No. 22-1242

IN THE

# Supreme Court of the United States



JON McCLELLAND,

*Petitioner,*

v.

DR. JACK CHAPMAN, MD.

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

## PETITION FOR A WRIT OF CERTIORARI

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June 23, 2023

## QUESTIONS PRESENTED

1. Is a *Complaint* a cognizable 'three-party' Contract (simple or specialty, and ultimately of record, i.e. judgment), between the State and the parties, a substantive benefit and property interest created by state law, and does that Contract, including the State's rules, regulations, statutes, ordinances, resolutions, and policies or procedures,– expressed or implied – (adhesion contract clauses) rise to the level of a legitimate claim of entitlement protected by the US Constitution's 14th Amendment due process clauses, both procedural and substantive, and the 5th Amendment's protection of property without due process?

2. Since *New York State Rifle and Pistol Ass'n v. Bruen* (2022), how does this Court reconcile and continue to justify the constitutional construction and congressional intent found in *Pierson v. Ray* (1967), *Stump v. Sparkman* (1978), *inter alia*, for judicial immunity under 42 USC § 1983 considering *Randall v. Brigham* (1868); and the application of 17 *Stat.* 13, to include judges as proper parties for civil liability within the sets as defined by "That any person who" found therein, and "Every person who ..." found within 42 USC § 1983?

3. In protecting Petitioner's procedural and substantive due process rights under the US Constitution's 14th Amendment protected, the questions fairly included herein are:

(a) was Petitioner's Colorado Rule of Civil Procedure ("CRCP") Rule 59 *Motion to Reconsider* timely filed?

(b) was Petitioner's Colorado Rules of Appellate Procedure ("CAR") 4(a) *Notice of Appeal* timely filed?

(c) Is the use of the word 'terminated' or 'mailing' in CAR 4(a)(3) and (5), respectively *void for vagueness*, with respect to the calculation of time with respect to CRCP Rules 59 and 58?

## CERTIFICATE OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of SUP.CT.R. 14.1(b)(iii):

- *McClelland v. Chapman*, No. 2022SC808, Supreme Court of Colorado. Petition for Writ of Certiorari denied March 27, 2023.
- *McClelland v. Chapman*, No. 2022CA872, Colorado Court of Appeals, Order to Dismiss for lack of jurisdiction pursuant to Order to Show Cause, September 12, 2022.
- *McClelland v. Chapman*, No. 21CV26, District Court, Pueblo County, Colorado. Case dismissed March 3, 2022; Judgment entered March 11, 2022; Motion to Reconsider denied April 21, 2022.

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## I. PETITION FOR WRIT OF CERTIORARI

Jon McClelland petitions the Court for a *Writ of Certiorari* to review and answer the *Questions Presented* and the dismissal of McClelland's appeal by the Colorado Court of Appeals pursuant to an Order to Show Cause for filing the *Notice of Appeal* out of time, and the denial by the Colorado Supreme Court of McClelland's *Petition for Writ of Certiorari* to the Colorado Court of Appeals.

## II. OPINIONS BELOW

The Colorado Supreme Court's Order denying McClelland's Petition for Writ of Certiorari is attached at Appendix A3. The Colorado Court of Appeal's unpublished Order dismissing McClelland's appeal is attached at Appendix A5. The Colorado Court of Appeals' Order to Show Cause is attached at Appendix A6.

## III. JURISDICTION

The State of Colorado entered its Order denying McClelland's *Petition for Writ of Certiorari* on March 27, 2023. *See* Appendix A3. This petition is timely filed pursuant to SUP.CT.R. 13.1.

Possibility of review by all courts within the State have been exhausted. This Court has jurisdiction under 28 USC § 1257(a).

Pursuant to SUP.CT.R. 14.1(e)(v) and 29.4(c), 28 USC §2403(b) may apply.

## IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, § 10. Clause 1 of the United States ("US") Constitution provides: "No State shall enter

into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The Fifth Amendment to the US Constitution provides, in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law; ..."

The Fourteenth Amendment § 1 to the US Constitution provides, in relevant part: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

17 *Stat.* 13 (Ku Klux Klan Act, The Enforcement Act) Be it enacted in the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress ; such proceeding to be prosecuted in the several district or circuit courts of

the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

42 USC § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or 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 purposes 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.

In pertinent parts:

COLORADO REVISED STATUTES ("CRS")

§ 24-12-101.

I [name], do [select swear, affirm, or swear by the everliving God] that I will support the constitution of the United States, the constitution of the state of Colorado, and the laws of the state of Colorado, and

will faithfully perform the duties of the office of [name of office or position] upon which I am about to enter to the best of my ability. If choosing to swear an oath, the person swearing shall do so with an uplifted hand.

COLORADO RULES OF APPELLATE PROCEDURE ("CAR")

Rule 4 – Appeal as of Right - When Taken

"(a) **Appeals in Civil Cases.** This subsection applies to appeals in civil cases other than appeals filed pursuant to C.A.R. 3.1, 3.2, 3.3, 3.4, and 4.2.

