously enables the Superior Court, through the manner in which New Jersey Court Rule 4:36-3(c) is applied (or, as in this case, *not* applied), to arbitrarily *deny* certain litigants the adjournments they may request, to accommodate

the scheduling conflicts of those expert witnesses whose live testimony they wish to present, while arbitrarily *granting* the adjournment requests of other litigants, made for the same purpose.

The decision of the Appellate Division effectively affirmed the arbitrary nature of the trial court's decisions to deny Petitioners' single adjournment request (App. 5-7), as did the New Jersey Supreme Court's refusal to review it. These decisions make it clear that, although it may be "neutral" on its face, like the 120-day time limit at issue in *Logan*, in its application New Jersey Superior Court Rule 4:36-3 effectively creates two classes of civil litigants in New Jersey: the first class consisting of those litigants who are afforded the benefits of the Rule, such that a "date certain" for trial will not be set in their cases, until after "consultation with counsel," as required by Rule 4:36-3(a), and whose single adjournment requests, to accommodate the scheduling conflicts of the expert witnesses whose live testimony they wish to present will be granted; and the second class consisting of those litigants, like Petitioners, who are arbitrarily denied the benefits of the Rule, such that a "date certain" for trial will be fixed in their cases *without* "consultation with counsel," and who will be arbitrarily denied their single adjournment requests and effectively punished for delays in their cases, arising from factors completely beyond their control, and through no fault of their own, will be relegated to the inferior option of presenting the testimony of their experts via videotape, or worse still, the mere reading of a deposition transcript. (*Cf.*, *Logan*, 455 U.S. 424, at 429-430).

2. The Court Should Reaffirm That, In A Civil Action, The Fourteenth Amendment's Due Process Clause Is Not Satisfied Simply Because A "Hearing" Has Been Provided, Unless It Is A Hearing "Appropriate To The Case."

Petitioners recognize that, regardless of the realities of trial practice, the New Jersey Courts have a legitimate interest in presiding over their own trial calendars. An excessive number of adjournment requests to accommodate experts' schedules could easily have the untoward consequence of clogging trial calendars and wasting judicial resources, while litigants strive to coordinate their trial dates with their expert witnesses. Such considerations clearly form the basis for those provisions of Rule 4:36-3 which expressly limit the number of adjournment requests that can be made, to accommodate the scheduling conflicts of a given expert witness. *See*, *e.g.*, Rule 4:36-3(c).

In this case, however, Petitioners were guilty of *no* "excessive requests" for an adjournment, and there was no wrongful or improper action by Petitioners themselves, or by their counsel, that was *ever* identified by either the Presiding Civil Judge, in his denial of Petitioners' informal adjournment request, or by the judge hearing pretrial motions in this case, as a basis for their denials of Petitioners' single adjournment request. It was also undisputed that the single adjournment request Petitioners made, to accommodate the scheduling conflict of their key liability expert in this case, was both the first and only such adjournment

request by Petitioners, in almost four years of litigation; undisputed that both Petitioners and their critical liability expert, Zafer Termanini, M.D., were ready, willing, and able to proceed to trial on September 9, 2013, at the time the *first* trial date was set in this case; undisputed that the initial trial date of September 9, 2013, was adjourned by the court itself, without any statement of the reasons for the adjournment; undisputed that adjournment of the initial trial date was completely beyond the control of either Petitioners or their counsel; undisputed that a full eleven months after the initial trial date was adjourned, the court had still taken no action whatsoever to set a new trial date; and also undisputed that Petitioners' first and only trial adjournment request in this case offered to accept an alternative trial date two weeks *earlier* than the date set by the court. (App. 34).

