

20-6357
No. 05-20

IN THE

Supreme Court of the United States

ORIGINAL

PAUL COOK

Petitioner,

v.

THE STATE OF CALIFORNIA

Respondent.

FILED
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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF CALIFORNIA

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QUESTIONS PRESENTED

1. Can a for-profit law firm, without supervision from the public prosecutor, be contracted out to criminally prosecute someone and still be impartial and fair under the Due Process clauses of the 5th and 14th Amendments?

LIST OF PARTIES

[XX] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Name	Role
1. Baldwin Park Unified School District, all of its current and previous, public officials and employees.	Respondent
2. Partnership of Atkinson, Andelson, Loya, Ruud & Romo.	Real Party in Interest, Private Law Firm illegally representing the People.
3. Los Angeles County District Attorney	Real Party in Interest
4. Attorney General of California	Real Party in Interest

RELATED CASES

People v. Cook, No. BS42047 (Los Angeles Superior Court, judgment filed on March 6, 2020) (currently, pending appeal on the final judgment).

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul Cook, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix F & G to the petition and was summarily denied and [XX] is unpublished.

Petitioner, Paul Cook, respectfully prays that a writ of certiorari issue to review the California Court of Appeal denial order at appendix A to this petition. The California Supreme Court ordered the Court of Appeal to review the case, but only issued a one paragraph order, holding that even though a for-profit private law firm represented the People and presented a conflict, the Appellant-Defendant had the burden of showing how such a conflict prejudiced the Defendant. Here, the Court of Appeal didn't believe that such a conflict warrants a writ or reversal.

JURISDICTION

[XX] For cases from state courts:

The date on which the highest state court decided my case was on June 10th, 2020.

A copy of that denial appears at Appendix F & G. Appellant filed both a Petition for Writ of Mandamus and a Petition for Review against the Court of Appeal Order (Appendix A). Both were summarily denied. (The Petition for Review was denied on July 10, 2020, but the court clerk reissued the denial on July 24, 2020, because the Court of Appeal number was incorrect.)

[XX] Petition for rehearing cannot be filed for a denied writ or Petition for Review.

[XX] This Court, under its emergency order extended the writ of cert deadline by 60 days. Hence, the due date for the writ of cert is November 7, 2020.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V:

... No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

U.S. Const. Amend. XIV, sec. 1:

... No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Defendant was cited by a school police officer for allegedly running a stop sign¹ at the local elementary school on July 31, 2020 at 8:55 PM². Before arraignment, Defendant filed a motion to compel discovery, amongst other motions.

Then on or around October 9, 2019 – the School District hired the private law firm of Atkinson, Andelson, Loya, Ruud & Romo, through their attorneys, Sarah Lustig (Lustig) and Alfonso Estrada (Estrada, to appear as the People on behalf of the School District). They opposed the motion with a lengthy 38-page opposition.

Hence, Lustig and Estrada represented the People to criminally prosecute the traffic citation under California Penal Code § 19.7 at the local courthouse. In California, Section 19.7 states in relevant part, “all provisions of law relating to misdemeanors shall apply to infractions”. (The California Legislature decided to prosecute the vehicle infraction as a criminal charge. If it wanted to, the California Legislature could have prosecuted this infraction civilly, as it did in 1993 with parking citations, removing them from criminal courts to civil court.

See Weiss v. City of Los Angeles, 2 Cal. App. 5th 194, 207 (2016).)

¹ Defendant denies doing this and has never been found guilty of traffic ticket in 20 years on his California driver's license.

² Defendant believes the school district has no right to even have jurisdiction to cite individuals given the facts. There were no students or staff around. Jurisdiction over city streets is with the city police. Private prosecution is just another tool for the school district to expand unlawful power it shouldn't have.

On October 24, 2020 - Alfonso Estrada, a partner, who charges at \$295 an hour, appeared as the People on the day of arraignment and hearing on the Defendant's motion.

