No. 20-6700

In the Supreme Court of the United States

MELISSA CALABRESE, Petitioner

vs.

STATE OF CALIFORNIA et. al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

> Whether a district court order that denied the appointment of counsel under 28 U.S.C. § 1915(e)(1) for an in forma pauperis Plaintiff, who is gravely-mentally disabled [never able to provide for her own food or clothing or shelter with high suicidality] is appealable on an interlocutory basis under the collateral-order doctrine.

Respondents agree that multiple courts of appeals have reached conflicting conclusions over the question of whether there is immediate interlocutory appealability of the Collateral Order Doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)

PETITIONER REPLY

1. Respondents do *not* deny that this Petitioner is gravely-mentally disabled in the highest risk group to die by suicide
2. Respondents do *not* deny that they have treated Petitioner since 2008 with many involuntary hospitalizations, failed psychopharmaceutical trials, 13 electroconvulsive (ECT) treatments and she has never recovered
3. Respondents do *not* deny that Petitioner has The Americans

with Disabilities Act of 1990 or ADA (42 U.S.C. § 12101) class protection rights as decided by this Court in Olmstead v. L.C., 527 U.S. 581 (1999).

4. Respondents do *not* deny that they intentionally lied to the District Court falsely claiming ADA exemption as a private entity.
5. Respondents do *not* deny that they discharged Petitioner from a 5150 involuntary hospitalization to months of homelessness, drinking non-potable water and salvaged food (illegal hospital-dumping)
6. Respondents admit that multiple Circuit Court of Appeals provide conflicting rulings on the same legal issue: immediate appealability of the Collateral Order Doctrine
7. Respondents state Petitioner's ADA *"claims were dismissed with prejudice as the district court reasoned that an amendment would be futile."* That ruling was based on Respondent's fraud on the District Court when they intentionally falsely claimed ADA exemption as a private entity.
8. Respondents state: "*Petitioner never filed a Third Amended*

Complaint; thus, Providence St. Joseph Health and Mission Hospital brought a motion to dismiss for failure to prosecute under Federal Rules of Civil Procedure 41(b). D. Ct. " Respondents knew that unrepresented, Petitioner's ADA-protected disability made it impossible for her to file any responses. Furthermore, Respondents knew that there was no need to amend the Second Amended Complaint based on the District Court denying Petitioner her rightful ADA protections. The SAC correctly claimed Petitioner's ADA protections. The District Court erred based on Respondents' intentionally false claim of ADA exemption.

9. Respondents state: "*Petitioner failed to file an opposition and on September 25, 2020, the district court granted defendants' motion and ordered the matter dismissed. D. Ct.*" Respondents knew that unrepresented, Petitioner's ADA-protected disability made it impossible for her to file any responses.

10. Respondents state: "*Appeal gives the upper court a power of review, not one of intervention. So long as the matter re-*

mains open, unfinished or inconclusive, there may be no intrusion by appeal." citing Cohen v. Benefit Indus. Loan Corp." Cohen (1949) antedates ADA (1990) and Olmstead (1999). Respondents knew that Petitioner's ADA-protected disability made it impossible for her to litigate at all. A priori, unrepresented, the Petitioner could never provide a District Court record for the Ninth Circuit to review. Respondents enjoy unlimited top attorney representation to develop their record and leverage their officer of the court status to commit fraud the District Court with their false ADA exemption lie.

11. Respondents state: "*By denying the motion without prejudice, the district court invited Petitioner to renew the request for the court's consideration on a later date. Petitioner does not address the district court's ability or willingness to do such.*" The Cert Petition clearly states Petitioner could not respond due to being gravely-mentally ill and denied any ADA assistance to file.

12. Respondents state: "*the denial of counsel in civil actions does not resolve an important issue completely separate from*

the merits of the case. As such, appellate courts can only decide whether the denial of appointment of counsel prejudiced a litigant's rights after it assesses the effect of the ruling on the final judgment." Richardson-Merrell Inc., 472 U.S. at 439 (1985) antedates ADA (1990) and Olmstead (1999).

13. Respondents state: "*Petitioner must demonstrate that the 'denial of immediate review would render impossible any review whatsoever.*" Firestone (1981) antedates ADA (1990) and Olmstead (1999). Because Petitioner's ADA-protected disability made developing the District Court record impossible, proper review of that record is a prior impossible.