"(1) **Time for Filing a Notice of Appeal.** Except as provided in C.A.R. 4(d), the notice of appeal required by C.A.R. 3 must be filed with the appellate court with an advisory copy served on the lower court within 49 days after entry of the judgment, decree, or order being appealed.

* * *

"(3) **Effect of a C.R.C.P. 59 Motion on the Deadline for Filing a Notice of Appeal.** The running of the time for filing a notice of appeal is terminated as to all parties when any party timely files a motion in the lower court pursuant to C.R.C.P. 59, and the time for an appeal under section (a)(1) of this Rule runs for all parties from the timely entry of any order disposing of the last such timely filed motion under C.R.C.P. 59 or the expiration of the time for ruling on such a motion pursuant to C.R.C.P. 59(j).

"The lower court continues to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and is timely ruled on or is deemed denied under operation

of C.R.C.P. 59(j). All proceedings in the appellate court are stayed while the motion is pending in the lower court.

* * *

"(5) Entry Defined. A judgment or order is entered within the meaning of section (a)(1) and (a)(4) when it is entered pursuant to C.R.C.P. 58. If notice of the entry of the judgment or order is transmitted to the parties by mail or E-Service, the time for the filing of the notice of appeal runs from the date of the mailing or E-Service of the notice."

COLORADO RULES OF CIVIL PROCEDURE ("CRCP")

Rule 54 – Judgments; Costs

* * *

"(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the

rights and liabilities of all the parties."

Rule 58 – Entry of Judgment

(a) **Entry.** Subject to the provisions of C.R.C.P. 54(b), upon a general or special verdict of a jury, or upon a decision by the court, the court shall promptly prepare, date, and sign a written judgment and the clerk shall enter it on the register of actions as provided in C.R.C.P. 79(a). The term "judgment" includes an appealable decree or order as set forth in C.R.C.P. 54(a). The effective date of entry of judgment shall be the actual date of the signing of the written judgment. The notation in the register of actions shall show the effective date of the judgment. Entry of the judgment shall not be delayed for the taxing of costs. Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed or e-served by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared.

Rule 59 – Motions for Post-Trial Relief

(a) **Post-Trial Motions.** Within 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow pursuant to a request for an extension of time made within that 14-day period, a party may move for post-trial relief including:

(1) A new trial of all or part of the issues;
(2) Judgment notwithstanding the verdict;
(3) Amendment of findings; or
(4) Amendment of judgment.

Motions for post-trial relief may be combined or asserted in the alternative. The motion shall state the ground asserted and the relief sought.

* * *

(j) **Time for Determination of Post-Trial Motions**. The court shall determine any post-trial motion within 63 days (9 weeks) of the date of the filing of the motion. Where there are multiple motions for post-trial relief, the time for determination shall commence on the date of filing of the last of such motions. Any post-trial motion that has not been decided within the 63-day determination period shall, without further action by the court, be deemed denied for all purposes including Rule 4(a) of the Colorado Appellate Rules and time for appeal shall commence as of that date.

(k) **When Judgment Becomes Final**. For purposes of this Rule 59, judgment shall be final and time for filing of notice of appeal shall commence as set forth in Rule 4(a) of the Colorado Appellate Rules.

## V. STATEMENT OF THE CASE

### Chronology.

McClelland filed his complaint for *res ipsa loquitur* negligence on May 19, 2021 (R.1).

For grounds, not on appeal here, the trial court dismissed the case on March 3, 2022 (R.114).

On March 10, 2022, Defendant filed a *Motion for Entry of Judgment Pursuant to CRCP 58* (R.124).

*Entry of Judgment Pursuant to CRCP 58(a)* was Ordered by the Court March 11, 2022 (R.126).

McClelland filed a *Motion to Reconsider, Motion to Vacate Dismissal, and Objection and Preservation of Issues for Appeal* ("Motion to Reconsider") (R.127) on March 21, 2022.

The trial court denied the *Motion to Reconsider* (R.175) on April 21, 2022.

An exhaustive *Objection for the Record* was filed by McClelland on May 4, 2022 (R.178).

The *Notice of Appeal* was filed in the Colorado Court of Appeals ("COA") May 31, 2022.

An 'Order to Show Cause' was filed by the Colorado Court of Appeals on August 16, 2022, and received by McClelland August 19, 2022, *See* App. A6.

McClelland filed his *Response to Order to Show Cause* on August 23, 2022.

The COA dismissed the McClelland's appeal for lack of jurisdiction on September 12, 2022.

McClelland filed a *Petition for Rehearing* September 21, 2022, which was denied by the COA October 5, 2022.

McClelland filed his Petition for *Writ of Certiorari* to the Colorado Supreme Court October 27, 2022, and the Petition was denied March 27, 2023, App. A3.