Defendant objected on the record regarding private counsel's appearance as the People, because under Due Process and California Government Code § 41803.5, a city (and not a school district) can prosecute misdemeanors and that can only be done by receiving consent from the local District Attorney. In open court, the following was stated:

PAUL COOK[00:02:47.18] . . . I would like to say that the private counsel on my left is not allowed to be here today, they need to take a seat because this is a criminal matter, as the case has been set under Penal Code 19.7.

[Without even giving a thought, the court ruled.]

THE COURT[00:03:00.15] Alright that request is denied. (AX-07:1-6.)

The trial court judge denied the disqualification order and cut off the Defendant from making further arguments.³ (*Id.*)

On or around November 15, 2019, Cook filed an interlocutory appeal, at

³ Before the private law firm was involved, the trial court stated that it would dismiss the traffic ticket if the school district failed to supply discovery. After the private law firm became involved, the trial court judge had a change of heart and proceeded to totally deprive Defendant of Due Process as explained later.

The trial court, at trial, on multiple instances wouldn't permit Defendant to make his record.

the Appellate Division⁴ in the Los Angeles Superior Court regarding the issue of private criminal prosecution.

On January 17, 2020 – the Appellate Division filed an order requesting letter briefing from the District Attorney and Defendant as to the authority that gave the Appellate Division interlocutory jurisdiction.

On January 31, 2020 – Defendant filed a letter brief arguing that an interlocutory appeal was mandatory on a denial order of the disqualification of counsel under *Meehan v. Hopps*, 45 Cal.2d 213 (1955),

Furthermore, Defendant argued in his letter brief to the superior court that the private representation was a violation of Due Process, because a private attorney, who is getting paid by the hour, cannot be objective and fair under Due Process. Criminal prosecutors require independent and fair judgment for mainly two reasons. One, prosecutors must not file cases without probable cause. Two, prosecutors should issue a fair deal under their discretion to plea bargain.

The District Attorneys office did not file a letter brief. Therefore, only the Defendant's brief was before the Appellate Division.

On February 11, 2020 – the Appellate Division ruled that it didn't have jurisdiction over the case, even though authority is clear that it had no right to

⁴ The Appellate Division is a branch of the Los Angeles Superior Court, which hears appeals for misdemeanors. In other words, such appeals cannot directly go to the Court of Appeal in California.

dismiss the appeal. (AX-017-018.) On February 18, 2020 – Cook filed a petition for rehearing, a request for a statement of decision, and request to transfer the matter to the Court of Appeal. On February 24, 2020 – the Appellate Division denied all the above motions.

On February 26, 2020 – Cook filed a writ of mandamus at the Court of Appeal to transfer and hear the case from the Appellate Division.

On March 6, 2020 – right before trial – the Court of Appeal summarily denied the writ. (AX-018).

On March 6, 2020 – the trial judge found the Defendant guilty. (After filing the interlocutory appeal, the private attorney declined to appear as the People⁵ at trial and instead watched from the jury box.)

On March 30, 2020 – Cook filed his second notice of appeal⁶, which is still pending at the superior court Appellate Division at the time of filing this writ of cert.

On April 30, 2020 – Defendant filed a writ of mandamus in the California

⁵ Circumstantial evidence suggests that there may have been ex parte communication between the court and the private law firm, which was motivated by Defendant's interlocutory appeal. It's just another fact that makes the practice of private criminal prosecution tarnish the integrity of the judicial system.

⁶ At trial, Defendant was totally deprived of Due Process. Defendant was denied the right to have counsel represent him at his own expense, to have Brady discovery, to fully cross-examine the officer, to have impeachment evidence against the officer under *Pitchess*, and to have a right to a reasonable doubt standard (here, the officer, the sole witness against Defendant, impeached himself twice on the record.)

Supreme Court for the first interlocutory appeal, which was summarily denied on March 6, 2020.

On May 5, 2020 – the Supreme Court directed review of the case back to the Court of Appeal, Division 5. (AX-022).

