No. 22-5276

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

Naftalovich v. California

Daniel Naftalovich,

Petitioner,

vs.

State of California,
California Supreme Court,
California Court of Appeal, Second District, Division 4,
California Superior Court, County of Los Angeles,
and Helen Wexler,

Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

REQUEST FOR COUNSEL
per U.S. Const., amend. VI

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I. Questions Presented

A - Primary questions presented

1) Is California's Domestic Violence Prevention Act (DVPA) a criminal statutory scheme where it results as a matter of law and in practice in relief that is criminal in nature under *Hicks v. Feiock*, 485 U.S. 624 (1988) and where it essentially copied-and-pasted the Penal Code into the Family Code and created an alternate 'arrest warrant' process?

2) Do violations of the separation of powers occur where under the DVPA relief that is criminal in nature is granted by the Superior Court without any involvement whatsoever by the executive branch and where the judge is instructed to essentially prosecute a requesting party's case for her by the Court of Appeal's mandate to "play a far more active role in developing the facts" in a manner that the Court of Appeal has itself recognized is *not* a "purely adversarial setting"? (*In re Marriage of Nadkarni*, 173 Cal.App.4th 1483, 1500 (2009); *Ross v. Figueroa*, 139 Cal.App.4th 856, 867 (2006).)

3) Is the definition of "abuse" under the DVPA as any conduct that upsets the other party void for vagueness under this Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) due to the "grave nature" of the "serious consequences" wherein a person may be removed from his home and deprived of numerous other fundamental rights?

4) Is protection of people's emotional calm within romantic relationships a 'compelling' reason to deprive a respondent's fundamental rights in DVPA proceedings where even California's own Court of Appeal has recognized that "[t]here is no occasion for the law to intervene in every case where some one's feelings are hurt"? (California Family Code §6320(c); *Cochran v. Cochran*, 65 Cal.App.4th 448, 496 (1998).)

B - Additional questions presented [1]

5) Is a form checkbox prior restraint on speech unconstitutional as a matter of law where its application via the Judicial Council Form calls for no factually–based limitation by the judicial officer and where its broad scope covers *all* content of discussion?

6) Does cruel and unusual punishment or violation of due process occur when the State restricts a person's parenting rights *ex parte* for three months prior to a custody hearing or in a hearing with a standard of proof of only 'by a preponderance of the evidence' in proceedings that the State's Court of Appeal openly acknowledged as being biased?

7) Did the State of California effect a violation of my right to freely exercise my religion and/or a violation of my right to be married when it executed a *de facto* termination of my marriage by *residentially, physically, and verbally* restraining me from my wife prior to any court-ordered or religious dissolution of the marriage and prior even to any filing of a petition for marriage dissolution or for legal separation?

8) Was I denied equal protection of the law when the California Court of Appeal blatantly ignored its own case law holding that "[t]he writ process, not the appeal process, is the way to get that review" in a case involving temporary child custody orders and when the Superior Court similarly blatantly ignored the statutory letter and spirit of the law and clearly favored the female requesting party by granting her defective requests yet denying all my requests even when the other party did not provide disputing testimony? (*Lester v. Lennane*, 84 Cal.App.4th 536, 565 (2000).)

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[1] I contend there are so many questions presented because the California Domestic Violence Prevention Act was imbued with unrestrained government power and caused a catastrophic breakdown of our justice system.

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V. Petition for Writ of Certiorari

I, Daniel Naftalovich, am restrained in ways not shared by the general public under a domestic violence restraining order issued against me by the Superior Court of California, County of Los Angeles, and thereafter willfully and corruptly permitted by the California Court of Appeal, Second District, Division 4 and the California Supreme Court. It is quite apparent that all three of these Courts willfully turned a blind eye to numerous violations of my constitutional rights and to the State's own laws—as presented herein—and I respectfully submit this petition for a writ of certiorari to request that this Court evaluate the lawfulness of my restraints. "When faced with the corruption of our legal system, we must start over." (*Pizzuto v. Blades*, 673 F.3d 1003, 1013 (9th Cir. 2012).)

I claim the proceedings at the Superior Court were a *de facto* criminal prosecution, and that the California Supreme Court should have at a minimum assigned counsel when presented with my claim that a state law denied me the right to counsel in a criminal proceeding *as a matter of law*. This Court previously demonstrated by example in *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963) and *Gideon v. Cochran*, 370 U.S. 932 (1962) that to present a claim of a violation of the right to counsel as a matter of law it is appropriate to assign counsel. This Court has also previously clarified that "[t]o present a claim of ineffective [or non-existent] assistance . . . a prisoner likely needs an effective attorney. [¶] The same would be true if the State did not appoint an attorney to assist . . . ." (*Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012).) I contend this case is much like *Gideon*, where the State's Supreme Court " 'upon consideration thereof' but without an opinion, denied all relief." (*Id.* at 337.) Here, the Court of Appeal "read and considered" but without an opinion, denied all relief. (App. 065.)

I claim the state court of last resort, through its refusal to evaluate my claim that such proceedings are criminal, effectively "decided an important question of federal law that has not been, but should be, settled by this Court" (Rules of the Supreme Court of the United States, Rule 10(c))—namely the primary question presented of whether the State's proceedings under its Domestic Violence Prevention Act are criminal in nature under the Constitution of the United States of America. "[T]he characterization of [a] proceeding and the relief given as civil or criminal in nature, for purposes of determining the proper applicability of federal constitutional protections, raises a question of federal law rather than state law." (*Hicks v. Feiock*, 485 U.S. 624, 630 (1988).)

Thus, the California Supreme Court also effectively "decided an important federal question in a way that conflicts with relevant decisions of this Court" (Rule 10(c)) because the restraining order upon me is squarely "criminal in nature" under this Court's decision in *Hicks*—see Section IX.A, *infra*. I presented this claim to the California Supreme Court, and to the California Court of Appeal, along with emphasis on the claim that "*Habeas corpus* and assignment of counsel are warranted" (App. 5, II.B), when "I humbly request[ed] from [that] Court appropriate relief to ensure review of the merits of my claims, by mandating the Court of Appeal to review . . . and/or by granting *habeas corpus* to review the lawfulness of my restraints, and/or by assigning to me counsel and an opportunity for a hearing on these claims—following the example properly set forth [by this Court] in *Gideon* at 338." (App. 9.) Yet that court shockingly decided that the appropriate action is to deny *any* sort of relief, even on a claim as critically important as that the State of California *routinely* subjects people to *de facto* criminal prosecutions without the protections of the criminal justice system.

I thus also claim I was denied 'equal protection' under the law because the State's courts—at all three levels—willfully ignored many violations of my constitutional rights. At the trial court I was abused by a prejudiced judge, in blatant violation of State laws. (App. 69 and 149-191.) The California Supreme Court simply did not want to deal with it —i.e., did not want to deal with and uphold *the U.S. Constitution.* And the Court of Appeal denied review in part based on the plainly erroneous statement that I "fail[ed] to demonstrate entitlement to extraordinary relief" (App. 065) where I had in fact clearly cited the Court of Appeal's own legal authority to the contrary on the basis of this case involving a temporary child custody order, where seeking appropriate relief then "can be done by filing a petition for writ [but] It cannot be done by filing an appeal". (*Lester v. Lennane*, 84 Cal.App.4th 536, 565 (2000) (see also *Id.* ("The writ process, not the appeal process, is the way to get that review.").) (App. 82.) Thus my petition *was* entitled to extraordinary relief by the Court of Appeal—but it seems that court also just did not want to take my case and provide me with equal protection of the state laws of writ procedure.

I request this Court to vacate the restraining order against me and restore all of my fundamental rights that have been deprived. (On the merits of the arguments herein and in the attached appendices—particularly Appendix D, as well as Appendices B and I). I contend the matter is fit for direct resolution by this Court given the horrendous judicial conduct below that "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" (Rule 10(a)), and given the important nature of the primary question presented: whether or not I was treated like a criminal without the protections of the criminal justice system, and whether this occurs routinely in the State of California as a matter of law.[3]

[3] And elsewhere in this Nation. (See Section X.D.)