**The Trial Court Misinterpreted and Misapplied the Colorado Revised Statutes and Case Law.**

After the trial court dismissed McClelland's complaint on grounds wholly inconsistent with the Colorado Revised Statutes and the applicable case law, See App. A40 (R.114), McClelland filed a *Motion to Reconsider, Motion to Vacate Dismissal, and Objection and Preservation of Issues for Appeal* ("CRCP Rule 59 Motion to Reconsider), *See*, App. A11 (R.127). After *Chapman* filed a Response (R.161), McClelland filed his second Reply captioned PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO RECONSIDER, ET. AL.

In a nutshell, the trial court erred as to:

1. Although Plaintiff's Complaint's single claim for relief was for negligence based on *res ipsa*

*loquitur*, Defendant and the trial court kept framing the argument as a medical negligence case;

2. *res ipsa loquitur* negligence cases are not required to have a *Certificate of Review*;

3. if the trial court were to decide that *res ipsa loquitur* is not applicable in the case, then defense should motion for an Order compelling Plaintiff to provide a *Certificate of Review*, and at the least, the trial court, *sua sponte* should issue forth an Order for the same – neither happened;

4. as such, the trial court dismissed McClelland's Complaint for failure to provide the *Certificate of Review*, notwithstanding that the statute and case law cited do not support the trial court's position.

Appendix pp. A11 ¶¶4-19 (R.128-139) are included and incorporated here, *inter alia*, as foundation to show pattern of conduct of the lower courts' deliberate, wanton and willful due process violations that infringe on the procedural and substantive due process issues raised in the *Questions Presented*.

**The Colorado Court of Appeals Misinterpreted and Misapplied the Colorado Rules of Civil Procedure**

The COA dismissed Petitioner's appeal, ostensibly, as the Court held in its order to show cause, that McClelland had not 1) filed his *Notice of Appeal* timely, and 2) had not timely filed his post-judgment CRCP Rule 59 *Motion to Reconsider*. The COA's position is that, "It appears that a final,

appealable judgment was entered on March 3, 2022." *See*, App. A6; citing *Widener v. District Court*, 200 Colo. 398, 615 P2d 33 (1980). Presumably, the portion of *Widener* the Court is referring to states,

> 3. **Notice of Appeal – Failure to File – Time – Deprivation of Jurisdiction — Denial of Review.** Failure to file a notice of appeal within the prescribed time deprives the appellate court of jurisdiction and precludes a review of the merits.

Continuing, the *Order to Show Cause* further states, "The court notes that the May 11, 2022 order entered [the Entry of Judgment] under C.R.C.P. 58 appears to be unnecessary . . . "

However, as stated in Petitioner's *Response to Order to Show Cause* ¶11 and more exhaustive *Petition for Rehearing* ¶9(c),

> "CRCP Rule 59 clearly states that the triggering event that starts the clock on the 14-day time-line to file a Motion to Reconsider/Motion for new trial, starts from the entry of judgment pursuant to CRCP Rule 58. Only ten days had elapsed, and the filing is therefore timely. "C.R.C.P. 58(a), however does control the date of entry of judgment for the purposes of a C.R.C.P. new trial motion." *Moore & Co. v. Williams*, 672 P2d 999 (Colo 1983), citing *Poor v. District Court*, 190 Colo. 433, 549 P2d 756 (1976)"

*Poor*, held that, if the parties are not present when judgment is entered, the time limit for filing a motion for new trial begins when the notice of judgment is mailed to the parties. 549 P2d at 758.

*See*, also *Bonanza v. Durbin*, 696 P2d 818, 821 (Colo. 1985).

> CRCP Rule 58(a) states, "...The effective date of entry of judgment shall be the actual date of the signing of the written judgment. ...Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed or e-served by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared."

With CRCP Rules 58 and 59 being unequivocal on this point, "the time for filing a rule 59 motion is specifically triggered either by entry of judgment in the presence of the parties or by mailing of notice of the court's entry of judgment if all parties were not present when judgment was entered." *Littlefield v. Bamberger*, 10 P3d 710 (Colo. App. 2000); See, also *Wilson v. Fireman's Fund Ins. Co.*, 931 P2d 523 (Colo. App. 1996).

To recap, with respect to the issue as to whether the CRCP Rule 59 *Motion to Reconsider* was timely:

1. CRCP Rule 58 *Entry of Judgment* was signed March 11, 2022 (R.126);

2. CRCP Rule 59 *Motion to Reconsider* was filed March 21, 2022 (R.127);

3. CRCP Rule 59 imposes a 14-day time limit to file the *Motion to Reconsider*;

4. Only 10 days had elapsed, and therefore the COA's ruling in its Order, App. A6 that, "the post-trial motion under C.R.C.P. 59 was filed untimely from the March 3, 2022 order and did

not extend the time to file the notice of appeal." is incorrect;

5. The COA is using the March 3, 2022 date that the case was dismissed (R.114) instead of the March 11, 2022 date when the *Entry of Judgment* (R.124) was signed as required under CRCP Rule 59.