On May 15, 2020 – the Court of Appeal again summarily denied the writ, this time holding that the conflict wasn't enough to prove prejudice under *People v. Vasquez* (2006) 39 Cal.4th 47, 70. *Vasquez* held that Defendant needed to prove that the conflict the Defendant faced by a partial prosecutor prejudiced his case. (AX-02-03.) (The Court of Appeal opinion is in direct conflict with *Young v. United States ex rel. Vuitton et Fils SA*, 481 US 787 (1987) [hereinafter (“Young”)] -- which held that a financially interested prosecutor warrants a reversal under harmful error because of the egregious questions of integrity regarding the justice system.)

On May 22, 2020 Cook filed a petition for review at the Supreme Court.

On May 28, 2020 – Cook also filed a writ of mandamus at the Supreme Court, in the event that it wanted to mandate review with the Court of Appeal again.

On June 10, 2020⁷ – both Cook's writ and petition for review were denied by the California Supreme Court. (AX-024 & AX-026).

Petitioner now seeks a writ of certiorari from this Court on the sole

⁷ The Petition for Review is dated July 24, 2020, because the court had to reissue the order after correcting the Court of Appeal number on it.

question of whether a for-profit attorney, charging billable hours, can be a public criminal prosecutor without violating his duty to be fair and independent under the 5th and 14th Amendments.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE CRIMINAL PROSECUTION CAN BE PRIVATIZED UNDER DUE PROCESS.

A. *Young v. United States* Leaves Open the Question: Does the Defendant have a Due Process Right to a Fair and Impartial Prosecutor?

As Solicitor General Justice Kagan pointed out in her brief advocating the dismissal of *Robertson*, under *Young v. United States ex rel. Vuitton et Fils SA*, 481 US 787 (1987):

Since *Young*, state courts have reached different conclusions on the question whether there is a due process right to a disinterested prosecutor. *Compare*, e.g., *Wilson v. Wilson*, 984 S.W.2d 898, 903-904 (Tenn. 1998) ("We hold that Due Process does not mandate adoption of a rule which automatically disqualifies a litigant's private counsel from prosecuting a contempt action."), cert. denied, 528 U.S. 822 (1999), with, e.g., *People v. Calderone*, 573 N.Y.S.2d 1005, 1007 (N.Y. City Crim. Ct. 1991) ("[P]rivate prosecutions by interested parties or their attorneys present inherent conflicts of interest which violate defendants' due process rights."). *See* U.S. Solicitor General Brief for *Robertson v. U.S. Ex. Rel. Robertson v. US Ex Rel. Watson*, 560 US 272 (2010) [hereinafter

(“Robertson”)] (Kagan’s Solicitor General Amicus Brief, filed Nov. 6, 2009[hereinafter (“U.S. Solicitor General Brief”)]⁸).

In *Young*, Justice Blackmun concurred and stressed, “I would go further, however, and hold that the practice — federal or state — of appointing an interested party’s counsel to prosecute for criminal contempt is a violation of due process.” (*Id.* at 814-815).

Hence, under Court Rule 10(c), this Court should grant cert because “[1] a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court [and] [2] has decided an important federal question in a way that conflicts with relevant decisions of this Court.” One, the Court’s holding in *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987) needs clarification, and as presented here, even the appellate courts in California are issuing rulings in conflict with it. Furthermore, there’s a widening split on how all 50 states are interpreting *Young*. Two, the privatization of criminal prosecution is trending across all 50 states, as discussed more below.

As Justice Blackmun recognized, *Young* left open two questions. One, does an interested criminal prosecutor violate Defendant’s right to Due Process? Two, does a defendant enjoy a federal constitutional right to have a fair and impartial prosecutor?

⁸ Available at <https://www.justice.gov/osg/brief/robertson-v-united-states-ex-rel-watson-amicus-merits>.