VI. Proceedings Below

The Superior Court proceedings involve three related cases, with the same parties:

21PDRO01160 - Initial request by Ms. Wexler for a domestic violence restraining order against me and deprivation of my child custody rights. Filed *ex parte* without notice of *ex parte* filing on October 22, 2021 (App. 544-561) and granted in full by a judge *pro te*, resulting in a temporary restraining order until a hearing date on November 15, 2021 (**App. 529-543**). Then at the hearing on November 15, 2021 (App. 427-547), a permanent restraining order was granted for one year until November 15, 2022. (**App. 420-426.**) The child custody portion of the hearing was delayed *suo sponte* by the judge until December 10, 2021 (App. 421:5(c)), and then again until January 19, 2022. (12/10/2021 hearing transcript page 18, at Court of Appeal petition exhibits Volume 3, page 599:7,25.)

21PDRO01272 - Cross-request for a domestic violence restraining order by me against Ms. Wexler, filed on November 17, 2022, denied in full on that same day and then denied in full again at the hearing on December 10, 2021 (*without disputing testimony*).

21PDFL01989 - Petition for legal separation, filed by Ms. Wexler on November 17, 2021 (later amended to a petition for dissolution of marriage on January 13, 2022).

The Court of Appeal proceeding involved a PETITION FOR WRIT OF MANDATE, PROHIBITION, AND *HABEAS CORPUS*, OR OTHER APPROPRIATE RELIEF, case number B318636, filed February 25, 2022 and denied March 3, 2022. The denial order stated that "[t]he oversized petition . . . has been read and considered and is denied." (App. 065) A short technical opinion followed in the next sentence: "The petition presents an untimely challenge to an appealable domestic violence protective order . . . and fails to demonstrate entitlement to extraordinary relief." (*Id.*, citations omitted.) No full written opinion was issued.

The California Supreme Court proceeding involved a PETITION FOR WRIT OF MANDATE AND *HABEAS CORPUS*, OR OTHER APPROPRIATE RELIEF, case number S273823, filed March 29, 2022 and summarily denied *en banc* on April 13, 2022.

VII. Jurisdiction

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. 2101(c), whereby I have timely filed this petition within 90 days of the California Supreme Court denial of review on April 13, 2021, as discussed also in Rule 13.1 of the Rules of the Supreme Court of the United States. The restraining order in question was entered on November 15, 2021.

Additionally, 28 U.S.C. §2403(a) may apply because the constitutionality of an Act of Congress is drawn into question. (See section X.D.) I served the Solicitor General. I also served the California Attorney General because 28 U.S.C. §2403(b) may apply.

VIII. Constitutional Provisions Involved

This case primarily involves the protections to the criminally accused under the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution and the Fourteenth Amendment to the U.S. Constitution, as well as the doctrine of the separation of powers. The First, Second, and Eighth Amendments to the U.S. Constitution are also involved.

The Amendments read as follows in the pertinent parts:

U.S. Const., amend. IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., amend. V:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . and to have the assistance of counsel for his defense."

U.S. Const., amend. XIV:

"No state shall . . . 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."

U.S. Const., amend. I:

"Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech, . . . or the right . . . to petition the government . . . ."

U.S. Const., amend. II:

" . . . the right of the people to keep and bear arms, shall not be infringed."

U.S. Const., amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

IX. Statement of the Case

The State of California ambushed me with a highly illegal criminal prosecution!

This case is a modern *Gideon v. Wainwright*, 370 U.S. 932 (1962): I claim my Sixth Amendment right to counsel was violated as a matter of law in State proceedings. But unlike Mr. Gideon, who knew that he was in criminal proceedings, I was not informed "that it is a charge and not a suit" (*Hicks v. Feiock*, 485 U.S. 624, 639 fn. 10 (1988)). I claim that California's Domestic Violence Prevention Act is a criminal statutory scheme under *Smith v. Doe*, 538 U.S. 84 (2003), and, more directly, under *Hicks*.

The State of California thinks it can circumvent the protections to the criminally accused that the U.S. Constitution guarantees to persons in these United States by merely copying-and-pasting the definition and procedures of domestic violence from the Penal

Code to the Family Code. The State constructed a statutory scheme that effectively lets *private parties* acquire and execute *de facto* arrest warrants in violation of respondents' right to be free from unreasonable seizures under the Fourth Amendment to the U.S. Constitution, and in violation of the separation of powers.

In this present case, an albeit-imperfect but legally-innocent man has been convicted and sentenced to a year of imprisonment in a domestic violence restraining order in complete violation of the State's own rules under the DVPA, in a manner that exceeds mere judicial negligence and instead occurred due to gender bias or other prejudice and rises to the level of judicial brutality. I claim that my right to receive equal protection of the law as guaranteed to me by the Fourteenth Amendment was severely violated. I was not innocent until proven guilty in that courtroom: because I am a man and because a woman complained of domestic violence, I was immediately prejudicially sentenced and the judge quite obviously cherrypicked evidence against me, going as far as ignoring undisputed evidence and clear statutory mandates such that the biased prejudice speaks for itself—in the manner of *res ipsa loquitur*. (App. 69 and 149-191.)

I kindly request this Court to assign counsel, following its previous appropriate example in *Gideon* at 338, and grant certiorari to examine the very important questions presented, which are in essence: is California's DVPA a criminal statutory scheme? And why does the State of California think it can infringe any fundamental right of any person at any time and for any reason when this Court has previously held that the Fourteenth Amendment to the U.S. Constitution "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), emphasis in original.)

A. The DVPA is a criminal statutory scheme under *Hicks v. Feiock*

California's Domestic Violence Prevention Act is a criminal statutory scheme because of the following reason: it results in relief from the Superior Court that is "criminal in nature" under *Hicks v. Feiock*, 485 U.S. 624 (1988). (A similar conclusion is also reachable under *Smith v. Doe*, 538 U.S. 84 (2003)—see App. 70 II.D.3 and 238-257.)

Hicks established the definitive test for when a court order constitutes relief that is criminal in nature. The answer to this federal question of law, which has "been settled ... for many decades" (*Id.* at 631), is conceptually that a relief is civil if "the punishment is remedial" (*Id.*, internal quotation omitted) and for the benefit of the other party, whereas relief is criminal if "the sentence is punitive" (*Id.*). This centers around "[t]he distinction between refusing to do an act commanded,—remedied by imprisonment until the party performs the required act; and doing an act forbidden,—punished by imprisonment for a definite term" (*Id.* at 632, internal quotations omitted). The definitive test is thus the following: "the unconditional nature of the punishment renders the relief criminal in nature" (*Id.* at 633). In other words: in relief that is civil and remedial, "those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets' " (*Id*, internal citation omitted) and may "end the sentence and discharge [themselves] at any moment" (*Id.*); but relief that is *determinate and unconditional* is criminal in nature.

In the present case, the Superior Court issued a restraining order against me for the determinate duration of "a year". (App. 420, item 4 and top right, and App. 454:15.) The restraining order is unconditional: there were no 'if's, 'and's, or 'but's. The Superior Court did not order me to be restrained until I gave my wife a big hug or said I am sorry. Nor did the Superior Court attach any other conditions whatsoever to the restraining order.

There was no condition that I must complete a batterer's intervention program or a parenting class and that I would be released on doing so. As such, this restraining order is relief that is criminal in nature under *Hicks* because it is unconditional and determinate and "the sentence is punitive" (*Id.* at 631, internal quotation omitted), essentially *punishing* me for "doing an act prohibited" (*Id.*)—the act being 'upsetting my wife', and this act being prohibited under Family Code §6320(c). The relief that the Superior Court granted is "punitive in character" (*Hicks* at 633, internal quotation/citation omitted) and as such it is criminal in nature. This is *not* a civil remedial relief where I am "imprisoned until [I] obey the order, [and I] 'carry the keys of [my] prison in [my] own pockets.' " (*Id.*)

And I am *imprisoned*, indeed. The restraining order includes stay-away orders restraining me from being within 100 yards from my wife or the home I was living in. These are physical confinements! California law is clear that for 'imprisonment' "it is not necessary that there be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment." (*People v. Agnew*, 16 Cal.2d 655, 659 (1940).) The State of California issued a restraining order against me that compels me to go from the apartment that I lived in or be within 100 yards of it. This is inverse-'house arrest'! I demand a proper criminal prosecution if the State of California wishes to imprison me.