Now that timeliness of the *Motion to Reconsider* has been established, McClelland now addresses the timeliness of his *Notice of Appeal*.

CAR 4(a)(1) imposes that, "the notice of appeal required by C.A.R. 3 must be filed with the appellate court with an advisory copy served on the lower court within 49 days after entry of the judgment, decree, or order being appealed."

The date of the judgment being appealed, as previously stated, from the date of *Entry of Judgment*, is March 11, 2022. The Rule 59 *Motion to Reconsider* was filed March 21, 2022. The COA's Order denying the CRCP Rule 59 *Motion to Reconsider* is dated April 21, 2022. The *Notice of Appeal* was timely filed into the COA May 31, 2022 – 40 days later.

It is at this point we bifurcate into two issues of Constitutional question.

1. **CAR 4(a)(3) is Unconstitutionally Void for Vagueness.** At first glance, if one were to take the 40-days between the Order of denying the *CRCP Rule 59 Motion to Reconsider* and add it to the 10 having elapsed from the *Entry of Judgment* to the filing of the *CRCP Rule 59 Motion to Reconsider* it adds up to 50 days, and appears as though the COA does not, in fact, have jurisdiction; however, CAR 4(a)(3), states,

> **(3) Effect of a C.R.C.P. 59 Motion on the Deadline for Filing a Notice of Appeal.** The running of the time for filing a notice of appeal is **terminated** as to all parties when any party timely files a motion in the lower court pursuant to C.R.C.P. 59, and the time for an appeal under section (a)(1) of this Rule **runs** for all parties from the timely entry of any order disposing of the last such timely filed motion under C.R.C.P. 59 or the expiration of the time for ruling on such a motion pursuant to C.R.C.P. 59(j).

McClelland asserts that 'terminated' can be read to mean 'exterminated,' in that, the time before one files a CRCP Rule 59 *Motion to Reconsider* no longer counts toward the 49-day limit. There is no mention of tolling in the rule. Further, 'runs' is not qualified as '*continues* to run,' as such CAR 4(a)(3) is ambiguous and deprives Petitioner of substantive due process protected under the 14th Amendment to the US Constitution. The phrasing, to eliminate any ambiguity, should have been drafted,

> ...The running of the time for filing a notice of appeal is terminated [**and tolled**] as to all parties when any party timely files a motion in the lower court pursuant to C.R.C.P. 59, and the time for an appeal under section (a)(1) of this Rule [**continues to run**] for all parties from the timely entry of any order disposing of the last such timely filed

motion under C.R.C.P. 59 or the expiration of the time for ruling on such a motion pursuant to C.R.C.P. 59(j).

2. **The COA failed to take into consideration CAR 4(a)(5), and deprives McClelland of substantive due process.** CAR Rule 4(a)(5) states,

> (5) Entry Defined. A judgment or order is entered within the meaning of section (a)(1) and (a)(4) when it is entered pursuant to C.R.C.P. 58. If notice of the entry of the judgment or order is transmitted to the parties by mail or E-Service, **the time for the filing of the notice of appeal runs from the date of the mailing or E-Service of the notice.** [Emphasis added]

As stated in McClelland's *Petition for Rehearing* with respect to the COA's *Order to Show Cause*,

> As McClelland is not an attorney, and is not represented by an attorney, he does not have access to the Colorado Courts' E-Filing system, therefore notice of the *Entry of Judgment* was transmitted to him by mail. The Rule 58 Order disposing of the Rule 59 *Motion to Reconsider* may have been filed April 21st, 2022 at 4:12 PM (R. 175), but, at the same time, there was an *Order for Bill of Costs* filed April 21st, 2022 at 4:18 PM (R. 166). When both of these documents arrived in the mail on April 25th, 2022, attached to them was a

> notice that the documents had been submitted to the E-File system at 18:30:06 MDT, See Exhibit A [*as attached to the original Petition for Rehearing, not attached to this Petition for Writ of Certiorari*]. This means that these documents would have been in possession of the Integrated Colorado Courts E-Filing System ("ICCES") which mails E-Filed pleadings via USPS first class mail, later than 18:30:06 MDT, and placed into the US Mails on April 22nd, 2022 — **Calculating 49 days, not 50**. "Where notice of entry of judgment is mailed to only one party in contravention of C.R.C.P. 58(a), the time provided by section (a) of this rule for filing a post-trial motion commences from the date that the notice is mailed by that party to the party subsequently moving for post-trial relief." *Padilla v. D.E. Frey & Co., Inc.*, 939 P2d 475 (Colo. App. 1997).

Paraphrasing *Padilla*, the time for filing the CRCP Rule 59 *Motion to Reconsider* commences from the date that the notice was mailed to McClelland.

As the ICCES filing system shows that the *Entry of Judgment* was submitted into that system at "Fri Mar 11 18:30:09 MST 2022," ICCES could not have placed the physical document into the USPS on March 11, 2022.