Petitioner advocates that a for-profit lawyer acting in the role of criminal prosecution violates Due Process. All criminally accused defendants should have the right to a fair and impartial criminal prosecutor.

In *Young*, the court permitted the appointment of a private law firm to prosecute criminal contempt proceeding, and this Court reversed. The private law firm was the attorneys for the civil plaintiff. Regarding the case, the Court held that in criminal contempt proceedings, “Regardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety (an issue on which we express no opinion), that appointment illustrates the potential for private interest to influence the discharge of public duty. . . . In short, as will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created opportunities for conflicts to arise, and created at least the appearance of impropriety” (*Id.* at 806).

The Court further held: “Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision.” (*Id.* at 812-813).

In crafting a remedy, the Court held, “Public confidence in the disinterested conduct of that official is essential. Harmless-error analysis is not equal to the task of assuring that confidence.” (813-814).

Young concludes:

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice. [A private] prosecutor . . . is required by the very standards of the profession to serve two masters. The appointment of counsel for . . . to conduct the contempt prosecution in these cases therefore was improper.

Despite *Young*'s harsh remedy for private prosecution, since *Young*, according to John Bessler's, *The Public Interest and the Unconstitutionality of Private Prosecutors*⁹, "[c]urrently, a split of authority exists regarding whether private prosecutors are constitutionally permissible." (47 Ark. L. Rev. 511, 521 (1994)). According to Bessler, some states ban private prosecution completely, some states permit it under the supervision of the public prosecutor, and at least since 1994, some states like Ohio, Montana, and Alabama (under certain circumstances) permit unbridled private criminal prosecution. (*Id* at 529).

After *Young*, courts however have held that *Young* only represents a case

⁹ Cited by this Court in Supreme Court case in *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, FN24 (1998).

on “supervisory authority,” or have disregarded the holding by distinguishing the case. The California Appellate Court in this case issued a ruling in direct conflict with *Young*. The California Court of Appeal held in its summary denial of the writ, that even though there was a conflict, under *People v. Vasquez*, that Defendant had not shown how that conflict prejudiced him in his case. But *Young* held that the conflict presented by private criminal prosecution is so egregious to the appearance of the justice system, that such a case is not only reversed but dismissed to deter the government from engaging in such practices.

Here, this case proves that the concerns that the Court had in *Steel Co.*, when it stated, “According to these historians, private prosecutions developed in England as a means of facilitating private vengeance.” (*Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, FN24 (1998)). There’s more to this case than just a traffic ticket and a private law firm prosecuting it.

Here, Defendant is an attorney and activist and journalist. Defendant was puzzled by the odd encounter with the school police officer on summer holidays, outside of school hours; so, he investigated the school police department and discovered that the school police chief that the local school police chief was a felon; an insurance fraudster; and a serial sexual predator, who was fired from the LAPD for a number of violations and published it on his

blog¹⁰. The school district, against its own will, had no choice but to suspend the school police chief, who is still suspended as of filing this writ. Afterwards, the school district sought vengeance by spending thousands of dollars of the taxpayer money, to criminally prosecute a \$238 traffic ticket. This money could've been better spent on educating the students of the City.

Again, this example points to the fact that private prosecution schemes in the hand of local public agencies (that are not the public prosecutor) can be a tool to punish political enemies, journalists, critics, and even gadflies. (And as already mentioned above, the other errors of this case calls into question the integrity of the judicial system, when a private prosecutor for profit engages in such a scheme, even when hired by a public agency.)

Recently, Petitioner, as an attorney representing another Defendant, had the issue of private prosecution re-appear. In *People v. Ehlers*, the City¹¹ hired

¹⁰ The article is titled: *Ex-felon, Fraudster, & Sexual Predator: The Secret Life of Baldwin Park's School Police Chief - Jill Marie Poe*.

It starts, "Baldwin Park's Unified School Police Chief, Jill Marie Poe had a secret life, which she doesn't want you to know about. Besides being fired from the Los Angeles Police Department LA for being a sexual predator - she's also an ex-felon, who pled guilty to auto insurance fraud and filing a false police report. Now, she's around children from age 5 to 18. One has to wonder how this happened. . . ."