The Court in *Smith* also expressed quite clearly that when a legislative act imposes physical restraint it "resemble[s] the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." (*Smith* at 100.) This is a major factor under the approach in *Smith*. The Court has said that " 'only the clearest proof' that a

law is punitive based on substantial factors will be able to overcome the legislative categorization" of an Act as civil or criminal. (*Id.* at 107.) I contend this is such a case. Even the California Court of Appeal itself has recognized that restraining orders under the so-called 'civil' DVPA "may sweep *more broadly than criminal protective orders*"! (*Lugo v. Corona*, 35 Cal.App.5th 865, 870 (2019), emphasis added.) Essentially, the State is using the DVPA's placement in the Family Code to completely circumvent *all* of the protections to the criminally accused under the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. The California Court of Appeal basically unequivocally admits that it treats respondents in DVPA proceedings as criminals: "[Family Code] Section 6389 is analogous to a prohibition on *felon* weapon possession" (*Altafulla v. Ervin*, 238 Cal.App.4th 571, 581 (2015), emphasis added). If a respondent is being treated like a convicted *felon* for the deprivation of fundamental rights, the respondent must first be treated like a criminal suspect for provision of the protections to the criminally accused!

Yet the State of California does not provide *any* of the protections to the criminally accused in proceedings under the Domestic Violence Prevention Act, the most urgent of which being—even a step upstream from the right to assistance of counsel—the right "to know that it is a charge and not a suit." (*Hicks* at 639, footnote 10.) Instead, the State of California ambushes respondents without counsel, without informing them of their rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), without a jury, and without even an opportunity to demur a poor indictment due to California Rules of Court rule 5.74(b)(2), which provides that "[d]emurrers, motions for summary adjudication, and motions for summary judgment must not be used in family law actions." (*Id.*) Not only are respondents not informed "that it is a charge and not a suit" (*Hicks* at 639, fn. 10), but

respondents are not informed of anything!—the DVPA states, twice for good measure under Family Code §§6326 and 6300(b), that *as a matter of law* respondents get no notice, in stark violation to the mandate in the Fourteenth Amendment to the U.S. Constitution that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." Indeed, in the present case, I was restrained in very severe ways *ex parte* and without even minimal notice of the filing of an *ex parte* motion. Moreover, there was no apparent emergency that could possibly justify this because the requesting party's complaint merely alleged that I pushed her *three whole weeks* prior to the action's filing. Three weeks is not an emergency.

In summary, I was *ambushed* by an illegal government criminal prosecution, in complete circumvention of all of the rights and protections to the criminally accused. No counsel; no jury; no proof beyond a reasonable doubt; no speedy trial; no right against self-incrimination; no arrest warrant; no statement of rights under *Miranda*; no notice. Not even a bed to sleep on in the county jail until the trial! I was removed from my home *ex parte* and without notice and without an arrest warrant!—what is the State of California smoking that it thinks it can treat people like this??

B. Catastrophic violations of the separation of powers occur under the DVPA

The DVPA violates the separation of powers by permitting *private parties* to seek relief that is *criminal in nature* under *Hicks—without a government criminal prosecution.* There may be no involvement by the executive branch of the State government *at all*! (Restraining orders under Part 4 of the DVPA are requested directly by private parties,

whereas emergency protective orders under Part 3 of the DVPA do involve police officers —but those have another problem, as shown below: they are *de facto* arrest warrants!)

In all other precedents where this Court previously analyzed a legislature's classification of a statutory scheme as civil or criminal, the statutory scheme called for action by the executive branch of government: e.g., the Department of Corrections or the police (*Smith v. Doe*, 538 U.S. 84 (2003)); the Officer of the Comptroller of the Currency (*Hudson v. United States*, 522 U.S. 93 (1997)); the Environmental Protection Agency and the Coast Guard (*United States v. Ward*, 448 U.S. 242 (1980)); and the Board of Immigration Appeals of the Department of Justice (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). But California's Domestic Violence Prevention Act not only subjects respondents to criminal punishment via determinate and unconditional restraining orders, it does this by initiation at the hands of *private parties*—not even government employees of the executive branch!

The entire architecture of letting *private* individuals *directly petition* to the *judicial branch* to restrain other persons in court restraining orders that are *criminal* in nature is obviously completely rotten to its core. This circumvents any executive branch involvement, both in the execution of the restraints and in their initiation and *prosecution.* (This situation, which could hardly be imagined to become any worse, is made worse still: the State of California does all this *ex parte* and without notice! As a matter of law.)

Indeed, the Court of Appeal has essentially recognized all this—and supported it: "the trial court should be mindful that 'in light of the vulnerability of the targeted population (largely unrepresented women and their minor children), bench officers are 'necessarily expected to play a far more active role in developing the facts, before then

making the decision whether or not to issue the requested permanent protective order.' " (*In re Marriage of Nadkarni*, 173 Cal.App.4th 1483, 1500 (2009), citations omitted.)

Since when do we have a "targeted population" for justice?—when to the contrary the Fourteenth Amendment to the U.S. Constitution provides that "No state shall . . . deny to *any* person within its jurisdiction the equal protection of the laws." (*Id.*, emphasized.) Clearly, 'respondents' are not the "person[s] within its jurisdiction" (*Id.*) that the State of California is concerned about. This is also evident overtly in the Legislature's dismissal of notice requirements despite that the Fourteenth Amendment to the U.S. Constitution also provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law": Family Code §6300(b) states that "[a]n ex parte restraining order [request] . . . shall not be denied solely because the other party was not provided with notice"; Family Code §6326 similarly states that "[a] petition for an ex parte order . . . shall not be denied solely because the other party was not provided with notice." Wow—the State of California really does not want respondents to be guaranteed notice!

Family Code §6326 also states that "[a]n ex parte order under this article shall be issued or denied on the same day that the application is submitted to the court", which can be better understood along with Family Code §6241 that states that "the superior court in each county shall designate at least one judge, commissioner, or referee to be reasonably available to issue orally, by telephone or otherwise, emergency protective orders at all times whether or not the court is in session." Basically, the State of California concocted a parallel mechanism to the issuance of arrest warrants but oh-so-conveniently without the protections of the criminal justice system! Indeed, also Family Code §6250 states that "[a] judicial officer may issue an ex parte emergency protective order where a

law enforcement officer asserts reasonable grounds to believe . . . [t]hat a person is in immediate and present danger of domestic violence . . . ." (*Id.*, summarized briefly.) This is basically an arrest warrant! But this parallel-universe completely diverges from the long-standing notion of issuing "warrants . . . upon probable cause", as codified in the Fourth Amendment to the U.S. Constitution and interpreted in the criminal procedure law. In other words: the DVPA is a criminal statutory scheme, and it circumvents criminal law jurisprudence and *all* of the protections of the criminal justice system. It must be stopped.

Besides letting private parties initiate and prosecute petitions for criminal relief under *Hicks*, the concerning mandate by the Court of Appeal that "bench officers are necessarily expected to *play a far more active role in developing the facts*" (*Nadkarni* at 1500, internal quotations omitted and emphasis added) also lets the judicial officer act as a prosecutor in the case. This is a violation of the separation of powers doctrine, under which a government prosecutor from the executive branch should be prosecuting the case if relief that is criminal in nature under *Hicks* is sought. Not a private party, nor the judge. Indeed, this Court previously recognized that when the "judge [is] solely responsible for identifying, prosecuting, adjudicating, and sanctioning", the situation is "liable to abuse." (*Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994).) Even the Court of Appeal basically acknowledged this as a violation of the separation of powers by noting that proceedings under the DVPA are *not* a "purely adversarial setting", and instructing that "[t]he role of a judicial officer sitting in such [proceedings] has many attributes of an inquisitorial as opposed to an adversarial process". (*Ross v. Figueroa*, 139 Cal.App.4th 856, 866 (2006).)

