

21-5429
No.

IN THE

SUPREME COURT OF THE UNITED STATES

PEDRO A. REYES — PETITIONER
(Your Name)

ORIGINAL

vs.
STATE OF COLORADO ET AL.
BUREAU OF LAND MANAGEMENT
LARIMER COUNTY ET AL. RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FILED
AUG 17 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

10th CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

PEDRO A. REYES

(Your Name)

2805 FARVIEW DRIVE

(Address)

FORT COLLINS, CO 80524

(City, State, Zip Code)

970-221-4444

(Phone Number)

IV QUESTIONS PRESENTED FOR REVIEW

1. Whether State action is implied by the Bureau of Land Management's (BLM) anomalous codification of C.R.S. § 34-32.5-112 (9) (c) into the Division of Reclamation and Mining Safety (DRMS) Construction Materials Rule 1.6.2 (1) (f) (g), and whether the unwarranted change in statutory intent effected the adverse denial of Notice to the Colorado Parks and Wildlife (CPW), the Plaintiff and other affected persons of the proposed land use application.(*appendix I*)
2. Whether, Larimer County was obligated by statute, to have in its employ, an ADA coordinator **prior to February 12, 2018.**
3. Whether the Office of Mined Land Reclamation (the **Office**); had complied with C.R.S. § 34-32.5-112 (9) (c) by immediately sending ALL (3) groups of owners of record, ***mailed notice*** of the public comment period before the end of the public comment period on November 8, 2017.
4. Whether the **BLM**, had applied the law unequally and denied equal protection of the the Fourteenth Amendment; by accepting the Colorado Parkas & Wildlife (CPW) **90-day late** agency comment and denying accommodation of the disabled Plaintiff's **1-day late** public comment letter, and whether the disparity constituted discrimination based on disability in violation of 43 C.F.R. § (a) (b) (i) (vii).
5. Whether the Larimer County Department of Public Health and Environment's (LCDPHE) participation as a '*covered entity*' and advisory agency, during the public hearing, inferred that; Health Insurance Portability and Accountability Act (**HIPAA**) regulations were in force during the public hearing and whether Larimer County violated

HIPAA regulation in **45 C.F.R. § 164.502 (a)** - by compelling the Plaintiff to involuntarily disclose health information; as a requisite to availing public entity of free speech during the designated public forum.

6. Whether Larimer County Designees had violated **5 U.S.C. § 552 a (b)** by conditioning awarding of program benefits, on the Plaintiff's disclosure of personal information and whether the Privacy Act required Larimer County Designees to have secured Plaintiff's written consent, prior to compelling the Plaintiff to disclose personal information, during the public hearing, which was being telecast live across the internet.
7. Whether denial of family members as interpreters to **LEP** participants during public hearings implies discrimination on the basis of race, color and national origin.
8. Whether, issues concerning **BLM**, the **Office** and the **Division's** faulty dissemination of Notice that had been:
 - a. Raised by the Plaintiff
 - b. Raised by 12 other affected persons, identified in the Adequacy review
 - c. Shown by the **90-day late** Colorado Parks and Wildlife (**CPW**) Agency comment

Demonstrate that; the **BLM**, the **Office**, the **Board** and the **Division**; failed to abide by Due Process requirement of Notice, in the decision to deny standing and clearly established right

to equal protection clause of the 14th Amendment – to the Plaintiff and all other legitimate persons entitled to; but denied benefit of recognized party standing to the proposed mining operation.

9. Whether, letter received by the Plaintiff from the Larimer County Planning Department establishes the Plaintiff as an owner of record affected by the proposed mining operation, identified in C.R.S. § 34-32.5-112 (9) (c) and whether the said letter from the Larimer Planning Department, warranted immediate designation and timely mailing of Notice of the public comment period to the Plaintiff whose property has been affirmed as being in the vicinity of the proposed mine. (*appendix E*)

10. Whether, the Office's failure, to *immediately designate and send mailed* Notice to all affected owners of record, particularly those who could be affected by the proposed mine; had denied Due Process and had led to the Plaintiff, the CPW and the 12 other affected persons identified in the Adequacy review, to involuntarily forfeit opportunity to respond with comment letters before the public comment period deadline on November 8, 2017. *emphasis added.*

11. Whether, Due Process required the Office to send Plaintiff and other affected persons, mailed Notice of the Office's designation of affected persons, before the end of the public comment period on November 9, 2017 instead of the end of the review process on January 30, 2017.

12. Whether the Office had changed statutory intent in C.R.S. § 34-32.5-112 (9) (c) by

deferring designation of affected persons, until January 30, 2018 (90 days after the public comment period had already ended) – even though:

- a. BLM awarding of recognized party status, was contingent on affected owners of record being immediately notified of the public comment period, by mailed Notice.
- b. The affected owners of record had no way of knowing about the public comment period, and responding accordingly, with comment letters, because the Office had not met its duty to expeditiously designate them as owners of record and send them notice of the public comment period before it ended on November 8, 2017.

13. Whether anomalous codification of C.R.S. § 34-32.5-112 (9) (c) to D.R.M.S. Rule 1.6.2 (1) (*f*); denied due process and clearly established First and Fourteenth Amendment rights from the Plaintiff and other affected persons of the community of LaPorte. *emphasis added*

14. Whether the addition of a clauses - (**f**) & (**g**) - into The Division of Reclamation and Mining Safety (DRMS) Construction Materials Rule 1.6.2 (1) was authorized by legislation; and whether the addition of clause (**f**) & (**g**) transgressed statutory intent in C.R.S. § 34-32.5-112 (9) (c), by enforcing a rule, that, contradicts immediate designation of owners of record so that they may receive required notice, and whether denial of mailed Notice had adversely

denied recognized party status from the Plaintiff and other legitimate parties who had been unjustly excluded and denied standing by the anomalous statutory codification.

15. Whether the malicious codification of statute stated in 15 above, transgressed on the disabled Plaintiff's right to due process, 43 C.F.R. § 17.3 Subpart B et seq. and 42 U.S.C. § 2000d and 42 U.S.C. § 1983.

16. Whether due process required the Office, the Board, the Division and Larimer County to have informed owners of record *whether or not they had been designated by the Office as affected persons of the proposed mining operation*, in order to afford them opportunity to present reason, why the Office and the Board should not deny them standing and program benefits associated. (*Appendix F – Adequacy Review showing names of 12 owners of record with Notice concerns*)

17. Whether an ongoing Larimer County policy, that prohibits family members as interpreters during public hearings, denies Article III standing, and whether the prohibition of a family member as an interpreter constitutes intentional discrimination by a Recipient of Federal funding assistance; in violation of the equal protection clause of the Fourteenth Amendment, 43 CFR § 17.3 et seq. and 42 USC § 2000d.

18. Whether, Defendants had perjured, by presenting the Court with false statements, declaring that deferring and designating time was prohibited during the public hearing; when video and transcribed records show otherwise, that no such rule was in force at the

time of the unlawful deprivation of First and Fourteenth Amendments and whether the Honorable Judge Varholak's determination that the transgression was immaterial to the case had been in error, owing to the fact that the case is premised on the unjust denial of deferring and designating of time; to the **LEP** Plaintiff.