Thus, to the extent the Presiding Civil Judge, the judge hearing pretrial motions, or the Appellate Division suggested that the refusal to provide Petitioners with the benefits of Rule 4:36-3(c) was appropriate in light of the "age" of the case, that suggestion was baseless, because the "age" of the case had nothing to do with any actions or inactions on the part of Petitioners. Instead, as in *Logan*, whatever time delays were involved were purely the product of (1) the court's own scheduling problems; and (2) were completely *beyond* Petitioners' control.[2] As a result, here as in *Logan*,

[2] The Appellate Division's assertion that "the scheduled trial date was more than six years after an amended complaint was filed in this case" is incorrect. The last amended complaint in this

there is no valid governmental objective advanced by the discriminatory treatment afforded to the two classes of litigants Rule 4:36-3 creates, and whatever "interest" the New Jersey Superior Court may have in retaining the discretion to arbitrarily deny some litigants the single adjournment request that Rule 4:36-3(c) appears on its face to guarantee, while arbitrarily granting that single adjournment request to other litigants, is clearly "insubstantial." *Cf.*, *Logan*, 455 U.S. at 435.

For all of these reasons, this Court should review this case to reaffirm that the Fourteenth Amendment's Due Process Clause does not merely guarantee a "hearing"; it guarantees the aggrieved party "the opportunity to present his case and *have its merits fairly judged*," and "'an *opportunity* . . . granted *at a meaningful time* and *in a meaningful manner* . . .' for a hearing *appropriate to the nature of the case.*" *Logan*, 455 U.S. 424, at 437 (emphasis supplied). And clearly, no knowledgeable practitioner could assert, with a straight face, that the trial of complex products liability claims in which the claimants are relegated to the presentation of the expert testimony of their critical liability expert via videotape, while the manufacturer is able to present the live testimony of its own experts, is a hearing "appropriate to the nature of the case." *Id*. As a result, the

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case was filed on January 4, 2011, approximately four years before the March 23, 2015 trial date. Most importantly, however, the case would have been more than eighteen months younger, at the time of trial, if the initial trial date of September 9, 2013 had not been adjourned *by the court itself*. *Cf.*, *Logan*, 455 U.S. 424, at 426.

Court should review this case to make it clear that State court civil claimants fail to receive a hearing "appropriate to the case" when, as the result of arbitrary State court action, they are deprived of a fair opportunity to present the live testimony of a witness whose testimony is required to establish their claims, at the time of the trial in which the ultimate outcome of those claims is determined.

C. THE COURT SHOULD MAKE IT CLEAR THAT WHEN A PROCEDURAL RULE IS APPLIED TO ARBITRARILY *DENY* CERTAIN LITIGANTS THE RIGHTS AND PROTECTIONS IT CONFERS, WHILE ARBITRARILY *GRANTING* THOSE SAME RIGHTS AND PROTECTIONS TO OTHER LITIGANTS, THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE IS ALSO VIOLATED.

From what occurred in Petitioners' case, despite Rule 4:36-3's implicit recognition of the advantage of presenting the live testimony of an expert witness, as opposed to presenting that testimony via videotape, the New Jersey Superior Court has made it clear that it will not hesitate to deny a litigant the single adjournment request conferred by subdivisions (b) and (c) of that Rule, even where there is no valid basis for doing so, and the court knows that, as the result of that denial, an opposing party in the same case will be able to present the live testimony of its own expert witnesses, while the moving party is unable to do so. (App. 5-7). In fact, by arbitrarily refusing to provide Petitioners

with the "conference" required by Rule 4:36-3(b), when the consent to an adjournment request cannot be obtained, for purposes of that Rule the Presiding Civil Judge effectively elevated in importance Bell's refusal to consent to Petitioners' adjournment request, over the single adjournment request the Rule purports to guarantee. (App. 24). These circumstances make it clear that, even though it may appear to be "neutral" on its face, *as applied* by the New Jersey Courts, Rule 4:36-3 also constitutes a violation of the Fourteenth Amendment's Equal Protection Clause.