Paul C., *Ex-felon, Fraudster, & Sexual Predator: The Secret Life of Baldwin Park's School Police Chief - Jill Marie Poe*, THE LEGAL LENS, September 4, 2019, <https://alchemistcook.blogspot.com/2019/09/ex-felon-fraudster-sexual-predator.html>.

¹¹ The City of Baldwin Park has an established history of retaliating against the First Amendment, maliciously and without merit. The City files meritless

the private law firm of Jones & Mayer to prosecute a 78 year old man, under two local municipal temporary sign ordinances¹². The City alleges that Ehlers allegedly hung up a sign of a council member, depicting him as a jackass, and labeling him a “fraud,” “bully,” “liar,” and “corrupt.” The private prosecution is happening in the same local court that the Defendant was prosecuted in in this case, and the trial court, who was specially assigned to hear this issue, which otherwise would be all purposes, distinguished *Young* by stating that the private prosecution was permissible, because a City, and not a private individual, was paying the bill. This can't be right. Cert is required for

temporary restraining orders against journalists. *See* Ruben Vives, *Great Read: A Baldwin Park gadfly the mayor would love to swat away*, LA TIMES, March 30, 2015, <https://www.latimes.com/local/great-reads/la-me-c1-baldwin-park-gadfly-20150330-story.html>; Eugene Volokh, *Politician seeks restraining order against critic who called her ‘political prostitute’ and ‘honey’*, THE WASHINGTON POST, March 15, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/15/politician-seeks-restraining-order-against-critic-who-called-her-political-prostitute-and-honey>; Eugene Volokh, *Baldwin Park (L.A. suburb) city attorney threatens local gadfly with restraining order — over two harassing and offensive e-mails*, THE WASHINGTON POST, August 7, 2014, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/07/baldwin-park-l-a-suburb-city-attorney-threatens-local-gadfly-with-restraining-order-over-two-harassing-and-offensive-e-mails/> & Ruben Vives, *Baldwin Park officials lose battle for restraining orders against critics*, LA TIMES, March 21, 2016, <https://www.latimes.com/local/california/la-me-baldwin-park-free-speech-20160320-story.html>.

¹² The private prosecution scheme is its latest attempt to silence political dissidents, and an example of why this Court should grant review. *See* Colleen Shalby, *Sign Showing Councilman as ‘corrupt’ donkey at center of 1st Amendment tiff*, LA TIMES, Jan. 18, 2020, <https://www.latimes.com/california/story/2020-01-18/councilman-ricardo-pacheco-baldwin-park-first-amendment>. *See* LA Times Colleen Shalby, *Sign showing councilman as ‘corrupt’ donkey at center of 1st Amendment tiff*, Jan. 18, 2019.

clarification.

B. Robertson v. US Ex Rel. Watson – The Imperfect Case for Cert.

In *Robertson*, cert was dismissed, but Chief Justice Roberts dissented, reasoning heavily on the evolution and history of the common law. 560 US 272 (2010). The Chief Justice held that only the government could file criminal charges against an individual. (*Id.*)

Now; this case tests the Chief Justice's belief. Petitioner would advocate further that only an agent of the crown, or in the U.S., the People (the Sovereign), and not a contractor can criminally prosecute a Defendant and not a contractor, which is analogous to the government hiring a mercenary.

If a city, which doesn't have criminal prosecutorial powers, hires a private lawyer – would that still be a permissible criminal prosecution under Due Process? How about if a school district did so? (Aren't school districts supposed to be in the business of educating students, not criminal prosecution? Cities are in the business of providing services too, unless there's an elected city attorney.)

In several Southern California cases, cities hired private lawyers to criminally prosecute misdemeanors, which resulted in enormous and crippling attorney's fees for indigent defendants (as discussed below). A class action had to be filed to end such practices. But the example illustrates the abuses of the criminal justice system to line the pockets of private attorneys.