In the same pattern of conduct as ICCES did with respect to the *Order for Bill of Costs* and the

denial of the *Motion to Reconsider*, the *Entry of Judgment* could not have been mailed by USPS any earlier than March 12, 2022, and, since March 12th was a Saturday, more likely than not, placed into the USPS on March 14, 2022, **thereby deleting at least one day, if not three, from the 10 days having been counted** from the date of the *Entry of Judgment* to the filing of the *CRCP Rule 59 Motion to Reconsider*. Which means that the *Notice of Appeal* was timely filed.

## VI. REASONS FOR GRANTING THE WRIT

**Filing a Complaint Creates a 'third-party' contract with the State.**

Inasmuch as it's true within the *Federal* courts as *State* courts, the reality of filing a civil case constitutes a 3-party contract – simple, or under seal. All of the elements exist: *offer* – Plaintiff: "Would you accept my Complaint to resolve a dispute against Defendant?"; *acceptance* – State: "Sure."; *valuable consideration* – State (to Plaintiff): "You need to pay a fee.", and Plaintiff pays the filing fee; continuing *valuable consideration and performance* constitutes the resolution of the dispute (summary or default judgment, resolution on the merits, dismissal, etc); and *time* is regulated by various statutes, i.e. statutes of limitations and repose, *Case Management Order*, etc. The third-party is Defendant. The contact clauses between the parties, besides any implied or expressed contract and issues of the case itself, also include relevant statutes; ordinances; resolutions; policies, formal and informal; regulations; rules, e.g. rules of civil procedure, bankruptcy, probate, etc.; and the relevant case law that clarifies, expands and contracts

the scope of authority, constitutionality, and applicability of the same within the relevant context ("the State's laws"). As such, this contractual framework creates a protect property interest and benefit in the State's non-discretionary application of *the State's laws*.

Resolution of the federal issue, here, begins with a determination of what it is that state law provides. In the context of the present case, the central state-law question is whether Colorado law gave McClelland an expectation and right to properly and fully apply the State's laws in McClelland's trial court case, on appeal into the COA and the Petition for Writ of Certiorari to the Colorado Supreme Court.

Citing from *Castle Rock v. Gonzales*, 545 US 748 (2005),

> The procedural component of the Due Process Clause does not protect everything that might be described as a "benefit": "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 US 564, 577 (1972). Such entitlements are " 'of course, ... not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " *Paul v. Davis*, 424 US 693, 709 (1976) (quoting *Roth, supra*, at 577); see also *Phillips v. Washington Legal*

*Foundation*, 524 US 156, 164 (1998).

* * *

> Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. See, e.g., *Kentucky Dept. of Corrections v. Thompson*, 490 US 454, 462–463 (1989).
>
> * * *
>
> Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 US 1, 9 (1978) (emphasis added) (quoting *Roth*, *supra*, at 577); cf. *United States ex rel. TVA v. Powelson*, 319 U. S. 266, 279 (1943).

In *Perry v. Sindermann*, 408 US 593, 601, this Court said that a "person's interest in a benefit is a 'property' interest for due process purposes if there are ... rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." This Court recognized that the "wooden distinction" between "rights" and "privileges" was not determinative of the applicability of procedural due process, and that a property interest may be created by statute, as well as by contract. *Id.* at 408 US 571.

To determine what process is constitutionally due, this Court has generally balanced three distinct

factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.
> *Mathews v. Eldridge*, 424 US 319, 335 (1976).

It is self-evident that McClelland has a significant private interest in having *the State's laws* properly applied; erroneous deprivation of such interest forecloses having the case heard on its merits, and there are no additional or substitute procedural safeguards, if, as here, the COA and the Colorado Supreme Court follow suit and fail to properly apply *the State's laws* as well; and the State has no interest in denying McClelland's procedural and substantive due process expectations and reliance in violation of his valid security interest in *the State's laws*. The substantive component of the 14th Amendment forbids certain official actions altogether, no matter what the circumstances and no matter what process is followed. Even if the actions are made in good faith and believed they were acting properly, denying the procedural due process of the State's laws to McClelland triggers liability under the substantive portion of the 14th Amendment. Further, these acts by the COA simply cannot be claimed as negligent[1], as three judges concurred in the Order dismissing McClelland's appeal.