19. Whether the Limited English Proficiency Plaintiff (**LEP**), had twice asked the Chairman for permission that his wife be allowed to speak as his interpreter during the hearing, and whether the Defendants had violated 43 C.F.R. § 17.3 et seq. by denying the Plaintiff's request for an interpreter, twice. Appendix M

20. Whether, a Larimer County policy that prohibits deferring time during public hearings; creates adverse disparate impact under Title VI to Limited English Proficiency (**LEP**) individuals of a different race, color and national origin, and whether the prohibition had denied public entity benefits to the Plaintiff and excluded the Plaintiff from participating in the public hearing.

21. Whether, Larimer County as an instrumentality of the State of Colorado and recipient of

federal funding assistance from the Department of the Interior (**DOI**); is subject to purpose of 43 C.F.R. § 17.1 and whether Larimer County Planning public hearings are affirmative action programs as defined by 43 C.F.R. § 17.2 (a). Appendix C

22. Whether Larimer County had demonstrated the existence of a substantial legitimate justification, to knowingly impose a requirement prohibiting a family member as an interpreter for the Plaintiff and whether compelling Reyes to speak in English when his inability to do so would result in his exclusion and denial of public entity benefits; constituted intentional discrimination based on race, color and national origin in violation of 43 CFR § 17.3 et seq. and 42 U.S.C. § 2000d and 42 U.S.C. § 1983.

23. Whether Larimer County's enforcement of a policy and practice; that prohibits family Members as translators to **LEP** individuals during designated forums; created by the State of Colorado in C.R.S. § 21-65.1-404 – implies State action.

24. Whether, Larimer County had conditioned awarding of public entity benefit, on Plaintiff's involuntary disclosure of protected health information during the hearing which, was being transmitted across the internet and whether the Larimer County Department of Public Health and Environment (**LDPHE**) participation as advisory agency during the hearing, implies Larimer County transgression on Plaintiff's rights protected by the Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act in 5 U.S.C. § 552 a(b). Appendix K

25. Whether, Larimer County prohibition of family members as interpreters, during public hearings is construed as intentional discrimination and a denial of meaningful access to programs and services; by a Recipient of Federal funding assistance.
26. Whether the denial of family members as interpreters to Limited English Proficient (LEP) individuals, constitutes overreach that creates racial distinction and discrimination against individuals of a protected class on the basis of race and national origin.
27. Whether, prima fascia evidence of intentional discrimination, is established by video and transcripts showing Defendants' unequal application of the law in denying equal protection of the Fourteenth Amendment, to the Asian-American Plaintiff, whom they denied a Next Friend, to help access program benefit, and to conversely privilege Mr. X, a Caucasian-American speaker with a Next Friend; even though the circumstances had been the same and the Plaintiff, like Mr. X, had been in need of help with presenting and being heard, at a meaningful time and in a meaningful manner, and whether the Defendants' uneven hand and unequal application of the law effected disparate harm, to the Plaintiff, who had been the only public hearing participant who was of a different race, color and national origin and whether the decision-makers' bias excluded the Plaintiff from a program administered by a recipient of federal funding assistance in violation of the Fourteenth Amendment, 43 C.F.R. § 17.3 et seq. and 42 U.S.C. § 2000d.
- Appendix M

28. Whether Larimer County policy, of prohibiting family members as interpreters during

public hearings, is an ongoing administrative policy, that is neutral on its face; but one that takes away clearly established rights conferred by free speech of the First Amendment and the equal protection clause of the Fourteenth Amendment and whether adverse disparate impact is established by the fact that; the LEP Asian-American Plaintiff was the only participant excluded from the hearing, because of inability to effectively articulate viewpoint in English, and because the decision-makers of the public hearing simply chose to deny the Plaintiff a family member as his interpreter even when doing so would result in exclusion of the Plaintiff from the hearing because of his race, color and national origin; in violation of 43 C.F.R. § 17.3 (a) (4) (ii) .

Appendix A – p. 8-9 showing a Larimer County Planning rule that is neutral on its face, but one that effects exclusion and denial of benefits, to members of a protected class, who identify with a different race, color and national origin.

V. LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[V] 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 judgement is the subject of this petition is as follows:

Bureau of Land Management

State of Colorado

Office of Mined Land Reclamation et al.

Mined Land Reclamation Board et al.

Division of Reclamation and Mining Safety et al.

Larimer County et al

RELATED CASES

- *Reyes v. Larimer County Planning Dept., et al*, No. 20-1247, U.S. Court of Appeals, Tenth Circuit. Judgement entered May 24, 2021.
- *Reyes v. Larimer County, et al*, No. 19-1295, U.S. Court of Appeals, Tenth Circuit. Judgement entered December 3, 2019.
- *Reyes v. Colorado Div. of Reclamation, et al*, No. 19-1283, U.S. Court of Appeals, Tenth Circuit. Judgement entered
- *Reyes v. Larimer County et al*, No. 1:2019cv01579, U.S. District Court for the District of Colorado. Judgement entered
- *Reyes et al v. Larimer County Planning Commission, The et al*, No. 1:2018cv03115, U.S. District Court for the District of Colorado. Judgement entered
- *Reyes v. Office of Surface Mining Reclamation and Enforcement Western Region*, No. 1:2018cv00860. Judgement entered

VIII. Table of Authorities

1. Larimer County has an ongoing administrative policy, that conditions awarding of public entity benefit, on the requirement that Limited English Proficient (LEP) participants; speak in English during the public hearing.

Violation – 43 C.F.R. § 17.3 (b) (1) (i) (iii) (iv) (v) (2)

2. Larimer County has an ongoing policy that conditions awarding of public entity benefit on the requirement that, LEP participants with impediments, disclose sensitive information in order to qualify for First Amendment right to free speech at the designated public forum which was simultaneously being telecast across the internet.

Violation - 5 U.S.C. § 552a (b) -The “No Disclosure without Consent” Rule

3. Larimer County has an ongoing policy that prohibits family members as interpreters for LEP participants; even though Notice from the Department of the Interior and the Department of Justice (*see Appendix D*) states otherwise, that; at the LEP individual’s request, the Recipient may allow a family member to translate for the LEP participant.

Violation - 43 C.F.R. § 17.3 (4) (ii)

4. On page 8 & 9 of Appendix A, the Appellate Court affirmed that Defendants’ action to exclude Plaintiff from the public hearing, had been by reason of an indiscriminate Larimer County Planning Commission *no deferring of time to others* rule; that video and transcripts show; the Chairman did not announce as a ground rule at any time, before, during and after the August 15, 2018 Knox Pit hearing. (*please see time stamped video showing no such ground rule was announced by the Chairman*).

The Honorable Judge Varholak himself had affirmed; in Appendix B page 3, that the Defendants had perjured; to justify exclusion and discrimination on the basis of race, color and national origin; effected against the Plaintiff.

Violation – 18 U.S.C. § 1621

5. Larimer County Department of Public Health and Environment (LCDPHE) participation at the Knox Pit hearing implies HIPAA regulations were in force during the hearing when the public entity compelled Plaintiff to disclose protected health information to qualify for public entity benefit.