What is more ironic—or, frankly, corrupt—is that the Court of Appeal instructed this in order that parties in DVPA proceedings will not lose their "most fundamental . . .

constitutional and statutory procedural rights" (*Id.*)—yet both the Superior Court judge and then the Court of Appeal completely disregarded *my* constitutional and statutory rights in favor of their "targeted population" female party. (*Nadkarni* at 1500.) Indeed, besides violating the separation of powers doctrine, a mandate that "bench officers are necessarily expected to *play a far more active role in developing the facts*" (*Nadkarni* at 1500, internal quotations omitted and emphasis added) also necessarily violates the notion of equal protection of the law in a fair tribunal with an impartial fact finder. If the judge is developing the requesting party's facts for her then the judge is not providing the respondent with a fundamentally fair trial! "Under such circumstances, disinterested factfinding and evenhanded adjudication [are] essential, and [respondents] [are] entitled to a criminal jury trial." (*Bagwell* at 837-838.) In other words: "Judges should be umpires rather than players." (*Omaha Indemnity Co. v. Superior Court*, 209 Cal.App.3d 1266, 1273 (1989).)

But wait—there's more! Once the DVPA is revealed for what it is—a criminal statutory scheme masquerading as a civil legislative Act within the Family Code—it becomes apparent that this Act also on its face may subject people to double jeopardy and *ex post facto* punishments. Family Code §6306 states that "[p]rior to a hearing on the issuance or denial of an order under this part, the court shall ensure that a search is or has been conducted to determine if the subject of the proposed order has a prior criminal conviction . . . ." (*Id.*) Then, Family Code §6300 says: "An order may be issued under this part to restrain any person . . . if . . . any additional information provided to the court pursuant to Section 6306[(the criminal record check)], shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." (*Id.*) This says that *based on a past*

criminal act (which may have even preceded this statute, thus possibly *ex post facto*), the respondent may be restrained *again* in a manner comprising relief that is criminal in nature. This is in direct violation of the Fifth Amendment's Double Jeopardy Clause.

Family Code §6345 even more directly subjects respondents to double jeopardy: "In the discretion of the court, [restraining orders] issued after notice and a hearing under this article may have a duration of not more than five years . . . [but] may be *renewed*, upon the request of a party, either for five years or permanently, *without a showing of further abuse*" (*Id.*, emphasis added). So after a respondent is imprisoned in a restraining order for up to five years (like a *felon* under this *criminal* statutory scheme) he may be imprisoned *again for the same offense* (double jeopardy) at the request of a private party (violation of the separation of powers) and actually he may be restrained *permanently*, in a *life sentence* (disproportionately cruel and unusual punishment), for merely having upset his spouse (void for vagueness, and impingement on right to be married), and all this can start with an *ex parte* no-notice ambush (hello?!—due process??) with an order that removes the respondent from his own home (unreasonable seizure without a warrant) "regardless of . . . title" (what!?—due process!!). It is absolutely insane that the State of California thinks it can make such a law within this Union under this U.S. Constitution.

Essentially, California's DVPA represents a complete and catastrophic breakdown of our justice system. It was constitutionally reckless for the Legislature to enact it and amend it as such—and it was corrupt willful ignorance by the Court of Appeal and the California Supreme Court to refuse to provide a hearing to ensure that the State's laws are constitutional and just. I now kindly ask this Court to fix this catastrophic mess.

C. Upsetting the other party in a romantic relationship is void for vagueness

California's Domestic Violence Prevention Act (DVPA) (Family Code §6200...) authorizes the Superior Court to deprive respondents' numerous fundamental rights—including respondents' rights under the Fourth Amendment to the U.S. Constitution "to be secure in their . . . houses . . . against unreasonable . . . seizures" (*Id.*)—for just about *any reason.* Family Code §6320(c)'s definition of "disturbing the peace of the other party" as referring to conduct that "destroys the mental or emotional calm of the other party" (*Id.*) is enormously vague generally and particularly given that it applies specifically under Family Code §6211 to the context of intimate romantic relationships, where emotional upsets are sure to occur. Emotional upsets in an intimate relationship may occur *for any reason*—like from loading the dishwasher in some particular way. This statute is far too vague to support the extreme deprivation of fundamental rights that occurs under the auspices of the DVPA *even under the so-called "civil" proceedings* that purportedly occur under this Act. And it is *certainly too vague as a criminal statute*: to satisfy due process, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." (*Skilling v. United States*, 561 U.S. 358, 402 (2010).) What may upset one party may not upset another. Under this statute, a person cannot know if a comment that may be taken favorably or not will upset the other party and also result in the removal of the person from the home via government action!

Recently in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court clarified that the most exacting vagueness standard should apply in the void-for-vagueness doctrine

even to civil statutes where results are of a "grave nature" and constitute a "particularly severe penalty". (*Id.* at 1213, internal quotations omitted.) The Court exemplified this with the punishment of deportation, which it called a "drastic measure" often amounting to lifelong "banishment or exile". (*Id.*) In the present case, the so-called "civil" DVPA similarly produced a "particularly severe penalty" of a "grave nature": I was removed from my home—*ex parte* and without notice!—and effectively banished and exiled from my community. I have been restrained by the Superior Court excessively and aggressively with a multi-part restraining order that included a move-out order that removed me from my home and a stay-away order physically confining me away from that area in a manner that I contend is a form of inverse-'house arrest' and legally constitutes imprisonment. These restraints are on me via California's vague "disturbing the peace of the other party" statute—Family Code §6320(c).

The only thing more vague than this horrendous statute is the judge's statement that he is restraining me "basically based on . . . controlling behavior". (App. 454:12.) The judge did not even specifically cite a statute, like Family Code §6320(c), or provide proper legal justification for restraining me![4]

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[4] I promptly filed a Motion to Vacate and Enter a Different Judgment in which I pointed out to this judicial officer the vagueness of the ruling—and also that he had completely failed to provide a necessary analysis of whether I actually and proximately caused the alleged outcomes. However, my motion to vacate was ignored by the Superior Court, just like my later petitions with the Court of Appeal and California Supreme Court were unfairly ignored.

The Court of Appeal denial, in particular, was clearly erroneous because that Court falsely stated that I "fail[ed] to demonstrate entitlement to extraordinary relief" (App. 065; order denying relief by the Court of Appeal on 3/3/2022) even when I had explicitly pointed out to that Court in

D. Extreme violation of fundamental rights occurs without a 'compelling' reason

The Court previously established that deprivation of fundamental rights under the U.S. Constitution must be justified under strict scrutiny, and that the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).)

Protecting people from emotional upset is not a compelling government interest. Indeed, the California Court of Appeal has recognized this: "There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam." (*Cochran v. Cochran*, 65 Cal.App.4th 448, 496 (1998), internal citation omitted.)

Therefore, the State of California may not infringe my numerous fundamental rights under the Family Code §6320(c)'s "disturbing the peace of the other party" clause. Not my enumerated fundamental right under the Fourth Amendment to be secure in my home from unreasonable seizures; not my enumerated fundamental right to bear arms by treating me like a convicted felon when I have neither been convicted nor charged; not my enumerated fundamental right to free speech, merely because I may have said

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my petition that this case involves a temporary child custody order and I cited legal authority in *the same paragraph* that "the only effective recourse is to obtain immediate review of any objectionable temporary custody order[, which] can be done by filing a writ, but not an appeal which will sit in abeyance . . . while the bond between child and custodial parent strengthens and deepens." (*Lester* at 565.) (App. 082, footnote 1.)

something that upset my wife or because I am a married man who argued with his wife; nor my unenumerated fundamental right to custody of my child, under *Santosky v. Kramer*, 455 U.S. 745, 766 (1984), nor my fundamental liberty "interest of [a] parent[] in the care, custody, and control of [his] children" under *Troxel v. Granville*, 530 U.S. 57, 65 (2000), or my fundamental right "to direct the education and upbringing of [my] child" (*Washington* at 720); and not my right to be 'innocent until proven guilty', one of the most basic requirements of a fair trial, as recognized in *Taylor v. Kentucky*, 436 U.S. 478 (1978). Nor can the State of California deprive me of property "regardless of . . . title" (Family Code §6321)—yet the Superior Court granted sole possession of and access to *my* car to the requesting party, even when this car was *my separate property* from before the marriage *and this fact was undisputed.* Has the Superior Court gone crazy?