[1]Daniels v. Williams, 474 US 327 (1986)

Restating the obvious,

> The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. No decision of this Court before *Parratt* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was "intended to secure the individual from the arbitrary exercise of the powers of government,' " *Hurtado v. California*, 110 US 516, 527 (1884). See also *Wolff v. McDonnell*, 418 US 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 US 114, 123 (1889)"); *Parratt*, at 451 US 549. By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., *Rochin*, it serves to prevent governmental power from being "used for purposes of oppression,"

*Murray's Lessee* 474 US 332 v. *Hoboken Land & Improvement Co.,* 18 How. 272, 59 US 277 (1856) (discussing Due Process Clause of Fifth Amendment)

In *Pembaur v. City of Cincinnati*, 475 US 469 (1986), this Court said,

> In *Monell v. New York City Dept. of Social Services* the Court concluded that municipal liability under 42 USC §1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal [policy of some nature . . . ]". The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

In *City of St. Louis v. Praprotnik*, 485 US 112 (1988), this Court said,

> Two Terms ago, in *Pembaur, supra*, we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. Although the Court was unable to settle on a general formulation, JUSTICE BRENNAN's opinion articulated several guiding principles. First, a majority of the Court agreed that municipalities may be held liable under §1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered." *Id.* at 475 US 480. Second, only those municipal officials who have "final

> policymaking authority" may by their actions subject the government to §1983 liability. *Id.* at 475 US 483 (plurality opinion). Third, whether a particular official has "final policymaking authority" is a question of state law. *Ibid.* (plurality opinion). Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business. *Id.* at 475 U. S. 482-483, and n. 12 (plurality opinion).

These pronouncements are all well and good when municipalities are involved, but what relief exists when it's the Courts of a State that are deliberately abusing and ignoring fundamentally protected rights, and *not pursuant to official municipal, county or state policy of some nature*; or by a final *policymaking* authority? How is McClelland any less aggrieved? Is it honestly within the intent of the 5th and 14th Amendments that Judges are allowed to run amok with no consequences? The violation of substantive and procedural due process, regardless of how incurred, by whom, or under what policy – or no policy at all – extracts the same result. However this Court chooses to put makeup on the pig; it's still a pig.[2] Twisting logic, using logical fallacies, or framing

[2]See, *Korematsu v. US*, 323 US 214 (1944)(Incarcerating US citizens in concentration camps as a military necessity. The whole point of the Constitution is to protect the people from those very infringements of unbridled power); *Betts v. Brady*, 316 US 455 (1942) (Denied counsel to indigent defendants prosecuted by a state); after *Grant* lost *Hepburn v. Griswold*, 75 US 603 (1870)(US government is authorized to coin money,

but that power was distinct from the power to make paper legal tender, which was not authorized under the US Constitution), he packed the court with two additional justices with *Knox v. Lee / Parker v. Davis*, 79 US 457 (1870) (*Legal Tender Cases*)(Pursuant to this horrible decision, today's dollar has the purchasing power is less than five cents of the value of 1960. Inflation is not 'transitory', it is a hidden tax on the wealth of the nation and deprives the *People* of property without just compensation.) magically overturning *Griswold* [nothing like packing the court to get your political agenda pushed through, right? It's almost as though the plain language of Art 1 § 10 is too vague to understand, in that, "No State shall ... make any Thing but gold and silver Coin a Tender in Payment of Debts", so much for "In expounding the Constitution of the United States, every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added." *Holmes v. Jennison*, 39 US 570, 571 (1840)]; *Roe v. Wade*, 410 U.S. 113 (1973) (Life, liberty and property, unless of course you are still in the womb, having no rights to Life in the name of a 'right to privacy'); *Dred Scott v. Sandford*, 60 U.S. 393 (1856)(pre-14th, so it's possible to get a pass on that one); *Buck v. Bell*, 274 U.S. 200 (1927)(Eugenics sterilizing the infirm); *Bowers v. Hardwick*, 478 U.S. 186 (1986)(No constitutional protection for sodomy); *Bush v. Gore*, 531 U.S. 98 (2000)(Stopping a recount on a Presidential election); *Citizens United v. FEC*, 558 U.S. 310 (2010)(Corporations are people and as such Corporations have politically protected free speech and can spend as much money as they want to sway an election. The problem being, See, *Spring Valley Waterworks v. Schottler*, 110 U.S. 347 (1884) and *Hale v. Henkel*, 201 U.S. 43 (1906). Corporations are creatures of government and can be regulated any way the Executive sees fit. On one hand, this Court protects political speech, yet, when the Governors moved to abrogate liberty in their respective States using 'mandates' on the laughable excuse of the COVID19 'pandemic', the Courts of the United States, *in toto*, did nothing to protect the corporations' property rights, right to assemble, right to petition for redress of grievance [even

and couching language[3] to protect the Court judges responsible for the deprivation of *the State's laws* against McClelland is tantamount to misprision.

Without having to incur the exorbitant costs and years of protracted litigation associated with filing for declaratory and injunctive relief in the Federal District Courts, what compels a State District Court, the Court of Appeals, or a State Supreme Court to actually follow the law? Apparently, nothing. Judges enjoy absolute immunity for judicial actions, and qualified immunity for administrative acts; States can't be sued, as a general rule, because of the 10th Amendment. In Colorado, a violation of a rule of civil procedure does not create a private cause of action. *Weiszmann v. Kirkland and Ellis*, 732 F. Supp. 1540 (D. Colo. 1990). As such, as here, McClelland is deprived of *the State's laws* at the trial court level, the COA, and the Colorado Supreme Court, and the

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the Courts were closed and wouldn't accept pleadings], once again, as in *Korematsu*, government over-reach was tacitly and explicitly allowed, and the US Constitution, and those of the several States, went right down the toilet.); *Smith v. Doe*, 538 US 84 (2003)(Because the Alaska Sex Offender Registration Act is nonpunitive, its retroactive application does not violate the *Ex Post Facto* Clause. McClelland suggests that the Justices of this Court, as a good-faith offering, place their children and grandchildren into the *National Sex Offender Registry* just to see how nonpunitive these sex offender registries actually are.); *ad infinitum*.