Also, for the purposes of filing criminal charges, is that public-private

contractual criminal prosecution service constitutional under Due Process? The California Supreme Court has already held that even if public agencies hire a private contractor as adjudicator (and not a prosecutor) that Due Process would be violated because the petitioner would be presumed to have an unfair hearing. (See *Haas v. County of San Bernardino*, 119 Cal.Rptr.2d 341 (2002)) The same reasoning should apply for contracted criminal prosecutors, no? Isn't the Defendant entitled to an impartial prosecutor under Due Process, like she is for a disinterested adjudicator?

In *Robertson*, the Chief Justice stated, "Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another." (*Id.* at 2188). The Chief Justice reasoned, "A basic step in organizing a civilized society is to take that sword out of private hands and turn it over to an organized government, acting on behalf of all the people." (2190). The Chief then disagreed that cert should be dismissed and stated that cert should indeed be granted and the question rephrased. (*Id.* at 2191).

Justice Sotomayer and Kennedy agreed with the Chief Justice and stated, "THE CHIEF JUSTICE would hold that criminal prosecutions, including criminal contempt proceedings, must be brought on behalf of the government. I join his opinion". (*Id.*)

In *Robertson*, Solicitor General Kagan also believed, "At common law, a crime was a public wrong, and the sovereign was 'the proper prosecutor for

every public offence.” *See* U.S. Solicitor General Brief.

For this reason, Kagan understood the potential problems of Due Process raised by private prosecution. She stated, “The exercise of the sovereign's prosecutorial authority by private individuals may raise constitutional questions”. (*Id.*) In relying on *Young*, she noted, “Private prosecutions by interested parties (such as respondent) also have the potential to raise due process questions.” (*Id.*)

Kagan recommended dismissing cert in *Robertson* however, because the Petitioner did not “raise this due process claim in his brief, however, and he has affirmatively disavowed it previously. It is accordingly not before the Court.” (*Id.*)

But here, Petitioner over and over again raised Due Process concerns before the superior court and higher courts, arguing that a private prosecutor billing by the hour violates Due Process, arguing that his prosecutor had two masters, profit and justice. For a \$238 traffic ticket, the private law firm is estimated to have billed thousands of dollars for profit, in filing meritless briefs. Also, the prosecutor refused to offer a fair plea deal and sought the maximum punishment possible, all with the purpose of retaliation. The court appeared to worsen the situation by effectively denying all Due Process protections to the defendant – such as denying him the right to be represented by counsel as his own expense. Yet, the court permitted the school district to have illegal private representation. How come one side could be illegally represented but the

Defendant could not be?

Furthermore, since this case is a criminal case and not a criminal contempt case, the question presented to the court is more straightforward. With criminal contempt, the court has to grapple with dealing with an adjudicated civil action – with criminal contempt acting as a remedy to enforce a Defendant's compliance with a court order.

There's additional complexity in addressing private prosecution within a criminal contempt action, as Justice Scalia pointed out in *Young* because of the separation of powers doctrine. Here, unlike a criminal contempt action, the case started as a criminal case and ended as a criminal case. It did not start as a civil one, turning into criminal contempt. Therefore, the separation of powers doctrine does not complicate the matter here. Hence, Kagan's concern for a more factually sound case is present here and cert should be granted. **

C. The Trending National Problem of the Privatization of Criminal Prosecution.

This is not an isolated case. In fact, criminal prosecution is being privatized across the country. Most egregious in this practice was in 2015, in Southern California. In 2015, the City of Coachella hired the private law firm of Silver and Wright to prosecute code enforcement violations. In one case, the defendant was charged with a building violation. He paid \$900 to fix the violation, but Silver and Wright then charged him with 29 counts of a

misdemeanor and billed him \$31,000.¹³

One elderly woman was fined nearly \$6,000 for an infraction in having too many chickens¹⁴, which turned into a misdemeanor prosecuted by a private firm. (*Id.*) The City of Indio also hired Silver and Wright.¹⁵ Palm Springs also nearly hired the private firm. (*Id.*)

In the end, the Institute of Justice and O'Melveny & Myers filed a class action, which ended the scheme. Here, even though the City technically was supervising this private law firm, the consequences were disastrous for these poverty stricken residents in these cities. (Baldwin Park is also a poverty stricken city.)