As Justices Blackmun, Brennan, Marshall, O'Connor, Powell, and Rehnquist explained, in their concurring opinions in *Logan*, considering the appellant's equal protection claim arising from the 120-day limit for Commission action arbitrarily applied in different ways to different litigants in that case,

> . . . the procedure at issue does not serve generally to hasten the processing or ultimate termination of employment controversies. Once the Commission has scheduled a fact-finding conference and issued a complaint, there are no statutory time limits at all on the length of time it can take to resolve the claim.
>
> . . . So far as the State's purpose is concerned, every FEPA claimant's charge, when filed with the Commission, stands on the same footing. Yet certain randomly selected claims, because processed too slowly by the State, are irrevocably terminated without review. In other words, the State converts similarly situated claims into dissimilarly situated ones,

> and then uses this distinction as the basis for its classification. This is the very essence of arbitrary state action. "*The Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out. . . .'*"
>
> The State no doubt has an interest in the timely disposition of claims. *But the challenged classification failed to promote that end—or indeed any other—in a rational way. As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so. . . .*

Logan v. Zimmerman Brush Co., 455 U.S. 424, at 444 (emphasis supplied).

These principles are directly applicable to the arbitrary denial of Petitioners' adjournment request in this case as well. Like the equal protection claim at issue in *Logan*, the arbitrary action at issue in this case did not serve to "generally hasten the processing or ultimate termination" of this case through trial. Significantly, the trial date of March 23, 2015, set without consulting Petitioners' counsel, in direct violation of Rule 4:36-3(a), was still more than eight months away when it was arbitrarily selected by the Court in August of 2014. Changing it to a date either two weeks earlier or two weeks later, as requested by Petitioners, would have effectively changed nothing—except that, if selected after "consultation with counsel," as Rule 4:36-3(a) required, it would have provided for the assurance that *both* Respondent *and* Petitioners would be able to present the live testimony of those experts they wished

to have appear personally, at the time of trial, instead of that opportunity being made available *only* to Respondent Bell.

In short, it is clear that here as in *Logan*, in certain randomly selected cases, like Petitioners, processed too slowly by the New Jersey State court itself, the New Jersey Superior Court arbitrarily punishes litigants for the court's own excessive delays, by depriving them of the right to present the live testimony of their expert witnesses, along with the other benefits and protections of Rule 4:36-3, while other litigants are arbitrarily provided with the benefits and protections of that Rule.

In fact, this unfettered discretion to either enforce, or completely ignore the provisions of Rule 3:36-3, on a purely arbitrary basis, raises additional "due process" concerns, and brings to mind the situation considered unconstitutional by this Court for that very reason more than a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, the Court was asked to consider the constitutionality of an ordinance purporting to regulate the maintenance of laundry facilities in wooden structures in San Francisco, California. The Court concluded that, in light of the unfettered discretion conferred upon the "supervisory board" charged with its enforcement, the ordinance effectively amounted to nothing more or less than a vehicle for expression of the arbitrary will of the board's members:

> The ordinance drawn in question in the present case is of a very different character. It

does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, *it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living*.

. . . It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face, as being within the prohibitions of the fourteenth amendment, *and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances, -an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them*.

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that *they do not mean to leave room for the play and action of purely personal and arbitrary powe*r.

Id., 118 U.S. at 366-371 (emphasis supplied).

Significantly, in its decision in *Yick Wo*, this Court explained precisely the danger which is presented by statutes and rules which effectively confer upon those provided with the authority to "enforce" them, the absolute power and unfettered discretion to do so, or *not* to do so, effectively at their whim:

> It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, *when we remember that this action of non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration*. In fact, *an ordinance which clothes a single individual with such power hardly falls*

> *within the domain of law*, and we are constrained to pronounce it inoperative and void.

Id. at 373 (emphasis supplied).

It is indeed ironic that, in this age of modern jurisprudence, a State court rule like New Jersey Court Rule 4:36-3, just like the ordinance at issue in *Yick Wo*, would be applied in such a way as to provide to the State court judges who administer it precisely the type of "purely personal and arbitrary power" that this Court correctly found to be so objectionable, and clearly unconstitutional in *Yick Wo*, more than a century ago. *Id*.

The Court should make it clear that when a State court procedural rule is applied in a manner which arbitrarily *denies* certain State court civil litigants the rights and protections it confers, while *granting* those same rights and protections to other civil litigants, in addition to violating its Due Process Clause, the Fourteenth Amendment's Equal Protection Clause will also be violated. *Cf*., *Yick Wo v. Hopkins*, 118 U.S. 356, at 366-371.