14. Respondents state: *"Petitioner concedes that the vast majority of circuits hold that an order denying appointment of counsel is not immediately appealable."* Respondents wordsmith to intentionally mischaracterize the significant multi-Circuit split in this case.

15. If Petitioner lived in the Third, Fifth, Eighth & Federal Circuits that allow immediate interlocutory review for appointment of counsel, she would not have been denied due

process.

16. Respondents cite: *Appleby v. Meachum*, 696 F.2d 145, 146-47 (1st Cir. 1983) (per curiam) where the court cited the theory that a district court can reassess a plaintiff's need for counsel throughout the litigation and thus these orders are reviewable on appeal. The docket shows that Petitioner made several filings to the District Court and three appeals to the Ninth Circuit to receive IFP consideration for court-appointed counsel.

17. Respondents cite cases from the Circuits that deny immediate interlocutory appeal in the multi-Circuit split decisions:

> *Cotner v. Mason*, 657 F.2d 1390 (10th Cir. 1981)
>
> *Ficken v. Alvarez*, 146 F.3d 978, 980 (D.C. Cir. 1998)
>
> *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757, 759 (6th Cir. 1985)
>
> *Holt v. Ford*, 862 F.2d 850 (11th Cir. 1989)
>
> *Miller v. Simmons*, 814 F.2d 962 (4th Cir. 1986)
>
> *Randle v. Victor Welding Supple Co.*, 664 F.2d 1064, 1066- 1067 (7th Cir. 1981)
>
> *Smith-Bey v. Petsock*, 741 F.2d 22 (3rd Cir. 1984)
>
> *Welch v. Smith*, 810 F.2d 40 (2nd Cir. 1987)

All these cases antedate ADA (1990) and Olmstead (1999). None involve discrimination against seriously-mentally-ill Americans.

18. How *Wilborn v. Escalderon* differs:

> Wilborn appealed a grant of summary judgment for defendants Rushen and Escalderon in his 42 U.S.C. Sec. 1983 action for deprivation of property without due process.
>
> "Before summary judgment was granted, Wilborn had appealed the district court's denial of his motion for request of counsel under 28 U.S.C. Sec. 1915(d).1 Because such orders are not immediately appealable interlocutory orders, we find that the district court properly retained jurisdiction after Wilborn's appeal of that order."
>
> "However, we hold that the district court should have given Wilborn leave both to amend his complaint and to conduct such discovery as would support that amendment. Thus, we reverse and remand for further proceedings below.
>
> Wilborn v. Escalderon, 789 F.2d 1328 (9th Cir. 1986)

a. The District Court in this case, did not grant Petitioner the required right "to conduct such discovery as would support that amendment." The simplest discovery would have proved the validity of the SAC. The Defendants' major fraud on the

court would have been exposed and forced a hearing and reversal of the Court's Motion to Dismiss order.

b. Furthermore, the Wilborn decision was legally sound because Frederick Wilborn was mentally competent to self-represent and had financial resources. Petitioner is not competent and applying Wilborn denied her ADA Class due process and equal protection. The District Court wrote affirming Petitioner is not competent and would never be competent to author anything including a third amended complaint. The District Court denied Petitioner her lifelong ADA accommodations for assistance from her mother to help file, erroneously applying Local Rule 83-2.2.1 to completely stopping any future amended complaints, motions or responses etc.

c. Finally, Wilborn's 42 U.S.C. Sec. 1983 action was for deprivation of property without due process. Wilborn left his dentures behind in his car when he was taken into custody for parole violations in San Diego. Some six months after Wilborn's arrest, his counsel, who had been appointed to repre-

sent him in a state criminal proceeding, arranged for the recovery of Wilborn's dentures.

19. Respondents argue: "*the Eighth Circuit has held that orders denying the appointment of counsel are immediately appealable, Hudak v. Curators of University of Missouri, 586 F.2d 105 (8th Cir. 1978) cert, denied, 440 U.S. 985 (1979). Since the Eighth Circuit has stated it is open to reconsidering its position in light of the conflicting views from other circuits, this Court need not use its judicial resources to resolve the conflict.*" The Eighth Circuit can never resolve the multi-Circuit Splits on immediate appealability of appointment of counsel. Only this Court can resolve this important Circuit split. Only this Court can bring the Collateral Order Doctrine into compliance with the ADA.