Private criminal prosecution is trending in Texas and Alabama. In Harris County, Texas, the District Attorney is contracting out misdemeanor prosecutions to private law firms.¹⁶ In Montgomery, Alabama, the privatization of probation turned simple traffic tickets into a \$4,713 fine, which was owed to the private

¹³ Scott H. Greenfield, *It's A Living for Silver & Wright*, SIMPLE JUSTICE, November 18, 2017, <https://blog.simplejustice.us/2017/11/18/its-a-living-for-silver-wright/>.

¹⁴ Petitioner has hens too, and finds this concerning.

¹⁵ J. Justin Wilson, *Class Action Lawsuit Challenges California Cities' For-Profit Prosecution Scheme*, INSTITUTE FOR JUSTICE, February 14, 2018, <https://ij.org/press-release/class-action-lawsuit-challenges-california-cities-profit-prosecution-scheme/#>.

¹⁶ Samantha Ketterer, *Advocacy groups protest Harris County DA for program allowing civil lawyers to prosecute misdemeanors*, HOUSTON CHRONICLE, Feb. 26, 2020, https://www.houstonchronicle.com/news/houston-texas/houston/article/Advocacy-groups-protest-Harris-County-DA-for-15086342.php?utm_source=The+Appeal&utm_campaign=e707bc0020-EMAIL CAMPAIGN 2018 08 09 04 14 COPY 01&utm_medium=email&utm_term=0_72df992d84-e707bc0020-.

company.¹⁷

Closer to home, in Los Angeles County, the City of Beverly Hills has also contracted the firm Dapeer, Rosenblit, Litvak LLP¹⁸ to prosecute misdemeanors and infractions.

As already mentioned above, Petitioner re-cites to *People v. Ehlers*, Cal. Sup. Ct. Case No. ELM9EM07323, (Arraignment Jan. 7, 2020), in which Defendant is the attorney for the client in the case. In *People v. Albert Ehlers*, the City of Baldwin Park hired the private law firm of Jones & Mayer to prosecute a 78 year old man under sign ordinance, because he allegedly hung up a sign, depicting a councilmember as a jackass, and called him a “fraud,” “bully,” “liar,” and “corrupt.” In Ehlers, the private attorney, bills at \$200 an hour, who originally agreed to drop the charges if the sign came down, proceeded to continue with the case, even though there’s no probable cause, because he could bill more hours. The private prosecutor has continued the case for almost a year now.

¹⁷ Sarah Stillman, *Get Out of Jail, INC.*, THE NEW YORKER, June 26, 2014, https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc?utm_source=The+Appeal&utm_campaign=e707bc0020-EMAIL CAMPAIGN 2018 08 09 04 14 COPY 01&utm_medium=email&utm_term=0_72df992d84-e707bc0020-.

¹⁸ (In her biography, Castillo states she prosecuted red light traffic infractions, which fall under the criminal procedures that government misdemeanors. See Penal Code § 19.7.) Caroline Karabian Castillo, *Associate – Civil Trial Practice and Code Enforcement Group*, DRL LAW, (Last visited November 4, 2020), <http://www.drlaw.com/About/Caroline-K-Castillo.shtml>.

Running a red light can cost over \$500 for this infraction, which suggests a profit motive for local agencies and private law firms.

People v. Ehlers clearly illustrates why cert needs to be granted. Private prosecution, as this Court has already noted, encourages revenge prosecution,¹⁹ as in *Ehlers*. And these type of revenge prosecutions, put the sword in the hands of local agencies and not public prosecutors. And it appears that they wield that sword against political enemies, journalists, gadflies, and citizen activist who want to criticize the government.