Violation - 45 C.F.R. § 164.502 (a)

- No Person in the United States Shall, on the Grounds of Race, Color or National Origin Be Denied the Benefits of, or be Otherwise Subjected to Discrimination Under any Program to Which This Part AppliesP. 3

43 C.F.R. § 17.1 Purpose

43 C.F.R. § 17.2 Application of This Part

43 C.F.R. § 17.3 (1) (v)

42 U.S.C. § 2000d

Richmond v J. A. Croson Co.,

488 U.S. 469 (1989)

Adarand Constructors, Inc. v Pena,

515 U.S. 200 (1995)

Federal Regulations, equal protection clause of the First and the Fourteenth Amendments Prohibited the Defendants from Erecting a Barrier That Denied a Next Friend to the Asian-American Plaintiff. Intentional Discrimination is Evidenced by Video and Transcripts Showing that the Defendants had Applied the Law Unequally, By Prohibiting a Next Friend to the LEP Plaintiff and granting a Next Friend to a Caucasian Speaker, Even Though the Circumstances Were The same.

The Supreme Court Ruled In *Yick Wo v Hopkins* That A Law That Is Race-Neutral On Its Face But Is Administered In A Prejudicial Manner, Is An Infringement Of The Equal Protection Clause In The U.S. Constitution.

43 C.F.R. § 17.1

43 C.F.R. § 17.2

43 C.F.R. § 17.3 (1) (ii) (iii) (iv)

43 C.F.R. § 17.3 (4) (ii)

42 C.F.R. § 1983

Yick Wo v Hopkins,

118 U.S. 356 (1886)

Monell v Department of Soc. Svcs.,

436 U.S. 658 (1978)

Defendants Declare That They Excluded Plaintiff from Participating in the Hearing Because Mr. Jensen, Mr. Gerrard and the Planning Commissioners Were Enforcing *The Planning Commission's rule, Applicable To All Participants, That Speakers Could Not Defer their Speaking Time To Others.*

Larimer County Is a Recipient of Federal Financial Assistance From the Department of the Interior. 43 C.F.R § 17.12 (f) (1) (i) Defines Larimer County as an Instrumentality of the State and local government obligated to effectuate Provisions Of Title VI of The Civil Rights Act of 1964 to The End That No Person In The United States Shall, on The Grounds of Race, Color or National Origin, Be Excluded From Participation In, Denied The benefits Of, Or Be Otherwise Subjected to Discrimination Under Any Program or Activity Receiving Federal Financial Assistance From the Department of The Interior.

Equal Protection Clause of the Fourteenth Amendment

Equal Protection Clause of the First Amendment

43 C.F.R. § 17.1

43 C.F.R. § 17.2

43 C.F.R. § 17.3 (1) (ii) (iii) (iv)

43 C.F.R. § 17.3 (4) (ii)

42 C.F.R. § 1983

42 U.S.C. § 2000d

42 U.S.C. § 2000d-7

Yick Wo v Hopkins,

118 U.S. 356 (1886)

Monell v Department of Soc. Svcs.,

436 U.S. 658 (1978)

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

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

IX. OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____ ; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____ ; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____ ; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished

The opinion of the _____ court

Appears at Appendix _____ to the petition and is

☐ reported at _____ ; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished

X. JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case
was May 24, 2021

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on
the following date: _____, and a copy of the
order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted
To and including _____ (date) on _____ (date)
In Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date:
_____, and a copy of the order denying rehearing appears at
Appendix _____

☐ An extension of time to file the petition for a writ of certiorari to was granted to and
Including _____ (date) on _____ (date) in
Application No. _____ A _____.

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

XI CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A.

Amdt14.S1.4.1.3.1.4 Facially Neutral Laws Implicating a Racial Minority

B.

43 C.F.R. § 17.3 (b) (2) – Discrimination Prohibited

A recipient, in determining the types of services, financial aid or other benefits, or facilities which will be provided under any such program or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin.

C.

42 U.S. CODE § 2000d – Prohibition Against Exclusion From Participation

In, Denial of Benefits of, And Discrimination Under Federally Assisted Programs on Ground of Race, Color or National Origin

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

D.

42 U.S. CODE § 1983 – Civil Action For Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

E.

43 C.F.R. § 17.3 (a) – Discrimination Prohibited

(a) General – No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

F.

43 C.F.R. § 17.3 (b) (1)(i)(ii)(iii)(iv)(v)(vi)

A recipient to which this part applies may not, directly or through contractual or other arrangements on the grounds of race, color or national origin

- (i) Deny an individual any service, financial aid, or other benefit provided under the program
- (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program
- (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefits under the program
- (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program
- (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program
- (vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded to others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section)

G.

43 C.F.R. § 17.3 (4) (ii)

Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

H.

Co. Rev. Stat. § 24-65.1 – 404 (2018)

The Local government shall hold a public hearing before designating an area or activity of State interest and adopting guidelines for administration thereof.

I.

43 C.F.R. § 17.203 (a) (1) (b) (i) (iii) (vii)

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) Discriminatory actions prohibited (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service; (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others; (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service.

J.

43 C.F.R. § 17. 203 (b) (5)

Discriminatory actions prohibited. In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections

(i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or

(ii) that have the purpose of effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

K.

45 C.F.R. § 164.530 (c) (1) (2) (i)

45 C.F.R. § 164.530 (c) (1)

- A covered entity must have in place appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information.

45 C.F.R. § 164.530 (2) (i)

- Implementation specification: Safeguards. A covered entity must reasonably safeguard protected health information from any intentional or unintentional use or disclosure that is in violation of the standards, implementation specifications or other requirements of this subpart.

L.

Article III Section II of the Constitution

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consults;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to

controversies between two or more states;--between a state and citizens of another state;--
between citizens of different states;--between citizens of the same state claiming lands under
grants of different states, and between a State, or the citizens thereof, and foreign states, citizens
or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state
shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before
mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with
such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be
held in the state where the said crimes shall have been committed; but when not committed
within any state, the trial shall be at such place or places as the Congress may by law have
directed.

M.

5 U.S.C. § 552a (b)

The “No Disclosure Without Consent” Rule

“No agency shall disclose any record which is contained in a system of records by any means of
communication to any person, or to another agency, except pursuant to a written request by, or
with the prior written consent of, the individual to whom the record pertains [subject to 12
exceptions].”

N.

45 C.F.R. § 164.502 (a) (g) (1)

45 C.F.R. § 164.502 (a) Standard

A covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

45 C.F.R. § 164.502 (g) (1) Standard: Personal representatives. As specified in this paragraph, a covered entity must, except as provided in paragraphs (g) (3) and (g) (5) of this section, treat a personal representative as the individual for purpose of this subchapter.

O

43 C.F.R. § 17.203 (a) (b) (1) (i) (vii) (4) (i) (ii) (iii)

43 C.F.R. § 203 – Discrimination prohibited

(a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) Discriminatory actions prohibited

(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded to others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

94) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration

(i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap,

(ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons or

(iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

P

Amdt14.2 State Action Doctrine

Certainly, an act passed by a state legislature that directs a discriminatory result is state action and would violate the first section of the Fourteenth Amendment. *United States V. Raines*, 362

U.S. 17, 25 (1960)

In addition, acts by other branches of government "by whatever instruments or in whatever modes that action may be taken" can result in a finding of "state action." *Ex parte Virginia*, 100

U.S. 339, 346 (1880)

A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal

protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. *Id.* At 346-47

Q

45 C.F.R. § 164.502 (a) – Standard

A covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

R.