And has the California Legislature ever heard of or read the Bill of Rights? The California Legislature may think it is a 'forward thinking' victory to protect self-alleged victims from *anything* that is upsetting in domestic relationships but it is *not* forward thinking to force individuals out of their homes without arrest warrants issued to the executive branch's law enforcement department based on probable cause and to then submit those individuals to *de facto* criminal proceedings and punishments, or to deprive individuals of their custody rights to their children without any due process of a hearing or even notice—based on non-emergency allegations from three weeks prior—and to also silence respondents by overbroad-as-a-matter-of-law prior restraints on speech that are not limited to only the prohibition of repetition of speech that has been found after a hearing to be abusive. "It is forward thinking to begin by reading the [Bill of Rights] as ratified in 1791; to understand the history of authoritarian government as the Founders

then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech [and other liberties]; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom [] for the generations to come." (*Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (KENNEDY, J., concurring opinion) ("*Nat'l*").)

In short, the State of California went on a rampage against my fundamental rights, all in the name of protecting self-alleged victims from emotional upset. I was not given a fair trial and I was not innocent until proven guilty. The judge restrained me excessively and unnecessarily in a manner that constitutes *judicial brutality*: not so different are a police officer who unnecessarily and excessively beats a criminal suspect based on skin color and a judicial officer who unnecessarily and excessively restrains a respondent based on gender bias or other prejudice. The judge ignored undisputed evidence and well-settled principles of law and clear statutory mandates, and ignored all of my legitimate requests and granted everything that the other/female party asked for, even requests that were blatantly defective procedurally and substantively. Then the Court of Appeal and the California Supreme Court continued this unfair judicial abuse of me! A grave miscarriage of justice occurred in this case, and in all cases under the DVPA.

E. The prior restraint on my speech is in no way constitutionally permissible

My wife may stop speaking to me if she wishes, but the State of California may not *force me* to stop speaking to her without a compelling reason and narrowly tailored means: I have a "right [for] the family to remain together without the coercive interference of the awesome power of the state" (*Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977)) and a right to free speech under the First Amendment to the U.S. Constitution.

This Court has previously established very *very* clearly that prior restraints on speech that are content-based are *presumptively invalid*, and that it is very important for States to avoid such action because "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." (*Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 390 (1973).) The Court also held that a permissible order restraining future speech "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." (*Carroll v. Princess Anne*, 393 U.S. 175, 183-184 (1968).) So how did the State of California interpret this to mean that it is permissible to issue ultra-wide, all-encompassing checkbox prior restraints on speech? And to do so *routinely*? And without any statement of supporting factual findings?

Moreover, the Court of Appeal has clearly recognized that it is only the "ability to *continue* to engage in activity that has been *determined after a hearing* to constitute abuse" that is not subject to protection under the First Amendment to the U.S. Constitution. (*In re Marriage of Evilsizor & Sweeney*, 237 Cal.App.4th 1416, 1429 (2015), emphasized.) So how in the world did the Superior Court think it is valid to issue a prior restraint on my speech when the Superior Court did not make findings of abusive speech by me? (Despite numerous allegations by the requesting party to that effect.) (App. 421:6(a)(2) and lacking fact statement at App. 454:5-14.) I am *not* restrained only from repeating and continuing to engage in speech activity that has been determined to constitute abuse. In fact, I am restrained extremely broadly, even also from engaging in speech that as a matter of law does *not* constitute abuse, like even saying 'hello' or 'please' or 'thank you'.

The no-contact order is incredibly broad: "[I] must not . . . [c]ontact, either directly or indirectly, by any means, including, but not limited to, by telephone, mail, e-mail, or other electronic means" the other party (with the sole exceptions that "[p]eaceful written contact through a lawyer or process server or another person for service of legal papers related to a court case is allowed and does not violate this order" and that "[b]rief and peaceful contact with the [other party], and peaceful contact with [the children], as required for court-ordered visitation of children, is allowed unless a criminal protective order says otherwise.") (App. 421; order on 11/15/2021, item 6.) The order is a checkbox on a form. There is not even room designed for the judicial officer to write in *any* supportive factual findings or to limit the content of the order. This order is *incredibly broad* and restrains *all content* of my speech—even regarding the very narrow exception for "court-ordered visitation of children" (*Id.*), where my speech is still restrained to be brief. This is *by no means* "couched in the narrowest terms that will accomplish the pin-pointed objective" (*Carroll* at 183-184) of preventing "the ability to continue to engage in [speech] that has been determined after a hearing to constitute abuse" (*Evilsizor* at 1429). I contend this is unconstitutional as applied and on its face.

Also problematic is that I received *absolutely no due process* of law with regards to the prior restraint on my speech: the complaint against me, in the form of a request for domestic violence restraining order on Judicial Council form DV-100, *did not* request a no-contact order. I thus did not have notice of impending freedom of speech litigation. Then, *during the hearing*, the judge asked the requesting party: "Do you wish to remain having contact with this gentleman?", to which she replied "No", and then the judge, who

granted all her wishes like a genie, issued a restraining order against me that includes a very extreme prior restraint on speech. (App. 241; 11/15 transcript at 454:21 and 451:7-11.)

More corrupt than this is that the Court of Appeal was then willing to uphold this prior restraint on my speech, regarding which I received *no notice*, but it was willing in a previous case to reverse a restraining order against a female party who had *actual notice* because the notice was in the form of a responsive pleading but not a request per se for a domestic violence restraining order on the Judicial Council form. (*Isidora M. v. Silvino M.*, 239 Cal.App.4th 11 (2015).) I claim that the Court of Appeal thus grossly discriminated against me and violated my right to receive equal protection under the laws as guaranteed to me by the Fourteenth Amendment of the United States Constitution. The request for a no-contact order against me was not on a Judicial Council form *and* it was not even in a responsive pleading: it was in casual conversation with the judge, with no prior notice whatsoever. It should have been clearly reversed by the Court of Appeal both on state law grounds and on federal constitutional grounds, but this was ignored, like my many other claims that were obvious on both state law grounds and constitutionally. My claims were all ignored because the California courts simply did not want to help me: they did not want to help a man avoid unlawful restraints, and they wanted to help a woman receive a restraining order even if she was not legally entitled to it and even if it is blatantly unconstitutional for numerous reasons. Such corruption I can hardly believe...

F. My freedom of religion and right to be married were violated

It is one thing if my wife wants to leave the marriage and leave our bedroom, but it is another matter altogether for the government of the State of California to enter that bedroom, illegally seize me from it without a warrant (through only a piece of paper

marked as a civil order), and interfere with my marriage by separating me from my wife via a triple-whammy restraining order that physically, residentially, and verbally restrains me away from her.

"The Constitution promises liberty to all . . . to define and express their identity." (*Obergefell v. Hodges*, 576 U.S. 644, 651-652 (2015).) California's state government may not reach so deeply into my life and pull me out of it for expressing my identity as a spouse and a parent if it does not agree with my conduct when that conduct is "within a lawful realm" (*Id.*)—and it may certainly not do so with complete disregard to my due process rights, with neither a hearing nor notice, in a very extreme and severe manner. The California Legislature may also not make laws defining unintentional upsetting of a spouse, or of another domestically or romantically related person, as being outside of the "lawful realm" (*Id.*)—and certainly not by effectively *criminalizing* such conduct, and especially not covertly by *de facto* criminal proceedings in the family code, circumventing the rights of the criminally accused and the protections of the criminal justice system.

If I was not perfect as a husband to my wife, then that is for me to grow from and for her to help me grow from. It is not for the State government to come in, even at her invitation, and obliterate my life in all directions: removing me from my home, banishing me from my community, restricting my custody rights to my child severely, depriving me of property, silencing me, and restraining me in various numerous ways. "It is not within the province of the state to make significant decisions concerning the custody of children [or other fundamental rights] merely because it could make a 'better' decision." (*Troxel* at 63.) The State of California may not restrain me for imperfection.