[3][P]laintiffs must prove that governmental policy or custom was "the moving force" behind the unconstitutional conduct of municipal employees. *Monell*, 436 US at 694. A plurality of the court later emphasized that "[a]t the very least, there must be an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 US 808, 823 (1985).

complete corpus of law, as it currently rests, provides no enumerated protected property interest associated with his reliance and expectation of procedural and substantive due process.

As an argument furthering this position, McClelland relied upon the trial court's issuance of the CRCP Rule 58 *Entry of Judgment* in calculating when the *Notice of Appeal* needed to be filed. The COA dismissed because, as it sees it, McClelland is out of time and lacks jurisdiction; however:

> In different factual contexts, our supreme court has held that counsel's reasonable reliance upon a court's ruling, albeit an erroneous ruling, justifies a relaxation of otherwise mandatory rules. The underpinning of these decisions, as I read them, is that it is unfair to penalize counsel for their good faith reliance upon the statements and rulings of a trial court, even when the court is wrong. See *Converse v. Zinke*, 635 P.2d 882 (Colo.1981) (trial court's statement on the record that 15 days rather than 10 days are allowed for filing post-judgment motions constitutes a "unique circumstances" exception to the mandatory language for timing of motions under C.R.C.P. 6(b)); *Tyler v. Adams County Department of Social Services*, 697 P.2d 29 (Colo.1985) (counsel's failure to perfect an appeal in reliance upon trial court's erroneous statement that a motion for a new trial was unnecessary constituted excusable neglect justifying relief under C.R.C.P. 60.) *Nienke v. Naiman Group, Ltd.*, 857 P.2d 446 (Colo. 1993) Judge

ROTHENBERG concurring in part and dissenting in part.

**The Court's Methodology With Respect to Analyzing Constitutional Construction and Congressional Intent is Wholly Inconsistent**

This is not a bifurcation error in logic. With sentential and predicate logic, there are only two methods to interpret the written word. For our purposes here, I use the nomenclature of *positive-explicit* and *negative-implicit*. Either the drafters of the Constitution, and those of the Amendments, and the Laws of this land mean only what they say, or they don't. Under the umbrella of *positive*, this Court has held, "The courts must give effect to the intention of Congress as manifested by the statute. They cannot make, but can only declare, the law." *Burnett v. United States*, 116 U.S. 158 (1885). This Court is simply not allowed to put language into the law. It is not for you to assume what they meant. Strict positive application of the law is the ONLY method that is acceptable; anything else is legislating from the bench. If it is not written into the law, and created by this Court, as in *Roe*, you are wrong. As such, it is either left to Congress to change the law, or leave it to the States to enact whatever deficiencies that may exist. It is NOT your job to save a statute; if a statute requires interpretation other than the plain reading, then it's *void for vagueness*, and this Court should strike it down, and send it back for a re-do. If the States' General Assemblies or Congress don't like it, too bad; they should be drafting their laws succinctly and in such a manner that marginally intelligent, 100 IQ, 6$^{th}$ graders should be able to understand.

Under the umbrella of negative, "A long established and steadily adhered to principle of constitutional construction precludes a judicial tribunal from holding a legislative enactment, federal or state, unconstitutional and void unless it is manifestly so. *Halter v. Nebraska*, 205 U.S. 34." *Halter* is wrong. It is understood that life, and legislative construction and intent comes with nuance, and the application of the US or respective State Constitutions against government actions, pronouncement and edicts does not come without intellectual sacrifice; however, as it was best said,

> To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. * * * So also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *US v. Fisher*, 2 Cranch 358, 6 US 399; *Doggett v. Railroad Co.*, 99 U. S. 72.

There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption.

Such considerations give weight to that line of remark of which *People v. Purdy*, 2 Hill 35, (cited in *Lake County v. Rollins*, 130 US 662 (1889)) affords an example. There, Bronson, J., commenting upon the danger of departing from the import and meaning of the language used to express the intent and hunting after probable meanings not clearly embraced in that language, says:

"In this way, the constitution is made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a mere dead letter, and that too where the language is so plain and explicit that it is impossible to mean more than one thing, unless we lose sight of

> the instrument itself and roam at large in the fields of speculation." Words are the common signs that mankind make use of to declare their intention to one another, and when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation. *Lake County v. Rollins*, 130 U.S. 662, 671 (1889)

Why does this matter? Ignoring *Randall*, *Pierson v. Ray*, 386 US 547 (1967) sustains the concept of judicial immunity and *Stump v. Sparkman* 435 US 349 (1978) holds harmless any act, including criminal, by a judge as long as he has jurisdiction over the matter.