18 U.S.C. § 1621 – Perjury Generally

Whoever- (1) Having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true or (2) In any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

XII STATEMENT OF THE CASE

Brief Background of the Case

The complaint stems from denial of public entity benefits, and meaningful access to programs administered by instrumentalities of the State, and Recipients of Federal funding assistance. The Plaintiff respectfully presents for the Supreme Court's scrutiny; denials of Due Process, in the administration of programs by Recipients of Federal funding. The U.S. District Court of Colorado ruled to dismiss the case for lack of jurisdiction, hence, the Plaintiff is respectfully requesting the Court for leave to invoke, Fed. R. Civ. P. Rule 41 (b), in an appeal for reconsideration of the case based on the merits, by reason(s) that: the case had been dismissed by the Honorable Judge Varholak for lack of jurisdiction; the Plaintiff failed to join the State of Colorado as party under Fed. R. Civ. P Rule 19, the complaint was dismissed without prejudice, and, to the best of the Plaintiff's understanding, the claims asserted are not claim preclusive.

I

1. Denial of Notice & Loss of Standing (re: First question presented for review)

Construction Materials Rule 1.6.2 (1) (f) (g) is a regulation that effects adverse disparate impact, by denying standing to legitimate parties of land-use applications.

- a) Evidence adduced at the LaPorte Pit Adequacy Review supports that; the improper codification of C.R.S. § 34-32.5-112 (9) (c) into the Division of Reclamation and Mining Safety (DRMS) Construction Materials Rule 1.6.2 (1) (f) (g); denies equal protection clause of the Fourteenth Amendment, by effecting malicious deprivation of Notice; such

as that which had been done to the Plaintiff and other owners of record, affected by the proposed land use application. It is asserted that, the malicious codification of C.R.S. § 34-32.5-112 (9) (c) into the Division of Reclamation and Mining Safety (DRMS) Construction Materials Rule 1.6.2 (1) (f) (g); took away Plaintiff's right to recognized party status and benefits associated by transgressing on Due Process of Notice. (*pls. see diagram appendix I*)

- b) The Plaintiff understands, State action requires that, in order for a Plaintiff to have standing to sue over a law being violated, the Plaintiff must demonstrate that the local, State, or Federal government, was responsible for the violation, rather than private actor. Plaintiff states that the government, in Co. Rev. Stat. § 24-65.1 – 404 (2018), had created the Knox Pit public hearing, to solicit public opinion on the proposed land use application. Plaintiff argues that: the Bureau of Land Management (BLM) through the Office of Mined Land Reclamation (the Office), the Mined Land Reclamation Board (the Board) and the Division of Mining and Reclamation Safety (the Division) decision to deny recognized party status to the Plaintiff, who is a disabled member of a protected class and one who identifies with a different race, color and national origin, infers the BLM's enforcement and implementation of a State authorized policy that discriminates on the basis of race and national origin.
- c) The Division had been apprised, that, the Plaintiff and his spouse are owners of record affected by the proposed land use application, and that, the Plaintiff and his spouse are individuals with a recognized disabilities. Owing to the fact that the Office and the Division, failed an administrative duty to apprise the Plaintiff of the mining application and public comment period; the Plaintiff in effort to access program benefits, appealed

to the Division for acceptance of his 1-day late public comment letter, which the Division requires as a condition for recognition as party to the mining application.

Plaintiff's assertion:

- The Bureau of Land Management (BLM), Division of Reclamation and Mining Safety (DRMS), and Larimer County, are instrumentalities of the State of Colorado, and Recipients of Federal funding assistance from the Department of the Interior (DOI).
- The Plaintiff argues that, State action is implied by the improper codification of Colorado Land Reclamation Act 34-32.5-112 (9) (c) to Construction Materials Rule 1.6.2 (1) (f); and that the change in statutory intent, brought about by the improper codification, caused disparate harm, by denying due process of Notice that directly resulted in exclusion, and denial of program benefits, to the Plaintiff and other owners of record, whom the government, and the laws had intended to integrate into the permitting process and protect against unjust exclusion. *emphasis added*.
- The BLM, the DRMS, and Larimer County Planning, through Designees, had acted under color of law to exclude the Plaintiff and others, from the Recipients' program, through the imposition of an improperly codified regulation, that had effected a deprivation of Plaintiff's clearly established rights to the First Amendment and equal protection clause of the Fourteenth Amendment; through denial of standing as a legitimate party with recognized party rights to the LaPorte Pit permitting process.

According to the Supreme Court in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) "*Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its*

participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.”

- The Knox Pit public hearing on August 15, 2018, was created by State in Co. Rev. Stat. § 24-65.1 – 404 (2018); for purpose of requiring Larimer County, to hold a public hearing before designating an area or activity of State interest and adopting guidelines for the administration thereof.
- Plaintiff asserts that; Co. Rev. Stat. § 24-65.1 – 404 (2018) implies government authority in the administration of land use permitting process, and participants of public hearings, including County’s designees and decision-makers subject to Constitutional constraints.

Rules in force at the time of the alleged denial of rights:

- 43 C.F.R. § 17.3 et seq.
- 43 C.F.R. § 17.203 (a) (1) (b) (i) (iii) (vii)
- 42 U.S.CODE § 2000d
- 42 U.S.C. § 1983

II.

2. Failure to Immediately Designate Plaintiff as Affected Person – Loss of Standing

The Mined Land Reclamation Board (the Board), failed an administrative duty to ‘*immediately*’ designate owners of record who stood to be affected by the proposed mining operation, even though Colorado Land Reclamation Act 34-32.5-112 (9) (c) required the Board to expeditiously designate and mail Notice of the *public comment*

period to owners of record such as the Plaintiff and others; to afford them opportunity to protest or support the proposed land use application. (Appendix G - *Vague Notice*)

The improper codification of Colorado Land Reclamation Act 34-32.5-112 (9) (c) into the DRMS Construction Materials Rule 1.6.2 (1) (f); had effected a change in statutory intent, by dissociating owners of record who may be affected by the proposed mining operation from the group of all owners of record that Colorado Land Reclamation Act 34-32.5-112 (9) (c) had intended to receive mailed notice of the public comment period.

The Adequacy Review report shows that; not only the Plaintiff but several other owners of record as well the Colorado Parks and Wildlife (CPW), seem to have been denied Mailed Notice of the mining application and the start and end of the public comment period. (Appendix F)

Simplified:

- A. The Office was obligated to ***immediately*** designate owners of record who may be affected by the proposed mine; so that, the said owners of record would be apprised of the public comment period by the release of the 1st newspaper publication on September 28, 2017
- B. The DRMS required interested parties to send the Division, comment letters, in order to qualify for recognized party status and benefits associated.
- C. Interested parties were required to turn in public comment letters, before the end of the public comment period on November 8, 2017.
- D. Colorado Land Reclamation Act 34-32.5-112 (9) (c) clearly required the DRMS to ensure that the applicant not only **published Notice** of the application in the

newspaper, but also send **MAILED Notice** of the mining application and public comment period to:

- i. All owners of record of surface and mineral rights of the affected land
- ii. Owners of record of all land surface within 200 feet of the affected land
- iii. Any other owners, designated by the Board, who may be affected by the proposed mining operation.