And given the fact that the City has a couple millions in reserve, it can intimidate and bankrupt a defendant or wear out the public defender (who is already resource strapped). And as with this City, the public officials are not wasting their own money but public funds. For them, however, they can reap the benefits of staying in office with the purpose of self-dealing in public funds – like the Council Member that was exposed and forced to resign. It was that same council member who sought private criminal prosecution against the Defendant for hanging up a political sign that criticized him.

Hence, this public-private relationship is bad for democracy, as the case here and *Ehlers* illustrate. Private prosecution of journalists and activists corrodes the public participation process by chilling Free Speech and limits information available to the marketplace. Generally, journalists and activists are trying to

¹⁹ The City has a long history of filing malicious cases against activists in civil court. Since that hasn't been working, the City has now taken a new step to take political dissidents to criminal court for filings the District Attorney has declined. See Eugene Volokh's article here: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/15/politician-seeks-restraining-order-against-critic-who-called-her-political-prostitute-and-honey/>

expose corruption or present their criticisms as to why politicians should be voted out.

At the end of the day, cities exist to provide public services for the residents, which would be better placed in their hands than in any individual, like a police force. But they are not in the business of criminal prosecution; that's what we have the public prosecutor's office, which is elected and can administer the values of the people – whether that be deterrence or retribution.

And more dangerously in *Ehlers*, the private prosecutor is not even answering to an administrator, who is appointed by the council and paid a flat salary. The private attorney is answering to a City Attorney²⁰ that is also contracted, making the private prosecutor a subcontractor and making accountability and governance even more slippery. Both the contractor and subcontractor exist for one purpose as well. Not justice, but making money. For all these reasons, cert should be granted.

Finally, a more recent example illustrates this is still a current problem in the federal courts too. The Intercept reports that around of August of 2019 - the New York federal district court appointed a private law firm to prosecute an environmental activist lawyer in criminal contempt charges “after the Southern

²⁰ The City Attorney, Robert Tafoya has recently been served a federal search warrant, implicating him in marijuana bribery scandal. *See Ruben Vives & Adam Ehlmahrek, FBI raids Compton councilman's home, Baldwin Park city attorney's office in pot inquiry*, LA TIMES, November 3, 2020, <https://www.latimes.com/california/story/2020-11-03/fbi-cannabis-investigation-baldwin-park-compton>

District of New York declined to do so — a move that is virtually unprecedented. [Defendant's] lawyer has pointed out, the firm Kaplan chose, Seward & Kissel, likely has ties to Chevron [the plaintiff in the civil action]."²¹ Hence, the problem keeps popping up, is current, and needs to be reviewed by this Court.

D. Infractions are Governed by Criminal Misdemeanor Law in California.

Although one can argue that this is an infraction, this is still a factually sound case and presents a pure question of law. There are no technical difficulties or complications that were presented in *Robertson*. The Due Process arguments were raised from superior court to the highest state court and now the highest court in the land. The case highlights all the dangers and problems of a \$238 infraction and the questions of justice that are presented by the profit motive of a private law firm becoming entangled in our criminal justice system, especially when a partner represents the case at \$300 an hour. In California, infractions are treated as misdemeanors under Cal. Pen. Code § 19.7. This Court has deferred to California's Legislature previously when it comes to questions of what the state considers a serious crime. *See Ewing v. California*, 538 U.S. 11 (203). And here, California has determined that the infraction of running a stop sign is governed by its criminal justice system under Cal. Pen. Code § 19.7. Therefore, cert is still warranted.

²¹ Sharon Lerner, *How the Environmental Lawyer who won a massive Judgment against Chevron lost everything*, THE INTERCEPT, January 29, 2020, <https://theintercept.com/2020/01/29/chevron-ecuador-lawsuit-steven-donziger/>

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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