"Governments must not be allowed to force persons [out of their homes and away from their communities for] express[ing] a message [according] to their deepest convictions" (*Nat'l* at 2379) or otherwise expressing a message that has upset those persons' spouses. "There is no occasion for the law to intervene in every case where some one's feelings are hurt." (*Cochran* at 496.) California's Domestic Violence Prevention Act severely imperils those liberties that people in this Nation, including respondents, are guaranteed under the U.S. Constitution and the Bill of Rights. "This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression" (*Nat'l* at 2379), especially within the sacred realm of a marriage—where people hold "their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these." (*Id.*)

I claim that my right to marry—and as one and the same my right to *be* married—was violated as applied when the Superior Court residentially, physically, and verbally restrained me from my wife and when it did so prior to the filing of any petition for dissolution of the marriage. It is no longer a marriage when I cannot live in the same house as my wife or be within 100 yards of her, when I cannot touch her in any way, and when I cannot speak with her. Thus the Superior Court's so-called "family" division effectively and essentially doomed my marriage to failure without giving it a chance, and it took a family with some loose screws that was shaken up after/during a pandemic and instead of gluing us together it shattered us apart. The Superior Court thus effected a *de facto* termination of my marriage, in violation of the State's laws of divorce which provide a minimum duration of six months from petition until dissolution, and in violation of my fundamental right to be married under the U.S. Constitution.

I also claim that my right to freely exercise my religion was violated by the Superior Court's interference with my marriage and family life and by removing me from my home. My wife and I married by an orthodox Jewish marriage and we actively sought to maintain *shlom bayit* in our home—signifying peace and harmony of the family home—among other religious observances. If we hit some rough waters on this mission that by no means gives the State of California a right to fish-hook me out of the marital ocean altogether—certainly not when the Bill of Rights under the federal Constitution protects me, and especially not when the ship of our marriage was in a stormy ocean after/during the tsunami that was this pandemic. Yet the State of California completely shattered my ability to pursue this and other Jewish notions when it removed me from my family home and when it physically confined me away by 100 yards from anywhere that my wife is. This effectively prevents me from even peacefully being in the same building as her at the Rabbi's house for Shabbat dinners on Friday nights or on holidays, and thus prevents my ability to engage with my local Jewish community and freely exercise my religion. Essentially, this restraining order has made it a *crime* for me to have Shabbat dinner with my community peacefully if my wife is also present.

G. Cruel and unusual punishment occurred when my baby was taken from me

The State of California may not take my baby away from me as it did. It was nothing short of cruel and unusual punishment; it was inhumane. Without notice and without a hearing on the allegations against me, my very young minor daughter, who was less than a year and a half old at the time and still breastfeeding, was taken away from me. What exactly have I done for which a fit punishment would have been such an action?

The allegations against me were essentially merely disagreements on parenting style, and none of them actually resulted in any findings by the Superior Court of child abuse by me. Yet the Superior Court, through its judge *pro te*, issued an *ex parte* temporary restraining order against me, with no notice, that very severely restrained my parenting rights: the order granted sole physical and legal custody of our daughter to my wife and restricted me to only occasional visits with my daughter *under supervision* by a third party monitor. Then two subsequent judges adopted this order as a default and it remains nine months in! Moreover, it was three whole months before I actually received a custody hearing!! And inconceivably at that hearing my rights remained constrained because of a *mandatory* presumption against me having custody per Family Code §3044—despite that I satisfied *all* of the statutory factors listed in that statute! This is unconscionable! No merits of my parenting were actually discussed because this undefeatable presumption prevailed. Thus it became six whole months in very severe supervised visitation restraints before I would have any chance at a hearing about the actual merits of my parenting! This is insane!

What was done to me by the Superior Court is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and this Court's case law, I contend. I was falsely and unjustifiably removed from my child and restricted to supervised visitation, without a hearing and without notice, and auxiliary to domestic violence restraining order proceedings that are known to be subjected to "implicit bias" and prejudice of which the Court of Appeal has been "mindful". (*K.L. v. R.H.*, 70 Cal.App.5th 965, 984 fn. 11 (2021).) I claim that a standard of proof of by a preponderance of the evidence is inappropriate in such a known-biased setting and regarding such serious consequences as the restriction of a person's parenting rights.

The Court of Appeal has been mindful with regards to implicit biases and "preconceptions that often damage the credibility of victim-witnesses" (*Id.*), and it has "encourage[d] continued diligence and education to guard against *such* preconceptions" (*Id.*, emphasis added, internal citation omitted). But *such* preconceptions are not the only ones that the judiciary must be alerted to. Here, the bias pendulum has swung the other way and the woman asking for the restraining order against the man was believed in blind ignorance of the evidence. While credibility should not be damaged on preconceptions it should also not be accidentally bolstered on preconceptions such that a witness is believed merely because she alleges to be a victim. While the Court of Appeal wisely cautions against damage to the credibility of victim-witnesses based on preconceptions, it should equally caution against damage to the credibility of alleged-abusers. In the he-said she-said situation at the Superior Court, I was judged on preconceptions as an uncredible alleged-abuser and the female requesting party was judged as a credible victim-witness, and her request was granted despite that she did not demonstrate by a preponderance of the evidence that there was causation from my actions to her fear when there was evidence including her own testimony supporting other theories of causation. (See section I.A.1 of the attached Court of Appeal petition, App. 151-155.)

Moreover, the standard of proof must be calibrated to the situation. In proceedings known to be affected with bias the risk of falsely restraining a party by a standard of proof of only by a preponderance of the evidence is too high of a risk. The signal may be overcome by the noise, and whether a preponderance of evidence is observed by the judicial officer depends more on the direction of that judicial officer's preconceived bias —if leaning pro-petitioners or pro-respondents, or based on gender or other biases—than

on the merits of the case and on the evidence. A standard of proof of by a preponderance of the evidence along with known prejudice and biases results in a substantial risk of harm of falsely restraining people. Especially when restraining fundamental rights, such as custody to one's child, and when irreparable harm will occur when a young child is deprived of her father, such risk is unacceptable. It is illogical to retain a standard of proof of only by a preponderance of the evidence, which can be tipped by a featherweight towards the requesting party's favor, when a much greater weight of preconceptions in favor of the requesting party's bolstered credibility may exist. The scales of justice teeter by the winds of prejudice in such a situation and thus whether a respondent has a presumption of innocence or not is left to the whims and winds of prejudice, instead of to reliable protections in the constitutional spirit.

In *Santosky*, the Court invalidated a state statute permitting termination of parental rights by a standard of proof of "fair preponderance of the evidence" (*Id.* at 747, et seq.) and set the standard of proof in termination of parental rights proceedings to at least "clear and convincing evidence" (*Id.* at 769-770). While the Court held this in the context of permanent and irrevocable severance of the rights of a parent to his child, I contend the holding informs even temporary custody and visitation orders, especially where the Court of Appeal found that once the child has bonded with the custodial parent, even on a temporary basis, the Superior Court will likely find the child's best interest require preserving that bond to maintain stability of the child's life (*Lester* at 565), and where temporary orders seem to last for months before a hearing, in a complete violation of due process rights. This is even more especially applicable when surrounded by the additional biases and prejudices of the domestic violence context. In *Santosky* the Court

pointed at the absurdity that in that state "the factual certainty required to extinguish the parent-child relationship [was] no greater than that necessary to award money damages in an ordinary civil action" and held "that the Due Process Clause of the Fourteenth Amendment demands more than this." (*Id.* at 747.) I contend the Court should now again "convey[] to the factfinder the level of subjective certainty about his factual conclusions" (*Id.*) necessary to ensure a fundamentally fair procedure by holding that at least clear and convincing evidence is needed for custody deprivations in domestic violence settings that may be fraught with bias one way or the other. Otherwise, with a standard of proof of only by a preponderance of the evidence, uncalibrated to the minefield litigation battleground that a respondent may be thrust into—without notice and in an ambush that is quite frankly a *de facto* criminal prosecution and demands a standard of proof of beyond a reasonable doubt—there exists too high of a chance of a vicious and inhumane deprivation of a person's parenting rights.