D. The Board did not send the Plaintiff any such notice, announcing the Knox Pit application or the deadline of the public comment period. The Adequacy Review shows that several other interested persons did not receive notice of the application and public comment period. *emphasis added (Appendix F - p.)*

E. The Colorado Parks and Wildlife (CPW), firmly denied being late with agency comment and stated that no notice had been received even though the Adequacy Review states that CPW Agency comment was 60 days late. Appendix: Shane Craig & Brandon Marette of the Colorado Parks and Wildlife (CPW) email firm denial of being late with Agency comment of Knox Pit.

F. The Board did not apprise the Plaintiff of its decision to deny or recognize the Plaintiff as an owner of record that may be affected by the proposed mining operation, even though Larimer County Planning had sent the Plaintiff a letter stating that the Planning Department recognizes the Plaintiff's property as being within the vicinity of the proposed land use application. Appendix E

III.

3. Inconsistencies in codification of statute Leading to Denial of Notice and Party Status

Standing

A. Colorado Land Reclamation Act 34-32.5-112 (9) (c) required ALL 3 groups of owners of record be '*immediately*' sent Mailed Notice of the application and public comment period.

B. The DRMS Construction Materials Rule 1.6.2 (1) (f) however; disparately denies to the 3rd group of owners of record, the provision of *immediate* mailed Notice, such as that granted to the first and second group of affected owners of record.

Simplified:

If, the public comment period closed on November 8, 2017 and the Board was obligated to:

- i. '*Immediately*' designate owners of record who may be affected by the mining operation
- ii. '*Immediately*' Mail to the designated owners of record; Notice of the application and public comment period, in order to allow them to participate in the permitting process as recognized parties to the application

The Plaintiff asserts that:

Harm effected by the improper codification of Colorado Land Reclamation Act 34-32.5-112 (9)

(c) to the DRMS Construction Materials Rule 1.6.2 (1) (f), lies in the fact that: instead of

'*immediately*' designating owners of record who could be affected by the proposed mine, as

Colorado Land Reclamation Act 34-32.5-112 (9) (c) had required; the Mined Land Reclamation Board had instead, purposefully enforced DRMS Construction Materials Rule 1.6.2 (1) (f) to defer identifying and designating, the said owners of record, until the end of the Adequacy Review process, even though Colorado Land Reclamation Act 34-32.5-112 (9) (c) had required that, the said owners of record be sent **Mailed** Notice **immediately before** the end of the public comment period on November 8, 2017 and NOT after the public comment period had already ended on January 30, 2018 (end of Adequacy Review period). *emphasis added*

The fact remains that the DRMS did not send any notice informing the Plaintiff or others that they had either been recognized or rejected as owners of record who could be affected by the proposed mining operation that would abut in the backyards of homes and whose trucks would be plying through the mile-long 2-lane road across the community.

The Plaintiff alleges that, it is this inconsistency in the codification of the said regulations that had inadvertently caused the exclusion of affected persons from attaining legitimate party status recognition in lieu of the fact that; that the purpose of the public comment period, was to enable affected persons attain recognized party status, through comment letters that the DRMS required the public to submit before the end of public comment on November 8.

Therefore, failure of the Board to identify, designate and **Mail** Notice to owners of record who stood to be affected by the proposed mine, establishes violation of due process and denial of clearly established right to the equal protection clause of the Fourteenth Amendment, to the Plaintiff and other legitimate affected persons denied Notice and recognized party status to the proceeding.

IV

4. Ongoing Larimer County Policy to prohibit family members as interpreters/ Next Friends to Limited English Proficiency (LEP) Individuals During Designated Public Forums is An Overreach that Creates Racial Distinction and Discrimination on the Basis of Race and National Origin

Pages 8 and 9 of Appendix A; the Tenth Circuit Court mentions of a Larimer County Planning Commission's rule that prohibits deferring speaking time to others. The Defendants reason that the Plaintiff was prevented from exercising First Amendment right to free speech at a designated public forum, which the government had created, to secure public opinion, on the basis of a Planning Commission's policy that prevents deferring speaking of time to others. The said Larimer County policy that indiscriminately prohibits deferring time to others, infringes on clearly established Constitutional rights to free speech and equal protection of the First and Fourteenth Amendments to LEP individuals in need of help gaining meaningful access to public entity benefits in the most meaningful manner.

The Plaintiff therefore asserts that, violations of the First Amendment in a designated public forum merits strict scrutiny standards; shifting the burden to the County, to prove the existence of a substantial legitimate justification to have knowingly imposed a requirement prohibiting a family member as an interpreter/Next Friend when doing so, would exclude the Plaintiff from participating in the public hearing and deny the Plaintiff public entity benefit of presenting and being heard in a program that the State had created to secure public opinion. *emphasis added*

Plaintiff respectfully appeals for the Supreme Court's determination, on whether Plaintiff had been denied protection, conferred by 43 C.F.R. § 17.3 et seq. and 42 U.S.C. 2000d and 42 U.S.C. § 1983.

V

5. Larimer County through its Designees conditioned the awarding of public entity benefit on the Plaintiff's involuntary disclosure of protected health information.

- The Knox Pit public hearing on August 15, 2018, was a proceeding that was being *transmitted over the internet.*
- The Larimer County Department of Public Health and Environment (LCDPHE), a Covered Entity under the Health Insurance Portability Accountability Act (HIPAA) was in attendance during the public hearing.
- To the best of the Plaintiff's understanding, the LCDPHE is a covered entity under the Health Insurance Portability Accountability Act (HIPAA) and that Larimer County public hearings on land use; under advisory of the LCDPHE. Appendix K
- On page 9 of Appendix A - last paragraph; the Appellate Court states that under the ADA, summary judgement for failure to accommodate was proper by reason that Plaintiff did not request an accommodation.

Plaintiff argues that:

- Title 43 Part 17 Subparts A & B were rules in force during the hearing

- Free speech of the First Amendment and Equal Protection of the laws of the Fourteenth Amendment were clearly established Plaintiff's rights during the designated public forum.
- Under the **Privacy Act** and under **HIPAA Law**; the Plaintiff had no duty to disclose personal information or privileged medical information before the public at the public hearing which was being telecast live across the internet.
- The Defendants were in violation of the Privacy Act and HIPAA Law by compelling the Plaintiff to disclose personal privileged information without prior written consent.
- To the best of the Plaintiff's understanding, the Defendants, as Recipients of Federal funding assistance, were prohibited from conditioning awarding of public entity benefit on the Beneficiaries involuntary disclosure of protected personal and medical information.
- 43 C.F.R. § 17.3 (4) (ii) required Larimer County Planning to accord affirmative action by accommodating the Plaintiff's request for a family member as an interpreter to avert the LEP Plaintiff's exclusion from the public hearing.
- Appellate court on page 9 states that under the ADA, "A public entity must provide a reasonable accommodation when it knows that the individual is disabled and requires an accommodation of some kind to participate in or receive the benefits of its services" and that summary judgement for failure to accommodate was proper.
- It is argued that the Appellate ruling to uphold District Court decision was in error for the following reasons:

- a. Video and transcribed records of the hearing show the Plaintiff DID ask for public entity accommodation of an interpreter to help exercise free speech and to help avert his exclusion from the hearing
- b. HIPAA Law and the Privacy Act were clearly established rights that protected the Plaintiff against disclosure of protected personal and medical information.
- c. Larimer Planning policy and administrative practice of conditioning awarding of public entity benefit of speaking and being heard on Plaintiff's involuntary disclosure of his protected health information, was a request tantamount to a demand that the Plaintiff compromise and forgo his own right to privacy conferred by the Fifth Amendment in exchange for exercise of First Amendment right to present and be heard during the public hearing.