20. Respondents state: "*As for the Federal Circuit, the holding in conflict with the majority view was decided more than thirty years ago. See Lariscey v. United States, 861 F.2d 1267 (Fed. Cir. 1988). Since then, there have been no published decisions in the Federal Circuit regarding whether an order*

denying the appointment of counsel is immediately appealable. Given that the vast majority of circuits now hold that such orders are not immediately appealable, it is likely that the Federal Circuit would reconsider its position should the issue arise in the future." Respondents create a delusion that somehow they know the Federal Circuit will reverse their published case approval of immediate appealability of appointment of counsel proposing a non-existent case that Respondents postulate may be filed sometime in the future.

21. Respondents state: *"Lastly, even if a meaningful circuit conflict existed, such conflict should be resolved through rulemaking rather than adjudication. As this Court has stated, "rulemaking, 'not expansion by court decision,' [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable." Mohawk Indus, v. Carpenter, 558 U.S. 100, 113, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009) (citation omitted)."* Respondents know for certain that the significant multi-Circuit split in this case qualifies for review by this Court. They tell this Court to deny this Cert

Petition because Petitioner should have sought rulemaking instead.

22. Providence St Joseph Health - Mission Hospital Regional Medical Center has:

a. refused any voluntary remedy since September 2019

b. refused to comply with relevant provisions of Medi-Cal, the CA Lanterman-Petris-Short Act, their County of Orange, State of CA Lanterman-Petris-Short Designated Facility contract and the CA Welfare and Institutions Code.

c. made materially-false representations to the District Court to intentionally take unfair advantage of a gravely-mentally disabled patient who has always lived in their hospital catchment area and remains assigned to their care and now

d. refused to even acknowledge ADA accommodations for psychotic patients are required in the federal courts.

e. argued that their discharge of involuntarily-hospitalized gravely-disabled mentally ill patients into homelessness fulfills their legal obligation to discharge to the least restrictive setting, despite the Olmstead v. L.C. Justices stating discharge into homelessness is not allowed.

f. breached their duty as officers of the court, and argue to this Court, fantastical, hypothetical, non-existent case law and

g. argued that a gravely-mentally ill American who cannot provide for her own food, clothing or shelter with high suicidality would understand rulemaking or even live long enough to see rulemaking restore her due process in federal court.

23. Respondents argues: *"this Court has already held that to permit widespread appeals on the grounds that an order causes prejudice would "constitute an unjustified waste of scarce judicial resources."* The District Court docket in this case exceeds 100 documents filed in nine months. The Ninth Circuit appeal can take two years to even reach a panel for

decision. The case then could require waiting-in-line again to be heard. Only then can the District Court finally allow IFP U.S. Marshal service that was unfairly denied Petitioner. Upon return to this same case, there is inevitable bias from the first time this case was denied any hearing and then rejected. There was an undeniable lack of recognition for the severe nature of Petitioner's lifelong disability, which has left her homebound and stripped of basic functioning that others take for granted.

24. The court requirements to just keep this case alive since 12-27-19 have been beyond extreme, even under the liberal pro se pleading standard. Now realistically, the Petitioner is convinced there will now be even more Defendant retaliation for continuing this case. She is very scared. Other similarly-situated gravely-mentally ill will never turn to the judiciary to preserve their rights for fear of Respondents' unethical tactics. The Founding Fathers established the judicial branch to protect the minority. In CA, landmark laws such as the Lanterman-Petris -Short Act (1967) has saved and restored

innumerable lives of the most vulnerable seriously mentally ill. But when the laws are not properly enforced by the government, as in this case, the only recourse is for injunctive relief.

25. This case is exceptional, important, and complex. The injunctive relief sought to end Respondents' discrimination against Medi-Cal psychiatric patients is impossible to obtain without appointment of counsel. Respondents continue to threaten the lives of the Medi-Cal gravely-mentally ill with high suicidality. They will not stop until this case forces them to follow the law. There are no perfect cases. This case is ideal for this Cert Petition because it was discharged without a single court hearing in a Motion to Dismiss.

26. The Ninth Circuit immediate interlocutory consideration of appointment of counsel that was denied 08-19-29, is the only remedy that preserves judicial economy. A fortiori, immediate interlocutory appeal also restores due process.

CONCLUSION

Only this Court can timely resolve this important multi-Circuit split.

Only this Court can advance the 1947 Collateral Order Doctrine to incorporate important advancements in the law such as ADA and Olmstead v. L.C.

Only this Court can protect IFP gravely-mentally ill Americans with high suicidality from these unconstitutional denials of due process and equal protection under law.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

Melissa Calabrese

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01-31-21