As the Court explained in *Robinson v. California*, 370 U.S. 660, 666-667 (1962), "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." (*Id.*) Similarly, even one day in the prison of a flawed restraining order that keeps a man from his minor child is cruel and unusual punishment if that restraining order is for a charge of something—like a common cold or innocent marital disagreement—that does not properly constitute abuse under the law and does not provide a compelling reason that justifies the deprivation of the fundamental human right of custody to one's child. In *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) the Court noted that "[t]he question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment", indicating that a penalty must be

examined "in light of the basic prohibition against *inhuman* treatment" (*Id.*, emphasized). The Court elaborated that the Cruel and Unusual Punishment Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id.* at 100-101.) Adopting this to the present time in which the importance of fathers and other parents in the lives and welfare of children is known and appreciated, this Court should now hold that the *mistaken* separation of child and parent by government action is against the prevailing standards of civilized society and is within the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause, and should be protected against by a standard of proof of at least clear and convincing evidence, if not more.

X. Reasons for Granting the Writ

A. To avoid erroneous deprivation of my right to counsel and other protections to the criminally accused, and to avoid such deprivations systematically as a matter of law, this Court should declare California's Domestic Violence Prevention Act (DVPA) a criminal statutory scheme.

The DVPA routinely results in court orders that constitute relief that is criminal in nature under *Hicks*, both in practice and as a matter of law. Moreover, the Act *on its face* is a criminal statutory scheme because it copy-and-pasted the criminal assault and battery statutes from the Penal Code to the Family Code and it concocted a parallel-mechanism for the issuance of *de facto* arrest warrants in circumvention of all of the protections to the criminally accused under the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. By masquerading as a civil Act within the Family Code, the DVPA subjects respondents to so-called "civil" proceedings in which their *fundamental* rights—

including their right "to be secure in their ... houses ... against unreasonable ... seizures" (U.S. Const. amend. IV)—may be violated *ex parte* and without notice and without the assistance of counsel. Indeed, the Court of Appeal has recognized that "most of those appearing before the court [are] unrepresented" in DVPA proceedings (*Ross* at 867), and the Court of Appeal has even commented that "[i]t is rare for a Court of Appeal to get a peek into the world of domestic violence proceedings, because these protective orders are nearly never appealed." (*Id.* at 861.) This is why! Because respondents in California DVPA proceedings are ambushed by *de facto* criminal proceedings without the assistance of counsel, and without even being informed "that it is a charge and not a suit"! (*Hicks* at 638, fn. 10.) This Court should grant the requested writ to conduct a complete review.

B. This case provides the Court an opportunity to consolidate its two distinct lineages of case law regarding the classification of government action as civil or criminal: (1) the lineage of *Hicks v. Feiock*, 485 U.S. 624 (1988), which regards the classification of civil or criminal court orders; and (2) the *Kennedy-Ward* approach and the lineage of *Smith v. Doe*, 538 U.S. 84 (2003), which regards the classification of civil or criminal statutory schemes. California's DVPA is unique as a challenged statutory scheme since its means of action is via court orders, rather than via statutorily designed action of the executive branch of government.

The Court has previously taken two parallel approaches to determining the nature of sanctions or proceedings as "civil" or "criminal". One is the *Hicks* approach; the other is the so-called *Kennedy-Ward* approach (see *Smith*).

The *Hicks* approach is concrete and elemental, the element being whether the relief is determinate and unconditional. If so, the relief is criminal in nature. This has been mostly applied to the setting of contempt orders, but has also seen application in other analyses, such as regarding retroactive limitation of felony probation duration. (*People v. Sims*, 59 Cal.App.5th 943, 959 (2021).)

The *Kennedy-Ward* approach, on the other hand, is a factors analysis approach. Unlike *Hicks*, which has been applied primarily to court orders, the *Kennedy-Ward* approach has been applied directly to test the legislative classification.

Both approaches agree that "the substance of the proceeding and the character of the relief" dictate the classification and that "the labels affixed either to the proceeding or to the relief imposed under state law are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." (*Hicks* at 631; see also *Smith* at 107 ("we look behind the legislature's preferred classification to the law's substance, focusing on its purpose and effects.") (SOUTER, J., concurring in the judgment).) While the State of California may try to bamboozle the People by quietly placing the DVPA in the Family Code and calling proceedings under it 'civil' lawsuits, this Court should not and will not be suckered by that classification. This Court should grant review to examine carefully the "substance of the proceedings and the character of the relief." (*Hicks* at 631.)

C. To avoid a fundamental miscarriage of justice, this Court should clarify to the State of California what the United States Constitution requires from States in this Union, specifically what substantive due process under the Fourteenth Amendment requires regarding depriving persons of their fundamental rights and about the doctrine of the separation of powers and the protections to the criminally accused.

The State of California treated me brutally by excessively and unnecessarily restraining me in blatant violation of its own laws and in violation of *numerous* rights that I am guaranteed under the U.S. Constitution and the Bill of Rights. The State does this *routinely* to people, mostly men, under the flag of its Domestic Violence Prevention Act.

The time has come to put an end to this madness. Since its inception, the DVPA has violated this Nation's highest constitutional principles by "allow[ing] for findings of *criminal conduct*, including clerical, *ex parte* findings of criminal conduct, without the protections of a formal indictment or information, right to counsel, reasonable opportunity to prepare, and trial by jury", as a previous challenger of this law stated to the California Supreme Court in 1988 (case number S004375, filed 2/22/1988, emphasized). That Court denied hearing. Decades later, this Act continues to be an abominable evil to the Constitution of the United States of America and the State's courts have made it clear that *they have no intention of even analyzing the legality or constitutionality of this Act.* I thus call upon this Court to presently do so. (In 2019 this Court declined an opportunity to do so in case No. 19-17 by Mr. Baker, who was supported by an *amicus curiae* brief by the National Coalition for Men—a civil rights organization dedicated to ending harmful discrimination against men and boys—which has advocated against the unconstitutionally vague and ever-expanding definition of "abuse" under the DVPA since 2014. However,

that petition failed to address the key critical flaw of the DVPA: it is a *de facto* criminal statutory scheme that unfairly circumvents all protections to the criminally accused. The present case is a perfect vehicle for addressing this primary question presented.)

D. To recover from a *nationwide* constitutional disaster, this Court should extend the arguments herein to the federal Violence Against Women Act (VAWA).

While California's witchhunt crusade against me is particularly egregious, surely other States in this Nation have related legislative schemes that are also horribly defective. Indeed, there is an apparent *federal* basis for this insanity within the federal statutes of the Violence Against Women Act (VAWA) (42 U.S.C. Subchapter III)—an Act that on its face by its name does not suggest that it was enacted with consideration for 'equal protection' of the law and that manifests the same catastrophic unconstitutionalities discussed herein.

For example, 34 U.S.C. § 12401 authorizes the Attorney General of the United States "to provide grants to States . . . regarding stalking and domestic violence" for which to be eligible involves the State "establish[ing] a program that enters into the National Crime Information Center records of . . . *protection orders* intended to protect victims from stalking or domestic violence" (*Id.*, emphasized). This establishes a suspect federal law question: are these "protection orders" (§12401(b)(3)) and the related "arrest warrants" (§12401(b)(1)) and actual "arrests or convictions" (§12401(b)(2)) that occur in the (numerous) "States" (§12401(a)) to which the U.S. Attorney General is authorized by this federal law "to provide grants" (*Id.*) legitimate under the protections to the criminally accused that are guaranteed by the Bill of Rights and the U.S. Constitution?

The answer is provided in 34 U.S.C. § 12410(2) that defines 'protection order' as:

> the term "protection order" includes an injunction or any other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil or criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

Is this constitutional? Absolutely not. This is highly unconstitutional on its face, I contend. It states that: "the term 'protection order' includes an injunction . . . preventing . . . physical proximity to, another person . . . issued by civil or criminal courts . . . obtained by filing an independent action . . . by or on behalf of a person seeking protection." (*Id.*, cropped.) I claim this is not permissible under the U.S. Constitution and Bill of Rights because "an injunction . . . preventing . . . physical proximity to, another person" (*Id.*) *physically confines* the respondent in a manner that "resemble[s] the punishment of imprisonment" (*Smith* at 100), and this may *not* be "issued by *civil or* criminal courts" (34 U.S.C. § 12410(2)., emphasis added) but rather may be issued *only* by criminal courts and with the provision of the protections to the criminally accused that the U.S. Constitution and Bill of Rights guarantee to respondents in this country.