In addition to Mr. Justice Douglas' correct dissenting opinion in *Pierson*, 386 US at 559, incorporated here in its entirety, "I do not think that all judges, under all circumstances, no matter how outrageous their conduct, are immune from suit under 17 *Stat.* 13 , 42 USC §1983 ("1983"). The original *Ku Klux Klan Act, 17 Stat. 13* made no mention of judges, that, this Court must agree. § *1983* explicity states, "...except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, ..." Which explicitly says that there are actions brought against judges under this Act, and then the Act continues to make exception for "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." § 1983 makes no mention of immunity for judges for monetary relief.

Judicial immunity was first recognized in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868). In its opinion, the Court stated that a judge was not liable

for judicial acts unless they were done "maliciously or corruptly." If this Court wants to look at *history and tradition*, as it did in *New York State Rifle and Pistol Ass'n v. Bruen*, 142 S.Ct. 2111, how does this Court reconcile the expansion of an unenumerated right of judges to impenetrable immunity? With particularity, the addition of language in §1983 that isn't there.

As modern examples of what is painfully wrong with the judiciary in this country, which desperately needs to be cured, is found in the case of *LM v. Town of Middleborough, et. al*, US District for District of Massachusetts, 1:23-cv-11111-IT. Radical socialism, communism, and retarded democrat philosophy aside, Judge Indira Talwani, stated in her blatantly incorrect *Memorandum & Order* dated June 16, 2023, "School administrators were well within their discretion to conclude that the statement 'THERE ARE ONLY TWO GENDERS' may communicate that only two gender identities–male and female–are valid, and any others are invalid or nonexistent," The level of arrogance and ignorance among the judiciary is mind-blowingly stupefying, not to mention her obvious lack of understanding of the law and of the principles of the 1st Amendment. It is a matter of biological fact that there are only two genders, anything else IS nonexistent. This represents the level of moronic ideology that spews forth from the judges in this country on a daily basis, and yet, still held harmless for even the most inane pronouncements. Exactly what you would expect from an Obama appointment; and it took a 9-0 ruling from this court in *Tyler v. Hennepin County*, 21-166 (05/25/2023), to finally obliterate home equity theft by the States. How many judges in the lower courts, throughout the nation, in those States that made use

of that practice, clearly lacked any understanding of the principles of the law that this court, amazingly, easily saw as an unlawful taking? How many lives ruined? How many lives bankrupted? How many people left homeless? Still, this court rules that judges should remain immune from civil liability.

So which is it? Does "every person" mean *every person*, or not? Does "Any person" mean *every person*, or not? Or does any construction fail to include the judiciary? What legislative construction would this Court find acceptable that qualifies that judges are included within the set of persons liable for suits for monetary damages? If *every person* taken in a literal sense, and a positive-explicit interpretation with no judicial legislation, then, since 17 Stat. 13 is still valid law, how is it that 17 Stat. 13 does not apply to the judiciary? After all, the Executive has always been immune from suits at law for acts as President; but currently, under *Thompson v. Trump*, D.C. District Court, (1:21-cv-00400), using 42 USC §1985, "If two or more persons ...", Trump has not been dismissed. How is it that *two or more* persons magically includes *two or more* (including a President), but *every person* excludes judges and no presidents? The amount of self-serving political bias is astounding. Here, McClelland has three judges who deliberately misapplied controlling case law in contravention to the Colorado and US Constitutions, and their oaths of office. Would three judges deliberately, wantonly and willfully moving in concert to deprive McClelland, or those similarly situated, of their constitutional rights qualify as proper parties for suit under §1985? or 17 Stat. 13? The primary rule of statutory construction is, of course, to give effect to the intention of the legislature. *Rodgers v.*

*United States*, 185 U.S. 83 (1902), but it's how the Court gives effect to the intention that matters.[4]

**CONCLUSION**

The Colorado Court of Appeals unconstitutionally applied the CRCP and CAR depriving Petitioner of fundamentally protected rights, and procedural and substantive due process under the laws of this United States, and of Colorado, and in violation of the contract created by the filing of Petitioner's Complaint in the Pueblo County District Court.

WHEREFORE, Petitioner prays the petition for certiorari be granted.

Respectfully Submitted,

Jon T McClelland

Jon McClelland

6-23-03

Date

[4]This Court picks and chooses whatever convenient methodology needed to manifest a majority opinion. This slipshod approach to writing legal opinions makes it impossible for the *People* and legislative bodies to rely upon how this Court may rule, and more importantly, grants incentive to the legislative bodies to make the construction of the statutes as broad and as vague as possible – hopefully without making it either over-broad, void or voidable. A written, uniform set of *Court Rules of Opinion* should be promulgated to which the appellate courts and this Court would be bound and any deliberate deviation of the same would constitute a private right of action.