VI

6. The decision-makers unequal application of the law, implied bias and intentional discrimination by a Recipient of Federal funding assistance from the Department of the Interior (DOI)

Larimer County is a recipient of Federal funding assistance through the DOI's Payment in Lieu of Taxes Program (PILT). It is the Plaintiff's understanding that all programs administered by Recipients of Federal funding are affirmative action programs under Title 43 of the Department of the Interior. Appendix C – Payment in Lieu of Taxes Program (PILT)

Video and transcribed records show unequal application of the law by arbiters of the Larimer Planning Knox Pit public hearing. Denial of affirmative action is reflected by

Arbiters' denial of accommodation to the Plaintiff's request for a Next Friend; when a Next Friend had been necessary in helping Plaintiff access program entity benefit of presenting and being heard in protest of a land use detrimental to health, safety, and quiet enjoyment of home.

Plaintiff is an individual from a different race, color and National origin. Unequal application of the law and denial of equal protection of the Fourteenth Amendment are asserted, in light of the fact that, the decision-makers had accommodated another participant's need for a Next Friend to help access public entity benefit of presenting and being heard; immediately after having disparately denied exact same need; that they had denied to the Plaintiff, even though the circumstances were the same.

The Plaintiff asserts, that the decision-makers of the Knox Pit public hearing failed to abide by *the appearance of fairness requirement* of Due Process. And that, through no fault of theirs, the Board of County Commissioners' (BOCC) decision to approve the proposed mining operation; had been based on the Planning Commission's recommendation, which had essentially violated Due Process, by effecting discrimination, that had excluded and prevented the Plaintiff from participating in the public hearing as an affected person of the proposed land use application.

XIII. REASONS FOR GRANTING THE PETITION

The Plaintiff respectfully petitions the Supreme Court for Certiorari; owing to the fact that, in the decision to render judgement in favor of the Defendants, the U.S. District Court and the Tenth Circuit Court, had erroneously dismissed the case, without having ruled on the merits of the following facts integral to the complaint:

- I.** The lower courts failed to closely scrutinize and take into account that; Larimer County, in administering quasi-judicial public hearings, enforces a policy of denying family members as interpreters; and that the practice of denying interpreters adversely and disparately affects participants with Limited English Proficiency (**LEP**), and members of a protected class who are of a different race, color and national origin.
- II.** The lower courts failed to recognize, that *State Action* is implied by the Bureau of Land Management (**BLM**), the Office of Mined Land Reclamation (the **Office**), the Mined Land Reclamation Board (the **Board**) and the Division of Reclamation and Mining Safety (**Division**) enforcement of **C.R.S. § 34-32.5-112 (9) (c)**; a statute that had been injudiciously codified into the Bureau of Land Management's (BLM) Construction Materials Rule 1.6.2 (1) (f) (g); and that the anomalous change in statutory intent, had denied standing, by effecting the unlawful exclusion of the Plaintiff and other affected persons as recognized parties to the Division of Reclamation and Mining Safety's (DRMS) permitting process of the Knox Pit mining application. The lower courts failed to recognize that; the seemingly benign, but malicious change in statutory intent, had, and will continue to perpetuate segregation of, and denial of equal protection of the Fourteenth Amendment to, legitimate affected persons and owners of record, with health,

economic, and property interests to protect, just as the anomalous rule had done to the Colorado Parks and Wildlife (CPW), the disabled Plaintiff, and to 12 other individuals who had been denied Due Process by deprivation of Notice.

III. The lower courts failed to closely analyze that; the BLM had applied the law unequally and denied equal protection clause of the 14th Amendment, by refusing to accept the disabled Plaintiff's public comment letter by reason that it was one (1) day late; and to disparately accept the Colorado Parks and Wildlife's (90) day late Agency Comment:

- 1) Even though, the **BLS**, the **Office**, the **Board**, the **Division** and **Larimer County**; had knowingly disadvantaged the disabled Plaintiff, by not sending the Plaintiff mailed Notice of the public comment period, that C.R.S. § 34-32.5-112 (9) (c) clearly required. *emphasis added*.
- 2) Even though, the disabled Plaintiff's public comment letter was postmarked on the day, prior to, the end of the public comment period deadline
- 3) Even though, the **BLS**, the **Office**, the **Board**, the **Division** and **Larimer County**, as decision-makers clothed by State authority, were bound by duty as program administrators and enforcers of the rules, to be cognizant, that the anomalous codification of C.R.S. § 34-32.5-112 (9) (c) into the DRMS Construction Materials rules, 1.6.2 (1) (f) (g) would result in:
 - a) Denial of Due Process
 - b) Denial of expedited designation of '*affected persons*' critical to dissemination of time-sensitive Notice
 - c) Denial of mailed Notice to the disabled Plaintiff and the 12 other affected persons identified by the Adequacy review process

d) Denial of Notice to Colorado Parks and Wildlife (CPW). *emphasis added*

4) Even though, the **BLM** is a recipient of Department of the Interior (DOI)

Federal funding assistance and **BLM** programs affirmative action programs and the **BLM's** denial of affirmative action to accommodate Plaintiff's letter, would result in Plaintiff's exclusion from participation in the program and the denial of program benefits by a Recipient of Federal funding assistance from the DOI.

emphasis added. (pls. see Appendix C)

5) Even though, the **BLM**, the **Board**, the **Office** and the **DRMS** were fully aware that the action to deny accommodation of disabled Plaintiff's 1 day late public comment letter, constituted denial of affirmative action, in violation of

42 U.S.C. § 2000d, 43 C.F.R. § 203 (a) (b) (1) (i) (ii) (iii) (vii) (4) (i) (ii) (iii).

In *Ex parte Virginia*, 100 U.S. 339, 346 (1880) the Court found that: A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. *Id.* At 346-47

IV. The lower courts had erroneously deemed immaterial; Larimer County Planning act of

perjury, which had effected the unjust exclusion and denial of program benefits to the Plaintiff.

V. The lower courts failed to scrutinize that; the Bureau of Land Management, through the Office of Mined Land Reclamation, enforces a discriminatory administrative policy that denies Due Process and meaningful access to program activities and benefits and denies recognized party standing to legitimate owners of record, participating in the land-use permitting process.

I.

A LARIMER COUNTY POLICY THAT DISCRIMINATES ON THE BASIS OF
RACE, COLOR AND NATIONAL ORIGIN

A. The lower courts failed to identify and closely scrutinize, the Larimer County Planning policy that is alleged to have caused harm by denying standing to the Plaintiff and other legitimate owners of record affected by the proposed mining operation.

1. On pages 8 & 9 of Appendix A; the 10th Circuit Court confirms that; the Chairman and the Defendants, justify exclusion of the LEP Plaintiff, and denial of public entity benefits to the same, had been by reason that, the decision-makers and Planning Commissioners in attendance during the hearing, *were enforcing the Planning Commission's rule applicable to all participants - that speakers could not defer their speaking time to others.*
2. The Plaintiff argues that, the Larimer County rule that indiscriminately prohibits deferring time to family members as interpreters during public hearings, constitutes discrimination on the basis of race and ethnicity, and one that effects

adverse disparate impact against LEP members identified with a protected class and individuals belonging to a different race, color and national origin.