D. THIS CASE IS AN IDEAL VEHICLE TO GIVE SUBSTANCE TO THE COURT'S HOLDINGS ACKNOWLEDGING THE RIGHT OF LITIGANTS IN STATE COURT CIVIL ACTIONS TO RECEIVE HEARINGS "APPROPRIATE TO THE CASE," AND FOR THE COURT TO ENUNCIATE FACTORS STATE COURTS SHOULD APPLY TO INSURE THAT OCCURS.

This case presents the ideal vehicle for the Court to begin the process of giving substance to the Court's holdings acknowledging the right of litigants in State court civil actions to receive hearings "appropriate to the case." It also presents the ideal vehicle for the Court to enunciate factors State courts should apply to ensure that occurs, for several reasons.

At the outset, this case involves one of the factors the Court has already found significant to this determination in connection with criminal proceedings: the presence (or absence) of the "live testimony" of witnesses. *United States v. Raddatz*, 447 U.S. 667, 678-679; *Barber v. Page*, 390 U.S. 719, 725. The importance of the opportunity to present live testimony, as it relates to the rights of the litigant in State court civil actions to receive hearings "appropriate to the case at issue," follows logically from the Court's consideration of this issue in the criminal context. Indeed, as noted above, in the context of civil litigation it is a widely recognized truism that the absence of live testimony is a "*very serious handicap*. . . ." (*Schertenleib v. Traum*, 589 F.2d 1156, 1159), and "'[T]o fix the place of trial at a point where litigants cannot compel

personal attendance of witnesses and may be forced to try their cases on deposition, is to create a condition not satisfactory to the court, jury or most litigants.'" *Kurzke v. Nissan Motor Corp. in U.S.A.*, 320 N.J. Super. 386, 399, citing *Gulf Oil Corp.*, 330 U.S. at 511.

Violations of the Fourteenth Amendment's Due Process and Equal Protection Clauses, like the ones that victimized Petitioners in this case, may not always have as their underlying motive the type of invidious racial, ethnic, or disability discrimination afoot in cases like *Yick Wo* and *Logan*. However, regardless of its nature, arbitrary State court action can clearly be expected, in many instances, to have the effect of prejudicing the claims of the least powerful among us, just as occurred in this case. *Cf.*, *Logan*, 455 U.S. at 434-435; *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 1067-1068. Moreover, in light of the thousands of civil claims prosecuted every day in our State courts, arbitrary State action which prejudices the presentation of claims and defenses in State court civil actions may be just as pervasive, and just as damaging to the interests of its victims, if not more so, at least on a cumulative basis.

The substantial nature of the civil claims involved, given the catastrophic injuries sustained by Petitioner Carl Lawson, also serves to underscore the importance of civil litigants receiving a hearing "appropriate to the case." That is another feature of this case which makes it a particularly fitting one for the Court to utilize as a vehicle for elaborating on the question of what is meant by a hearing "appropriate to the case," for

Fourteenth Amendment Due Process and Equal Protection Clause purposes, in a State court civil action.

For all of these reasons, this Court should review and vacate the "no cause" verdict obtained by Respondent in this case, and remand this case with directions to the New Jersey Superior Court that require it to provide Petitioners the "consultation with counsel," and "telephone conference" Rule 4:36-3 entitles them to, and to set a new trial date at a time which assures not just Respondent Bell, but Petitioners as well, the opportunity to present the *live* testimony of their critical liability experts, so that Petitioners are finally afforded a hearing "appropriate to the case" they are prosecuting, and one in which the merits of their products liability claims can finally be "*fairly* judged." *Cf.*, *Logan*, 455 U.S. 424, at 437 (emphasis supplied). In so doing, the Court will be both reaffirming, and giving substance to the message that, just like the defendants in criminal proceedings, the litigants in State court civil actions are also not just entitled to a "hearing," for Fourteenth Amendment Due Process and Equal Protection Clause purposes, they are entitled to a hearing "appropriate to the case" at issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 2018