It is also unconstitutional that such "an injunction preventing . . . physical proximity to, another person" (*Id.*), which "resemble[s] . . . imprisonment" (*Smith* at 100),

would be "obtained by filing an independent action . . . by or on behalf of a [private] person seeking protection." (34 U.S.C. §12410(2).) Given that such relief "resemble[s]... imprisonment" (*Smith* at 100), and is generally also "criminal in nature" under *Hicks* (since it determinately and unconditionally "prevent[s] . . . contact or communication with or physical proximity to, another person" (34 U.S.C. § 12410(2)), it must be sought through an official and proper government criminal prosecution, *on behalf of the People* and by an appropriate agent of the executive branch of the government, i.e., a prosecutor, *not* "by or on behalf of a person seeking protection" (34 U.S.C. § 12410(2)). If a person is seeking protection in a manner that constitutes criminal relief on the respondent, the person should turn to an appropriate unit in the executive branch of government, such as a police department—not directly to a court.

Thus, this federal Act also appears to be rotten to its core: it supports the infliction of relief that is criminal in nature under *Hicks* and *Smith* via 'civil' proceedings, yet its entire stated purpose is "to Control and Prevent *Crime*" (the Act's long title, emphasized; see also "Violent *Crime* Control" in the title of 34 U.S.C. Subchapter 121, emphasized). Let me clarify that I am in no way supporting violence against women, nor any violence. But to prevent violent crime requires proper criminal procedure in the United States. This Act quite simply does not provide that. It seeks to control and prevent 'crime' and it is inhabited with numerous references and interrelations to "national crime . . . databases" (e.g., 34 U.S.C. § 12410) and other inherently 'criminal' mechanisms. It is located within a part of the United States Code that regards violent crime control, and it specifically defines "domestic violence" to include "felony or misdemeanor crimes" (34 U.S.C. §12291(a)(12)). Yet it seeks inexplicably to achieve its purposes via 'civil' proceedings.

The Act even goes as far as to overtly "encourage arrests" based on nothing more than a violation of terms of a *civil* 'protection order'. (34 U.S.C. §10461(c)(1)(A)(ii).) Thus in magician-like sleight-of-hand, Congress has pulled off a problematic switcheroo: it approved "protection orders . . . issued by civil . . . courts" (34 U.S.C. §12410(2)) and then it "encourage[s] arrest" (34 U.S.C. §10461(c)(1)(A)(ii)) and thus calls for *criminal* government response. Through the cracks fall *all* of the protections to the criminally accused that persons in this Nation may expect under the Bill of Rights and Constitution.

The Violence Against Women Act Reauthorization Act of 2022 (H.R. 1620) does not solve this problem, but rather illuminates the problem even stronger by its rewording of "encourag[ing] . . . alternatives to the criminal justice response" (*Id.*, Sec. 102(a)). *Alternatives* to the criminal justice response is precisely what the U.S. Constitution aims to *avoid* in its *guaranteed* protections to the criminally accused! Rather, the Constitution and the Bill of Rights seek to *guarantee* to the criminally accused *the* criminal procedure and due process that was designed with particular intentionality for them by the Framers —as evolved by subsequent acts of Congress and judicial interpretation and oversight— *not* some unsanctioned rogue 'alternative' to it. The VAWA's design of 'protection orders' constitutes relief that is criminal in nature under *Hicks* and *Smith*: it is not constitutionally permissible to be forced upon an individual by a government *without* criminal procedure. The design of *civil* 'protection orders' that constitute relief that is *criminal* in nature forms an 'alternate' 'arrest warrant' mechanism detached from criminal jurisprudence, and it thus un-constitutionally circumvents the (proper and intended) criminal justice response.

It is also unwise that the Congress has called these orders 'protection orders' instead of admitting head-on that these are first-and-foremost 'restraining orders' that

restrain the respondent, more so than they 'protect' the petitioner. In so doing, Congress engaged in thinking that "a person seeking protection" (34 U.S.C. § 12410(2)) from the government, even as an individual private party petitioner, is entitled to more protection by the government than the People generally receive through the police department and other legislatively designed mechanisms executed *by the executive branch* of government, and also in falsely thinking that a respondent to such a proposed 'restraining order' is not entitled to the protections to the criminally accused even when the proposed *restraints* constitute relief that is criminal in nature under this Court's precedents in *Hicks* and *Smith.* This is exemplified pristinely by California's Family Code §6306 which refers to the *respondent*—not to the *petitioner*—as "the subject of the proposed order". (*Id.*) Yet, the courts seem single-mindedly focused on acquiring *for the petitioner* her requested 'order' instead of properly focusing on providing the *respondent* with his guaranteed due process, even when he is the "subject" (*Id.*) of the proposed 'order' and where such order *restrains* the respondent in a manner that is criminal in nature and demands *full* criminal procedure. By referring to these orders as 'restraining orders' a legislative body can better understand that the respondent who is "the subject of the proposed [restraints]" (*Id.*, word clarified) is essentially the "subject of the proposed [imprisonment]" (*Id.*, word modified), and that such proposed *imprisonment* should be the subject of a respectable criminal prosecution. In other words, these are not 'protection orders' but they are 'restraining orders', and these are not even 'restraining orders' but rather they are 'imprisonment sentences'.

In sum, the Violence Against Women Act quite literally places as side-by-side 'civil' matters like 'divorce' and 'parental rights' along with 'criminal' investigations, prosecutions, and post-conviction matters (34 U.S.C. § 12291(a)(24)(C)(i-ii)), and by so

doing—and by doing so within a "Violent Crime Control" subchapter of the U.S. Code—Congress has made a mess analogous to the legislative blunder in California, resulting ultimately in the systematic and catastrophic deprivation of the rights to the criminally accused for respondents in such proceedings, and in violation of the separation of powers.

XI. Conclusion

California's Domestic Violence Prevention Act must be condemned as it exhibits "unrestrained power [that is not] exercised under the spirit of constitutional limitations formed to establish justice." (*Weems v. United States*, 217 U.S. 349 (1910).) The Superior Court routinely issues restraining orders that are criminal in nature under *Hicks* and as such the Act is a criminal statutory scheme that must be wholly abolished or reformed drastically in order to provide respondents with the rights and protections to the criminally accused as guaranteed by the U.S. Constitution and the Bill of Rights.

The restraining order upon me is highly illegal on numerous constitutional grounds: it is criminal in nature under *Hicks*, and it was issued in violation of the separation of powers and in violation of my numerous rights and protections under the Fourth, Fifth, and Sixth Amendments; I was ambushed by *ex parte* proceedings without notice, which were not justified by the allegation of abuse three weeks prior, and I was forbidden from demurring; I was convicted under a statute that should be declared as void for vagueness, and which fails to present a compelling State interest that justifies deprivation of my numerous fundamental rights; I was not given equal protection under the law and I was discriminated against due to gender bias or other prejudice; I was deprived of property that was undisputedly my separate property without any legal basis and in violation of my

due process rights; the restraining order violates my right to freely exercise my religion and my right to be married and to raise my child as I see fit; and the prior restraint on speech upon me is completely illegal: I received no notice of it whatsoever; the Superior Court did not provide any explanation supported by findings of facts as to why it is narrowly couched to only preventing the repetition of speech that was determined at a hearing to be abusive, and as such it is presumptively invalid; and it is indeed not narrowly couched, as a matter of law, because it is a broad all-encompassing checkbox restraint.

I respectfully ask this Court to issue a writ of certriorari and a ruling to end this catastrophic wide-reaching *fundamental miscarriage of justice* once and for all.

DATED July 11, 2022

Respectfully submitted,

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Petitioner, *pro se*