The Department of Justice states that, the first step in analyzing any disparate impact case is determining whether the Recipient's criteria or method of administering its programs or activities adversely and disparately affect members of a protected class. (*see appendix D*)

The Plaintiff respectfully brings to the Court's attention the following elements required to prove adverse disparate impact under Title VI:

1) An Ongoing Larimer County Discriminatory Policy and Practice Exist

In Appendix A, pages 8 & 9, the Appellate Court had identified an ongoing Larimer County Planning Commission policy, that is neutral on its face, but one that indiscriminately enforces the no deferring of time rule, on ALL participants, without regard for cultural and language limitations imposed on LEP individuals belonging to a different race, color and national origin. The Planning Commission's indiscriminate imposition of the no deferring of time rule on ALL participants, irrespective of whether the participant identifies with a protected class, evidences an ongoing administrative policy, that, if left unaddressed will continue to effect disparate treatment and exclusion of LEP participants in need of an interpreter or *Next Friend* during public hearings. Unless rectified, the facially neutral policy will continue to perpetuate discrimination based on race, color and ethnicity.

2) Adversity and harm established

Larimer County Planning's imposition of the no deferring of time rule; deprived the Plaintiff of freedom of speech, in a designated public venue, where violations of the First Amendment merit strict scrutiny. The decision-makers of the public forum had no

grounds to deny Plaintiff's request for a family member to help articulate and translate his viewpoint on the proposed land use application; by reason that, the lower courts had clearly affirmed, that there had been no rule in force at the time of alleged conduct; that prohibited deferring of time to others. *More so, the arbiters and decision-makers of the public hearing had no grounds to deny Plaintiff First Amendment right to free speech at the public forum, because the public hearing was created by the State to secure public opinion on the proposed mining application.*

Larimer County Planning's prohibition of an interpreter to help Plaintiff access public entity benefit and to avert Plaintiff's exclusion from participation in the Recipient's program; had violated due process, by denying equal protection of the Fourteenth Amendment and freedom of speech to the Plaintiff, who is an LEP individual and a member of a protected class identified with a different race, color and national origin.

The Larimer County policy at issue and method of administration identified by the 10th Circuit Court on pages 8 & 9 of Appendix A, is a law that is neutral on its face, but one that adversely; harms and discriminates by prohibiting deferred time to members of a protected class; when the prohibition is tantamount, to a denial of meaningful access to Recipient's program and benefits. The Plaintiff argues that the prohibition is arbitrary and perpetuates discrimination causing adverse disparate impact under Title VI and 42 U.S.C. § 2000d.

3) **Disproportionate share of adversity/harm borne, based on race, color and national Origin**

According to the Department of Justice, some assume that, the intentional use of race should be carefully scrutinized, only when the intent is to harm a group or an individual defined by

race, color or national origin. That is not true: the Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), and *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 226 (1995), established that any intentional use of race, whether for malicious or benign motives, is subject to the most careful scrutiny. Accordingly, the record need not contain evidence of "bad faith, ill will or any evil motive on the part of the recipient." *Williams v. City of Dothan*, 745 F. 2d 1406, 1414 (11th Cir. 1984).

Bias, intentional discrimination, and unequal application of the law, are all evidenced by transcripts and video of the hearing, that show, Larimer County denied the Asian-American Plaintiff the benefit of designating time to a Next Friend; but disparately granted the next Caucasian-American speaker the benefit of a Next Friend; even though the circumstances were the same.

- The lower courts failed to scrutinize *transcribed records* and *video* of the hearing, showing *Express classification* and direct evidence of the Defendants' discriminatory intent, where, according to the Department of Justice, *Express classifications* are the clearest form of direct evidence of discriminatory intent.
- If, a Recipient explicitly conditions the receipt of benefits or services on the race, color or national origin of the beneficiary, or directs adverse action to be taken based on race, color and national origin, such a policy or practice constitutes an express classification.

(appendix J)

Simplified:

Video and transcribed records evidence that, intentional discrimination on the basis of race, color and national origin, had been effected against the Plaintiff during the Larimer County public hearing as shown by:

a) Larimer County Planning action to condition awarding of public entity benefit by enforcing an administrative policy that required the LEP Plaintiff to speak in English, at the podium, before the public.

b) Larimer County Planning directed adverse disparate action, by prohibiting the Plaintiff from participating in the hearing, and denying Plaintiff equal access to program benefits, on the grounds that:

- a. The Plaintiff failed to meet a Recipient's administrative policy; that required LEP participants to express comments in English
- b. A Larimer County administrative policy exists that denies family members as an interpreters to LEP participants
- c. A Larimer Planning administrative policy exists that required disclosure of private and HIPAA protected health information; as a requisite to qualify for program benefits during the hearing. *emphasis added*.

4) Causation Established

The court held in Flores v. Arizona, 48F. Supp. 2d 937, 952 (D. Ariz. 1999), "Plaintiff's duty to show that the practice has disproportionate effect requires plaintiff to demonstrate a causal link between the practice and the disparate impact identified." And that to establish a violation of its disparate impact provision, an investigating agency must determine that the impact is causally linked to a Recipient's policy or practice. See Elston v. Talladega Cty. Bd. Of Educ., 997 F. 2d 1394, 1415 (11th Cir. 1993).

Therefore, the Plaintiff's burden of establishing 4th and final element of adverse disparate impact relies heavily on the 10th Circuit Court's affirmation, that the Defendants had indeed prohibited the Plaintiff from deferring time, [*when the need for a family*

member to interpret for the Plaintiff was called for to enable Plaintiff to access program benefits and to avert discrimination and deprivation of clearly established rights to the First and Fourteenth Amendments and 42 U.S.C. § 2000d, which were statutes in force at the time of alleged conduct] by reason that Defendants were following Larimer Planning rule; clearly establishes that the adverse disparate impact at issue is causally linked to the Larimer Planning rule applicable to all participants, that indiscriminately prohibits deferring time to all participants – even to the LEP and all other members of a protected class identified with race, color and national origin.

The Plaintiff asserts; that the lower court's decision to dismiss the case in favor of Larimer County had been in errors+ for the following reasons:

- a) Larimer County is a recipient of Federal funding assistance from the Department of the Interior's Payment in Lieu of Taxes program (PILT) and as such; Larimer County programs are affirmative action programs under jurisdiction of Title 43 Subparts A & B of the Department of the Interior; which proscribe discrimination based on race and disability, in Federally assisted programs of the Department of the Interior. (*appendix C*)
- b) Transcripts and video of the public hearing showed that, the Plaintiff had twice asked the decision-makers of the hearing, if he could give his time to his wife to help articulate his protest of the proposed land-use application.
- c) The Plaintiff is an individual with a recognized disability, and an Asian-American with limited English proficiency (LEP).
- d) The Defendants failed an administrative duty, to avert Plaintiff's exclusion from the public hearing, by deliberately prohibiting a family member as translator' to

help Plaintiff access equal public entity benefit – when doing so would be violating the DOI LEP Guidance to Recipients of Federal funding assistance.

(see appendix D)

- e) Larimer County Planning decision-makers had violated 5 U.S.C. § 552 a(b) by transgressing on Plaintiff's right to privacy by action to compel Plaintiff to involuntarily disclose his speech and health impediments and as a condition to qualify for and access public entity benefits. *(see appendix J)*
- f) The Defendants violated the *Privacy Act* by compelling Plaintiff to disclosure his own protected health information before the public at the public forum and other strangers; being that, the hearing was being telecast simultaneously across the internet.
- g) The Larimer County Department of Public Health and Environment (LCDPHE) was in attendance during the public hearing.
- h) To the best of Plaintiff's understanding; the LCDPHE is an advisory agency of Larimer County Planning and a covered entity under the Health Insurance Portability and Accountability Act (HIPAA).
- i) Larimer County Department of Public Health and Environment (LCDPHE) attendance at the August 15, 2018 Knox Pit public hearing as an Advisory Agency, infers covered entity accountability, in safeguarding Plaintiff's medical information; and that Plaintiff's medical information was protected by HIPAA law against **breach**, at the time of unlawful conduct. *(see appendix K)*
- j) Larimer County Designee's denial of the LEP Plaintiff's request to designate a family member to interpret on his behalf constituted intentional discrimination'

inferring that, Plaintiff's exclusion from the program activity was by reason of State actors acting with an uneven hand and an evil eye; to deny Plaintiff program benefits due.

k) The Chairman, vice chairman and planning commissioners, all denied the Plaintiff's request for an interpreter twice:

a) Even though, 43 C.F.R. § 17.3 (4) (ii) required that; the Chairman, the vice – Chairman and the Planning Commissioners, in their roles as administrators of the public hearing; to have been cognizant of civil rights laws and to have taken affirmative action to overcome limiting participation by persons of a particular race, color or national origin, such as the Plaintiff.

b) Even though, *A Limited English Proficiency Guidance to Recipients of Federal Financial Assistance* Notice from the Department of the Interior found at the Federal register, on the Use of Family Members, Friends, other Program Participants, or Acquaintances as Interpreters; states that, '..... *Where LEP persons so desire, they should be permitted to use, at their own expense, an interpreter of their own choosing*' (Appendix C)

c) Even though, there had been no ground rule that prohibited designating or deferring time during the public hearing.

II.

Denial of Due Process

Bureau of Land Management - Office of Mined Land Reclamation - Anomalous
Codification of Statute Effecting Change in Statutory Intent and Perpetuating Denial of
Standing

- To the best of Plaintiff's understanding, C.R.S. § 34-32.5-112 (9) (c) established 3 groups of owners of record that the Office was required to send Notice of the proposed mining application.
- The owners of record identified by statute were:
 - a. Owners of record of surface mineral rights of affected area
 - b. Owners of record within 200 feet of the affected area
 - c. And, owners of record who may be affected by the proposed mining operation, such as the Plaintiff
- C.R.S. § 34-32.5-112 (9) (c) required that, the Office; *immediately designate* owners of record, who may be affected by the proposed mining operation, so that they may be immediately sent Notice of the proposed mining application, in time and to submit public comment letters that the Office, the Board and the DRMS had required as a condition for recognition as a party to the proceeding.
- Aside from newspaper publications of the proposed mining application; C.R.S. § 34-32.5-112 (9) (c); also required that all 3 groups of owners of record, be notified of the application and the public comment period; by mail.

- Plaintiff alleges, that the seemingly benign addition of section (f) and (g) in the codification of C.R.S. § 34-32.5-112 (9) (c) to DRMS Rule 1.6.2 (1) (f) (g) is ‘the’ anomalous administrative policy, that effects dissociation of affected owners of record that C.R.S. § 34-32.5-112 (9) (c) had originally intended to be accorded equal benefit of expedited dissemination of Notice.
- Simply put:
 Instead of immediately designating said owners of record who may be affected by the proposed mine and *immediately* sending them **mailed Notice** of the proposed mine as **C.R.S. § 34-32.5-112 (9) (c) had intended** – DRMS Rule 1.6.2 (f) (g) instead served as a barrier that contradicted C.R.S. § 34-32.5-112 (9) (c); by deferring designation of said owners of record until January 30, 2018 at the end of the review process when the intent of C.R.S. § 34-32.5-112 (9) (c) was for all 3 owners of record to be notified of the application before the end of the November 8, 2017 public comment period and not at the end of the review process, almost 90 days later on January 30, 2018.
- Plaintiff believes that issues regarding Notice presented by 12 individuals identified in the Adequacy Review, along with, the Colorado Parks and Wildlife’s (CPW) 90-day late Agency comment; supports the Plaintiff’s claim that faulty dissemination of Notice had adversely denied Due Process and standing to the Plaintiff, the 12 other individuals identified in the Adequacy review and the CPW. *emphasis added.*

III

UNEQUAL APPLICATION OF THE LAW – DENIAL OF EQUAL PROTECTION –
DENIAL OF AFFIRMATIVE ACTION - EXCLUSION & DENIAL OF PUBLIC ENTITY
BENEFITS TO A DISABLED

1. The BLM, Office, Board and DRMS Excluded the Plaintiff from a Program that receives Federal funding assistance from the DOI by Denying Notice and program benefits to the disabled Plaintiff and other Affected Persons of the Knox Pit mining application

Sometime on August of 2017, the Plaintiff received a letter from the Larimer County Planning Department informing the Plaintiff that; his property was within the vicinity of the proposed Knox Pit mining operation.

Facts:

- The Plaintiff and his wife are both individuals with recognized disabilities
- The Plaintiff, like many members of the community, does not subscribe to newspaper publications
- The Plaintiff did not learn of the public comment period until a couple of days before the end of the public comment period
- After learning of the November 8, 2017 public comment period deadline only by chance, and the urgency of submitting public comment to qualify as a recognized party with benefits associated, the Plaintiff, immediately sent the DRMS a protest letter postmarked the day before the deadline
- The DRMS refused to accord Plaintiff recognized party status as an affected person; even though the DRMS failed to send the Plaintiff notice of the public comment period

- Repeated appeals for acceptance of the Plaintiff's public comment letter were presented to the DRMS, by the Plaintiff
- The DRMS assured that; the issue of Plaintiff's request for Party status recognition, would be addressed by the Board at the hearing to be held in Denver
- Health problems that impair Plaintiff's ability to drive to Denver and back to Fort Collins, in the dark posed hardship and safety issues to the Plaintiff
- Plaintiff's wife is mobility impaired
- Plaintiff is limited English proficient (LEP)
- The DRMS assured the Plaintiff that request for party status would be addressed at the BLM public hearing in Denver
- The DRMS, the Board and the Office never informed the Plaintiff of the disposition of his appeal for party status recognition
- Despite reassurances, made by the DRMS to the Plaintiff, that consideration of the Plaintiff's appeal for recognized party status recognition, would be addressed at the DRMS Board Hearing in Denver - the DRMS, the Board and the Office, never gave word nor sent Notice in writing, of the disposition, of the Plaintiff's request for recognition as a party.

2. The Plaintiff and other legitimate persons were denied Due Process, and standing as recognized parties to the proposed mining application, by the Office's, the Board's & the DRMS' administrative practice of:

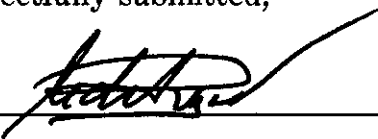
- a) Excluding and denying program benefits to the Plaintiff and other legitimate affected persons of the proposed land use application

required to affected Persons; resulting in denial of access to Recipient's program and benefits associated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: AUGUST 16, 2021